

(1983) 10 SIK CK 0001
In the Sikkim High Court

Purna Bahadur Bista

APPELLANT

Vs

Santa Bista and Another

RESPONDENT

Date of Decision : 07-10-1983

Acts Referred:

Citation : (1984) CriLJ 1145

Hon'ble Judges : Anandamoy Bhattacharjee, Acting C.J.

Bench : Single Bench

Judgement

A.M. Bhattacharjee, Ag. C.J.

1. In this revision directed against an order of maintenance passed u/s 488 of the Cri.P.C 1898, that being the Code still operating in Sikkim. Mr. Bishambhar Sharma, the learned Advocate for the revision-petitioner has assailed the order on two grounds only, namely. (1) the respondent No. 1, in whose favour the order has been passed, is not, and has not been proved to be, the wife of the revision-petitioner and (2) the amount of the maintenance ordered is excessive.

2. The learned Sessions Judge, who tried the case, (and be it noted that because of certain provisions of law operating in Sikkim, the Sessions Judge is, as held by this Court in Chandra Bahadur Tamang Vs. Sundermaya Tamang, , competent to try and dispose of proceedings u/s 488 of the Code), has on a careful consideration of the evidence adduced before him, both oral and documentary, held that the respondent No. 1 was duly married to the revision-petitioner and the monthly salary of the latter, who is a police constable, having been found to be not less than Rs. 600/-, the Sessions Judge ordered him to pay maintenance to the respondent No. 1 at the rate of Rs. 200/- per month.

3. I have been taken through the entire evidence on record by Mr. Sharma, the learned Advocate for the petitioner and I have no doubt that in view of the nature of the evidence on record, the finding of the learned Sessions Judge as to the factual of marriage is unassailable at least in revision. AH the seven witnesses examined by the respondent No. 1, who was the applicant for

maintenance, including herself and her father, except witness. No. 4; Cleary testified as to the fact of the marriage between the parties and while one of them, being witness No. 1, was not at all cross-examined, the others remained absolutely unshaken in cross-examination, and as pointed out by the learned Judge, there is nothing on record to doubt their veracity or to question their reliability or to disbelieve them on any ground. As against this, the revision-petitioner himself was his sole witness seeking to repudiate the factum of marriage merely with his bald denial. And though the witness No. 4 for the respondent No. 1, C.P. Rai. deposed that he had no knowledge about the marriage between the parties, yet he stated further that the revision-petitioner stated to him that as he and the respondent No. 1 belonged to separate castes, he was ready to pay some money to the. petitioner as compensation. There is also a document on record written in Nepali which has been signed by witnesses Nos. 1, 2, 3, 5 and 6, all of whom have proved their respective signatures in the document and have referred to the document in their depositions as "a document regarding the marriage" "prepared in the presence of the Panchayats". In the body of the document it appears to have been recorded that the revision-petitioner and the respondent No. 1 have married each other according to their own choice and out of their own will and accord and that the document is in respect of the revision-petitioner taking or making the respondent No. 1 as his wife - "Patni Tulyeko Bishayama". But though the witnesses noted above have proved their respective signatures on the document, the document as a whole has not been proved and there appears to be no evidence as to who wrote the body and the learned Judge also has not marked the document as a whole as a proved Exhibit. No one has also proved the alleged signature of the revision-petitioner on this document and the latter also has not been confronted with this document or cross-examined with reference to its contents. The contents of the document, therefore, cannot be taken into consideration and the learned Judge also has not referred to or relied on its contents but has rested his finding on the other evidence on record referred to hereinabove and as already stated. On the state of evidence on record the finding arrived at by the learned Judge as to the factum of marriage between the revision-petitioner and the respondent No. 1 cannot call for any interference in revision.

