

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Subhendu Samanta

FA No. 111 of 2024

Sudhir Kumar
-vs-
Shrimati Mithilesh Prajapati

For the appellant : Mr. Sourav Sen,
Mr. Shambha Chakraborty,
Ms. Adrisnata Chakraborty.

For the respondent : Mr. Amitava Mukherjee,
Ms. Antara Das,
Ms. Anita Das,
Ms. Arpita Saha

Heard on : January 9, 2025.

Judgment on : January 9, 2025.

Sabyasachi Bhattacharyya, J.:

1. The plaintiff/husband in a suit for declaration of the marriage
between the parties to be a nullity under Section 25(i) and (iii)

of the Special Marriage Act, 1954 (in short “SM Act”) is the appellant before us.

2. By the impugned judgment and decree, the learned trial Judge allowed an application filed by the defendant/wife challenging the maintainability of the suit.
3. The learned trial Judge proceeded on the premise that insofar as the relief under Section 25(iii) of the SM Act is concerned, the same is palpably barred by limitation since the proceedings were instituted beyond one year after the alleged fraud was discovered.
4. Insofar as the relief under Section 25(i) of the SM Act is concerned, the learned trial Judge was of the opinion that it is evident from the written objection filed by the appellant/husband in a proceeding under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “the DV Act”) that the parties have been residing together after the marriage. Moreover, the learned trial Judge also was of the opinion that in a previous suit filed by the husband for restitution of conjugal rights, it was admitted by him that the spouses were leading a conjugal life.

5. Learned counsel appearing for the appellant fairly concedes that insofar as the relief of nullity on the ground of fraud under Section 25(iii) of SM Act is concerned, the same appears to be barred by limitation on the face of the plaint.
6. However, insofar as Section 25(i) of the SM Act, that is non-consummation of the marriage, is concerned, the learned trial Judge overlooked that the husband, in his plaint under Section 9 of the Hindu Marriage Act, 1956 (in short "HM Act") in the previous suit for restitution of conjugal rights, had categorically averred that the appellant-husband and the respondent-wife have not been living together and there is no physical relationship between them. Moreover, it is contended that in the written objection filed by the appellant-husband in the DV Act proceedings as well, it was categorically pleaded that although the spouses lived under the same roof, there was no relationship between the parties as husband and wife. It was further alleged that when the appellant tried to cohabit with the respondent, she had avoided the same.
7. Thus, it is argued that the very premise of the impugned judgment is bad.

8. It is contended that at best the plaintiff/appellant/husband is required to prove his plaint case at the trial stage but the appellant could not have been shut out at the threshold by the learned trial Judge.
9. Learned counsel appearing for the respondent controverts the arguments of the appellant and places reliance on the printed form under Section 9 of the HM Act, which was filled in by the appellant/husband while filing his previous suit for restitution of conjugal rights. In paragraph no. 1 in the “pleadings” portion thereof, it was categorically averred that the marriage between the parties was solemnized on 16.04.2018 according to Hindu rites and customs and after the marriage both of them had been living / live together as husband and wife.
10. That apart, it is argued that the very fact that the appellant filed a suit for restitution of conjugal rights presupposes that they have been leading a conjugal life, since the expression “restitution” connotes “restoration” of the conjugal life, which obviously would be for consummation, which previously existed between the parties.
11. Thus, in view of such admission of the husband as to the parties having led a conjugal relationship, the learned trial

Judge was justified in passing the impugned judgment by construing such fact as an admission on the part of the appellant/husband of consummation having taken place between the parties.

