

(2011) 10 MAD CK 0053

Madras High Court

Case No: C.M.A. No's. 1420 and 1421 of 2009 and MP No's. 1 and 2 of 2011 in CMA No. 1420 of 2009 and M.P. No's. 2 and 3 of 20011 in 1421 of 2011

V. Prema Kumari

APPELLANT

Vs

M. Palani

RESPONDENT

Date of Decision: Oct. 19, 2011

Acts Referred:

- Child Marriage Restraint (Amendment) Act, 1978 - Section 5
- Criminal Procedure Code, 1973 (CrPC) - Section 125, 488
- Family Courts Act, 1984 - Section 19, 2
- Hindu Adoptions and Maintenance Act, 1956 - Section 18
- Hindu Marriage Act, 1955 - Section 11, 12, 12(1), 13, 13(2)
- Prohibition of Child Marriage Act, 2006 - Section 12, 3

Citation: (2012) 2 CTC 727 : (2011) 5 LW 791 : (2012) 2 MLJ 362

Hon'ble Judges: K. Mohan Ram, J; G.M. Akbar Ali, J

Bench: Division Bench

Advocate: T.S. Rajamohan, for the Appellant; D.S. Ramesh, for the Respondent

Judgement

G.M. Akbar Ali, J.

Appeal filed under Sec. 19 of the Family Court Act, 1984 against the order and decretal order passed by the learned Principal Family Judge, Chennai in FCOP No. 1345 of 2006 dated 22.7.2010.

2. The appellant in the above appeals, is the petitioner in O.P No. 650 of 2007, which was filed under Sec. 11 of Hindu Marriage Act 1955 to declare the marriage of the petitioner with the respondent as null and void. She is the respondent in O.P No. 163 of 2007 filed under Sec. 9 of the Act for restitution of the conjugal rights.

3. The appellant's petition for declaration of the marriage as null and void was dismissed and the respondent's petition for restitution of conjugal rights being

ordered. These appeals were preferred against the common order.

4. The case of the appellant is as follows:

The appellant was born on 19.1.1990 and was residing with her parents at No. 11/4, II Street, Kamarajar Nagar, Thiru.Vi. K. Nagar, K.C. Garden, Chennai.

5. The respondent was staying on the first floor of the appellant's house from the year 2004 to 2005. Taking advantage of the innocence of the appellant, the respondent by exercising fraud, coercion, undue influence, and mesmerizing through chanted lemons, controlled her mind and kidnapped her on 19.10.2005, from the custody of the parents. The appellant was hardly 15 years of the age at the time of the said unlawful act. She was taken to Thiruvannamalai by the respondent. The parents of the appellant lodged a complaint on 21.10.2005 for the alleged offence of kidnapping. On 22.10.2005, the appellant was rescued at Thiruvannamalai. In February 2006, the respondent alleged that he had married the appellant and sent photographs of the alleged marriage to the neighbours, friends and the appellant's parents. The respondent was warned about his illegal acts and a complaint was also given to the police.

6. The respondent filed O.P No. 163 of 2007 for restitution of conjugal rights. Since the alleged marriage is a child marriage and against the will of the appellant and also without the consent of the guardian, it is null and void and no such marriage exists in law. However, the appellant was constrained to file a petition under Sec. 11 of Hindu Marriages Act to declare the alleged marriage dated 19.10.2005 as null and void.

7. The respondent in his O.P No. 163 of 2007 and also in the counter filed in O.P No. 650 of 2007 would contend that the appellant was not a minor at the time of the marriage and the marriage was solemnised on 19.10.2005 as per Hindu Rights and Customs and it was a love marriage. He would further allege that they lived together as husband and wife for sometime and the parents of the appellant forcibly took her away from the respondent. Therefore, he has filed an application for restitution of conjugal rights and the petition filed by the appellant under Sec. 11 is not maintainable.

8. On the above averments, the learned Principal Judge, Family Court, Chennai enquired the applications. The Birth Certificate and the Transfer Certificate of the appellant were perused and it was found that the date of birth of the appellant was 19.1.90 and she had completed only 15 years and nine months at the time of the alleged marriage i.e., on 19.10.2005. However, the learned Judge found that Sec. 11 of the Hindu Marriage Act was not applicable as the ground raised in the petition will not fall under Sec. 11. The learned Judge also considered Secs. 12(c) and 13(2)(iv) of Hindu Marriage Act and found that the said provisions were also not applicable and in the result, the learned Judge dismissed the petition filed by the appellant and allowed the petition filed by the respondent. Aggrieved by which, the appellant has

preferred both the appeals.

9. We have carefully heard the contentions put forth on either side and perused the materials available on record.

10. In the course of the arguments, both sides admitted that at the time of the marriage on 19.10.2005 the appellant has only completed 15 years and 9 months. Obviously, it is a child marriage. However, the appellant has filed an application under Sec. 11 of the Hind Marriage Act 1955 which reads as follows:

11. Void marriages - 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. Sec. 11 deals with void marriages. Under the said section if any marriage solemnised after the commencement of the Act, contravenes any one of the conditions specified in the clauses (i),(iv) and (v) of Sec. 5 is void and either party can approach the court to declare the marriage as null and void.

