

(2017) 03 BOM CK 0011

In the Bombay High Court

Case No : Family Court Appeal No.90 of 2015

Sau. Shalini w/o Dhanraj Shirsat

APPELLANT

Vs

Dhanraj s/o Tukaram Shirsat

RESPONDENT

Date of Decision : 09-03-2017

Acts Referred:

Hindu Marriage Act, 1955 — Section 11, Section 29(2)

Citation : (2017) AIR(Bombay) 116 : (2017) 3 AIRBomR 551 : (2017) 3 ALLMR 735

Hon'ble Judges : Vasanti A. Naik and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. A.K. Choube, Advocate, for the Appellant; Mr. A.M. Tirukh, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Deshpande, J.—By the present family court appeal, the appellant is questioning the legality and correctness of the judgment and decree passed by the learned Judge of the Family Court, Akola in B.P.No.B1/ 2014 dated 30.05.2015, whereby the learned Judge of the Family Court allowed the petition filed on behalf of the respondent and declared that the marriage between the petitioner and respondent dated 17.02.2013 is null and void.

Two different proceedings were filed before the Family Court. The appellant (hereinafter referred to as the "Wife" for the sake of brevity) filed a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. The said petition was registered as Petition No.152/13.

Whereas the respondent in the present appeal (hereinafter referred to as the "Husband" for the sake of brevity) filed a petition for a declaration that the marriage is null and void. The said petition was registered as B. P. No.1/2014.

2. Both the petitions were decided by a common judgment dated 30.05.2015. The petition for restitution of conjugal rights was dismissed whereas

B.P.No.1/2014 filed by the husband was allowed and a decree was granted in favour of the husband that the marriage between the husband and wife dated 17.02.2013 is null and void.

3. Though the petition for restitution of conjugal rights filed by the wife was dismissed, the wife did not prefer any appeal to challenge the said dismissal. The wife is before this Court in order to challenge the decree for dissolution of marriage as granted by the Court below in Petition No. 1/2014. Facts giving rise to the present appeal are as under:

4. The husband preferred petition under Section 11 of the Hindu Marriage Act. According to the pleadings, earlier he was married with one Rajkanya. The said marriage was dissolved by a decree of divorce by the Additional District Judge, Delhi in Hindu Marriage Petition No.127/1999 on 11.10.2000.

It is further pleaded that a friend of the husband; Sudhir Pradhan was informed by the husband that he wishes to remarry. Therefore, the said Pradhan suggested the name of the wife to the husband. The brother of the wife called the husband at his house and in the said meeting, husband informed that he was earlier married. However, he got the decree of divorce from the Court. The marriage in between them was settled and it was solemnized on 17.02.2013 at Akola.

After marriage, the husband went to Delhi as the husband was serving as a driver in All India Congress Committee at Delhi and the wife started residing at her parent's house.

5. On 25.04.2013, the husband had been to Akola for taking the wife to Delhi. On 29.09.2013, the wife accompanied the husband to cohabit with him at Delhi. According to the pleadings, for some days the wife cohabited with the husband properly however thereafter she started picking up quarrels with him for small reasons. Even their marriage was not consummated. It was the insistence of the wife that she should be taken to Akola at her parent's house. She was not ready to cohabit with the husband and therefore both came to Akola as per the wish of the wife in June 2013.

It is further pleaded that the husband informed the behaviour of the wife to her parents and brother. Thereafter, the husband went to Paras, his native place. On inquiry, he got knowledge that the wife was already married with one Anant Maroti Sawadkar on 13.06.1989 and from the wedlock, she gave birth to a male child by name Guddu on 29.05.1990 and the husband also got the knowledge that the wife had not taken a decree of divorce from her first husband Anant from any competent court. It is also pleaded that the wife had filed proceedings under Section 25 of the Guardian and Wards Act against her first husband and that was registered as Miscellaneous Judicial Case No.205/1995 and it was decided on 22.06.1998 by which the wife was appointed as guardian of the minor son Guddu.

It is pleaded in the petition filed by the husband that the wife suppressed her first marriage. It is also pleaded that the wife is legally wedded wife of Anant Sawadkar. With the aforesaid pleadings, the petition was filed.

