

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 124 OF 2017
WITH
CIVIL APPLICATION NO.2340 OF 2017

WITH

SECOND APPEAL NO. 125 OF 2017
WITH
CIVIL APPLICATION NO.2341 OF 2017

Sudarshan s/o Yamaji Pandhare,
Age 35 years, Occupation Service,
R/o Gokulnagari, Kopargaon
Tq. Kopargaon Dist. Ahmednagar.

...Appellant.
(Ori.Petitioner)

VERSUS

Sau. Pallavi w/o Sudarshan Pandhare,
Age 28 years, Occupation Household,
R/o. C/o. Yuraj Patil,
At Post Pachora Tq. Pachora
Dist. Jalgaon.

...Respondent.
(Ori. Opponent)

....

Mr. Sachin Deshmukh, Advocate for Appellant.
Mr. Milind Patil, Advocate for Respondent.

....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
20-06-2019.**

**Date of Pronouncing The Order :
11-09-2019**

JUDGMENT :

1. Both these appeals are between same parties. Present appellant is the husband who had filed Hindu Marriage Petition No.522 of 2013 (Old No.37 of 2013) before 3rd Jt. Civil Judge, Senior

Division, Jalgaon for annulment of marriage under Section 11 read with Section 5(1) of Hindu Marriage Act. In the same petition, the wife - present respondent had filed counter claim for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. The said petition came to be allowed by the learned Trial Court on 20-12-2014 and the counter claim was dismissed. Wife approached District Court by filing two separate appeals challenging the decree of annulment in one appeal and dismissal of her counter claim in second appeal i.e. by Regular Civil Appeal No.12 of 2015 and Regular Civil Appeal No.13 of 2015. By a common Judgment, learned District Judge -7, Jalgaon allowed the appeals on 27-10-2016, thereby setting aside the Judgment and decree passed by learned Trial Court in respect of declaration of marriage as null and void and then allowed the counter claim filed by the wife for restitution of conjugal rights. Hence, these second appeals. (Parties are now referred to as 'husband and wife').

2. Before turning to the disputed facts the admitted facts are that the husband and wife got married on 15-05-2007 at Manmad Tq. Nandgaon Dist. Nashik in Nageshwar Mandir as per Hindu rites. They have two sons out of marriage. After marriage the wife started residing with husband at Kolpewadi Tq. Kopergaon. It is also a further admitted position that, a complaint was lodged against husband by wife with Kopergaon Police Station and he was arrested.

It is further an admitted position that, the wife had earlier married on 05-05-2005 at Wakod Tq. Jamner Dist. Jalgaon.

3. With these admitted facts it is now required to be seen as to what case both the parties had put before the Courts below. The husband contended that, wife used to raise suspicion over his character and used to insult him by giving taunts. There were disputes between wife and the mother of the husband and under those circumstance the husband started residing with wife at Kopargaon. There was a quarrel between them on 16-08-2012. The cause for the quarrel was that, she was suspecting that husband had a affair with a girl in his Karate Coaching Class. After the arrival of wife's mother, the husband was abused him publicly and then the said complaint was lodged in which he was arrested and was detained overnight. Thereafter, again there was a quarrel between the husband and wife on 02-02-2013 and during quarrel wife, in anger, made a statement that she has committed a blunder by performing second marriage with him. It was also told by her that, her first husband was very good. According to the husband he came to know about the first marriage of the wife for the first time on that day. Wife had never disclosed him about the first marriage and he was under impression that wife had never married earlier. Thereafter, he collected the information and came to know about wife's earlier marriage on 05-05-2005. Husband therefore says that,

the wife had a living spouse at the time of his marriage with her and there was no legal divorce between the wife and her earlier husband. He had then contacted the first husband of the wife and came to know that the marriage between wife and earlier husband lasted for about 1 ½ year. Wife had conceived from him but without his consent she had aborted that child at one hospital in Jalgaon. Therefore, the husband contends that the wife had intentionally concealed the information regarding her first marriage, and therefore, his marriage with her is null and void. He, therefore, sought declaration to that effect.

