
(2009) 09 P&H CK 0110
In the Punjab And Haryana At Chandigarh
Case No : FAO No. 72-M of 2006 (O and M)

Ms. Bhavna @ Sahar Wasif

APPELLANT

Vs

Flg. Off. Rajiv Gakhar

RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Constitution of India, 1950 — Article 142, 366
Dissolution of Muslim Marriages Act, 1939 — Section 2
Hindu Marriage Act, 1955 — Section 11, 12, 2, 23(1)(a), 28
Penal Code, 1860 (IPC) — Section 12, 323, 406, 419, 420

Citation : (2010) 1 CivCC 248 : (2009) 4 RCR(Civil) 856

Hon'ble Judges : Vinod K.Sharma, J

Bench : Single Bench

Advocate : G.S. Bhatia and Mr. J.S. Bhatia, for the Appellant; R.K. Malik, Mr. S.S. Malik and Mr. Vikas Malik, for the Respondent

Judgement

Vinod K. Sharma, J.—This appeal by the appellant/wife is directed against the judgment and decree dated 07.03.2006 passed by the learned Additional District Judge-1, Faridabad on a petition filed by the respondent/husband for dissolution of marriage by a decree of nullity under sections 5 and 12 of the Hindu Marriage Act (for short the Act).

2. In order to appreciate the controversy between the parties it would be appropriate to reproduce the averments made in the petition in toto:

1. That the marriage between the parties was solemnized on 28th November, 1999, at Arya Samaj Mandir, Rathkhana, Bikaner, according to the Hindu rites and ceremonies. The respondent (Bhavna) gave a written affidavit to the Arya Samaj for the performance of the ceremony, that she is a spinster and has never been married before in the past. An affidavit duly attested affirming the place and date of marriage is enclosed.

2. That the status of the parties to the petition at the time of marriage and at the time of filing this petition (which came to knowledge of the petitioner subsequent

to marriage) are as under:

Status of husband	Age	Place of Residence	Status of Wife	Age	Place of residence
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Before Marriage	Hindu	Bachelor	25 years	Acm,	Shalimar Bagh, Delhi-110052
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Muslim	Divorcee	37 years	A 4 Sector 29,	Jal Vayu Vihar,	Faridabad, Haryana
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At the time of filing petition	Hindu	Married	26 years	AC/71,	Shalimar Bagh, Delhi-110052
Muslim	Married	38 years	A 4 Sector 29,	Jal Vayu Vihar,	Faridabad, Haryana

3. That no issue was born out of the said wedlock. Actually, the parties never ever lived together as husband and wife.

4. That the parties have been living separately since 28th November, 1999 and have had no cohabitation. That the petitioner has continued to live separately since the said date, he has not consummated or cohabited or condoned the acts of respondent during this period.

5. That upon detection of fraud at the marriage, the parties did not even begin to live together as husband and wife, and till date have never lived together as husband and wife. Further acts of fraud were discovered/occurred in Delhi and other palaces.

6. That the petitioner is a pilot with the Indian Air Force and was posted as Pilot Officer at Hakimpet (Hyderabad) in April, 1997. In the last week of April, 1997 the petitioner was traveling by train from Delhi to Hyderabad, where he met respondent and she introduced herself as "Bhavna. She claimed to be the Vice Principal of St. Peters Convent, Vikas Puri and a journalist. Respondent further claimed that she was traveling to Hyderabad in connection with a book she was writing on Anglo Indians. During the conversation respondent claimed to be a virgin spinster and gave her age (then) as 27 years. During her stay in Hyderabad respondent phoned and arranged to meet the petitioner to ask for petitioners advice on the book she was writing. Much later the petitioner learnt that the respondent had actually gone to Hyderabad to give her B.A. Exams from Osmania University.

7. That during her subsequent visit to Hyderabad, on Sunday 25.05.1997, the respondent, unannounced, visited the petitioner at the Air Force Base. During the conversation the respondent portrayed herself to be an educated, influential and competent journalist.

