

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-M-132 of 2010

DATE OF DECISION: JULY 14, 2015

SUNIL KUMAR LOHIA

...APPELLANT

VERSUS

BISHNA

...RESPONDENT

**CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.
HON'BLE MRS. JUSTICE RAJ RAHUL GARG.**

1. Whether the judgement should be reported in the digest? Yes

PRESENT: MR. JAIVEER YADAV, ADVOCATE FOR THE APPELLANT.
MR. ANKUR GUPTA, ADVOCATE FOR THE RESPONDENT.

M. JEYAPPAUL, J.

1. Appellant Sunil Kumar Lohia has preferred the appeal aggrieved by the decree of restitution of conjugal rights passed by the trial Court in the petition under Section 9 of the Hindu Marriage Act, 1955 filed by respondent Bishna.

2. It has been contended in the petition filed by the respondent herein that the appellant and the respondent solemnized marriage on 15.6.2005 at Shiv Vakunt Dham Mandir, near Tribune Chowk, Chandigarh according to Hindu rites and ceremonies in the presence of friends of both the parties. After marriage, they lived and cohabited together as husband and wife at various places at Chandigarh. No child was born out of the wedlock. In the month of July, 2005 the appellant left for Bhubneshwar for getting training in an industrial unit. The appellant kept on visiting the respondent herein and the respondent herein also visited him at

Bhubneshwar. The appellant and the respondent proceeded to the residence of the appellant at Kurukshetra, where the parents of the appellant expressed their unwillingness to admit the marriage. When they came to know of the marriage, they started using abusive language against the respondent and her friends. The respondent tried to reconcile the parents of the appellant, but to no avail. The respondent had to come back to her parents' house at Chandigarh. On 29.8.2005, when the respondent contacted the appellant, he refused to listen to her and informed her that he would prefer to go as per the choice of his parents. The appellant has withdrawn from the society of the respondent without reasonable excuse. Hence, the petition under Section 9 of the Hindu Marriage Act praying for restitution of conjugal rights.

3. The appellant filed written statement before the trial Court contending therein that there was no marriage ever solemnized between the appellant and the respondent on 15.6.2005. The appellant never cohabited with the respondent at any time in his life. The appellant joined a gym to maintain his physical fitness. The respondent used to stare at him, but the appellant ignored the solicitation of the respondent. One Tuesday evening, the respondent who walked past the appellant came out of the temple, kissed him and forcibly caught his hand and put it on her breast. In the meantime, a boy who was on a motorcycle took photograph of the incident. The respondent started blackmailing the appellant with those photographs. After few days, the respondent came to meet the appellant and gave him some type of prasad to eat. The respondent had mixed something in the parsad to mesmerize the appellant. The respondent expressed her desire to marry him.

But the appellant was shocked to hear such a desire on the part of the respondent. The appellant was below 21 years of age at that time. On 15.6.2005, the appellant participated in a get-together organized by the respondent. The appellant was taken to a Mandir near Tribune Chowk, Chandigarh. A baba who was in the Mandir gave the appellant something to eat as prasad after performing puja. Soon thereafter, the appellant started feeling drowsy. The appellant was not aware of what actually happened thereafter. The appellant was never in his senses at that time. The respondent visited Kurukshetra on 29.8.2005 and used filthy language against the parents of the appellant. With the above contentions in the written statement, the appellant has sought for dismissal of the petition filed by the respondent herein.

4. On the side of the respondent, one Shyam Parkash who was the friend of the respondent was examined as PW1. The respondent herself was examined as PW2. One Anurag, the employer of the respondent was examined as PW3. The photographs of marriage were exhibited as Ex.P1 to P9 and e-mail communications were exhibited as Ex.P10 and P11 on the side of the respondent, herein.

5. The appellant examined one Ram Sharan Shastri who was serving as a Teacher in the school where the appellant studied as RW-1. The appellant Sunil Kumar examined himself as RW-3. (There was no one examined as RW-2 in this case).

6. PW2 Bishna, the respondent in this appeal has categorically deposed that in the aftermath of the love affair between the appellant and

the respondent, the appellant married her at Shiv Vakunt Dham Mandir, near Tribune Chowk, Chandigarh as per Hindu rites and customs. PW1 Shyam Parkash, a friend of PW2 has corroborated the testimony of PW2 that there was a marriage solemnized between the appellant and the respondent. He also participated in the marriage function, he has further deposed. The employer of the respondent was examined as PW3 who also completely supported the evidence of PW1 and PW2 that a marriage between the appellant the respondent was solemnized on 15.6.2005 by a pujari of the Mandir according to Hindu rites and ceremonies. It is his testimony that all the essential ceremonies of marriage were performed at the time of marriage. The photographs Exs.P1 to P9 would go to establish that the appellant and the respondent had taken photographs during the marriage function. The e-mail communications Exs.P10 and P11 would also support the case of the respondent that the appellant and his family members did not prefer to accept the marriage that took place between the appellant and the respondent.

