

Sardar Kumar Vs. Indirabai

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Court : Madhya Pradesh

Decided On : May-04-1995

Reported in : II(1995)DMC639

Judge : R.S. Garg, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13 - Order 43, Rule 1;
[Hindu Marriage Act, 1955](#) - Sections 13(1), 15 and 28

Appeal No. : Misc. Appeal No. 226 of 1989

Appellant : Sardar Kumar

Respondent : indirabai

Advocate for Def. : None

Advocate for Pet/Ap. : Umesh Trivedi, Adv.

Disposition : Appeal allowed

Judgement :

R.S. Garg, J.

1. The appellant-husband, whose application for setting aside the ex parte decree dated 11.8.1987, passed in Civil Suit No. 25-A of 1987, has been rejected by order dated 22.4.1989 in Misc. Civil Case No. 10 of 1987, passed by the District Judge,

Seoni, has preferred this appeal under the provisions of Order 43, Rule 1(d) of the Code of Civil Procedure.

2. The brief facts leading to the present appeal are that the parties, who are Hindus, were husband and wife. Their marriage was solemnised on 18.11.1984. On 7.7.1987 the respondent-wife filed an application before the District Judge, Seoni, seeking a divorce under Section 13 of the Hindu Marriage Act, on the ground of cruelty. The learned Trial Court in Suit No. 25-A of 1987, holding that the summons was properly served, proceeded ex parte in the matter and finally passed an ex parte decree on 11.8.1987.

3. The appellant-husband, as he alleges, having come to know about the ex parte decree, filed an application for setting aside the said ex parte decree on 12.12.1987, on the ground that the summon was not properly served. After service of the present petition filed under Order 9, Rule 13, C.P.C., the wife made appearance and opposed the application on the ground that the application has become infructuous as she had already contracted marriage with one Munnalal on 24.10.1987. She also submitted that if the said ex parte decree is set aside, then it could create a chaotic situation.

4. The Trial Court, after hearing the parties, came to the conclusion the application for setting aside the ex parte decree has become infructuous because of the second marriage which, under the circumstances was legal and valid. The appellant-husband has preferred this appeal under the provisions of Order 43, Rule 1(d) C.P.C. It was admitted for hearing parties and notice were issued to the respondent-wife. None appeared on her behalf to oppose the appeal.

5. Learned Counsel for the appellant contended that the learned Court below in its hot haste has not appreciated the true import and impact of Sections 15, 23(4) and 28 of the [Hindu Marriage Act, 1955](#). It was contended that the ex parte decree can always be set aside, if the person applying for setting aside the ex parte decree satisfied the Court that there was sufficient cause for his non-appearance on the date when the suit was called on for hearing. It was also submitted that the satisfaction of the Court below is of prime consideration and the moment the Court is satisfied that the summons was not duly served or that the applicant was

prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as too costs, etc.

6. In the instant case, the wife raised a plea that the ex parte decree was passed on 11.8.1987 and the second marriage was contracted by her on 24.10.1987 and she begot a daughter from the second marriage on 13.12.1988. According to her, if the ex parte decree is set aside, it would create a chaotic condition. The learned Trial Court, after hearing the parties, considering the effect of Section 15 of the Hindu Marriage Act, held that the non-applicant wife has remarried after the prescribed waiting period of remarriage of the divorcee, therefore, she was entitled to remarry soon after the impediments of Section 15 of the Hindu Marriage Act became inapplicable to her. The learned Trial Court was also of the view that the effect of setting the decree may result in the dismissal of the original petition of the non-applicant on the admitted ground that she has married a second husband and, therefore, she would be deemed to be living in adultery because the second marriage then would be void and her daughter may be deemed to be illegitimate. The learned Trial Court was carried away by the thought that the legal marriage subsisting would stand dissolved, though not due to her fault or the fault of her husband. The Trial Court thought that under the circumstances, it was proper to accept the preliminary objection.

7. The tenor and texture of the order of the learned Trial Court shows that it is more on the emotions than appreciation of law. The warp and woof by which the order is woven shows that the learned Trial Judge was not impressed by the legal arguments but wanted to wriggle out of the legal position some how or the other. It is expected of a Court of law that it has to dispense justice in accordance with law. IT would have been a different question that after setting aside the ex parte decree, the parties could or could not settle the matter, but, in my opinion, the approach of the Trial Court is patently illegal. Section 15 of the Hindu Marriage Act reads as under :

'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.'

It merely says that it shall be lawful for either party to the marriage to marry again, if the time prescribed for appealing has expired without an appeal having been presented or an appeal, though presented, stands dismissed. It nowhere says that if the party who suffered the decree does not inform the other party and the other party remarries, then the appeal itself would become infructuous. Section 15 would not control the provisions of Section 28 of the Hindu Marriage Act, which reads as under:

28. (1) All decrees made by the Court in any proceeding under this Act shall, subject to the provisions of Sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

(2) Orders made by the Court in any proceeding under this Act under Section 25 or Section 26 shall, subject to the provisions of Sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.'

