



* IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 10th May, 2022

Decided on: 03rd June, 2022

+

MAT.APP.(F.C.) 220/2019

ARINDAM SAHA

..... Appellant

Represented by: Mr. Gagan Gupta, Mr. D. Bhattacharya, Advs. with appellant in person.

versus

DIPANWITA THAKUR

..... Respondent

Represented by: Ms. Jagriti Ahuja, Ms. Vidhi Gupta, Advs. with respondent in person.

+

MAT.APP.(F.C.) 274/2019

ARINDAM SAHA

..... Appellant

Represented by: Mr. Gagan Gupta, Mr. D. Bhattacharya, Advs. with appellant in person.

versus

DIPANWITA THAKUR

..... Respondent

Represented by: Ms. Jagriti Ahuja, Ms. Vidhi Gupta, Advs. with respondent in person.

+

MAT.APP.(F.C.) 284/2019

ARINDAM SAHA

..... Appellant



Represented by: Mr. Gagan Gupta, Mr. D. Bhattacharya, Advs. with appellant in person.

versus

DIPANWITA THAKUR Respondent
Represented by: Ms. Jagriti Ahuja, Ms. Vidhi Gupta, Advs. with respondent in person.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J.

CM APPL. 37083/2019 (Delay of 116 days in filing appeal) in MAT.APP.(F.C.) 220/2019

CM APPL. 46303/2019 (Delay of 589 days in filing appeal) in MAT.APP.(F.C.) 274/2019

CM APPL. 47559/2019 (Delay of 199 days in filing appeal) in MAT.APP.(F.C.) 284/2019

1. By these applications, the appellant seeks condonation of 116 days' delay in filing the appeal in MAT.APP.(F.C.) 220/2019, 589 days' delay in filing the appeal in MAT.APP.(F.C.) 274/2019 and 199 days' delay in filing the appeal in MAT.APP.(F.C.) 284/2019 respectively.
2. For the reasons stated in the applications, delays of 116 days, 589 days and 199 days respectively in filing the appeals are condoned.
3. Applications are disposed of.

MAT.APP.(F.C.) 220/2019
MAT.APP.(F.C.) 274/2019

**MAT.APP.(F.C.) 284/2019**

1. The appellant-husband aggrieved by order dated 06th January, 2018 closing his evidence as petitioner; order dated 30th January, 2019 closing his right to further cross examine the respondent; final judgement and decree dated 22nd February, 2019 dismissing his petition under Section 9 of the Hindu Marriage Act, 1955(*hereinafter referred to as the 'Act, 1955'*) and order dated 06th July, 2019 dismissing his review/recall petition under order 9 Rule 13 of Civil Procedure Code, 1908 by the learned Principal Judge, Family Court, East District, Karkardooma Courts has filed the abovementioned three appeals under Section 19 of the Family Courts Act, 1984.
2. The case of the appellant is that he met the respondent through social media site i.e., 'Facebook', and developed affection. Eventually, they got married according to the Hindu rites and customs on 17th February, 2007 at Arya Samaj Mandir, Mayur Vihar, Phase-II, Delhi.
3. The appellant was working in a Multi-National Company at Gurgaon, while the respondent, who was M.Tech, was employed in CDAC, Pune. The respondent came to reside with the appellant in a rented accommodation at J-39, First Floor, Pandav Nagar, Delhi. In April, 2007, the respondent became pregnant and she decided to get her delivery done in West Bengal, at her parental home. The appellant noticed sudden behavioral change in her conduct towards him on 15th November, 2007, which aroused his suspicion. The respondent quarreled with the appellant and went to Kolkata on 25th November, 2007. The appellant received information about the birth of a daughter in Behala Nursing Home and he rushed to Kolkata but to his



surprise on reaching Kolkata, he found that there was no such hospital. The appellant tried his level best to contact the respondent but to no avail since her mobile phone was switched off.

