Karnataka High Court
H.S. Uma vs G.K. Sumanth Arya on 8 April, 1993
Equivalent citations: II (1993) DMC 174, ILR 1993 KAR 1774, 1993 (2) KarLJ 529
Author: Krishnan
Bench: M Ramakrishna, B Krishnan
JUDGMENT Krishnan, J.

1. The appellant was respondent before the Addl.Prl.Judge, Family Court, Bangalore in M.C No. 642 of 1989 and being aggrieved by the decree of divorce granted in the said case has preferred this Appeal.

2. Parties shall hereafter be referred to with reference to their ranks in the lower Court or husband and wife as the occasion may demand. The petitioner filed the petition under Section 13(1)(1a) of the Hindu Marriage Act (for snort 'the Act') seeking a decree for divorce to dissolve his marriage with the respondent. The case put forward by him in brief, is as follows:

He married the respondent on 19-6-1988 at Bangalore and out of the said wedlock a female child was born. The respondent lived with the petitioner for a short period of only 4 to 5 months and even during the said period her actual residence with him was only for a few days as she used to go away to her parents house at Viveknagar quite often and that too without the consent of either himself or his mother. She had treated him with cruelty and caused him great mental agony and physical exertion. Despite the fact that petitioner tolerated that kind of attitude on the part of his wife, she did not change her attitude towards him or towards other members of the family. She has not shown any interest in the domestic work and was also not assisting her mother-in-law in any domestic work. She used to keep herself in a room closed and whenever she was out of the room she was quarrelling either with the petitioner or with his mother and used to create a scene by threatening that she would commit suicide. All the members of the family were always kept under tension. She had superiority complex and she was mentioning that she was a post graduate and she could earn more than Rs. 2,000/- and was stating that she would not care for any of the members of the family. One of the conditions under which he married the respondent was that she should not take up any appointment. But contrary to the assurance, she was seeking for a job and in fact had later joined as a lecturer in the Vidya Vardaka Sangha, First Grade College for Women, West of Chord Road, Bangalore. After getting that job, she had left the company of the petitioner voluntarily and she has not shown any intention of joining him. The respondent did not even inform him about the birth of the child. She had no mind to live with the petitioner. When all the efforts to bring her around failed, he issued a legal notice dated 11th September, 1989 and called upon her to join him or in the alternative to join him for presenting a Petition for divorce by consent but she has not done either. The respondent had deprived him the love and affection of his choice. Therefore, the petitioner sought for a decree of divorce. 'After service of notice of the petition, the respondent entered appearance through her Advocate one Shri S.R. and the case was posted for objection and for counselling to 22.3,1990. On that day, as time was prayed for by the learned Advocate for the petitioner the case was posted for counselling to 10.4.1990, On that date the respondent was absent and objections were not filed and the case was posted to 12.4.1990. On that date again the respondent was absent. The petitioner was directed to file an affidavit in support of his case and he

filed one on the next date. Subsequently by perusing the Petition and the affidavit filed in support of the Petition, the learned Judge of the Family Court passed an order allowing the Petition. It is being aggrieved by this order of the learned Judge of the Family Court, the respondent has preferred this Appeal.

3. It was contended on behalf of the appellant that her learned Advocate who was appearing in the Family Court could not make proper representation on her behalf on account of her personal inconvenience and the trial Court without posting the matter to a further date has proceeded to pass an exparte order and therefore the said order is liable to be set aside. It was secondly contended that under the provisions of the Hindu Marriage Act, the Court before granting the relief should make every endeavour to bring about reconciliation between the parties and the records of the Family Court do not indicate that any such endeavour was made by it to find out whether reconciliation could be made. It was further urged that even on the very averments made in the Petition which have been again sworn to by the petitioner, there is absolutely no scope to hold that a case had been made out to grant divorce under Section 13(1)(ia) of the Hindu Marriage Act. Therefore, it was urged that the order granting divorce should be set aside and the matter should be remitted back to the Family Court with a direction to afford opportunity to the appellant to file her objection statement and thereafter to give opportunity to both the sides to adduce evidence and thereafter to dispose of the case according to law.

