Tejinder Kaur vs Gurmit Singh on 23 February, 1988

Equivalent citations: 1988 SCR (2)1098, 1988 SCC (2) 90, AIR 1988 SUPREME COURT 839, 1988 (2) SCC 90, (1988) 1 JT 395 (SC), (1988) 1 APLJ 25.2, (1988) 1 ALL WC 523, 1988 SCC (CRI) 313, (1989) 1 MAD LW 589, (1988) 1 PUN LR 629, (1988) PAT LJR 64

Author: A.P. Sen

Bench: A.P. Sen, B.C. Ray

PETITIONER:
TEJINDER KAUR

Vs.

RESPONDENT:
GURMIT SINGH

DATE OF JUDGMENT23/02/1988

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
RAY, B.C. (J)

CITATION:
1988 SCR (2)1098 1988 SCC (2) 90
JT 1988 (1) 395 1988 SCALE (1)398

ACT:
Constitution of India, 1950: Article 136-Decree for dissolution of marriage-Upheld by High Court-Wife filing SLP-Husband contracting second marriage one month after dismissal of appeal by High Court-SLP whether rendered infructuous.

Hindu Marriage Act, 1955: Section 15-Effect of deletion of proviso by Marriage Laws (Amendment) Act, 1976-Decree for dissolution of marriage upheld by High Court-SLP under Article 136 of Constitution of India filed by wife-Husband marrying again one month after dismissal of High Court appeal-Preliminary objection that SLP rendered infructuous-Whether maintainable.

Limitation Act, 1963 : Article 113(c)Decree for dissolution of marriage-Upheld by High Court-SLP-Filed within 90 days by wife-Husband meanwhile contracting second marriage-Whether SLP rendered infructuous.

HEADNOTE:

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Section 15 of the Hindu Marriage Act, 1955 provided that when a marriage was dissolved by a decree of divorce, it shall be lawful for either of the spouses to marry again, where either there was no right of appeal or where there was such a right of appeal, the time for appealing, had expired, without the appeal being presented or the appeal having been presented, was dismissed. Proviso to the section provided that it shall not be lawful for either of them to remarry unless at the date of such marriage at least one year had elapsed from the date of decree in the court of first instance. This proviso was deleted by the Marriage Laws (Amendment) Act, 1976.

A decree for dissolution of marriage was granted by the Additional District Judge against the petitioner-wife on the ground of cruelty under s. 13(i-a) of the Hindu Marriage Act, 1955. The petitioner-wife's appeal to the High Court was dismissed in limine.

The petitioner-wife filed a Special Leave Petition in this Court. A preliminary objection was raised on behalf of the respondent-husband

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that the petition had become infructuous inasmuch as the respondent-husband had meanwhile married again on 17th August, 1986, just a month after the dismissal of the petitioner's appeal by the High Court.

Over ruling the preliminary objection and directing the Special Leave Petition to be placed for hearing,

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HELD: Under the law laid down in the Hindu Marriage Act, 1955, monogamy is the rule and a party can only contract valid second marriage after the first ceases to exist in the manner envisaged by s. 15. This rule is an integral part of the proceedings by which alone both the parties to the decree can be released from their incapacity to contract a fresh marriage. [1102E-F]

Prior to the Amendment Act of 1976, the proviso to s. 15 laid down a period of waiting of one year between the passing of a decree for divorce by the court of first instance and the remarriage of any of the spouses. The deletion of this proviso, by the Marriage Laws (Amendment Act), 1976 and doing away with the period of waiting has given rise to a question of great difficulty. [1103A-B]

The section, when it speaks of a case where there is a "right of appeal" does not in terms cover the case of an application for special leave to appeal to the Supreme Court under Article 136 of the Constitution. [1103B-C]

Under Article 133(c) of the Limitation Act, 1963 a special leave petition can be filed within 90 days from the

date of the disposal of the appeal by the High Court. Therefore, a successful party cannot take away the right of presenting an application from the other spouse by marrying immediately after the High Court's judgment and must wait till that period was over and make sure whether an application for special leave has been filed in the Supreme Court. [1103C-D]

Chandra Mohini Srivastava v. Avinash Prasad Srivastava JUDGMENT:

Ors., [1978] 3 SCR 922, followed.