4. Mr. Sharma has, however, very strongly argued that the revision-petitioner and the respondent No. 1 having belonged to different castes, there could not be any legal and valid marriage between them and Mr. Sharma has urged that as a woman applying for maintenance u/s 480 of the Code as a wife must, if her marriage is denied by the opposite party, prove that she was legally married to the opposite party, the respondent No. 1 was not entitled to apply for maintenance under this Section because, even "assuming the factum of her marriage with the revision-petitioner to have been proved, there could not be any legal and valid marriage between them as they belong to different castes. As pointed out by this Court in *Bishnu Kala v Bishnu Maya* at page 12. any such question as to the validity of a Hindu Marriage on the ground of the parties

thereto belonging to different castes or sub-castes would not detain any Court for a moment if the parties are domiciled in the other States in India where the Hindu Marriage Validity Act, 1949 was. or the Hindu Marriage Act. 1955 is, in force because u/s 3 of the former Act and u/s 29(1) of the latter Act, which repeals and replaces the former Act, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reasons only of the fact that the parties thereto belonged to different castes, sub-castes or sects. The Hindu Marriage Validity Act, 1949 could not and, therefore, did not extend to the then State of Sikkim. The Hindu Marriage Act. 1955 also has not, as yet, been extended to this State and as it is not the case of any of the parties that they, though residing in Sikkim. are domiciled elsewhere in India where the Hindu Marriage Act, 1955 extends, the marriage in the case would be governed by the provisions of the Hindu Law sans these legislative provisions.

5. But does the expression "wife" in Section 488 of the Code of Criminal Procedure mean a woman legally married to the opposite party and must a woman applying for maintenance u/s 488 prove that not only there was a marriage in fact between her and the opposite party but also that it was a marriage valid according to the requirements of law Assuming, as urged by Mr. Sharma and as laid down in a number of decisions, that since the expression "wife" in Section 488 is unqualified the expression "child" has been qualified by the words "legitimate or illegitimate", the expression "wife" in Section 488 would mean only a legally married wife, I do not think that a Magisterial Court u/s 488 is required to enter into the question as to the legal validity of a marriage which has been proved to have taken place in fact unless the illegality or invalidity thereof resistibly demonstrates itself without any doubt or debate At least from 1869, when the Privy Council decided *undercut v. Ramaswamy* 13 Moo Ind App 141 at p. 148), the law appears to be well-settled for more than a century that "if there was a marriage in fact, there was a presumption of there being a marriage in law". In 1911. the Privy Council again declared in *Moutu Lal v. Chandrabati* ILR (1911) Cal 700 at 707 that to "matters of form and ceremony, the established presumption in favour of marriage undoubtedly applies". In 1947, the Privy Council in *Kashi Nath v. Bhagwan Das* AIR 1947 PC 168 referred to and reaffirmed what it declared in *Inderun v. Ramaswamy* (supra) in 1869, namely, "when once you get...that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law". And, in 1962. the Supreme Court in *A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael etc.*, referred to *Moutu Lal v. Chandrabati* (supra) and ruled that "where it is proved that the marriage was performed in fact, the Court will also presume that the necessary ceremonies have been performed". Such presumption of marriage in law arising from the proof of a marriage in fact may not be sufficient to sustain a proceeding for matrimonial reliefs or a prosecution for matrimonial offence that is however a different matter not arising for consideration in this case and, therefore, need not detain me. But in a proceeding like the present one u/s 408, once a marriage in fact is proved to have taken place, the presumption arising therefrom in favour of

a marriage in law and of the necessary ceremonies having been performed would be sufficient to entitle the wife of such a marriage to maintain an application u/s 488 unless the marriage on its fact; is stamped with indisputable illegality and the invalidity thereof stares at the face. It should be noted that at the time when the Cr.P.C. of 1898 was enacted, the Hindu Law of marriage as then administered by the Courts consisted of conflicting arid sometimes almost irreconcilable texts of the different Smritis and the Nibandhas and somewhat confusing case-laws, and also of customs and usages very often overriding those laws and there was great divergence of opinions on almost all the important questions like, saguaro marriages, inter-caste marriages, limit and extent of the sapinda relationship and prohibited degrees for marriage etc. Keeping this in view and the fact that the Legislature in enacting this Section 483 was mainly concerned with preventing vagrancy and providing the discarded and abandoned wives and children with a speedy relief by way of maintenance through a summary procedure and also the fact that the administration of the provisions of this Section was entrusted to Magistrates who could not be expected to have proper knowledge or training to determine complicated questions relating to the validity of marriages among the Hindus and also the Muslims, the two major communities in the country, it would be difficult to conceive that the Legislature, could require the Magistrate, before or daring maintenance of a Hindu wife, whose marriage in fact was established, to go into and decide these difficult questions relating to the legal validity of Hind marriages in these summary proceedings.