6. Written statement was filed on behalf of the wife. In the written statement, she admitted her first marriage with Anant Sawadkar. However, as per the pleadings, the said marriage was dissolved by executing "Farkatnama" as per the customs prevailing in the community. It is pleaded that the said Farkatnama was written on 19.12.2012 on a stamp paper of Rs.100/. It was pleaded that in their community, the customary divorce is accepted.

7. Issues were struck by the learned Judge of the Court below, which are as under:

1. Whether the petitioner proves that at the time of marriage respondent was already married?

2. Whether the petitioner proves that marriage between him and respondent dated 17.02.2013 is null and void?

2A. Whether there is custom in the community of parties to dissolve marriage by customary divorce?

3. Whether petitioner is entitled to a decree as claimed?

3A. Whether petition is within limitation?

4. What order?

8. The husband entered into the witness box and also examined one Pramod Kothalkar. The wife entered the witness box and one Rajendra Ahir and Savita Wankhede were examined by her. Pramod Kothalkar was examined by husband and through him, the husband pointed out how he got knowledge of the first marriage of the wife.

9. The learned Judge of the trial Court recorded a finding that the wife has failed to prove that there is a custom in the community of the parties to dissolve the marriage by customary divorce and, therefore, the learned Judge recorded a finding that at the time of marriage between husband and wife, the first marriage of wife was still in existence and therefore the present marriage is null and void.

10. We have heard Mr. A. K. Choubey, the learned counsel for the appellant-wife and Mr. A. M. Tirukh, the learned counsel for the respondent-husband. We have also minutely perused the record. The learned counsel for the appellantwife submitted that by virtue of the customary divorce deed, the relations between the wife and her first husband came to be severed. He submitted that the wife has proved the custom by examining her two witnesses. On the contrary, the learned counsel for the respondent-husband supported the order passed by the Family Court.

11. On a perusal of the record and on hearing the learned counsel for the parties, following points arise for determination in this family court appeal.

(i) Whether the wife proves that there is a custom in the community to dissolve the marriage by customary divorce?

(ii) Whether the judgment of the Family Court requires interference?

(iii) What order?

12. The evidence of Rajendra Ahir shows that he knows both the husband and wife and prior to the marriage, her marriage was performed with Anant Sawadkar on 13.08.1989 but the said marriage was a failure and therefore as per the custom, on 19.12.2012 on bond paper of Rs.100/, the deed of divorce was executed and at that time he was personally present. He further states that the said deed is having signature of the wife and her brother Santosh Wankhade and her first husband Anant Sawadkar. It is further deposed by him that in their community such type of divorce is permissible. When this witness was under cross-examination, he has stated as under:

"I am aware that parties have to apply to the Court to dissolve marriage."

Another witness Savita is the sister of the wife. Her evidence is to the effect that there is a practise in their community to have customary divorce.

13. It is not disputed by the learned counsel for the appellant that the parties are governed by the provisions of the Hindu Marriage Act. Section 29(2) of the Hindu Marriage Act saves the validity of customary divorce. Sub Section (2) of Section 29 of the Hindu Marriage Act reads as under:

"29 Savings. ?

(1)

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."

Custom is a rule which in a particular family or a particular class of community or in a particular district has, from long usage, obtained the force of law. It must be ancient, certain and reasonable custom being in the derogation of general rule of law, must be construed strictly and should be established by evidence. It is also well known and well settled that the party relying on custom must allege and prove the custom on which he relies.

14. The Madras High Court in the case of S.K. Subbaraj and ors. v. Indirani; reported in 1999 Madras Law Reports 579, in paragraph 15 held as under:

"15. The Hindu Marriage Act came into force on 18.5.1955. Section 29(2) of this Act reads thus, Nothing contained in this Act shall be deemed to affect any right

recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act.

Relying upon the above provision, Counsel for the defendant submitted that custom must be ancient and there must be proof of customary divorce prior to passing of the Act and as all the documents filed are after the Act, that will not prove custom. He further submitted that the evidence of P.W. 1 is that in the presence of Panchayatdars, divorce had taken place and so, it is not the custom and it does not prove that customary divorce was prevailing in their community and it was ancient and prior to passing of the Act. To prove customary divorce, the plaintiff must establish the proof of custom. As regards the nature and quantum of proof of custom, the following propositions are enunciated by this Court in *Gopalayyan v. Ragupatiayyan*, 7 MHCR 250 :

(i) The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with the law and this conviction must be inferred from the evidence.

