

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

S.A.No.1420 OF 2011

JUDGMENT :

The 1st defendant in O.S.No.1632 of 2002 on the file of II Additional Junior Civil Judge, Kakinada and appellant in A.S.No.67 of 2009 on the file of Principal Senior Civil Judge, Kakinada preferred this appeal aggrieved by the concurrent findings recorded by the trial Court and appellate Court declaring the plaintiff, who is the 1st respondent herein (Divvela Veera Venkata Maha Lakshmi) as wife of the 2nd respondent herein/2nd defendant as legal and valid accepting the customary divorce allegedly obtained by the plaintiff/respondent No.1 with her husband Buddala Satyanarayana.

2. For convenience of reference, the rank given to the parties before the trial Court will be adopted through out the Judgment.

3. The plaintiff/respondent No.1 filed suit to declare that the marriage between her and the 2nd defendant was love marriage and performed on 25.04.1982 at Annavaram as per Hindu rites and customs as valid marriage, alleging that she is the legally wedded wife of the 2nd defendant/2nd respondent herein. The relatives of the 2nd respondent did not attend the marriage except attendance of cousins and friends of the 2nd

defendant including the relatives of the plaintiff. Immediately, the marriage was registered before the Registrar of Marriages on 28.04.1982. But the parents of the 2nd defendant did not approve the marriage as it was inter-caste marriage (the plaintiff belongs to Yadava community and 2nd defendant belongs to Vysya Community).

4. The parents of the 2nd defendant forced him to marry his sister's daughter (appellant/1st defendant) and at the wish of his parents, he married the 1st defendant secretly at Tirupathi on 05.06.1982 and started living with the 1st defendant while visiting the plaintiff's house at regular intervals. The plaintiff and the 2nd defendant were blessed with son by name Divvela Subba Rao and daughter by name Divvela Surekha.

5. While the matter stood thus, the 2nd defendant discontinued to visit the house of the plaintiff and started living with the 1st defendant while neglecting the plaintiff and her children. Thereupon, the plaintiff filed M.C.No.12 of 1986 and 13 of 1986 respectively, the Court was pleased to award maintenance of Rs.100/- to each of the petitioners in the maintenance case and the 2nd defendant paid the maintenance amount for some time, later he joined the plaintiff and started living with the plaintiff while sharing his life with the 1st defendant.

6. During Wedlock between the 1st defendant and the 2nd defendant, they were blessed with three children viz. Vinay, Mahalakshmi and Sree Padma.

7. The plaintiff initiated criminal proceedings against the 1st defendant for marrying the 2nd defendant, who is already married and the same is registered as C.C.No.115 of 1986, but the same was dismissed on the sole ground that performance of Saptapadi was not proved in the case of both marriages, though the same was not essential ritual for a valid marriage.

8. As the marriage of the plaintiff took place with the 2nd defendant at Annavaram on 25.04.1982 and the marriage of the 1st defendant with the 2nd defendant took place on 05.06.1982, the 1st marriage is valid and the 2nd marriage is void as the 2nd defendant was already having a living wife by the time of his alleged marriage on 05.06.1982. Therefore, the plaintiff filed suit for declaration that her marriage with the 2nd defendant is valid and the marriage between the 1st defendant and 2nd defendant is not valid under law.

9. The defendants resisted the claim by filing written statement denying material allegations, *inter alia*, contending that the suit is not maintainable as the claim of the plaintiff is barred by limitation.

10. The defendants belong to Vysya Community, whereas the plaintiff belongs to Yadava Community, who married to her brother-in-law Buddala Satyanarayana in the year 1979 and marriage with the 2nd defendant during subsistence of the earlier marriage with Buddala Satyanarayana without any divorce legally is not valid. Therefore, her marriage cannot be declared as valid while declaring the marriage of the 1st defendant with the 2nd defendant as invalid.

11. The plaintiff filed suit suppressing the factum of marriage with Buddala Satyanarayana and performance of marriage of the plaintiff with the 2nd defendant on 25.04.1982 is not correct while contending that the 1st defendant is the legally wedded wife of the 2nd defendant and the suit is filed in collusion with the 2nd defendant to gain wrongfully in the pending suit O.S.No.33 of 1998 filed by the plaintiff on the file of Principal Senior Civil Judge, Kakinada.

12. Letter dated 25.04.1982 executed by the plaintiff and the 2nd defendant establish as existence of marriage of the plaintiff with Buddala Satyanarayana on 25.04.1982. The plaintiff is not aware about the maintenance case and the order passed in it is not binding on the 1st defendant and that dismissal of Calander Case No.115 of 1986 is sufficient to dismiss the claim of the plaintiff and prayed for dismissal of the suit.

