
(1982) 02 AHC CK 0020
In the Allahabad High Court
Case No : First Appeal No. 349 of 1979

Smt. Kiran Bala Asthana and Another	APPELLANT
Vs	
Bhaire Prasad Srivastava	RESPONDENT

Date of Decision : 08-02-1982

Acts Referred:

Contract Act, 1872 — Section 14, 17, 18
Hindu Marriage Act, 1955 — Section 12(1), 5

Citation : AIR 1982 All 242

Hon'ble Judges : Deoki Nandan, J

Bench : Single Bench

Advocate : Triveni Shankar, for the Appellant; D.P. Bhat, for the Respondent

Judgement

Deoki Nandan, J.—This is a wife's first appeal from a decree dissolving her marriage with the respondent husband by a decree of divorce under the Hindu Marriage Act on the ground that the appellant has been incurably of unsound mind within the meaning of Clause (iii) of Sub-section (1) of Section 13 of the Act.

2. The respondent husband was the petitioner in the court below. He had claimed the relief of declaration that the marriage between the parties was null and void and had claimed the relief of dissolution of the marriage in the alternative. The trial court has also recorded the finding that the consent of the husband to the marriage was obtained by fraud, inasmuch as he was not apprised of the fact that a former marriage of the appellant had been declared to be a nullity on the ground that the appellant was of unsound mind at the time of that marriage. Indeed, on that finding, the respondent husband was entitled to an annulment of the marriage by a decree of nullity u/s 12(1)(c) rather than a dissolution of the marriage by a decree of divorce u/s 13(i)(iii) of the Act.

3. At the outset of the hearing in this Court, it was suggested before me that the appellant was not of unsound mind and it was impossible to say that she was incurably of unsound mind and an application was made on her behalf for

medical examination. On a consideration of the material placed before me at that time, I referred the appellant's case to the Lucknow Medical College by my order dated the 18th Jan. 1980 for examination and observation and a report on the following points :--

(i) Whether the appellant has been incurably of unsound mind?

(ii) Whether she has been suffering continuously or intermittently from mental disorder which means mental illness, arrest or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind which includes schizophrenia, or from psychopathic disorder which means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on her part; and whether or not it requires or is susceptible to medical treatment?

4. One Dr. Prabhat Sitholey, acting for Dr. J. K. Trivedi, Lecturer in Psychiatry, in the Medical College, Lucknow, thereupon made a report, which was forwarded to this Court with a letter dated the 16th July, 1980, by the Principal of that College. The penultimate opinion expressed in that report reads as under:--

"Overall, she does not seem to have any mental disorder which may result in abnormally aggressive or seriously irresponsible conduct on her part. She is suffering from a mild neurotic depression which requires and is susceptible to medical treatment (this may include a change in her circumstances)".

5. On receiving this report, the attempt to bring about a reconciliation between the parties was renewed, and, on my persuasion, it was agreed between the parties, and I directed, that the appellant shall get herself treated at the Lucknow Medical College and obtain and submit a report of her mental condition after three months. I further directed that it shall be open to the respondent husband to look after the appellant's treatment to the best of his ability and inclination in order to assure himself that the appellant's disease is in fact curable and cured, or otherwise. Ultimately, on the 16th December, 1980, with the good offices of Mr. S. N. Verma, the learned counsel for the respondent husband, he agreed to take the appellant back with him as a measure of trial in order to make sure that the appellant is free from the mental disorder complained of. The appellant was also willing to go with the respondent. That seemed to me to be the best course to be adopted for bringing about a reconciliation and settlement between the parties and I accordingly directed that without prejudice to the rights of the parties in this appeal, the appellant may go and live with the respondent and the result be reported to the Court after three months when the appeal shall be listed for further orders. Liberty was, however, reserved to the parties to apply to the Court for any orders or directions in the meanwhile. The experiment failed, and on the 23rd Jan. 1981, the respondent appeared with the appellant in Court along with an application for a direction that the appellant's parents may take her away to look after as the respondent found it impossible to do so in view of her mental condition. Notice of the application

