

(2005) 09 OHC CK 0024
In the Orissa High Court
Case No : Civil Appeal No. 38 of 2001

Mamata Mishra

APPELLANT

Vs

Subhas Chandra Mishra

RESPONDENT

Date of Decision : 02-09-2005

Acts Referred:

Family Courts Act, 1984 — Section 19
General Clauses Act, 1897 — Section 6
Hindu Marriage Act, 1955 — Section 12(1), 5

Citation : (2005) 100 CLT 724 : (2006) 1 DMC 68 : (2005) 2 OLR 682

Hon'ble Judges : Pradip Mohanty, J; P.K. Tripathy, J

Bench : Division Bench

Advocate : J. Rath and D.C. Swain, for the Appellant; B.K. Nanda, K. Ghosh and S. Behera, for the Respondent

Final Decision : Allowed

Judgement

Pradip Mohanty, J.—This is an appeal u/s 19 of the Family Courts Act filed by the wife-appellant challenging the judgment dated 18.10.2001 in Civil Proceeding No. 264 of 1998 of the learned Judge, Family Court, Cuttack.

2. The case of the husband-respondent in brief is that the wife-appellant was suffering from organic brain disorder and recurrent attack of epilepsy since long prior to, the marriage. This fact was suppressed to the respondent and his family members and fraudulently the marriage was solemnized on 18.6.1997. During the stay of the wife-appellant in the matrimonial house, the husband-respondent noticed some abnormality and loss of self-control of the wife-appellant. On 25.6.1997 at about 11.00 p.m. the appellant fell down in the bed room and lost her senses and after some time she regained her sense. Ultimately, on 27.8.1997 she had an attack of virulent type of fits and after some time she regained her sense. Thereafter, the wife-appellant insisted to go to their parent's house or else she would commit suicide. She was taking medicines regularly to control the attack of fits. She was taken to the Assistant Professor of Neurology, SCB Medical

College and Hospital, for medical check up before whom the appellant disclosed that she was suffering from fits since last one and half years, i.e., prior to. the marriage. When it was confirmed that the appellant was suffering from epileptic fits, the respondent had no way out but to file a petition before the Judge, Family Court, Cuttack u/s 12(1)(b)(c) read with Section 5(ii)(b)(c) of the Hindu Marriage Act for a declaration that the marriage was voidable and prayed to annul the same by a decree of nullity.

3. The appellant filed her written statement denying the aforesaid allegations. She further stated in her written statement that the husband-respondent ill-treated her and demanded additional funds by way of gift after marriage. She also made wild allegation of termination of pregnancy by the husband-respondent.

4. In order to prove his case, the husband-respondent examined three witnesses including the Assistant Professor of Neurology, who had treated the wife-appellant as P.W.3 and exhibited six documents including a letter said to have been written by the wife-appellant and the medical prescriptions. The wife-appellant also examined three witnesses including one independent witness as O.P.W. 3 but did not file any document in support of her case. After considering the evidence on record, the Judge, Family Court came to the conclusion that the wife-appellant was suffering from recurrent attack of epilepsy with mental disorder and the said fact was suppressed to the husband-respondent and his family members prior to and at the time of marriage. Thus, by playing fraud the marriage was solemnized. He, therefore, annulled the marriage by passing a decree of nullity.

5. Mr. Rath, learned counsel for the appellant, submitted that the Judge, Family Court, without appreciating the evidence on record, came to the conclusion that fraud was played by the appellant and her family members at the time of or before the marriage. He further submitted that a petition for annulment of marriage could be entertained if the same is filed within one year from the date of discovery of the fraud. In the instant case, the so-called fraud was detected on 25.06.1997, but the petition was filed on 13.07.1998, i.e., beyond one year from the date of discovery of the fraud. Lastly, he submitted that the word "epilepsy" has already been omitted from Section 5(ii)(c) of the Hindu Marriage Act by the recent amendment, i.e., with effect from 29.12.1999. Therefore, the learned Judge, Family Court is wrong in holding that the marriage was solemnized by playing fraud inasmuch as the wife-appellant was suffering from epilepsy before or at the time of marriage, which fact was suppressed to the husband-respondent and his family members.