(ii) Evidence of the acts of the kind, acquiescence in those acts, decisions of Courts, or even of Panchayats, upholding such acts; statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible; but it is obvious that although admissible evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.

Even though there is oral evidence of P.Ws. 1 to 8, those witnesses have spoken about the divorces which took place after passing of the Act and they have not spoken with regard to divorce relating to the period prior to passing of the Hindu Marriage Act. The evidence on the side of the plaintiffs must satisfy the Court with regard to customary divorce. Any amount of document filed which came into existence after coming into force of the Act will not amount to proof of custom. The evidence of PWs is that there is customary divorce in their Kammavar community. P.W. 1's evidence does not speak about the customary divorce. He says that the divorce between the defendant and the deceased Govindaraj was effected in the presence of Panchayatdars. The plaintiffs also rely upon the document Ex. A2 to prove the divorce. In Ex. A2; there is no mention with regard to customary divorce."

In another case in *Udaya Swain v. Satya Swainani* reported in 1970 *The Cuttack Law Times*, 1330 , the learned single Judge of the Orissa High Court found as under:

"The question to be examined, therefore, is as to whether the defendant has been able to establish the custom alleged by him. This custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. It is essential that it should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that Courts can

be assured of its existence, and of the fact that it possesses the conditions requisite of recognition.

8. As was indicated in a very old decision of the Madras High Court in *Gopalayyan v. Raghunatiayyan* and continuity of the usage and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence. It was further stated that the evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of courts, or even of panchayats upholding such acts, the statements of experienced and competent persons on their belief that such acts were legal and valid will all be admissible but it is obvious that, although admissible evidence of this latter kind will be of little weight unsupported by actual evidence of usage asserted. The rule laid down by the Board in the case of *Ramalakshmi Ammal v. Sivanatha Perumal Sathuravar*, has been quoted with approval on several occasions by their Lordships of the Judicial committee and runs to the following effect:

"It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the condition of antiquity and certainty on which alone their legal title to recognition depends."

The evidence in the present case shows that the wife has not led any evidence to show existence of any customary divorce prevailing in her community. No document is filed relating to the period prior to the passing of the Act. In our view, the evidence both oral and documentary is too short to prove that there was a customary divorce practise prevailing in the community. The wife has not examined any elderly person from the community who could have deposed in support of the custom prevailing for obtaining customary divorce. Though, Section 29(2) of the Hindu Marriage Act protects customary divorce, it is obligatory on the party relying on the said custom to prove the existence of custom, that it is ancient, certain and reasonable and it does not oppose to the public policy. The said party is under obligation to prove that the divorce has in fact taken place in conformity with the custom.

15. From the evidence available on record from the side of the wife, it is clear that the said is not acceptable evidence with regard to the customary divorce. A custom cannot be created by an agreement between the a parties as found in this case as "Farkatnama" so as to bind on others.

Clause (a) of Section 3 of the Hindu Marriage Act reads as under:

(a) the expressions "Custom" and "usage" s" ignify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public

policy; and Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family."

Thus the custom must have been observed for a long time and must be ancient. In pages 49 and 50 of the Mayne's Hindu Law & Usage, it is observed that,

"The beginnings of law were in Customs. Law and usage act, and react upon each other. A brief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and an uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of community, it becomes a custom, which is a part of their personal law."

16. In the present case, the wife has not led any evidence to show existence of customary divorce preceding the Act. The oral and documentary evidence do not establish that there was customary divorce prevailing in the community to which the party belongs. The evidence of Rajendra shows that he knows that for obtaining divorce one has to approach to the Court. The another witness is sister of the wife. She is totally silent as to on what basis she is deposing that there is a custom in their community to obtain the customary divorce. In the absence of such a positive evidence, merely because she is deposing in favour of the wife is hardly of any use to support the case of the wife. Therefore, it is clear that the evidence adduced on record by the side of the wife cannot take place of custom.

17. In totality of the circumstances, we observe that the learned Judge has not committed any mistake of law in observing and ruling that the wife has failed to prove that there is a custom to obtain customary divorce. Hence, the appeal must fail. Accordingly, the appeal is dismissed with no order as to costs.