APPELLATE CIVIL

Before Prem Chand Jain, J.

KARAM SINGH,—*Appellant.*

Versus

AMRO,—*Respondent.*

First Appeal From Order No. 30-M of 1965

February 12, 1970.

Hindu Marriage Act (XXV of 1955)—Sections 5, 11, 12 and 15—Decree for annulment of marriage passed in favour of wife—Husband filing appeal against the decree—Wife re-marrying during pendency of the appeal—Such marriage—Whether makes the appeal infructuous.

Held, that from the plain reading of section 15 of the Hindu Marriage Act, 1955, it is clear that it has no application to the decree of nullity of marriage passed under sections 11 and 12 of the Act and its operation is limited to a marriage dissolved by a decree of divorce. There is no other provision similar to section 15 of the Act which can be applicable in case of decrees passed under sections 11 and 12 of the Act. The moment a decree of nullity is passed in favour of either party, there is no disability on the other to contract a re-marriage. Section 5 of the Act prescribes the conditions which are necessary to be fulfilled in order to make a marriage valid and binding. A party by contracting marriage after obtaining decree of nullity does not violate any condition of section 5. The parties' status as husband and wife ceases to exist after the passing of the decree of nullity and their marriage is legally annulled. Section 15 cannot be read so as to include cases which are covered by sections 11 and 12 of the Act. Hence where a decree for annulment of marriage is passed and the wife re-marries during the pendency of the appeal by the husband against the decree, the appeal becomes infructuous. (Para 9)

First Appeal from the order of Shri R. S. Gupta, Subordinate Judge 1st Class, Ludhiana, dated 30th November, 1964, passing a decree of the annulment of the marriage of the parties in favour of the applicant against the respondent under secton 12 of the Act on the ground that respondent was impotent at the time of marriage and had continued to be so till the institution of the application.

S. S. KANG, ADVOCATE, for the appellant.

J. S. CHAWLA, ADVOCATE, for the respondent.

JUDGMENT.

P. C. JAIN, J.—Briefly the facts of this case are as follows:—

Smt. Amro filed an application on 6th December, 1963, under section 12 of the Hindu Marriage Act, 1955 (hereinafter referred to as

the Act), that her marriage with the appellant be declared null and void on the ground that her husband was impotent at the time of the marriage and had continued to be so until the filing of this petition. The application was contested by the husband who *inter alia* pleaded that he was potent, that the allegation was malicious and defamatory, that he was perfectly fit for accomplishing the sexual act, and that there was no earning member in the family of the wife and she desired him (appellant) to live with her mother and to support the children to which he did not agree, on which this false application was filed.

(2) On the pleadings of the parties, the following issues were framed by the trial Court:—

(1) Whether the respondent was impotent at the time of his marriage with the petitioner and had continued to be so till the institution of this petition?

(2) Whether there was any unnecessary or improper delay in instituting the proceedings ?

(3) Relief.

(3) Issue No. 1 was decided in favour of the applicant while issue No. 2 was decided against the respondent. Accordingly the application was allowed and a decree for the annulment of the marriage of the parties in favour of the respondent under section 12 of the Act was passed, on 30th November, 1964. Feeling aggrieved from the order of the learned Subordinate Judge, 1st Class, Ludhiana, the present first appeal has been filed.

(4) After hearing the learned counsel for the parties, I am of the view that there is no merit in this appeal.

(5) It is an admitted fact that in spite of several opportunities afforded to the appellant, he refused to subject himself to the medical examination. He, on one pretext or the other, did not get himself examined medically and finally refused to go to any doctor for his medical examination on 7th September, 1964. To prove whether the husband was impotent or not, the best evidence that could be produced by the respondent was to get him examined by a doctor; but as earlier observed, the husband refused to subject himself to the

medical examination. In these circumstances, the trial Court rightly drew an adverse inference against him. The only evidence is of the wife now who has categorically stated as A.W. 1, that her husband was impotent at the time of her marriage and continued to be so till the institution of the application. She stated that the respondent could never consumate the marriage. As the appellant did not get himself medically examined, the trial Court rightly believed the statement of the wife as she was the best person to depose about the impotency of the husband.

