$~32

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of decision: 12th October, 2023***

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T ***(oral)***

CM APPL. 3736/2018 *(Condonation of delay)*

1. The present Application under Section 5 of the Limitation Act, 1963 has been filed on behalf of the applicant/appellant seeking condonation of 12 days' delay in filing the present appeal.

2. For the reasons and grounds stated in the present application, the application is allowed, the delay of 12 days in filing the present appeal is hereby condoned.

3. Accordingly, the present application is disposed of.

MAT. APP.(F.C.) 22/2018

4. The present Appeal under Section 19 of the Family Courts Act, 1984 has been filed on behalf of the appellant against the Judgment and Decree dated 29.11.2017 passed by the learned Judge, Family Court, North, Rohini Courts, Delhi, whereby the Petition under Section 11 of the Hindu Marriage Act, 1955 *(hereinafter referred to as* "HMA, 1955"*)* filed by the respondent/husband was allowed thereby declaring the marriage between the parties as null and void.

5. The parties got married on 28.04.2009 according to the Hindu customs and rites. Admittedly, the appellant/wife had earlier got married to one Mr. Mukesh, but she was granted divorce in her first marriage on 31.03.2008. However, her first husband, Mr. Mukesh had preferred an Appeal against the grant of divorce *vide* FAO M-126/2008.

6. The appellant had admitted during the course of her evidence that she became aware of the pendency of the Appeal in December, 2008, when her counsel appeared before the High Court of Punjab and Haryana in the Appeal against her first divorce, but the said Appeal was eventually withdrawn after more than four years on 22.07.2012.

7. Apparently, due to the differences between the parties in their second marriage, the respondent/husband herein preferred the Petition under Section 11 of HMA, 1955 for getting the marriage annulled on the ground that the first marriage of the appellant was subsisting on account of appeal pending before the Punjab and Haryana High Court against the Decree of Divorce that was granted *vide* Order dated 31.03.2008 passed by the learned Additional District Judge, Jhajjar, Haryana. He claimed that the marriage of the appellant/wife during the subsistence of first marriage (since the Appeal was still pending) was null and void.

8. The learned Judge, Family Court observed that since the Appeal was pending against the first Decree of Divorce of the appellant at the time when she got married to the respondent, the marriage was subsisting in terms of Section 5 read with Section 15 of HMA, 1955. Consequently, the marriage between the parties was held to be null and void under Section 11 of HMA, 1955 and the marriage was accordingly annulled.

9. Aggrieved by the Judgment and Decree dated 29.11.2017, the appellant/wife has preferred the present Appeal.

10. **Submissions heard from the counsels for the parties, the documents and the evidence perused.**

11. It is an admitted case of the parties that the appellant herein was married to one Mr. Mukesh and she got divorced from her first husband on 31.03.2008. The Appeal against the Decree of divorce was preferred by her first husband, Mr. Mukesh *vide* FAO M-126/2008 on 22.05.2008 before the Punjab and Haryana High Court. The summons was duly served upon the appellant and her counsel appeared on her behalf of the said High Court in December, 2008. It is also admitted by the appellant in her testimony as RW1 that she became aware of the pendency of the Appeal before she got married to the respondent herein. Despite being aware of the pendency of the Appeal, she got married to the respondent on 28.04.2009. A plea has been taken on behalf of the appellant that the respondent was also aware about the pendency of the Appeal before they got married and he had assured that the pendency of Appeal is no deterrence for him to get married to the appellant. It is argued that once the respondent himself was privy to all the facts, he cannot be permitted to take the benefit of his own wrong. It is also contended on behalf of the appellant that the respondent was also a

divorcee at the time of his marriage with the appellant, but he declared himself to be a bachelor and, therefore, he misrepresented his marital status to the appellant.

12. Though it is provided under Section 23 of HMA, 1955 that a party cannot be allowed to take the benefit of its own wrong, but the question is whether a legal bar can be circumscribed by the consent of the parties.

13. Section 5 of HMA, 1955 provides for a valid marriage. It reads as under: -

> *"**Section 5: - Conditions for a Hindu marriage.—***
> *A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: -*
>
> ***(i) Neither party has a spouse living at the time of the marriage;***
>
> *(ii) At the time of the marriage, neither party —*
>
> *(a) is incapable of giving a valid consent to it in consequent of unsoundness of mind; or*
>
> *(b) 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*
>
> *(c) has been subject to recurrent attacks of insanity.*
>
> *(iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;*
>
> *(iv) 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;*
>
> *(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."*

14. Both the parties should not have a living spouse according to Section

5(i) of HMA, 1955. In case, there is a violation of this condition, the marriage is void in terms of Section 11 of HMA, 1955. Once there is a legal bar to the performance of the second marriage, the consent of the parties cannot confer the validity to a marriage held in violation of the condition specified in Section 5(i) of HMA, 1955.

