

Doly Ghosh Vs. Kumud Chandra Ghosh

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Court : Kolkata

Decided On : Mar-24-2004

Reported in : (2004)3CALLT138(HC),2004(2)CHN585

Judge : Dilip Kumar Seth and ;Rajendra Nath Sinha, JJ.

Acts : [Bengal, Agra and Assam Civil Courts Act, 1887](#) - Section 18; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Sections 15, 21 and 24 - Order 7, Rules 7 and 10; ;[Hindu Marriage Act, 1955](#) - Section 12; ;[Limitation Act, 1963](#) - Section 14; ;Court fees Act

Appeal No. : F.A. No. 74 of 2003

Appellant : Doly Ghosh

Respondent : Kumud Chandra Ghosh

Advocate for Def. : Jahar Lal De and ;Supriyo Chattopadhyay, Advs.

Advocate for Pet/Ap. : S.P. Roychowdhury, ;Prabir Mishra, ;Mahua Chatterjee, ;Afjal Hossain and ;Amitabha Ray, Advs.

Disposition : Appeal allowed

Judgement :

Dilip Kumar Seth, J.

1. A suit was filed in the Court of the learned Munsif in November, 1995 being O. C. Suit No. 169 of 1995 for the following reliefs :

(a) Decree for cancelling the marriage held on 16.2.92 and setting aside the Hindu Marriage Registration certificate issued on 25.5.92.

(b) Declaration that no marriage was held between the plaintiff and the defendant on 26.2.92 according to the Hindu Shastras or in any other way and the defendant is not husband of the plaintiff.

(c) Permanent injunction restraining the defendant from forcibly taking the plaintiff to the house of the defendant as his wife and/or entering the house of the plaintiff as the plaintiffs husband and/or creating obstruction in nursing works or any other works of the plaintiff.

(d) Decree for entire costs of the suit along with interest for the same'.

1.1. Subsequently this suit was sought to be withdrawn which was allowed by the learned Munsif by an order dated 10th of July, 1998 with liberty to sue afresh in the appropriate Court after recording that the plaintiff wanted to file the suit in the appropriate Court under the provisions of the [Hindu Marriage Act, 1955](#). Thereafter, a suit was filed under Section 12 of the Hindu Marriage Act in the Court of the learned District Judge, Dakshin Dinajpur, Balurghat which was registered as Matrimonial Suit No. 44 of 1998. Against the dismissal of this suit, the present appeal has been filed. The learned District Judge had found that there was no marriage between the parties, therefore, in his judgment and decree dated 19th of September, 2001, he had passed the following order :

'In view of my foregoing observations, the petitioner should have to pray for negative declaration before a competent Court of lowest jurisdiction and Section 12 has no application as she categorically denied solemnisation of any marriage in any form between her and O.P. Accordingly, she is not entitled to any relief in this case. These two issues are, accordingly, answered against her'.

1.2. In the plaint the petitioner had pleaded that there was no marriage and in consequence no consummation in between the petitioner and the opposite party

was performed and that the alleged registration of the marriage under the Hindu Marriage Act was void and a nullity. The learned District Judge, on evidence and the materials on record placed before him, had come to the conclusion so far as issue No. 1 relating to the maintainability of the suit that the suit was not maintainable in view of the fact that there was no marriage and as such, Section 12 had no manner of application. On merit it had found that the opposite party took no attempt to establish that any such marriage was solemnized in between the parties. He had not examined either the barber or the priest or any important person attending the marriage. He had also not taken any step to prove the registration certificate by calling for the original from the Sub-registry office to show that the petitioner had signed the document. Since there was no marriage, there could not be any question of using force or fraud for solemnizing the marriage. Having regard to the facts and circumstances of the case, there was no scope for applying under Section 12 of the [Hindu Marriage Act, 1955](#). Since marriage was not proved, the registration of the marriage could not be accepted as valid and thus there was no question of marriage being consumed. Thus though he had found the issues on merit in favour of the petitioner but the learned Judge refused to grant relief on the ground that the petitioner was entitled to pray for negative declaration before a competent Court of lowest grade of jurisdiction and that the petitioner was not entitled to the relief claimed in the suit. No cross-objection has since been taken against this judgment by the husband/opposite party/respondent.

