

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

+ MAT APP.40/2009

Date of Decision: August 26, 2010
KAPIL MOHAN SHARMA Appellant

Through: Mr.Sudhir Nandrajog,
Senior Advocate with
Mr.Abhilash K.Mishra and
Mr.Jitin Sahni, Advocates
with Appellant in person.

versus
SHARDA

..... Respondent
Through: Mr.R.K. Verma and
Mr.H.Kumar, Advocates
with Respondent in person.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

J U D G M E N T

ARUNA SURESH, J.

MAT APP.40/2009

1. This is an appeal filed by appellant Kapil Mohan Sharma, challenging the judgment and decree of the learned Additional District Judge dated 11th February 2009, whereby his petition filed under Section 11 r/w Section 5 of the Hindu Marriage Act (hereinafter referred to as 'the Act') seeking annulment of

marriage between him and the respondent was dismissed.

2. In brief, case of the petitioner is that around August-September 2004, he came in contact with the respondent and they voluntarily stayed together in hotels and lodges in fake names. Thereafter they decided to get married and solemnized their marriage as per Hindu Rites and Ceremonies in Jhandewalan Temple at Paharganj on 31st December, 2004. After marriage, they had been temporarily living in hotels and lodges because petitioner was facing resistance from his family members for this marriage. He started looking for a separate residential accommodation and during that period, he became apprehensive and suspicious because, respondent insisted that he should continue to give fake names in the hotels and lodges even after their marriage. Petitioner wanted to get the marriage registered, to which respondent showed reluctance for no plausible reasons.

3. On 13th/14th January 2005, petitioner came to know that respondent was already married and the said marriage was subsisting, though, he was a bachelor before marrying her. Respondent refused to divulge information about her first marriage and on her insistence, he took her to his native village. His parents agreed to accept her provided their marriage was solemnized as per

their customs, to which respondent refused. On 21st January 2005, petitioner came back to Delhi and joined his duties. On 28th January 2005, he came to know that respondent had filed a complaint against him under Section 376 of the Indian Penal Code (for short 'IPC') and an FIR bearing No.58/2005 was registered against him at Police Station, Paharganj. Petitioner filed a writ petition under Section 482 Cr.P.C. seeking quashing of the said FIR and he also filed a petition under Section 11 of the Act on 3rd December, 2005 seeking annulment of marriage solemnized on 31st December, 2004. However, parties arrived at a compromise and in accordance with the compromise, respondent got the FIR quashed and he again solemnized marriage with her in Arya Samaj Vedic Marriage Mandal, Jamna Bazar on 11th March 2005, wherein the parties filed their affidavits. In the said affidavit, respondent had declared that she was a divorcee of Mr.Sunil Kumar, her previous husband. Respondent did not agree for registration of marriage performed on 11th March, 2005 and threatened the petitioner, his family members and his Advocate of false implication in various cases. She informed the petitioner that her marriage with Sunil Kumar was still subsisting and the statement given by her on affidavit in the Temple and before the Court was incorrect. Hence, this petition.

4. Respondent in her written statement denied all the allegations levelled against her by the petitioner and alleged that she was compelled to marry the petitioner under undue influence and pressure on 21st December, 2004 and he forcibly put '*Sindoor*' over her forehead and not only this, petitioner put *Mangalsutra* on her neck despite resistance and protest from her and in the garb of marriage, he raped her number of times. Therefore, she had got registered an FIR under Section 376 IPC against him. She has admitted that parties had compromised and they re-married on 11th March 2005, according to Hindu Rites and Customs at Jamuna Bazar and in view of the said marriage, FIR was quashed and also the first petition of the petitioner for annulment of marriage came to an end. She has averred that on 6th August, 2005 around 7.00/8.00 pm she was taken to the house of petitioner's maternal uncle Sh. Raj Mohan Sharma in Burari for preparing dinner for him, where many people raped her and she filed another complaint with police under Section 376 (g)/109 IPC, being FIR No.418/2005 in Police Station Timarpur, which is still pending trial. She has further averred that this petition is not maintainable as on the basis of compromise arrived at between the parties, previous criminal proceedings were quashed and they had also compromised their disputes and the earlier petition

accordingly came to an end. She has denied that her marriage with Sunil Kumar was subsisting and alleged that she was a divorcee when she married the petitioner. She further averred that petitioner cannot be allowed to file similar petition against her and has claimed that she is lawful wedded wife of the petitioner.

5. Replication was filed by the petitioner controverting the averments of the respondent as raised in the written statement.