8. That some time around the first week of July, 1997, the petitioner was in Delhi, onward to a posting at Chabuwa. The respondent called the petitioner and at her request the petitioner met the respondent. With an intention to cheat the respondent fraudulently, dishonestly, impersonated herself to be an educated, influential and competent journalist, a Hindu virgin spinster, and (then) aged 27 years.

9. That around the third week of March 1998, the petitioner met respondent at

Sona Rupa restaurant in Nehru Place, Delhi, and deceived (& cheated, & induced) by her above dishonest misrepresentations and impersonation, the petitioner gave the respondent a gold chain (which the petitioner was wearing at that moment) worth Rs. 9,000/- . Owing to the aforesaid impersonation and misrepresentations, the interaction between the two continued, wherein respondent continued to call and write letters to the petitioner, and the petitioner used to write back.

10. That during the petitioner's posting at Nal (Bikaner), in addition to the above misrepresentations & impersonation which made the petitioner take a sympathetic view towards the respondent, she (emotionally blackmailed the petitioner) by threatening to commit suicide and claimed to be in possession of sleeping pills and poison with herself all the time.

11. That respondent, by using emotional coercion, impersonation, misrepresentations (including that she was a Hindu virgin spinster, born in the year 1970), fraud, cheating, tricked the petitioner to marry her on 28.11.1999 at Arya Samaj Mandir, Rathkhana, Bikaner, at a wedding ceremony which was arranged and planned much in advance by her. Respondent also gave a written affidavit to the Arya Samaj for the performance of the ceremony, that she is a spinster and has never been married before in the past.

12. That during the marriage ceremony, when asked by the pundit, respondent told her year of birth to be 1962. After the marriage when the full import of her statement hit the petitioner, the petitioner was devastated, shocked, heart broken and inquired repeatedly of her to explain this. During the ensuing conversation it further transpired from the words of the respondent that she had previously been married and her previous husband had run away. Though the petitioner would talk to the respondent to avoid embarrassment (as she would threaten to trouble, and would repeatedly call him till the petitioner respondent), they have not lived as husband and wife from the very moment the petitioner learnt the above facts.

13. That in January 2000, Bhavna's father called the petitioner at Sona Rupa restaurant in Nehru Place and it emerged during the conversation that respondent (Bhavna) had two children out of the previous wedlock, namely daughter Heena (13 years) and son Shaz (11 years). Further that respondent was a Muslim and her actual name was Sahar Wasif and her previous marriage had taken place according to Muslim Law with a Muslim after her conversion to Islam. The petitioner was totally shocked and devastated to hear all this. The Marriage under the Hindu Marriage Act is impermissible between a Hindu and a Muslim and therefore the alleged marriage between the e petitioner and the respondent is void-ab initio.

14. That the respondent and her brother (Varun Sharma @ Varun Carlay), have by cheating and dishonestly induced the petitioner to deliver valuables and moneys. They have misappropriated by dishonestly converting to their own use

the petitioner's goods and moneys. They have cheated the petitioner by impersonation. They have committed forgery for the cheating and used as genuine forged documents: They have committed forgery to harm the petitioner's reputation. They have also committed other offences of fraud, misrepresentation, etc. for which a FIR 690/2000, under sections 406, 419 & 420 IPC, registered with P.S. Kalkaji has been registered and the contents of the said FIR be read as part of the present petition though not being reproduced for sake of brevity. There have been other acts of cruelty etc., by the respondent on the petitioner. The same have been detailed in the above FIR and are not being detailed in the present petition. A copy of the FIR is annexed as Annexure A. Even before the fraudulent marriage took place the respondent was perpetuating fraud on, misusing, and cheating the petitioner by misrepresentation, lies and forgeries. The same came to knowledge of the petitioner for the first time only during the process of filing of the criminal complaint and investigations thereupon. The respondent also indulged in blackmail, coercion and manipulations.

