

SAMAR KUMAR ROY (D) THROUGH LR (MOTHER)

A

v.

JHARNA BERA

(Civil Appeal No. 11200 of 2017)

SEPTEMBER 05, 2017

B

[R. F. NARIMAN AND SANJAY KISHAN KAUL, JJ.]

*Specific Relief Act, 1963 – s.34 – Maintainability of, at the behest of a legal representative of a dead plaintiff – Suit filed against defendant-respondent seeking declaration that defendant was not legally married wife of the plaintiff and has no right to claim the plaintiff as her husband inasmuch as the alleged marriage between plaintiff and respondent was not valid and also seeking permanent injunction against the defendant restraining her from disturbing him in office and otherwise – During pendency of suit, plaintiff died – Substitution of mother was allowed – However, order of substitution was set aside on the ground that after the death of plaintiff, no right to sue survived in favour of plaintiff's mother – Whether a suit filed under s.34 is maintainable at the behest of a legal representative of a dead plaintiff – Held: The examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act shows that the statute creates special rights or liabilities and provides for determination of rights relating to marriage – The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act – s.8(a) of the Family Courts Act excludes the Civil Court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation – It does not purport to bar the jurisdiction of the Civil Court if a suit is filed under s.34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage – An exclusion of the jurisdiction of the civil courts is not readily inferred – Given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has*

C

D

E

F

G

H

A *never taken place either de jure or de facto, it is clear that the civil court's jurisdiction to determine the said legal character is not barred either expressly or impliedly by any law – Family Courts Act, 1984 – ss.7, 8 – Hindu Marriage Act, 1955 – Jurisdiction of civil court.*

B **Disposing of the appeal, the Court**

**HELD: 1. It is obvious that a suit or proceeding between parties to a marriage for a decree of nullity or restitution of conjugal rights or judicial separation or dissolution of marriage, all have reference to suits or petitions that are filed under the Hindu Marriage Act and/or Special Marriage Act for the aforesaid reliefs. There is no reference whatsoever to suits that are filed for declaration of a legal character under Section 34 of the Specific Relief Act. [Para 13][279-C-D]**

D *Dhulabhai v. Madhya Pradesh* [1968] 3 SCR 662 – referred to.

**2. The examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act show that the statute creates special rights or liabilities and provides for determination of rights relating to marriage. The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act. Section 8(a) of the Family Courts Act excludes the Civil Court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the Civil Court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage. An exclusion of the jurisdiction of the civil courts is not readily inferred. Given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either *de jure* or *de facto*, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law. [Para 14][280-B-E]**

*Smt. Yallawwa v. Smt Shantavva* [1996] 7 Suppl. SCR  
268 : (1997) 11 SCC 159 – referred to.

A

3. The respondent has also argued that the 2006 suit is itself time barred inasmuch as the so called marriage between the parties took place on 13<sup>th</sup> December, 2002 whereas the suit was filed in January, 2006, that is beyond the period of three years mentioned in Article 58 of the Limitation Act, 1963. The appellant has submitted that instead of driving the parties to another long litigation, she would be prepared to share the estate of the deceased plaintiff with the respondent. This being the case, the respondent is called upon to file an affidavit, in which she has to disclose truly and faithfully to this Court all the amounts that have been received by her owing to her alleged marriage with the deceased plaintiff. 50% of the total amount stated therein shall be payable by her to the appellant within a period of eight weeks thereafter. [Para 16][280-G-H; 281-A, C]

B

C

*Krishna Pal v. Ashok Kumar Pal* (1982) 2 Cal LJ 366;  
*Tapash Kumar Moitra v. Pratima Roy Chowdhury*  
(1985) 89 CWN 671; *Sasanka Sekhar Basu v. Ms.*  
*Dipika Roy* AIR 1993 Cal 203; *Harmohan Senapati v.*  
*Kamala Kumari Senapati* AIR 1979 Orissa 51; *Smt.*  
*Ram Pyaari v. Dharam Das & Ors.* AIR 1984 All 147;  
*Smt. Lajya Devi v. Smt. Kamala Devi* AIR 1993 J&K  
31 – referred to.