6. Mr. Nanda, learned counsel for the respondent, on the other hand, submitted that the marriage was solemnized on 18.06.1997 by suppressing the fact that the wife was suffering from epilepsy. Subsequently, on 26.06.1997 on suspicion she was taken to the Assistant Professor of Neurology for treatment and after investigation, on 01.10.1997 it was confirmed that she was suffering from

epilepsy. Thus, the fraud was detected on 01.10.1997 and the petition for annulment of the marriage was filed on 13.07.1998, which was within time. He further submitted that the amendment came into force on 29.12.1999 while the matter was pending before the Judge, Family Court, for adjudication. But much before that, the petition was filed by the husband-respondent. It is the settled principle of law that an amendment will run prospectively and not retrospectively. Therefore, there is no illegality committed by the Judge, Family Court.

7. Perused the evidence on record. There was no material, either oral or documentary, before the Judge, Family Court, that prior to or at the time of marriage, the appellant was suffering from epileptic fits. In order to establish that fraud was played by the appellant, onus lies on the husband-respondent to adduce cogent evidence. According to the pleadings of the husband-respondent and the evidence of P.Ws.1 and 2, the disease was detected on 25.06.1997. There is no material on record to show that prior to or at the time of marriage, she was suffering from epilepsy. The doctor, who has been examined on behalf of the husband-respondent as P.W.3, ha nowhere stated in his deposition that the patient was suffering from epilepsy prior to the date of marriage. On the other hand, O.P.W.3, who is an independent witness, has specifically stated that he knew the appellant from her childhood. He was present at the time of her marriage. After the marriage, he had also been to the house of the respondent and observed that both the appellant and the respondent were leading a happy conjugal life. Nothing has been elicited from him in course of cross-examination and no suggestion has been given to this witness with regard to the alleged suffering of the appellant. A careful scrutiny of the evidence reveals that there was no disease, from which the appellant was suffering, either before or at the time of marriage. Mere non-disclosure prior to marriage or concealment of curable epilepsy of a girl and false representation that she was healthy does not amount to fraud within the meaning of Section 12(1)(c). P.W.3 in his examination-in-chief has not stated as to whether the disease epilepsy, which the appellant was suffering from at the time of examination, was non-curable. On the other hand, in his cross-examination, he admits "60% of the patient suffered from the above disease are curable." So, the irresistible conclusion is that she is not suffering from epilepsy, which is not curable. Therefore, it cannot be construed that fraud has been played by the appellant.

8. The next contention raised by the learned counsel for the appellant is that the petition for annulment of the marriage was not filed within one year from the date of detection of the disease. The evidence of the respondent's witnesses is to the effect that epilepsy was detected on 01.10.1997 and the case was filed on 13.07.1998. Limitation is to be counted from the date of detection of the disease or fraud. Therefore, this Court holds that the petition was presented within time.

9. Learned counsel for the appellant has also raised a contention that the word "epilepsy" having been deleted from Section 5(ii)(c), the proceeding is not maintainable. Admittedly, the amendment came into force with effect from

29.12.1999. From that date, the word "epilepsy" has been deleted from Section 5(ii)(c) of the Hindu Marriage Act. The civil proceeding was filed on 13.07.1998 and disposed of by the learned Judge, Family Court on 18.10.2001. Therefore, the amendment having made during pendency of the civil proceeding, it has no effect on the said proceeding. In other words, deletion of the word "epilepsy" by the amending Act has no effect on the proceeding. In this respect, Section 6 of the General Clauses Act is very clear that such legal proceeding shall continue as if the repealing Act had not been passed. Therefore, the plea advanced by the appellant has no effect.

10. A careful analysis of the fact and circumstances of the case would show that though the petition for annulment of the marriage was filed in time and the amendment in question has no bearing on the case, but it is found that no fraud has been committed by the appellant prior to or at the time of marriage inasmuch as it has not been established that she was suffering from epilepsy before the marriage. That apart, the doctor has not specifically stated whether the epilepsy was curable or non-curable.

11. In the result, the appeal succeeds and is hereby allowed. The impugned judgment of the Judge, Family Court is set aside. No costs.

P.K. Tripathy, J.

I agree.