

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.739 of 2016

Smt. Renu Singh, W/o Shri Brijendra Singh, aged about 47 years, R/o 7, Kesar Avas, Rajkishore Nagar, Police Station Sarkanda, Bilaspur, Distt. Bilaspur (CG)

(Applicant)
---- Petitioner

Versus

Brijendra Singh, S/o Late Dr. Himmat Singh, aged about 52 years, R/o Chhuikhadan, Distt. Rajnandgaon (CG)

(Non-applicant)
---- Respondent

For Petitioner: Mrs. Fouzia Mirza, Advocate.

For Respondent: Mr. Praveen K. Dhurandhar, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

17/02/2017

1. The petitioner herein/defendant is wife of the respondent herein/plaintiff. The respondent/plaintiff firstly instituted a suit bearing Civil Suit No.6-A/2009 for granting decree of divorce under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter called as 'the HM Act, 1955'), on 8-4-2009. That suit was tried by the Judge, Family Court, Rajnandgaon and by judgment and decree dated 7-5-2010, it was dismissed. On appeal being filed by the respondent/plaintiff bearing First Appeal (M) No.68/2010, the Division Bench of this Court by judgment dated 28-2-2012, affirmed the decree granted by the Family

Court dismissing the appeal of the respondent/plaintiff. No further challenge was made to the judgment of this Court dismissing the first appeal.

2. Thereafter, on 24-2-2013, the respondent/plaintiff again instituted an application under Section 12 of the HM Act, 1955 for declaring his marriage with the petitioner void on the ground that the petitioner was suffering from gynecological problem and she was incapable of conceiving and that the marriage was performed suppressing the material fact that she is suffering from gynecological disorder and is incapable of conceiving. It was further pleaded that such suppression of fact / fraud came to the notice of the respondent/plaintiff on 8-4-2009 and thereafter, the cause of action accrued on 8-4-2009 and each-day thereafter.
3. The petitioner/defendant filed written statement controverting the averments made in the application filed under Section 12 of the HM Act, 1955, on 8-7-2015 and thereafter, by order dated 9-9-2016 amended the written statement taking plea that the application was filed under Section 12 (1) (c) of the Act raising the grounds mentioned therein and therefore by virtue of Section 12 (2) (a) (i), the application ought to have been presented within one year from the discovery of said fraud, therefore, the suit / application is barred by the said provision.

4. Thereafter, the petitioner/defendant also filed application under Order 7 Rule 11 of the CPC raising the ground that in view of the statutory bar contained in Section 12 (2) (a) (i) of the HM Act, 1955, since the application has been filed beyond the period of one year from the date of discovery of fraud i.e. 8-4-2009, the application filed under Section 12 of the HM Act, 1955, is liable to be dismissed invoking Order 7 Rule 11 (d) of the CPC. The respondent herein replied the said application and prayed for rejection of the said application.
5. The Family Court by its impugned order dated 9-9-2016 rejected the application filed under Order 7 Rule 11 of the CPC holding that the question of limitation is mixed question of law and fact and that cannot be considered and decided without recording evidence.
6. Feeling aggrieved and dissatisfied against the said order passed by the Family Court rejecting the application under Order 7 Rule 11 of the CPC, this writ petition under Article 227 of the Constitution of India has been filed on the ground that the order passed by the Family Court is contrary to facts and law available on record.
7. Return has been filed by the respondent/plaintiff opposing the writ petition and supporting the order of the Family Court stating that the writ petition deserves to be dismissed.

8. Mrs. Fouzia Mirza, learned counsel appearing for the petitioner/defendant, would submit that the application filed by the respondent/plaintiff for declaring the marriage as void on the ground incorporated in Section 12 (1) (c) of the HM Act, 1955 is statutorily barred in view of the provisions contained in Section 12 (2) (a) (i) of the HM Act, 1955. Elaborating her submission, she would submit that as per the plaint allegation, the fact of fraud / suppression of material fact was noticed on 8-4-2009 by the respondent/ plaintiff and therefore the suit ought to have been preferred within one year from 8-4-2009 in view of the provisions contained in Section 12 (2) (a) (i) of the HM Act, 1955. She would emphasize that the opening words of Section 12 (2) (a) of the HM Act, 1955 stipulate that no petition for annulling a marriage shall be entertained. According to her submission, the word "entertained" would be a bar to consider the application if it has been presented after more than one year from the date of discovery of fraud. Therefore, the learned Family Court is absolutely misdirected in holding that the question of limitation is involved in filing the application. According to her, it is a clear cut statutory bar contained in the Act for entertainment of application if it is filed beyond the period of one year from the date of discovery of fraud and therefore the provision is imperative in nature, as such, the impugned order deserves

to be set aside.