4. The learned Advocate for the respondent urged that there is no substance in any one of these contentions and it was also urged that the case was posted on more than one occasion and the appellant and her Advocate were absent and therefore the Family Court was left with no other alternative but to proceed to hear the matter exparte. It was further urged that having regard to the fact that respondent and her Counsel were absent, there was no scope for the Family Court to find out whether the parties could reconcile their differences. The contention that even if all the averments made by the petitioner are accepted no case is made out for grant of divorce under the relevant Section has also been disputed. It was also urged that subsequent to the divorce granted by the trial Court, the petitioner has married and a child is also born out of the said wedlock and if the order of the trial Court is to be set aside it would affect the valid second marriage of the petitioner and in that view of the matter, even if a case is made out for setting aside the order of the trial Court, it should not be set aside having regard to this subsequent event.

5. On these contentions the short Points that arises for Consideration are:

1. Whether a case is made out for setting aside the impugned order and remand of the case to the Family Court?

2. Whether the impugned order is not liable to be set aside on account of the alleged subsequent event of the second marriage of the petitioner?

6. The order sheet of the lower Court indicates that on 16.1.1990 one Smt. S.R. undertook to file vakalat for respondent and the case was posted for filing vakalat and objections to 13.2.1990. On that day the case was adjourned to 22.3.1990 for counselling. On 22.3.1990 the learned Advocate for

the petitioner prayed for time and therefore it was posted to 10.4.1990. On that day the respondent was absent and objections were not filed. The case was adjourned to 12.4.1990. Again, on that date, the respondent was absent and the petitioner was directed to file an affidavit in support of his case and the case was adjourned to 16.4.1990. On that day the affidavit was filed on behalf of the petitioner and the case was posted for orders on 20.4.1990 and as on that date the orders were not ready it was again adjourned to 21.4.1990 and orders were pronounced on that day allowing the petition. It may be noticed that though from 10.4.1990 the case was adjourned four times before the Petition was allowed the dates were given at very short intervals and hardly eleven days had expired from the date on which the respondent was absent to the date on which the orders were pronounced. Though the affidavit of the learned Counsel appearing for the respondent before the trial Court has not been filed before us, the personal inconvenience of that Advocate adverted to in the course of the Appeal Memorandum has not been seriously disputed on behalf of the petitioner. In fact at one stage the learned Advocate for the petitioner had to practically concede that but for the subsequent event he would not have been in a position to seriously resist the prayer made on behalf of the respondent to set aside the order of the trial Court and for remand of the case.

7. Apart from the fact that no proper representation could be made on behalf of the respondent before the Family Court on account of the personal inconvenience of her learned Advocate, the order is liable to be set aside because no endeavour as contemplated under the Hindu Marriage Act has been made for finding out whether the parties could reconcile their differences. Section 9(1) of the Family Courts Act, which refers to the duty of the Family Court to make efforts for settlement, reads as hereunder:

"In every suit or proceedings, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it deem fit."

Section 23(2) of the Hindu Marriage Act which again refers to the duty | of the Court to bring about reconciliation between the parties reads as hereunder:

"Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties."

It may be noticed that in contra distinction to just the word "endeavour" mentioned in Section 9(1) of the Family Courts Act, in Section 23(2), a duty is cast on the Court in the first instance to make every endeavour. The use of the word "every" before the word "endeavour" in this Section assumes great importance in respect of the duty cast on the Court dealing with a proceeding under the Hindu Marriage Act to bring about reconciliation.