15. That the petition is not being instituted in collusion with respondent.

16. That there has not been any unnecessary or improper delay in filing the petition.

17. That there is no other legal ground why the relief should not be granted to the petitioner.

18. That there have not been any proceedings with regard to the marriage by or on behalf of any party.

19. That the marriage was solemnized at Nal, Bikaner. The respondent is and was residing in the jurisdiction of this Hon'ble Court. Incidents and detection of fraud were discovered/occurred in Delhi.

20. That this Hon'ble Court has the necessary jurisdiction to try and entertain this petition.

21. That the petitioner therefore, prays that the marriage between the parties being voidable, may be annulled by the Hon'ble Court by a decree of nullity. Any other order this Hon'ble Court may deem fit and proper in the circumstances of the case be also passed.

3. The petition was contested by the appellant/wife by raising preliminary objection that the petition filed was not maintainable as the provisions of Sections 5 and 12 of the Act were not attracted as no fraud or cheating was ever played or committed by the appellant/wife. Plea of estoppel was also raised on the ground that the respondent was guilty of various matrimonial offences and could not take advantage of his own wrongs. It was also pleaded that the respondent had suppressed true and material facts and did not disclose the true and real facts. The jurisdiction of the court was also challenged. Allegations of cruelty were also levelled against the respondent.

4. On merit, it was the case set up by the appellant/wife that the marriage between the parties was solemnized on 28.11.1999 at Arya Samaj Mandir, Rath Khana, Bikaner according to Hindu rites and ceremonies. It was denied by the respondent that she had filed any affidavit voluntarily at the time of performance of marriage or that she claimed herself to be spinster or suppressed any material facts with regard to her past. It was pleaded that the appellant had disclosed all the material true facts pertaining to her past marriage and divorce with a Muslim husband in the third week of April, 1997 when the parties met for the first time while journeying in the train. The respondent/husband was said to be well acquainted with the previous marriage with Muslim husband and of divorce. He was also aware that the appellant had two kids from the previous husband. She denied that at the time of marriage she was a Muslim married woman. She however, admitted that there was no issue from this wedlock.

5. The allegations made in para No. 4 were specifically denied. It was pleaded that the marriage was performed according to wish and planning of the respondent/husband. She also pleaded that after the marriage she was taken to Air Force Station, Nal, Bikaner and kept her in bachelor accommodation allotted to him, as his wife where they lived together for 7 months. Marriage was duly consummated. It was also the case set up that even prior to the marriage they were living together and legal shape was given to the marriage on 28.11.1999. It was pleaded that before settling at Jodhpur the respondent temporarily took accommodation on rent in House No. 677, Sector 17, Faridabad. There also the parties resided as husband and wife. Kids of the appellant were also residing with them, where they were admitted to Modern School, Sector 17, Faridabad. She denied that the marriage was not consummated as alleged. It was also pleaded that the parties lived as husband and wife till 07.08.2000 at various places i.e. at Bachelor's accommodation, Air Force Station, Nal, Bikaner; Sector 17, Faridabad and at Jodhpur for few days and for 2 days in in-laws house at Shalimar Bagh, New Delhi.

6. In reply to para No. 6, she admitted that the respondent was Pilot in Indian Air Force at the time when they met in train. It was also asserted that at that time the appellant was posted as Vice Principal in St. Peters Convent School, Vikaspuri, Delhi. Contents of para No. 7 were also vehemently denied. She pleaded that in the Air Force Base, or in the Air Force Club, nobody from outside can enter the premises being a highly protected and sensitive area. Entry to the Air Force Station is permissible with the consent of concerned officer. She specifically denied that she had given her age to be 27 years.

7. The allegations made in para No. 9 were also denied. She specifically denied the allegations of cheating, misrepresentation or impersonation. She denied the allegations of black mail. While denying averments, she specifically pleaded that marriage certificate showed that there was no suppression of any material fact including the age of the appellant. She denied having furnished any affidavit. Contents of para No. 12 of the petition were specifically denied and it was

pleaded that the story given was totally fabricated and made up. It was pleaded that respondent was well aware and acquainted with the past of the appellant. It was pleaded that with full faith the parties lived a happy married life with their own free consent.