In the instant case, the High Court having dismissed the appeal on 16th July, 1986, the petitioner could have presented a special leave petition within ninety days therefrom i.e. till 14th September, 1986. Till that period was over, it was not lawful for either party to marry again as provided by s. 15. [1104C-D] Though the respondent has denied any knowledge of the filing of the appeal in the High Court or of its dismissal, and has justified the second marriage on August 17, 1986, this has been controverted by the petitioner, by filing a copy of the registered notice dated May 31, 1986, intimating the respondent of the filing of the appeal. It was, therefore, incumbent on the respondent to have apprised himself as to whether the appeal in the High Court was still pending; and if not, whether the period for filing a special leave petition to this Court had expired. [1104A-C] Catterall v. Sweetman, [1845] 9 Jur. 951, 954, referred to.

& CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 13306 of 1986.

From the Judgment and order dated 16.7.1986 of the High Court of Punjab and Haryana in First Appeal from Order No. 110/M of 1986, and Civil Misc. No. 3087 C11 of 1986.

Mrs. Sarla Chandra and Girish Chandra for the Petitioner.

Mukul Mudgal and P.K. Jain for the Respondent. The Judgment of the Court was delivered by SEN, J. In this special leave petition by the wife against the decree for dissolution of marriage granted by the Additional District Judge, Patiala dated 29th March, 1986 on the ground of cruelty under s. 13(ia) of the Hindu Marriage Act, 1955, against which the petitioner-wife had preferred an appeal to the Punjab & Haryana High Court and which the High Court by its order dated 16th July, 1986 dismissed in limine, a preliminary objection is raised that the petition has become infructuous inasmuch as the respondent-husband has in the meanwhile married again on 17th August, 1986 i.e. just after a month of the dismissal of her appeal.

It is not necessary to state the facts in any detail. It is enough to say that the learned District Judge held the wife guilty of mental cruelty for having voluntarily deprived the husband of her society and cohabitation for a long period as, according to him, marriage without sex is an anathema. He further held that the wife had falsely charged the husband with adultery. It is quite evident on these facts that the marriage has irretrievably broken.

We heard learned counsel for the parties and the question is whether the condition pre-requisite before a lawful marriage can take place after a decree for dissolution of marriage under s. 15 of the Act has been fulfilled. Prior to its amendment by the Marriage Laws (Amendment) Act, 1976 by which the proviso was deleted, s. 15 was in these terms:

> "15. 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.
>
> Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance."

Emphasis supplied Prior to the Amendment Act of 1976, the proviso to s. 5 laid down a period of waiting of one year between the passing of a decree for divorce by the Court of first instance and the remarriage of any of the spouses. The Allahabad High Court in Lila Gupta v. Laxminarayan, ILR (1969) 1 All 92 and the Calcutta High Court in Uma Charan Roy v. Smt. Kajal Roy, AIR (1971) Cal. 307 held that such period of waiting was enjoined on the parties in the interests of public policy and morality so as to discourage divorcees from entering into fresh matrimony and to avoid confusion of parentage. It was pointed out that even in Mohammadan law a divorced wife is expected to marry any other man only after the expiry of the period of iddat to avoid a danger of confusion of paternity. It was accordingly held that the prohibition being mandatory, if any divorced party married again within a period of one year, such marriage was nullity. That view however did not find favour with this Court in Lila Gupta v. Laxmi Narain & Ors., [1978] 3 SCR 922 and it was held that a marriage contracted in contravention of the rule relating to one year laid down in the proviso would not be void. The Court referred to the following observations of Dr. Lushington in Catterall v. Sweetman, [1845] 9 Jur. 951, 954:

> "The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void ..... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it ....From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity."

It was observed that a decree for divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. But there was nothing in s. 15 of the Act to make that

marriage a nullity. The reason for this was an incapacity for second marriage for a certain period does not have the effect of treating the former marriage as subsisting.