13. The 2nd defendant filed an independent written statement almost supporting the plaintiff's claim in all respects while contending that his marriage with the plaintiff was performed as per the Hindu rites and customs at Annavaram on 25.04.1982, same was registered with the Registrar of Marriages at Kakinada as per the Hindu Marriages Act on 28.04.1982, and was performed against the wish of his parents and his marriage was again performed with the 1st defendant by his parents by bringing pressure.

14. The 2nd defendant lived with the 1st defendant and they were blessed with children and on coming to know about the second marriage of the 2nd defendant, the plaintiff filed criminal case against the 2nd defendant and his second wife for bigami. During pendency of the calander case, the 2nd defendant approached the plaintiff and obtained her signature on blank paper with a view to utilize the same as defence in the criminal case. But the said case was ended in dismissal.

15. The 2nd defendant's specific contention is that the plaintiff's earlier marriage with Buddala Satyanarayana was dissolved by customary divorce on 25.05.1980 and denied the averments made in the plaint and prayed to pass appropriate decree.

16. On the strength of the above pleadings, the trial Court, framed the following six issues:

- 1) *Whether the plaintiff is entitled a declaration as prayed for?*
- 2) *Whether the marriage dated 25.04.1982 is valid marriage?*
- 3) *Whether the claim of the plaintiff is barred by limitation?*
- 4) *Whether the 1st defendant is legally wedded wife of 2nd defendant as alleged by defendant No.1?*
- 5) *Whether the 1st defendant and the 2nd defendant marriage took place on 05.06.1982 is true?*
- 6) *To what relief?*

17. During the course of trial, on behalf of the plaintiff, PWs.1 to 7 were examined and marked Exs.A.1 to A.21. On behalf of the defendants, defendant No.2 was examined as DW.1 and defendant No.1 was examined as DW.2 and marked Ex.B.1 to B.3 and Exs.S.1 and X.2.

18. Upon hearing argument of both counsel on record, the trial Court decreed the suit declaring that the marriage between the plaintiff and the 2nd defendant was performed on 25.04.1982 at Annavaram is valid without recording any finding as to the validity of the marriage of the 1st defendant/appellant and the 2nd defendant. Aggrieved by the said decree and judgment of the trial Court, the 1st defendant preferred appeal in A.S.No.67 of 2009 on the file of Principal Senior Civil Judge, Kakinada and the same was dismissed by decree and judgment dated 25.07.2011.

19. The present second appeal under Section 100 of the Code of Civil Procedure is filed challenging the concurrent findings recorded by both the Courts below on various grounds.

20. Learned counsel for the appellant/defendant No.1 formulated as many as nine substantial questions of law raising several grounds in the grounds of appeal, but upon hearing both counsel, this Court formulated the following substantial questions of law:

1. *Whether the 2nd defendant, who belongs to Vysya Community is competent to plead a customary divorce allegedly prevailing in the Yadava Community to which the plaintiff belongs to?*
2. *Whether the marriage between the plaintiff and her husband Buddala Satyanarayana was subsisting as on the date of marriage of plaintiff with the 2nd defendant i.e. on 25.04.1982, if so, whether in the absence of any pleadings about dissolution of marriage by customary divorce between the plaintiff and Buddala Satyanarayana can the Court record a finding regarding customary divorce based on the pleading of the 2nd defendant?*
3. *Whether the plaintiff is entitled for declaration under Section 34 of the Specific Relief Act having suppressed the factum of her earlier marriage with Baddala Satyanarayana, if so, the decree passed by the trial Court and the appellate Court are legal?*

POINT No.1:

21. Admittedly, the plaintiff belongs to Yadava Community and the defendants belong to Vysya Community and both the defendants are closely related. The marriage between the plaintiff and the 2nd defendant is not a disputed fact. However, the validity of marriage is in dispute. It is the case of the plaintiff that she married the 2nd defendant on 25.04.1982 at Annavaram, as per the pleadings in the plaint. She did not disclose her earlier marriage with Buddala Satyanarayana-PW.6. Strangely, the 2nd defendant, who belongs to Vysya Community, pleaded customary divorce between plaintiff and her former husband Buddala Satyanarayana without disclosing the details of marriage like date, in whose presence the marriage was dissolved etc. The custom may be local custom or caste custom. The 2nd defendant did not plead whether the divorce was obtained by the plaintiff based on caste custom or local custom and in fact, he is not competent to plead about the prevailing caste custom in Yadava Community to obtain divorce without reference to the Court. The 2nd defendant, though raised such contentions, did not adduce any evidence in support of the specific plea of customary divorce.

22. All the more, the plaintiff examined PW.2, PW.5 and PW.6 to establish the prevailing caste custom of divorce in Yadava community without approaching the Court.