9. Mr. Praveen K. Dhurandhar, learned counsel appearing for the respondent/plaintiff, would however, support the impugned order and would submit that the question of limitation raised by the petitioner in her application under Order 7 Rule 11(d) of the CPC is mixed question of law and fact and that cannot be adjudicated unless the evidence is recorded and the issue is framed, and by framing that issue, that issue can be resolved and as such, the Family Court is absolutely justified in rejecting the application filed under Order 7 Rule 11 of the CPC.

10. I have heard learned counsel for the parties at length and considered their rival submissions made herein and also gone through the record carefully and critically.

11. In order to consider the issue raised at the Bar, the provisions of Sections 11 and 12 (1) (c) read with Section 12 (2) (a) (i) of the HM Act, 1955, are required to be noticed herein.

“11. Void marriages.—Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

12. Voidable marriages.—(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on

any of the following grounds, namely:—

(a) *** *** ***

(b) *** *** ***

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(d) *** *** ***

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage —

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) *** *** ***

(b) *** *** ***”

12. Section 11 of the HM Act, 1955 speaks of void marriages.

Section 12 speaks of voidable marriages. Under Section 12

(1), a competent Court may annul a marriage by decree of nullity of any marriage solemnised, whether before or after the commencement of the Act, on the ground, that the marriage has not been consummated owing to the impotence of the respondent; that the marriage is in contravention of the condition specified in clause (ii) of

Section 5 of the Act; and that the consent of the petitioner or where the consent of the guardian in marriage of the petitioner was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.

13. The words 'force' or 'fraud' appearing in Section 12 (1) (c) of the HM Act, 1955 must be interpreted to mean such circumstances or condition as to show want of real consent to the marriage. 'Fraud' within the meaning of Section 12 (1) (c) is such which procures the appearance without the reality of consent and thereby becomes an act fitted to deceive. The term 'fraud' cannot be attributed the same meaning as it has under Section 17 of the Contract Act. (See **Nandkishore v. Smt. Munnibai**¹ and **Vijay Jaiswal v. Smt. Nisha Jaiswal**².)

14. The word 'fraud' employed in Section 12 (1) (c) of the HM Act, 1955 does not speak of fraud in any general way, nor does it mean every misrepresentation or concealment, which may be fraudulent, but fraud as to the nature of ceremony or as to material fact or circumstances concerning the respondent. "Fraud" according to Chambers Dictionary means, "deceit". Thus, in case where the consent to the marriage has been obtained by deception, it was liable to be

1 AIR 1979 MP 45

2 2008 (5) MPHT 263

annulled under Section 12 (1) (c) of the HM Act, 1955, before the amendment of clause (c) of Section 12 (1) of the Act, and insertion of the words “as to the nature of the ceremony or as to any material fact concerning the respondent”. Thus, after the amendment of clause (c) of Section 12 (1) of the HM Act, 1955 by the Marriage Laws (Amendment) Act, 1976, the emphasis cannot be laid only regarding the nature of the ceremony or factum of marriage, but, in case there is deception as to any material fact or circumstances concerning the respondent, the said case would also be covered by clause (c) of Section 12 (1) of the HM Act, 1955. (See **Nalini Kumari v. K.S. Bopaiah**³.)

15. Sub-section (2) of Section 12 of the HM Act, 1955 states that notwithstanding anything contained in sub-section (1), no petition for annulling a marriage on the ground specified in clause (c) of sub-section (1) shall be entertained if the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered. Thus, presentation of petition for annulling a marriage as void under Section 12 (1) (c) must be within one year from the date after the force had ceased to operate or, the date the fraud had been discovered. Therefore, presentation of petition within one year from discovery of fraud or the force had ceased to operate is a

3 AIR 2007 (NOC) 313 (Kar.)

sine qua non for valid presentation of petition for annulment of marriage under Section 12 (1) (c) of the HM Act, 1955. If the petition is presented after more than one year from that date, the bar would operate and suit would be statutorily barred and as such the provision is imperative and prohibitory in nature.

16. Even otherwise, the issue raised herein is no longer *res integra* and stands concluded by a judgment rendered by the M.P. High Court. In this regard, reference may be to a Division Bench decision of the M.P. High Court in **Nandkishore** (supra) in which the M.P. High Court has held that a petition for annulment of a marriage shall not be entertained if the conditions laid down in various sub-clauses of Section 12 (2) of the HM Act, 1955 are not satisfied, and observed as under in paragraph 11: -

“11. Heading of this sub-section (2) would indicate that a petition for annulment of a marriage shall not be entertained if the conditions laid down in its various sub-clauses are not satisfied. It is, therefore, incumbent on a petitioner to plead and for a Court to find that the petitioner has strictly fulfilled the requirements of those sub-clauses. In order to succeed under clause (d) of [Section 12\(1\)](#) of the Act, the petitioner must not only show the existence of pregnancy at the time of marriage, but should also prove that he was ignorant of that fact at the time of marriage, that the proceedings were instituted within a period of one year fixed by the statute and that he did not have marital intercourse with the wife subsequent to the time when he had grounds for reasonably inferring the cause on which he is seeking annulment. In the instant case, the marriage took place on 2-5-