8. It was contended on behalf of the petitioner-husband that in a case, where the other party is absent there is absolutely no scope for the Court to make any endeavour to reconcile the differences

and therefore it cannot be said that the Family Court is guilty of not making every endeavour to reconcile the differences between the parties. We are not at all persuaded to accept the contention advanced on behalf of the husband that in a case where the other party to the proceeding is absent, there is absolutely no scope for the Court to make efforts to reconcile the differences between the parties. After all, if the case is posted for filing of the objections to the main Petition and if on that particular day the respondent and her Counsel were absent and the case is posted to the next date nothing prevents the Court from again issuing a notice to the party to appear in person before the Presiding Officer to enable the Officer to persuade the parties to reconcile the differences. Therefore, we are not prepared to accept the contention urged that in cases where the opposite party remains ex parte there is no scope to the Court to reconcile the differences between them. After all, if on a particular day when the case is posted for filing the objections the party is absent, it may be attributable to so many reasons, as, for example, the inconvenience of the learned Advocate pleaded in the present case. It may be a case where the party may not be in a position to come to the Court for lack of finances. If the opposite party is residing at a place different from the one where the Court is located she may not have sufficient resources to come to the Court personally and in such a case the Court may have to direct the opposite party to deposit reasonable expenses of the opposite party to enable her to appear before the Court. The instances may be varied and the instances mentioned above are just illustrative and not exhaustive. The way in which the case has been disposed of hurriedly within eleven days from the date on which the case had been posted for filing objections without making any endeavour to find out whether the parties could reconcile their differences indicates that the lower Court has abdicated the solemn duty cast on it both under Section 9(1) of the Family Courts Act and Section 23(2) of the Hindu Marriage Act.

9. It may also be noticed that the relief sought for its divorce and before putting an end to the marital tie especially in a case where the only averment made is, that the petitioner had been treated with cruelty and when no other serious allegations have been made regarding the character of the opposite party, the Court should be very circumspect and should try to find out whether the differences between the parties which are not very serious could be resolved and the responsibility of the Court to reconcile the differences between the parties in a case where the party has sought for divorce would be greater than in a case, say for example a case of restitution of conjugal rights or grant of maintenance under Section 125 Cr.P.C. In this case we are entirely in agreement with the contention advanced on behalf of the wife that the impugned order is liable to be set aside solely on the ground that the solemn duty cast on the lower Court under the Sections referred to already has not been discharged by it.

10. The next and more important Point for Consideration is, whether by virtue of the fact that the petitioner is stated to have married for the second time the order of the lower Court is not liable to be set aside though there are justifying grounds for setting aside the same. For purpose of consideration of this contention we would assume for a moment that the subsequent event has transpired as sought to be made out by the husband and find out whether therefore there is any impediment to set aside the order of the lower Court.

11. For appreciating the contention advanced in this behalf, a few dates may be noted. The order of the Family Court was pronounced on 21.4.1990, the alleged second marriage of the husband is on

26.5.1990. The Civil Courts including the High Court had been closed for summer vacation from 23rd April, 1990 to Sunday 27th May 1990, both days inclusive. The Courts reopened on 28th May, 1990. Section 19(3) of the Family Courts Act prescribes the period of thirty days for preferring the appeal from the date of judgment. As thirty days from the date of order in the present case expired during summer vacation, the Appeal could have been preferred before this Court on 28th May, 1990 could not be disputed by the learned Advocate for the husband. Section 15 of the Hindu Marriage Act, on which great stress was laid by the learned Advocate for husband to show that his client had exercised his right for remarriage as provided by law and that the second marriage cannot be put in jeopardy by the order of this Court, reads as hereunder:

"15. Divorced person 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".

It was urged that by the time of the second marriage of the petitioner the respondent had not even applied for grant of certified copy of the order and therefore though she could have lawfully presented an appeal on the reopening date of the Courts viz., 28th May, 1990 the period prescribed for preferring the appeal had expired by the time of remarriage of his client and therefore it was lawful on the part of his client to have married again as prescribed by this Section. When the Section refers to an appeal having been preferred and it having been dismissed, though the mention therein is the time for appealing having expired, the Court must necessarily interpret the Section in such a way to find out whether on 26.5.1990 the right of preferring the appeal had come to an end on account of the lapse of time. Having regard to the circumstances noticed above and when undisputedly the Appeal could have been filed on the reopening day viz., 28th May, 1990, it cannot be said that the time for appealing against the impugned order had expired without an appeal having been presented and therefore the alleged remarriage on 26.5.1990 cannot be said to be one which was permissible or lawful for either party within the meaning of Section 15 of the Hindu Marriage Act.

