Krishnaveni Rai vs Pankaj Rai on 19 February, 2020

Equivalent citations: AIR 2020 SUPREME COURT 1156, AIRONLINE 2020 SC 239, AIR 2020 SUPREME COURT 1156 (2020) 4 SCALE 289, (2020) 4 SCALE 289

Author: Indira Banerjee

Bench: Arun Mishra, Indira Banerjee, M.R. Shah

REPORT

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 321 OF 2020
(ARISING OUT OF SLP (CRL.) NO. 7903 OF 2019)

Krishnaveni Rai ……Appel

versus

Pankaj Rai & Anr. ……Responden

JUDGMENT

Indira Banerjee, J.

Leave granted.

2. This appeal is against a judgment and order dated 9.4.2019 passed by the High Court for the State of Telangana, dismissing Criminal Revision Case No. 2587 of 2017 filed by the Appellant under Section 397/401 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C”), challenging the order dated 7.8.2017 passed by the Additional Metropolitan Sessions Judge, Fast Track Jubilee Hills Bomb Blast Case(JHBBC)-cum-Additional Family Judge at Hyderabad, dismissing the application of the Appellant under Section 125 of the Cr.P.C. for maintenance, on the purported ground that the marriage between the Appellant and the Respondent No.1 was a nullity.

3. On or about 11.09.1989, the Appellant married one Arvind Chenjee in accordance with Hindu rites and customs. The marriage of the Appellant with the said Arvind Chenjee was, however, dissolved by a decree of divorce dated 28.06.2005, passed by the Family Judge, Hyderabad in O.P. No. 847 of 2000.

4. According to the Appellant, the period of limitation for filing an appeal against the decree of divorce passed on 28.06.2005, expired on 26.09.2005. No appeal was filed either by the Appellant or by the said Arvind Chenjee, within the period of limitation.

5. In August, 2006, almost a year after expiry of the period of limitation, the Appellant filed an appeal against the said order dated 26.8.2005. The delay in filing the appeal was condoned by an order dated 13.7.2007. The operation of the decree does not appear to have been stayed.

6. In the meanwhile, in 2006 the said Arvind Chenjee had remarried Shipra Chenjee. The appeal filed by the Appellant against the decree of divorce was, from the inception, infructuous. The appeal was, however, formally dismissed as withdrawn on 02.09.2016.

7. On 13.12.2014, over 9 years after the Appellant's first marriage with the said Arvind Chenjee was dissolved and long 8 years after the Appellant's ex-husband had re-married, the Appellant married the Respondent No.1

8. Unfortunately, the Appellant's second marriage also did not work. The Appellant has alleged that the Respondent No.1 subjected the Appellant to harassment and cruelty and even threw her out of the matrimonial home.

9. The Appellant lodged a complaint against the Respondent No.1 at the Banjara Hills Police Station, under Sections 406, 498A and 500 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') which was registered as FIR No.470/2015.

10. Claiming that she did not have any independent source of income, the Appellant filed an application being M.C. No. 152 of 2015 in the Court of the Additional Metropolitan Sessions Judge, Fast Track Jubilee Hills Car Bomb Blast Case (JHCBBC)-cum-Additional Family Judge, Hyderabad, under Section 125 the Code of Criminal Procedure (Cr.P.C.) for maintenance.

11. The Respondent No.1, on the other hand, filed a suit being O.P. No. 475 of 2015 in the Additional Family Court, Hyderabad, for declaration of nullity of his marriage with the Appellant, inter alia, on the ground that the marriage had been solemnized during the pendency of an appeal from the decree of dissolution of the appellant's marriage with her first husband. According to the Appellant, the suit was a counterblast to the application for maintenance. We are informed that the suit is pending trial.

12. On or about 28.5.2015, the Appellant filed a complaint before the IV Metropolitan Magistrate, Hyderabad seeking relief against the respondent No.1 under the Protection of Women from Domestic Violence Act, 2005.

13. On or about 22.3.2016, Charge sheet was filed in the proceedings against the Respondent No.1 inter alia under Sections 406, 498A & 500 of the IPC, pursuant to FIR No.470/2015.