12. Learned counsel appearing for the respondent cites a judgment of a learned Single Judge of the Punjab & Haryana High Court in the case of *Captain B. R. Syal Vs. Smt. Ram Syal* reported at *AIR 1968 Punjab & Haryana 489* in support of the proposition that an application for restitution of conjugal rights means that the petitioner seeks a renewal of cohabitation with the spouse who had started living separately. As such, it is argued that the filing of the restitution of conjugal rights suit by the husband itself indicates that there was a pre-existing conjugal relationship between the parties, which was sought to be resumed.
13. Learned counsel for the respondent next cites a judgment of a learned Single Judge of this Court in the matter of *Sm. Lagna Bhattacharjee Vs. Shyamal Bhattacharjee* reported at *AIR 1975 Calcutta 6*, where the learned Single Judge refused to accept the contention that since the marriage is registered under the provision of the SM Act, the same is deemed to be a

marriage under the said Act and the previous marriage under a different law loses its existence.

14. It was considered by the Court in the said case that Section 25 of the SM Act lays down the ground on which any marriage solemnized under the said Act may be a nullity and does not contemplate the annulment of a marriage entered into under some other Act, including the HM Act.
15. Borrowing from the said concept, the respondent argues that since the husband had admitted in the printed form filed in his suit under Section 9 of the HM Act that marriage was contracted under Hindu rites and customs, a subsequent marriage under the SM Act could not change the statute under which the marriage was solemnized.
16. Thirdly, learned counsel appearing for the respondents cites another judgment of a learned Single Judge of this Court in the case of *Supriya Chakraborty (Nee Paramanik) Vs. Champak Kumar Chakraborty* reported at *AIR 2000 Calcutta 76*. In the said judgment, the learned Single Judge had observed that Section 34 of the SM Act provides an embargo on the court to grant a relief in a proceeding under the said Act if there is an unnecessary or improper delay and it was observed that the

starting point of limitation for filing a suit under Section 25(i) of the SM Act would arise only after there was a willful refusal by the respondent to consummate the marriage.

17. Thus, it is submitted that although the statute does not provide a specific limitation period for initiating a proceeding under Section 25(i) of the SM Act, the courts, in the light of Section 34 of the said Act, have held that unless the proceeding is initiated within a reasonable period, the same should be dismissed. It is submitted that in the instant case the present suit for nullity was instituted after five years from the marriage and as such, the same was rightly dismissed at the outset.

18. Since it is evident from the second proviso to Section 25 of the SM Act that the relief sought by the husband under Clause (iii) of the said Section is palpably barred by limitation, which has also been conceded by learned counsel for the appellant, we need not enter into any detailed discussion on such aspect of the matter and hereby hold that the finding of the learned trial Judge to such extent was justified.

19. The primary question which arises upon hearing learned Counsel for the parties is whether the relief claimed by the

plaintiff/appellant/husband under Section 25(i) of the SM Act is barred by limitation.

20. A bare reading of Section 25 clearly shows that although statutory limitation period has been prescribed with regard to reliefs sought under Clause (ii) as well as Clause (iii) of the said Section, no such fetter of limitation has been imposed with regard to a relief of nullity sought under Clause (i) of Section 25 on the ground of non-consummation of the marriage. It is not for the court to read a limitation period into a statute where the Legislature, in its wisdom, has specifically omitted to incorporate such a fetter.
21. In fact, the very fact that limitation periods have been prescribed for a suit filed for annulment of marriage under the other two clauses of Section 25, that is, Clause (ii) and Clause (iii), but such limitation has not been imposed for a suit under Clause (i), itself is sufficient to show that the intention of the Legislature was specifically not to include any limitation period for a suit for declaration that a marriage under the SM Act is a nullity on the ground of non-consummation of the marriage.
22. Learned Counsel for the respondent has cited *Supriya Chakraborty (supra)* in support of his contention regarding

limitation. However, in the said decision, the court was considering the submission of one of the parties to the effect that Section 34 of the SM Act puts an embargo upon the court's power to grant a relief where there has been an unnecessary or improper delay in instituting the proceedings. However, even in the said case, the learned Single Judge did not lay down any ratio that there is any limitation period whatsoever for a suit under Section 25(i) of the SM Act. In fact, the party which advanced the argument on Section 34 itself had also submitted that it is only when the proceeding reaches the stage of deciding the question whether the relief claimed should be decreed or not that the occasion will arise for the court to decide the question whether there has been any unnecessary or improper delay in instituting the proceeding under Section 25(i) of the SM Act.

23. Hence, it is only at the stage of final hearing of the suit that the court may or may not consider the question as to whether the relief claimed in the present suit ought to be turned down on the ground that the same was filed with an unnecessary or improper delay. The said issue, if at all raised and formulated by the court, has to be decided upon evidence being adduced

by both the parties, upon a full-fledged trial being held and could not have been a ground for dismissing the suit at the threshold stage. Thus, we are unable to accept the submission on such count made by the respondent.

24. Next comes the question as to whether the suit filed by the present appellant for nullity ought to have been dismissed at the outset on the ground that the husband has admitted that there was consummation of marriage between the parties.

25. We, however, are unable to convince ourselves in that regard as well. It may be noted here that the “pleadings” in a suit, as per the definition given in the Code of Civil Procedure, comprise of the plaint and the written statement of the parties. The purpose of a printed format, which is used in certain jurisdictions, is to bring before the court the necessary facts of the case in a nutshell. However, it is only the plaint which comprises of the pleadings of the plaintiff and it is open to the plaintiff, in the plaint, to incorporate further details even beyond the printed format.

26. Although the pre-printed format in the present case was supported by a verification signed by the husband, in the very same case, the husband also filed a proper plaint within the

contemplation of Orders VI and VII of the Code of Civil Procedure, which was also verified.

27. In paragraph no. 1 of the plaint, it was merely stated that the petitioner and the respondent are legally married husband and wife and their marriage was solemnized on 16.04.2018 in front of Ratna Singha, Marriage Officer. Thus, from the very statement it is evident that the marriage was solemnized not as per Hindu rites and customs but before a Marriage Officer, indicating that it was a marriage contracted under the SM Act. The statements regarding the marriage being held according to Hindu customs, as found in the printed form, are the usual printed averments which are there in the form even before the filing of the same. It is customary that in jurisdictions requiring such forms to be filled up, the relevant blanks are filled up by the parties and the same provides in a nutshell the rudiments of the facts of the case. Thus, in the present case, we cannot rely on the averments of the printed form and hold that those override the averments of the husband in the main plaint of the restitution of conjugal rights suit.

28. Even if we proceed on the premise that the husband took a contradictory stand in his previous suit for restitution regarding

the Act under which the marriage was solemnized, it is not clear from the said contradictory averments as to which marriage took place prior to the other. Whereas, in the printed form, the date of the marriage is mentioned as April 16, 2018, the same date is also mentioned in paragraph no. 1 of the plaint. In the absence of any clinching proof or clear and unequivocal averment to show that the Hindu marriage took place prior to the special marriage, it is beyond the jurisdiction of the trial court and/or this court to hold at the outset that the current suit SM Act is not maintainable.

29. In any event, the said issue was a non-issue in the impugned judgment and having not been raised before the learned trial Judge, we cannot dwell at length over the same. As such, the judgment of the Punjab & Haryana High Court cited by learned Counsel for the respondent is not at all relevant in the context.

30. It is also important to note that in the said judgment of the in the case of *Captain B.R. Syal* (supra), the Punjab & Haryana High Court had distinguished between “sexual intercourse” and “cohabitation” and had observed that in a suit for restitution, the petitioner seeks renewal of “cohabitation”.

31. The expression “cohabitation”, in plain English, means joint residence and/or living together. The same may or may not include ‘sexual intercourse’, which is synonymous with ‘consummation’ within the contemplation of the SM Act. Thus, it may very well be that the parties cohabited with each other but there was no consummation of marriage between the parties by way of sexual intercourse.
32. Section 22 of the SM Act as well as Section 9 of the HM Act provide for restitution of conjugal rights. The language used in both the said provisions is that “when either the husband or the wife has without reasonable excuse withdrawn *from the society of the other,.....*”.
33. The “society of each other” might or might not mean consummation of marriage between the two by way of sexual intercourse and, as such, even if the expression “restitution” is taken on its face value, a suit for restitution of conjugal rights can only mean that the plaintiff seeks a restoration of the cohabitation, that is, living together, of the parties as husband and wife, where the underlying intent may or may not be of consummation.

34. We must also not be oblivious to the present social context in that regard. In modern day Indian society, there are several marriages between people of advanced years or otherwise, where consummation is an unnecessary appendage to the marriage. Marriage has several connotations much beyond the limited perspective of consummation and the spouses may very well want to lead a matrimonial life without having sexual intercourse amongst themselves. Thus, we cannot restrict the meaning of marriage to the primitive and archaic expression which was previously used (which we deliberately choose not to mention here, since it is most inappropriate and derogatory to the dignity of the couple) to connote the entire perspective of marriage within the restricted realm of sexual intercourse.
35. Seen from such perspective as well, the suit for restitution of conjugal rights may or may not imply that there was prior sexual relationship between the parties, which is precisely the synonym of consummation.
36. Thus, looking at the matter from the said angle as well, we do not find that mere institution of a prior suit for restitution of “conjugal rights” necessarily means an admission, that too, an

unqualified admission, on the part of the husband that there was consummation between the parties.

37. In any event, we need not dwell at such length on the said aspect of the matter, since in paragraph no. 2 of the petition under Section 9 of the HM Act, the appellant / husband had categorically mentioned that after marriage, the petitioner and respondent were not living together and did not have any physical relationship inbetween them.

38. Insofar as the written objection filed by the husband in the DV Act proceeding initiated by the wife, in paragraph no. 10 of the said written objection, the appellant/husband, in no uncertain terms, stated that though the parties lived under the same roof, there was no relationship between the two as husband and wife and when the husband tried to cohabit with the wife, she avoided the same. Thus, we do not find that at any point of time the husband admitted consummation having taken place between the parties.

39. Hence, the learned trial Judge erred in law and in fact in proceeding on a complete misappreciation of the pleadings of the appellant-husband in the previous legal proceedings in dismissing the current suit at the threshold on the ground that

the husband had admitted previous consummation between the parties and thus negating the grounds taken by the husband under Section 25(i) of the SM Act at the outset without giving him any opportunity of proving his allegations on trial.

40. In such view of the matter, we are of the opinion that although the learned trial Judge was justified in holding that the ground under Section 25(iii) of the SM Act taken by the husband in his suit for annulment of the marriage was time-barred, the learned trial Judge completely erred in law on the other aspect of the matter in dismissing the suit even on the ground of Section 25(i) of the SM Act.

41. Accordingly, FA No. 111 of 2024 is partially allowed on contest, thereby setting aside the impugned judgment and decree dated February 28, 2024 passed by the learned Additional District Judge, Fast Track Court – II, Howrah Sadar, District: Howrah in Matrimonial Suit No. 330 of 2023 so far as the dismissal of the suit is concerned.

42. The matter is thus remanded to the learned trial Judge for hearing the same on merits upon granting opportunity to both the parties to adduce evidence in accordance with law and

holding a full-fledged trial, but restricted only to the ground of non-consummation of marriage under Section 25(i) of the SM Act.

43. The finding of the learned trial Judge regarding the relief under Section 25(iii) of the SM Act being barred is, however, hereby sustained.

44. In view of the implicit urgency involved in the matter, since it arises out of a matrimonial dispute and directly pertains to the lives of both the parties, it is expected that the parties will cooperate with the learned trial Judge to ensure that the suit is decided on merits at the earliest.

45. There will be no order as to costs.

I agree.

(Subhendu Samanta, J.)

(Sabyasachi Bhattacharyya, J.)