

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 3-4-2018****Pronounced on 11-4-2018****FAM No. 29 of 2013**

Smt. Bhagwati Sahu W/o Shiv Kumar Sahu aged about 28 years
Thru- C/o Hemlal Sahu, R/o Ramnagar, Mukti Dham, Supela,
Bhilai, Tah. and Distt. Durg C.G., Chhattisgarh

---- Appellant**Versus**

Shiv Kumar Sahu S/o Late Anand Ram Sahu aged about 31
years R/o Rishali Basti Rishai, P.S. Rishali, Bhilai, Distt. Durg
C.G., at present posted as Teacher in Higher Secondary School,
Teresara, P.S. Somani, Distt. Rajnandgaon C.G

---- Respondent

For appellant : Shri B.P. Singh, Advocate.

For respondent : Sushri Aparajita Gaikwad, Advocate.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice**Hon'ble Shri Sharad Kumar Gupta, Judge****C.A.V. JUDGMENT****Per Sharad Kumar Gupta, J.**

1. Challenge in this appeal is levied to the judgment and decree dated 25-3-2013 passed by the 2nd Additional Principal Judge, Family Court, Durg in Civil Suit No. 31-A/2011 vide Annexure A-1 whereby and whereunder the trial Court declared that the marriage solemnized between the appellant and the respondent is void under Section 11 of the Hindu Marriage Act, 1955 (in brevity 'Act of 1955').
2. This is admitted by the appellant that name, address and other particulars of both the parties shown in the title of the plaint are correct; her marriage was solemnized with the respondent on 3-4-2009 in accordance with customary rites and rituals at Rishali, Bhilai; in the wedlock, a male child namely Jatin Sahu was born on 16-1-2010 who is

living with her; earlier her marriage was solemnized with one Dileshwar Sahu on 23-4-2000; and she is working in Police Department.

3. The respondent has specifically pleaded in para 3 of his plaint that the erstwhile husband of the appellant Dileshwar Sahu is alive. This fact has not been denied specifically or by necessary implication, or stated to be not admitted in the pleading of appellant. Thus, as per provisions of Order VIII Rule 5(1) of the Civil Procedure Code, 1908 the above mentioned fact be taken to be admitted by the appellant.
4. In brief, case of the respondent is that no divorce has taken place between the appellant and her erstwhile husband Dileshwar Sahu. Thus, subsequent marriage solemnized between him and the appellant is null and void.
5. In brief, case of the appellant is that divorce had taken place between her and Dileshwar Sahu in the meeting of the community. Thus, the suit of the respondent may be dismissed.
6. After completion of the trial, the trial Court passed the impugned judgment and decree. Being aggrieved, the appellant has preferred this first appeal.
7. Shri B.P. Singh, Counsel for the appellant vehemently argued that the appellant and the respondent lived together as wife and husband. In the wedlock, a male child was also born. The trial Court has given the finding that the appellant had not concealed the fact of earlier marriage from the respondent. He further submits that the earlier

marriage of the appellant has been dissolved by custom. Thus, the aforesaid judgment and decree are bad in the eye of law and deserve to be set aside.

8. Sushri Aparajita Gaikwad, Advocate, for the respondent argued that disclosure or non-disclosure of earlier marriage is wholly irrelevant to declare the subsequent marriage as void. She supported the impugned judgment and decree arguing that they are strictly in accordance with law and do not call for any interference by this Court.

9. **Points for determination :-**

There are following points for determination in this case :-

- (1) Whether earlier marriage of the appellant and Dileshwar Sahu had been dissolved by customary divorce ?
- (2) Whether the marriage solemnized between the appellant and the respondent is null and void ?
- (3) Whether the minor son Jatin Sahu is entitled to get allowance for maintenance from the respondent, if so, then at what rate ?
- (4) Relief and costs.

Point for determination No. 1 : Findings with reasons :-

10. NAW 1 Smt. Bhagwati Sahu says in para 1 of her statement on oath that her earlier marriage with Dileshwar and her subsequent marriage with the respondent were solemnized in accordance with the Hindu rites and rituals.
11. NAW 1 Bhagwati Sahu says in para 1 of her statement given on oath that customary divorce had taken place to

dissolve the marriage solemnized between her and Dileshwar Sahu.

12. Shri B.P. Singh, Advocate for the appellant placed reliance on a decision of the Hon'ble Supreme Court in the matter of **Challamma -v- Tilaga and others** [(2009) 9 SCC 299], which deals with the presumption of valid marriage. In the case in hand, the earlier marriage of the appellant and Dileshwar Sahu is not in dispute. Thus, appellant does not get any help from the above cited case.
13. It would be noteworthy to mention the provisions of Section 29(2) of the Act of 1955 which reads as under :-

“29. Savings.—

“(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.”