8. The averments made in para No. 13 were also denied. It was pleaded that the facts alleged about her previous marriage to a Muslim were known to the respondent. It was pleaded that she had divorced her previous husband on 20.03.1995 in accordance with Shariat and Muslim law by clearly stating in the presence of the appellant and other family members" Talaq thrice, with clear intention to divorce the appellant with immediate effect. It was pleaded that there was no bar to marrying any Hindu thereafter. It was also her pleaded case that on 22.07.2000 while parties were living together the respondent entered into altercation with one S.D. Aggarwal and a criminal case was registered in which both the appellant and respondent were arrested by the police and were released after 2 days. She also pleaded that they were lodged in Rohtak jail case registered vide FIR No. 509 dated 22.07.2000 under sections 323, 452 and 506 IPC. The case was said to be still pending.

9. The averments made in para No. 14 of the petition were also specifically denied. The case registered with Police Station Kalkaji, Delhi was said to be a pressure tactics to

get divorce by mutual consent. Other averments made in petition were also denied.

10. In the replication, averments made in the petition were reiterated whereas averments made in the written statement were denied.

11. On the pleadings of the parties the following issues were framed by the learned Matrimonial Court:-

1. Whether the respondent was Muslim lady at the time of marriage with respondent No. 1 and as such, whether the marriage is void, as provided u/s 5 of the Hindu Marriage Act? OPP

2. Whether the respondent has played fraud on the petitioner and, as such marriage is declared null and void, as alleged? OPP

3. Whether the petitioner is estopped by his act and conduct to file the present petition? OPR

4. Relief.

Learned Counsel for the respondent did not address any argument but only submitted written arguments before the learned matrimonial court. Learned matrimonial court decided issues No. 1 and 2 together.

12. Learned matrimonial court proceeded with the presumption that ignorance of the appellant with regard to the appellant's previous marriage with Muslim

named Wasif Khalil and her divorce from him assumed significance in the light of the fact that the respondent was seeking dissolution of marriage in the light of Sections 5 and 12 of the Act as also section 23(1)(a) of the Act.

13. After referring to the provisions of the Act, learned matrimonial court noticed that admittedly parties were married on 28.11.1999 at Arya Samaj Mandir at Bikaner, where the respondent was working as Flight Lieutenant in the Indian Air Force. The learned matrimonial court also held that prior to the marriage the parties had courtship from 24.04.1997. The learned matrimonial court came to the conclusion that during the journey the appellant had introduced herself as Miss Bhavna Sharma and claimed herself to be the Vice Principal of St. Peters Convent School, Vikaspuri, Delhi and an eminent journalist, who was journeying from Delhi to Hyderabad in connection with writing of book on Anglo-Indian. They had another meeting on 25.05.1997 and had telephone conversations on 2-3 occasions. During his visit to Delhi he stayed for 2 weeks at Delhi. During this period the parties were in constant touch through letters and telephone conversations. Letter in support of this were produced by the appellant/wife. He admitted his letter Ex. R18 wherein he had written certain Do's and Don'ts during his absence. Letters produced were addressed by the respondent which showed the relationship between the parties. The court also took note of the photographs Exs.R.28 to R.35. Respondent had to admit that the some of the photographs were taken in the house of Ms. Arpana i.e. daughter of RW2 Shri K.V. Krishanaya at Hyderabad.

14. The learned matrimonial court held that the evidence led by the respondent/husband showed that he was indulging in select dementia and his conduct was not found to be above board. The learned matrimonial court did not accept the plea of the respondent in view of the documentary evidence in shape of rent note, showing that he had taken lease property at Faridabad for her. The learned matrimonial court further held that the stand of the respondent that he came to know about the date of birth of the appellant/wife only at the time of marriage was also not accepted, in view of the evidence on record. The finding was recorded in view of the fact that the house was taken on rent by him in the year 2000, wherein he paid advance rent. Payment by cheque was also proved by way of documentary evidence. The court also did not believe the plea of coercion or black mail by evaluating the documentary evidence. The respondent had admitted that he was arrested by the police on 22.07.2000. The learned matrimonial court, therefore, held that arrest of the respondent left no doubt that he was visiting the appellant during this period and that the proclaimed threat that he was not to see the appellant again after 28.11.1999 was not accepted. The learned matrimonial court, however, held that the appellant was 12 years older than the respondent.

