Allahabad High Court
Jamboo Parasad Jain vs Smt. Malti Prabha And Anr. on 24 January, 1979
Equivalent citations: AIR 1979 All 260
Author: A Banerji
Bench: A Banerji
ORDER A. Banerji, J.

1. These two civil revisions are between the same parties and arise out of two different orders passed in the same matrimonial suit and it will be convenient to decide them by a common order,

2. Shri Jamboo Prasad Jain, hereinafter referred to as the petitioner filed a petition under Sections 12 and 13 of the Hindu Marriage Act, hereinafter referred to as the Act, read with the provisions of U. P. Act No. XIII of 1972 for a declaration that the marriage of the petitioner with the respondent was null and void or a decree for divorce be granted to the petitioner against the respondent. He alleged in the petition that the marriage of the parties was solemnised at Rohtak on 25-4-1970 and the parties were Jain Hindus. It was alleged that the mother and the father of the respondent were in active collusion with the respondent and defrauded the petitioner. At the time of the marriage the respondent was suffering from schizophrenia, a mental illness which comes within the purview of lunacy, with lucid intervals. It was also stated that schizophrenia is a mental illness which cannot be cured. The respondent was of unsound mind at the time of her marriage and from before. In the alternative it was stated that if the petitioner was not able to prove the unsoundness of the mind of the respondent, the latter was extremely cruel to the petitioner during the time they stayed together. The facts in support thereof were stated to ask for an alternative relief of divorce. A written statement was filed by the wife on 7-4-1971. Issues were framed on the following day. Issue No. 1 was in regard to the question as to whether the respondent was mentally unfit and deficient as alleged by the petitioner on the date of marriage or before and whether the marriage was null and void under Section 12 of the Act. Issue No. 4 was whether the petition was cognisable in the Court of the Civil Judge. This issue was decided by the learned Civil Judge by his order dated 19th April, 1971 and it was held that the Court had jurisdiction to try the suit. The petitioner examined his witness. Thereafter date was fixed for recording of the evidence of the respondent. Thereafter the respondent sought the amendment of the written statement by saying that inconsistent pleas in the petition under Sections 12 and 13 of the Act could not be permitted. This plea was rejected. A revision was filed and the revision was dismissed. On the 25th Sept. 1971 the Court rejected another application of the respondent praying that the petitioner be directed to inform the Court about the exact case and to elect one of the alternative cases in the petition. This application was rejected. Time was obtained on several occasions and ultimately an appeal was filed by the respondent before the District Judge. After the disposal of the appeal the file was received on 20-1-1972 and the Court ordered the case to be put up for fixing a date in the case. 16th Feb. 1972 was fixed for evidence and arguments. The respondent was absent. The Court treated the proceedings as one under Order XVII Rule 3 C. P. C. and the very same day passed a judgment allowing the petition. The suit was decreed against the respondent and it was declared that the marriage of the petitioner with the respondent Smt. Malti Prabha held on 25th April, 1970 was null and void. Smt Malti Prabha, filed the Civil Appeal No. 98 of 1972 against the decree dated Feb. 16, 1972 before the District Judge on 24-4-1972. This appeal is still pending. The petitioner moved an application dated 4-1-1975 stating that after his

marriage with the respondent had been declared null and void, he had contracted marriage with one Pratibha Jain on 19th Feb. 1972 and there were two issues born from this wedlock. He prayed that the appeal be declared to have become infructuous. This application was, however, rejected on 14th Feb. 1975. The present revision No. 754 of 1975 has been filed by the husband against the above order. In this revision it has been contended on behalf of the husband that the order passed by the Court below was without jurisdiction.