14. Definition of the custom and uses as provided in Section 3(a) of the Act of 1955 is also relevant which is quoted below :-

“3. Definitions.—In this Act, unless the context otherwise requires,—

(a) the expression “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;”

15. In the matter of **Smt. Savitri Devi -v- Smt. Manorama Bai and others** (AIR 1998 MP 114) a Division Bench of Hon'ble Madhya Pradesh High Court has held that :-

“Section 29(2) of the Hindu Marriage Act, 1955 protects customary divorce. But the party relying on custom must prove the existence of custom and that it is ancient, certain, reasonable and is not opposed to public policy. He must further prove that the divorce has in fact taken place in conformity with that custom.”

16. In the matter of **Yamanji H. Jadhav v. Nirmala** (AIR 2002 SC 971) Hon'ble Supreme Court has laid down the following judicial precedent :-

“Customs of prevailing of customary divorce being an exception to general rule on divorce, it have to be pleaded and proved by the party claiming so by leading cogent evidence.”

17. In the matter of **Subramani -v- Chandralekha** (AIR 2005 SC 485), Hon'ble Supreme Court has laid down the following judicial precedent :-

“A custom being an exception to the general rule of divorce must be specially 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 policy. Therefore, there would be an obligation on the Court to frame 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 to the satisfaction of the Court”

18. Looking to the aforesaid provisions of the Act of 1955 and the judicial precedent laid down by Hon'ble Supreme Court in *Rameshchandra Rampratapji Daga* (supra) and *M.M. Malhotra* (supra) it is manifest that divorce under Section 13 of the Act of 1955 is the general rule. Section 29(2) of the Act of 1955 recognizes customary divorce. Thus, the customary divorce under section 29(2) of the Act of 1955 is exception of the general rule. This is essential that a Hindu person who wants to rely upon a custom which protects divorce, must plead and prove that such custom is in existence in his community, it is ancient, certain, reasonable and is not opposed to public policy, it is being observed in his community for a long time, continuously, uniformly and has taken the force of law. The compliance with the manner or formalities attendant to such custom must also be pleaded and proved.
19. In the case in hand, the appellant has only pleaded in para 2 of his written statement that her earlier marriage with Dileshwar Sahu had been dissolved by customary divorce with mutual consent of both the parties.
20. It is significant that the appellant has not pleaded in her written statement firmly and strongly that a divorce could be allegedly obtained by any member of Sahu community under the custom prevailing in their community. The appellant has not pleaded allegedly about compliance with

the manner or formalities attendant to the custom. She has also not pleaded that the alleged custom is ancient, certain, reasonable. She has also not pleaded that allegedly it signifies a rule which has been continuously and uniformly observed for a long time, it has obtained the force of law in their community and it is not opposed to public policy.

21. NAW 1 Bhagvati Sahu, NAW 2 Budh Kumar Sahu and NAW 3 Babulal Sahu do not say clearly and strongly in their statements given on oath about the existence of alleged customary divorce in the Sahu community which has been recognized in their community, which is not opposed to the public policy, and which has obtained the force of law in their community. Moreover, the appellant has not made the suggestion to AW 1 Shiv Kumar Sahu, AW 2 Balram Sahu, AW 3 Dushyant Kumar Sahu regarding these facts. Moreover, NAW 1 Bhagvati Sahu says in para 1 of her statement that Dileshwar Sahu had ousted her, he was agree to give her divorce through court. Moreover, in the alleged agreement of divorce Ex. P-1 it has been mentioned that the appellant and Dileshwar Sahu are allegedly giving divorce to each other. In Ex. P-1, aforesaid facts of the custom have not been mentioned. Moreover, the appellant has not examined any office bearer of Sahu community who may say about aforesaid facts of alleged customary divorce. These circumstances go against the existence and recognition of alleged customary divorce, as projected by the appellant.

22. After the appreciation of the evidence discussed hereinabove, this Court disbelieves the aforesaid statement of NAW 1 Bhagvati Sahu that earlier marriage solemnized between her and Dileshwar Sahu had been dissolved by customary divorce.
23. Looking to the above-mentioned facts and circumstances of the case, concerned admitted facts, judicial precedents laid down in the matters of **Yamanji H. Jadhav** (supra), **Subramani** (supra) and **Smt. Savitri Devi** (supra), this Court finds that the appellant has failed to prove that her earlier marriage with Dileshwar Sahu had been dissolved by customary divorce. Thus, this Court decides point for determination No. 1 accordingly.

