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In the Andhra Pradesh High Court

Padullaparthi Mutyala Paradeshi — APPELLANT

Vs

Padullaparthi Subbalakshmi and Another — RESPONDENT

Date of Decision : 03-08-1961

Acts Referred:
Evidence Act, 1872 — Section 3, 32, 50
Hindu Marriage Act, 1955 — Section 11, 12, 16, 17, 4
Penal Code, 1860 (IPC) — Section 109, 114, 366, 494, 495

Citation : (1962) CriLJ 308

Hon'ble Judges : Munikanniah, J;Basi Reddy, J

Bench : Division Bench

Judgement

Munikanniah, J.—A question of importance concerning the interpretation of Section 17 of the Hindu Marriage Act (Central Act XXV of 1955) read with Section 494 IPC is involved in this reference which has been made by my learned brother, Basi Reddy, J.

2. This revision petition is filed by the petitioner (1st accused) against Criminal Appeal No. 338 of 1959 on the file of the Sessions Judge, Rajahmundry who dismissed it. That appeal arose out of C.C. No. 66 of 1959 on the file of the Additional District Munsif-Magistrate, Ramachandrapuram. As against the 1st accused a private complaint was laid u/s 494 IPC read with Section 17 of the Hindu Marriage Act, 1955 Central Act XXV of 1955) alleging that this accused, a retired elementray School teacher, contracted a marriage with the 2nd accused, who is the daugther of accused 3 and 4, even though he had at the date the marriage with the 2nd accused the complainant as his wife. The 2nd accuse is the second wife of 1st accused; and accused 3 and 4 who are the father and mother of the 2nd accused, stood charged u/s 494 read with Sections 109 and 114 IPC

The learned Additional District Munsif-Magistrate found that the second marriage of the 1st accused with the 2nd accused was solemnized at 2-00 a.m. on 1-9-1959 in Seethanagaram In Rajahmundry taluk, and believing the evidence of

the 3rd accused who deposed as D.W, 2 that A-2 and A-4 had no knowledge of the marriage, acquitted them. The 1st accused was charged and convicted u/s 494 IPC and sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 900/-; the 3rd accused was also found guilty u/s 494 IPC read with Section 114 IPC and sentenced to undergo three months rigorous imprisonment. On appeal by accused 1 and 3, the learned Sessions Judge held the view that the 3rd accused gave his daughter in. marriage under a mistaken impression that the previous marriage of the 1st accused with the complainant has been annulled and that therefore, the 3rd accused did not intentionally aid the commission of the offence. He, therefore, allowed Criminal Appeal No. 332 of 1959 filed by the 3rd accused, but confirmed the conviction and sentence imposed on the 1st accused as he dismissed Criminal Appeal No. 338 of 1959.

3. A few more facts may be briefly stated: The complainant, Suhbalakshmi, married Mu tyala Paradesi (A-1) in 1947. She had three daughters by the 1st accused but only one or them is alive. They lived in Undrajavaram of Tanuku Taluk in West Godavri District. In or about 1955 and 1956, there were differences between the complainant and her husband. Thereafter the 1st accused arranged with Bulusu Suryanarayana (A-3) to marry his daughter Saraswati (A-2), The 1st accused at about 3-00 P. m., on 31-8-1958 arrived at Seethanagram where Saraswathi and Suryanarayana lived, for having the marriage celebrated. Just about that time, Suryanarayana (A-3), father of Saraswathi, came to know that the 1st accused was having a wife alive, and therefore he and P. Ws. 2 and 3 questioned the 1st accused about it. It is in evidence that the 1st accused told them that (he complainant left his protection and that her marriage with him was annulled. Regarding this, the" 3rd accused examined as D.W. 2 has further stated that "he (A-1) would not; have agreed to the present marriage if he had not the prior marital the cancelled in view of the prevailing Hindu Law."

Bulusu Suryanarayanamurti also deposed {hat the marriage of the 1st accused with his daughter, Saraswathi, was celebrated at Seethanagaram and that the 1st accused is his son-in-law and the husband of the 2nd accused. Subbalakshmi, the complainant, deposed as P. W, 1 that she cams to know of this marriage only two months prior to the filing of this complaint and she sent a registered notice (Exhibit A-2) later. P.W. 2 deposed that he was orally invited to the marriage of A-l with A-2 on 1-9-1958 and that he attended the marriage celebration which took place at 2-00 A. M. at Bulusu Suryanarayarnurthi''s house. It was elicited from him in further cross-examination that no person from a different village came to attend that marriage and that the purohit that officiated at the marriage was alive and available in Seethanagaram. He stated that there were pipers and no presents were given by A-l to A-2 or by A-3 to the bridal couple.

P.W. 3 is a rich man who spent money for the marriage as he wanted t0 help Surynarayanamurthi who is a poor man. P.W. 3 also attended the marriage function. He was also present when the terms of the marriage were settled. He spoke of the presence of P.W. 2 at the marriage. According to him, the petitioner

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and another by name B. Ramamurthi Avadhani of Rajahmundry also came On 31-8-1958. He spoke to the performance of the marriage of 1st'' accused and Saraswathi at the 3rd accused''s house. The 1st accused denied the offence and stated that he did not know any of the prosecution witnesses who, according to him, depose falsely having been bribed. The 3rd accused who was permitted to represent A-2 and A-4 stated that the marriage of A-l with Saraswthi was true but brought by misrepresentations of the 1st accused.

