

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 851 OF 2015
WITH
CIVIL APPLICATION NO. 1821 OF 2015 IN S.A. NO. 851 OF 2015

Supriya Subhash Bhatmare ... Appellant/Applicant
Vs.
Shivanand Babaso Swami ... Respondent

Mr. P.S. Dani, Senior Advocate i/b. Mr. V.B. Rajure, Advocate for the appellant/applicant.

MR. N.J. Patil i/b. Mr. Amey Patil, Advocate for the respondent.

CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 19th April, 2018.
PRONOUNCED ON : 27th April, 2018.

JUDGMENT:

This Appeal is directed against the judgment and decree dated 16th June, 2015 passed by the District Judge-3, Kolhapur in Regular Civil Appeal No. 506 of 2012 declaring relief of nullity of marriage, thereby setting aside the judgment and decree dated 7th May, 2012 passed by the learned 4th Joint Civil Judge Senior Division, Kolhapur in Hindu Marriage Petition No. 378 of 2010. The original petitioner/wife is the appellant in present marriage petition.

2. Admit. By consent, the Appeal is heard finally and decided at the stage of admission. The substantial questions of law formulated is as follows:

- (i) Whether, by ignoring the provisions of Section 25 of the Special Marriage Act, the First Appellate Court has erred in holding that the marriage between the parties was performed with free consent and without misguiding the appellant, hence is a valid marriage?
- (ii) Whether the First Appellate Court has committed error of law by holding the marriage between the appellant and respondent as valid though there was no consummation of marriage and has failed to appreciate the provisions of Section 25 of the Special Marriage Act?

3. The facts of the case, in brief, are as follows:

As per the case of the appellant, both are residents of Pattan Kodoli, Taluka Hatkanangale, District Kolhapur. They are of same locality. The respondent lied that he was drawing salary of Rs.20,000/- p.m. and have a good job in the factory. He also promised her that he will try for her job. He obtained signature on blank papers and blank forms, as she trusted him. In the month of May 2009, he took her signatures on some documents with a false promise of service. Then he took her to Registrar's office at Kolhapur and obtained her signature by misguiding her. She did not

understand the procedure. She gave the signature but then she realized that a registered marriage was performed on 20th August, 2009 though she never intended to marry him. Thereafter she scolded him for such deception and refused to stay with him. As the marriage was without her intention and consent, she continued to stay with her parents and never stayed with the respondent. It is her case that marriage was never consummated, however, the respondent pursued her and harassed her in different ways, therefore, she filed the Petition for nullity. The respondent appeared in the matter and he strongly defended by filing written statement and it was contended that he never deceived her or gave false promise for job but it was a consensual, valid marriage. It was contended that he wanted to continue a married life with her and there cannot be nullity of marriage when they had sexual relations so Appeal is to be dismissed.

4. The trial Court framed issues. Both the parties tendered oral as well as documentary evidence and after considering the same, the trial Court held that the consent obtained was by fraud and the marriage was not consummated, hence decreed the Petition and declared the marriage null and void. Against this, the respondent

filed Regular Civil Appeal, it was contested by the appellant/wife. However, the Appellate Court allowed the Appeal and set aside the judgment and decree passed by the trial Court. Against this, the original petitioner/wife filed this Appeal.

5. The learned counsel for the appellant and respondent took me through the pleadings and evidence of both the parties. The learned counsel has relied on the judgment and order of the trial Court and has submitted that the appellant's case of performance of registered marriage without her intention and free consent was rightly accepted by the trial Court. She never intended to marry, never gave consent to marry so also they never stayed together even for one day and there was no sexual relationship between the parties and hence the trial Court has rightly decreed the Petition. He further submitted that the First Appellate Court ought to have considered the evidence in proper perspective. He has submitted that when the fact of non-consummation of marriage was stated on oath, then the respondent ought to have produced some evidence in support of his submissions. He argued that no documentary evidence to that effect is produced and finding given by the First Appellate Court is illegal and erroneous. It is to be set aside.

6. The learned counsel for the respondent has submitted that it was a registered marriage with one month prior notice given by the Registrar of marriage. The appellant and respondent were in love with each other 4 to 5 years prior to their marriage. The learned counsel argued that it is a love marriage, however, this fact was suppressed by the appellant from her father due to fear and therefore, she could not come and stay with the respondent/husband. He further submitted that the petitioner is always ready and willing to go and cohabit with him and therefore, not only they had sexual relations but she remained pregnant from him, however, she suffered miscarriage. The allegations of fraud are not sustainable. On the contrary, the appellant lied, therefore, no decree can be passed on the ground of fraud, misrepresentation or undue influence so also on the ground of non-consummation of marriage. He submitted that the Second Appeal must fail on the point of substantial question of law.

7. The Court has come across the most ironical situation that both the parties though unanimously claim that they did not stay together even for a day, are fighting with each other for nine years on the issue of their nuptial relationship. Thus, without leading a married life even for a day, the dispute of nullity is going on for 9 years. On the

point of nullity, two substantial questions of law are raised in view of requirement of Section 25 of Special Marriage Act. Section 24 of the Special Marriage Act is about marriages, which are void ab initio, and Section 25 of on voidable marriages. A marriage is voidable under the Section if one of the spouses challenges the validity of either of the grounds mentioned in Section 25 of the Special Marriage Act. Section 25 reads thus:

“25. Voidable marriages.—Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if,—

(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (9 of 1872): Provided that, in the case specified in clause (ii), the court shall not grant a decree unless it is satisfied,—

(a) that the petitioner was at the time of the marriage

ignorant of the facts alleged;

(b) that proceedings were instituted within a year from the date of the marriage; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the court shall not grant a decree if,—

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.”