Point for determination No. 2 – Finding with reasons :-

24. It would be pertinent to mention the provisions of Section 11 of the Act of 1955 which are as under :-

“11. Void marriages.—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

25. The provisions of Section 5(i) of the Act of 1955 are also noticeable to resolve the dispute in the case in hand which is extracted below :-

“5. Conditions for a Hindu marriage.—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely :—

(i) neither party has a spouse living at the time of the marriage;”

26. In the matter of **Rameshchandra Rampratapji Daga -v- Rameshwari Rameshchandra Daga** [(2005(2) SCC 33], which was a case where no decree of divorce was obtained by wife from the court, she only obtained registered document of Chhor Chitthi from her previous husband but existence of such customary divorce was not established, the Hon'ble Supreme Court held that in absence of any decree of dissolution of marriage from Court, first marriage of wife subsisted when she solemnized second marriage hence the decree of declaration of her second marriage as null and void was rightly passed.
27. In the matter of **M.M. Malhotra -v- Union of India** [2005(8) SCC 351] Hon'ble Supreme Court has held that where it was found that first marriage of wife was subsisting at the time when she married appellant, second marriage of wife was held null and void and so, subsequent marriage of appellant cannot be said to be case of plural marriage.
28. A plain reading of Section 11 and Section 5(i) of the Act of 1955 and aforesaid judicial precedents laid down by Hon'ble Supreme Court in **Rameshchandra Rampratapji Daga** (supra) and **M.M. Malhotra** (supra) makes it clear that when the marriage solemnized between two Hindus have not been dissolved under section 13 or 29(2) of the Act of 1993, as the case may be, then at the time of second marriage of any spouse having his or her living spouse, as the case may be, his or her earlier marriage subsists and

therefore the second marriage would be null and void, irrespective of this fact that applicant had knowledge or no knowledge about the earlier marriage of the opponent. Thus, this Court is not impressed with the argument raised by the counsel for the appellant regarding this matter.

29. This has earlier been decided that earlier marriage of the appellant with Dileshwar Sahu has not been and could not be dissolved by the alleged customary divorce.
30. Looking to the above-mentioned facts and circumstances of the case and judicial precedent in **Rameshchandra Rampratapji Daga** (supra) and **M.M. Malhotra** (supra) this Court finds that the marriage solemnized between the appellant and the respondent is null and void. The point No. 2 is decided accordingly.

Point for determination No. 3 – Finding with reasons :-

31. This is admitted that in the wedlock of the appellant and the respondent, Jatin Sahu was born on 16-1-2010 and he is at present minor and living with the appellant. Thus, looking to the facts and circumstances of the case, this Court is of the considered opinion that it may be just and proper to pass the order regarding the maintenance of minor child Jatin Sahu under the provisions of Section 26 of the Act of 1955.
32. There is no such evidence that the respondent has no sufficient means. There is no such evidence on record on the strength of which it could be said that any such movable or immovable property is in the name of the minor son Jatin Sahu from which he may earn handsome amount.

33. Now we will consider the conduct of the respondent for the purpose of the assessment of allowance for the maintenance. In the case in hand, the respondent has not challenged the finding of the trial Court that he had knowledge about the earlier marriage of the appellant. Thus, we find that the appellant has not acted in accordance with normal human conduct.
34. From day by day experience, we know that the price index, prices of cereals and commodities of daily needs are increasing, thereby cost of living is also increasing.
35. Looking to the aforesaid facts and circumstances, this Court finds that Rs. 10,000/- (Rupees Ten thousand only) per month would be just, sufficient and reasonable amount for maintenance of minor son Jatin Sahu.
36. Looking to the above-mentioned facts and circumstances of the case, concerned admitted facts, material placed on record, this Court finds that minor son Jatin Sahu is entitled to get the allowance for maintenance at the rate of Rs. 10,000/- (Rupees Ten thousand only) per month from the respondent. Thus, this Court decides the point No. 3 accordingly.

Point for determination No. 4 – Finding with reasons :-

37. After complete appreciation of the evidence discussed above, this Court finds that there is no substance in the appeal. Thus, this Court affirms the judgment and decree of the trial Court to the above extent and dismisses the appeal. Respondent Shiv Kumar Sahu is ordered that he

shall pay allowance of maintenance at the rate of Rs. 10,000/- (Rs. Ten thousand only) per month to minor son Jatin Sahu till his attaining majority, through his mother/ guardian/appellant Smt. Bhagvati Sahu from the date of judgment of the trial Court i.e. 25-3-2013. Arrears due on this amount till 25-3-2018 shall be paid within two months from today.

38. Parties shall bear their own costs. A decree be drawn accordingly.

Sd/-
(Thottathil B. Radhakrishnan)
Chief Justice

Sd/-
(Sharad Kumar Gupta)
Judge