was immediately served on the appellant's counsel, and, on the 27th Jan. 1981, the appellant's father appeared in Court. The appellant was also present with the respondent that day. My order dated the 27th Jan. 1981, makes a note of the fact that from the conduct of the appellant and her appearance it appeared that she was not keeping fit those days. When she appeared that day, it was clear from her conduct that she was not sound in her mind. I accordingly directed that the appellant shall stay with her father for the time being and the appeal was directed to be listed on the 16th March, 1981 for hearing. Dr. J. K. Trivedi of the Lucknow Medical College, who had examined the appellant, was thereafter summoned by this Court as a witness in order to elucidate facts and to have his expert opinion about the mental condition of the appellant. There was some delay in securing his presence and ultimately he appeared in Court and was examined on the 11th Jan. 1982. When the report received with the letter dated the 16th July, 1980, from the Principal of the Medical College, Lucknow, was put to the witness, he stated that he had occasion to examine the appellant before that report, but the report was given by Dr. Prabhat Sitholey as he had proceeded on leave and the observations made in the report were of Dr. Prabhat Sitholey. His own observations were different. During the three days, when he had examined the appellant between 4th June, 1980 and the 7th June, 1980, he formed the opinion that possibly the case was of residual schizophrenia although, when the difference between his report and that of Dr. Prabhat Sitholey was put to the witness, he said that the report of Dr. Prabhat Sitholey is correct because he had occasion to observe the patient only for three days. Examined further the witness stated that he had the records of the Medical College relating to the appellant's case before him. The appellant had been admitted to the Medical College Hospital on the 9th Feb-1981, 8th June, 1981, 15th August, 1981 and lastly on the 2nd Dec. 1981 and was under the treatment of Dr. A. K. Agrawal, Reader in the Department of Psychiatry. She was still ill and the hospital record showed that the diagnosis was that she is suffering from schizophrenia, and, on that basis, the witness said that his original diagnosis of the case, as one of residual schizophrenia, appears to have been correct. The witness also stated that the disease was curable, "if the treatment is continuous and prolonged, and additionally she stays in a congenial atmosphere, rather than hostile." Cross-examined the witness stated that he had occasion to examine the appellant on the 31st Jan. 1981 and his diagnosis was that she was suffering from schizophrenia and advised hospitalisation. The witness called it to be a case of mental disorder and a case of psychopathic disorder. He further stated that Dr. A. K. Agrawal, Reader in the department of Psychiatry, who was treating the appellant, had also diagnosed her case to be of schizophrenia,

6. After the examination of the witness was over, I heard Mr. G. N. Verma, the learned counsel for the appellant. He found it difficult to get over the expert opinion on the mental condition of the appellant, which now seems to establish beyond doubt that she is suffering from schizophrenia. During the period of almost between the parties also shows that the appellant's mental disorder is of

such a kind that the respondent cannot reasonably be expected to live with the appellant, Mr. G. N. Verma, however, argued that the finding of the trial court is based entirely on the documents produced from the earlier case between the appellant and her first husband Captain D. P. Asthana which showed that the marriage between them was annulled with the finding that the appellant was an idiot at the time of her marriage with Dr. D. P. Asthana. According to Mr. Verma, the evidence was inadmissible and could not be referred to at all and with regard to the evidence taken in this Court about the mental condition of the appellant, Mr. Verma contended that it was irrelevant inasmuch as Section 13(1)(iii) requires that the mental disorder must be not only incurable, but should have existed at the time of marriage, According to Mr. Verma, there was no evidence to show that the appellant was of unsound mind or was suffering from the mental disorder from which she has been found to be suffering at present, at the time of her marriage and that the mental disorder was such as could not be cured and on account of which the respondent could not reasonably be expected to live with the appellant.

7. In the course of examining the argument so raised by Mr. Verma, I found that the primary case set up by the appellant for annulment of his marriage with the appellant by a decree of nullity, on the ground that his consent was obtained by fraud, was clearly made out and that the marriage in this case should have been annulled by a decree of nullity rather than dissolved by a decree of divorce. I have already referred to the finding recorded by the trial court on issue No. 2 that the respondent's consent to the marriage was obtained by fraud. The fraud was that the fact of the annulment of the appellant's earlier marriage with Dr. D. P. Asthana was concealed from the respondent. I need not go into evidence on this point for the finding of the trial court is in accord with the probabilities, and it can well be said that the respondent would have never agreed to marry the appellant if he had known that the appellant's first marriage with Dr. D. P. Asthana had been annulled on the ground that she was an idiot or a person of unsound mind at the time of her first marriage.

8. u/s 12(1)(c) of the Hindu Marriage Act, marriage is voidable,

"and may be annulled by a decree of nullity" on the ground "that the consent of the petitioner....was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent."