14. On or about 15.3.2017, the Respondent No.1 filed an application u/s 239 for Cr.P.C for discharge, from the proceedings initiated pursuant to FIR No.470/2015, which was dismissed by the XIIIth Addl. Chief Metropolitan Magistrate, Hyderabad by an order dated 15.3.2017.

15. The Respondent No.1 filed a criminal Revision Petition No.192/2017 in the Court of the Metropolitan Sessions Judge, challenging the aforesaid order dated 15.3.2017 of the XIII th Additional Chief Metropolitan Magistrate, rejecting the application of the Respondent No.1 for discharge.

16. By an order dated 23.1.2018, the Metropolitan Sessions Judge, Hyderabad allowed the Criminal Revision Petition No.127/2017 and discharged the Respondent No.1 from the proceedings under Section 406, 498A and 500 of the IPC. The Appellant contends that the order dated 23.1.2018 discharging the Respondent No.1, was passed without notice to the Appellant.

17. In the meanwhile, by an order dated 7.8.2017, the Additional Metropolitan Sessions Judge, Fast Track Jubilee Hills Car Bomb Blast Case (JHCBBC)-cum-Additional Family Judge, Hyderabad, dismissed the application filed by the Appellant, claiming maintenance under Section 125 CrPC.

18. The Appellant filed a Criminal Revision Petition being Crl. R.P. No.149 of 2019 in the High Court of Telangana inter alia challenging the order dated 23.1.2018 discharging the Respondent No.1 from the proceeding under Sections 406, 498A and 500 of the IPC and also made an application being I.A. No.8 of 2019 for suspension of the said order of discharge. By an order dated 15.2.2019, the High Court suspended the said order of discharge.

19. The Appellant also filed a Criminal Revision Case No.2587 of 2017 before the High Court challenging the order dated 7.8.2017 passed by the Additional Metropolitan Sessions Judge, Fast Track Jubilee Hills Car Bomb Blast Case (JHCBBC)-cum-Additional Family Judge, Hyderabad, dismissing the application being M.C. No.152 of 2015 of the Appellant for maintenance under Section 125 of the Cr.P.C.

20. The Appellant filed a Criminal Revision Petition No.2587 challenging the aforesaid order dated 7.8.2017. The Respondent No.1, on the other hand, filed a petition under Section 482 of the Cr.P.C., for quashing of the criminal proceedings against him under Sections 406, 498A and 506 of the IPC. By an order dated 9.4.2019 the said criminal proceedings were quashed on the ground that the marriage of the Appellant with the Respondent No.1, solemnised during the pendency of an appeal from the decree of dissolution of the appellant's marriage with her first husband, was null and void.

21. An application for pendente lite maintenance being IA No.1192 of 2017 filed by the Appellant in the Court of the 1st Additional Family Judge, Hyderabad in O.P. No. 475 of 2015 being the pending suit of the Respondent No.1 for declaration of nullity of the marriage between the Appellant and the Respondent No.1, was allowed by an order dated 19.12.2018 whereby the Respondent No.1 was

directed to pay Rs.20,000/- per month from the date of the application, that is, 30.11.2017 and an additional Rs.20,000/- towards litigation expenses.

22. A Civil Revision Petition No.242 of 2019 filed by the Respondent No.1, challenging the aforesaid order dated 19.12.2018 passed by the Family Court has been dismissed by a Single Bench of the High Court by a well-reasoned judgment and order dated 19.03.2019.

23. The Criminal Revision Petition No.2587 of 2017 filed by the Appellant against the order dated 7.8.2017 passed by the Additional Metropolitan Sessions Judge, Fast Track Jubilee Hills Car Bomb Blast Case (JHCBBC)-cum-Additional Family Judge, Hyderabad dismissing the application under Section 125 of the Cr.P.C. was also dismissed by an order dated 9.4.2019, on the same ground on which the Criminal proceedings against the Respondent No.1 had been quashed.

24. As recorded by the High Court, it is not in dispute that the Appellant and the Respondent No.1 had got married as per prevailing customs on 13.12.2014. The short question in this appeal is, whether the Appellant could have been denied maintenance under Section 125 of the Cr.P.C. on the ground that her marriage with the Respondent No.1 was a nullity, just because the marriage had taken place while an appeal filed by the Appellant against a decree of dissolution of marriage with her first husband was still pending. In other words, is a second marriage performed during the pendency of an appeal from a decree of divorce a nullity, even though there were no stay of operation of the decree.

