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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: March 01, 2011*

+ **WP (C) 981/2010**

NO.98005229, EX.CONSTABLE SHIV RAM Petitioner
Through: Mr.Anil Gautam, Advocate.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr.Amit Chadha, Advocate with
Asstt.Comdt.Amit Chadha, BSF.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.(Oral)

1. Heard learned counsel for the parties. Another instance of conflict between India and Bharat. The social norms in Rural India are not accepting the changes which the legislature intends to bring. Hindu Marriage Act 1955! It is observed more in breach rather than in compliance in rural areas. The reason appears to be that the rural society is not in sync with the modern ethos which the city bred propagates.

2. Petitioner, Ex.Ct.Shiv Ram was admittedly married to one Kalo Devi in April 2000. He and the lady are residents of two different villages in Tehsil Salooni, District Chamba, Himachal Pradesh. It is the customs which govern their social living and

not the legislation. May be, the Government hardly reaches out to rural areas and thus they decide to live by their own norms.

3. The two could not pull along. The village elders intervened. A customary divorce took place when a panchayati decision was arrived at requiring the petitioner to pay alimony to Kalo Devi. This decision was taken in April 2002.

4. Petitioner and Kalo Devi separated and were happy. Petitioner paid the alimony. On 11.1.2006 Kalo Devi re-married one Narain Singh, an army officer. She was happy.

5. At a pilgrimage to Manimahesh, petitioner met one Indu Sharma. The two fell in love. They got married on 16.11.2006. They got married secretly. The reason was obvious. Petitioner had a previous marriage which was annulled at a customary Court and was not recognized as a divorce under the Hindu Marriage Act 1955.

6. Albeit belatedly, parents of Indu Sharma reconciled to the marriage but for unexplainable reasons Indu Sharma and her parents fell foul with the petitioner and made a complaint that the petitioner had breached the discipline of his organization and had committed an offence by contracting a second marriage with Indu Sharma during the lifetime of his first spouse; with the first marriage subsisting.

7. A Court of Inquiry was ordered. Affidavits of Kalo Devi and her second husband Narain Singh were filed testifying that on account of the customary divorce, Kalo Devi had re-married Narain Singh. Petitioner led evidence to establish that Indu Sharma had married him with full knowledge of the true facts.

8. On 31.3.2007, the Court of Inquiry gave an opinion as under:-

“After going through the findings of the court and documents produced by various witnesses the court

has come to the following conclusion:-

That No.98005229 Const Shiv Ram of 24 Bn. BSF married Smt.Kalo Devi in the year 2001 but has no issue from her. As per available evidence Mrs.Kalo Devi w/o Shiv Ram deserted him and remarried with one Shri Naran Singh S/o Chet Ram village Sundaratha Pargana Bagori Distt. Chamba H.P. The village Pradhans Panchayat Saikothi and Lanote Distt. Chamba have given an information under their official seal of the above effect in reply to an official query made on 22.01.07 by 24 BN BSF. Mrs.Kalo Devi too has given an undertaking of above effect and her name does not figure in the family register of (vill-Alla (Lanote) Chamba HP) Ct.Shiv Ram

That in Aug 06 during a pilgrimage to Manimahesh, Chamba Const Shiv Ram and Miss Indu Sharma D/o Sh. Om Prakash Sharma fell in love with each other. Evidence has also come that Miss Indu knew about the caste, marital and service status of Const Shiv Ram. Since the parents of Miss Indu were not ready to marry her to Const Shiv Ram she deserted her home and married Shiv Ram in the court of Chamba HP on an affidavit on 16 Nov 06. Late on 17 Nov they married themselves according to Sikh customs in the Gurudwara Singh Sabha Jansali, Chamba HP. On 17 Nov 06 itself this information was given to Shri Om Prakash F/o Miss Indu.

