

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.389 of 2002Order reserved on: 11-3-2019Order delivered on: 28-3-2019

Sanmet Bai, W/o Shri Vishwanath Rajwar, aged about 45 years, caste Rajwar, Occupation Agriculture, R/o Village Thore, Tahsil Ambikapur, Distt. Surguja (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Mu. Rasekeliya Bai, Wd./o Late Shri Aghansai, aged about 45 years.
2. Butan, S/o Late Shri Aghansai, aged about 16 years (Minor), through Natural Guardian Respondent No.1, Mus. Rasekeliya Bai

Both Caste Rajwar, R/o Village Dhore, Tah. Ambikapur, Distt. Surguja (C.G.)

3. State of Chhattisgarh, through Distt. Collector, Surguja (C.G.)
(Defendants)
---- Respondents

For Appellant: Mr. Sushil Dubey and Mr. Aman Upadhyay, Advocates.

For Respondents No.1 and 2: -

Mr. A.K. Prasad and Mr. Rishi Mahobia, Advocates.

For Respondent No.3 / State: -

Mr. R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The following substantial question of law was framed at the time of admission of appeal: -

“Whether the Learned Lower Appellate Court was justified in law in reversing the decree passed by the Trial Court and dismissing the suit of the plaintiff by holding marriage of defendant No.1 Rasekeliya Bai with late Aghansai proved in the absence of legally admissible evidence of proof of valid marriage in accordance with law?”

(Parties hereinafter will be referred as per their status and ranking shown in the plaint before the trial Court.)

2. The suit property was held by Dular Sai. His widow namely Bechni

had filed the instant suit for declaration of title and permanent injunction, but during the pendency of suit, she died and her daughter Sanmet was substituted as plaintiff in the suit, as her son Aghan Sai had already died on 3-1-1981. The original plaintiff has filed suit that her son Aghan Sai was impotent and on account of his impotency, his wife left him and thereafter, Aghan Sai did not marry any woman including defendant No.1 and defendant No.2 is not the son of Aghan Sai out of his alleged wedlock with defendant No.1. Mutation was done by the revenue authority in revenue records in the names of the plaintiff and the defendants jointly leading to filing of suit for declaration that the plaintiff is the exclusive title holder of the suit land and also entitled for permanent injunction. Defendants No.1 & 2 filed written statement stating inter alia that Aghan Sai had married Raskeliya – defendant No.1 and out of their wedlock, defendant No.2 was born and therefore they are also entitled to succeed the suit property of Dular Sai.

3. The trial Court decreed the suit holding that marriage had never taken place between Aghan Sai and defendant No.1 and therefore defendant No.2 is also not entitled to succeed the property of Aghan Sai by virtue of Section 16(3) of the Hindu Marriage Act, 1956 against which first appeal was preferred by defendants No.1 & 2 and the first appellate Court reversed the finding of the trial Court by holding that marriage of Aghan Sai was solemnised with defendant No.1 and defendant No.2 is son born out of their valid wedlock and as such, set aside the decree of the trial Court against which second appeal has been preferred by the plaintiff in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.

4. Mr. Sushil Dubey, learned counsel appearing for the appellant / plaintiff, submits that the first appellate Court is absolutely unjustified in holding that marriage of Aghan Sai was solemnised with defendant No.1, as there is no legally admissible evidence on record to prove the valid marriage. He further submits that birth certificate of defendant No.2 dated 31-10-1980 has been relied upon which is not proved as well as un-exhibited document and which has not been proved in accordance with law, therefore, the first appellate Court is absolutely unjustified in relying upon the said unproved document. He also submits that there is no evidence at all on the record to hold that marriage of defendant No.1 was solemnised ever with Aghan Sai and therefore judgment & decree of the first appellate Court deserve to be set aside by restoring the judgment & decree of the trial Court.
5. Mr. A.K. Prasad, learned counsel appearing for defendants No.1 & 2 / respondents No.1 & 2 herein, assisted by Mr. Rishi Mahobia, submits that the first appellate Court is absolutely justified in dismissing the suit of the plaintiff, as there is sufficient evidence on record to hold that marriage of defendant No.1 was solemnised with Aghan Sai and defendant No.2 was born out of their wedlock and therefore the suit filed by the plaintiff was rightly dismissed by the first appellate Court.
6. I have heard learned counsel for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.
7. The question for consideration is, whether the fact of marriage of Aghan Sai with defendant No.1 Raskeliya has rightly been held to be proved by the first appellate Court?
8. In order to decide the point and before adverting to the facts of the case, it would be appropriate to notice the legal position with regard to

marriage.