D

E

Case Law Reference

(1982) 2 Cal LJ 366	referred to	Para 9
(1985) 89 CWN 671	referred to	Para 10
AIR 1993 Cal 203	referred to	Para 10
AIR 1979 Orissa 51	referred to	Para 11
AIR 1984 All 147	referred to	Para 11
AIR 1993 J&K 31	referred to	Para 11
[1968] 3 SCR 662	referred to	Para 13
[1996] 7 Suppl. SCR 268	referred to	Para 15

F

G

H

A CIVIL APPELLATE JURISDICTION: Civil Appeal No.11200 of 2017.

From the final Judgment and Order dated 15.10.2015 passed by the High Court of Calcutta in C.O. No. 3409 of 2013.

B Gourab Banerji, Sr. Adv., Sahil Tagotra, S. P. Mukherjee, Arjun Krishnan, Advs. for the Appellant

Rabin Majumder, Joydeep Mukherjee, Ms. Antima Bazaz, Advs. for the Respondent

The Judgment of the Court was delivered by

C R. F. NARIMAN, J. 1. Leave granted.

2. The present case arises out of a Title Suit filed in January, 2006 by one Samar Kumar Roy against Smt. Jharna Bera. The suit is instituted as a Title Suit under Section 34 of the Specific Relief Act, 1963 for a declaratory decree, and under Section 38 of the Specific Relief Act, 1963 for perpetual injunction. According to the plaintiff, the father of the defendant was a senior employee under the Directorate of Employment Exchange, Government of West Bengal. The plaintiff was a junior employee under the same Directorate. According to the plaintiff, by blackmail and coercion, a show of marriage was arranged by the defendant's father with the plaintiff by registration of the said marriage under the Special Marriage Act, 1954. The averments in the plaint are that no essential ceremonies of a Hindu marriage were performed and that there was no consummation of the said marriage thereafter. After narrating a litany of wrongs by the defendant, the plaintiff asked for the following reliefs:

F A. A decree of declaration that the defendant is not legally married wife of the plaintiff and that she has no right to claim the plaintiff as her husband inasmuch as the alleged marriages between the plaintiff and the defendant are not legal, valid and tenable in law;

G B. Permanent injunction against the defendant restraining her from claiming the plaintiff as her husband and disturbing the plaintiff at his office, on the way of the plaintiff going to office and coming back home;

H C. Temporary injunction;

D. For such other relief or reliefs the plaintiff is entitled to in law and equity.” A

3. A written statement was filed by the present respondent in the said suit, denying all the allegations contained therein. While the said suit was pending, the plaintiff died on 10<sup>th</sup> October, 2012. On 19<sup>th</sup> December, 2012, the plaintiff’s mother applied under Order 22 Rule 3 of the Code of Civil Procedure, 1908, to be added as a legal representative of the plaintiff. By an order dated 17<sup>th</sup> April, 2013, the plaintiff’s mother was so substituted. Against the said order, a revision was filed, and by the impugned order dated 15<sup>th</sup> October, 2015, the order dated 17<sup>th</sup> April, 2013 was set aside, it being held that after the death of the plaintiff, no right to sue survived in favour of the plaintiff’s mother. B C

4. Mr. Gourab Banerji, learned senior counsel appearing on behalf of the appellant, has submitted that the High Court’s judgment is wrong on principle, and has cited extracts from the 59<sup>th</sup> Law Commission Report of 1974 and various judgments to show that the plaintiff’s mother could continue the suit, inasmuch as the said suit was not, in substance, a petition for dissolution of marriages under either the Special Marriage Act, 1954 or the Hindu Marriage Act, 1955. It was a suit filed under the Specific Relief Act for declaration of a legal character which, according to him, was maintainable as such. D

5. On the other hand, learned counsel for respondent, has argued before us that the High Court judgment is correct and that, in substance, the suit is really for a decree for annulment of marriage and would, therefore, fall under the Special Marriage Act and/or the Hindu Marriage Act. He has referred to the Family Court’s Act, 1984 Sections 7 and 8, in particular, to buttress his submission that, in any event, the Civil Court’s jurisdiction would be barred the moment a suit of this nature is filed. E F

6. Having heard the learned counsel for the parties, the question that needs to be decided is as to whether a suit which is, in substance, a suit filed under Section 34 of the Specific Relief Act is maintainable at the behest of a legal representative of a dead plaintiff. G

7. Shri Banerji took us through portions of the 59<sup>th</sup> Law Commission Report 1974. What exercised the Law Commission was as to whether the expression “on a petition presented by either parties thereto” ought to be omitted, and third parties be allowed to ask for the reliefs that only the husband and wife could ask for under the Hindu H

A Marriage Act. Examples were given of a first wife being left out and persons who seek reliefs after the death of a party being left out. The Law Commission opined that there was no need to change the present law inasmuch as:

B “2.4 A third party (for example, a person interested in the estate of either the husband or the wife) can certainly question the validity of their marriage in a civil suit and obtain a finding, or he may even bring a suit for a declaration that the marriage was void. But such a decree, made by a civil court, will not be a decree of “nullity”, as contemplated by matrimonial law.

C 2.5 A void marriage can, no doubt be invalidated at the instance of other parties, but it is better not to incorporate the remedies of third parties into the Hindu Marriage Act and confuse matrimonial relief with declaratory relief.”

The Law Commission then went on to state

D “2.6. This does not mean that third parties have no remedy at all. They have- but not by a petition under the Hindu Marriage Act.

The Specific Relief Act, in Section 34, provides as follows:

E “Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief:

F “Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

Explanation- A trustee of property is a ‘person Interested to deny a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.’”

G Under section 35 of the Act, the declaration is binding only on the parties etc.

Banerji in his Tagore Law Lectures on the Law of Specific Relief, observed:-

H

“The Indian enactment, in one respect at any rate, has a more extended scope, for it contemplates the settlement, not only of conflicting claims to property but also of disputes as to status.”

Holland, in his ‘Elements of Jurisprudence’, explaining the meaning of “status” says:-

“The Chief varieties of status among natural persons may be referred to the following causes:

(1) Sex, (2) minority, (3) ‘patria potestas’ and ‘manus’, (4) coverture, (5) Celibacy, (6) mental defect, (7) bodily defect (8) rank, caste and official position, (9) race and colour, (10) slavery, (11) profession, (12) Civil death, (13) illegitimacy, (14) heresy, (15) foreign nationality and (16) hostile nationality. All of the facts included in this list, which may be extended, have been held, at one time or another, to differentiate the legal position of persons affected by them from that of persons of the normal type.”

There can, therefore, be no objection if a third party claiming an interest in the property, sues for a declaration that B was not the lawfully wedded of A. In an English case, it was specifically held that a declaration may be granted that a marriage has been dissolved. The grant of similar relief was held to be competent in a Calcutta case.”

8. We may hasten to add that since the Special Marriage Act did not contain an express limitation to the effect that the petition can only be filed by a party to the marriage, this was also recommended and, in fact, carried out by the Marriage Laws (Amendment) Act, 1976.

9. We find that the High Courts have uniformly taken the view that a suit for declaration of a legal character filed under Section 34 can be filed by a third party plaintiff, or continued at the behest of the legal representative of a dead plaintiff. Thus, in *Krishna Pal vs. Ashok Kumar Pal* (1982) 2 Cal LJ 366 a Single Judge of the Calcutta High Court was confronted with whether a suit filed in the Munsif’s Court for a declaration that there was no marriage solemnized at all would be without jurisdiction. Section 19 of the Hindu Marriage Act requires all suits or petitions filed under the Act to be instituted before a District Court, whereas a suit for declaration as to a legal status is to be instituted in the Munsif’s court. After referring to the prayer in that case, the

A learned Single Judge found:

B “9. As already stated, the plaintiff has chosen not to pray for any relief either by way of annulment of decree of nullity or by way of a decree for dissolution of the alleged marriage. The plaint filed by him cannot be considered to be a petition under the Hindu Marriage Act. The plaintiff has sought for certain declaration regarding the status of the parties and for consequential reliefs and the learned Munsif has jurisdiction under the Specific Relief Act to consider whether the plaintiff has made out any case for obtaining such discretionary declaratory and consequential reliefs. I add that the findings and observations made by the learned Munsif regarding the maintainability of the suit did not amount to determination of any other issue framed by him.

C I accordingly discharge this Rule without any orders as to costs. Let the records be sent down expeditiously.”

D 10. This statement of the law has since been followed by the Calcutta High Court in Tapash Kumar Moitra vs. Pratima Roy Chowdhury (1985) 89 CWN 671. Paras 12 to 15 of the judgment are as under:

E “12. I respectfully agree with the above observations of Chittatosh Mookerjee, J. in the case referred to above.

F 13. In the instant case the plaintiff-petitioner in his plaint has neither prayed for restitution of conjugal rights nor for dissolution of marriage under Section 9 or Section 13 of the said Act. He has also not prayed for annulment of alleged marriage by a decree of nullity. The plaintiff in the instant suit has asked for a declaration that the purported registration of the alleged marriage be declared null and void and consequently cancellation of the said purported registration of marriage.

G 14. In my opinion this suit is simply for cancellation of purported registration of the alleged marriage under the Hindu Marriage Act, 1955 and the Hindu Marriage Registration Rule, 1958 and consequential reliefs. If it is the averment that marriage has not been solemnized, then the registration under Section 8 of the Act read with relevant provisions of the said Hindu Marriage Registration Rule by itself will not result in making the marriage

H

complete and binding between the parties. Such registration may raise a presumption of marriage being solemnized. A

15. I am, therefore, of opinion that the plaint in the instant suit cannot be considered to be a petition under Section 19 of the said Act, and learned Munsif is fully competent and has jurisdiction to entertain, try and determine the suit.” B

And in *Sasanka Sekhar Basu vs. Ms. Dipika Roy* AIR 1993 Cal 203, it was held:

“16. In the instant case although the petitioner inter alia prayed for a declaration that the marriage between the parties was void, the same will not make the plaint ipso facto a petition under the Hindu Marriage Act within the meaning of S.19 of the said Act. Under S.11 and 12 of the Hindu Marriage Act the circumstances under which a petition can be filed for annulment of marriage on the ground that the same is void are clearly specified. But in the instant case, such declaration that the marriage is void has not been asked for by the plaintiff on any of such grounds on which such an annulment can be obtained under S.12 or even under S.11 of the said Act. The instant suit really appears to be on the face of the plaint, a suit for declaration as to the status of the parties. D

17. In deciding whether or not the plaint filed by the petitioner in substance is a petition under S.12 or under S.11 of the Hindu Marriage Act for annulling the marriage between the parties by a decree of nulling or for the matter of that under any other provisions of the Hindu Marriage Act and which is the proper forum for filing the suit, at the preliminary stage the Court is not called upon to record a finding about truth or otherwise of the allegations made in the plaint. The only question relevant for consideration at such a stage is whether on the basis of the averments made in the plaint and the prayers contained therein, the suit is a suit for annulment of marriage within the meaning of Hindu Marriage Act or for a declaration under the Specific Relief Act. E F G

18. Proceeding on such a basis it appears to me prima facie that suit is not one under S.11 or under S.12 of the Hindu Marriage Act or for any other provisions under the Hindu Marriage Act, but for a declaration relating to status. Therefore, not being a H

A petition under the Hindu Marriage Act, S.19 of the said Act is not attracted in the instant case. The learned Munsif, therefore, has jurisdiction to try the suit before whom such a suit can be maintained.”

B 11. A similar view has been taken by the Orissa High Court at the behest of a suit filed by the first wife in *Harmohan Senapati vs. Kamala Kumari Senapati AIR 1979 Orissa 51*; and by the Allahabad and Jammu and Kashmir High Courts in *Smt. Ram Pyaari vs. Dharam Das & Ors. AIR 1984 All 147* and *Smt. Lajya Devi vs. Smt. Kamala Devi AIR 1993 J&K 31* respectively.

C 12. An allied question that arises is as to whether suits of the present kind would be barred under any provision of law. The learned counsel for the respondent has brought to our notice Sections 7 and 8 of the Family Courts Act, 1984 which read as follows:

D 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

E (b) xxx xxx xxx xxx xxx

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

F (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) xxx xxx xxx xxx xxx

G (c) xxx xxx xxx xxx xxx

(d) xxx xxx xxx xxx xxx

(e) xxx xxx xxx xxx xxx

(f) xxx xxx xxx xxx xxx

H

(g) xxx xxx xxx xxx xxx

A

8. Exclusion of jurisdiction and pending proceedings- Where a Family Court has been established for any area

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

B

(b) xxx xxx xxx xxx xxx

(c) xxx xxx xxx xxx xxx

13. It is obvious that a suit or proceeding between parties to a marriage for a decree of nullity or restitution of conjugal rights or judicial separation or dissolution of marriage, all have reference to suits or petitions that are filed under the Hindu Marriage Act and/or Special Marriage Act for the aforesaid reliefs. There is no reference whatsoever to suits that are filed for declaration of a legal character under Section 34 of the Specific Relief Act. Indeed, in *Dhulabhai vs. Madhya Pradesh* (1968) 3 SCR 662, this Court had occasion to consider whether the civil court's jurisdiction was expressly or impliedly barred by statute. After referring to a number of judgments, this Court laid down 7 propositions of law, of which two are of relevance to the present case:

C

D

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

E

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

F

G

H

A (7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.”

B 14. On a reading of the aforesaid propositions, it is clear that the examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act show that the statute creates special rights or liabilities and provides for determination of rights relating to marriage. The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act. Section 8(a) of the Family Courts Act excludes the Civil Court’s jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the Civil Court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage. Also as was pointed out, an exclusion of the jurisdiction of the civil courts is not readily inferred. Given the line of judgments referred to by the High Courts, and given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either *de jure* or *de facto*, it is clear that the civil court’s jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law.

E 15. This Court has referred to personal causes of action and held in *Smt. Yallawva vs. Smt Shantavva* (1997) 11 SCC 159 at para 6 which reads as follows:

F “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.”

G 16. Learned counsel for the respondent has also argued before us that the 2006 suit is itself time barred inasmuch as the so called marriage between the parties took place on 13<sup>th</sup> December, 2002 whereas the suit was filed in January, 2006, that is beyond the period of three

H

years mentioned in Article 58 of the Limitation Act, 1963. Shri Banerji, appearing on behalf of the appellant, has drawn our attention to Section 16(1) of the Limitation Act in this behalf and has argued that, in any event in so far as his client is concerned, the cause of action would begin to run only from the date of death of the plaintiff, and that since he has applied within two and a half months for continuing the suit, the bar of limitation would not apply. We do not propose to go into this plea in view of the fact that Shri Banerji has very fairly submitted before us that instead of driving the parties to another long litigation, he would be prepared to share the estate of the deceased plaintiff with the respondent. This being the case, we call upon the respondent to file an affidavit, within a period of four weeks from today, in which she has to disclose truly and faithfully to this Court all the amounts that have been received by her owing to her alleged marriage with the deceased plaintiff. 50% of the total amount stated therein shall be payable by her to the appellant within a period of eight weeks thereafter.

17. The appeal is disposed of accordingly.