8. The evidence and facts show that being a registered marriage, a notice was given in the month of May, 2009 in the office of Registrar at Bhavani Mandap, Kolhapur and signature was obtained and thereafter again she went to the same place on 20th August, 2009 and signed the papers. The appellant was adult and graduate

at the time of giving notice, therefore, it cannot be believed that she was deceived by the respondent under the pretext of providing job. The First Appellate Court discussed the evidence of all the witnesses on the point of performance of registered marriage and rightly answered that the fact of fraud or undue influence by the respondent/husband is not proved. It can be safely gathered from the evidence that it was a conscious decision of two adults to marry. There was no fraud on the part of respondent/husband. Whether the wife intended to marry or not is immaterial, however, her consent was a conscious consent to marry him is proved. In some cases, the parties do not intend to marry each other, however, with knowledge they marry against their wishes and may give consent unwillingly, however that consent cannot be said to be obtained with undue pressure or coercion. One may intend to marry however may not intend to marry a particular person, who is selected by the parents or not of his or her choice. There may be other compelling circumstances for consent than liking or intending to marry a person. Thus, in the issue of marriage, intention and consent are two different things and not be mixed up. While ascertaining the meaning and scope of words 'consent', 'intention', 'fraud' under section 25 of the Act, the context based on the facts and circumstances is to be taken

into account.

9. One of the most important objects of the marriage is a regularization of sexual relationship between the two parties and in absence of such relationship, the object of marriage is frustrated. Even a single occurrence of sexual intercourse amounts to consummation of marriage. Sexual starvation or refusal to have sex may be the grounds of cruelty, however it is not a case of nullity. Thus, in the present case, when the parties did not stay together even for a single day and no evidence is brought by the respondent when he claims that there was sexual relationship, then in absence of such evidence, the contention of the respondent is not accepted while the appellant establishes the case of non-consummation of marriage. In the present case, the Appeal is filed under section 25 of the Special Marriage Act. Section 25(1) speaks about non-consummation of marriage, however, it states that non-consummation is on ground of willful refusal of the respondent to consummate marriage. As per the case of the respondent, he never willfully refused for consummation of marriage. Even though it is accepted that he is ready and willing for keeping sexual relationship with the appellant, the fact proved is that there was no

consummation of marriage though the parties married in 2009, i.e., 9 years ago and have not stayed together even for a day.

10. The respondent/husband is resisting the relief of nullity and he claimed that there was sexual relationship between the parties. He also contended that the appellant was pregnant from him but there was miscarriage. However, as held by the First Appellate Court, this fact is denied by the appellant in her evidence, then the burden was on the respondent to produce documentary evidence of miscarriage. If the opinion of Gynecologist about the pregnancy test was available, evidence could have been produced on record, however, it was not brought and therefore, the fact of non-consummation of marriage is to be believed and accepted. The trial Court has taken a correct view on this point and learned Judge of the Appellate Court has committed error in holding that the marriage was consummated. Hence, substantial question of law no. 2 is answered in affirmative.

11. The time does not stop for anybody. All the Courts dealing with matrimonial issues have to consider that the age of the parties in marriage proceedings has important bearing on the issues before the Court. The appellant/wife was 21 years old and respondent/husband

was 24 years old when they got married in the year 2009. Thus, today the appellant is nearly 30 years old and respondent is 33 years old. The Courts below including the counsel before the Court have tried their level best for amicable settlement between the parties. At the request of the counsel and with consent of the parties, I have also tried to convince the parties to go for amicable settlement either to decide to live married life together afresh as husband and wife or to separate mutually so that they can rehabilitate their lives and free themselves from this deadwood marriage. However, it was in vain. The parties have become very bitter and vindictive towards each other and blame other party, has ruined his/her nine years of life. This attitude is going to ruin their further more years. This situation like Gordian knot is required to be dealt with, as lives of two young persons are at stake, may be due to their incorrect or self-destructive decisions. An irretrievable marriage is not a ground under Special Marriage Act but non-consummation of marriage is a ground.

12. Thus, substantial question of law No. 1 is answered in negative, i.e., in favour of the respondent/husband, as the appellant/wife has failed to prove that the consent obtained was under undue influence, coercion or fraud.

13. The substantial question of law No. 2 is held in affirmative, i.e., in favour of the appellant/wife on the ground of non-consummation.

14. Hence, I am of the view that for the reasons given and evidence discussed above, marriage is declared as nullity due to non-consummation. Therefore, it is decided as follows:

In the result, Second Appeal is allowed. The marriage between the appellant and respondent is declared as null and void. Decree to be drawn accordingly.

15. In view of this, Civil Application does not survive and the same is accordingly disposed of.

16. The learned counsel for the respondent submitted that the respondent wants to challenge this judgment before the Hon'ble Supreme Court and hence seeks stay for 8 weeks.

17. The learned counsel for the appellant opposed this prayer for stay of the judgment.

18. As the learned counsel for the respondent wants to challenge this judgment before the Hon'ble Supreme Court, the operation of this judgment is stayed for a period of 8 weeks from today.

(MRIDULA BHATKAR, J.)