7. The above evidence on record would go to establish that there was in fact a marriage between the parties on 15.6.2005 as per Hindu rites and ceremonies. But unfortunately, the appellant and her parents did not prefer to accept the marriage. In the face of the above material evidence adduced by the respondent, there is no reason to suspect the version of the respondent that they lived as husband and wife after marriage at various places in Chandigarh.

8. As per school records maintained by RW-1 Ram Sharan Shastri,

the appellant was born on 19.7.1984 and on the date of marriage that took place on 15.6.2005 he had not attained marriageable age. He was just about 1 month short of completion of the age of 21 years.

9. Learned counsel appearing for the appellant would vehemently submit that the photographs Exs.P1 to P9 are not admissible in evidence, inasmuch as the negatives thereof were not exhibited nor was the photographer examined.

10. Learned counsel appearing for the respondent would submit that inasmuch as the appellant has never pleaded that his figure had been faked in those photographs, there was nothing wrong in relying upon those documents even in the absence of the negatives of the photographs.

11. Of course, it is a settled position of law that negatives of the photographs shall be produced to establish that the photographs were really taken. But in the instant case, the figure of the appellant found in the photographs Exs.P1 to P9 was not specifically disputed by the appellant. Further, the respondent has not simply relied upon the photographs alone to establish the marriage. The photographs have been produced only to corroborate the other material evidence on record produced by the respondent. Further, the respondent may not be in a position to produce the negatives in case the appellant who got married the respondent organized a photographer and just left the photographs Exs.P1 to P9 at the hands of the respondent. In view of the above, the photographs Exs.P1 to P9 cannot be rejected as inadmissible in evidence.

12. Learned counsel appearing for the appellant cited a decision of

this Court in Vinit Kumar Behl vs. Smt.Ruchi, 2003(2) RCR(Civil) 272. It was held therein that the photographs are not *per se* admissible. The same shall be exhibited and proved in accordance with the Evidence Act. Even the negatives can be exhibited only through the person who had developed the negatives.

13. In the above case, it appears that photographs were not exhibited, but were only marked. But in the instant case, the photographs were duly exhibited. There was no allegation in the instant case that the photographs were fake. Further, the photographs were not the only material evidence to substantiate the claim of solemnization of marriage set up by the respondent. In view of the above, the above ratio is factually distinguishable.

14. Learned counsel appearing for the appellant would submit that the pujari or the mahant who allegedly performed the marriage was not examined. Learned counsel appearing for the respondent would contend that the respondent has otherwise established the solemnization of marriage. Therefore, the non-examination of pujari or mahant does not disprove the evidence of marriage adduced by the respondent.

15. In all fairness, the respondent should have examined the pujari or mahant who performed the marriage. But the question is whether the other material evidence adduced by the respondent can be totally ignored, just because the pujari or mahant who performed the marriage was not examined. The evidence of PW1 to PW3, in the background of Exs.P1 to P11 would go to establish that the marriage between the appellant and the

respondent was solemnized in accordance with the Hindu rites and customs. Therefore, the failure on the part of the respondent to examine the pujari or mahant who performed the marriage does not neutralize the above evidence on record.

16. Learned counsel appearing for the appellant cited a decision of the Calcutta High Court in Joyita Saha vs. Rajesh Kumar Pandey, 2000(2) LJR 768, wherein it has been held that if the ceremonies of Saptpadi and Kanyadan had not taken place, the solemnization of marriage with proper ceremonies as contemplated under Section 7 of the Hindu Marriage Act, 1955 cannot be construed.

17. It is relevant to extract Section 7 of the Hindu Marriage Act, 1955 which reads as follows:-

“7. Ceremonies for a Hindu marriage.-(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the saptpadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.”

18. Of course, a Hindu marriage shall be performed observing the customary rites and ceremonies of one of the parties to the marriage. In the event of such rites and ceremonies of one of the parties to the marriage include Saptpadi, the marriage would become complete and binding the moment seventh step is taken.