4. Both the lower courts relied upon the evidence of these witnesses and also that of A-3 who deposed as D. W, 2 and held that the prosecution established that the bigamous marriage was solemnized. Before the learned Sessions Judge, a. point that the ingredients necessary to establish a Hindu marriage have not been proved, was taken on behalf of the 1st accused. It was put on the ground that as the parties are Brahmins, it was incumbent upon the prosecution to prove that the ceremonies at the marriage including that of Saptapadi have in fact taken place. The learned Sessions Judge has pointed out that, beyond suggesting that P.Ws. 2 and 3 were bribed by A-3, do other questions were put in cross-examination. Keeping .therefore in mind (Jaat there was no cross-examination directed as to the want of proper and necessary ceremonies and remarking that

not even a whisper was made that the form of marriage went through by the appellant (A-1) and the 2nd accused was not; known to or recognised by law

and also observing that the validity of the latest marriage of the latest accuse cannot be questioned negatived the contention of the 1st accused that his marriage with A-2 U not bigamous.

5. In this revision petition the same point is again agitated and elaborately argued by Mr. ParthasarathySwamy the learned Counsel for the petitioner. He contends firstly ''that the prosecution, when it charges a person with the offence of bigamy punishable u/s 494 IPC should prove positively, apart from the marriage which is subsisting, that the accused contracted another valid marriage in accordance with the rites obtaining in the particular caste or sect of the Hindus; and secondly if there is no proof by the prosecution of such a valid second marriage, there is no offence of bigamy. In other words, having regard to the facts of the instant case, what is contended by the learned Counsel is, that short of the evidence of the taking of the seventh step as a result of the performance of ceremony of Saptapadi which must be made available by evidence of the direct witnesses there is no other way of proving the solemnization of a marriage in such a case.

The learned Counsel pointed out that just as the first marriage, the second offending marriage should be established as haying taken place by due performance of ceremonies including Saptapadi; and maintained that any inferential conclusion otherwise leading to the establishment thereof is, at any rate, outside the purview of the scheme of the Hindu Marriage Act. He submitted that the importance of including Section 7 in the Hindu Marriage Act has to be

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recognized, in that special significance is to be attached to the stress laid on he mention made about the marriage becoming complete and binding only when, the seventh step is taken in the ceremony of Saptapadi.

It would thus be seen that in substance, the learned Counsel has been urging that whatever position was before the enactment of Central Act XXV of 1955, no complainant can succeed thereafter in getting the accused punished for an offence of bigamy without leading evidence as to the taking of the seventh step when the parties to the second marriage are Brahmins.

6. For the determination of the points so raised, a preliminary examination of how the penal provisions contained in Section 494 of the Indian Penal Code came to be applied to the case of Hindus cannot be considered unimportant. Before 1946, the marriages between Hindus were; not made monogamous by statute unless such marriages were contracted between Hindus under the Special Marriage Act (III of 1872). A few statutes such as the Madras Marumakkattayam Act IXXII of 1933) probihited polygamy and the Madras Nambudri Act, which governed the Nambudris in the province of Madras'', allowed the taking of a second wife by a Nambudri only in some contingencies. The second marriage by a woman was not also unknown which depended upon desertion or putting away of the wife by her husband. In the State of Bombay, the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (XXV of 1946) made the contract of bigamous marriage void and penal.

The Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 had a similar effect in that State. A similar legislation in Madhya Pradesh made marriages between Hindus in that State monogamous. In the State of Madras as it existed then, the Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949) rendered any marriage solemnized after the commencement ot the Act between a man and woman either of whom has a1 spouse living at the time of such solemnization void, notwithstanding any rule of law, custom or usage of the contrary, while preserving the right of a man or woman whose marriage has been dissolved by a final order of a Court u/s 5 of that Act, or under any other law for the time being tri force, or in accordance with any custom or usage permitting of divorce after six months from the date of such final order, or from the date on which the marriage was dissolved in accordance with the custom or usage. Provision was also made in Sub-section (2) of Section 4 of that Act for punishing u/s 494 or 495, IPC a party to such a void marriage as It is bigamous.

While so, Hindu Marriage Act (Central Act XXV of 1955) was enacted which repealed all these local statutes and replaced them. A provision has thereby been made giving the statutory recognition to the rule of monogamy. Section 5 so far as material for the present purpose is as follows:

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 marriage;

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Section 11 is in the following terms;

Any marriage solemnized after the commencement of this Act shall be null and void and may, on petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clause (1) XX XX XX of Section 5.

Section 17 treats the bigamous marriage as void and prescribes the punishment for it. It reads;

Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sees. 494 and 495 of the Indian Penal Code (Act XLV of 1860) shall apply accordingly.

Thus, it could be seen that this Central Act has, while replacing the local statutes relating to the prevention of bigamous marriages, sought to achieve the object underlying those statutes, by the provisions made in the above mentioned sections. This also brought the law relating to marriage between Hindus to stand on a par with that under the Special Marriage Act, 1954 which replaced the earlier Act III of 1872.