Submission on behalf of the appellant:

2. Mr. Roychowdhury, appearing on behalf of the appellant, contends that it is the learned District Judge who is the competent Court to entertain all kinds of civil suits, including the kind of suit for negative declaration that there was no marriage. He may not be the lowest grade of Court of competent jurisdiction but that does not mean that the learned District Judge was not competent to entertain the suit. It was open to the learned District Judge to return the plaint for being presented to the appropriate Court or to retain the same and grant relief. He relies on Sections 9, 13 and 18 of the [Bengal, Agra and Assam Civil Courts Act, 1887](#). Relying on Section 18 he contends that it is the learned District Judges who are competent to take cognizance of all suits triable by the Civil Courts, subject to Section 15 of the

Code of Civil Procedure (CPC). Section 15 CPC prescribes institution of every suit in the Court of lowest grade competent to try it. Section 15 is a procedural provision. It does not curtail the jurisdiction of the Court of higher grade of competent jurisdiction. It is only for the sake of convenience and in order to relieve or ease the pressure of suit on the higher grade of Courts and to leave such higher grade of Courts to deal with appeal and other matters. He also relies on Order 7 Rule 7 CPC and contends that even in such a case the Court is competent to mould the prayer and grant relief. He also relies on some decisions to support his contention to which we will be referring to at appropriate stage.

Submission on behalf of the respondent:

3. Mr. Dey, the learned Counsel for the respondent, on the other hand, contends that the petitioner herself had filed the suit for declaration that there was no marriage in the lowest grade of competent Court, namely, the Munsif. But after some evidence was gone into, she withdrew the suit with liberty to file the suit under the provision of the [Hindu Marriage Act, 1955](#). Accordingly, the learned Munsif had permitted withdrawal of the suit with liberty to file a suit before the appropriate Court under the Hindu Marriage Act. Therefore, she could not claim any relief before the learned District Judge where she herself consciously had filed the suit for declaration under Section 12 of the 1955 Act. He also points out that it was the question of jurisdiction, which the petitioner herself had opted to file before one such Court at the lowest grade. Therefore, after having opted to bring the suit at the Court of the lowest grade, she was not entitled to withdraw the suit and file it before the Court of higher grade and claim relief. She was estopped from seeking any relief other than those available under Section 12 of 1955 Act, since that was the ground for which the suit was allowed to be withdrawn from the Court of the learned Munsif for presenting before the learned District Judge, If she failed on that count, in that event, she could not seek for alternative relief. According to him, these two reliefs, being inconsistent and conflicting, the same could not be permitted to be adopted in the plaint. According to him, therefore, the learned District Judge was right in refusing the relief. The petitioner could continue the suit before the Court of competent jurisdiction from the stage from where it was withdrawn or otherwise or could proceed on the basis of the materials available on

record and could have asked for transfer of the suit invoking Section 24 of the CPC to the appropriate Court. It was equally open to the learned District Judge either to transfer under Section 24 of the CPC or to return the plaint under Order 7 Rule 10 of the CPC. He next contends that if the District Judge is permitted to decide the same, then one forum of appeal would become unavailable.

Points at issue:

4. The question involved in this appeal are as to (i) whether the learned District Judge could be treated to be a Court of competent jurisdiction though not the lowest grade of Court of competent jurisdiction and (ii) whether the learned District Judge could grant relief on the strength of the pleadings made in the plaint overlooking the question of limitation, as contended by Mr. Dey in the facts and circumstances of this case.