12. The present Appeal has no doubt been presented not on the reopening date but after expiry of the time prescribed for preferring the Appeal and the delay has been condoned by this Court. Though the Appeal in the present case has been preferred after the prescribed period, we are concerned with the aspect whether it was lawful for the husband to have gone in for remarriage on 26.5.1990. When our finding is that on that day it was not lawful for him to go in for second marriage, the mere fact that the Appeal in the present case has been preferred after the prescribed period cannot in any way enure to the benefit of the husband to make the appeal infructuous on the ground of his second marriage. If the second marriage was subsequent to 28th May, 1990 then the matters would have taken altogether different dimensions, but when that is not so and when it was not lawful for the husband to have gone in for the second marriage within the meaning of Section 15 of the Hindu Marriage Act and when the delay in preferring the appeal has been condoned by this Court, it cannot be said that the appeal should be dismissed as infructuous solely on the ground that

if the impugned order is set aside it would affect the second marriage of the husband as also the rights of the second wife.

13. The learned Advocate for the husband cited a number of Decisions wherein under different circumstances the second marriage by the husband who had been granted divorce having been hold as not invalid, fn none of those Cases the second marriage had been performed violating the letter and spirit of Section 15 of the Hindu Marriage Act.

14. In Lata v. Vilas, 1987 (2) Divorce & Matrimonial cases 479 relied upon by Sri Sadashivappa learned Counsel for the husband, arising under Section 12 of the Hindu Marriage Act, pertaining to annulment of marriage, it was held that the second marriage of the husband after the decree of annulment in the absence of a stay order or prohibitory order was a valid marriage so long as the provisions of Section 5 had not been violated. It has been pointed out in the course of this Decision that Section 15 had been specifically made applicable in cases of decree for divorce and no provision similar to Section 15 was to be found in the Act, which could be made applicable to a decree of nullity annulling the marriage and therefore, it is clear that this Decision cannot assist the husband in the present case. We are not concerned with a decree of annulment of the marriage but a decree of divorce granted under Section 13 to which undisputedly Section 15 is applicable. The Decision of the Rajasthan High Court in HARJEET SINGH v. MST. GUDDI, 1981 (2) Divorce & Matrimonial Cases 97 has also no application to the present case, because that relates to a case where the second marriage had taken place 3-1/2 months after the grant of decree of divorce and there was no question of violation of Section 15 in that case. In the Decision of Madhya Pradesh High Court reported in SHAKUNTALA @ SHAKUN v. GOVIND PRASAD, 1985 (1) Divorce & Matrimonial Cases 472 it has no doubt been held that the appeal preferred after expiry of period of limitation had become infructuous on account of the second marriage contracted by the husband though the delay in preferring the appeal had been condoned. In that case, the decree for divorce had been granted on 19.11.1981 and the husband had remarried and taken a second wife on 2.3.1982 after the period of appeal had expired. That is not the case here and here there is clear violation of Section 15 of the Act. Therefore this Decision has also no application to the present case. The learned Advocate for the husband also invited our attention to the unreported decision of a Division Bench of this High Court in Miscellaneous First Appeal No. 2253/1985. That was a case where the application for condonation of delay was dismissed. In that case also the decree for divorce was passed on 24.10.1983 and the remarriage was on 29.2.1985 and the application for condonation of delay in preferring the Appeal came to be dismissed on 31.7.1985. Therefore that Decision has also no application to the facts of the present case.

15. After giving our anxious consideration to all the contentions urged on behalf of the husband by his learned Advocate Sri Sadashivappa, we are satisfied that there is no merit in the contention advanced on his behalf that Appeal should be dismissed as infructuous on the ground of the alleged second marriage of the husband. Therefore, Point No. 2 is answered against the husband.

In the result, the order and decree of divorce are set aside and the matter is remitted back to the Family Court with a direction to afford an opportunity to the wife to file objections and then to dispose of the case according to law in the light of the observations made herein. The Appeal is

allowed only to the extent indicated above.