7. It is also clear from the above that the question posed in so far as it pertain to the proof of marriage should have come before Courts. Cases which involve proof of first or second marriage of a person with a view to find out whether the second marriage is bigamous and punishable under Sees. 494 and 495 IPC are legion Till 1946 these cases undoubtedly would no have arisen in matters pertaining to marriages of Hindus without reference to the Special Marriage Act but only among persons other than Hindus or where a Hindu contracted the marriage under the Special Marriage Act then in force. Nevertheless, these decisions would, in our view, be of guidance to find out the nature and quantum of proof required to establish the solemnization of a marriage be it the first or the second when especially the approach to the question was with a view to find out whether the second marriage was bigamous.

Decided authorities under Hindu Law to which what tantamounts. to proof of solemnization of a marriage is discussed cannot also be lacking, and they too are likely it0 be helpful. A review as far as possible, of some of them ''will be useful to find out the state of law regarding the onus of proof, the presumptions which arise and the special rules of evidence, if any, made marriage solemnized after the commencement applicable to such cases till at least the Hindu Marriage Act of JL955 came into force. We consider that embarking upon such an enquiry is essential in view of the argument of the learned Counsel that the provision contained in Section 7 Of the Hindu Marriage Act, 1955 created a special rule of evidence in supersession of any presumptions which may arise in respect of the validity of a marriage even when in fact it has been found to have been truly

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performed. Section 7 which the learned Counsel relies on in this context, reads:

7 (1) A Hindu marriage may be solemnized in accordance with their customary rites and ceremonies of either party thereto. (2) Where such rites and .ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken,

The learned Counsel seeks to interpret this Section as stating that a marriage which has not been proved to be complete as proof of the seventh step; taken in accordance with the ceremony of Saptapadi is wanting (when such a ceremony has to be gone through), that marriage, should be considered as mot binding on the parties and as therefore void. As a corollary he would urge that when this infirmity apaches to a second marriage of a person or at least when the complainant does not prove that the second marriage is complete in this way, the person accused of bigamy cannot be held to be guilty as there is no valid second marriage. We will advert to this second point later. Before then, we will proceed to consider the state of decided authorities so far are made available to this Court.

8. At the outset, it Is necessary to remember that in proving the existence of any relationship by marriage, the statements of a person who had special means of knowledge and when such a statement was made before the question in dispute was raised, is made admissible under Sub-section (5) of Section 32 of the Indian Evidence Act and that Section 50 has rendered an opinion as to relationship of one person to another expressed by the conduct of any person who, as a member of the family or otherwise, has special means of knowledge on the subject as relevant when the Court has to form that opinion.

But the proviso Section 50 makes such opinion insufficient to prove a marriage in proceedings under the Indian Divorce Act (IV of 1889) or in prosecutions Under Sections 494, 495, 497 or 498 of fee Indian Penal Code. This would mean that the proof of fact- at marriage is not to depend on opinion or conduct evidence. The offences adverted to in that proviso are those relating to marriage and are contained in Chapter XX of the Indian Penal Code, Therefore, time and again, the sufficiency of proof of a marriage where the offence is bigamy, adultery or enticing or abducting and detaining with criminal intent a married woman have come to be considered in decided cases. In all these offences, since marriage as an ingredient has to be proved for one purpose or the other, what should be considered in law as proof of marriage has been frequently formulated in pronouncements by Courts.

9. It is convenient to first take up the decision in Empress v. Pitambur Singh ILR 5 Cal 566 (FJB). There the Full Bench was concerned in resolving the dispute as to what is meant by strict proof of the marriage which is required in a case where the accused is charged with an offence of adultery and when can it be said that there is or not sufficient proof of the marriage. The Calcutta High Court was

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considering the case where the only evidence of the marriage of the .woman was the statement of the prosecutor and that of the woman who admitted the marriage. The Full Bench appears to approve the opinion in the referring judgment that Section 50 of the Evidence Act excludes the sufficiency of less strict proof of marriage as may be available by the application of Section 32 or the provisions of Section 50 of the Evidence Act. It required the specification of time and place, and followed the English law in demanding strict proof. The Full Bench does not seem to disagree with the following expressed in the referring order. The excerpt reads:

It appears to us that the framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law. And in England there has never been any doubt that, in an indictment for bigamy, the first marriage, or in proceedings founded upon adultery, the marriage must be proved with the same strictness as any other material fact

Garth, C.J. delivering the opinion of the Full Bench said;

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of illicit intercourse, and the provisions of the Evidence Act (Section 50) seem to point out very plainly, that where the marriage is an ingredient in, the offence, as in bigamy, adultery, and the enticing of married woman, the fact of the marriage must be strictly proved in the regular way.