6. On the pleadings of the parties, Trial Court framed the following issues:-

“1. Whether the previous marriage of the respondent was validly dissolved on the date of solemnization of her marriage with the petitioner? If so, to what effect? OPR

2. Relief.”

ISSUE NO. 1

7. Mr.Sudhir Nandrajog, senior counsel appearing on behalf of the petitioner has argued that it was for the respondent to prove that her marriage with her previous husband, Sunil Kumar was dissolved by way of a decree of divorce and that she had legally married the petitioner. However, she has failed to discharge the onus of proving the same and under the circumstances, petitioner is entitled to a decree for annulment of marriage, as prayed.

8. Submissions made by counsel for the petitioner are refuted by Mr.R.K.Verma counsel appearing for the respondent. He has submitted that marriage between the parties was solemnized according to Hindu Rites and respondent was a divorcee at the time of the said marriage, therefore, she is legally wedded wife of the petitioner. He further submitted that since petitioner had earlier filed a similar petition, which was dismissed in default, he is debarred from filing the present petition claiming same relief and therefore, his petition is not entertainable in law and deserves dismissal.

9. Admitted facts are that:-

“(i). Parties met each other somewhere in August-September 2004 and they continued to live together in various hotels and lodges of their own free will in fake names.

(ii) Against wishes of their parents, they married each other on 31st December, 2004 at Jhandewalan Temple in Paharganj.

(iii) The marriage was consummated and they co-habited at various places.

(iv) A petition under Section 11 of the Act was filed which was compromised and the said petition was dismissed in default.

(v) Respondent had got registered an FIR bearing No.58/2005, under Section 376 IPC, Police Station Paharganj against the petitioner. In view of the compromise, aforesaid FIR was got quashed by filing a writ petition under

Section 482 Cr.P.C.

(vi) Parties again solemnized their marriage in Arya Samaj Vedic Marriage Mandal, Jamna Bazar on 11th March, 2005.

(vii) Parties are living separately since 3rd August, 2005.

(viii) Petitioner has filed this petition seeking annulment of marriage between him and the respondent performed on 31st December, 2004 and 11th March, 2005.

(ix) Respondent got registered another FIR bearing No. 418/2005 under Section 376 (g) /109 IPC in Police Station Timarpur. The trial of the case is still continuing.”

10. The dispute *inter se* the parties which needs resolution by this Court is whether this petition is maintainable in view of the fact that petitioner’s previous petition was dismissed in default and the other question to be considered is whether respondent was a divorcee when she married the petitioner on 31st December, 2004 and subsequently on 11th March, 2005.

11. Petitioner had filed his previous petition under Section 11 of the Act seeking annulment of marriage on the ground that respondent had concealed the fact that she was previously married and also that she is not a divorcee. Since the matter was compromised, the said petition was dismissed in default on 8th April,

2005 due to non-appearance on behalf of the petitioner. After its dismissal in default, petitioner did not take any steps to get it restored and pursue it. In the said case, he had disputed the legality of marriage, which took place between him and the respondent on 31st December, 2004. Provisions of Order 9 Rule 9 CPC are applicable to the proceedings under the Act.

12. Order 9 Rule 9 CPC bars fresh suit filed on the same cause of action where earlier suit or part of it is dismissed in default under Order 9 Rule 8 CPC. A party is entitled to move an application for setting aside the dismissal order. If the court is satisfied that there were sufficient grounds for his non-appearance when the suit was called for hearing, it would restore the suit.

13. As pointed out above, petitioner did not file any application seeking restoration of the petition dismissed in default. Therefore, he is debarred from filing this petition seeking the same relief of annulment of marriage dated 31st December, 2004 based on the same cause of action. He cannot be allowed to re-agitate his case and seek declaration of decree of annulment of the said marriage.

14. Hence, the Trial Court rightly held that the petitioner in these proceedings cannot once again re-agitate for seeking declaration of decree of annulment of his marriage with the

respondent on 31st December, 2004.

15. However, fresh cause of action accrued in favour of the petitioner when the parties married again on 11th March, 2005 after the matter was compromised *inter se* them. The relevant terms of the compromise are:-

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b) That the reason for the dispute between the parties were based on the alleged information received by the petitioner regarding the subsistence of the first marriage of the respondent.

c) That the doubt of the petitioner regarding the subsistence of the first marriage of the respondent at the time of the solemnization of the marriage of the parties herein, was removed on the basis of “declaration” given by the respondent in para (2) of the compromise/settlement deed to the effect that she was a divorcee of her former husband Shri Sunil Kumar.

d) It was also agreed between the parties that they shall get their marriage solemnized once against strictly in accordance with Hindu Rites and Ceremonies and that the said marriage will be followed by the registration of the same.”