4. The appellant filed a petition bearing No. 440/2008 under Section 9 of the Act, 1955 on 22nd April, 2008 at Karkardooma Courts. The matter was amicably settled on 28th February, 2009 and the parties made the statement in the court that they would reside peacefully together along with the daughter in the matrimonial home. The petition under Section 9 of the Act, 1955 was accordingly disposed of.

5. The respondent finally joined the appellant at Delhi in October, 2009 but stayed only for four days. She came back in December, 2009 but finally left him and went to Jaipur on 25th January, 2010 and thereafter, refused to join the matrimonial home. Left with no choice, the appellant again filed the present petition under Section 9 of the Act, 1955 for Restitution of Conjugal Rights.

6. The respondent in her written statement denied her marriage with the appellant on 17th February, 2017 at Arya Samaj Mandir, Mayur Vihar, Phase-II, Delhi and claimed that the marriage certificate and other documents have been fabricated by the appellant. The respondent also denied having ever cohabited with the appellant as husband and wife. The respondent admitted that she became friends with the appellant through social media i.e., 'Facebook' but denied all other assertions.

7. The respondent explained that she got married to one Sankar Nandi on 30th April, 2002 at Village and Post Office Ramganj, PS Islampur, District Uttar Dinajpur, West Bengal according to the Hindu rites and ceremonies, and the marriage was registered before the Additional District Registrar,



Dinajpur, West Bengal. After marriage, the respondent went to her matrimonial home along with her husband at 31, Vidyasagar Road, Kolkata, where they resided together. The respondent stated that her husband Sankar Nandi is a well-educated person, working on a good post in The Punjab National Bank, Sutapatti Branch, Kolkata.

8. The respondent completed her MCA from Kolkata in the year 2005 and thereafter, she took admission in M.Tech in the academic year 2005-07 at Banasthali University, Jaipur, Rajasthan, where she stayed from July, 2005 to April, 2006. It is claimed that from May 2006 to June 2006, she was at her matrimonial home with her husband, Sankar Nandi at Dumdum, Kolkata. She completed her one year mandatory training in CDAC at Pune from July, 2006 to April, 2007 and secured first position in M.Tech. Thereafter, the respondent went to Pune with her husband-Sankar Nandi and became pregnant.

9. The respondent secured a job as Technical Support Engineer in V-Customer Services India Pvt. Ltd., a Multi-National Company, at Sarita Vihar. She needed a residence and the appellant, whom she had befriended through social networking site-‘Facebook’ offered her to stay in his flat as a paying guest for some time, to which she agreed as she was pregnant at that time. The respondent came to stay with the appellant who was fully aware of her marriage with Sankar Nandi. She went to her matrimonial home in Kolkata for delivery and a daughter was born on 04th January, 2008 at Apollo Glenangles Hospital, Kolkata.

10. It was asserted that the appellant, with an ill-motive and with intent to harass the respondent, got the false marriage certificate prepared. The appellant filed the petitions bearing No. 440/2008 and prepared fake



documents and some super-imposed nude photographs and started blackmailing the respondent and demanded Rs. 2,00,000/- to return the fabricated documents and to withdraw the petition. The respondent was thus compelled to make the statement and also sign documents before the court, in order to save her dignity. The respondent also paid the money to the appellant.

11. Thereafter, the appellant again filed the present petition for restitution under Section 9 of the Act, 1955 and demanded Rs. 5,00,000/- for withdrawing the same. However, the respondent refused to pay the money and contested the present petition.

12. The issues were framed on 25th January, 2017 as under:

“1. Whether the respondent has withdrawn from the society of the petitioner without any reasonable excuse? OPP.

2. Whether the petitioner is entitled to a decree of restitution of conjugal rights? OPP.

3. Relief.”

13. A preliminary issue was framed on 28th August, 2017 as under:

“Whether the respondent is legally wedded wife of the petitioner? OPP.”