9. As per Hindu law, among Hindus, marriage is always considered to be a sacrament and divorce was not recognised as a means to put an end to marriage, it was only an exception where it is recognised by custom. The Hindu Marriage Act, 1955 (for short, 'the Act of 1955') came into force on 18-5-1955. Section 5 of the Act of 1955 lays down conditions for a Hindu marriage and Section 7 lays down ceremonies for a Hindu marriage by providing that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Sub-section (2) of Section 7 provides that where such rites and ceremonies include the *saptapadi* (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. Section 11 of the Act of 1955 provides 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 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. Likewise, marriage can be dissolved between them on any of the grounds specified in Section 13 of the Act of 1955. Section 29 of the Act of 1955 saves the rights recognised by custom or conferred by special enactment to obtain the dissolution of marriage, whether solemnised before or after commencement of the Act. Section 29(2) of the Act 1955 states as under: -

“(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.”

10. Clause (a) of Section 3 of the Act of 1955, which defines the

expressions “custom” and “usage”, reads as under: -

“(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;”

11. Thus, the custom must have been observed for a long time and must be ancient. In pages 49 and 50 of the Mayne's Hindu Law & Usage, it is observed that,

“The beginnings of law were in Customs. Law and usage act, and react upon each other. A brief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and an uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of community, it becomes a custom, which is a part of their personal law.”

12. Customs will have to be always strictly proved and in relation to matrimonial matters particularly to existence of customs. In this connection, the decision of the Supreme Court rendered in the matter of **Gurdit Singh v. Mst. Angrez Kaur and others**¹ is more relevant and in that case, there was an entry recorded in riwaj-i-am which had entered custom of divorce amongst Hindu Jats of Jullundur District. The Court, while holding dissolution of marriage by custom was still valid and the divorced wife was entitled to enter into a second marriage, held that riwaj-i-am was not reliable to prove custom of divorce. The Supreme Court held so, even in a situation where there was an entry regarding a so-called divorce.

13. In the matter of **Gokal Chand v. Parvin Kumari**², the Supreme Court

1 AIR 1968 SC 142

2 AIR 1952 SC 231

laid down the principles to be kept in view in dealing with questions of customary law which state as under: -

“1. It should be recognized that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance and other matters mentioned in [Section 5](#) of the [Punjab Laws Act, 1872](#).

2. In spite of the above fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him. See 'DAYA RAM v. SOHEL SINGH', 110 P.R. 1906 p. 390 at 410; ['ABDUL HUSSEIN KHAN v. BIBI SONA DERO'](#), 45 Ind App 10 (PC).

3. A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. See [MT. SUBHANI v. NAWAB](#)', AIR 1941 PC 21 at 32.”

14. The Supreme Court in the matter of [Yamanaji H. Jadhav v. Nirmala](#)³

has held that custom being an exception, the general rule of divorce ought to have been specifically pleaded and established by leading cogent evidence by the person propounding such custom and observed as under: -

"[T]he 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,

³ (2002) 2 SCC 637

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 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 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."

15. The principle of law laid down in Yamanaji H. Jadhav (supra) was followed with approval by the Supreme Court in the matter of Subramani and others v. M. Chandralekha⁴ by holding that as per Hindu law, divorce was not recognised as a means to put an end to marriage which was always considered to be a sacrament, only exception being where it was recognised by custom. It was further held that for getting customary divorce in the community, it must be specifically pleaded and established by the person propounding such custom. Paragraphs 10 and 14 of the report state as follows: -

"10. It is well established by a long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. The High Court came to the conclusion that the appellants failed to either plead the existence of a custom in their community to dissolve the marriage by mutual consent or to prove the same by leading cogent evidence.

14. From a perusal of the above averments in the pleadings, it is clear that the defendant-appellants did not plead that in their community, marriage could be dissolved under custom. They even failed to respond to the averments made in the plaint that no custom was prevalent in their community to dissolve the marriage under custom. In the absence of such pleadings the trial Court rightly did not frame an issue as to whether the marriage in the community to which the parties belong could be dissolved under the custom prevalent in their community."

16. In Gokal Chand (supra), the Supreme Court has also held that

⁴ (2005) 9 SCC 407

continuous cohabitation of a man and a woman as husband and wife may raise the presumption of marriage. It was further held that but the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the Court cannot ignore them and observed in para 10 as under: -

“(10) ... It seems to us that the question as to how far the evidence of those particular witnesses is relevant under S. 50 is academic, because it is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage. In the present case, it seems clear that the plaintiff and Ram Piari lived and were treated as husband and wife for a number of years, and, in the absence of any material pointing to the contrary conclusion, a presumption might have been drawn that they were lawfully married. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the Court cannot ignore them. We agree with the learned Judges of the High Court that in the present case, such circumstances are not wanting and their cumulative effect warrants the conclusion that the plaintiff has failed to prove the factum of his marriage with Ram Piari. ...”