16. It was in terms of the compromise that the parties re-married on 11th March, 2005. Respondent filed her affidavits one before Arya Samaj Vedic Marriage Mandal, Jamna Bazar and another before the Court in the writ petition under Section 482

Cr.P.C. seeking quashing of FIR No.58/2004, declaring that she was a divorcee of Sunil Kumar, her previous husband. However, she has failed to produce the decree of divorce and prove it in evidence to satisfy the court that she was a divorcee at the time of her marriage with the petitioner on 11th March, 2005 and therefore, is his legally wedded wife. Onus of proving this issue heavily lay on the respondent and she had to open evidence. Record indicate that she did not lead any evidence to prove that her previous marriage was validly dissolved on the date of solemnization of marriage with the petitioner.

17. Vide order dated 2nd July 2009, during pendency of the appeal, this Court gave an opportunity to the respondent to file certified copy of the decree of divorce obtained by her against her previous husband Sunil Kumar. She failed to produce the certified copy as directed and also absented herself despite directions. On 24th August 2009, respondent stated that she is illiterate and does not know the particulars of the date nor is in a position to give the name of the court from which the decree of divorce was obtained. She could not even give the name of the lawyer who was representing her in the said case. Till date, respondent has not been able to place on record either certified copy of the decree sheet or any particulars of

the alleged divorce petition, wherein she was allegedly granted a decree of divorce against her previous husband Sunil Kumar. It is pertinent that she could not disclose even small particulars of the alleged petition to assist the Court. Case of the petitioner throughout has been that despite his best efforts and persuasion, respondent was successful in avoiding getting her marriage with him registered. It is significant that respondent herself has disputed legality of the marriage dated 31st December, 2004, as according to her, no *Saptapadi* was performed.

18. Thus, it is evidently clear that a valid marriage existed between the respondent and Sunil Kumar when she entered into matrimonial knots with the petitioner. Her marriage with the petitioner, under the circumstances of the case, is in volition of Section 5 sub-clause (1) of the Act and therefore, is a void marriage within the meaning of Section 11 of the Act. Any statement made by the respondent by way of affidavits that she was a divorcee knowing it well that she was not a divorcee of Sunil Kumar, under no circumstance, would mean that she was legally divorced by Sunil Kumar before she married the petitioner.

18. Trial Court while relying upon “*M.M.Malhotra Vs. Union of India & Ors.*”, (2005) 8 SCC 351, mis-interpreted it when

it dismissed the petition observing that petitioner has not led any evidence to explain the averments raised by him in his petition.

While dismissing the petition, Trial Court observed:-

“29. In the present case also, the parties to the petition have filed a compromise deed as well as the affidavits before the Hon’ble High Court of Delhi and they have acted upon this. According to those affidavits and compromise deed, the respondent is a divorcee. But the petitioner has not led any evidence to explain the averments raised by him in his petition. The other judgments relied upon on behalf of the petitioner also laid down that the expression “wife” means only the “*legally wedded wife*”. The issue no. 1 is decided accordingly.”

19. To my mind, the Trial Court did not properly interpret the consequences of the documents i.e. compromise deed and the affidavits of the respondent viz-a-viz Section 5 sub-clause (1) of the Act. The court on the basis of the evidence and the compromise deed concluded that respondent is a divorcee. Any admission against law made by the respondent cannot be accepted as correct and binding on the petitioner. The marriage is null and void and it is not necessary that petitioner should approach the court for a formal declaration of decree of nullity of marriage. However, Section 11 of the Act empowers a court to declare such marriage by way of decree of nullity on a petition presented by either party to such marriage if,

it contravened any of the conditions specified in clauses (1), (4) and (5) of Section 5 of the Act.

20. In view of my discussion as above, it is concluded that since respondent has failed to prove that she was a legally divorced wife of Sunil Kumar at the time of solemnization of her marriage with the petitioner on 11th March 2005, in my opinion, the said marriage between the parties is a nullity being violative of the provisions contained in Section 5 sub-clause (1) of the Act. Findings of the Trial Court on this issue are accordingly set aside.

RELIEF

21. In view of my observations on issue No.1, appeal is allowed and the impugned judgment and decree of the Trial Court dated 11th February, 2009 is set aside. Marriage between the parties dated 11th March, 2005 is hereby declared a nullity. Parties are left to bear their own costs. Decree be prepared accordingly.

CM No.6252/2009 (for stay)

22. Since the appeal has been disposed of, this application has become infructuous and the same stands dismissed accordingly.

**ARUNA SURESH
(JUDGE)**

AUGUST 26, 2010/sb