23. In the examination in Chief, PW.1 testified that customary divorce was permitted in the presence of elders in Yadava Community and admitted that she married earlier Buddala Satyanarayana, who belongs to Yadava Community and thus, the marriage between her and her husband Buddala Satyanarayana was dissolved by customary divorce, which is reduced into writing and signed by both parties in the presence of elders at Tondangi Village on 25.03.1980 and again reiterated in para 4 of her examination in chief that her marriage with Buddala Satyanarayana was dissolved by customary divorce prevailing in Yadava Community. In the cross examination, several suggestions were put to PW.1 denying the prevailing caste custom to obtain divorce without approaching the Court. She produced Ex.A.11, which is the certified copy of divorce letter dated 25.05.1980 executed by Buddala Satyanarayana and Veera Lakshmi @ V.V.Mahalakshmi and Ex.A.12- certified copy of household card issued by the Mandal Revenue Officer, Kakinada on 04.08.2005. Exs.A.13 to 16 are the voter identity cards of the 2nd defendant, plaintiff and D.Subba Rao. A suggestion was put to PW.1 that the marriage between her and her husband - Buddala Satyanarayana was subsisting and that there was no valid divorce between them in the customary form and that no custom would prevail in her caste to obtain divorce without approaching the Court.

24. As seen from the testimony of PW.1, she traveled beyond pleading and testified that her marriage with Buddala Satyanarayana was dissolved by customary divorce based on the prevailing custom in the community. Therefore, her evidence regarding divorce and dissolution of her marriage with Buddala Satyanarayana in the customary form, which prevailing custom in the Yadava community is not based on any pleading and in the absence of any pleading, any amount of evidence to prove prevailing caste custom and dissolving marriage by customary divorce cannot be looked into.

25. The plaintiff also examined her mother, who attended the marriage of plaintiff with the 2nd defendant and in para 3 of her examination in chief, she admitted about performance of marriage with Buddala Satyanarayana, who is Yadava by caste, while contending that the marriage was dissolved by customary mutual divorce pronounced and reduced into writing and singed by both parties in the presence of caste elders at Tondangi Village on 25.05.1980. She is one of the attestors of the said divorce, which is marked as Ex.A.11, along with other elders, who were present. Thus, examination in chief is consistent with the plea raised by the 2nd defendant. In the cross examination, she admitted that the marriage between plaintiff and the 2nd defendant is the first marriage for defendant No.2. She also admitted that she deposed in the criminal case filed against defendants 1 and 2

that she performed the marriage of plaintiff with Buddala Satyanarayana and they lived together for a period of one month at Tondangi Village. A suggestion was put to PW.2 that no custom was prevailing to dissolve the marriage by customary divorce and got denial of it. She also stated in page 3 of the cross examination that documentary evidence is available to establish prevalence of customary divorce in Yadava community, but did not produce the same.

26. PW.6 is the alleged former husband of plaintiff by name Buddala Satyanarayana, who supported plea of the 2nd defendant regarding customary divorce between himself and the plaintiff before the caste elders on 25.05.1980. In the cross examination, PW.6 admitted that he did not obtain divorce through Court and that to his knowledge no customary divorce is effected in his community, but he came to know that from long ago, the customary divorce is affected in his community. Therefore, PW.6 has no knowledge about the prevailing custom in the caste to obtain divorce without approaching the Court.

27. PW.7 is the caste elder, aged 53 years by the date of his examination i.e. on 24.06.2008, who allegedly acted as elder in the village, testified about prevalent caste custom to obtain divorce in the presence of elders i.e. in the Yadava community. In fact, he was not the elder, who was present at the time of alleged customary divorce between plaintiff and

her former husband-PW.6. In the cross examination, he admitted that he was not present at the time of customary divorce between plaintiff and PW.6-Buddala Satyanarayana. He made specific admission regarding prevalence of such custom in the cross examination, the same is extracted hereunder for better appreciation:

“I was not present at the time of customary divorce between plaintiff and Budda Satyanarayana. It is true that I am not personally aware about the customary divorce between plaintiff and Budda Satyanarayana. There is no documentary evidence to show that there is customary divorce in Yadava Community prevailing or not.”

28. Thus, the evidence of PW.7 is not helpful to prove the divorce between the plaintiff and Budda Satyanarayana, but at best his evidence may be taken into consideration to decide whether any such custom is prevailing in the Yadava community or not. Thus, the evidence of PWs.1, 2, 6 and 7 is only to prove the marriage between the plaintiff and the 2nd defendant and the divorce allegedly obtained by the plaintiff with her husband Buddala Satyanarayana in the customary form. Without any factual foundation in the pleading regarding customary divorce obtained by the plaintiff with her husband Buddala Satyanarayana, whom she admittedly married prior to the marriage with the 2nd defendant, the evidence whatever adduced is of no use, but curiously the 2nd defendant, who belongs to Vysya community, set up the plea

of the prevailing custom in Yadava community. Therefore, he is incompetent to raise such plea and at the same time, the plea raised by him directly proved collusion between himself and the plaintiff.