Whether District Judge could entertain the suit:

5. Section 18 of the [Bengal, Agra and Assam Civil Courts Act, 1887](#) (1887 Act) prescribes that the jurisdiction of the District Judge extends to all the original suits cognizable by a Civil Court subject to the provisions of Section 15 CPC. Therefore, it could not be denied that the learned District Judge is a competent Court to deal with this matter though it may be two grades higher than the lowest grade competent to decide this question. Admittedly, it is a fact that when it was conclusively found by the Court below that there was no marriage, it excludes the application of Section 12 of the 1955 Act. Section 15 requires filing of a suit in the lowest grade of competent jurisdiction. It is an inbuilt provision, which is not a jurisdictional one. It only selects one of the competent Court, the lowest grade of the Court competent to entertain the suit. Therefore, the question is of convenience and procedure not a question of jurisdiction. Therefore, there is no jurisdictional bar. The District Court can entertain an original suit even though it might not be the lowest grade of Court of competence. There is no denying the fact that under Section 18 of the 1887 Act the District Judge is the competent Court to entertain all suits of civil nature, admittedly the highest grade of Court to entertain such suit within the district. Section 24 of the CPC permits the learned District Judge to transfer any suit from the file of any Court subordinate to it and

direct the same to be heard by any other Court of competent jurisdiction or could transfer to its own file. Section 21 CPC also does not postulate that despite objection raised and wrongly decided, a decree would be void if the question of jurisdiction is not taken before settlement of the issue. This indicates that Section 15 CPC does not have the effect of rendering a decree passed by a Court of competent jurisdiction though of a grade one or two higher than the lowest grade a nullity or void. Therefore, the learned District Judge was competent to entertain the suit.

5.1. As rightly pointed out by Mr. Dey, his client might have lost one forum of appeal if such a suit is entertained by the learned District Judge but that will not be a ground for overlooking the competence of the learned District Judge in the matter of competence for trying the suit though it might be inconsistent or against such procedure but that would be a case of irregularity but not of lack of jurisdiction. But still then, he is not deprived of his right to appeal. One the other hand, he could have had an opportunity to prefer an appeal before this Court both on law and fact, therefore, there is no scope of applying the principle of prejudice in such a case. Though we are of the view that the Court ought to have exercised its discretion on the basis of the plaint case made out to adopt the procedure provided under Order 7 Rule 10 of CPC but even then it was a question of advice by a lawyer with regard to the proceedings and the implications of law which an ordinary litigant may not be able to understand and who had undertaken this long journey since 1995, and thus only on the ground of technicality we cannot deny the relief which is otherwise available to her.

5.2. We may support our decision by the judgment cited by Mr. Roychowdhury in the case of Mohini Mohan Das v. Kunja Behari Das, 47 CWN 720 in which it was held that when a suit that ought to have been instituted in the Court of a lower grade was instituted in the Court of higher grade, the Court of higher grade had a discretion either to return the plaint or retain it for hearing. While laying down this principle, this Court had relied on the decision in Nidhi Lal v. Mazhar Husain, ILR 7 Allahabad 230 (1884) followed in Matra Mandal v. Hari Mullick, ILR 17 Calcutta 155 (1889). In Nidhi Lal (supra), it was held that Section 15 was inserted for the purpose of protecting the Courts. The suitor was obliged to bring the suit in the

lowest grade competent to try it. The object of the legislature was that the Court of the higher grade should not be overcrowded with suit. The proviso was for the benefit of the Court of higher grade and it was not bound to take advantage of it. If it did not wish to try the suit, it might refuse to entertain it. If it wished to retain the suit in its Court, it might do so, it was not bound to refuse to entertain it.

5.3. Mr. Roychowdhury also relied on the decision in *Bishambhar Dayal v. Girdhar Lal Odhavji*, : AIR1953 All158 . There it was held that Section 15 CPC contained merely a procedural provision and its object was not to oust the jurisdiction of the Court of higher grade to try and decide a suit of smaller valuation. Consequently, the Civil Judge of a higher grade had jurisdiction to try the claim for recovery of amount, which could have been recovered by a suit before the Court of Munsif. This decision was rendered by a learned Single Judge following the decision in the *Nidhi Lal* (supra) and *Matra Mandal* (supra). In *Bhuwaneshwari Kuer v. Raghubansh Mani Prasad Narayan Singh*, AIR 1954 Patna 34, the Division Bench had held that Section 15 Order 7 Rule 10 CPC were not imperative in their character and the Court of higher grade had discretion either to return the plaint or not to return the plaint for being presented to the Court of the lower grade. The Court of higher grade cannot be said to have committed any illegality in the exercise of its jurisdiction. It had also followed the decision of the Allahabad and the Calcutta High Court in *Mohini Mohan Das v. Kunja Behari Das* : AIR1943 Cal450 along with the decision in *Nidhi Lal* (supra).