No evidence has come that Miss Indu Sharma was threatened pressurized or induced for marriage or was sexually exploited against her free will. This is also evident from the fact that no FIR was lodged at any stage and no medical examination of Miss Indu was done. Evidence has also come that the parents made up their mind to accept the marriage but they changed their mind when they saw the name of Mrs.Kalo Devi in the service record of Const. Shiv Ram. At this stage the first complaint against Const. Shiv Ram was made to Comdt. 24 Bn.BSF.

The Court therefore opined that Const.Shiv Ram did not marry Miss Indu fraudulently. As per existing evidence it's a legal marriage of two adults with their mutual consent, without any threat, pressure or

inducement to Miss Indu. Miss Indu Sharma, 21 well education was at liberty to communicate and seek help from her parents/authorities at all times and at all places. Further in the opinion of the court she was not sexually harassed.

However as per the provisions of Hindu Marriage Act the court does not given much weightage to divorce on affidavit hence legally speaking Smt.Kalo Devi is still wife of Const.Shiv Ram though she has married to other person. In this view Const.Shiv Ram legally remains guilty of dual marriage till such time he does not divorce Smt.Kalo Devi by a court decree which now remains a legal formality only.

Keeping in view the opinion and circumstances under which Const.Shiv Ram has remarried the court finally opines that there months notice be given to No.98005229 Const.Shiv Ram of 24 Bn BSF for producing divorce court decree with Ex wife Kalo Devi failing which administrative action will be taken. Till such time Cont. Shiv Ram may be kept under suspension.”

9. Accepting the findings of the Court of Inquiry, on 10.4.2007, the Commandant recorded his opinion as under:-

“01. I generally agree with finding and opinion of the Court.

02. Evidence on the record revealed that No.98005229 Const. Shiv Ram was married to Smt.Kalo Devi in the year 2001 but she deserted Const.Shiv Ram and remarried with Shri Narain Singh S/o Chet Ram vill Sundaratha Pargana Baagori, Distt. Chamba (HP) without divorcing Ct.Shiv Ram in Court.

03. Evidence has also come that Miss Indu Sharma D/o Shri Om Prakash Sharma deserted her home herself and married Ct.Shiv Ram in the Court of Chamba (HP) on 16.1.2006 on affidavit and later on they married themselves according to Sikh customs in the Gurudwara Singh Sabha Jansah, Chamba on 17.11.2006.

04. Miss Indu Sharma D/o Sh.Om Prakash Sharma 21 years of age. Well education was in love with Const.Shiv Ram. She was not threatened, pressurized induced for marriage or sexually exploited against her free will.

05. It appears that due to lack of knowledge about the divorce provision in Hindu Marriage Act Ct.Shiv Ram did not approach the District Court for divorce decree from his first wife in spite of the fact that she had remarried in his absence.

06. I therefore direct that:-

(a) Three months notice be given to No.98005229 Const Shiv Ram to producing divorce court decree with Ex-Wife Kalo Devi failing which administrative action will be taken against Const Shiv Ram as per BSF Act and Rules.

(b) Till such time he may be kept under suspension.”

10. Petitioner claims that he was verbally told by the Commandant to regularize his affairs by obtaining a formal divorce from a Competent Court with respect to his divorce with Kalo Devi. Accordingly, the petitioner moved the Court of Competent Jurisdiction seeking divorce with consent from Kalo Devi on 14.6.2007. Unfortunately for him, the learned Judge concerned acted technically by deferring the application seeking divorce by mutual consent for a period of six months and finally granted a decree of divorce annulling the marriage of the petitioner with Kalo Devi vide decree dated 20.12.2007. But, in the meanwhile the higher authorities i.e. the I.G. took a different opinion of the matter. Finding that Kalo Devi and her second husband were not examined at the Court of Inquiry and that the opinion of the Court of Inquiry was rendered on the basis of purported affidavits filed by Kalo Devi and her second husband

Narain Singh, it was directed that further Court of Inquiry be held. Further Court of Inquiry was held and opinion given was that in view of the fact that petitioner had sought decree of divorce by mutual consent from Kalo Devi in the month of June 2007, it was apparent that the petitioner had married Indu Sharma during the subsistence of a first legal marriage.