14. The appellant was given ample opportunity to adduce the evidence, but he failed to file his affidavit of evidence and eventually his evidence was closed vide the order dated 06th January, 2018 against which the appeal bearing No. MAT.APP.(F.C.) No. 274/2019 has been filed.

15. Thereafter, the respondent led her evidence and tendered her documents in support of her defence. The respondent was cross-examined



by the counsel for the appellant on three effective dates i.e., 23rd July, 2018, 28th November, 2018 and 30th January, 2019. The right of further cross-examination was closed on 30th January, 2019. Aggrieved by the said order, the appeal bearing No. MAT.APP.(F.C.) No. 284/2019 has been filed.

16. The learned Principal Judge, Family Court after considering the pleadings and the entire evidence, came to the conclusion that the respondent was already married to Sankar Nandi at the time of alleged marriage with the appellant. The appellant failed to produce any oral or documentary evidence of his marriage with the respondent. The petition under Section 9 of the Act, 1955 was accordingly dismissed vide judgement dated 22nd February, 2019.

17. The appellant filed an application bearing Misc. DJ No. 21/2019 dated 06th July, 2019 under Order 9 Rule 13 of CPC for review or recall of the judgement dated 22nd February, 2019 but it was dismissed by the learned Principal Judge, Family Court on 06th July, 2019.

18. Aggrieved by the order of dismissal of his Restitution petition, the appellant has filed appeal No. MAT.APP.(F.C.) 220/2019.

19. The main grounds of challenge raised by the appellant are that in the first petition bearing No. 440/2008 under Section 9 of the Act, 1955 admissions have already been made about the marriage of the appellant and the respondent and once the finding had attained finality, the issue of marriage between the appellant and the respondent could not have been reopened in this second petition. It is also claimed that the respondent after leaving the appellant, has got re-married to Sankar Nandi i.e., respondent's first husband.



20. The appellant has further asserted that he is an innocent litigant, who cannot be penalized for the lapses and negligence of his earlier counsel, Mr. Rajesh Kumar, who did not pursue his case diligently and acted without his knowledge. The appellant has claimed that he was diligently pursuing his other connected cases against the respondent and by no stretch of imagination could it be said that there was any laxity on his part nor he was responsible for the lapses in any manner. Immediately on being informed about the dismissal of petition by the counsel for the respondent in the connected litigation, the appellant sought the recall of the impugned final order dated 22nd February, 2019 at the earliest possible opportunity, with utmost diligence.

21. A prayer has, therefore, been made for setting aside the impugned orders closing his evidence; his right to further cross-examine the respondent and dismissal of his restitution petition with a prayer that the appellant may be given an opportunity to lead evidence, file documents and also cross-examine the respondent in order to bring on record true facts for fresh disposal of the restitution petition on merits.

22. Learned counsel for the appellant has explained that when the final order is challenged any interlocutory orders made during the trial can also be challenged in the same appeal, for which reliance has been placed on the decisions reported as Kores (India) Limited vs. Bank of Maharashtra &Ors. (2009) 17 SCC 674, Harjit Singh Uppal vs. Anup Bansal (2011) 11 SCC 672 and Satyadhyan Ghosal vs. Deorajin Debi (SMT) & Anr. AIR 1960 SC 941. Therefore, the appellant had originally filed one appeal against the final order in which the appellant had also challenged the order dated 06th January, 2018 and order dated 30th January, 2019 closing his right to lead



evidence and right to examine the respondent respectively. However, on an objection being taken, he has filed three separate appeals which are under consideration.

23. Learned counsel for the appellant has claimed that the appellant has been defrauded by the respondent and is entitled to relief as claimed by the appellant for which the appellant has placed reliance on Maya Devi vs. Lalta Prasad (2014) 142 DRJ 1 SC.