15. On the question "whether the respondent was aware of factum of previous marriage of the respondent with a Muslim, and that she had two children out of the previous marriage" was held in affirmative, as in the telephone conversations

on several occasions especially in July, 1997 he had inquired about the well being of her two children, which stood corroborated from letter Ex. R17 which was written by the respondent to the appellant, wherein he had conveyed his special love to Heena and Hello to Shaz. The learned matrimonial court held that the stand of the respondent, that he believed them to be the children of her relation or friend could not be accepted in view of the letter Ex. R17, which was addressed by the respondent to the appellant. The learned matrimonial court further held that the respondent had filed a suit in the court of learned Senior Sub-Judge, Tees Hazari Court, Delhi where he sought direction to the Principal, Sherwood Convent senior Secondary School, DLF City Gurgaon, Regional Office CBSC, Chandigarh and the Controller of examinations, CBSC, Delhi to delete his name as father of Master Rohan and Kumari Ragini i.e. the new names given of the children of the appellant.

16. The learned matrimonial court, however, held that those children could not be treated to be the children of the respondent as he had not adopted them. Learned matrimonial court did not find the judgment of learned Additional District Judge, Delhi in the suit filed by the respondent to be judgment declaring the marriage between the parties to be invalid to record a finding in the petition filed by the respondent under sections 5 and 12 of the Act. The learned matrimonial court further held that the respondent was convicted in the inquiry report Ex. RW7/A regarding his act of sexual activities, before marriage with the appellant.

17. Even though the petitioner sought decree of nullity of marriage by invoking the provisions of Section 5 read with section 12 of the Act and had not claimed decree of nullity u/s 11 of the Act, but the learned matrimonial court in spite of recording a positive finding that there was no fraud or misrepresentation, went on to decide the petition to decree the petition by taking the marriage to be nullity in view of the subsisting marriage of the appellant with her previous husband. Though the declaration of nullity can be claimed by parties alone, and the court has no such suo motu power, in view of Section 11 of the Act.

18. The findings were based on the plea that previous marriage of the appellant was not validly dissolved, inasmuch as though appellant was born in a Brahmin family but after her marriage with Wasif Khalil she had converted to Muslim religion. She claimed in the evidence that she had taken divorce by saying "Talaq" three times, and further that she had no documentary evidence in support thereof. The learned matrimonial court further held that in the affidavit Ex. PN she had mentioned that she was previously known as Sahar Wasif, but after her divorce from her previous husband Mr. Wasif Khalil, she was called as Bhavna. She also deposed that notices in various newspapers were also given in this regard. She also produced Pandit Babu Lal to prove that she has undergone Shudhikaran for reverting back to Hinduism. Learned matrimonial court noticed that it was not only the respondent, but the appellant was also not truthful as her stand that she was working as Vice Principal in St. Peters Convent School,

Vikasपुरी, Delhi stood belied from the evidence on record. The learned matrimonial court found that evidence led to disprove this fact could not be shattered in cross-examination by the appellant.

19. The learned matrimonial court found that her deposition that she was an under-graduate in 1997, and thereafter had appeared from Osmania University to get degree of B.A. stood falsified from marks-sheet mark A which revealed that she had failed in three subjects. Her statement that she enrolled in M.A. in Indira Gandhi University was also not believed. The learned matrimonial court also did not believe that she was an eminent journalist, as she had no diploma in journalism nor she has been graded as journalist with any newspaper. The learned matrimonial court found that there was also no evidence of her having written any article in "Hindu".