3. Smt. Malti Prabha also filed an application under Order IX, Rule 13 CPC for setting aside the decree dated 16th Feb. 1972 but the same was rejected by the learned Civil Judge on 15th March, 1972. A miscellaneous appeal was filed against the above order before the District Judge. The latter held, by an order dated 9th Dec. 1976 that the proceedings before the Civil Judge would be deemd to be one under Order XVII, Rule 2 CPC and recalled the order dated 16th Feb. 1972. The ex parte decree passed against the Respondent was set aside and the case was sent back to the trial court for a decision in accordance with law. Civil Revision No. 235 of 1977 is filed against the order. It has been contended by the learned counsel for the Petitioner that the order passed by the learned District Judge was manifestly erroneous and amounted to an illegal exercise of jurisdiction.

4. I have set out these facts in some detail to appreciate the question that has arisen in these civil revisions. The first and the primary question is : whether there was any legal bar to the Petitioner contracting a second marriage on the 19th Feb. 1972, i.e. within 3 days of the passing of the decree by the trial court, Secondly, what is the effect of the marriage contracted by the Petitioner with Smt. Pratibha Jain on 19th Feb. 1972?

5. Mr. Ravi Kiran Jain, learned counsel for the petitioner in this case contended that since the decree passed on 16th Feb. 1972 was a decree for the annulment of the marriage under Section 12 of the Act, the provisions of Section 15 of the Act had no application. The latter section applied in the case of a dissolution of marriage by divorce and not in the case of an annulment of marriage, Consequently, there was no bar in contracting a second marriage. In support of his contention he relied on two decisions reported in Promod Sharma v. Radha, AIR 1976 Punj and Har 355 and Mohanmurari v. Kusum Kumari (AIR 1965 Madh Pra 194). He also referred to the decision of the Supreme Court in the case of Chandra Mohini v. Avinash Prasad (AIR 1967 SC 581) and urged that on the observations made by their Lordships, Section 15 had application only in respect of dissolution of marriage by divorce. Lastly, he referred to the decision of the Supreme Court in Pasupuleti Venkateswarlu v. Motor & General Traders, AIR 1975 SC 1409 in which it was held that subsequent events have to be noticed by a court of law. He emphasised that since a marriage has taken place with Smt. Pratibha Jain on 19-2-1972 and there have been three issues from the same marriage it was not in the interest of justice that the lives of Smt. Pratibha Jain and the children be put in jeopardy.

6. Mr. Vishnu Sahai, appearing for the Respondent, however, contended that although Section 15 did not specifically mention an annulment of marriage yet in view of the observations of their Lordships of the Supreme Court in Chandra Mohini v. Avinash Prasad (supra) the principle laid down in Section 15 would still be applicable even in a case where the marriage had been annulled. He also cited two decisions in support of his contention Vathsala v. Manoharan (AIR 1969 Mad 405)

and Krishan Lal v. Krishna (AIR 1971 J. & K. 31). He also contended that in view of the setting aside of the ex parte decree dated 16-2-1972 the position in law was that the marriage between the petitioner and Smt. Malti Prabha Jain subsisted and any marriage contracted while the parties had at spouse living was null and void. It was further contended that in this view of the matter the alleged marriage between Smt. Pratibha Jain and the petitioner was void and they must bear the consequences of a void marriage.

7. The questions raised in this case are not free from difficulty. Question of the validity of a marriage deserves especial care, and caution must be exercised before a marriage is declared void.

8. The principle question as indicated earlier, is whether Section 15 or the principles underlying therein are to apply in a case where a decree for annulment of the marriage has been passed under Section 12 of the Act. Section 15 of the Act reads as follows:--

"When a marriage has been dissolved by 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 dcree in the court of the first instance."

It may be mentioned here that the Parliament passed an Act known as the Marriage Laws (Amendment) Act, 1976 (Act No. 68 of 1976) by which the proviso to Section 15 of the Hindu Marriage Act was deleted. However, by Section 39 of the 1976 Act the provisions of the 1976 Act were made applicable to all pending proceedings. The amendment is, therefore, retrospective in effect in the sense that it is applicable to a pending proceeding and the said proceedings are to be decided as per the amended provisions. Consequently, the proviso to Section 15 will have to be read as if non-existing.