1975. The petition was filed on 14-6-1976. The summer vacation that year commenced from 10-5-1975. The Courts did function on 3-5-1975. Obviously the petition was presented beyond the period of one year fixed by the statute. Again, it is in the evidence of the appellant and his witnesses that he had practically become certain of the alleged pregnancy of the respondent soon on her arrival to the appellant's house. The respondent has specifically pleaded that after the marriage she had marital intercourse with the appellant and with his full consent. She also deposed so in the witness-box. In spite of this, the appellant did not amend the petition to deny any cohabitation with the respondent. The respondent was put no question in cross-examination to challenge that part of her testimony. It can, therefore, be safely held that marital intercourse had taken place with the appellant's consent since discovery of the alleged pregnancy. That being so, the appellant has utterly failed to prove compliance of conditions incorporated in [Section 12\(2\)\(b\)](#) (ii) and (iii) of the Act. His petition must fail on this count also."

17. Similar is the proposition laid down by a Division Bench of the Bombay High Court in the matter of **Savlaram Kacharoo Mhatre v. Yeshodabai Savlaram Mhatre**⁴ in which a Division Bench of the Bombay High Court has clearly held that petition for nullity of marriage on ground mentioned in Section 12 (1) (d) of the HM Act, 1955 cannot be entertained if the conditions mentioned in Section 12 (2) (b) are not complied with, and observed as under: -

"A fair reading of this section clearly shows that it does not prescribe a period for filing a petition by the plaintiff; it is in terms mandatory and prohibitory and provides that the Court shall not entertain the petition if the conditions laid down therein are not satisfied. These conditions are in

4 AIR 1962 Bombay 190

absolute terms and they cannot be relaxed. Now, it is argued that the words "no petition shall be entertained" cannot mean that the petition must be dismissed in limine merely because it is filed beyond one year mentioned in that clause. Reliance for this purpose is placed on sub-clauses (i) and (iii) of sub-section (2) (b) of [section 12](#). It may be that two of the conditions, i.e. those in (i) and (iii) may require evidence before the making of the decree. But so far as condition (ii) is concerned, it is self evident from examination of the plaint and if the examination discloses that the condition is not fulfilled, the Court must dismiss the petition."

18. Likewise, in the matter of Nanikaram Gellaram v. Smt. Drupadiben⁵, the Gujarat High Court following the decision of the Bombay High Court in Savlaram Kacharoo Mhatre (supra) has clearly held that Section 12 (2) (b) (ii) of the HM Act, 1955 does not prescribe period of limitation but creates a statutory bar for entertainment of petition, and observed as under: -

"Sub-section (2) of Section 12 provides that, a petition for a decree of nullity, on any of the four grounds, shall not be entertained, unless the Court is satisfied that the proceedings have been instituted within one year from the date of the marriage. The provision is a mandatory one and creates a bar to the entertainment of the petition under Section 12 (1) (d), unless the Court is satisfied that the proceedings are instituted within one year from the date of the marriage. It does not prescribe a period of limitation. Clearly, therefore, Section 10 of the General Clauses Act, 1897, will have no applicability in such a case."

19. Thus, in view of the aforesaid legal analysis, it is quite apparent that petition for annulling a marriage to be void has

5 AIR 1974 Gujarat 111

to be presented within one year from the date after the force had ceased to operate or the fraud had been discovered under Section 12 (1) (c) of the HM Act, 1955 and the said provision is in the shape of a statutory bar for annulment of marriage on the grounds incorporated in Section 12 (1) (c) of the HM Act, 1955.

20. Applying the principle of law laid down in the aforesaid judgments read with Sections 12 (1) (c) of the HM Act, 1955, coming back to the facts of the present case, it is quite apparent that the respondent / plaintiff has clearly asserted in his plaint that he came to know about the gynecological disorder of the petitioner / defendant, which has been suppressed by the petitioner herein, on 8-4-2009. Undisputedly, the suit for annulment of marriage was filed on 24-2-2013 which is beyond the statutory period of one year. Therefore, I have no hesitation in holding that the statutory bar contained in Section 12 (2) (a) (i) of the HM Act, 1955 is squarely attracted and the said suit / application is hit by the said provision and therefore the Family Court is absolutely unjustified in entertaining the suit / application filed beyond the period of one year from 8-4-2009. Consequently, the Family Court is further unjustified in not entertaining the application under Order 7 Rule 11(d) of the CPC. Thus, I am unhesitatingly of the opinion that the suit for annulment of marriage filed by the respondent / plaintiff

was barred by Section 12 (2) (a) (i) of the HM Act, 1955 read with Order 7 Rule 11(d) of the CPC.

21. Accordingly, the writ petition is allowed and consequently, the application under Order 7 Rule 11 of the CPC is also allowed. Plaint filed by the respondent/plaintiff for annulment of marriage under Section 12 (1) (c) of the HM Act, 1955 stands rejected. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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