5.4. Mr. Dey relies on the decision in *Krishna Pal v. Asoke Kumar Pal*, 1982(2) CLJ 366. In this case the marriage was sought to be declared void on the ground that there was no marriage before the learned Munsif. The question arose whether such question relating to the validity of the marriage could be filed before the Court of the learned Munsif instead of the learned District Judge having jurisdiction relating to matrimonial matters. This Court had held that such suit could be maintained before the learned Munsif. Relying on this decision, Mr. Dey wants to contend that this suit was to be decided by the learned Munsif and the learned Munsif alone. The learned District Judge could not have entertained this suit. For the reasons foregoing, we again stretch our reasoning to such an extent that by reason of this decision, the competence of the learned District Judge could neither

be taken away nor overlooked. He also relied on the decision in Sasanka Sekhar Basu v. Dipika Roy, CLT 1993(1) HC 226. This decision had followed the earlier decision of this Court in Krishna Pal (supra), and it had held that the suit for declaration that there was no marriage could be maintained before the learned Munsif. In our view such question had already been dealt with in Krishna Pal's case. Next he relied on the case of Bismillah v. Janeshwar Prasad, 1990(1) SCC 207. In the said decision it was held that the exclusion of the jurisdiction of the Civil Court was not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. The provisions of law, which seek to oust the jurisdiction of Civil Court, need to be strictly construed. In view of our discussions made above, we are unable to see reason in the submission of Mr. Dey. It is already settled law that Section 15 CPC does not exclude the jurisdiction of the Courts of higher grade, it is only a procedural provision created to protect the Courts of higher grade from being overcrowded by suits.

Whether the District Judge could grant the relief:

6. Order 7 Rule 7 CPC empowers the Court to mould the prayer in order to grant the relief if occasion so arises. Admittedly, in the present case both the parties have understood each other's case and have led evidence as well as issues were also framed. Therefore, there is no scope of applying the principle of prejudice as against the opposite party. He has also not prayed for any decision on the question of jurisdiction at the very early stage. Be that as it may, it would not be a case for refusing relief only on this technical ground.

6.1. In the case of Ganesh Shet v. Dr. C.S.G.K. Setty, : [1998]3SCR479 , it was held that when the parties had understood each other's case and had participated in the proceedings no prejudice could be said to have been suffered by either of the parties even if the prayers or the relief claimed might be obscure or where different kind of relief was claimed, when a relief was inconsistent with the pleading was granted. In this case, however, the pleading was not inconsistent but the relief claimed was inconsistent. Therefore, under Order 7 Rule 7 CPC the relief could be moulded on the basis of the pleadings made out in the plaint. In this case the relief was with regard to declaration that there was no existence of the

marriage and that the marriage certificate was void. There was no ambiguity either in the plaint, though relief claimed might have been little obscure. In *Bhagawati Prasad v. Chandramaul*, : [1966]2SCR286 , the Apex Court had held that it was the substance which was to be considered as was held in *Trajan & Co. Ltd. v. Nagappa Chettiar*, : [1953]4SCR789 and *Sheodhari Rai v. Suraj Prasad Singh*, : AIR 1954 SC758 . If the plea was not specifically pleaded and yet it was covered by an issue by implication and the parties knew that the said plea was involved in the trial then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it was satisfactorily proved by evidence. There might be an exception to the general rule that no relief could be founded, which was not made out in the pleadings. But in this case, the pleadings had been made out but the relief was somewhat obscure. In any event, in the said decision it was further held that the pleadings would be purely formal and technical and it could not deny the relief simply because of technicality when evidence was led and case was also made out and each of the parties had understood the same.