9. In the present case, the respondent husband was the petitioner and the appellant was the respondent in the court below. The question was whether the consent of the respondent husband could be said to have been obtained by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the appellant wife. "Fraud" has been defined u/s 17 of the Contract Act; and according to Section 14 thereof, consent is said to be free when it is not caused by fraud as defined in Section 17 or misrepresentation as defined in Section 18.

10. The parties in this case had both attained the age of majority when the marriage was solemnised. The allegation is that the fact of the appellant's first marriage to Dr. D. P. Asthana having been annulled on the ground that the appellant was a person of unsound mind at the time of that marriage, was concealed from the respondent husband. Mr. Verma suggested that it was no part of the duty of the appellant or her parents to have gone out of their way to inform the respondent husband of this fact. It was for the respondent husband to himself find out all that he wanted to about the appellant, and, in fact, the respondent had known the appellant for some time before the marriage and it was on account of her good looks that he readily agreed to marry her. If the respondent did not make any further inquiries, it was not for the appellant or her parents to tell him that her earlier marriage had been dissolved or that she had been under treatment for a mental ailment at the Benaras Hindu University Hospital earlier. Mr. Verma also contended that a Hindu marriage is not a contract and the principles of Contract Act cannot be applied thereto. It is a sacrament and a Hindu marriage once solemnised according to the Dharma Shastras cannot be annulled or declared void.

11. The language of Section 12(1)(c) is specific. That read with Clause (ii) of Section 5 and the fact that neither of the parties can be below eighteen years of age at the time of marriage, imply that there can be no marriage in law without the free consent of the parties. It may be that the consent of the parties may not be expressly asked for or expressly given and a marriage may not be liable to be annulled merely on the ground that a party to it did not consent, nevertheless if it is shown that the facts and circumstances about one of the parties were such that the other party could not have readily consented to marry the other, and there was an element of deception or misrepresentation in bringing about the marriage at the instance of a party, such as to amount to fraud, a Hindu marriage could surely be annulled u/s 12(1)(c) of the Hindu Marriage Act, notwithstanding its sacramental character.

12. As already indicated above, it appears clear to me that the facts that the earlier marriage of the appellant with Dr. D. P. Asthana had been annulled on the ground that the appellant was a person of unsound mind at the time of that marriage, and that she had been treated for a mental disorder at the Benaras Hindu University Hospital, were not known to the respondent husband, and, indeed, as found by the trial court, these facts could be said to have been concealed from him. The marriage between the parties to this case was accordingly fit to be annulled by a decree of nullity u/s 12(1)(c) of the Hindu Marriage Act.

13. The above finding makes it unnecessary to consider the question whether the appellant's case was covered by Section 13(1)(iii) also so as to entitle the respondent husband to a decree of divorce on the ground that the appellant has been incurably of unsound mind or has been suffering continuously or intermittently from a mental disorder of such a kind or to such an extent that the

respondent husband cannot reasonably be expected to live with her. However, since the matter has been gone into in this Court, it would be proper to observe for the purposes of the present case that the appellant has been suffering from (Schizophrenia) and her mental disorder, though intermittent, has been of such a kind and to such an extent that the respondent husband cannot reasonably be expected to live with her. It is not correct to say that the mental disorder must be shown to have existed at or before the marriage. This ground for divorce could be one that had arisen subsequent to the marriage,

14. At the close of the arguments on the last day of hearing, I had given the appellant an opportunity to move an application u/s 25 of the Hindu Marriage Act. I had, in fact, meant Section 27 because it was suggested that certain articles and thing and money etc., were presented at the time of the marriage. Mr. G. N. Verma, counsel for the appellant, stated before me that he had not received any instructions from the appellant to move the application. The respondent husband, who was present in Court, stated that although some jewellery presented by him to the appellant at the time of the marriage was with her, he was not interested in pursuing that matter provided he got rid of this marriage tie. It is accordingly not necessary to pass any orders in this appeal u/s 25 or Section 27 of the Hindu Marriage Act. The amounts paid in pursuance of the order u/s 24 shall, of course, be appropriated by the wife to her use absolutely. There will be no order as to costs. Let a decree of nullity annulling the marriage between the parties u/s 12(1)(c) be passed accordingly. In substance the appeal will be deemed to have been dismissed although the decree appealed from has been modified completely.