4. Wife filed written statement-cum-counter claim and denied all the averments adverse to her made in the petition. It was contended that, since 2008 she is residing with husband at Kopergaon. Husband had treated her properly for about two to three years, but after the birth of their first son, there was change in the behaviour of the husband. He used to leave the house at 04.00 a.m. and used to return at late at night. He was serving in Military School and he was also Karate Trainer. It is stated that, he had developed extra marital affair with the girls in the Karate class, and therefore, he had started ill-treating her mentally and physically. He used to neglect, insult and abuse as well as assault her. She admitted that, she had performed the first marriage but she contends that, as per the custom prevalent in her community, their

marriage has been dissolved before the panchayat. It is stated that, they both i.e. husband and wife are from 'Hatkari Dhangar' community. She herself as well as her family members had informed about her first marriage and customary divorce to the husband and his family. The mediators who had mediated at the time of settlement of marriage also had knowledge about the same, and therefore, the marriage which was performed between them was 'Shiv Vivah'. A Notarized document was executed in respect of customary divorce. She has not concealed anything from the husband, and therefore, there is no question of annulment of marriage. It is also stated that, by making such false allegations regarding concealment of first marriage, the husband has taken away her gold ornaments. She was severely assaulted in front of her mother on 15-08-2012, and therefore, she was constrained to file complaint against him. The police had filed only chapter case and then released him after he executed bond for good behaviour. At that time she had gone to her parental house for a period of one month but then returned back. But thereafter she has been deserted without any reasonable ground, and therefore, she filed the counter claim for restitution of conjugal rights.

5. Husband filed written statement to the counter claim and denied the allegations made against him as well as reiterated the fact that he was not aware about the first marriage of the wife and

therefore his marriage with wife is null and void.

6. Taking into consideration the rival contentions, issues were framed, parties have led oral as well as documentary evidence. Taking into consideration the evidence on record and hearing both sides, the learned trial Court has allowed the petition filed by the husband as aforesaid and declared the marriage as null and void, thereby dismissing the counter claim and in appeal the said decision has been reversed. Hence, present appeals.

7. Heard learned advocate Mr. S. S. Deshmukh for appellant – husband and learned advocate Mr. Milind Patil for respondent – wife.

8. It has been vehemently submitted on behalf of the appellant that, the learned First Appellate Court has not considered the evidence properly. The customary divorce was not at all proved by the wife. Though it had come on record that, the parties belong to Hatkar Dhangar community but the evidence that was led to show that the customary divorce taken on some notarized document cannot be said to have been proved as contemplated under Section 29 (2) of the Hindu Marriage Act, 1955. The custom which has to be immemorial in time will have to be proved by cogent evidence. It has been observed by the learned First Appellate Court itself that the evidence regarding customary divorce adduced by witnesses examined by the wife would show that, that custom was observed

since last ten to fifteen years. But then the learned First Appellate court went wrong in observing that, people of Hatkar Dhangar community have accepted and relied upon the said custom of taking divorce i.e. by executing a document of stamp paper. Merely because several people had obtained such type of divorce, it cannot be said that it was a 'custom', and therefore, the reversal of the decree of annulment of marriage was wrong. The decree has been reversed on the point of limitation also by the learned First Appellate Court, however no such point was framed by him. When the husband had adduced evidence regarding knowledge about the said fact of first marriage, it ought to have been considered properly. Whatever evidence has been adduced by the wife has been taken as gospel truth, when in fact the witness who was examined i.e. D.W.7 Ramdas Kolekar, claiming to be the founder member and president of Malhar Mahasangh, Aurangbad has clearly admitted that he is not a panch from his community. Though he has clarified that, Hatkar Dhankar caste comes under Nomadic Tribe, they are continuing the divorce by executing the deed of divorce on stamp paper. His said statement cannot be accepted as law and therefore we are required to consider as to whether such customary divorce was prevalent in the community and whether it has proved. The said witness himself has admitted that, people from his community are also taking divorce by filing petition in Court. Wife has not led any evidence

that any panchayat was called and in presence of panchas, the said divorce had taken place and it is not her case that the notarized document has been executed only as a proof, but the main procedure as per the custom was observed in front of panchas only. Therefore, when evidence was not led by the wife to prove that there is a custom in her community to take such kind of divorce then her marriage with earlier husband subsist when the marriage with the present husband took place. The learned trial Court had assessed the evidence properly and all the points were dealt with properly by the trial Court, and therefore, there was no necessity for the First Appellate Court to reverse the said decree. It was also submitted that, no proper evidence has been adduced to prove that the husband has deserted the wife. The quarrel was the outcome of the suspicion in the mind of the wife that husband has extra marital affair. Another fact that is required to be considered is that, when the marriage between the husband and wife is null and void, husband now cannot be directed to resume cohabitation.