9. In the above event it will be necessary to analyse the provisions of Section 15 of the Hindu Marriage Act. It provides that it shall be lawful for either party to marry again whose marriage has been dissolved by a decree of divorce in the following circumstances: Firstly, where there is no right of appeal against the decree, of divorce; secondly, if there is such a right of appeal the time for filing the appeal has expired without any appeal having been presented; thirdly, if there is such a right of appeal and an appeal has been presented, on the dismissal of the appeal. Section 15 does not create an express bar to the contracting of a marriage afresh after the decree of divorce is passed, but any such marriage would not be lawful unless it took place after any one of the three circumstances mentioned above. The Proviso to Section 15 lays down that a marriage taking place within a period of one year after the passing of the decree of divorce would be unlawful. This Proviso appears to have been enacted for a definite purpose. The underlying principle appears that the successful party should not complicate matters by contracting a fresh marriage within a period of one year from the passing of the decree for divorce. This is a salutary provision of law. If the Proviso was applicable,

then in that event whether an appeal was filed or not, any fresh marriage contracted by the parties within a period of one year would be unlawful. If the Proviso is omitted then the position would be that a fresh marriage would be lawful only after one of the three circumstances taking place as stipulated in Section 15 above. A question arises as to what would be the position if the fresh marriage is contracted even before the expiry of the period of filing an appeal. The answer is discernible from the second circumstance. If an appeal is provided and the time for filing an appeal has expired without any appeal having been filed the marriage would be lawful. It means any marriage contracted after the expiry of the period fixed for filing of the appeal would be lawful. It follows that where the time for filing of an appeal has not expired, a marriage contracted by the successful party during this period would not be lawful.

10. What is the effect of such a marriage? Is it void? The Supreme Court in a recent decision, Lila Gupta v. Laxmi Narain (AIR 1978 SC 1351), held that a marriage contracted in contravention of or violation of the proviso to Section 15 of the Act Is not void but merely invalid but not affecting the marriage. Their Lordships further held "Even though the Proviso is couched in prohibitory and negative language, in the absence of an express provision, it is not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso."

11. Section 12 of the Hindu Marriage Act Es in respect of voidable marriages. It provides that any marriage solemnised whether before or after the passing of the Act shall be voidable and may be annulled by a decree of nullity on the grounds mentioned in the section. Any one of the parties to the marriage could seek a decree of annulment of the marriage on the ground that the other party was an idiot or lunatic at the time of marriage. The Court trying the petition under Section 12 of the Act is empowered to pass a decree annulling the marriage as null and void on being satisfied that a case has been made out for the same. The result would be that the marriage would be rendered ab initio void.

12. Section 15 has been specifically made applicable in the case of a decree of divorce. There is no provision in the Act similar to Section 15 applicable to a case of decree of nullity annulling a marriage. But it was contended by the learned counsel for the respondent that notwithstanding the omission in Section 15 of the Act the position has been made clear by their Lordships of the Supreme Court in the case of Chandra Mohini (AIR 1967 SC 581) (supra).

13. In the case of Chandra Mohini (supra) their Lordships were considering a case of dissolution of marriage by a decree of divorce. There was also an alternative prayer for a decree for judicial separation. The question of annulment did not arise and was not considered in the Supreme Court case but there is an observation of the Supreme Court which is very material.

14. In the above case the trial court had refused the reliefs prayed for by the husband. The husband filed an appeal in the High Court. The High Court granted the relief of dissolution of marriage by a decree of divorce on 7-1-1964. A special leave petition was presented before the Supreme Court on 7-4-1964, special leave was granted on 25-8-1964 and the husband got notice of the grant of the special leave on 9-9-1964. In the meantime he had married another woman. A question was raised whether the provisions of Section 15 would be applicable in a case of special leave. The Court

observed (at p. 583):--

"It is true that Section 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 and thus take away from the losing party the chance of presenting an application for special leave. Even though Section 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 cannot take a risk and cannot ask this Court to revoke the special leave on this ground."