In the result, according to this decision of the Full Bench, the available evidence of the marriage in that case was held not sufficient to justify a conviction for adultery. We would like even before the commencement of discussion of other cases, to draw, pointed attention to the importance the Full Bench attached to the proof of the fact of marriage "as any other material fact" and "in the regular way", and that the decision is an authority that the fact of marriage cannot be held to be proved merely on the admissions contained in the statements of the husband and wife. The danger of convicting a person accused of an offence u/s 497 J, P. G. on mere assertions of the spouse has been clearly brought out in Empress of India v. Kallu ILR 5 All 233. Straight, J. observed

the judge (Sessions Judge) who tried the case should have required some satisfactory proof independent of the very vague assertions of Durbi and Parbatta, to show that the ceremony of marriage, as recognised among Kachis, had taken place between them ....

The learned Judge followed the ruling of the Full ''Bench in ILR 5 Cal 566 (F3) and remanded the case for, further enquiry as he felt that proof adduced regarding the marriage was not sufficient.

10. The next important land-mark is created by the decision in Queen Empress v. Subbarayan ILR 9 Mad 9. A Division Bench consisting of Muttuswajnj Ayyar and Hutchins JJ. were concerned with the acquittal by the appellate court of an

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accused .who was convicted of an offence Punishable u/s 498 IPC i.e., enticing away a married woman. The appellate court which acquitted the accused relied upon the decision in ILR 5 Cal 56 (FB). Their Lordships of the Madras High Court however interpreted the Full Bench decision of the Calcutta High Court to mean that the fact of marriage must be proved in the ordinary way i.e., by other more reliable evidence than that of the mere "opinion expressed by conduct of a person who, as a member of the family Or otherwise, has special means of knowledge."

They were definitely of the opinion that neither the Full Bench decision of the Calcutta High Court nor that in ILR 5 All 233 meant t0 lay down that a husband or wife is precluded from, proving his or her marriage. Hutchins J. who spoke for the Bench, went to the extent of remarking that if such was the purpose of those two decisions the Division Bench of the Madras High Court was prepared to dissent. Substantiating the stand taken by them, the learned Judges of the Madras High Court drew support from the practice obtaining in English Courts and pointed out that the celebration of a marriage in England could be proved by any person who was actually present and saw the ceremony performed, and the onus is on the defendant for impugning its validity.

Though they could be said to approve such a general proposition, the decision in that case actually turned upon taking stock of nature or proof available on record. Observing that what was before them was a marriage Between the parties belonging to Marava community, that the wife deposed that four years elapsed since the marriage was performed, that she. cohabited after attaining puberty and that there was a similar admission by the husband and there was the. further fact also that the mother of the woman who was examined as witness No. 4 swore that he had her daughter married to the prosecutor coupled with another feature that ''none of these witnesses were cross-examined as to the facrum or validity of the marriage, and the accused persons in no way impugned its validity, they felt that they could not entertain any doubt that the marriage has been sufficiently established.

At the same time they relied upon the decision in R. v. Inhabitants of BramPton (1808) 10 East 282 which clearly laid down that the Onus is thrown on the defendant for impugning the validity of the marriage. They referred also to the passage which occur in Archbold Criminal Pleadings, Evidence and Practice (185.9 edition) in Section 1 of Chapter 18 dealing with bigamy and which brings out that "there must be evidence of celebration; as evidence of acknowledgment, on of cohabitation or repute will not suffice."

11. Later decisions of the High Courts in India, it may be pointed out, contented them'' selves in finding out what proof made out marriage or negatived it in the circumstances of each case and decided the same as falling under the dicta of either JLR 5 Cal 56.6 or ILR 9 Mad 9. To illustrate: The Allahabad High Court in Queen Empress v. Dal Singh ILR 20 All 166 considered that where the accused was prosecuted u/s 498 IPC the evidence of marriage which consisted in the

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statements of the woman and of the complainant would not be adequate; and the following observations were made by the Division Bench consisting of Edge C. J, and Burkitt J.

In cases of this kind where a false charge may easily be made of enticing away a woman, said to be a married woman, but possibly only a mistress, the court should require some better evidence of the marriage than the mere statement of the complainant and the woman.

The strong proof of marriage hat is specially required where the woman, and man may join together to harass the accused is thus particularly stressed, In Emperor v. Nazir Khan ILR 36 All 1 : AIR 1914 All 214 (2) Ryves J. referred to both ILR 5 Cal 566 (FB) and ILR 9 Mad 9 and repelled the contention that the actual marriage of the complainant and the woman Musamma1'' Sirtajan was not strictly proved by evidence. He observed after referring to the class of oases which followed ILR 5 Cal 566 (FB) the following:

I do not think these rulings lay down that the fact of the marriage can be proved only in some particular way.

Opining that the case before him was much more like the case in ILR 9 Mad 9 he observed :

In the present case I find on going through the record that the complainant was not asked one word throughout a lengthy cross-examination about his marriage with the woman Sirtajan.

The learned Judge concluded :

There is unrebutted evidence in this case of the woman, the husband and their parents describing the marriage in detail. I think, therefore, in this case the fact and legality of the marriage have been satisfactorily proved.