12. Sec. 5 of the Act reads as follows:

Sec. 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 consequence 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;

13. To attract Sec. 11, there must be a contravention of clauses (i),(iv) and (v) of Sec. 5. The mere reading of sub clause (i),(iv) and (v) would show that this provision is not attracted. The case of the appellant is that she was minor child at the time of the

marriage which is voidable.

14. It is well settled that under Hindu Law the marriage of the minor is a voidable marriage at the instance of the minor. Sec. 12 of the Act deals with voidable marriages.

15. Sec. 12(1)(c) reads as follows:

12. Voidable marriages (1) (c)

That the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner (was required u/s 5, as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

16. This provision is applicable if the consent of the petitioner or the consent of the guardian of the petitioner was obtained by force or fraud. Admittedly, the consent refers to Sec. 5(ii)(a), (b) and (c), which deals with the persons suffering from unsoundness of mind, mental disorder and insanity. Therefore, this provision is also not applicable.

17. Sec. 13 of the Act deals with divorce on other grounds. Sub clause (2) of Sec. 13 deals with the wife presenting a petition for dissolution of her marriage.

18. Sec. 13(2)(iv) reads as follows:

13. Divorce(2)(iv):that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

19. To attract this provision the marriage should have been solemnised before she attained the age of 15 years and she has to repudiate the marriage after attaining that age but before attaining the age of 18 years. Therefore, this provision is also not applicable.

20. In the net result, the family court held as follows:

18. The marriage between the parties can be declared as null and void if the marriage is performed in violation of the conditions specified in clauses i, iv and v of section 5 of the Hindu Marriage Act. It is not the case of the respondent/wife that her marriage with the petitioner was solemnized in violation of conditions specified in clauses i, iv, and v of Section 5. Therefore, it is held that Section 11 of Hindu Marriage Act is not applicable to the case of the respondent/wife. It has also been held in the earlier paragraph that Section 12(1)(c) of the Hindu Marriage Act is also not applicable. Now we have to see whether Section 13(2)(iv) can be invoked for the purpose of granting the relief sought for by the respondent/wife. This clause was added by the amending act of 1976. It confers on girls who have been married

before attaining the age of 15 years, a right of repudiation. However, the right must be exercised before attaining the age of 18. The explanation to the clause enacts that it applies whether the marriage was solemnized before or after the commencement of the amending act. The repudiation also may be made before the girl has attained the age of 18. The clause only gives a right of repudiation as therein mentioned but the -petition for dissolution of marriage on this ground is maintainable by her after completing 18 years of age. The date of birth of the respondent/wife is 16.1.1990. The marriage was solemnized on 19.10.2005. Therefore, it is clear that the respondent/wife has completed 15 years of age on the date of the marriage. Section 13(2)(iv) applies only when marriage is solemnized before the completion of 15 years of age. Hence it is held that the respondent/wife cannot also invoke Section 13(2)(iv) of Hindu Marriage Act.

21. May be the Family Court had difficulty in annulling the voidable marriage of the appellant and found the anomaly in the provisions of Hindu Marriage Act 1955 in the case of child marriage. The Family court had all the reason to come to the above conclusion. But it is amusing how the court as well as the legal fraternity, who is supposed to help the court, have missed the correct provision under The Prohibition of Child Marriage Act, 2006 which came into force on 10.1.2007 to annul the voidable marriage of a child. The Child Marriage Restraint Act 1929 was enacted to restrain the solemnisation of child marriages. However, it dealt only with punishment for a male adult marrying a child and punishment for solemnization of child marriage. The later Act of prohibition of Child marriage in 2006, is more comprehensive and provides the remedy. Let us see the development of law on this subject.

22. The child marriage was and is prevalent in India. Though the Hindu Law has accepted such marriages, they are held to be voidable marriages. The minor child can always avoid such marriage on attaining majority. Therefore, there must be some provision under Hindu Marriage Act 1955 to declare the child marriage as voidable at the option of the child.

23. Sections 5, 12 and 13 of The Hindu Marriage Act 1955 stood as follows before the amendment in 1976 and in 1978:

Sec. 5: Conditions for a Hindu marriage:

5. 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) neither party is an idiot or a lunatic at the time of the marriage;
- (iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen 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;
- (vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

Section 12: Voidable marriages:

12....

(1)....

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required u/s 5, the consent of such guardian was obtained by force or fraud; or

13. Divorce:

(1) Any marriage solemnized, whether before or after the commencement of this Act, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) is living in adultery; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from virulent and incurable form of leprosy; or

(v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against the party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree;

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner;

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

By an amendment in 1976, section 13 of the Act underwent a sea of change and the present various grounds for divorce were incorporated. Significantly sub clause 2 of section 13 was amended to incorporate,

iii) that in a suit u/s 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding u/s 125 of the Code of Criminal Procedure, 1973 (2 of 1974), (or under the corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898); a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation: This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)

Similarly, sec. 5 sub clause (vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage was deleted, as it was opposed to The Child Marriage Restraint Act 1929.

Consequently section 12(c) was also amended as

12. Voidable marriages (1)

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner (was required u/s 5, as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or An amendment was made w.e.f. 1.10.1978 to sec. 5.(iii) increasing the age of the

girls from fifteen to eighteen and boys from eighteen to twenty one as conditions of marriage. However, corresponding amendment was not made in section 13(2)(iv) where the age of the girls still mentioned as fifteen for repudiation and eighteen as limitation.

24. As stated earlier, Sec. 5 deals with conditions for Hindu Marriage and to fulfill such conditions, the bridegroom should have completed the age of 21 years and the bride should have completed the age of 18 years at the time of marriage. The age of the bride and the bridegroom in sub clause (iii) of Sec. 5 was substituted under Act 2 of 1978 w.e.f. 1.10.1978. Prior to amendment it was "18 years and 15 years respectively. Sec. 12 of Hindu Marriage Act does not deal with contravention of Sec. 5(iii). However, Sec. 13(2)(iv) deals with wife filing a petition for dissolution of marriage on the ground that her marriage was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years.

25. The age 15 referred to in Sec. 13(2)(iv) is in consonance with the position that existed prior to the amendment of Sec. 5(iii). Obviously after the amendment by increasing the age of bride to 18 years, corresponding amendment to sub clause 13(2)(iv) was not made. That is why the trial court found that the ground under Sec. 13(2)(iv) was not available to the minor wife.

26. However, The Prohibition of Child Marriage Act, 2006 came into force on 10.1.2007 and Sec. 3 deals with child marriages to be voidable at the option of the contracting party being a child. It reads as follows:

Sec. 3.

Child marriage to be voidable at the option of contracting party being a child

(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage. Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the District Court only by a contracting party to the marriage who was a child at the time of the marriage

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along-with the Child Marriage Prohibition Officer

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority

(4) Whether granting a decree of nullity under this section, the District Court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion

of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money.

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the District Court and show cause why such order should not be passed.

27. Under Sec. 2(e) of the definitions, District Court includes Family Court. Therefore, the Principal Judge, Family Court is wrong in holding that there is no provision under the Hindu Marriages Act 1955 to declare the voidable marriage of the appellant as null and void.

28. Significantly marriage of a minor child in certain circumstances are also declared to be void under Sec. 12 of the Prohibition of Child Marriage Act, 2006. Sec. 12 reads as follows:

12. Marriage of a minor child to be void in certain circumstances:

Where a child, being minor -

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

29. If a minor child is taken or enticed out of the keeping of the lawful guardian and by force compelled or by any deceitful means induced to go through a form of marriage, the said marriage will be void. It means such a marriage is not valid and the section declares such marriage shall be null and void. Since the intervention of the Court is not necessary there is no provision in the Act to declare such marriage as null and void. In any event, the courts are not precluded from declaring such marriage as null and void.

30. It is well settled that quoting wrong provisions will not disentitle a party from getting a relief.

31. Though Sec. 11, 12(c) and 13(2)(iv) of the Hindu Marriage Act will not come to the rescue of the appellant, she is protected under Sec. 3 of the Prohibition of Child Marriage Act, 2006.

32. As stated above, when sec. 5(iii) of Hindu Marriage Act 1955 was amended to substitute 21 years and 18 years for 18 years 15 years respectively, Sec. 13(2)(iv) was not amended simultaneously to substitute 15 years in respect of the girl. Had it been amended there would not have been any difficulty in invoking Sec. 13(2)(iv). However, the provision under Prohibition of Child Marriage Act 2006 enables a child or his/her guardian or next friend to file a petition for annulling a child marriage

before the District Court which includes Family Court.

33. Though, in view of the position stated above, the amendment to Sec. 13(2)(iv) may not be necessary, we are of the considered view that it still requires an amendment by substituting the age 18 years for 15 years, so that in a voidable child marriage, the child or her guardian can have an option either to invoke The Hindu marriage Act 1955 or The Prohibition of Child Marriage Act 2006.

34. In the result, both the appeals are allowed with costs throughout. The orders passed by the learned Principal Judge, Family Court, Chennai in FCOP Nos.163 and 650 of 2007 dated 25.4.2011 are set aside. O.P No. 163 of 2007 is dismissed and O.P.No. 650 of 2007 is allowed declaring the marriage between the appellant and the respondent held on 19.10.2005 as null and void. Consequently, connected MPs are closed.

35. The Registrar(Judicial) is directed to place a copy of this judgment before the Hon"ble the Chief Justice for His Lordship's consideration for the circulation of the same to the District Judges and Family court Judges.