Learned counsel for the respondent wife urged that the aforementioned observation of the Supreme Court would be applicable even in a case where Section 15 is not strictly applicable and that would include a decree for annulment of marriage. Learned counsel for the applicant's contention was that the above observation must be read in context of the decree passed in the case viz : that it was a decree for dissolution of marriage by divorce and their Lordships were only considering whether the principle of Section 15 will be applicable in a case of special leave to appeal.

15. There is no dispute that even the observations made by the Supreme Court of India are binding on this Court. The question is whether the observations have any application to the facts of the present case. It must be borne in mind that the above observations of the Supreme Court were made in a case relating to dissolution of marriage by a decree of divorce. That was a case under Section 13 of the Act. The case in hand is one of annulment of marriage under Section 12 of the Act. It is to be seen whether the principles laid down in Section 15 are at all applicable to a case under Section 12 of the Act. It will be relevant to consider some of the reported decisions of the various High Courts on this point. In the case of a petition under Section 9 of the Hindu Marriage Act the High Court of Madras in Vathsala v. Mancharan (AIR 1969 Mad 405) (supra) has followed the Supreme Court dicta quoted above in a case under Section 12 of the Act. The Court held that once the ex parte decree is set aside the suit proceeds and the remarriage would not render the application for setting aside the ex parte decree infructuous. In the case of Krishan Lal v. Krishna (AIR 1971 J&K 31) (supra) a Division Bench of the Jammu and Kashmir High Court was considering a petition under Section 9 of the Hindu Marriage Act. The Division Bench followed the dicta of the Supreme Court and held that once the first marriage had been proved the remarriage could not stand in the way of a decree being passed in the suit. The Court set aside the decree by the trial court and a decree for restitution of conjugal rights was passed.

16. The Madhya Pradesh High Court in the case of Mohanmurari v. Kusum Kumari (AIR 1965 Madh Pra 194) (supra) was considering a case under Section 12(1)(a) of the Act. There the husband preferred an appeal but the wife contracted a re-marriage during the pendency of the appeal. It was held that the appeal became infructuous as Section 15 was not attracted. This decision of the Madhya Pradesh High Court was given prior to the decision in the case of Chandra Mohini v.

Avinash Prasad (AIR 1967 SC 581) (supra). The reason given in this case was as follows: There was no legal incompetency in the respondent wife for contracting a re-marriage once a marriage with the appellant had been annulled by a decree of nullity. The marriage between the appellant and the respondent having been annulled their status as husband and wife with each other had ceased to exist. It was further observed that if the appellant wanted the status quo to be observed, he should have applied for a prohibitory order restraining the respondent from marrying again till the appeals filed by him had been decided. Since there was no such order there was no impediment to her remarriage. The District Judge had decreed the suit of the wife on 29th June 1963. It will be relevant to notice that the first appeals had been filed by the husband on 5-10-1963. The wife had married another person on 20-1-1964. Although the marriage was contracted within a period of one year from the passing of the decree in this case the Madhya Pradesh High Court held that Section 15 of the Act had no application to such a decree. Consequently, the appeal was declared to have become infructuous and dismissed as such.

17. The Punjab & Haryana High Court in the case of Promod Sharma v. Radha (AIR 1976 Punj & Har 355) (supra) was considering a case under Section 12 of the Hindu Marriage Act. It was further held that a party whose marriage had been annulled can re-marry, and an appeal filed against annulment after such re-marriage is rendered infructuous. The Division Bench had referred to the case of Chandra Mohini v. Avinash Prasad (AIR 1967 SC 581) (supra) and rejected the contention that there can be no re-marriage within a period of one year from the passing of the decree. The Division Bench also held that the Supreme Court decision was a case of divorce and not a case of nullity and further held that there was no quarrel with the proposition of law as laid down in the Supreme Court case. The Division Bench had also referred to the earlier decision of the Punjab & Haryana High Court in Karam Singh v. Amro ((1970) 72 Pun LR 503) where it was held that there was no disability on the appellant to contract a re-marriage after a decree for nullity was passed in favour of the respondent under Section 12 of the Act. In this case it may be mentioned that the re-marriage took place soon after the dismissal of the first appeal by P.D. Sharma, J. of the Court. There was a special appeal and the matter was sent back for a fresh decision on merits before another learned single Judge. Thereafter, there was a Letters Patent Appeal which was decided on 3-4-1975. So by the time the appeal was decided almost 9 years had elapsed between the re-marriage and the date of appeal.