29. The 2nd defendant was examined as DW.1, who admitted the marriage between the plaintiff and himself, so also marriage with the 1st defendant. In para 7 of his affidavit filed under Order 18 Rule 2 C.P.C. in lieu of examination in chief, he specifically asserted that the earlier marriage of the plaintiff with Buddala Satyanarayana was dissolved by customary divorce on 25.05.1980. In the cross examination, he asserted that a customary divorce is permissible as per plaintiff's caste custom and that he was personally aware that the plaintiff obtained divorce from her former husband in customary form. Suggestions were put to DW.1 that no caste custom is prevailing in the Yadava caste and no divorce was obtained in the customary form by the plaintiff with her husband Buddala Satyanarayana and got denial.

30. The 1st defendant was examined as DW.2, whose examination in chief is consistent with the pleading that the plaintiff married Buddala Satyanarayana, whose marriage was subsisting as on the date of marriage with the 2nd defendant. In the cross examination, she admitted that the plaintiff and Buddala Satyanarayana belong to Yadava community and according to her enquiry there was no caste

custom in Yadava community to dissolve the marriage by customary divorce. A suggestion was put to her that marriage between the plaintiff and Buddala Satyanarayana was dissolved in the customary form, which she denied categorically. In fact, the 1st defendant pleaded subsistence of marriage between the plaintiff and Buddala Satyanarayana as on the date of marriage of plaintiff and the 2nd defendant i.e. on 25.04.1982. Therefore, it is for the plaintiff to file a rejoinder i.e. subsequent pleading under Order 8 Rule 9 CPC when she asserted that the marriage between the plaintiff and Buddala Satyanarayana was not subsisting as on the date of her marriage with the 2nd defendant. Obviously, for reasons best known to the plaintiff, she did not file any rejoinder and adduce any evidence in support of the plea raised by the 2nd defendant, who supported the plaintiff in all respects regarding validity of her marriage.

31. According to Order 14 Rule 1 CPC, when one party affirmed a fact or law and denied by other, an issue arises. The issue may be either legal or factual. But in the present case, the plaintiff did not plead any customary divorce disclosing her earlier marriage with Buddala Satyanarayana despite raising a plea about subsistence of earlier marriage between them. In her written statement, she did not choose to file a rejoinder, but raised a specific plea about the customary divorce between herself and Buddala

Satyanarayana. In such a case, she is not entitled to adduce any evidence in support of the plea raised by the 2nd defendant in the written statement. The plaintiff did not insist either before the trial Court or the appellate court to frame an additional issue under Order 14 Rule 5 CPC, but went on trial with the matter and invited findings.

32. On over all consideration of pleadings, it is difficult to accept the contentions of the plaintiff that a custom was prevailing in Yadava community to obtain divorce in customary form since there is no factual foundation in the pleadings. But based on the plea of the 2nd defendant, who belongs to a different caste i.e. Vysya, the plaintiff cannot take advantage of such plea and adduce evidence in support of it. It is evident from the record that dispute is not between the plaintiff as one set and defendants as another set, but the dispute is between plaintiff, 2nd defendant as one set and 1st defendant as another set. When the 2nd defendant denied the fact affirmed by the 1st defendant, the trial Court ought to have framed an issue of fact. Accordingly, substantial question is answered.

POINT No.2:

33. The undisputed fact is that the marriage between the plaintiff and Buddala Satyanarayana was performed, but the question is whether the said marriage was dissolved in any

form more particularly by customary divorce allegedly prevailing in the caste of plaintiff and Buddala Satyanarayana.

34. To claim such benefit of customary divorce, there must be a factual foundation in the pleadings and adduce evidence to establish prevalence of such caste custom in Yadava community.

35. A similar question came up before the Apex Court in **Mahendra Nath Yadav v. Sheela Devi**¹ and **Ramesh Chandra Rampratapji Daga v. Rameshwari Ramesh Chandra Daga**² wherein the Apex Court consistently held that when the customary divorce is basis for the claim, which must be pleaded specifically and in the absence of such plea, the Court cannot look into such contentions. In another case of the Apex Court in **Yamanaji H.Jadhav v. Nirmala**³ wherein the Supreme Court highlighted the importance of the pleading when custom is the basis for obtaining the divorce and held as follows:

“In the instant case, we have perused the pleadings of the parties before the trial Court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was every pleaded by the defendant as required by law or any evidence was led in this case to substantiate the