24. It is further argued that the conclusion of the learned Principal Judge, Family Court in regard to the validity of the marriage, has seriously prejudiced the appellant as it has direct bearing on his custody petition bearing Guardianship Case No. 148/2012 pending before the learned Guardian Judge, Tonk, Rajasthan to claim the custody of the daughter, which according to the appellant was born from his relationship with the respondent.

25. Learned counsel on behalf of the respondent also submits that the earlier petition under Section 9 of the Act, 1955 was not decided on merits but was disposed of on the statements made by the parties. There was neither any admission nor any finding of a valid marriage between the appellant and the respondent.

26. Further, it is admitted by the appellant himself that he was aware of the earlier marriage of the respondent with Sankar Nandi. He has claimed that he was informed by the respondent that she has taken divorce from her husband but aside from oral assertions, no proof of divorce has been produced. It is further submitted that mere hearsay claim of divorce which is denied by the respondent, is of no legal consequence. Moreover, the appellant intentionally chose not to appear in the present case while he and



his counsel were pursuing and appearing on the same dates in other litigations with the respondent. This clearly belies the claim of the appellant that there was negligence or lapses on the part of his counsel or that he was kept unaware of the proceedings in the present petition. It is asserted that the petition is nothing but a tool to harass the respondent and it has been rightly dismissed.

27. Submissions heard.

28. The appellant had sought restitution of conjugal rights by way of a petition under Section 9 of the Act, 1955. A precursor to this relief is a valid marriage as provided under Section 5 of the Act which lays down the conditions for marriage. Clause (i) of Section 5 provides that *“at the time of marriage, no party should have a living spouse.”*

29. The respondent in her testimony as RW-1 has categorically asserted that she never got divorced from her husband-Sankar Nandi and proved her original marriage certificate (Ex. RW-1/1) and original photographs of marriage (Ex.RW-1/2 to Ex.RW-1/8). In proof of her status as wife of Shankar Nandi, she produced various documents namely, original sale deed bearing No. 9678 dated 19th December, 2003 (Ex.RW-1/9), original document for taking house building land from Punjab National Bank (Ex.RW-1/10), certified copy of LIC policy bearing No. 418246303 (Ex.RW-1/12), joint savings account (Ex.RW-1/14), joint D-MAT account (Ex.RW-1/16), her passport (Ex.RW-1/17) and (RW-1/18), medical papers (Ex.RW-1/19), (Ex.RW-1/19A and RW-1/20), original birth certificate of the daughter (Ex.RW-1/22), and her educational papers, mark sheets etc. (Ex.RW-1/23 to Ex.RW-1/26). The authenticity of these documents has not been challenged by the appellant who has also admitted that he was aware at



the time of his alleged marriage with the respondent in the year 2007 that she was already married to Sankar Nandi.

30. The next aspect is the marriage of the appellant with the respondent. The appellant had placed documents on record to prove his marriage with the respondent on 17th February 2007 in Arya Samaj Mandir but despite numerous opportunities, he failed to step into the witness box to prove his assertions as well as his documents.

31. Even if all the documents of the appellant are admitted in regard to his marriage with the respondent and held to be genuine though they are claimed to be fabricated documents by the respondent, then too, the question is whether it would amount to a valid marriage between the appellant and the respondent No. 2 in terms of Section 5 (1) of the Act, 1955. According to the appellant, the respondent had informed him that she had already taken divorce from her husband, which makes his marriage with the respondent valid.

32. The Hindu Marriage Act, 1955 provides a complete mechanism for the divorce and an oral divorce is not recognized under the Hindu Marriage Act, 1955. The alleged divorce between the respondent and her husband-Sankar Nandi was required to be proved by way of cogent evidence, but no material particulars have been disclosed nor has a single document been produced by the appellant. Mere oral assertion of divorce which comes in the realm of hearsay evidence, can be of no consequence in the absence of any cogent evidence. Curiously, the appellant has asserted that the respondent has got remarried to her first husband.