20. Plea that she had given her correct date of birth was also not accepted on appreciation of evidence. The learned matrimonial court found that the respondent in any case could not take any benefit of this, as he had accompanied her and had himself purchased the stamp paper for swearing the said affidavit. Findings were recorded by the learned matrimonial court, that the respondent was aware about her previous marriage, as also her date of birth. The learned matrimonial court, however, did not believe the stand taken by the appellant that she had divorced her previous husband in view of Section 2 of the Dissolution of Muslim Marriage Act, 1939, as the marriage by the Muslim wife could only dissolve by filing a petition for dissolution of marriage in a civil court, as the Muslim wife could not suo motu divorce her husband.

21. The learned matrimonial court found that the appellant continued to be Muslim till July, 1999. Therefore, on the date of her proclaimed divorce in 1995 she was still Muslim and in the absence of decree of divorce by a competent court, the divorce claimed by her was not valid.

22. The learned matrimonial court further held that even for Muslim husband to get divorce by pronouncing Talaq three times certain prerequisites as envisaged in Muslim law are required to be fulfilled.

23. The judgment relied upon by the appellant in the case of *Perminder Charon Singh etc v. Harjit Kaur* 2003 (1) ACJ 711 (S.C.) : 2003 (2) RCR (Civil) 810 and judgment of this Court in the case of *Sunita v. Jugal Kishore* 2004 (4) RCR (Civil) 784 were held not applicable to the facts of the case. The learned matrimonial court, therefore, held that the marriage between the parties was nullity within the meaning of section 5 read with section 11 of the Act and consequently issues No. 1 and 2 were decided in favour of the respondent/husband. However, on issue No. 3 The learned matrimonial court was pleased to hold that the appellant would be entitled to permanent alimony at the rate of Rs. 2000/- (Rupees two thousand only) per month.

24. Mr. G.S. Bhatia, Learned Counsel appearing on behalf of the appellant contended, that the finding of the learned matrimonial court cannot be

sustained, in as much as the pleadings in the petition clearly showed that the respondent himself had shown the status of the appellant to be Muslim divorcee. It was for this reason that he had chosen to file a petition u/s 12 of the Act and not u/s 11 of the Act. Once the respondent had failed to prove fraud or misrepresentation learned matrimonial court could not have decreed the petition by making out a new case which was not pleaded. It was also the contention of the Learned Counsel appearing on behalf of the appellant, that it is well settled that no evidence beyond pleadings, can be looked into for recording a finding on an issue.

25. Learned Counsel appearing on behalf of the appellant also contended that in the present case much importance has been given to the typographical mistake in the evidence, wherein it was stated by the appellant that she had divorced her husband whereas it was otherwise. It was her previous husband who had divorced her by uttering word "Talaq" thrice in the presence of relations. This fact further stood proved from the statement of Babu Lal Pandit, who proved that the appellant had undergone Shudhikaran to come back to fold of Hinduism.

26. Mr. R.K. Malik, learned senior counsel appearing on behalf of the respondent, on the other hand, contended that in the petition it was pleaded by the respondent, that the marriage between the appellant and her previous husband was subsisting, therefore, it could not be said that the evidence led was beyond pleadings, as contended by Learned Counsel for the appellant. Learned senior counsel appearing on behalf of the respondent in support of the finding that the marriage between the appellant and her previous husband was not validly dissolved relied on the Full Bench judgment of Hon''ble Bombay High court in the case of Dagdu Chotu Pathan v. Rahimbi Dagdu Puthan & Ors. 2003 (2) CCC 182 (Bom) : 2003 (3) RCR (Civil) 773, wherein it was held that under the Mohammedan law "Talaq" must be for a reasonable cause and preceded by attempts of reconciliation between the spouses and two arbiters one from each family.

27. Reliance was also placed on the judgment of Hon''ble Supreme Court in the case of Shamim Ara v. State of U.P. & Anr. 2002 (2) ACJ 385 (S.C.) : 2002 8 AD (S.C.) 321, where again Hon''ble Supreme Court held that "Talaq" must be for a reasonable cause which must be preceded by an attempt of reconciliation by the husband and wife and two arbiters - one chosen by wife from her family and other by husband from his family. If such attempt fails then only "Talaq" may be effected.