6.2. Thus, the learned District Judge was very much competent to and could grant the relief.

Limitation:

7. The question of limitation would not be very material in this case when the marriage is not in existence. That apart, the cause of action in the earlier suit alleged to have been arisen in 1995 when there was a threat for marrying the opposite party, the suit was purported to have been filed and after withdrawing the same it was again presented before the learned District Judge. Since Section 12 of the 1955 Act does not apply, therefore, the period of one year may not be material but the residuary period of limitation, as contended by Mr. Dey, being the period of three years, we do not think, could be applied if it was a suit for declaration that there was no marriage or if there was no marriage at all when the cause of action alleged to have arisen on the threat to marry in 1995. The petitioner would also be entitled to the benefit of Section 14 of the Limitation Act. When there was no existence of marriage and on fact it was so found then the

question of limitation would not be of any importance in this present suit, when the cause of action is alleged to have arisen in 1995.

Valuation and Court-fees:

8. The last question that was raised by Mr. Dey was that the suit has not been valued, as it ought to have been valued, as suit for declaration and Court-fee thereon ought to have been paid. Without the proper Court fee and without the suit being properly valued, no relief could be had since the suit was liable to be dismissed on the ground of non-payment of Court-fee. True, it was the responsibility of the Court to find out as to whether proper Court-fee has been paid or not. But the Court-fees Act permits the Court to exercise its discretion to allow the parties in deficit to pay in the Court-fees within certain time. The relief that was claimed was taken in the first suit but in the second suit since it was filed under the Hindu Marriage Act, it was not attempted to be valued otherwise. Therefore, it seems that Mr. Dey has rightly pointed out the infirmity in the procedure. In the circumstances, we are inclined to grant time till four weeks to put in the valuation by amending the plaint adequately as well as the memo of appeal and putting the respective Court-fees accordingly and only upon which the order hereby passed would become effective.

On merit: Findings :

9. On merit, Mr. Dey contends that the finding arrived at by the learned District Judge could not be sustained on the basis of the materials on record. Having gone through the materials, we do not find any infirmity in the finding by the learned District Judge. We are fully in agreement with the same upon scrutiny of the materials and no different view can at all be taken on the basis thereof.

CONCLUSION

10. Having regard to the facts and circumstances of the case, we are of the view and hold that the learned District Judge was the competent Court to try the suit. A Court of higher grade can very well try a suit, unless in its discretion it returns the plaint. If it retains it and a decree is passed the same would not be a nullity. Since

the petitioner had undergone a long way of the proceeding and the respondent was not vigilant in insisting upon this point at the preliminary stage, the learned District Judge should have granted the relief for the ends of justice. However we would like to sound a note of caution while trying the particular suit the Court of higher grade should conform to Section 15 CPC and resort to Order 7 Rule 10 or Section 24 CPC.

ORDER

11. In the result, the appeal succeeds. The judgment and decree appealed against so far as it refused to grant relief is hereby set aside and the suit be and the same is decreed on the basis of the finding of the learned District Judge, which we hereby affirm.

11.1. Let there be a decree of declaration that there was no marriage between the parties and a further declaration that the alleged marriage certificate was void and a nullity and is of no consequence and effect.

11.2. On the oral prayer of the learned Counsel for the appellant, Mr. Roychowdhury, we allow the advocate-on-record for the appellant to put in the correct valuation in the memo of appeal and the plaint with liberty to file an amendment application within a period of four weeks to set the record straight, and also to put in the deficit Court-fees payable on the plaint as well as that payable on the memorandum of appeal within four weeks.

11.3. The suit is thus decreed and the appeal is thus allowed. This order will become effective only upon payment of the deficit Court-fees in terms of the liberty granted.

11.4. There will, however, be no order as to costs.

R.N. Sinha, J.

12. I agree.