6. In this view of the matter, therefore, granting that in a proceeding u/s 488, where a marriage is denied, the questions relating to the factum of ^marriage as well as its legal validity can or are to be gone into, I have no doubt that the questions would have to be answered in favour of the respondent No. 1, in this case in view of the nature and the scope of a Magisterial proceeding u/s 488 of the Code where the Legislature has designedly provided for no appeal against the orders passed in summary proceedings under that Section and has subjected these orders to the decisions of competent Civil Courts. As already noted, the argument of Mr. Sharma is that assuming that a marriage in fact between the revision-petitioner and the respondent No. 1 has been proved, this could not be a marriage in law as the parties having belonged to different castes could not legally marry under the Hindu Law as is applicable in Silddm, where there is no statutory law as in Section 3 of the Hindu Marriage Validity Act, 1949 or Section 29(1) of the Hindu Marriage Act, 1955, validating inter-caste and inter-sub-caste marriages among the Hindus.

7. There is, however, nothing on record to show that the parties in this case belong to two different-castes or sub-castes and the one is higher and the other lower. All that I get is that the surname of the revision-petitioner, that is, the alleged husband, is "Bista" and the maiden surname of the respondent was "Khawas". Mr. Sharma has, however, contended that "Bista" belongs" to the "Chhetri" caste which is a higher caste than the one to which the "Khawas" belongs. To my categorical question, as to whether "Bista" and "Khawas" are

different cases altogether or are different sects of or different sub-castes under the "Chhetri" caste, Mr. Sharma was frank enough to state that he could not give a categorical answer and candidly conceded that there is nothing on record on this point. Now, if "Bista" and "Khawas" are not altogether different castes, but are different sub-castes under the same caste "Chhetri", then even without the aid of any enactment like the Hindu Marriage Validity Act, 1949, or the Hindu Marriage Act, 1955, such inter-sub-caste marriage would be valid under the Hindu Law even as stood before these enactments. The old 1869 decision of the Privy Council in *Inderun v. Ramaswamy* 1869 13 Ind. App. 141 (supra) is itself an authority for the proposition that inter-sub-caste marriages, as distinguished from inter-caste marriages, were all along regarded to be legally valid. In the much later decision of the Privy Council in *Gopi Krishna v. Mst. Jaggo*, which has been relied on by the Privy Council in a yet later decision in *Kashi Nath v. Bhagwan Das* AIR 1974 PC 168 (supra), Sir Shadi Lai categorically ruled (at 199) that "the Shastras dealing with the Hindu Law of marriage do not contain any injunction forbidding marriages between the persons belonging to different divisions of the same Varna and neither any decided case nor any general principle can be invoked which would warrant such a prohibition."

8. But even if the parties belong to two different castes, then even according to Mr. Sharma, the bridegroom "Bista" was of higher caste and the bride "Khawas" was of lower one. As pointed out by this Court in *Bishnukala v. Bishnumaya* at p. 12 (supra), under the Shastric Hindu Law, as interpreted by the Courts, marriages between persons belonging to different castes were divided under two heads as "Anuloma" and "Pratiloma", the former being marriage between a male of higher caste and a female of lower caste and the latter being marriage between a male of lower caste and a female of higher caste. It was pointed out that though it was not easy to appreciate the rationale, it was generally held by the Courts that Anuloma marriages were not invalid but the Pratiloma Marriages were. While some of the Smritis, for example, *Vishnu Sanhita* (XXIV, 1-4), *Narada Samhita* (XV-XII 5-6) clearly; permitted Anuloma marriages, some later Commentators, for example, *Raghunandana* in his *Udvalia Tattwa* (II, 62), however, prohibited inter-caste marriages altogether. In a Division-Bench decision of the Assam High Court in *Makhana Katani v. Thaneswar* AIR 1950 Gau 11, *Sarjoo Prasad, C.J.*, held (at 12) that Anuloma marriages would have been valid under the Hindu Law even without Section 3 of the Hindu Marriage Validity Act, 1949, though I must note that some High Courts took a different view. In *Kashi Nath v. Bhagwan Das* AIR 1947 PC 108 (supra), the Privy Council, however, described the question as to the validity of inter-caste marriages as "the difficult question". But at any rate, this has not been disputed that even if marriages between persons belonging to different castes were not valid under the Shastric Law, custom and usage could validate the same (see, for example. *Mayne's Hindu Law - 11th Edition* P. 167). Another interesting feature of the earlier Hindu Law was that even if a marriage was invalid, the female party thereto was entitled to maintenance. *Raghavachariar* in his *Hindu Law* (7th Edition - 1980 -

