

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-M-284 of 2016 (O&M)

Date of Decision: 31.10.2018

Saroj Bala

...Appellant

Versus

Kasturi Lal

...Respondent

**CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN
HON'BLE MR.JUSTICE ANUPINDER SINGH GREWAL**

Present: Mr.Rishabh Gupta, Advocate for the appellant.

Mr.Bhupinder Singh, Advocate for the respondent.

RAKESH KUMAR JAIN, J. (Oral)

This appeal is directed against the order dated 2.5.2016 by which the learned trial Court has allowed the petition filed under Section 11 of the Hindu Marriage Act, 1955 (for short 'the Act') for declaration of the marriage of the parties to be null and void by a decree of nullity.

In brief, parties to the lis got married on 15.10.2007 as per Hindu rites at Jalandhar. The respondent-husband had initially filed a petition under Section 13 of the Act for seeking dissolution of marriage by a decree of divorce in which status of the appellant-wife was mentioned as Hindu divorcee. The said petition was ultimately withdrawn on 19.9.2013. Thereafter, the respondent had filed an application under Section 9 of the Act for seeking restitution of conjugal rights in which the appellant while appearing as RW1 on 1.4.2014 stated that she had obtained divorce by

Way of "*Panchayati Talaknama*". The said petition was however, withdrawn

by the respondent. Thereafter, the respondent filed a petition under Section 11 of the Act for declaration of their marriage as null and void on the ground that the decree of divorce has not been obtained from the competent Court of law and therefore, at the time of marriage with him the appellant was already married and therefore, at the time of his marriage with the appellant, her first marriage was already subsisting. The appellant had filed written statement to the petition under Section 11 of the Act before the trial Court in which she did not plead anywhere that the *Panchayati Talaknama* was obtained by following the custom. Be that as it may, the trial Court, agreeing with the contentions of the respondent and keeping in view the fact that *Panchayati Talaknama* has no sanctity of law, came to the conclusion that the marriage of the appellant with the previous husband was subsisting at the time when she contracted the marriage with the respondent on 15.10.2007. The learned trial Court thus taking into consideration Section 5 (i) read with Section 11 of the Act held that the marriage between the parties was null and void as Section 11 of the Act provides that 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. At the same time, Section 5 of the Act provides that a marriage may be solemnised between two Hindus when neither party has a spouse living at the time of the marriage.

Faced with this difficulty, counsel for the appellant has referred to Section 29(2) of the Act to contend that since divorce (*Talak*) was obtained by her as per custom, therefore, the provisions of the Act would

not apply.

Section 29(2) of the Act reads as under:

“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.”

He has also submitted that the learned trial court has committed an error in not framing a specific issue in terms of Order 14 Rule 1 of the CPC in regard to the dissolution of marriage by following the custom and in this regard, he has relied upon a decision of the Supreme Court rendered in the case of *Yamanaji H.Jadhav Versus Nirmala 2002 AIR (SC) 971*. It is further argued by him that the petition for divorce under Section 13 of the Act was filed by the respondent on 10.12.2012 and at that time he had mentioned the status of the appellant as a divorcee and had filed the petition under Section 11 of the Act on 13.9.2014. It is argued that since the respondent had the knowledge of the status of the appellant at the time when the petition under Section 13 of the Act was filed, he could not have filed the petition seeking annulment of the marriage on the said ground thereafter and is estopped by his own act and conduct. In reply, counsel for the respondent has submitted that there is no dispute about the provisions of Section 29(2) of the Act but in order to take the advantage of the said provision, the appellant was required to plead and prove the custom by which she was governed in respect of the first marriage and divorce. It is further submitted that in the reply filed by the appellant to the petition under Section 11 of the Act, there is no whisper of the divorce having been obtained by following the custom much less the custom itself. He has also submitted that question of estoppel cannot arise in this case because at the