A later decision of ''he Allahabad High Court reported in Emperor v. Buddhu ILR 42 All 175 : AIR 1920 AH 175 (1) is t0 the same effect. An illuminating discussion on whom lay the onus when a marriage is challenged by a party on the, ground of non-performance of rites or ceremonies is contained in Mt. Titli v. Alfred Robert Jones AIR 1934 AH 273 : ILR 56 All 428. This is found in the judgment of Sulaiman, C.J. who concurred with the separate judgment ''delivered Mukherji, J- at page 282 the learned Chief Justice adverted to the question whether the marriage In dispute was null and void on account of the omission to observe any rules, rites, ceremonies or customs. He was dealing with the validity of. a marriage under the Indian Christian Marriage Act which of course does not lay down what those rules, rites1, ceremonies and customs are. The learned Chief Justice held "the burden would lie on any party, who asserts that any such rules, rites, ceremonies and customs were not observed," This observation, no doubt, arises in a civil case. But we consider that this applies with equal force to criminal oases also and In making out charges of bigamy etc.

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The Judicial Committee of the Privy Council in Kashi Nath v. Bhagwan Das AIR 1947 PC 168 had an occasion to re-state the law enunciated long ago in Inderun Valungypooly v. Karaaswamy Pandia J3 Moo Ind App 14,1 at p. 158 regarding the presumption that arises when a marriage la fact has been proved to have taken place. The observation in the earlier decision Is as follows:

Then, if there was a- marriage in fact, was there a marriage in law? When one you get to this, namely, that there was a marriage in fact, there would be a presumption in favour of there ''being a marriage in law.

Applying its principle to the case before their Lordships where it is pointed out that at onetime an issue was raised whether the marriage had (been duly solemnized but the same was not press- ed on account of the concurrent findings of fact of the lower courts, their Lordships laid down:

The validity of this marriage, duly solemnized, being in question, haf presumption attaches. It is in that light that their Lordships have to review the evidence which was given on one side and the other in this case.

Two things emerge from this decision. That when a marriage is said to be solemnized, the presumption that the marriage has taken place in fact and legally arises; and secondly it may be proper to assume that the word "solemnized" may not have a restricted meaning than that in the accepted sense of due performance with solemn rites even when used with reference t0 marriages taking place under Hindu Law or when it occurse in the Hindu Marriage Act.

12. So far as the Calcutta High Court is concerned, we find that the Judicial Committee of the Privy Council has approved in Mouji Lal. v. Chandrabati Kumari ILR 38 Cal 700 (PC) the principle that the established presumption in favour of the marriage also applied to the forms and ceremonies necessary to constitute it a valid marriage, and that the necessary or obligatory forms and ceremonies were properly performed could be a matter of presumption if in fact the marriage had taken place. It may be observed that this was so held in a case where the validity of a marriage was questioned on the ground of mental incapacity of one of the parties but there was evidence in recognition of that marriage, though not performance of all the ceremonies.

In Taher Khan v. Emperor ILR 45 Cal 64 : AIR 1918 Cal 136, where the accused was charged u/s 366 IPC for kidnapping a married woman with intent to compel her to marry, the word ''marry'' has been construed as going through a form of marriage whether the marriage should prove in fact legal and valid or illegal and invalid: a Division Bench of the Lahore High Court in Santram v. Emperor ILR XI Lah 178 : AIR 1929 Lah 713, while dealing with a case of abduction and kidnapping, followed the decision in ILR 45 Cal 641 : (A.I.R. 1918 Cal 136) and observed that

it is settled law that in Section 366 of the Penal Code (as In Section 494) the

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word ''many implies going through a form of marriage, whether the same is In fact valid or not.

13. Mr. parthasarathy Swamy, however, places reliance on three decisions of the Calcutta High Court for contending that the factum of marriage as well as the strict observance of custom as applicable, must be proved and no presumption would arise in the case when an accused is being tried for offences Under Sections 494, 497 or 498 I. P, C. But we consider that all those three decisions turned upon certain special puculiarities pertaining t0 them. In Akshay Kumar Maiti and Others Vs. Emperor, the accused was tried for an offence u/s 498 IPC '' The only reliable evidence of the marriage consisted of the statements of the girls and their husbands. It was also held that there was doubt that the marriages had been celebrated strictly in ac- cordance with the requirements of custom and law applicable to the parties.

The Calcutta High Court also sought to follow the decision in Batiram Koet v. Bhandaram Keot AIR 1920 Cal 979 in holding that the evidence was not sufficient in. that case which was mainly concerned with the proof of validity of the marriage apart from die tact of its celebration and where such a thing is put in issue. We are of the view that the principle laid down in ILR 5 Cal 566 (FB) is undoubtedly attached to the facts of that case, and it does not lay down any general rule that the presumption as to the completion of the marriage by performance of ceremonies does not arise when, the solemnization of a marriage, as fact, is proved by other evidence.

The next case referred to by the learned Counsel is reported in Jogu Bibi v. Mesel Shaikh ILR 63 Cal 415. The accused in that case was charged with bigamy. The question which the Division Bench decided in that case was whether the marriage of one Jogu Bibi to Mesel Shaikh was proved according to law. Relying upon the evidence in that case, it was held that there was no contract of marriage between the parties as the proposal and acceptance made by the parties had not taken place on the same day a3 required by Mohomedan law, and that there was no evidence to establish the marriage. This decision also, in our view, does not affect the presumption which arises that a marriage which has been believed t0 have taken place in fact is also valid in law.