25. Sections 5, 11 and 15 of the Hindu Marriage Act, 1955, relevant to this appeal are set out hereinbelow for convenience: -

> "5. Conditions for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-
>
> (i) neither party has a spouse living at the time of the marriage;
>
> (ii) at the time of the marriage, neither party,-
>
> (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
>
> (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
>
> (c) has been subject to recurrent attacks of insanity or epilepsy;
>
> (iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

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11. Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses

(i), (iv) and (v) of Section 5.

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15. Divorced persons when may marry again.- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

26. It is well settled that a marriage which is null and void is no marriage in the eye of law. Where the marriage is a nullity application for maintenance is liable to be set aside on that ground alone. Under Section 5 of the Hindu Marriage Act, a marriage may validly be solemnized between any two Hindus, subject to the following conditions:-

(i) Neither party has a spouse living at the time of marriage [(Section 5(i) of the Hindu Marriage Act];

(ii) Neither party was incapable of giving valid consent of the marriage in circumstances specified in Section 5(ii) of the Hindu Marriage Act;

(iii) The parties to the marriage are of requisite age, that is, the bridegroom should have completed 21 years of age and the bride 18 years of age, at the time of marriage [Section 5(iii) of the Hindu Marriage Act];

(iv) The parties should not be within the degree of prohibited relationship unless the custom or usage governing each of them permits such marriage [(Section 5(iv) of the Hindu Marriage Act];

(v) Parties are not sapindas of each other unless the custom or usage governing each of them permits between two. [(Section 5 (v) of the Hindu Marriage Act];

27. Section 11 of the Hindu Marriage Act provides that any marriage solemnized after the commencement of this Act shall be null and void and may on a petition presented by either party thereto, against the other party, be so declared by a decree of nullity, if it contravenes any of the conditions in Clauses (i), (iv) and (v) of the Section 5.

28. A careful reading of Sections 5, 11 and 15 makes it amply clear that while Section 5 specifies the conditions on which a marriage may be solemnized between two Hindus, only contravention of some of those conditions render a marriage void.

29. Marriage in contravention of Section 5(i) of the Hindu Marriage Act, that is, where either party or both have a spouse living at the time of marriage is void. Similarly, a marriage is void if the parties to the marriage are within the degrees of prohibited relationship unless the custom or usage governing each of them permits of such marriage, or if the parties are sapindas of each other unless, again, the custom or usage governing each of them permits marriage between the two. [Sections 5(iv) and 5(v)]

30. Contravention of Sections 5(ii) or 5(iii) of the Hindu marriage Act does not render the marriage null and void. In such a case, the marriage is voidable at the option of the underaged party to the marriage or the party who could not have validly consented to the marriage.

31. Section 15 clarifies that when a marriage has been dissolved by a decree of divorce, and there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed, it shall be lawful for either party to the marriage to marry again. Had it been the legislative intent that a marriage during the pendency of an appeal should be declared void, Section 11 would expressly have provided so.

32. As held by this Court in Anurag Mittal v. Shaily Mishra Mittal reported in (2018) 9 SCC 691, the object of Section 15 is to provide protection to the person who had filed an appeal against the decree of dissolution of marriage and to ensure that such appeal was not frustrated. The protection afforded by Section 15 is primarily to a person contesting the decree of divorce. As observed by Bobde, J. in his concurring judgment in Anurag Mittal (supra):-

> "I am in agreement with the view taken by Nageswara Rao, J. but it is necessary to state how the question before us has already been settled by the decision in Lila Gupta v. Laxmi Narain [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . Even when the words of the proviso were found to be prohibitory in clear negative terms — "it shall not be lawful", etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of Lila Gupta [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . It is all the more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like "it shall be lawful". Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 and 10 of Lila Gupta case... ".....