time when the petition under Section 13 of the Act was filed, the respondent was only aware of the fact that the appellant had already obtained divorce but he was not aware of the manner in which the divorce was obtained by her and as soon as he came to know about the divorce from the mouth of the appellant herself when she had appeared as witness in the proceedings initiated by the respondent under Section 9 of the Act that she had obtained divorce by way of *Panchayati Talaknama* then the respondent had found that the said dissolution of marriage is not in accordance with the provisions of the Act by which parties are governed and therefore, the *Panchayati Talaknama* was just a waste paper having no sanctity of law and as such the marriage of the appellant with the previous husband was subsisting at the time when she got married to him on 5.10.2007. Therefore, the respondent had filed a petition under Section 11 of the Act for seeking annulment of the marriage by way of decree of nullity. In regard to decision of the Supreme Court, he has submitted that the appellant has failed to show any material of the prevalence of any such custom in her community on the basis of which marriage could have been dissolved before a *Panchayat* with a *Panchayati Talaknama*. It is submitted that the matter would have been different if the appellant had pleaded about the divorce from the previous husband by following the custom because in that situation fault would be on the part of the court in not framing the proper issue and allowing the parties to lead evidence but since the appellant did not say a word in the written statement filed to the petition under Section 11 of the Act before the trial Court that her previous marriage was dissolved by following the custom even if the custom was not specifically pleaded. The trial Court has rightly framed the

Section 5(i) of the Act.

We have heard learned counsel for the parties and after perusal of the record, are of the considered opinion that there is no merit in the present appeal and it deserves to be dismissed because Section 5(i) of the Act provides the conditions of the Hindu marriage as per which a marriage may be solemnised between two Hindus if neither party has a spouse living at the time of the marriage. Section 11 deals with nullity of marriage in which it is specifically provided that any marriage solemnised after the commencement of the Act shall be null and void and may on a petition presented by either party thereto 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.

The issue before us is as to whether the marriage of the appellant was subsisting at the time when she entered into matrimony with the respondent on 15.10.2007. There is no dispute that the appellant was already married. She has projected to the respondent that she has been divorced by her earlier husband and therefore, she does not have the status of a married woman. The respondent had averred that he had contracted marriage with the appellant on 15.10.2007 and when there was incompatibility between the spouse, filed petition under Section 13 of the Act in which status of the appellant was of a divorcee. However, the fact remains that the appellant did not attain the status of divorcee by obtaining divorce (*Talak*) by way of *Panchayati Talaknama* out of the Court. Section 29(2) though recognises such type of *Panchayati Talaknama* (divorce) out of the Court if the parties follow the custom but the custom needs to be pleaded and proved. In the present case, the appellant has neither pleaded in

her written statement while contesting the petition filed under Section 11 of the Act that she is governed by some custom in the matter of dissolution of marriage nor any such custom was brought by the appellant into the notice of the Court even during the trial of petition filed under Section 11 of the Act. Thus, it appears that the appellant in order to overcome the difficulty being faced in getting divorce (*Talak*) by way of *Panchayati Talaknama* has taken the shelter of Section 29(2) of the Act which is otherwise not available to her until and unless the custom is pleaded and proved by way of leading evidence. Insofar as the decision of the Supreme Court is concerned, the question of framing an issue would arise if the appellant had pleaded that the earlier proceedings of divorce were governed by the custom. In such situation, the appellant would have been successful in raising the argument but in the absence of a specific pleading in the reply that the appellant was governed by custom which permits her to seek dissolution of the marriage outside the Court, the learned trial Court has not erred in not framing the said issue at that time and an omnibus issue was framed about the validity of the marriage.

As far as the argument of counsel for the appellant that the second petition is barred by the plea of estoppel, it is suffice to say that at the time when earlier petition under Section 13 of the Act was filed in the year 2012, the respondent was aware only of the status of the appellant as a divorcee and had no knowledge as to how such divorce had been obtained but as soon as he came to know the manner in which the divorce was obtained, when she appeared in the witness box on 1.4.2014 to contest the petition under Section 9 of the Act, he filed the present petition on 30.9.2014 without wasting any time. There is no estoppel against the

Statute which provides the condition for valid marriage of Hindus in Section 5(i) of the Act which specifically provides that neither party has a spouse living at the time of the marriage which means that the other party against whom the allegation is made that there is a living spouse has to prove that either that person with whom she had earlier married is no more in this world or their marriage has been dissolved in the manner recognised by law.

No other point has been raised.

Thus, the present appeal is found to be without any merit and the same is hereby dismissed.

(Rakesh Kumar Jain)
Judge

(Anupinder Singh Grewal)
Judge

October 31, 2018

Meenu

Whether speaking / reasoned	:	Yes/No
Whether reportable	:	Yes/No