Vol. I - Pp. 51, 219) has referred to the Division Bench decision of the Bombay High Court in *Ram Chandra v. Gopal* ILR (1908) 32 Bom 619 and also a Division Bench decision of the Patna High Court in *Kamani Devi v. Kameshwar Singh* AIR 1946 Patna 316 for the proposition that even if the marriage was void as being violative of the rules relating to prohibited degrees or relating to Gotra or Pravara, "the wife is entitled to be maintained by the husband". Trevelyan also in his *Hindu Family Law* (1908, p. 40), after pointing out that "a marriage within the prohibited degrees is void", observed further that "the woman is entitled to receive maintenance from the man" and this was referred to with approval by the Patna Division Bench in *Kamani Devi v. Kameshwar Singh* (supra) at 319. In *Gour's Hindu Code* also (5th Edn. - Vol. I 1974 P. 254) it has been observed that even where the marriage was void as being within the prohibited degree, or being a prailoma one, the obligation to maintain the wife would remain.

9. This being the position in law on the point relating to inter-caste marriages among the Hindus, which even according to the Privy Council in *Kashi Nath v. Bhagwan Das* supra at 168 involved "difficult question", a Court u/s 488 of the Code, which is solely concerned with providing maintenance to a discarded and deserted wife cannot be required to go into such questions before ordering maintenance. In describing the scope and nature of a proceeding u/s 488 of the Code, Subba Rao, J., speaking for a three-Judge Bench of the Supreme Court in *Jagir Kaur and Another Vs. Jaswant Singh*, that "the proceedings, under this Section are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy...is ordinarily a helpless person" so "the words should be liberally construed". (Emphasis added). In an earlier decision of the Supreme Court in *Nandlal Misra Vs. K.L. Misra*, , the same learned Judge observed at p. 885 : at p. 1249 that Section 488 "prescribes a summary procedure for compelling a man to maintain his wife and children" and pointed out that "the findings of a Magistrate under this Chapter are not final and the parties can legitimately agitate their rights in a Civil Court," (Emphasis added). In fact, Section 489(2) expressly contemplates cancellation of an order made u/s 488 "in consequence of any decision of a competent Civil Court." In *Shri Bhagwan Dutt Vs. Smt. Kamla Devi and Another*, , it has again been pointed out by the Supreme Court at p. 85 : at p. 42 that the provisions of the Section are preventive in nature, providing a mode for preventing vagrancy and are "not intended to provide for a full and final determination of the status and personal rights of the parties" and determinations thereunder are subjected "to any final adjudication that may be made by a Civil Court between the parties regarding their status and civil rights". (Emphasis added). The proceeding being thus a summary one, not intended to determine fully or finally the status and the personal rights of the parties, the remedy being thus a summary one, the order having been made non-appealable but expressly made subject to the decision of a competent Civil Court, a Magisterial Court conducting a summary proceeding u/s 488 with its avowed object to prevent vagrancy cannot be required to go into the question of the legality of an inter-caste marriage, a question which even the

Privy Council certified to be a "difficult question". In *Jagir Kaur v. Jaswant Singh* at p. 1524 : at p. 415 (supra), the Supreme Court has ruled that the expressions in Section 488 should be liberally construed, meaning obviously liberally in favour of the wife and the children for whose speedy protection this section was enacted. Thus construed, a "wife in fact" with all legal presumption of being a "wife in law" operating in her favour should be held to be entitled to invoke this Section, unless the illegality or the invalidity of her marriage is apparent on its face with irresistible clarity and without any scope of any doubt or dispute.