What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as "it shall not be lawful" or an incapacity imposed by positive language like "it shall be lawful (in certain conditions, in the absence of which it is impliedly unlawful)". It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it was contracted under an incapacity. Obviously, this would have no bearing on the other conditions of a valid marriage. The decision in Lila Gupta case thus covers the present case on law."

33. In Leela Gupta v. Laxmi Narain & Ors. reported in (1978) 3 SCC 258, this Court held:

".....the interdict of law is that it shall not be lawful for a certain party to do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done thereby making it unlawful, without providing consequence for the breach, it is not legitimate to say that such a thing when done is void because that would tantamount to saying that every unlawful act is void." (Paragraph 10).

"....Merely because each one of them is prohibited from contracting a second marriage for a certain period, it could not be said that despite there being a decree of divorce for certain purposes the first marriage subsists or is presumed to subsist..... An incapacity for second marriage for a certain period does not have effect of treating the former marriage as subsisting....." (paragraph 13).

"Thus, examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, it cannot be said that such marriage would be void" (paragraph

20)"

34. In any case, the bar of Section 15 is not at all attracted in the facts and circumstances of this case, where the appeal from the decree of divorce had been filed almost a year after expiry of the period of limitation for filing an appeal. Section 15 permits a marriage after dissolution of a marriage if there is no right of appeal against the decree, or even if there is such a right to appeal, the time of appealing has expired without an appeal having been presented, or the appeal has been presented but has been dismissed. In this case no appeal had been presented with the period prescribed by limitation.

35. The bar, if any, under Section 15 of the Hindu Marriage Act applies only if there is an appeal filed within the period of limitation, and not afterwards upon condonation of delay in filing an appeal unless of course, the decree of divorce is stayed or there is an interim order of Court, restraining the parties or any of them from remarrying during the pendency of the appeal.

36. As observed above, the appeal was infructuous for all practical purposes, from the inception, since the Appellant's ex-husband had lawfully remarried after expiry of the period of limitation for filing an appeal, there being no appeal till then.

37. It could never have been the legislative intent that a marriage validly contracted after the divorce and after expiry of the period of limitation to file an appeal from the decree of divorce should rendered void on the filing of a belated appeal. If the marriage of the Appellant's ex-husband in 2006 was a valid marriage in law recognizing that he had no living spouse, the subsequent re-marriage of the Appellant could also not be void. We are in full agreement with the view of this Court in Leela Gupta (supra) that the effect of the prohibition against one of the parties from contracting a second marriage for a certain period is not to nullify the divorce and continue the dissolved marriage, as if the same were subsisting.

38. Learned counsel appearing on behalf of the Appellant has also argued that maintenance cannot be refused on the ground of nullity of marriage, until there is a declaration of nullity of marriage by a competent Court, in appropriate proceedings under Section 11 of the Hindu Marriage Act. We need not go into this question in view of our finding that a marriage contracted during the pendency of an appeal from a decree is not ab initio void, and certainly not when such an appeal is filed after expiry of the period of limitation.

39. The judgment and order under appeal confirming the order dated 7.8.2017 by relying on the order in Criminal Petition 14188 of 2015 cannot be sustained. The order dated 02.09.2016 of dismissal of the appeal was only a formality.

40. The appeal is allowed. The order under appeal and the order dated 7.8.2017 of the Additional Metropolitan Sessions Judge, Hyderabad dismissing M.C No.152 of 2015 are set aside. The application being M.C. No. 152 of 2015 is remitted to the appropriate Court having jurisdiction for determination of the Appellant's claim to maintenance. In the meanwhile, the Respondent No.1 shall pay to the Appellant maintenance of Rs.20,000/- per month, as directed by the Family Court by its order dated 19.12.2018, without prejudice to the rights and contentions of either party, until further orders of the appropriate Court/Family Court in the application under Section 125 of the Cr.P.C., or in the suit being O.P. No. 475 of 2015. The Respondent No.1 shall also pay the Appellant a lump sum amount of Rs.1,00,000/- towards arrears of maintenance within four weeks from date, which may later be adjusted towards arrears of maintenance as may be determined by the appropriate Court/Family Court.

.....J. [INDIRA BANERJEE] .....J. [M.R. SHAH] FEBRUARY 19, 2020;

NEW DELHI.