

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

Judgment Reserved on: August 08, 2016
% *Judgment Delivered on: August 10, 2016*

+ **MAT.APP (F.C.) 94/2015**

DR.SHAILEY MISHRA Petitioner
Represented by: Mr.Ravindra Narayan, Advocate and
Mr.Mohd.Zafar, Advocate
versus

ANURAG MITTAL Respondent
Represented by: Respondent in Person

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

MAT.APP (F.C.) 94/2015 & CM Nos.14631/2015, 5283/2016, 24534/2016, 24535/2016

1. We had heard arguments on August 08, 2016, in the appeal as also in the four above captioned applications. The respondent had appeared in person and made submissions. The respondent had also handed over written submissions which were taken on record.
2. We note the admitted facts.
3. The respondent was married to one Rachna Mittal (Aggarwal). Whereas the respondent filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955, Rachna Mittal filed a petition seeking annulment of the marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955. By a common judgment and decree dated August 31, 2009, whereas petition for restitution of conjugal rights filed by

the respondent was dismissed, the petition seeking annulment of marriage by Rachna Mittal was allowed.

4. The respondent filed two appeals in this Court registered as Mat.App. No.119/2009 and Mat.App.No.126/2009 challenging the judgment and decree dated August 31, 2009.

5. The operation of the impugned decree was stayed on November 20, 2009. The two appeals were admitted. The stay continued.

6. The respondent had a dialogue with Rachna Mittal to amicably resolve their disputes. A settlement was arrived at. The respondent agreed to withdraw both appeals, meaning thereby the decree of annulment of the marriage obtained on August 31, 2009, operation whereof had been stayed by this Court, would become operative once the stay was vacated.

7. Rather than to obtain an order from this Court withdrawing the two appeals, the respondent got married to the appellant on December 06, 2011. But before that, he informed the learned Registrar of this Court that a settlement had been arrived at between him and Rachna Mittal and thus the matrimonial appeals be listed before the Court. It is so recorded in the order dated November 28, 2011. The two appeals were ultimately withdrawn on December 20, 2011.

8. It is the claim of the respondent in proceedings initiated by her under Section 11 of the Hindu Marriage Act, that at the time of his marriage with her the respondent was having a spouse living at the time of the marriage and thus the marriage between the two is a nullity because clause (i) of Section 5 of the Hindu Marriage Act, 1955 was violated.

9. Dismissing the petition filed by the respondent the learned Family Court has reasoned as under:-

“23. Marriage between respondent and Rachna Aggarwal stood dissolved vide judgment/decreed dated 31.08.2009. The

said judgment was never set aside. Only its operation was stayed in appeal filed by the respondent and on withdrawal of his appeal by the respondent the said judgment stood confirmed thereby operating w.e.f. the date 31.08.2009 itself. The mandate of law is that it shall not be lawful for a certain party to do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done thereby making it unlawful without providing for consequence of the breach, it is not legitimate to say that such a thing when done is void because that would tantamount to saying that every unlawful act is void. The Act does not provide that a marriage solemnised in contravention of its Section 15 is void. Sanctity of marriage has to be respected and it cannot be declared void unless statute expressly says so. Merely because a party is prohibited from contracting a second marriage for a certain period it could not be said that despite there being a decree of divorce the first marriage subsists or is presumed to subsist. In Cl.(i), sub-s.(1) of s.5 the term 'Spouse' is understood to refer to husband and wife which term itself postulates a subsisting marriage. Stay of operation of judgement/decreed by a superior court merely suspends its operation. The judgment/decreed remains in abeyance during the pendency of the appeal. It does not become non-existent.

24. It is relevant to note that respondent had arrived at a settlement with his first wife on 15.10.2011 before Tis Hazari Mediation Centre. He filed an application before Hon'ble Delhi High Court on 28.11.2011 praying for withdrawal of his matrimonial appeals before he married the petitioner. It is submitted by respondent in his affidavit sworn onthat a joint request was made for early hearing in November 2011 or first week of December 2011 but the date 20.12.2011 was given by Sh.P.S.Chaggar, Registrar, Delhi High Court.

Respondent has contended that having settled the matter fully and finally with his first wife on 15.10.2011 inter alia vide which he agreed to withdraw his appeal being No.MAT Appeal No.126/2009 and MAT Appeal No.119/2009 and accordingly filed an application for withdrawal of his two appeals referred to above, before Hon'ble High Court on 28.11.2011 made his

appeals redundant, wherein stay was granted.

As noted above the judgment/decreed dated 31.08.2009 dissolving the earlier marriage of the respondent is judgment-in-rem. It was never reversed or set aside and on withdrawal of his appeal by respondent it operated w.e.f. the date it was passed i.e. 31.08.2009. Respondent had filed an application before the High Court for withdrawal of his appeal before his marriage with the petitioner.

Institution of marriage has to be respected and great care and caution is to be exercised in declaring it a nullity. As such issue No.1 is decided in favour of the respondent and against the petitioner.”

10. The aforementioned facts are not in dispute. The only question which arises is : Whether the view taken by the learned Family Court that the decree of divorce obtained by Rachna Mittal on August 31, 2009 entitled the respondent to contract a second marriage notwithstanding operation thereof being stayed.