¹ (2010)9 SCC 484

² AIR 2005 SC 422

³ (2002) 2 SCC 637

same. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a Court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognizable by a court unless specifically permitted by law. Therefore, **we are of the opinion to do complete justice in this case. It is necessary that the trial Court be directed to frame a specific issue in regard to customary divorce based on which the divorce deed dated 26th of June, 1982 has come into existence and which is the subject matter of the suit in question. In this regard, we permit the parties to amend the pleadings, if they so desire and also to lead evidence to the limited extent of proving the existence of a provision for customary divorce (otherwise through the process of or outside Court) in their** community and then test the validity of the divorce dated 26.06.1982 based on the finding arrived at in deciding the new issue.” **(Emphasis supplied)**

36. In **Vidyadhari and others v. Sukhrana Bai and others**⁴ the Apex Court, while deciding the case of succession, held that in the absence of proof of customary divorce between Sukhrana Bai and Sheetaldeen, the marriage is valid and the nominee, Vidhyadhari, whose marriage was performed during subsistence of marriage with Sukhrana Bai, is not entitled to succession certificate. The Madras High Court in **P.Umalakshmi v State Bank of India**⁵ while deciding the matter relating to the compassionate appointment of legal heirs of deceased employee by placing reliance in **Mahendranath Yadav v. Sheela Devi**⁶ and **Subramanai v. M. Chandralekha**⁷ held that a customary form of divorce is permissible in view of Section 29(2) of the Hindu Marriage Act, saving customary form of divorce, the party pleading the form of customary divorce is bound to raise the issue specifically before the competent court and prove the same by adducing oral and documentary evidence and get a judicial pronouncement regarding the proof of customary divorce. In such contingency only the alleged divorce by custom can be accepted by the Court. Thus, in view of the law declared by the Apex Court in the above judgment, pleading regarding customary divorce and prevalence of custom in the caste is imperative.

⁴ (2008) 2 SCC

⁵ 2010(9) SCC 484

⁶ 2010(9) SCC 67

⁷ (2005) 9 SCC 407

37. Custom is one of the sources of law. A stage has ripened to examine the scope and the extent of proof required to establish such a custom of either prevalence of customary divorce in the caste of the plaintiff i.e. Yadava community. To decide such issue, I would like to examine the concept of custom and requirements of proof of such custom. The concept of relevancy and proof of custom is codified under Section 13 of the Indian Evidence Act (Act 1 of 1982) nothing more than a repetition of the same would unfurl the implication, which reads:

“Section 13: Where the question is as to the existence of any right or custom, the following facts are relevant:-

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;*
- (b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.”*

38. Therefore, the relevancy of the proof of custom clearly is subject to sub-clauses (a) and (b) of the above provision. The Supreme Court has settled the law, that the burden of proving custom in derogation of general law, lies heavily on the party who sets it up, vide **Kunjuraman v. Mathevan**⁸ and **Md. Baqar v. Naimunnisa Bibi**⁹, and **Tarachand v. Reeb Ram**¹⁰. The mode and degree of proof of any type of custom

⁸ AIR 1971 SC 1398

⁹ AIR 1956SC 548

¹⁰ 1866(3) (Madras HC 50)

can be stipulated in law in substratum. In order that an alleged custom may be given the force of law. First, 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 law and this conviction must be inferred from the evidence. Secondly evidence of acts of the kind, acquiescence in those acts, their publicity, decision of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will be admissible. But evidence of this latter kind will be of little weight, if unsupported by actual examples of the usage asserted. Custom cannot be extended by analogy. It must be established inductively not deductively and it cannot be established by a priori methods.

39. Family custom being a category of special custom and similarly a caste custom should have the same attributes of antiquity, certainty and uniformity and it must be consciously accepted as having the force of law and these conditions must be proved by clear and unambiguous evidence, **Harihar Prasad Singh v. Balmiki Prasad Singh and others**¹¹ and **Pushpavathi v. Viswesumra**¹². As a first measure, such a custom should be pleaded in specific terms what the custom is, upon which a party is relying on, for the purpose of proof.

¹¹ 1975 AIR 733

¹² AIR 1964 SC 118

The law in this regard within the scope of Order VI Rule 3 CPC appears to be settled by the Supreme Court in more than one precedent, **Kochan Rani v. Mathewan Kani**¹³ and **Salig Ram v. Munshi ram**¹⁴. A careful and proper reading of the plaint in the present case, there is absolutely no pleading regarding prevalence of caste custom and obtaining the customary divorce by the plaintiff and her husband Buddala Satyanarayana. But based on stray contentions raised by the 2nd defendant, who is a collusive defendant, without any factual foundation of pleading i.e. plaint, the trial Court and appellate Court accepted the plea of customary divorce in the caste of Yadava.

40. The maxim of pleading and proof to be consistent and not contrary found in *allegans contraria non est a udiendns* appears to have been totally ignored in this case. This case is an illustration of flouting a serious caution by our own High Court in **Gangadhar Rao v Gollapalli Ganga Rao**¹⁵, that variance between pleading and proof is not permissible.