The third case is that reported in Swapna Mukherjee Vs. Basanta Ranjan Mukherjee and Others, . It is enough to observe that that decision mainly turned upon the point that a charge of bigamy cannot lie against a husband who gets himself converted and marries according to Hindu rites while the subsisting marriage was between the accused and a Christian wife in a Christian form. There the instance of both the marriages taking place in the same form pertaining to toe same faith turned the scales. The decision in Mt. Kalan v. Emperor AIR 1938 Sind 127, is a case where the parties were Sikhs and there was definite evidence that Granth or Anand Sahib wag not read as part of the ceremonies of the marriage. It is not, therefore, a case where any presumption as to valid marriage could be invoked. We have, therefore, no hesitation that

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these decisions relied upon by the learned Counsel lay no different principles from those enunciated In ILR 5 Cal 566 (FB) and ILR 9 Mad 9.

14. As far as the view of the Bombay High Court is concerned there is the observation in Bai Appibai Vs. Khimji Cooverji, as to the effect of the performance of the two ceremonies Vivhahoma and Saptapadi viz., the invocation before the sacred fire, and the taking of seven steps by the bridegroom and bride jointly before the consecrated fine. This matter has been considered in respect of the claim of maintenance. It is stated to be that ?n the performance of those ceremonies the marriage becomes perfect and irrevocable and that once the marriage ''s so performed, if cannot be dissolved.

The decision at the same time accepts the two cardinal principles laid down in 13 Moo Inct App 141, Bai Diwali y. Moti Karson ILR 22 Bom 509 and ILR 38 Cal 700 which are that when it is proved that a marriage was performed to fact, there is a presumption of there being a marriage in law; and that if some of the ceremonies usually observed on such occasions have been performed, they have been duly completed.

The decision in Malan and Others Vs. State of Bombay and Another, is distinguishable, There the evidence of marriage consisted of throwing sacred rice On the couple. The view of Miabhoy, J., in regard to this has been that it is not shown that throwing of rice on the couple was a necessary part of the ceremony in the performance of a valid marriage as it appeared to the learned Judges that this is ordinarily done by ail the spectators who remain present at a marriage and that that act was more consistent with the presence of the person at the time of the celebration of the marriage rather than actual participation in the acts which ultimately leads to the form of a marriage contract. This itself, in our view, brings out the special features of that case. We are, therefore, unable to hold that this decision rung counter to the accredited principles as to proof of marriage adumbrated by other decisions such as ILR 9 Mad 9.

15. Then there is the view that marriage cannot be proved by the evidence of the state in which the parties were living when the fact of marriage is in issue because the accused is charged for offences concerning the marriage is, as has already been pointed out, hit by the provisions contained in Section 32 and 50 of, the Evidence Act. In exemplication of the same rule, we may refer to the decision in Aziz Khan Vs. Ekram Hussain, . In an earlier decision in Ganga Patra Vs. Emperor, the Patna High Court was also concerned with references made by the spouses lo the relationship between them as husband and wife. It was held by Wort, J., correctly in our view, that ILR 5 Cal 566 (FB) applied to this case.

16. A careful consideration of the decisions in ILR 5 Cal 566 (FB) and ILR 9 Mad 9 reveals that the two decisions are not opposed to each other. On the other hand, they are complimentary in that while ILR 5 Cal 566 (FB) lays down that marriage cannot be held to be proved by he evidence of husband or wife only ILR 9 Mad 9 enunciates that such admissions coupled with the fact of the mother

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who swore that she had her daughter married to the prosecutor and the absence of cross-examination as to the factum or validity of the marriage of these witnesses, would warrant a conclusion of a valid marriage. In Emperor v. Mt. Soni. AIR 1936 Nag 13, Pollock, A. J. C. considered the effect of the evidence of a witness who stated that about 10 years ago there was marriage and also of other witnesses who spoke about the fact of the celebration of the marriage as they were present at the marriage. The uncle of the first wife of the accused who arranged the marriage also admitted that she was married to the accused. Observ- ing that the truthfulness of his evidence has not been challenged, it was held that the marriage was proved. The reason assigned by the learned Judicial Commissioner for coming to that conclusion is as hereunder:

Under Section 3, Evidence Act, a fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists, On the evidence in this case any prudent man would act upon the supposition that Soni was the legally married wife of Bafaan, In ILR 9 Mad 9 considerably less evidence than this was accepted as sufficient proof of a valid marriage.

A further point whether a different standard has to be set in regard to the proof of the second marriage which has also to be proved in order to make out the charge of bigamy u/s 494 IPC had been considered in this decision. It was held that it is enough if the prosecution has proved that, as in the case of the first. marriage, the parties "went through a form of marriage.

17. We may now observe that all this case law as to the proof of a marriage has no doubt been laid down in general as governing all persons in India, though under the Hindu Law, even before the Hindu Marriage Act, 1955, was passed, certain marriage ceremonies,, were made obligatory. It can be illustrated by extracting Mulla on Hindu Law (1959 Twelfth Edition) para 437 which states;

Marriage ceremonies: (1) there are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely:

(1) invocation before the sacred fire, and

2. Saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before is sacred fire.

The marriage becomes completed when the seventh step is taken; till then it is imperfect and revocable. Consummation is not necessary to make a marriage complete and binding.