28. Reliance was also placed on the judgment of this Court in FAO N0.61-M of 1998 Mohan Lal Sharma v. Parveen decided on 20.08.2009, wherein it was held that the marriage in violation of provisions of Section 5 is a nullity and the conduct of party seeking relief is of no consequence.

29. Reliance was also placed on the judgment of Hon''ble Bombay High court in the case of Dr. Mangla Shellar v. Dr. Laxman Ganpat Jadhav AIR 2008 (NOC) 773

(Bombay) wherein it has been held that decrees under sections 5, 11 and 12 of the Act, are different remedies provided under the law in different situations and different circumstances.

30. Learned senior counsel appearing on the behalf the respondent also relied upon the judgment of Hon''ble Supreme court in Bachhaj Nahar Vs. Nilima Mandal and Another, to contend that when a case is not specifically pleaded, can still be considered by the court when the pleadings in substance, though not in specific terms, contains the necessary averments to make out a case, and the issues framed generally covered the question involved and the parties proceeded on that basis and led evidence.

31. The Hon''ble Supreme Court in the case relied upon has held that it should be only in exceptional cases, where the court is Tully satisfied that pleadings and issues generally cover the case subsequently put forward by the parties, being conscious of the issue and have led evidence on said issue. This contention deserves to be noticed to be rejected, as petition was not filed u/s 11 of the Act but u/s 12 of the Act on the plea of fraud. On consideration of matter, I find force in the contentions raised by the Learned Counsel for the appellant.

32. In this case, the respondent had sought divorce u/s 12 of the Act primarily on the ground that the marriage was the outcome of fraud and misrepresentation. The case set up was not that the marriage between the parties was nullity u/s 11 of the Act, as is clear from the fact that the respondent himself mentioned in the petition the status of the appellant to be Muslim divorcee at the time of marriage. Even otherwise, it may further be noticed that if the plea of the respondent is to be accepted, that it was pleaded case of the respondent that the appellant had subsisting marriage and was Muslim, at the time of marriage, the judgment and decree still deserves to be set aside as in that eventuality the provisions of the Act would not be applicable to the parties. Hon''ble Bombay High Court in Smt. Neeta Kirti Desai Vs. Bino Samuel George, has been pleased to lay down as under:-

4. The Family Court Act creates a forum. The Family Court Act has not settled the rights and obligation between the parties viz. Restitution of conjugal rights, judicial separation, nullity of marriage and divorce. When both the spouses are Hindus, they are regulated under the Hindu Marriage Act, 1955. Undisputedly, petition was presented on the ground that at the time of marriage, petitioner''s husband was a Christian. If that be so, having regard to the provisions of Section 2 the Hindu Marriage Act, 1955 has no application for seeking any of the relief''s including the nullity of the marriage. Petition as presented, was, therefore, untenable.

33. Reliance of learned Senior Counsel appearing on behalf of the respondent in case of Gullipilli Sowria Raj v. Bandaru Pavani @ Gullipili Pavani 2009 (1) ACJ 165 (S.C.) : 2009 (1) CCC 336 (S.C.) : 2009 (1) RCR (Civil) 442 can not advance the case of the respondent as the question of the jurisdiction of the court to

entertain a petition in violation of Section 2 of the Act was not considered in the said case. Section 2 of the Hindu Marriage Act reads as under:-

2. Application of Act.- (1) This Act applies -

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samam,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.- The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:-

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding any thing contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

34. The reading of section clearly shows that if one of the parties is not Hindu, the Act will have no application, to entertain a petition for divorce. The judgment of Hon"ble Supreme Court is in exercise of powers under Article 142 of the Constitution of India, and the appellate court exercising powers u/s 28 of the Act is bound by the provisions of the Act.

35. In view of the findings recorded above, this appeal is allowed. The judgment and decree passed by the learned Additional District Judge-I is set aside, and petition filed by the respondent husband is ordered to be dismissed but with no order as to costs.