41. When a custom is pleaded by any party to the suit, the predominant ingredient of a custom as to its immemorial antiquity, there is a total laxity on the part of the plaintiff to plead or prove the same. It is fundamental that a legal custom relates to the length of time during which it has been

¹³ 1971 AIR 1398

¹⁴ AIR 1961 SC 1374

¹⁵ AIR 1968 AP 291

established. It must be immemorial, to mean, that the memory of man runneth not to the contrary. The expression 'time immemorial' means in the civil and canon law and in the systems derived there from, and originally meant in England also, time so remote that no living man can remember it or give evidence concerning it, custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist. (P.201 of Salmond on Jurisprudence 12th Edn. Referred supra). However, in the modern trend of immemorial custom, it must be established that it existed for a substantial period such as the time of actual human memory which will be sufficient to raise a presumption of immemorial antiquity. But the merit of the immemorial antiquity to prove the custom appears to get a different meaning in India. It appears that there is no fixed period of enjoyment necessary to establish a custom, yet a custom in order to receive legal recognition, should have existed for a sufficiently long period. It will depend upon the circumstances of each case what antiquity must be established before a custom can be accepted. (page 871 of Field's Law of Evidence, 1985 Edn.).

42. In **Baba Narayan Lakras v. Saboosa**¹⁶ a customary right which had been exercised for fifteen years did not

¹⁶ AIR 1942 PC 111

receive legal recognition. But in **Tula v. Sodhi**¹⁷, a customary right which had been exercised for a period of over 30 years was accorded legal recognition. However, in India, the trend of immemorial custom or its antiquity appears to date back at least to twenty years and more. Regarding the instances of such custom, it appears that one solitary instance or even four modern instances are not sufficient to prove custom unless the other ingredients supra are brought out.

43. Such custom must be reasonable. (Malus Usus Abolendus est). The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility. It is not meant by this that the Courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgment. At the same time, the custom must be in conformity with the statute. In the second place, the custom must not be contrary to an act of parliament. In the words of Lord Codes, no custom or prescription can take away the force of an Act of parliament. The custom must be observance as of right. The third requisition of the operational custom as a source of law is that it must have been observation as of right. This does not mean that the custom must be acquiesced language as a

¹⁷ AIR 1962 HP

matter of moral right. Thus, to claim benefit of custom prevailing in the community the above requirements are to be established.

44. The Hindu Marriage Act provides necessary safeguards to maintain the inverse relationship as sacrament recognizes certain modes of marriages and divorce which were recognized by custom either local or caste. At this stage, it is relevant to advert to the definition and relevant provision of Hindu Marriage Act, which recognize the custom and usage. The word custom and usage is defined under Section 3 of the Hindu Marriage Act and it is as follows:

“3 Definitions. —In this Act, unless the context otherwise requires,—(a) the expressions “custom” and “usage” signify 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;”

45. Section 4 of the Hindu Marriage Act, which deals with overriding effect of the Act, is extracted hereunder:

“Section 4 of The Hindu Marriage Act, 1955

4 Overriding effect of Act. Save as otherwise expressly provided in this Act,—

(a) any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately

before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;"

46. Similarly Section 29 deals with savings and Section 29(2) recognizes the custom and it reads as follows:

"Section 29(2) of The Hindu Marriage Act, 1955

(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."

47. From a conjoint reading of Section 29(2), Section 4(a) and Section 3(a) of the Hindu Marriage Act, it is clear that if a marriage is dissolved by custom, the provisions of Hindu Marriage Act have no application. A customary dissolution of marriage and dissolving the first marriage and marrying second wife after obtaining divorce according to caste custom is permissible under the provisions of the Act referred above. But in **Edamma v. Hussainappa**¹⁸ this Court held that plea of divorce based on custom is not valid and tenable. The said reason assigned by the Court appears to be contrary to law and in view of the later judgments a customary divorce is permissible subject to proof of requirement.

¹⁸ AIR 1965 AP 455

48. In **Subramani and others v. M.Chandralekha**¹⁹, the Apex Court, after elaborate consideration of various provisions of Hindu Marriage Act by placing reliance on **Yamanaji H.Jadhav's** case referred supra held that the custom has to be specifically pleaded and established by leading cogent evidence by the person propounding such custom. It was also held that the Courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable to divorce in the community to which the parties belong. As per the Hindu law administered by Courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus, such a custom being an exception to the general law of divorce ought to have been specifically pleaded and established by the party propounding such a custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public

¹⁹ AIR 2005 SC 485

policy. Therefore, there was an obligation on the trial Court to have framed an issue whether there was proper pleading by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the Court.