11. Proceeding to take further action, the Commandant issued a notice to show-cause in May 2008 calling upon the petitioner to show-cause as to why administrative action of dismissing the petitioner from service be not taken. Considering the reply filed and rejecting the same, order passed on 27.6.2008 was to retire the petitioner from service, which we understand means, as told by the respondents, penalty of compulsory retirement. Appeal filed by the petitioner was rejected vide order dated 23.9.2008. Further representation made to the Director General has been rejected on 21.8.2009.

12. Being out of job, petitioner challenges the order dated 27.6.2008, 23.9.2008 and 21.8.2009.

13. Whereas learned counsel for the respondent would contend that the petitioner having admittedly obtained a decree of divorce from Kalo Devi on 20.12.2007, in the teeth of his admission that he married Indu Sharma on 16.11.2006, it is apparent that the petitioner breached the service rules by marrying Indu Sharma during the subsistence of his previous marriage with Kalo Devi. Thus, respondent would urge that the writ petition be dismissed.

14. Per contra, Mr. Anil Gautam, learned counsel for the petitioner would urge that the first Court of Inquiry of Opinion resulting in its acceptance by the Commandant concludes the issue of the petitioner being in technical default. The

Department accepted the position that petitioner had obtained a customary divorce from Kalo Devi in April 2002, much before the petitioner marrying Indu Sharma on 16.11.2006; Kalo Devi had remarried Narain Singh on 11.1.2006. Counsel urges that the petitioner formalized the customary divorce at the asking of the Commandant and he having taken corrective action could not now be penalized for the same by treating date of divorce between the petitioner and Kalo Dev being 20.12.2007 i.e. when the Court of Competent Jurisdiction annulled their marriage.

15. We had prefaced our order by bringing out the conflict in the social thinking in rural areas and urban areas. Whatever be the reason, legislation has hardly any impact in rural areas. One reason could be that the Government hardly reaches out to those areas and they decide to live by their own norms. It has to be kept in mind that the petitioner is a constable and his social thinking would be in tune with the social thinking in rural areas. Right or wrong, he was led or misled, whatever may be the expression one may choose to use, to go by the dictates of the village elders. He thought that the customary divorce in April 2002 was fine. So did Kalo Devi think; remarrying Narain Singh on 11.1.2006. Narain Singh is an army man. Thereafter, petitioner married Indu Sharma on 16.11.2006. The finding of the First Court of Inquiry is in harmony with the social realities in India. Its acceptance by the Commandant was correct. Petitioner was rightly advised to regularize the technical wrongs. We see no reason why the petitioner should be made to suffer.

16. Suffice would it be to state that intention plays a very important part in every wrong. Needless to state an act becomes a wrong if backed with the requisite intention. Lacking an intention, an act would not be an offence.

17. The peculiar facts of the case noted herein above compels us to return a finding in harmony with the opinion rendered at the First Court of Inquiry. We may note at this stage that the requirement of the Second Court of Inquiry was to find out whether the affidavits submitted by Kalo Devi and Narain Singh were correct. Indeed, at the second Court of Inquiry proceedings it surfaced that the affidavits were correct. Indeed, Kalo Devi and Narain Singh had got married on 11.1.2006, but unfortunately for the petitioner the Department took a technical view and not the pragmatic view taken earlier. The technical view was that since the petitioner admittedly obtained a formal decree of divorce on 20.12.2007, he could not have married Indu Sharma on 16.11.2006.

18. We allow the writ petition and quash the orders dated 27.6.2008, 23.9.2008 and 21.8.2009 and direct the petitioner to be reinstated but hold that he would not be entitled to any back wages. Sans wages, petitioner would be entitled to all other consequential benefits including continuity in service, benefit of service rendered and pensionary benefits.

19. Compliance be made within 6 weeks from today.

20. No costs.

PRADEEP NANDRAJOG, J.

SURESH KAIT, J.

MARCH 01, 2011
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