15. With respect to the marital status of the respondent/husband, he had denied that he was a divorcee at the time of his marriage with the appellant. Both the parties had led evidence, but no proof of respondent being a divorcee could be brought on record.

16. The reliance has been placed by the appellant/wife on the profile of the respondent on *"JeevanSaathi.com"* Ex.PW1/R2, where the respondent's marital status was reflected *"awaiting divorce"*. As per URL, the date of this profile of the respondent on *"JeevanSaathi.com"* is 19.12.2013, which clearly reflected that this profile pertained to the present Divorce/Annulment proceedings and did not refer back to a time before he got married to the appellant. Therefore, there is no evidence whatsoever led to controvert the assertions of the respondent that he was a bachelor at the time of his marriage with the appellant.

17. It has been further contended on behalf of the appellant in the Divorce petition, the petitioner/respondent has stated that there was no child from the wedlock, when, in fact, one son was born from this wedlock on 26.04.2010.

18. The respondent has further explained that he was not aware of birth of the son and, therefore, his claim that they had no child, was based on his knowledge.

19. It is not in dispute that the parties separated in September-October, 2009 and the child was born on 26.04.2010. It is apparent that at the time

when the parties separated, the appellant was at a very initial stage of pregnancy, about which she herself may or may not have been aware. Therefore, it cannot be held that the respondent had intentionally stated wrong facts about the child in his Divorce petition. He, at the time of separation, was not aware of the son being born subsequently.

20. Learned counsel on behalf of the appellant had claimed that the Appeal was preferred beyond the period of limitation which was of 30 days. Since there was no legal impediment to the present marriage, it was validly performed on 28.04.2009.

21. **First and foremost**, we find that the marriage had been annulled by the Court of learned Additional District Juddge, Jhajjar, Haryana and not by a Family Court. The Appeal was, therefore, under Section 28(4) of HMA, 1955 which prescribes a period of 90 days for filing the Appeal. The Appeal was not under Section 19 of the Family Courts Act, 1984 which prescribes a limitation 30 days for filing an Appeal. Thus, the Appeal preferred on 22.05.2008, was within limitation of 90 days.

22. Section 15 of HMA, 1955 provides that when the parties can get re-married. It reads as under: -

> *"**Section 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."*

23. It is evident from the Section 15 of HMA, 1955 that if the Appeal has been preferred within Limitation, it is a bar to the second marriage till the Appeal is disposed of.

24. In the case of *Chandra Mohini Srivastava vs. Avinash Prasad Srivastava & Anr.* AIR 1967 SC 581, wherein it was observed that as per Section 15 of HMA, 1955, on dissolution of a marriage, a spouse can lawfully re-marry only if the time for filing the Appeal has expired or the Appeal if presented, has been dismissed.

25. In the present case, the parties had got married during the pendency of the Appeal that was in the knowledge of both the parties. Therefore, in terms of Section 15 of HMA, 1955, it has to be held that the dissolution of the first marriage was not confirmed and the marriage was subsisting on the date of marriage of the appellant with the respondent herein on 28.04.2009 which was in contravention of Section 5(i) of HMA, 1955.

26. Pertinently, the appellant herein had sought interim maintenance during the pendency of the Appeal from her first husband by moving the Application under Section 24 of HMA, 1955 which was disposed of on 03.09.2009 with the consent of the parties, whereby *pendente lite* maintenance @ Rs. 2,000/- per month was fixed and litigation expenses to the tune of Rs. 7,500/- were awarded.

27. Interestingly, even though the appellant had already got married to the respondent, she claimed her maintenance from the first husband in the pending Appeal against first husband which was granted *vide* Order dated 03.09.2009.

28. The very fact that the appellant had not only claimed but also accepted *pendente lite* maintenance during the Appeal from the first husband fortifies that the marriage was not finally dissolved.

29. The learned Judge, Family Court has, therefore, rightly declared the marriage between the parties as nullity under Section 11 of HMA, 1955.

30. For the foregoing discussions, we find no infirmity in the impugned Order dated 29.11.2017.

31. Accordingly, the present Appeal along with pending applications is dismissed being without merit.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 12, 2023
S.Sharma