49. According to Sections 10 to 13 of the Hindu Marriage Act, the importance of custom in relation to the applicability of the Act has been acknowledged by the legislature by incorporating Section 29(2) of the said Act providing that nothing in the Act can affect any right recognized by custom or conferred by any said enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act, even without proof of the conditions precedent for declaring the marriage invalid as incorporated in Sections 10 to 13 of the Act. Thus, the marriage, which may not be permissible to be dissolved as per the provisions of the Act can still be dissolved if the party relying on a custom can successfully plead and prove it. This shows that a valid and recognized customary law of divorce will prevail over the provisions of the Act and thus, it shares an inverse relationship with the provisions of Hindu Marriage Act, which restrict the right of spouses to get divorce on limited grounds only. It must be noted that the customary law

of divorce can be relied upon only if it satisfies certain well accepted principles, as laid down by the Courts from time to time. The characteristics of valid and binding custom or usage empowering the parties to obtain divorce are:

“(1) it must be of immemorial existence, it must be reasonable, it must, be certain and it must be continuous. Every custom must have to be in existence preceding memory of man and if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory,

(2) It is the essence of special usages modifying the ordinary law that they should be ancient and invariable; it is further essential that they should be established to be so, by clear and unambiguous evidence and that it is only by means of such findings that the Courts can be assured of their existence and that they possess the conditions of antiquity and continuity and certainty on which alone their legal title to recognition depends. Custom must be proved and the burden of proof is on the person who asserts it,

(3) after the existence of a custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence and it is for this reason that such an evidence is allowable as an explanation to the general rule,

(4) the breach of a custom in a particular instance need not destroy it for all times,

(5) the material customs must be proved in the first instance by calling witnesses acquainted with them until a particular custom has by frequent proof in the Court becomes so notorious that the Courts take judicial notice of it. A custom cannot be extended by logical process,

(6) an oral evidence as to instances, which can be proved, by documentary evidence cannot be fairly relied upon to establish custom when no satisfactory explanation for withholding the best evidence is given. Custom cannot be extended by analogy and it cannot be established by a priori method, and

(7) the ordinary rule is that a custom, general or otherwise, has to be proved under Section 57 of the Evidence Act. However, nothing need be proved of which the Courts can take judicial notice. When a custom has been judicially recognized by the Court then it passes into the law of the land as proof of it becomes unnecessary under Section 57(1) of the Evidence Act.”

50. The judicial responsibility of the courts is two fold. On the one hand, they respect the mandates of the valid and well recognized customs whereas, on the other hand, any attempt, which fails to satisfy the rigours of the public policy and societal interests is thwarted at the very threshold. The Courts are also very conscious to ensure that the requirement of existence of valid custom are duly fulfilled and they must be expressly pleaded and clearly established before any relief is granted. When once a family custom and local custom are validly recognized even in the limited, narrowed and restricted parameters of societal interests, such customs are given due weight-age and the wisdom by the Courts. Madras High Court in **Sankaralingam Chetti v. Subban Chetti and another**²⁰ took a view that divorce by consent is valid as a

²⁰ 1894 ILR 17 Madras 479

matter of custom of the pakhali caste of Ahmedabad observing that there was nothing immoral in a caste custom by which divorce and remarriage were permitted by mutual agreement. There was no invalidity in a custom by which married couple on account of disagreement between them by consent could divorce and were divorced by parties approaching the headman and other relations, paying certain amount and taking away tali or the sacred thread from round the wife's neck and giving it back to the husband. It was only when the divorce was enforced against the wishes of his wife that the custom permitted divorce would be illegal. In **Pakhali Jina Magan v. Bai Jethi**²¹ it was held that a custom of divorce with mutual consent of husband and wife stated to exist among the Hindus of Pakhali caste of Ahmedabad was not repugnant to Hindu Law. When it was contended that the institution of divorce was itself opposed to the concept of Hindu Law and that there was no decision of any Court in India which held a custom of divorce as valid as it was observed that divorce is not contemplated by the Hindu Law but it is not repugnant to its principles, and if there be a well established custom in its support, it may override the general provisions of that law. It was further observed that there had been many cases in our Courts arising out of divorce in the lower castes. In all those cases even where it was held that the divorce had not been properly granted it had been taken

²¹ ILR 1941 BOMBAI 535

for granted that the custom of divorce can validly exist in a particular community, especially if it is a Sudra community, but that divorce granted cannot be forced by the caste against an unwilling person.