18. On a consideration of the matter it appears to me that Section 15 of the Act only applies in the case of a dissolution of marriage by a decree of divorce. There is nothing in Section 15 itself to show that it applies even as regards a decree passed for annulment of marriage under Section 12 of the Act, The provisions of Section 15 are quite clear -- it starts with the words "when a marriage has been dissolved by a decree of divorce ..... " This specific provision, therefore, excludes a decree passed under other provisions of the Act. A decree of divorce dissolving a marriage stands on a different footing than a decree for annulment of the marriage declaring the marriage to be null and void. In the former case it postulates a valid and effective marriage which for subsequent events had to be dissolved. The latter case postulates a voidable marriage which has been declared void. If a party was held to be a lunatic or idiot on the date of the marriage such a marriage was not a valid or effective marriage between the parties. On the passing of a decree annulling such marriage and declaring that the marriage was null and void meant what was contracted as a marriage was no marriage in the eye of law. In other words, the marriage was rendered non est. The result would be

that the parties to such a marriage would be under no impediment to contract fresh marriage.

19. In the case of Lila Gupta (AIR 1978 SC 1351) (supra) D.A. Desai, J. speaking for the majority has observed: "If a marriage is annulled by a decree of nullity, the legal consequence would be that in the eye of law there was no marriage at all even though the parties contracting the marriage might have gone through some form of marriage ....."

20. As regards the observations of the Supreme Court in the case of Chandra Mohini (AIR 1967 SC 581) (supra), I am of the view that the principles laid down there have no application to a case of a decree for annulment of marriage. The facts and the circumstances of the case before their Lordships show that it was a case of divorce and not a case of annulment. The specific observation of the Supreme Court "even though Section 15 may not apply in terms ....." was spoken in respect of an application for special leave to the Supreme Court in a case arising out of a decree for dissolution of marriage by divorce. In my opinion the aforesaid observation of the Supreme Court would be applicable only In a case of dissolution of marriage by a decree of divorce. For the reasons given above and with great respect, I am unable to share the view taken by the learned Judges of the Madras, and Jammu and Kashmir High Courts but I respectfully subscribe to the view taken by the learned Judges of the Punjab & Haryana High Court in this respect.

21. In the above view of the matter, neither Section 15 applies in respect of a decree for the annulment of marriage specifically or by implication nor does the observation of the Supreme Court in the case of Chandra Mohini (AIR 1967 SC 581) (supra) make the provisions of Section 15 applicable in a case of decree of annulment passed under Section 12 of the Act. Further, in view of, the law laid down in the case of Lila Gupta (AIR 1978 SC 1351) (supra) such a marriage would not be void.

22. My conclusion, therefore, is that there is no impediment of any party in contracting a fresh marriage after a decree for annulment of marriage has been passed.

23. It is, therefore, obvious from the above that the order passed by the Civil Judge rejecting the application of the husband that the appeal has become infructuous must be held to be manifestly erroneous and set aside. Civil Revision No. 754 of 1975 is, therefore, liable to be allowed. The consequences of this would be that the appeal No. 98 of 1972 would be dismissed as infructuous. Further, in this view of the matter even though an order has been passed for setting aside of the ex parte decree that proceeding would also be rendered infructuous. I am aware of the fact that the respondent in this case would be deprived of contesting the suit or the appeal but then that being the position under the law there is no getting away from it.

24. Consequently, Civil Revision No. 235 of 1975 would also be liable to be allowed.

25. In the result, therefore, both the Civil Revisions are allowed and the orders dated 14-2-1975 and 9-12-1976 are set aside. The application of the applicant declaring the appeal to have been rendered infructuous is upheld. In the circumstances of the case there will be no order as to costs.