

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 265 of 2019

Sujit Dey S/o B.N. Dey Aged About 45 Years R/o Upadhaya Nagar, Mahesh Colony, Naya Talab, Gudiyari Raipur Tehsil And District Raipur Chhattisgarh, District : Raipur, Chhattisgarh

---- Appellant

Versus

Smt Anushri Dey (Valima) W/o Sujit Dey C/o Prakash Chandra Bagri R/o D-81 Tagore Nagar Raipur Tehsil And District Raipur Chhattisgarh, District : Raipur, Chhattisgarh

---- Respondent

For Appellant	:	Shri J.K. Gupta, Advocate
For Respondent	:	Shri Apurv Goyal, Advocate

D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava & Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Judgment

06/10/2020

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the order dated 18.2.2019 passed by learned Second Additional Principal Judge, Family Court, Raipur in Civil Suit (HMA) No.130 of 2014, by which the Family Court has granted decree of divorce in favour of respondent-wife.
2. Marriage between the parties was solemnized on 27.11.2003. Respondent-wife filed application for grant of decree of divorce alleging cruelty against the appellant-husband that the appellant-husband has started subjecting her to cruelty since 15.5.2005 which continued, due to which, she left the appellant and started residing with her sister since October 2005. On assurance of proper conduct and behaviour, wife again resumed relationship, but the husband did not mend his ways. The act of cruelty, negligence towards the wife and the child continued and in October 2007, a

meeting was organized to amicably settle the dispute. At this stage, appellant-husband again sought excuse and assured that he would not continue with the act of cruelty any more, but, he again started harassing his wife. In 2011, respondent- wife came to know that appellant-husband has started maintaining relationship with other women and despite objection, did not stop this act. In this manner, the relationship remained constrained so much so that the respondent-wife started living separately since 6.5.2012 and ultimately, respondent-wife was left with no option but to seek divorce.

3. The allegation were denied by the appellant-husband and it was stated that the respondent-wife was acting on the dictates of her father and brother and making false and fabricated allegations.
4. Learned Family Court, having framed issue and allowing the parties to lead oral and documentary evidence, granted decree of divorce in favour of respondent-wife relying mainly on the allegation of cruelty alleged by respondent-wife against the appellant-husband.
5. Though number of issues have been raised in this appeal, after appearance, on behalf of the respondent-wife, specific objection to the maintainability of the appeal has been raised on the statement that the judgment and decree was passed by learned Family Court on 18.2.2019 and the appellant did not prefer any appeal against the judgment and decree, within the time of limitation prescribed under the law, therefore, the respondent-wife, with a view to restart the new chapter of her life, re-married on 17.9.2019. Therefore, this appeal is now rendered infructuous. In support of this submission, learned counsel for the respondent placed reliance upon **Anurag Mittal Vs. Shaily Mishra Mittal** (2018) 9 SCC 691, order dated 19th February, 2020 passed by the Supreme Court in the case of **Krishnaveni Rai Vs. Pankaj Rai & Anr.** (Criminal Appeal No.321 of 2020), **Mohanmurari Vs. Smt. Kusumkumari** (AIR 1965 MP 194) and **A. Raja Sundari Vs. Suresh Kumar** (2016-2 L.W.333).
6. On the other hand, learned counsel for the appellant-husband argued that it is not a case where no appeal has been preferred. He would submit that though, belatedly, along with the application for condonation of delay, the

appellant filed appeal against the judgment and decree on 5.9.2019 and it is not a case where the respondent-wife has contracted second marriage prior to filing of appeal. He would argue that the appeal was filed on 5.9.2019 along with application for condonation of delay in filing appeal, whereas the second marriage was solemnized on 17.9.2019. Therefore, second marriage of the respondent – wife would not render the present appeal infructuous.

7. Having heard learned counsel for the parties, we are of the opinion that on account of second marriage by the respondent- wife, this appeal is rendered infructuous, in view of judgment of the Supreme Court in the case of **Leela Gupta Vs. Laxmi Narain & Ors.** (1978) 3 SCC 258, **Anurag Mittal** (supra) and recent judicial pronouncement in the case of **Krishnaveni Rai** (supra). In similar factual background, the effect of second marriage, after passing of judgment and decree of divorce, in the light of provision contained in Section 15 of the Hindu Marriage Act, 1955, came up for consideration of the Supreme Court. Relying upon the decision in the case of **Anurag Mittal** (supra) and **Leela Gupta** (supra), Their Lordships, in **Krishnaveni Rai**, held as below:-

“31. Section 15 clarifies that when a marriage has been dissolved by a decree of divorce, and there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed, it shall be lawful for either party to the marriage to marry again. Had it been the legislative intent that a marriage during the pendency of an appeal should be declared void, Section 11 would expressly have provided so.