51. In **Shakuntalabai v. V.L.V.Kulkarni**²² the Apex Court held that custom must be proved and the burden of proof is on the person who asserts it. A custom cannot be extended by logical process. It is also observed that customs cannot be extended by analogy and it cannot be established by a priori method. Further, nothing need be proved of which the Courts can take judicial notice. When a custom has been judicially recognized by the Court then it passes into the law of the land as proof of it becomes unnecessary under Section 57(1) of the Evidence Act. The Court entertaining no doubt that there has been ancient and unbroken customs of dissolution of marriage and of Serai Udiki marriage among the Panchamasal Lingayats which was judicially noticed by the Court, and that the marriage in the instant case, of the fourth defendant with Gurulingappa was proved to have been customarily dissolved and that she was subsequently legally married with Gurappa in the valid customary form of Udiki marriage, whereafter, she lived with Gurappa as husband and wife until Gurappa died, and that, thereafter, she enjoyed the family pension by dint of her being nominated as wife of Gurappa to the knowledge of all concerned. She was

²² AIR 1989 SC 1359

accepted by the community as wife of Gurappa even after his death. There is, therefore, no scope for declaring the marriage illegal posthumously.

52. In **Yamanaji Jadhav's** case, the Apex Court observed that the Courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law and that the deed in question is purported to be a document, which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties in the litigation belong.

53. Thus, such a custom being an exception to the general law, Hindu Marriage and customary divorce is one of the recognized modes. The party who pronouncing prevalence of such custom or customary divorce has to plead and establish, though it is contrary to law, and if not proved will be a practice opposed to public policy.

54. The Act recognize the customary divorce is only to keep up traditionally social values allowing Hindus and some times it may lead to certain complications as unscrupulous spouse may create such document as if there is a custom prevailing in the caste to deny rights of the children born to them through invalid marriage etc. But by passing orders based on customary divorce, the Court has to strike a balance between

the rights of the parties to the suit and unless the party, who propounded prevalence of caste custom, has to establish the requirement of caste custom referred supra, otherwise, such person is not entitled to claim any benefit under law.

55. In the present case, as discussed above, there is no pleading about prevalence of caste custom in the plaint filed by the plaintiff, who adduced evidence to establish prevalence of caste custom without any pleading and without establishing the requirements of custom referred supra. Though, the 2nd defendant set up the plea of customary divorce obtained by the plaintiff with her husband Buddala Satyanarayana, the trial Court did not frame any issue. In view of Order 14 Rule 1 read with Rule 5 CPC, the Court is required to frame an additional issue when the 1st defendant asserted that the marriage between the plaintiff and her husband Buddala Satyanarayana was subsisting and the 2nd defendant denied the very subsistence of the first marriage between plaintiff and the 2nd defendant by pleading customary divorce between plaintiff and her husband Buddala Satyanarayana since, the dispute was not alone between plaintiff and defendants, but between plaintiff, 2nd defendant as one set and 1st defendant as another set. The trial Court did not follow the procedure prescribed under Order 14 Rules 1 and 5 and decided the matter keeping the plaintiff totally in dark as to what the trial Court is going to

decide. If an issue is framed about prevalence of custom and recognition of customary divorce in the caste 'Yadava', the 1st defendant can avail an opportunity to rebut the evidence whatever adduced by the plaintiff and 2nd defendant in support of prevalence of customary divorce in the caste. In such a case, recording such findings by the trial Court and affirmed by the appellate Court without any issue regarding customary divorce and proof of requirement of valid custom, referred above, the concurrent findings recorded by the trial Court about the divorce between the plaintiff and her husband Buddala Satyanarayana cannot be accepted. But by following the judgment of **Yamanaji H. Jadhav's** case supra, the course open to this Court is to remand the matter without advert to other contentions raised before this Court.

56. Applying the principal laid down in **Yamnaji H. Jadhav's** case referred supra, the decree and judgment passed by the trial Court and confirmed by the appellate Court are hereby set aside remanding the matter to the trial Court directing it to frame an issue with regard to the customary divorce prevailing in the Yadava community by exercising powers under Order XIV Rule 5 CPC and both parties are permitted to let in evidence only to the extent of proof of customary divorce prevailing in the caste of Yadava community and decide the matter in accordance with law.

POINT No.3:

57. In view of my finding on Points 1 and 2, no finding need be recorded by this Court, as the matter is remanded to the trial Court with specific directions. Hence, this point is not answered, leaving it open to decide the same by the trial Court, after following the directions of this Court therein above.

58. In the result, the second appeal is allowed setting aside the decree and judgment dated 22.09.2008 passed in O.S.No.1632 of 2002 by the II Additional Junior Civil Judge, Kakinada, confirmed by the Principal Senior Civil Judge, Kakinada in A.S.No.67 of 2009; and the matter is remanded to the II Additional Junior Civil Judge, Kakinada for fresh disposal after framing an issue with regard to the customary divorce prevailing in the Yadava community by exercising powers under Order XIV Rule 5 C.P.C. Both parties are permitted to let in evidence only to the extent of proof of customary divorce prevailing in the caste of Yadava community and decide the matter in accordance with law. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

M.SATYANARAYANA MURTHY,J

21.09.2016
kvrn