Under the law laid down in this enactment, monogamy is the rule and a party can only contract a valid second marriage after the first ceases to exist in the manner envisaged by s. 15. The rule laid down in this section is an integral part of the proceedings by which alone both the parties to the decree of divorce can be released from their incapacity to contract a fresh marriage. The Law Commission in its 59th Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954 however suggested the deletion of the proviso to s. 15 which laid down that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the Court of the first instance, for the reason extracted below:

> "The consideration of the parties, freedom to marry and the inconvenience caused by the prohibition to remarry, out-weighed the two-fold purpose, i.e. avoiding confusion of parentage and checking an attempt to obtain divorce from one woman with the specific object of marrying another woman."

Parliament accordingly by the Marriage Laws (Amendment) Act, 1976 has done away with the period of waiting by deleting the proviso. In Lila Gupta's case, this Court held that the effect of deleting the proviso is that parties whose marriage is dissolved by a decree for divorce can contract marriage soon thereafter provided, of course, the period of appeal has expired and that all pending proceedings have to be decided as if the proviso had not been applicable. The deletion of the proviso has given rise to a question of great difficulty. The section when it speaks of a case where there is a 'right of appeal' does not in terms cover a case of an application for special leave to appeal to the Supreme Court under Art. 136 of the Constitution.

In Chandra Mohini Srivastava v. Avinash Prasad Srivastava & Anr., [1967] 1 SCR 864, on somewhat similar facts it was held that though s. 15 in terms does not apply to a case of special leave to appeal to the Supreme Court, a spouse who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's Judgment take away the right of presenting an application for special leave to appeal from the other spouse. It was further held that the successful party must wait for a reasonable time and make sure whether an application for special leave has been filed in this Court. Wanchoo, J. speaking for a two-Judge Bench said:

> "It is true that s. 15 does not in terms apply to a case of an application for special leave to this Court. Even so, we are of opinion that the party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's decree take away from the losing party the chance of presenting an application for special leave. Even though s. 15 may not apply in terms and it may not have been unlawful for the first respondent to have married immediately after the High Court's decree, for no appeal as of right lies from the decree of the High Court to this Court in this matter, we still think that it was for the first respondent to make sure whether an application for special leave had been filed in this Court and he could not by marrying immediately after the High Court's decree

> deprive the appellant of the chance to present a special leave petition to this Court. If a person does so, he takes a risk and cannot ask this Court to revoke the special leave on this ground."

In the present case, the respondent in the counter- affidavit has denied any knowledge of the fact that an appeal had been preferred in the High Court or of its dismissal and therefore asserts that he was justified in contracting a second marriage on 17th August, 1986 i.e. immediately after the expiry of one month from the date of the decree of dissolution of marriage passed by the learned Additional District Judge. This fact is controverted by the petitioner in her affidavit-in-reply. She has placed a copy of the registered notice dated 31st May, 1986 intimating the respondent of the filing of the appeal.

In view of this, it was incumbent on the respondent to have enquired about the fate of the appeal. At any rate, the High Court having dismissed the appeal on 16th July, 1986 the petitioner could have presented a special leave petition within ninety days therefrom under Art. 133(c) of the Limitation Act, 1963 i.e. till 14th September, 1986. Till that period was over, it was not lawful for either party to marry again as provided by s. 15. It was incumbent on the respondent, as observed in Lila Gupta's case to have apprised himself as to whether the appeal in the High Court was still pending; and if not, whether the period for filing a special leave petition to this Court had expired. We must accordingly overrule the preliminary objection following the views expressed in Chandra Mohini's and Lila Gupta's cases. We wish to add that in the subsequent decision in Lila Gupta the Court while dealing with the effect of deletion of the proviso observed:

> "The net result is that now since the amendment parties whose marriage is dissolved by a decree of divorce can contract marriage soon thereafter provided of course the period of appeal has expired."

The Court adverted to the word of caution administered by Wanchoo, J. in Chandra Mohini's case and reiterated:

> "Even, though it may not have been unlawful for the husband to have married immediately after the High Court's decree for no appeal as of right lies from the decree of the High Court to this Court, still it was for the respondent to make sure whether an application for special leave had been filed in this Court and he could not, by marrying immediately after the High Court's decree, deprive the wife of the chance of presenting a special leave petition to this Court. If a person does so, he takes a risk and could not ask the Court to revoke the special leave on that ground."

We must for this reason overrule the preliminary objection and direct the special leave petition to be placed for hearing. There shall be no order as to costs. N.P.V