33. The core issue in this case is the divorce of the respondent from her first husband which the appellant has miserably failed to prove. Learned



counsel for the appellant when questioned specifically, admitted that the only evidence in support of the alleged divorce between the respondent and her first husband-Sankar Nandi, was the information given to him by the respondent person. The only conclusion that necessarily follows from these bald assertions is that the respondent was already married in 2007 when she met the appellant which implies that the first requirement of clause (i) of Section 5 of the Act, 1955 which provides that '*both the spouses must be unmarried at the time of marriage*' has not been satisfied. Consequently, the alleged marriage of appellant with the respondent is void as provided under Section 11 of the Act, 1955 thereby disentitling the appellant to the relief of restitution of conjugal rights.

34. The other limb of the argument of learned counsel for the appellant was that once the respondent had admitted her marriage with the appellant and given the statement in the court, she is estopped from challenging the factum of marriage in the present proceedings. It was vociferously argued that once the court had accepted the statements and allowed the first restitution petition No. HMA No.440/08 issue of validity of marriage stands adjudicated and is binding as *res judicata* in all subsequent proceedings.

35. In order to appreciate this argument, it would be pertinent to refer to the statements of the parties made in first restitution petition HMA No.440/08 which read as follows:

"Statement of Ms. Dipanwita Thakur W/o Shri Arindam Saha r/o J 39, 1st Floor, Pandav Nagar, Patparganj, Delhi.
On SA:

I am the respondent in the present case a settlement has been arrived at between me and the petitioner and as per settlement we have started living together since January 2009. I have heard the statement of the petitioner



and I do not have any objection if the present petition is disposed of as compromised."

36. Similar was the statement of the appellant recorded on 28th February, 2009, which reads as under:

"Statement of Shri Arindam Saha s/o Shri RaghubirSaha, r/o J-39, 1st Floor, Pandav Nahar, Parparganj, Delhi.

On SA:

I am the petitioner in the present case a settlement has been arrived at between me and the respondent and as per settlement we have started living together since January, 2009. In view of the settlement arrived at between us the present petition be disposed of as compromised."

37. The final order made on the statements of the parties, reads as under:

"HMA No.440/08

Pr: Petitioner in person with counsel Shri K K Jha.

Respondent in person with counsel Shri Devki Nandan.

On putting inn appearance Shri Devki Nandan counsel for the respondent has filed vakalatnama on behalf of the respondent and both the parties have apprised the court that a settlement has been arrived at between them and as per settlement they have started living together since January 2009. Their statements to this effect has been recorded separately. In view of the settlement arrived at between the parties and separate statements recorded today in the court. The present petition is disposed of as compromised. File be consigned to the record room."

38. The statements of the parties and as well as the final order of the ADJ/HMA dated 28th February, 2009 clearly reflect that the parties did not



make any admission or statement about they being married according to Hindu customs and rites. The final order also does not speak about the marriage between the respondent and the appellant. The only statement made is that they both have decided to reside together. Mere decision to reside together neither amount to an admission of the respondent that she was validly married to the appellant estopping her from claiming otherwise in subsequent proceedings. Likewise, there is no finding on merit or otherwise by the learned ADJ/HMA in its order dated 28th February, 2009 about the marriage or its validity. There being no finding on merits, there is no question of invocation of principle of *res judicata*. In any case, the principle of estoppel cannot be invoked against a statute which makes the second marriage without the dissolution of first marriage, as void.

39. In the end, a contention has been made by the learned counsel for the appellant that the findings in the proceedings of the marriage between the appellant and the respondent would have an adverse impact on his petition seeking custody of the child. It may be noted that legitimacy and paternity are two different aspects and cannot be confused as each concept has its own legal consequences. The issue in this petition is confined to the restitution of conjugal rights which is dependent on existence of valid marriage between the parties. It has no bearing on the paternity of the child.