32. As held by this Court in *Anurag Mittal v. Shaily Mishra Mittal* reported in (2018) 9 SCC 691, the object of Section 15 is to provide protection to the person who had filed an appeal against the decree of dissolution of marriage and to ensure that such

appeal was not frustrated. The protection afforded by Section 15 is primarily to a person contesting the decree of divorce. As observed by Bobde, J. in his concurring judgment in Anurag Mittal (supra):-

“I am in agreement with the view taken by Nageswara Rao, J. but it is necessary to state how the question before us has already been settled by the decision in Lila Gupta v. Laxmi Narain [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . Even when the words of the proviso were found to be prohibitory in clear negative terms — “it shall not be lawful”, etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of Lila Gupta [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . It is all the more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like “it shall be lawful”. Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 and 10 of Lila Gupta case... “..... What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as “it shall not be lawful” or an incapacity imposed by positive language like “it shall be

lawful (in certain conditions, in the absence of which it is impliedly unlawful)". It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it was contracted under an incapacity. Obviously, this would have no bearing on the other conditions of a valid marriage. The decision in *Lila Gupta* case thus covers the present case on law."

33. In *Leela Gupta v. Laxmi Narain & Ors.* reported in (1978) 3 SCC 258, this Court held:

".....the interdict 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 consequence for 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." (Paragraph 10).

"....Merely because each one of them is prohibited from contracting a second marriage for a certain period, it could not be said that despite there being a decree of divorce for certain purposes the first marriage subsists or is presumed to subsist..... An incapacity for second marriage for a certain period does not have effect of treating the former marriage as subsisting....." (paragraph 13).

"Thus, examining the matter from all possible angles and keeping in view the fact that the

scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, it cannot be said that such marriage would be void" (paragraph 20)"

34. In any case, the bar of Section 15 is not at all attracted in the facts and circumstances of this case, where the appeal from the decree of divorce had been filed almost a year after expiry of the period of limitation for filing an appeal. Section 15 permits a marriage after dissolution of a marriage if there is no right of appeal against the decree, or even if there is such a right to appeal, the time of appealing has expired without an appeal having been presented, or the appeal has been presented but has been dismissed. In this case no appeal had been presented within the period prescribed by limitation.

35. The bar, if any, under Section 15 of the Hindu Marriage Act applies only if there is an appeal filed within the period of limitation, and not afterwards upon condonation of delay in filing an appeal unless of course, the decree of divorce is stayed or there is an interim order of Court, restraining the parties or any of them from remarrying during the pendency of the appeal.

36. As observed above, the appeal was infructuous for all practical purposes, from the inception, since the Appellant's ex-husband had lawfully remarried after expiry of the period of limitation for filing an appeal, there being no appeal till then.

37. It could never have been the legislative intent

that a marriage validly contracted after the divorce and after expiry of the period of limitation to file an appeal from the decree of divorce should be rendered void on the filing of a belated appeal. If the marriage of the Appellant's ex-husband in 2006 was a valid marriage in law recognizing that he had no living spouse, the subsequent re-marriage of the Appellant could also not be void. We are in full agreement with the view of this Court in *Leela Gupta* (supra) that the effect of the prohibition against one of the parties from contracting a second marriage for a certain period is not to nullify the divorce and continue the dissolved marriage, as if the same were subsisting."

8. Apparently, in the present case, the appeal has been preferred long after expiry of period of limitation. True it is that the respondent solemnized marriage on 17.9.2019 which is subsequent to filing of this appeal, but we find that there was no stay of effect, operation and execution of impugned judgment and decree of divorce passed in favour of respondent- wife. This appeal has been filed as late as on 5.9.2019, whereas the impugned judgment and decree was passed on 18.2.2019. Therefore, the principles laid down in the aforesaid decision squarely apply in the present case and the appeal, therefore, is liable to be dismissed as having rendered infructuous only on the ground that the respondent-wife had contracted second marriage after expiry of the period of limitation prescribed for filing appeal against the impugned judgment and decree dated 18.2.2019. The objection of learned counsel for the respondent has to be, therefore, sustained, with the result that this appeal is dismissed as having rendered infructuous.
9. Let appellate decree be drawn accordingly. Parties shall bear their respective costs.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge