

A.F.R.

Reserved on: 7.8.2019

Delivered on: 13.9.2019

Court No. - 34

Case :- FIRST APPEAL No. - 40 of 2011

Appellant :- Prachi

Respondent :- Shailendra Kumar

Counsel for Appellant :- Rakesh Pandey, Vishnu Pratap Pandey

Counsel for Respondent :- Ghanshyam Dwivedi, M.S. Pipersania

Connected with

Case :- FIRST APPEAL No. - 107 of 2016

Appellant :- Shailendra Kumar

Respondent :- Prachi

Counsel for Appellant :- G. S. Dwivedi

Counsel for Respondent :- Rakesh Pande

With

Case :- FIRST APPEAL No. - 157 of 2016

Appellant :- Dr Prachi Sharma

Respondent :- Dr Shailendra Kumar

Counsel for Appellant :- Tej Prakash Mishra, Tej Prakash

Counsel for Respondent :- G.S. Dwivedi

Hon'ble Sudhir Agarwal, J.

Hon'ble Rajeev Misra, J.

(Delivered by Hon'ble Rajeev Misra, J.)

1. First appeal No. 40 of 2011 (Prachi Vs. Shailendra Kumar) has been filed by appellant Prachi, challenging Judgement dated 4.12.2010 and Decree dated 22.12.2010, passed by Principal Judge, Family Court, Allahabad in Matrimonial Case No. 37 of 2002 (Shailendra Kumar Vs. Prachi) under section 12 (1) of Hindu Marriage Act 1955 (hereinafter referred to as Act, 1955), whereby marriage between parties has been declared, a nullity.

2. First Appeal No. 107 of 2016 (Shalendra Kumar Vs. Prachi) has been filed by plaintiff Shailendra Kumar, challenging findings recorded by Principal Judge, Family Court, Allahabad on Issue Nos. 1,2 and 3 in judgement dated 4.12.2010 rendered in Matrimonial Case No. 37 of 2002 (Shailendra Kumar Vs. Prachi).

3. First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) has been filed by appellant Dr. Prachi Sharma challenging Order dated 24.11.2008, passed by Principal Judge, Family Court, Allahabad in Marriage Petition No. 37 of 2002 (Shailendra Kumar Vs. Prachi Sharma), whereby application filed by appellant under section 24 of Act, 1955 (Paper No. 47 Ka) has been allowed and plaintiff has been directed to pay only a consolidated sum of Rs. 10,000/- to the appellant towards litigation expenses. appellant had also challenged order dated 6.2.2009, passed by Principal Judge, Family Court, Allahabad, whereby review application (Paper No. 69 Ka) filed by appellant, seeking review of order dated 24.11.2008, has been rejected.

4. We have heard Mr. Tej Prakash Mishra, learned counsel for defendant appellant Prachi and Mr. Ghanshyam Dwivedi for plaintiff Shailendra Kumar in First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar), Mr. Ghanshyam Dwivedi for plaintiff-appellant Shailendra Kumar and Mr. Rakesh Pandey for defendant-respondent Prachi in First Appeal No. 107 of 2016 (Shailendra Kumar Vs. Prachi), Mr. Rajesh Kumar Tripathi, Advocate, holding brief of Mr. Vishnu Pratap Pandey, learned counsel for plaintiff-appellant Dr. Prachi Mishra and Mr. Ghanshyam Dwivedi, representing defendant-respondent Shailendra Kumar in First Appeal No. 40 of 2011 (Prachi Vs. Shailendra Kumar). We shall, hereinafter, referred Dr. Prachi Sharma as appellant and Shailendra Kumar as plaintiff.

5. According to plaint allegations, marriage of appellant Prachi was solemnized with plaintiff Shailendra Kumar on 27.11.2002 at Allahabad in accordance with Hindu Rites and Customs. According to plaintiff,

marriage between parties never consummated, and as such, no issue was born out of aforesaid wedlock. After expiry of a period of one year and few days, plaintiff Dr. Shailendra Kumar filed Marriage Petition No. 37 of 2002 (Dr. Shailendra Kumar Vs. Dr. Prachi Sharma) under section 12 of Act, 1955 for a decree declaring marriage of parties as nullity. Plaintiff took as many as seven grounds for declaration of marriage as nullity. According to plaintiff, appellant has very weak eye-sight and cannot perform her house hold job without wearing spectacles. The aforesaid fact was concealed by parents of appellant at time of marriage. Appellant is also suffering from incurable form of disease in teeth. She was alleged to be suffering from Pyria and Peritonitis. The said fact was concealed before marriage and also at time of marriage. Appellant was further alleged to be suffering from Jaundice and abdominal pain, since before marriage and also at the time of marriage. Marriage of parties was got solemnized concealing the aforesaid. It was also alleged that parents of appellant concealed her age inasmuch as she was aged about 38 years at time of marriage, whereas, same was alleged to be 30 years at time of marriage. It was also pleaded that after marriage when appellant came to house of plaintiff, her behaviour was abnormal and unnatural which was like a psychotic patient. Appellant was also suffering from tuberculosis at the time of marriage, which fact has been concealed from plaintiff and his family. Lastly, it was pleaded that neither before marriage nor at time of marriage, it was disclosed by parents of appellant that she is hard of hearing and uses a hearing aid.

6. Upon issuance of summons in Marriage Petition No. 37 of 2002 (Dr. Shailendra Kumar Vs. Dr. Prachi Sharma), appellant appeared and filed an application under section 24 of Act, 1955 for payment of interim maintenance and litigation expenses (Paper No. 47 Ka). Aforesaid application was partly allowed by Court below vide order dated 24.11.2008 and only a sum of Rs. 10,000/- was awarded to appellant towards litigation expenses. Feeling aggrieved by order dated 24.11.2008,

since no interim maintenance was awarded, appellant filed review application (Paper No.69 Ka) seeking review of order dated 24.11.2008. However, same was rejected by Court below vide order dated 6.2.2009. Orders dated 24.11.2008 and 6.2.2009, passed by Principal Judge, Family Court, Allahabad. The same have been challenged by appellant in First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar).

7. Suit filed by plaintiff Dr. Shailendra Kumar was contested by appellant. She filed a written statement dated 18.5.2009 (Paper No. 82 Ka) whereby, not only she denied plaintiff's allegations but also raised additional pleas. According to appellant, she, after completing M.A. (Economics) Course, joined as a research scholar in Allahabad University and ultimately, submitted her thesis. Upon knowledge of the fact that appellant is unmarried and her marriage is to be settled, father of plaintiff himself proposed marriage of his son plaintiff with appellant. Father of plaintiff sent his bio-data and expected bio data of appellant along with photograph. Father of appellant, sent bio-data and her photographs to father of plaintiff. Later on father of plaintiff demanded horoscope of appellant, which was duly sent. Father of plaintiff intimated that horoscope of boy and girl are tallying and therefore, he (father of plaintiff) is desirous of marrying his son with appellant. In furtherance of aforesaid, father of plaintiff desired to have a look at the girl that is appellant. As such, aforesaid ceremony was held in a rented house of elder brother of appellant, at L-113 Sarojni Nagar, New Delhi. The aforesaid ceremony was attended by plaintiff along with his parents and brother. They saw appellant and also had conversation with her. Plaintiff separately met appellant and talked to her. Appellant duly disclosed about her educational qualifications and research papers. Later on father of plaintiff gave his consent for marriage of plaintiff with appellant and fixed 14.1.2002 as date for holding "Bagdan Ceremony", which is an important pre marriage ritual performance in the caste of parties. Accordingly, on 14.1.2002, the said ceremony was solemnized at Scientific Apartment. In

the aforesaid ceremony, parents of plaintiff, his Bhabi and younger brother came. As per his capacity, father of appellant, gave cash, goods and jewellery. In reciprocation, parents of plaintiff gave a ring, two sarees as well as fruits and sweets to appellant. In this ceremony, plaintiff and appellant stayed together for two hours and understood each other. Father of plaintiff- expressed his desire to send certificates and mark-sheets, pertaining to educational qualification of appellant. Later on father of plaintiff send application form to appellant for applying in Chandigarh University. However, as appellant was not awarded Ph. D degree upto that stage, she could not apply. Appellant, categorically denied factum regarding sufferance from any diecease. Before marriage she was suffering from jaundice but upon proper medical treatment she recovered. As per opinion of Doctor, appellant was only having weakness and therefore, advised to have restricted diet. In spite of aforesaid fact having been disclosed and papers relating to medical prescription of appellant, having been given, yet family of plaintiff gave greasy food to appellant which was not conducive for her health. She never suffered from Tuberculosis, Piereia, Hepatitis disease or abdominal pain. Lastly, it is also pleaded that father of appellant had given a cheque of Rs.1,00,000/- and Rs. 5,75,000/- in cash towards dowry along with other goods, jewellery and costly sarees. Plaintiff and his family raised a demand of Rs. 20,00,000/- towards dowry. As part of their technique, plaintiff on the pretext of taking appellant to a doctor, dropped her at her brother's place in New Delhi on 1.12.2002. Later on father of plaintiff called father of appellant at Delhi and took him to Kurukshetra. Some papers were got executed at Kurukshetra, in respect of which, F.I.R. was lodged at New Delhi. Appellant is younger to plaintiff by three years. Marriage was solemnized after holding due enquiry, when parents of appellant could not fulfil illegal demand of plaintiff, suit for annulment of marriage has been filed maliciously on false grounds.

8. Plaintiff filed replication (paper no.37 Ga) whereby he denied

contents of written statement and reiterated pleadings raised in plaint.

9. It may be noticed that initially, matrimonial petition was filed in the Court of District Judge, Kurukshetra. Subsequently, appellant filed Transfer Application (Civil) No. 772 of 2013 (Smt. Prachi Sharma Vs. Shailendra Kumar) before Supreme Court. Same was allowed vide order dated 8.8.2005 and Matrimonial Petition, pending in Court of District Judge, Kurukshetra, was transferred to Court of District Judge, Allahabad. Later on, District Judge, Allahabad transferred matrimonial petition to Family Court, Allahabad. Accordingly, same came to be registered as Matrimonial Petition No. 37 of 2002 (Shailendra Kumar Vs. Prachi).

10. After exchange of pleadings, parties went to trial. Court below on the basis of pleadings of parties, framed following issues for determination:

(I) Whether marriage of appellant has been solemnized with plaintiff by playing fraud as ailment of appellant prior to her marriage as well as at the time of marriage was deliberately concealed from plaintiff. If yes, it's effect?

(II) Whether in the bio-data of appellant, her age was wrongly shown to be less, deliberately concealing her real age. If yes, it's effect.

(III) Whether on account of physical and mental ailment of appellant, no conjugal relationship could be established between the parties. If yes, it's effect?

(IV) Whether appellant and her father have committed cruelty upon plaintiff and his family members?

(V) Whether plaintiff has abandoned appellant after subjected her to cruelty for demand of dowry. If yes, it's effect?

(VI) Relief.

11. Court below upon consideration of pleadings of parties, oral and documentary evidence adduced by parties, proceeded to decide above

mentioned issues framed by it. Plaintiff, in order to prove his case, adduced himself as P.W.1. No other witness was adduced by plaintiff. He also filed documentary evidence, which are mentioned in the impugned judgement.

12. Appellant in order to prove her defence, adduced herself as D.W.1, Ramesh Prasad Kala as D.W.2, Professor Dr. Girish Chandra Tripathi as D.W.3, Brij Lal Nagpal as D.W.4. Appellant also filed documentary evidence which has also been described in impugned judgement.

13. It may be noticed here that plaintiff took as many as seven grounds in support of his plea regarding declaration of marriage as nullity in terms of section 12 of Act 1955. It was pleaded by plaintiff that appellant has a very weak eye sight. Consequently, she cannot perform her house hold job without spectacles. But aforesaid fact was concealed by parents of appellant at the time of marriage. Plaintiff further pleaded that appellant is suffering from incurable form of disease in teeth. She is suffering from Pyria and Peritonitis but the same was not disclosed before marriage or at the time of marriage. In addition to aforesaid grounds, it was also alleged that appellant is suffering from Jaundice and abdominal pain, which facts were never disclosed. The age of appellant at the time of marriage was disclosed as 30 years whereas, appellant actually was aged about 38 years at the time of marriage. When appellant, after marriage came to her marital home, her behaviour was abnormal and unnatural like that of a psychotic patient; She was suffering from mental disorder. It was also alleged that appellant is suffering from tuberculosis and aforesaid fact was not disclosed either before marriage or at the time of marriage. Lastly, it was urged that parents of appellant did not disclose either before marriage or at the time of marriage that appellant was hard of hearing and used hearing aid.

14. Out of the aforesaid seven grounds pleaded by plaintiff, only one ground was accepted by Court below i.e. parents of appellant did not disclose either before marriage or at the time of marriage that appellant

was hard of hearing and using hearing aid. Other grounds taken by plaintiff could not be established in evidence, as such disbelieved by Court below.

15. Issue Nos. I, II and III were decided together. Court below concluded that appellant was not suffering from any of the diseases, alleged by plaintiff. It further held that appellant is younger to plaintiff by three years. It also held that marriage between parties was solemnized on 27.11.2002. Appellant came to her matrimonial home on 29.11.2002. Thereafter, she went to her brother's house on 1.12.2002, as such, marital relations between the parties, were never established. Court below further held that parents of appellant did not disclose to family of plaintiff either before marriage or at the time of marriage that appellant was hard of hearing and used a hearing aid. Issue No. IV was not decided by Court below on the ground that the same has been framed unnecessarily, as such, no finding is required to be returned on the point whether appellant and her father committed cruelty upon plaintiff and his family members. Issue No.V was decided in favour of plaintiff and it was held that appellant was not subjected to cruelty for demand of dowry nor she was disowned by plaintiff. Lastly, Court below concluded that plaintiff is entitled to decree of annulment of marriage as it was got solemnized by parents of appellant by playing fraud.

16. Learned counsel for appellant has challenged findings recorded by Court below on the point that marriage of parties has been obtained by practising fraud as disability of appellant i.e hard of hearing and using a hearing aid was never disclosed, either before marriage or at time of marriage. As such, marriage between parties was got solemnized by playing fraud and therefore liable to be declared a nullity in terms of section 12 of Act 1955. He submits that marriage of parties has been declared, a nullity, by a decree of Court under section 12 of Act 1955. The only ground on which Court below has passed aforesaid decree is that appellant was having defect in hearing at the time of marriage and was

using a hearing aid which fact was concealed from plaintiff. According to learned counsel for appellant, above ground by itself is not sufficient/enough to annul marriage of parties as the same does not fall within the ambit of section 12 or section 5 of Act 1955. In order to pass a decree of nullity of marriage under section 12 of Act 1955, Court below is mandatorily required to declare marriage to be voidable at the instance of plaintiff on the grounds mentioned in clauses a,b,c and d of sub-section (1) of section 12 of Act 1955. The ground taken by Court below is not at all sufficient to declare marriage of parties, voidable, at the instance of plaintiff. He further submits that marriage of plaintiff was finalized with appellant by father of plaintiff. However, father of plaintiff was not adduced as a witness to prove the element of fraud, alleged to have been played by family members of appellant in the settlement of marriage, nor there is any pleading raised in plaint as to how and by whom alleged fraud was played. He, lastly submits that ceremonies solemnized before actual marriage completely bely the case of plaintiff since he and his family members had duly seen and talked with appellant. Court below has erroneously shifted burden to prove pre-marriage ceremonies upon appellant. Filing of petition by plaintiff after more than a period of one year from the date of marriage is a malicious design on the part of plaintiff to a decree of nullity of marriage on non-existent ground.

17. Mr. Ghanshyam Dwivedi, learned counsel representing plaintiff has supported impugned judgment and decree on the basis of findings recorded therein.

18. Before proceeding to consider correctness of findings recorded by Court below that marriage between parties has been obtained by fraud inasmuch as it was not disclosed either before marriage or at the time of marriage by parents of appellant that she was hard of hearing and consequently, used a hearing aid, it shall be useful to reproduce section 12 of Act 1955, which relates to voidable marriages:

“12 Voidable marriages . (1) Any marriage solemnised,

whether before or after the commencement of this Act, **shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-**

(a) that the marriage has **not been consummated owing to the impotence of the respondent; or]**

(b) that the marriage is in **contravention of the condition specified in clause (ii) of section 5; or**

(c) that the **consent of the petitioner**, or where the consent of the guardian in marriage of the petitioner 13 [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 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**

(d) that the respondent was **at the time of the marriage pregnant by some person other than the petitioner.**

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage:-

(a) on the ground specified in **clause (c) of sub-section (1) shall be entertained if-**

(i) the petition is presented **more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or**

(ii) the **petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;**

(b) on the ground specified in **clause (d) of sub-section (1) shall be entertained unless the court is satisfied**

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.” (Emphasis added)

19. Section 11 of Act 1955 relates to void marriages. As per section 11 of Act 1955 any marriage solemnized after commencement of Act 1955 shall be null and void, if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of Act 1955. As noted above,

section 12 on the other hand deals with “voidable marriages”. Any marriage solemnized whether before or after commencement of Act 1955 shall be voidable and may be annulled by a decree of nullity on the grounds detailed in section 12 of Act 1955 itself.

20. The terms 'void' and 'voidable' are not defined in Act 1955. The aforesaid terms are defined in the Contract Act, 1872 as under:

Section 19. Voidability of agreements without free consent.—*When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract **voidable** at the option of the party whose consent was so caused.*

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception —If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

20. Agreement void where both parties are under mistake as to matter of fact.—*Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is **void**.*

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

21. When an agreement is enforceable at law, it becomes a contract. Based on validity, there are several types of contract, i.e. valid contract, void contract, illegal contract, etc. Void contract and voidable contract are quite commonly misconstrued, but they are different. Void contract, implied a contract which lacks enforceability by law, whereas voidable contract, alludes to a contract wherein one party has the right to enforce or rescind the contract, i.e. the party has to right to put the contract to end.

22. For better appreciation a comparison chart is given herein below, giving differences between void and voidable contract:

Void Contract	Voidable Contract
The type of contract which cannot be enforceable is known as void contract.	The contract in which one of the two parties has the option to enforce or rescind it, is known as voidable contract.
Section 2 (j) of the Indian Contract Act, 1872.	Section 2 (I) of the Indian Contract Act, 1872
The Contract is valid, but subsequently becomes invalid due to some reasons.	The contract is valid, until the party whose consent is not free, does not revokes it.
Subsequent illegality or impossibility of any act which is to be performed in the future.	If the consent of the parties is not independent.
No right in favour of parties to the contract which is void	Yes, but only to the aggrieved party.
Not given by any party to another party for the non-performance, but any benefit received by any party must be restored back.	Damages can be claimed by the aggrieved party.

23. Thus a void contract may be defined as a contract which is not enforceable in the Court of law. At the time of formation of the contract, the contract is valid as it fulfils all the necessary conditions required to constitute a valid contract, i.e. free consent, capacity, consideration, a lawful object, etc. but due to a subsequent change in any law or impossibility of an act, which are beyond the imagination and control of the parties to the contract, the contract cannot be performed, and hence, it becomes void. Further, no party cannot sue the other party for the non-performance of such contract.

24. Voidable contract on the other hand is a contract which can be enforceable only at the option of one of two parties to the contract. In this type of contract, one party is legally authorized to make a decision to perform or not to perform his part. The aggrieved party is independent to choose the action. The right may arise because the consent of the concerned party is influenced by coercion, undue influence, fraud or misrepresentation, etc. The contract becomes valid until aggrieved party

does not cancel it. Moreover, the party aggrieved has the right to claim damages from the other party.

25. Similarly, term 'fraud' has not been defined in Act 1955. The same has been defined in Section 17 of Contract Act, 1872 as follows:

“17. ‘Fraud’ defined.—‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent¹, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak², or unless his silence, in itself, is equivalent to speech.”

26. The issues which evolve for consideration are “whether plaintiff duly pleaded that marriage of parties was got solemnized by playing fraud and burden to plead and prove the same was upon plaintiff?” Secondly, “whether non disclosure by parents of appellant that she was having hearing deficiency and used a hearing aid either before marriage or at time of marriage, is a ground on which a decree of nullity of marriage, can be passed”.

27. Marriage in Hindus is a pious social obligation which is required to be performed for continuation of society in an orderly manner and also for satisfaction of physical desire of men and women. Apex Court in **Hirachand Srinivas Managaonkar V. Sunanda, 2001 (4) SCC 125** has therefore observed that object of Act 1955 is to maintain marital relationship and not to encourage snapping of such relationship. Following was observed in paragraph 16 of aforesaid judgement:

“At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship.”

28. In the present case, plaintiff is a Doctor whereas, appellant has

obtained her Doctrate Degree i.e. Ph.D. in Economics. Upon perusal of plaint, we find that there is no averment in the entire plaint as to how marriage of parties was finalized. It is only in the testimony of witnesses, manner in which marriage of parties came to be finalized, has been unearthed.

29. Learned counsel for appellant took us to testimony of P.W.1 Shailendra and thereafter, to testimony of D.W.1 Dr. Prachi and D.W.2. Ramesh Kala, father of appellant. From perusal of statement-in-chief/examination-in-chief of D.W.2, we find that marriage on behalf of plaintiff was initiated and finalized by his father. However, for reasons best known to plaintiff, he did not adduce his own father, who admittedly had finalized marriage between parties on his behalf to explain as to how marriage between parties came to be finalized.

30. Secondly, as noted above, plaint of marriage petition filed by plaintiff is completely silent as to how 'fraud' was committed upon plaintiff. Order VI Rule 4 C.P.C. clearly provides for the manner in which pleadings are to be made where fraud is alleged. For ready reference Order VI Rule 4 C.P.C. is quoted herein under:

“Particulars to be given where necessary” – In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.”

31. Unfortunately, we find that Court below while deciding divorce petition completely overlooked aforesaid facts. Even though plaint is completely silent regarding manner in which fraud was played, Court below has proceeded to consider this issue. It has completely lost sight of the fact that no amount of evidence can be looked into until and unless a fact has been pleaded. Once the factum regarding fraud having been played in settlement of marriage, was sought to be relied upon by plaintiff, it was incumbent upon him to categorically plead as to how marriage came to be finalized between parties and by whom by giving

exact date and specific particulars. The absence of material facts in this regard by plaintiff in plaint clearly establish that plaintiff did not approach Court below with clean hands.

32 Having taken notice of Section 12 of Act 1955, we repeatedly asked learned counsel for plaintiff as to how ground pleaded by plaintiff for annulment of marriage could be covered under section 12 of Act 1955. Learned counsel for plaintiff took us through impugned judgement and highlighted with emphasis on observations made by Court below, whereby Court below erroneously shifted burden upon appellant to establish that fraud was not played. It is well established that it is always the positive fact which is required to be proved. Therefore, burden was upon plaintiff himself to plead and prove the element of fraud in solemnization of marriage of parties. Plaintiff has to stand on his own legs and he cannot derive benefit from weakness in the defence of defendant.

33. When analysed from aforesaid point of view, we find that Court below has erroneously shifted burden to prove fraud upon appellant. Furthermore, after having perused section 12 of Act 1955, we find that ground pleaded by plaintiff for grant of a decree of nullity of marriage solemnized between parties is not covered within ambit and scope of section 12.

34. When confronted with the facts as noted above, learned counsel for plaintiff could not urge any thing new but supported impugned judgement on the strength of findings and observations contained therein.

35. First Appeal No. 107 of 2016 (Shailendra Kumar Vs. Prachi) has been filed by plaintiff Shailendra Kumar challenging the findings recorded by Court below on Issue Nos. I, II and III. Learned counsel for plaintiff did not press this appeal. Consequently, same is liable to be dismissed.

36. First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) which has been filed challenging order dated 24.11.2008,

whereby application under section 24 of Act 1955 filed by defendant appellant has been allowed only to the extent of granting litigation expenses of Rs. 10,000/- and review petition seeking review of order dated 24.11.2008, has been dismissed vide order dated 6.2.2009, we find that the short questions are involved in above appeal is “whether appellant is not entitled to any maintenance under section 24 of Act 1955” and “whether denial of same to appellant by Court below is justified or not”.

37. From perusal of impugned order dated 24.11.2008, we find that Court below has refused to award interim maintenance to appellant solely on ground that she has already been awarded maintenance at the rate of Rs. 2,000/- per month in maintenance case. Consequently, there is no necessity to award further maintenance to appellant.

38. Section 24 of Act 1955 provides for payment of interim maintenance during pendency of matrimonial dispute. For ready reference Section 24 of Act 1955 is reproduced herein below:

“24 Maintenance pendente lite and expenses of proceedings :-Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]”

39. There is no prohibition contained in section 24 of Act 1955 whereunder maintenance can be denied on account of an order of maintenance already passed under section 125 Cr.P.C. To the contrary, it is provided that maintenance awarded under section 125 Cr.P.C. shall be adjusted in the amount of maintenance awarded under section 24 of Act 1955.

40. Learned counsel for appellant submits that marriage of parties was solemnized on 27.11.2002 in accordance with Hindu Rites and Customs.

After marriage, appellant came to her marital home on 29.11.2002. plaintiff is alleged to have dropped appellant at her brother's place in New Delhi on 1.12.2002. As such, appellant has been forced to live separately from plaintiff and with her parents. Consequently, appellant is not residing separately out of her own will. Appellant is legally wedded wife of plaintiff. As such, plaintiff is legally and morally bound to maintain appellant. She is not having any independent source of income and therefore entitled to maintenance under section 24 of Act 1955 irrespective of order passed under section 125 Cr.P.C.

41. Plaintiff contested application filed by appellant under section 24 of Act 1955. However, he admitted that his salary is Rs. 37422/-. He also detailed deductions made from his salary. It was further pleaded by plaintiff that since appellant has already been awarded maintenance under section 125 Cr.P.C. , there is no legal right of appellant to seek maintenance under section 24 of Act 1955.

42. Court below considered the case of parties. Vide order dated 24.11.2008, it only allowed litigation expenses. Upon perusal of order dated 24.11.2008, we find that Court below has erred in law in refusing to grant interim maintenance to appellant. We further find that Court below has rejected review application filed by appellant on the ground that there is no legal error nor there is any error much less an error apparent on the face of record necessitating review of order dated 24.11.2008. In our view Court below has failed to appreciate that jurisdiction under section 24 of Act 1955 is not circumferenced by section 125 Cr.P.C. As noted above, any amount of maintenance awarded under section 125 Cr.P.C. shall be adjusted in the amount of maintenance awarded under section 24 of Act 1955. Consequently, First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) is hereby partly allowed. Order dated 24.11.2008, passed by Principal Judge, Family Court, Allahabad is modified. Appellant shall be entitled to monthly maintenance at the rate of Rs. 12,000/-. The amount of maintenance awarded under section 125 Cr.P.C.

i.e. Rs. 2,000/- shall be adjusted in aforesaid amount. Plaintiff is directed to pay aforesaid amount to appellant from date of application till 31.8.2019. Since we have already modified the order dated 24.11.2008, there is no necessity to decide validity of order dated 6.2.2009, whereby review petition filed by appellant, seeking review of earlier order dated 24.11.2008 has been rejected.

43. First Appeal No. 40 of 2011 (Prachi Vs. Shailendra Kumar) is hereby allowed. Judgement dated 4.12.2010 and decree dated 22.12.2010 passed by Vijai Kumar Khatri, Principal Judge, Family Court, Allahabad in Matrimonial Case No. 37 of 2002 (Shailendra Kumar Vs. Prachi) is hereby set aside and aforesaid marriage petition is dismissed.

44. First Appeal No. 107 of 2016 (Shailendra Kumar Vs. Prachi) is also dismissed.

45. First Appeal No. 157 of 2016 (Dr. Prachi Sharma Vs. Dr. Shailendra Kumar) is partly allowed and judgement and order dated 24.11.2008, passed by Principal Judge, Family Court, Allahabad is modified and order dated 6.2.2009, dismissing review of the appellant, is hereby set aside and it is provided that the appellant Dr. Prachi Sharma is entitled to monthly maintenance of Rs. 12,000/-. The amount of maintenance awarded under section 125 Cr.P.C. i.e. Rs. 2,000/- shall be adjusted in the aforesaid monthly maintenance granted by this Court under section 24 of Act 1955. Aforesaid maintenance shall be payable from the date of application till 31st August, 2019. The entire amount, as directed, shall be paid directly to the appellant by husband Dr. Shailendra Sharma or deposited in the Family Court. If amount is deposited by plaintiff Shailendra Kumar, same shall be released by Court below without any further delay. In case of default, it shall be open to appellant to take execution proceedings for recovery. It is provided that cost in all appeals is made easy.

Order Date :- 13.9.2019
Arshad