19. The respondent has set up a plea that as per the known Hindu rites and customs, the marriage was performed. Under such circumstances, the burden lies on the appellant to plead and establish that Saptpadi which was one of the rites and ceremonies adhered to by the family of either of the parties was not performed.

20. We find that there is no substantial pleading that marriage was not performed in accordance with the customary rites and ceremonies. There is also no plea on the part of the appellant that Saptpadi was one of the rites and ceremonies to be performed as per custom of the appellant or the respondent.

21. Further, there is evidence to show that all the customary rites and ceremonies of Hindu marriage were performed. Even assuming for the sake of arguments that Saptpadi ceremony was not performed in the marriage of the appellant with the respondent, unless it is established that Saptpadi ceremony was part of the ceremonies to be performed by one of the parties as per their customs, non-performance of Saptpadi ceremony does not affect the marriage performed by the appellant with the respondent.

22. On a careful perusal of the above decision of the Calcutta High Court in *Joyita Saha's case (supra)*, it is found that a party who pleaded that there was a marriage as per Hindu rites and customs and that the Saptpadi ceremony also was adhered to, failed to prove the same. Under such a special circumstance, the Calcutta High Court held that Saptpadi ceremony which was part of the ceremonies to be adhered to by the family of the party concerned was not at all performed as per their own showing and that,

therefore, such a marriage cannot be construed as a legal marriage as per Section 7 of the Hindu Marriage Act, 1955.

23. It was contended by the counsel for the appellant that the exact place where the appellant and the respondent resided after the marriage was not specifically stated by the respondent. *Per contra*, learned counsel appearing for the respondent would submit that within a few months of the marriage, the appellant and his parents had resisted the marriage of the appellant with the respondent. Therefore, they could not lead a happy married life in a permanent residence.

24. The appellant was a student of Punjab Engineering College, Chandigarh and thereafter he took training in an industrial unit in Bhubneshwar. No wonder, the appellant and the respondent had no permanent residence immediately after the marriage for leading their marital life. Under such circumstances, the contention of the respondent that they cohabited at various places in Chandigarh after the marriage cannot be completely ruled out. Even assuming for the sake of arguments that they had not lived together as husband and wife after marriage, the respondent has every right to seek the remedy of restitution of conjugal rights as legally wedded wife of the appellant invoking the provisions under Section 9 of the Hindu Marriage Act, 1955.

25. It was lastly contended by the counsel for the appellant that as per Section 5(iii) of the Hindu Marriage Act, 1955 the bridegroom should have completed the age of 21 years to constitute a valid marriage.

26. Of course, the bridegroom should have completed the age of 21

years as per the requirements contemplated under Section 5 of the Hindu Marriage Act, 1955. But in a case where there is a violation of such a condition, the question arises whether it can be construed as a void marriage or a voidable marriage at the instance of one of the parties under Section 11 and 12 respectively of the Hindu Marriage Act, 1955. On a careful reading of Section 11 and 12 of the Hindu Marriage Act, 1955, it is found that the Legislature has purposely omitted to include the requirement of Section 5 (iii) to attract the provisions under Section 11 and 12 of the Hindu Marriage Act, 1955. In other words, even if the marriage has been solemnized between a bride who is less than 18 years and a bridegroom aged less than 21 years, it cannot be held to be void under the Hindu Marriage Act, 1955.

27. Let us now refer to the Prohibition of Child Marriage Act, 2006 to analyze the ultimate consequences of a child marriage. 'Child' as per the definition found under Section 2(a) means 'a person who, if a male, has not completed 21 years of age and, if a female, has not completed 18 years of age'. Of course, such a child marriage as per Section 3 of the Prohibition of Child Marriage Act, 2006 is voidable at the option of one of the contracting parties, being a child at the time of marriage. It is very important to refer to Section 3(b) of the said Act which would read that the petition under Section 3 of the said Act can be filed before the child filing the petition completes 2 years of attaining majority. Therefore, in our view, at the distance of time, the appellant cannot contend that the marriage performed when he was below 21 years of age is void and, therefore, he cannot be directed to take his wife to the matrimonial home.

28. The evidence on record would go to establish that the appellant had solemnized the marriage with the respondent as per Hindu rites and customs and thereafter he and his parents did not choose to accept the marriage which obviously prompted the respondent to reside at her home. Therefore, the respondent has every right to get a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955.

29. Resultantly, the impugned judgement passed by the trial Court is confirmed and the appeal is dismissed.

(M. JEYAPPAUL)
JUDGE

July 14, 2015
Gulati

(RAJ RAHUL GARG)
JUDGE