10. I have referred to the observations in the well-known treatises on Hindu Law by Trevelyan, Gour and Raghavachariar and to a Bombay Division Bench decision and. also a Patna Division Bench decision to the effect that a wife of a void marriage was also entitled to maintenance under the earlier Hindu Law. u/s 25 of the Hindu Marriage Act, 1955, a woman whose marriage has been annulled by a decree of nullity on the ground of its being void has been held to be entitled to maintenance, even though the Section uses the expression "wife"" and reference in this connection may be made among others to *Sisir Kumar Kundu Vs. Smt. Sabita Rani Mandal*, , *Dayal Singh Vs. Bhajan Kaur*, , *Govindrao Ranoji Musale Vs. Sou. Anandibai and Another*, , *Kuldip Chand Sharma Vs. Geeta Sharma*, . In *C. Obula Konda Reddy Vs. C. Pedda Venkata Lakshmmamma*, it has been held that a "Hindu wife", who is entitled to maintenance u/s 18 of the Hindu Adoptions and Maintenance Act, 1956, would also include a Hindu wife whose marriage is void. If that was the position under the old Hindu Law and that is also the position under the present Hindu Law Codes, then the contention that the expression "wife" in Section 483 of the Code of Criminal Procedure, 1898, and also in Section 125 of the present Code of 1973, should include a "wife" of a void marriage also would require very serious consideration. In fact, K. Lahiri, J., of the Gauhati High Court has, ,in his very instructive judgment in *Boli Narayan Pawye Vs. Smt. Shiddheswari Morang*, , discarded the view that a discarded wife applying u/s 125 of the present Code of 1973 must prove herself to be "legally married" before she can be allowed to invoke that section and the learned Judge appears to have observed that "a marriage may be valid, void or voidable," but "nonetheless it is a marriage"" and if it is a marriage, the female party thereto is a wife for the purpose of Section 125. It is, however, not necessary for me in this case to go that far and the learned Additional Advocate-General appearing for the State, who has drawn my attention to this decision, has not also invited me to go to that extent, his main contention being that a "wife in fact" is good enough for a summary proceeding u/s 488, unless the materials on record unmistakably show that such a marriage could never take effect in law and that there is nothing on record to demonstrate such legal impossibility. Lahiri, J., has, however, observed in *Boli Narayan* at 676 (supra) that "absence of mandatory ceremonies may render a marriage void or voidable". With great respect, that does not appear to me to be the position in law at least under the Hindu Marriage Act, 1955, where absence of the mandatory ceremonies is not a ground which would render any marriage void u/s 11 or voidable u/s 12. I would like to

think that the absence of such essential ceremonies as referred to in Section 7 of the Hindu Marriage Act may make the marriage "no marriage" at all, but would not make it a void or a voidable marriage and the woman, who is party thereto, may not be even a "wife in fact" for the purpose of Section 48 of the Code of 1898 or Section 125 of the present Code. But these questions really do not arise for consideration in this case and need not be pursued. As I have already held, the finding as to a marriage" in fact between the parties in this case is beyond challenge in revision and as "here is nothing apparent on its face to clearly demonstrate its illegality or invalidity, the marriage in fact would attract in its favour all the presumptions of its being a marriage in law and would entitle the respondent No. 1 to invoke the provisions of Section 488 of the Code.

11. As to the quantum of maintenance, I have not been able to find any thing on record to persuade me to hold that the amount of Rs. 200,- per month awarded by the learned Judge for the wife of the revision-petitioner, who is earning not less than Rs. 600/- as his monthly salary, is excessive and warrants any interference in revision. It is true that under the provisions of Section 125 of the new Cr.P.C. 1973, which, as noted at the outset, has not yet been extended to the State of Sikkim, a wife, in order to be entitled to any maintenance under that Section, must be one who is "unable to maintain herself" as clearly pointed out in Section 125(1)(a) of the new Code. But as pointed out in *Shri Bhagwan Dutt Vs. Smt. Kamla Devi and Another*, the mere fact that the language of Section 408(1) does not expressly make the inability of a wife to maintain herself a condition precedent to the maintainability of her application under that Section, does not imply that while determining her claim and fixing the amount of maintenance the Court is debarred from taking into consideration the wife's own separate income or means of support. In other words, under the new Section 125, an application by the wife thereunder may not be maintainable unless she proves that she is "unable to maintain herself" while u/s 488 of the Code of 1898, the inability to maintain herself is not a sine qua non to the maintainability of an application thereunder, but the Court nevertheless is entitled to take into consideration the wife's separate income, if any, in determining the amount of maintenance to be awarded. In this case there is no evidence whatsoever that the respondent No. 1 has any separate income and while she has categorically stated that she is staying with her father with great difficulty, there has been no suggestion made to her or to any of her witnesses that she is not unable to maintain herself. That being so the impugned order cannot be challenged on the ground that the question whether the wife has any separate income or not was not specifically considered by the learned Judge. The revision thus fails and is dismissed.