8. The appeal is a right which is created by the statute. The appeal would become infructuous only if the law stands amended, that too with retrospective effect. Now, if instead of filing an appeal under Section 28, the husband/defendant was of the opinion that the said decree can be set aside by the same Court for the reasons stated in his application, then no fault can be found with him. It is to be seen that the ex parte decree can be set aside either by the same Court exercising powers

under Order 9, Rule 13, C.P.C., or by the Appellate Court where the issue would be at large. In either case, the decree would not remain final. If the Appellate Court sets aside the decree, then the parties are relegated to their original position. The party, marrying during the pendency of the appeal, taking advantage of Section 15, cannot contend before the Appellate Court that as the party had remarried, the appeal had become infructuous. The decree of the Trial Court is subject to confirmation, modification or reversion of the Appellate Court's jurisdiction. Similar would be the situation in a case where the application under Order 9, Rule 13 C.P.C. is filed. If the Court passing the decree is of the opinion that the applicant was not duly served with the summons or was prevented by any sufficient cause from appearing, when the suit was called on for hearing, in either case, the Court passing the decree has to set aside the ex parte decree.

9. In *Chandra Mohini v. Avinash Prasad*, A.I.R. 1967 S.C. 581, it was held that though Section 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 to appeal has been filed in the Supreme Court. The Supreme Court observed as under;

' It is true that Section 15 does in terms apply to a case of an application for special leave to this Court. Even so, we are of opinion that party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court decree take away from the losing party the chance of presenting an application for a 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 the matter, we still think that it was for the first respondent to make sure whether an application for a 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 the Court to revoke the special leave on this ground.'

I do not think that would be wrong in applying the principles laid down by Their Lordships in the matter of Chand Mohini (supra). Section 28 talks of an appeal. The Supreme Court held that the provisions of Section 15 do not apply to a case of special leave. According to the Supreme Court the principle underlying Section 15 would be applicable to a case where the special case is sought by a party. In the present case, the application under Order 9, Rule 13 had been filed. If the said application is allowed, the result would be the same, which an unsuccessful party could have achieved by filing an appeal. If the appeal is allowed or the application filed under Order 9, Rule 13, C.P.C. is allowed, the result in either case would be the same and the decree passed by the Trial Court would be set aside and would become non est.

10. The learned Trial Court has not appreciated that the decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. There was nothing in Section 15 of the Act to make marriage a nullity. The reason for this was on incapacity for second marriage for a certain period does not have the effect of treating the former marriage as subsisting. It is clear that the second marriage on the date when it was performed was absolutely legal and valid. The result of setting aside the ex parte decree may lead to an anomalous situation if the first marriage is subsisting and the second marriage on the date of performance was not illegal or nullity. Unfortunately nothing can be done.

11. The Supreme Court, in the matter of Tejinder Kaur v. Gurmit Singh, A.I.R. 1988 S.C. 839 = 1 (1988) DMC 355 (SC), considering the provisions of Section 15 of the [Hindu Marriage Act, 1955](#), has held that a successful party in the High Court must wait for a reasonable time and make sure whether an application for special leave has been filed in the Supreme Court. The Supreme Court further held that where a decree for dissolution is passed and an appeal against it is dismissed by the High Court and the husband remarries after one month of the High Court's order, he cannot be allowed to raise a plea that since he has remarried, special

petition filed by the wife becomes infructuous. It was incumbent on him to have apprised himself as to whether the appeal in the High Court is still pending and, if not, whether the period for filing special leave petition to the Supreme Court has expired.

12. The Supreme Court, while overruling the preliminary objection, held that despite the second marriage, taking advantage of Section 15 of the Hindu Marriage Act, the special leave petition before the Supreme Court did not become infructuous and was worth consideration.

13. As observed above, if the principles underlying Section 15 are to be extended to an application for special leave petition to the Supreme Court, then certainly the principles underlying Section 15 would be applicable to an application filed under Order 9, Rule 13, C.P.C. Merely remarrying after the period prescribed under Section 15, the second spouse would not be permitted to say that the application filed under Order 9, Rule 13, C.P.C. had become infructuous. In fact, it would be adding premium to the act of the person who secured the ex parte decree. It would otherwise be against the public policy that a person who secures the benefit under an ex parte decree is permitted to continue with the benefit of the ex parte decree if the Court is of the opinion that under the circumstances the ex parte decree can be set aside.

14. Learned Trial Court, in my opinion, was absolutely wrong in holding that because the wife had remarried and has given birth to a child from the second marriage, the application filed under Order 9, Rule 13, had become infructuous. The appeal deserves to be allowed.

15. The appeal is allowed and the case is remanded back to the Trial Court with a direction that it would register the application filed under Order 9, Rule 13, C.P.C. for setting aside the ex parte decree at its original number and after hearing the parties it should decide the matter in accordance with law. However, there shall be no order as to costs.