11. In the decision reported as 1995 Supp (4) SCC 642 Prakash Chand Sharma vs. Vimlesh (Smt), the relevant facts were that the learned Trial Judge granted a decree of divorce to the respondent which was affirmed by the First Appellate Court but reversed by the High Court. The date of the judgment of the First Appellate Court affirming the decree of divorce was August 29, 1988. As per Section 15 of the Hindu Marriage Act, 1955, where a marriage has been dissolved by a decree of divorce and there is a right of appeal, it would be unlawful for either party to marry again where the time within which the appeal has to be filed has not expired. Prakash Chand Sharma solemnised a second marriage. As noted above, the second appeal filed by the wife : Vimlesh succeeded and the problem projected before the Supreme Court was the second marriage solemnised by Prakash.

12. Affirming the reversal by the Second Appellate Court of the decree of

divorce granted by the Trial Judge and as affirmed in the first appeal, the Supreme Court held that the husband could get no benefit of the second marriage solemnized which was in disregard of Section 15 of the Hindu Marriage Act, 1955.

13. In the decision reported as (2002) 2 SCC 73 Savitri Pandey vs. Prem Chandra Pandey, similar view was taken by the Supreme Court where the husband solemnized a second marriage on account of the fact that the decree dated July 08, 1996 dissolving the marriage was not stayed and during the pendency of the appeal the wife solemnized a second marriage. It was described as an adventure undertaken by the wife at her own risk.

14. The legal position which can be culled out from the aforesaid two decisions is that where either spouse challenges a decree obtained by other spouse for dissolution of the marriage, till the appeal is decided the matrimonial bond cannot be said to have snapped and thus any marriage solemnized by either couple during the pendency of the appeal wherein operation of the decree for annulment of marriage is stayed would be in contravention of clause (i) of Section 5 of the Hindu Marriage Act, 1955.

15. The respondent had urged that the appellant knew about the first marriage; the decree of annulment petition obtained by his wife; the appeal filed by him challenging the decree of annulment and the stay granted therein. But there is no proof for said assertion.

16. We have seen the Trial Court record as also the instant appeal and would note the cantankerous attitude of the respondent. He has the habit of filing prolix applications and we give an illustration. CM No.14631/2015 prays for an early hearing of a preliminary objection. The application spans 10 pages. What are the preliminary objections? None. One is left to wonder. At page 3 commences a table 'A'. It refers to some concurrent attendance in

a Sessions Court by the father of the appellant. It refers to a different address in a General Power of Attorney filed three years ago viz-a-viz memo of parties. It refers to the fact that along with Memorandum of Appeal no application for exemption from appearance has been filed by the appellant.

17. We have noted as aforesaid to bring home the cantankerous attitude of the respondent.

18. The appeal paper book is now running into 800 pages with all and sundry filed by the respondent.

19. Before passing formal orders in the appeal we now take note of the applications and decide the same.

20. As noted above, CM No.14631/2015 prays for early hearing on some preliminary objections which are not stated in the application. Indeed there cannot be any preliminary objections in the matter. The said application is dismissed.

21. As regards CM No.5283/2016 it seeks recall of the order dated November 20, 2015 in so far CM No.13181/2015 and 13183/2015 filed by the appellant were allowed.

22. Vide CM No.13181/2015, 13 days delay in filing the appeal and vide CM No.13183/2015 21 days delay in re-filing the appeal were allowed. The order records the presence of the respondent and his consent that the delay in filing and re-filing may be condoned. The pleadings in the application are that the respondent is the sole bread earner of the family and he feels there is a fair chance of reconciliation between him and the appellant. He pleads that due to litigation he had suffered personal losses and forgone employment at the World Bank and has also not been able to take up prestigious appointment with the Government of India. He pleads that on account of the appellant seeking annulment of the marriage, his father died

due to stress. He pleads that on earlier occasion i.e. October 13, 2015, on a false ground that appellant's counsel was not available adjournment had been taken.

23. We see no relevance of the pleadings in CM No.5283/2016 to recall the order dated November 20, 2015 which had allowed CM No.13181/2015 and 13183/2015, filed by the wife seeking delay in filing and delay in refilling the appeal to be condoned. The respondent had consented thereto.

24. As regards CM No.24534/2016 the prayer made is to modify the order dated April 08, 2016 which records that the appellant is aggrieved by the dismissal of a petition filed under Section 5 read with Section 11 and Section 15 of the Hindu Marriage Act, 1955. There are pleadings replete with the misconduct of the appellant. But the prayer made is that refers to Section 5, Section 11 and Section 15 of the Hindu Marriage Act in the order dated April 08, 2016 be deleted.

25. Now, the order dated April 08, 2016 makes a recital that the appellant had filed a petition under Section 5 read with Section 11 and Section 15 of the Hindu Marriage Act. This is wrong. The appellant had filed a petition invoking Section 11 of the Hindu Marriage Act pleading therein that the marriage between the parties was liable to be declared null and void on account of contravention of clause (i) of Section 5 of the Hindu Marriage Act, 1955. So noting the application is dismissed.

26. As regards CM No.24535/2016, ones again making prolix applications the prayer made is to decide CM No.14631/2015 and 5283/2016. Since the said two applications have been decided by the present order resulting in dismissal of the two, instant application is also dismissed.

27. To bring the curtains down the appeal is allowed. Impugned

judgment and decree dated April 16, 2015 dismissing the petition filed by the respondent under Section 11 of the Hindu Marriage Act, 1955 alleging violation of the clause (i) of Section 5 of the Hindu Marriage Act, 1955 is set aside. The petition filed by the appellant is allowed holding that the respondent violated clause (i) of Section 5 of the Hindu Marriage Act, 1955 when he solemnized the marriage with the appellant on December 06, 2011, we declare the marriage null and void. All the interim applications are dismissed.

28. Parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

AUGUST 10, 2016
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