17. The principle of law laid down in **Gokal Chand** (supra) was followed with approval recently by the Supreme Court in the matter of **Dhannulal and others v. Ganeshram and another**⁵.
18. Reverting to the facts of the present case in the light of the principles of law laid down herein-above, in the instant case, the dispute is with regard to the suit property held by Dular Sai, as the suit land was settled in the Surguja Settlement. He died in the year 1945-46 and his son Aghan Sai married in 1957 with a woman, but alleging that he is impotent, she left Aghan Sai and it is the case of the original plaintiff i.e. his mother, that since he was impotent, he did not solemnize any marriage with any woman including defendant No.1 after his wife left him for her matrimonial home. Even the original plaintiff also claimed

⁵ (2015) 12 SCC 301

that Aghan Sai – her son, never solemnized any marriage with defendant No.1 and therefore the question of birth of defendant No.2 out of the wedlock with defendant No.1 does not arise. It is alleged that Aghan Sai allegedly married defendant No.1 after coming into force of the Act of 1955 and as per the Act of 1955, marriage can be declared void under Section 11 and can be dissolved under Section 13 of the Act of 1955 on the grounds enumerated therein, except customary divorce which is saved by virtue of the provisions contained in Section 29(2) of the Act of 1955. It is the case of the plaintiff that no such marriage has been solemnized, whereas it is the case of defendants No.1 & 2 that Aghan Sai – plaintiff's son, had solemnized marriage with defendant No.1. In the written statement filed by defendants No.1 & 2 it was simply pleaded that after Aghan Sai's first wife left him, he developed relation with defendant No.1 and thereafter, remarried her in the shape of *bandwa sagai*. The pleading made in the written statement is absolutely silent whether among the parties any customary marriage in *bandwa sagai* form is permissible and whether it has taken place in the shape of custom which is continuing for a fairly long time, which defendants No.1 & 2 were obliged to plead and thereafter to establish by leading evidence that any such custom i.e. marriage in the shape of *bandwa sagai* which Aghan Sai has allegedly entered with defendant No.1, is prevalent among them. As such, the valid custom of customary marriage in *bandwa sagai* form in the pleading is absolutely missing. The defendants on whom the burden lies to prove the marriage in *bandwa sagai* form have examined defendant No.1 herself as DW-1, but she did not state about any customary marriage in *bandwa sagai* form except pleading that she has married Aghan Sai in *bandwa sagai*

form. Likewise, her other witness Ram Karan (DW-2) has also stated in paragraph 16 of his cross-examination that on account of their illicit relation, defendant No.1 became pregnant in and also stated that no marriage took place between them, but in the same breath has stated that the marriage was in *chudi* form. As such, the fact of prevalence of customary marriage among them is not established.

19. Now, the question is, whether, even otherwise, defendant No.1 has proved the fact of marriage with Aghan Sai?

20. Defendant No.1 (DW-1) in her written statement stated that she firstly married Shivsai Rajwar and since he became innocent, after *chod chutti*, she married Budhram Rajwar of Village Sukhri, that also suffered the same fate and thereafter, she again entered into marriage with Chatru Ram. She has admitted three marriages, but in the cross-examination she has clearly admitted that she allegedly married five persons i.e. she had five husbands. In the cross-examination, para 9, she has stated that after Chatru left her, she was staying with Konda and when she was staying with Konda, there was no *chod chutti* with Chatru and then she allegedly entered into marriage with Aghan Sai. She further admitted that there was no *chod chutti* with Konda and she also admitted that she had already become pregnant with Aghan Sai when she came into the house of Aghan Sai and when Aghan Sai left her, she made an application for maintenance before the competent court in which reply was filed vide Ex.P-2 by Aghan Sai claiming that he is impotent and he was administered medicine by one Bechan Das to cure the impotency by which he became insane and a man of unsound mind.

21. The aforesaid evidence available on record clearly show that marriage of defendant No.1 was never solemnized with Aghan Sai. Not only

this, there is overwhelming evidence available on record to hold that Aghan Sai was impotent. In the plaint allegations it has clearly been pleaded by the original plaintiff that since her son Aghan Sai was impotent, therefore, his wife left for her matrimonial house. In Ex.P-2 which is a copy of reply filed by Aghan Sai, he has clearly admitted that he was impotent and on account of treatment, he took some forest produce to get rid of his impotency, but on taking the said medicine, he became a man of unsound mind. As such, since Aghan Sai was proved to be impotent, the question of birth of defendant No.2 out of his wedlock with defendant No.1 does not arise, even if the marriage is held to be established which is not established, as discussed herein-above.

22. Therefore, the finding recorded by the first appellate Court that marriage of defendant No.1 was solemnized with Aghan Sai, is perverse and contrary to record and it is liable to be set aside. Accordingly, judgment & decree of the first appellate is set-aside and that of the trial Court is restored. The substantial question of law is answered accordingly.
23. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge