

Court No. - 29

Case :- FIRST APPEAL No. - 394 of 2024

Appellant :-

Respondent :- (Deceased) And 2

Others

Counsel for Appellant :- Shailendra Kumar Ojha, Shyam Surat Shukla

Counsel for Respondent :- Rakesh Dubey

Hon'ble Vivek Kumar Birla, J.

Hon'ble Syed Qamar Hasan Rizvi, J.

1. Heard Shri Shyam Surat Shukla, learned counsel for the appellant and Shri Rakesh Dubey, learned counsel appearing for the respondent.

2. The present appeal has been filed against the judgement and order dated 10.01.2024 passed by Additional Principal Judge, Family Court No.3, Kanpur Nagar, in Case no.893 of 2022 (), under Section 11/5 of Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act').

3. One filed a petition, under Section 11 of the Act on 05.04.2022 on the ground that the marriage was an outcome of fraud as he has come to know that (the wife, appellant herein) was already married whereas at the time of marriage, she projected herself as unmarried and even produced various documents showing herself as unmarried girl and that she has also not converted into Hinduism and therefore, the marriage be declared void after filing of the petition. Unfortunately, the husband, died on 24.02.2023 in a road accident.

4. By the impugned order dated 10.01.2024, the application filed by the parents after the death of their son was allowed holding that the provisions of Order 22 of the Civil Procedure Code (hereinafter referred to as the 'CPC') are applicable in the present

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case in the light of the provisions of the Family Court Act and the parents were made party to the proceedings to pursue the petition.

5. It is submitted by learned counsel for the appellant that the dispute cannot continue after death of one of the spouse during the pendency of the litigation. He submits that after the death of the husband on 24.02.2023, the petition would stand abated.

6. It is further submitted that the Court below has committed a gross mistake of law in holding that the provisions of Order 22 CPC would be applicable in view of Section 10 of the Family Courts, Act, 1984.

7. Per contra, learned counsel for the respondent has supported the impugned order and submits that the Court below has not committed any mistake in allowing the aforesaid application as the property rights would certainly be get affected from the outcome of the present petition filed under Section 11 of the Hindu Marriage Act, if the marriage is declared void. He has placed reliance on a judgement of Hon'ble Division Bench judgement of this Court in ***Garima Singh Vs. Pratima Singh and another, 2023 (9) ADJ 101 (DB)*** by making reference to paragraphs 37 to 48 of the judgement.

8. We have considered the rival submissions and have perused the record.

9. Before proceeding further, it would be appropriate to take note of the relevant provisions of law.

10. Sections 5 and 11 of the Hindu Marriage Act reads as under:-

"5. Condition for a Hindu Marriage

" A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-

1. neither party has a spouse living at the time of the marriage;

2. at the time of the marriage, neither party-

i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

iii) has been subject to recurrent attacks of insanity;

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3. the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

4. the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

5. the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;"

11. Void Marriage

"Any marriage solemnized 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."

11. Sections 7 and 10 of the Family Courts Act, 1984 reads as under -

"7. Jurisdiction- (1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation - The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any

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person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

10. Procedure generally.-

"(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

(Emphasis Supplied)

12. Order 22 Rule 3 CPC reads as under-

Order 22, Rule 3 of CPC

Rule 3 deals with the procedure in case of death of one of several plaintiffs or of sole plaintiff. It states that—

"(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause

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the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

(Emphasis Supplied)

13. It is not in dispute that the petition under Section 11 of the Act was filed by the husband and he unfortunately died during pendency of the petition.

14. Two questions arise for consideration in the present case: (1) whether the provisions of CPC particularly Order 22 CPC are applicable in the proceedings before the Family court or not?; and (2) whether the parents can be substituted as legal representatives of the deceased to pursue the proceedings pending before the Family Court under Section 11 of the Act?

15. Insofar as the first question is concerned, a bare reading of the provisions quoted above would clearly reflect that the provisions of CPC other than the proceedings under Chapter IX of the Cr.P.C. would be applicable in all proceedings pending before the Family Court and that for the purpose of the said provision of the Code, a family court shall be deemed to be a Civil Court.

16. Learned counsel for the appellant could not dispute the legal position.

17. Accordingly, the question no. 1 is answered in affirmative and it is held that provisions of Order 22 CPC are applicable in the proceedings pending before the Family court under Section 11 of the Act.

18. Insofar as the second question is concerned, learned counsel for the respondent has placed heavy reliance on the judgement of this Court in *Garima Singh* (supra) and submitted that the parents who are legal representatives of the deceased husband Deepak Mahendra Pnadey are entitled to be made a party to pursue the proceedings under Section 11 of the Act.

19. The question involved in *Garima Singh* (supra) was that as to whether the first wife has a right to seek declaration under Section

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11 of the Act that the marriage performed by the husband with second wife was a void marriage, in other words, whether she is entitle to file a petition for obtaining such declaration.

20. After considering various provisions of Sections 5, 9 and 11 of the Act and Section 7 of the Family Court Act, it was held that the Family Court has rightly granted the right to the first wife to file an application under Section 11 of the Act.

21. Learned counsel for the respondent has referred to paragraphs 37 to 48 of *Garima Singh* (supra). We have gone through the entire judgement carefully.

22. Relevant paragraphs 37, 44 to 48 of *Garima Singh* (supra) are quoted as under:

"37. The term "either party thereto" shall be interpreted in harmony with "against the other party". The inclusion of the phrase "against the other party" was intended to provide a clear and purposeful understanding of the section's scope. The provision aims to ensure that anyone aggrieved by the solemnization of a second marriage has the option to file a suit in the family court, aligning with the objectives for which the Family Courts Act, 1984, was established. The underlying intention behind enacting the Family Courts Act, 1984 was to consolidate all litigation pertaining to marital disputes, including matters related to marriage, divorce, custody, guardianship, property partition, maintenance, and other familial suits, under one comprehensive platform. This consolidation was aimed at facilitating the efficient resolution of such cases.

44. The narrow interpretation given to the phrase "either party thereto" should not apply in cases where provisions of social welfare legislation are invoked. Such a restrictive interpretation would affect the principle of equal protection of laws and equality before the law, guaranteed under Article 14 of the Constitution. It would also negatively impact the rights of the first wife, as guaranteed under Article 14 and the provisions of the Family Courts Act, 1984.

45. If the first wife is deprived of seeking a remedy under Section 11 of the Hindu Marriage Act, it would defeat the very purpose and intent of the Act. The protection offered to legally wedded wives under sections 5, 11, and 12 of the Hindu Marriage Act would become insignificant in such a scenario.

46. Even if the meaning of the phrase "either party thereto" is considered to be unclear or ambiguous, the principle of beneficial construction should be applied to determine its intent. There is no justification for interpreting section 11 in a way that restricts its scope or narrows down its meaning. The purpose of granting a decree of nullity is to identify flaws in the marriage and subsequently declare it

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as void.

47. *In the process of beneficial construction, the Court should lean towards an interpretation that serves the interests of justice and aligns with the broader objectives of the law. By doing so, the Court can ensure that the remedies available under section 11 are not unduly limited, and individuals seeking relief are not unjustly deprived of their rights. The ultimate aim of granting a decree of nullity is to annul a marriage that is found to be invalid from its inception, effectively treating it as if it never existed. Therefore, it is essential to interpret the relevant provisions in a manner that facilitates a fair and just outcome for the parties involved.*

48. *In conclusion, we uphold the family court's decision, which grants the first wife, the respondent in this case, the right to file an application under section 11 of the Hindu Marriage Act. This application seeks the declaration of the second marriage as illegal and void. The Court affirms the validity of the impugned ruling, allowing the first wife to pursue legal recourse to nullify the second marriage on the grounds of its illegality. Accordingly, appeal is dismissed."*

(Emphasis Supplied)

23. In *Garima Singh* (supra) the Court was mainly considering the terms "either party thereto" and it was held that the narrow interpretation given to the phrase "either party thereto" should not apply in cases where provisions of social welfare legislation are invoked. It was also observed that if the first wife is deprived of seeking a remedy under Section 11 of the Act, it would defeat the very purpose and intent of the Act. The protection offered to legally wedded wives under Sections 5, 11 and 12 of the Act would become insignificant in such a scenario. It was also observed that the Court should lean towards an interpretation that serves the interests of justice and aligns with the broader objectives of the law and by doing so, the Court can ensure that the remedies available under Section 11 are not unduly limited and the individuals seeking relief are not unjustly deprived of their rights.

24. It is needless to say that ultimately the aim of granting a decree of nullity is to annul a marriage that is found to be invalid from its inception effectively treating it as if it never existed. In *Garima Singh* (supra), the first wife has claimed that her marriage was subsisting when second marriage was performed by the husband and as such, in the light of the provisions of Section 5 of the Act,

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the second marriage performed by the husband with the appellant-Garima Singh was void ab initio. Indisputably, the property rights are always involved in such cases when the marriage itself is being claimed as void ab initio. Therefore, clearly, the rights of the parties who are legal representatives of the deceased husband are also affected. Hence, in the present case, the parents have a right to get a declaration that the marriage between Shatakshi Mishra, the appellant herein and their son was in violation of provisions of Section 5 of the Act as their property rights are directly affected and they have a right to be made a party to the petition under Section 11 of the Act after the death of their son.

25. To draw further strength to our reasoning and conclusion we would also like to refer to certain other judgements of Hon'ble Apex Court. In **Maharani Kusumkumari and another vs. Smt. Kusumkumari Jadeja and another**, (1991) 1 SCC 582, the second wife was permitted to file the petition under Section 11 of the Act as the property rights of the family members including the legitimacy of children of void and voidable marriage (section 16 of the Act) would also be involved in a case of claim for property. While interpreting Section 11 of the Act (as it stood prior to amendment in 1976), it was held that the petition filed after death of other spouse was maintainable. The legislative intent was gathered from reading of Section 16 and 1976 amendment as well as Law Commission's report. It was also held that beneficent construction is required insofar as the interpretation of statute is concerned. In the aforesaid case, the appellant-Maharani Kusumkumari married in the year 1960, however, due to strained relationship couple started living separately. Subsequently, the husband re-married the respondent-Smt. Kusumkumari Jadeja therein without legally separating from the appellant and the couple had several issues. The husband died in the year 1974. The appellant-Maharani Kusumkumari filed an application for grant of Letters of Administration and the respondent applied for probate on the basis of an alleged Will, which was denied by the appellant. During the pendency of the proceedings, the respondent filed a petition under Section 11 of the Act for declaring her marriage as a nullity. The appellant had challenged the maintainability of the petition under Section 11 of the Act on the ground that the marriage could not be declared nullity after death of Maharaja. The

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trial Court and the High Court have rejected the appellant's plea. After discussions, in paragraph 10 of the said judgement, it was held as under;

"10. Even if it be assumed that the meaning of the section was not free from ambiguity, the rule of beneficial construction is called for in ascertaining its meaning. The intention of the legislature in enacting Section 16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955. There is no reason to interpret Section 11 in a manner which would narrow down its field. With respect to the nature of the proceeding, what the court has to do in an application under Section 11 is not bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flaw in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void. we, therefore, hold that an application under section 11 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse. Accordingly, this appeal is dismissed with costs."

(Emphasis Supplied)

26. The appeal was dismissed and the maintainability of petition filed by the respondent-second wife under Section 11 of the Act was held to be maintainable.

27. It can, therefore, be safely concluded from bare perusal of the aforesaid judgement that the Legal Representative who is not "either of the parties" and was not one of the spouse to the marriage in question can pursue the petition filed under Section 11 of the Act that marriage should be declared void and therefore, their application filed under Order 22 Rule 3 CPC would be maintainable.

28. We would also like to refer to another judgement. Although the facts of that case are different, however, a perusal of the same also reflects that such proceedings can be pursued by the legal representatives of the deceased plaintiff. In the case of **Samar Kumar Roy (Dead) through Legal Representative (Mother) vs. Jharna Bera**, (2017) 9 SCC 591, the plaintiff sought declaration that the defendant was not his legally married wife and that she had no right to claim him as her husband as his alleged marriage with defendant was not legal and valid, and thus, claimed a permanent injunction restraining defendant from claiming plaintiff as her husband and temporary injunction. It is noticeable that the

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suit was not based on any ground specified under Section 11 or Section 12 of the Act or under the provisions of Special Marriage Act. In the aforesaid case, after the death of the plaintiff, his mother applied under Order 22 Rule 3 of CPC to be added as a legal representative of the plaintiff. The civil suit was filed on the regular side and was not filed under the provisions of Hindu Marriage Act or the Special Marriage Act. It was held that the suit was not barred either under Section under Section 34 of the Specific Relief Act or under the provisions of Sections 7 and 8 of the Family Court Act. It was held that the High Court erred in setting aside the order allowing the application for substitution of legal representative on the ground that after death of the plaintiff no right to sue survived in favour of the plaintiff's mother. In the aforesaid case, provisions of Section 34 of the Specific Relief Act, Sections 7 and 8 of the Family Court Act and Sections 11 and 12 of the Hindu Marriage Act were considered. While interpreting such provisions, Hon'ble Apex Court has referred to another judgment in the case of **Yallawva vs. Shantavva**, (1997) 11 SCC 159. Paragraph 17 of *Samar Kumar Roy* (supra) is quoted as under:

"17. This Court has referred to personal causes of action and held in Yallawva v. Shantavva which reads as follows: (SCC pp. 168-69, para 6)"

"6..... Save and except the personal cause of action which dies with the deceased on the principle of actio personalis moritur cum persona i.e. a personal cause of action dies with the person, all the rest of the causes of action which have an impact on proprietary rights and socio-legal status of the parties cannot be said to have died with such a person."

(Emphasis Supplied)

29. In this background, it is clear that in such matters the declaration would have an impact on proprietary rights and socio-legal status of the parties cannot be said to have died with such a person.

30. In view of the discussions made hereinabove, it can safely be concluded that after death of the husband who has filed a petition under Section 11 of the Act the parents have a right to be substituted as legal representatives under Order 22 Rule 3 CPC to pursue the proceedings. The second question is also accordingly

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answered in affirmative.

31. In such view of the matter, it is clear that if it is being claimed that the marriage is void, legal representative can be impleaded / substituted to pursue the petition filed under Section 11 of the Act.

32. In view of the above, we find no illegality or infirmity in the order impugned.

33. The appeal is devoid of merit and is accordingly, dismissed.

Order Date :- 8.5.2024

RKM