

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO No. 718/2003

% Judgment delivered on: August 16, 2010

Smt. Renu Saxena Petitioner
Through: Mr. Dinesh Kumar, Adv.
versus

Sunil Saxena Respondent
Through: Mr. Mohit Gupta and
Ms. Neha Jain, Adv.

**CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J.

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955, the appellant seeks to challenge the judgment and decree dated 10.9.2003, whereby, the court of learned Additional District Judge, Delhi dismissed the petition

filed by the appellant under Section 9 of the Hindu Marriage Act.

2. Brief facts of the case relevant for deciding the present appeal are that the appellant was married to the respondent according to Hindu rites and ceremonies on 29.7.1991 at Kalkaji temple, New Delhi which fact is denied by the respondent. Thereafter the respondent left for his native place at Kanpur and after return contacted the appellant but evaded living with her on one pretext or the other. Feeling cheated by the respondent, the appellant preferred to file a petition under section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights which vide order dated 10.9.2003 was dismissed by the learned ADJ. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Assailing the impugned order, counsel for the appellant submits that the learned trial court has failed to appreciate the fact that the appellant and the respondent had married on 29.7.1991 at Kalkaji Temple, New Delhi, according to Hindu rites and ceremonies. Counsel further

submits that the said fact of marriage was fully proved by the appellant not only through her own deposition but also through the testimony of PW-4 Mr. Babu Lal, an employee of the temple. Counsel for the appellant further contends that the learned trial court also fell in grave error by taking a view that since the respondent had already remarried therefore discretion under Section 9 should not be exercised in favour of the appellant. Counsel thus contends that simply because the respondent had remarried during the subsistence of his first marriage, the said fact by itself would not create any hurdle to deny relief to the appellant under Section 9 of the Hindu Marriage Act.

4. Counsel for the respondent while vehemently denying the factum of marriage between the appellant and the respondent supports the judgment passed by the court below.

5. I have heard learned counsel for the parties and gone through the records.

6. The petitioner had filed a petition under Section 9 of the Hindu Marriage Act against the respondent seeking restitution of conjugal rights. The case set up by the appellant

in her petition was that she got married with the respondent according to Hindu rites and ceremonies on 29.7.1991 at Kalkaji Temple, New Delhi and despite the persistent efforts made by the appellant the respondent husband did not allow the appellant to live with him. The principal contention raised by the counsel for the appellant while arguing the present appeal was that the learned trial court wrongly disbelieved the factum of the marriage of the appellant with the respondent. The trial court framed a specific issue with regard to the factum of marriage. The same is reproduced as under:

“1. Whether the marriage has been solemnized between the parties according to Hindu rites and ceremonies? (OPP).

7. In support of her evidence, the appellant had examined herself as PW-1 besides examining three other witnesses. In support of her marriage the appellant had also filed marriage certificate obtained from one Pandit Pitambar Dass which was proved on record as Ex.PW4/1. The said certificate is admittedly not on any letter head of the Kalkaji temple, New Delhi and the same has not been executed or

signed by any authority of the temple. Some person with the name of Pitambar Dass is a signatory of the said marriage certificate but the said Pitambar Dass was not produced in the witness box by the appellant. No explanation has come forth from the appellant as to why and in what circumstances the evidence of the said material witness was withheld. The explanation given by the counsel for the appellant is quite amusing as he stated that it is possible that Pitambar Dass must have died at the stage of evidence. The explanation given by the counsel for withholding the evidence of such a material witness is far from convincing. Instead of producing the said Pitambar Dass, one Mr. Babu Lal was examined as PW-4, but no credence can be attached to his testimony as he even failed to produce any document or proof to show his employment with the said Temple. He also failed to produce any document on record to show that for how long he had worked in the said temple and how he was well versed with the handwriting and signatures of Pitambar Dass. The evidence of PW-4 is thus most unreliable and untrustworthy.

8. It is the case of the appellant herself that she had never stayed with the respondent after her alleged marriage and no explanation has come forth from the side of the appellant as to why she had waited for a period of seven long years to file the petition under Section 9 of the Hindu Marriage Act. It is hard to believe that the marriage which took place on 29.7.1991 has not seen the light of the day in its true sense as since then the parties did not stay together to discharge their marital obligations and it is surprising as to why the appellant would keep making efforts for seven long years to persuade her husband to come and reside with her without taking any legal action.

9. The respondent has strongly denied the existence of his marriage with the appellant. He in fact has pleaded to have married some other lady named Nidhi since 4.12.1994 and the respondent is also facing criminal proceedings for bigamy under Section 494 IPC. It is also an admitted fact on record that the respondent had two children from the said wedlock.

10. In this background of facts and in the absence of any cogent and reliable evidence placed and proved on record by the appellant, no fault can be found with the findings of the learned trial court disbelieving the factum of the said marriage between the appellant and the respondent. Once having decided the Issue No. 1 against the appellant and in favour of the respondent, no order under Section 9 of the HMA could have been passed by the learned trial court.

11. There is no merit in the appeal and hence the same is hereby dismissed.

August 16,2010

KAILASH GAMBHIR, J.