2. A marriage may be completed by the performance of. ceremonies other than those referred to in Sub-section (1), where if is allowed by the custom of the caste to which the parties belong.

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Among the references in the foot notes which form the basis for these observations, some of the cases discussed above have been noticed. It is. therefore, pertinent to remark that the'' law as conceived in the Evidence Act regarding proof and presumption has been made applicable both in regard t0 the legality of a marriage which has in fact taken place and also with regard to the performance of ceremonies. This principle later found statutory recognition in Section 7 of the Hindu Marriage Act; the words used in Sub-section (2) of Section 7 state the effect of taking the seventh step by the bridegroom and bride jointly before the sacred fire in the case of Brahmins. That Section makes the marriage complete and binding only then, whereas the words employed in Mulla''s Hindu Law are "imperfect and cable" which are copied from the decisions. But I the meaning of both set of terms, in our view, is So make the marriage where the seventh step has not been taken capable of being dissolved; and in any case is not to render that marriage void ipso jure.

Considered this way, it is not possible that the marriage is incomplete for want of taking the seventh step by the bridegroom and bride jointly before the sacred fire as it is not void ab initia. It may be not binding on the parties thereto at the instance of a person who sets up that that marriage has not become complete by reason of this defect. It, therefore,1 becomes clear that the burden will be on the person who seeks to get the marriage dissolved since that marriage in fact had taken place. There is also the significant fact that neither in Section 11 nor in Section 12 of the Hindu Marriage Act, a marriage rendered incomplete for the reasons stated in Section 7 has been considered as either void or voidable. The dissolution of such a marriage has been left to depend upon the nature of proof available in each case and circumstances attending the celebration or solemnization of the marriage. At any rate, we are unable to accede to the contention of the learned Counsel that Section 7 is in the nature of a special rule of evidence which enjoins1 upon the prosecution to establish in all cases by direct evidence the taking of the seventh step by the bridegroom and bride before the sacred fire and that otherwise the complainant" should be considered to have failed t0 prove for this reason the second marriage of the accused in cases of bigamy.

18. Before proceeding to consider whether the proof in respect of a, second marriage is different from that concerning the first marriage, we would set down the propositions deducible from the above discussion:

(1) A marriage cannot be proved merely by statements which relate to the existence of any relationship or by the opinion of any person given out or even expressed by conduct as to the existence of such relationship of any person although that person has special means of knowledge on the subject; or

2. by the admissions made by the parties to the marriage who may at times be actuated by ulterior motives; but if, in addition thereto or Independently, any evidence of the parents of the parties regarding celebration or solemnization of a marriage is available it would go a long way in establishing the factum of

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marriage.

3. The absence of cross-examination of the witnesses for the prosecution who depose as to the factum is a material consideration which goes to establish that the evidence as to the fact of marriage is undisputed; so also it is not possible to question the validity of a marriage without disputing Or impugning that fact in some way or other in the cross-examination.

4. When there is celebration or solemnization of a marriage which has been intended by the parties to be binding on each other and the form of it has not ''been wholly opposed or against the customs of the community or the caste t0 which the parties belong, the presump- tion that the ceremonies were complete and the marriage is legal arises, as on the supposition, that it is possible that; after a consideration of the matters before it the Court can believe that the marriage exists and has therefore been proved. The reason of this rule is not far to seek. It consists in that the intention of the parties which is in the purpose if all the evidence to make out when patent is not Jo be easily negatived by merely taking into account subsequent denials of the parties or the willingness to take advantage of one''s own purposeful remissness, or because others question it out of questionable motives; but the presumption of the marriage can be rebutted only by strong, satisfactory and conclusive evidence.

5. The mention in Section 7 of the Hindu Marriage Act which applies to. the case of first and second marriages equally that a marriage becomes complete and binding when the seventh step is taken by the bridegroom and bride jointly before the sacred fire is in recognition the state of law among the Hindus which provide for the dissolution of the marriage which is proved to be imperfect and revocable1. There is nothing in the language of that Section that all legal presumptions which arise in regard to file taking of the seventh step, as well as the performance of ceremonies, is set at naught, Further, the argument that the presumption in regard to the performance of the ceremonies would arise only when the witnesses speak at least to the adoption of some or part of the ceremonies at the marriage is Hot supported by authority.

6. There is nothing to indicate in the language of the Sections of the Hindu Marriage Act to suppose that it gives room to treat a solemnized marriage, though defective or irregular but intended to be in force and operative, as of no legal effect by pointing out that proof of particular ceremony is not made out by positive evidence though no effort is made to impugn it for that reason. Such a marriage, no doubt, when successfully impugned would be a nullity; but the marriage tie between the parties Jo such a marriage is not otherwise non-existent till the ceremonies are established to have been performed and that too by positive proof by complainant.