40. It may also be observed that the child was born on 04th January, 2008 during the subsistence of marriage between the respondent with Sankar Nandi and according to Section 112 of the Indian Evidence Act, 1872, a child born during the countenance of a valid marriage shall be a conclusive proof of the legitimacy of the child, unless it can be shown that the parties to



the marriage had no access to each other at any time when the child could have been begotten.

41. To conclude, the appellant's assertions of there being a valid marriage between him and the respondent is not proved. Also, the appellant has failed to prove the divorce of the respondent from her first husband. The learned Principle Judge has rightly concluded that there is no valid marriage between the appellant and the respondent and the petition under Section 9 of Hindu Marriage Act, 1955 has been rightly dismissed.

MAT. APP. (F.C.) No. 274/2019: (Challenge to order dated 06th January, 2019, closing the right of the appellant to lead evidence.)

42. The appellant has challenged the order dated 06th January, 2018 by which his right to lead evidence on the preliminary issue was closed. A blame was sought to be placed on the Advocate by claiming that he was negligent in handling this case and did not give proper information to the appellant. Admittedly, the same counsel was representing the appellant in other litigations at the same time and diligently pursuing the matters. Also, the appellant had also been appearing in person on various dates. Clearly, the appellant has no explanation for not leading the evidence.

43. It is also pertinent to note that after 06th January, 2018, when his evidence was closed, he appeared in the proceedings at the stage of recording of evidence of the respondent on 13th February, 2018, when the affidavit of evidence of the respondent was tendered and thereafter, for cross-examination on 23rd July, 2018, 25th September, 2018, 28th November, 2018, 07th December, 2018 and finally on 30th January, 2019, when his right of further cross-examination of the respondent was closed. The counsel had been appearing on his behalf and had even cross-examined the respondent



on three dates. It is also not refuted by the appellant that his counsel was appearing with him in other litigations with the respondent. His own submissions show that there was no negligence or lapses on the part of his counsel, which led to the closing of his evidence. It would not be out of place to mention that the appellant and his counsel appeared on various dates after the impugned order, but no steps were taken for recalling of the impugned order and it has only been challenged along with the main appeal.

44. The learned Principal Judge, Family Court has rightly observed in the impugned order dated 06th January, 2018, that the appellant despite being given ample opportunities, has failed to adduce evidence to prove his marriage to the respondent; so much so that he even failed to file an affidavit of evidence. The respondent who was resident of Tonk, Rajasthan had been appearing in the court on the dates fixed for appellant's evidence.

45. The appellant has failed to show any infirmity in the order dated 06th January, 2018 with which the evidence of the appellant was closed. The appeal is without merit and is, therefore, dismissed.

MAT. APP. (F.C.) No. 284/2019: (Challenge to order dated 30th January, 2019, closing the right of the appellant to cross-examine the respondent.)

46. The appellant's further cross-examination of the respondent was closed vide order dated 30th January, 2019 after she had been subjected to cross-examination on three effective dates. An opportunity for cross-examination was given on 13th February, 2018 and thereafter, the respondent was part cross-examined on 23rd July, 2018, 28th November, 2018 and 07th December, 2018. Sufficient opportunities were given to the appellant for cross-examination and there is no infirmity in the order dated



30th November, 2018 vide which the right to further cross-examine the respondent was closed.

47. The present appeal is also without merit and is dismissed.

CM APPL. 37082/2019 (Stay) in MAT.APP.(F.C.) 220/2019

CM APPL. 46302/2019(Stay) in MAT.APP.(F.C.) 274/2019

CM APPL. 47558/2019(Stay) in MAT.APP.(F.C.) 284/2019

1. In view of the judgement passed in the appeals, the applications are disposed of as infructuous.

**(NEENA BANSAL KRISHNA)
JUDGE**

**(MUKTA GUPTA)
JUDGE**

JUNE 03, 2022
S.Sharma

न्यायमेव जयते