(6) It was contended by Mr. Kang, learned counsel that the appellant had produced Dr. Gurmel Singh and had himself appeared in the witness-box. According to the learned counsel, the statement of Dr. Gurmel Singh was sufficient to hold that the appellant was not impotent. I have gone through the statement of Dr. Gurmel Singh and am of the view that no reliance can be placed on it. The doctor is an eye specialist and admits that he did not record the result of his examination. He says that the appellant was examined as a private patient. As earlier observed, his statement does not inspire confidence and it is very difficult to place reliance on the same. In case the appellant was potent and was inclined to get himself medically examined, I see no reason why did he make a statement on 7th September, 1964, to the effect that he was not prepared to go to any doctor for his medical examination. There should not have been any hesitation to him for getting himself examined. It seems that the report from Dr. Gurmel Singh was procured by the appellant on which no reliance can be placed. The trial Court rightly rejected the statement of the doctor.

(7) It is also contended by Mr. Kang. learned counsel for the appellant, that the respondent did not get herself medically examined and as such an adverse inference should be drawn against her. This argument must fail on the short ground that the refusal of the respondent to get herself medically examined, would not lead to the inference that the husband is potent. There may be various reasons for a woman not to get herself medically examined and in the peculiar circumstances of this case no adverse inference can be drawn against the respondent from this fact alone.

(8) Before I part with the judgment, I may dispose of a preliminary objection raised by Mr. Chawla, learned counsel for the respondent that the appeal has become infructuous as the respondent

after the passing of the decree in her favour has remarried and has also given birth to children. On the other hand it was contended by Mr. Kang that the marriage performed by the respondent during the pendency of the appeal was a nullity. Reliance was placed on section 15 of the Act which

"15. *Divorced persons when may marry again,—*

When a marriage has been dissolved by a decree of divorce and either 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 presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the Court of the first instance."

(9) After giving my thoughtful consideration to the entire matter, I am of the view that the preliminary objection must prevail. From the plain reading of section 15 it is clear that it has no application to the decree of nullity of marriage passed under sections 11 and 12 of the Act and its operation is limited to a marriage dissolved by a decree of divorce. There is no other provision similar to section 15 of the Act which could be applicable in case of decrees passed under sections 11 and 12 of the Act. The moment a decree of nullity was passed in favour of the respondent under section 12 of the Act, there was no disability on the respondent to contract a remarriage. Section 5 of the Act prescribes the conditions which are necessary to be fulfilled in order to make a marriage valid and binding. The respondent by contracting marriage after obtaining decree of nullity did not violate any condition of section 5. The parties' status as husband and wife ceased to exist after the passing of the decree of nullity and their marriage was legally annulled. In case the appellant desired that the respondent should not have married during the pendency of the appeal, he could have obtained a stay order from this Court. I find myself unable to agree with Mr. Kang that section 15 should be read as if it also includes the cases which are covered by sections 11 and 12 of the Act. The view I am taking is fully supported by a

Division Bench decision of the Madhya Pradesh High Court in ***Mohanmurari*** v. ***Smt. Kusumkumari*** (1), wherein after considering all the relevant provisions of the Act, it was observed thus:—

> "In this state of the law, there was no legal incompetency in the respondent wife for contracting a re-marriage once her marriage with the appellant had been annulled by a decree of nullity. The marriage between the appellant and the respondent having been annulled, their status as husband and wife of each other had ceased to exist. If the appellant wanted the *status quo* to be preserved till the final decision of the appeals, he should have applied for a prohibitory order restraining the respondent from marrying again till the appeals filed by him had been decided. But, in the absence of any such order, the respondent was no more the wife of the appellant and there was no provision in law which created any impediment to her re-marriage. No provision of section 5 of the Act which laid down the conditions of a valid Hindu marriage was violated. The re-marriage was thus a valid marriage. It was neither void nor voidable. It could not be annulled or dissolved for the reason that it was contracted during the pendency of the appeals, nor could it be affected by the ultimate decision of the appeals, even if it went in favour of the appellant. Unfortunately, for the appellant, the law had made no provision for such a contingency, just as it has made in section 15 in the case of a decree of divorce."

Thus upholding the preliminary objection, I find that the present appeal has become infructuous as the respondent has remarried after the passing of the decree of nullity.

(10) No other point was urged.

(11) For the reasons recorded above, this appeal fails and is dismissed, but in the circumstances of the case I make no order as to costs.

N.K.S.

(1) A.I.R. 1965 M.P. 194.