19. While there could be little doubt that these principles govern the proof of first marriage, it has now t0 be seen whether proof in regard to the second marriage, which has also to be established in the case of bigamy for the purpose of making

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out that another has been contracted by the person whose first marriage is subsisting, is different. A reference to English law in this connection is useful It has been undoubtedly laid down that "the prosecution m" prove the prisoner''s subsequent marriage ... i.e., that the prisoner went through a form of marriage ... (Vide para 3796 of Archbold''s ''Criminal Pleading, "Evidence and Practice, 34th Edition at page 1420). Further, we find the following in that paragraph :

Even if the subsequent marriage would have been void, as for consanguinity or the like, the prisoner is guilty of bigamy.

When a person already bound by an existing marriage goes through a form of marriage knows to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute (Offence against the Person Act, 1861) by reason of any special circumstances, which independently of the bigamous character of the marriage may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case.

Further below, in the same context, we have :

The celebration of the second marriage Is proved in the same manner as that of the first". Halsbury''s Laws of England, Simonds Edition (Third) Volume 10 at page 664 has the following in regard to the offences of bigamy even when the second marriage is invalid.

1267, "Invalid second marriage, A person already married who, having the intention of appearing to contract a second marriage, goes through a form known to and recognised by the law as capable of producing a valid marriage, is guilty of bigamy, although the second marriage, even if it were not bigamous, would be otherwise invalid.

The position so postulated so far as the second marriage is concerned brings out that the proof of the second marriage does not differ from that of the first marriage and the invalidity of the second marriage for any reason does not deprive it of its bigamous character till It is set aside. Coming nearer home, it may be observed there is nothing to show that the voidity of marriage for non-compliance with the conditions specified in Section 5 of the Hindu Marriage Act is absolutely non est for all purposes. Even marriages which are declared null and void by application of Section 11 of the Hindu Marriage Act cannot be considered void ab initio or void ipso jure, so as to render a child begotten or conceived before the decree is got, illegitimate. The effect of declaring a marriage voidable is also similarly dealt with in Section 16 of the Hindu Marriage Act, 1955.

While so, the position in regard to parties to a marriage which could be revoked or dissolved because of its imperfectness only at the instance, I initiation or impeachment by any party, cannot be considered as invalid or void for all purposes even from the inception. The subsistence of the second marriage

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between the parties whose intention t0 have it performed and who go through a form of it and never attempt to question it could in our view, be definitely taken as proof of that marriage. In such a case it will come u/s 494, Indian Penal Code as one where the husband or wife married again having already n spouse although the position after a decree for dissolution is obtained for proved infraction of the provisions of Section 7 may be on a different fooling.

It may not be inapt, having regard to the propositions stated above concerning the proof of marriage, to hold that no special responsibility is thrown on the prosecution to prove that the second marriage was completed by taking the seventh step when especially proof of it will be complete with the play of presumption juris which is always rebuttable.

20. The learned Counsel next placed strong reliance upon the judgment of Sanjeeva Row Nayudu, J., in Satyavathi v. Subbayamma (1959) 1 Andh WR 169 in support of his contention. But we are unable to find anything in it which goes against the accredited principles which we has already referred to concerning the proof of second marriage. After stating that the main fact in issue to be found in cases falling u/s 494 Indian Penal Code or ''section 4 of the Madras Hindu (Bigamy Prevention and Divorce) Act (Madras Act VI of 1949) is whether the second marriage has in fact taken place or not, the learned Judge arrive at the conclusion on the evidence that, in his opinion, the case failed for want of credible evidence establishing the factum of bigamous marriage. The learned Judge had, there-fore, no necessity to advert to the manner in which the second marriage has to be proved or whether it was necessary to establish the validity of the second marriage even if that is not questioned. We are, therefore, unable to see that any support could be drawn from this decision by the learned Counsel for his contention.

21. From the resume of facts and evidence concerning the instant case already given, it is not merely the evidence of P.Ws. 2 and 3 regarding the solemnization or celebration of the marriage which has been believed concurrently by the lower courts, but; also the evidence of the father of the bride who deposed as D.W. 2 that he gave away the bride. The want of any attempt on the accused to impugn the marriage on the ground of non-observance of any ceremony of Saptapadi so as to leave it incomplete weighed with the lower courts to find as a fact that there was solemnization of the second marriage. We are unable to see that this manner of making out the second marriage in any way detracts from the strict proof which is insisted in the case of a'' second marriage where the prosecution is for bigamy. The 1st accused (petitioner herein) is a retired school master.

P.W. 2 is a school teacher. They could not be taken to ignore or avoid the ceremonies at a marriage. It is also in evidence that the 1st accused protested where it was suggested that his earlier marriage with the complainant: was subsisting on the date of the second marriage. He had definitely come up with the statement that he would be the last person to get married a second time in view of the penal provisions of the Hindu Marriage Act. He would not have

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therefore given any room for doubting his bona fides by leaving out any part of the necessary ceremonies, Purohits have also officiated at the function; and there is therefore nothing to suppose that all the marriage ceremonies have not been properly gone through. On the other hand, we consider that is the reason for the absence of cross-examination or of any effort to impugn the second marriage by disputing it in cross-examination on the ground of irregularities in the performance of the ceremonies.

22. We find, therefore, no grounds for interfering with the findings of the lower Court, .We do not also propose to interfere with the sentence imposed on the petitioner. It follows-that this revision petition fails and is accordingly dismissed.

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