9. Per contra, the learned advocate appearing for the wife submitted that, the learned Trial Court had not considered the evidence properly, and therefore, the wife was required to file the appeals. Though the custom that was pleaded was in the form of divorce document on stamp paper yet many instances were quoted and those persons were also examined who have obtained that kind

of divorce. The founder member and social worker from Hatkar Dhangar community i.e. D.W.7 Ramdas Sakharam Kolekar who is the respected person from the community has categorically stated that, several spouses have obtained divorce by executing divorce deed on stamp paper, and therefore, when he was giving the information in respect of a fact from his community, the said fact has been accepted as evidence. The learned First Appellate Court has also appreciated the evidence properly on the point that the fact about divorce between the wife and first husband was made known to the husband prior to their marriage. It was informed to his family members as well as the mediators who took part for settlement of their marriage. Evidence to that effect has been led by the wife by examining the mediator. Therefore, in spite of knowledge, the husband has performed the marriage with the wife and under such circumstance he cannot come with a case that the marriage was got performed by playing fraud on him. He has admitted that, the marriage between him and wife was "Shiv" marriage which is the like "Gandharva" marriage. When two sons have been born out of the wed lock; now with ulterior motive the husband is coming with a case that he had no knowledge about the first marriage of the wife and want to get his marriage annulled. This shows his conduct, and therefore, interference has been rightly made by the First Appellate Court by setting aside the Judgment and decree passed by the

learned Trial Court.

10. The learned advocate for respondent has relied on the decision in *Jasbir Singh Vs. Inderjit Kaur*, reported in *AIR 2003 Punjab And Haryana 317*, wherein it has been held that,

"Evidence was led showing custom among Jat Sikhs of District Sangrur, permitting dissolution of marriage by divorce through writing executed by parties. Such divorce is recognised in view of S. 29 (2) of the Hindu Marriage Act. Under such circumstance, it cannot be said that, the wife was married and not divorcee at the time of her marriage with petitioner-husband. Marriage between petitioner and respondent could not be annulled on the ground of fraud. "

11. Here in this case, there is no concurrent finding of the Courts below, and therefore, straightway it can be said that case was made out for admitting the appeal as substantial questions of law are arising in this case. However, by consent of both the parties, since the matter has been taken up for final hearing at the stage of admission itself, I proceed to formulate the substantial questions of law now ;

(1) Whether the alleged divorce between wife and her first husband can be said to be customary divorce ?

(2) Whether the wife had not given information regarding her first marriage and alleged divorce to the husband prior to their marriage dated 15-05-2007 ?

(3) Whether the petition for divorce by husband was within limitation ?

(4) Whether husband is entitled to get decree for annulment of marriage ?

(5) Whether the counter claim can be allowed ?

12. In order to avoid repetitions, all the above said points are taken up together for discussion. The learned Trial Court has held that, there was no customary divorce between the wife and her first husband, and therefore, her marriage with present petitioner was null; in a sense that at the time of their marriage the spouse of the wife was living, and the said fact was suppressed by the wife from the husband-petitioner. These points have been reversed by the learned First Appellate Court. It will not be out of place to mention here that, though both the Courts below have not formulated a specific issue or point on the point of limitation yet both of them have dealt with the said point, and therefore, it is not at all necessary for this Court to remand the matter on that point. That can be considered in this second appeal also.

13. Wife admits that, her marriage was earlier performed with one Raju on 05-05-2005 and then she has come with a case that their marriage was dissolved by a notarized document executed on 08-12-2006, and in order to support this, she says that the said divorce is as per the custom prevalent in her community i.e. Hatkar Dhangar

community. When she had come with that case, naturally the burden was on her to prove the said custom. In her cross-examination she has stated that, except the notarized document, no proceedings for divorce had taken at any other place. Important point to be noted is that, in the written statement as well as in her examination-in-chief what she has stated is that, her earlier marriage has been dissolved in front of panchas (.....त्या विवाहाची समाजमान्य नोटरी पंच फारकत झालेली आहे. मी व राजू साहेबराव पांढरे हे हाटकर धनगर या समाजाचे असून आमचे समाजात पंच फारकतीस मान्यता आहे.) In normal parlance the words 'Panch Farkat' would give an impression that the divorce had taken place in presence of panchas. But in view of her admission and in absence of details of the names of those panchas in whose presence the divorce had taken place, there is no substance in her said statement or use of the word "Panch Farkat". It is then required to be seen as to whether in her community there is a custom of taking divorce on notary document. The custom should be since time immemorial. The Division Bench of this Court (Nagpur Bench) in, *Sau. Shalini Dhanraj Shirsat Vs. Dhanraj Tukaram Shirsat*, reported in *AIR 2017 Bombay 116*, has observed that,

"Custom is rule which in a particular family or a particular class of community or in a particular district has, from long usage, obtained the force of law. It must be ancient, certain and reasonable custom being in the

derogation of general rule of law, must be construed strictly and should be established by evidence. It is also well known and well settled that the party relying on custom must allege and prove the custom on which he relies."

14. Here in this case, the wife has examined in all nine witnesses and out of them seven witnesses are on the point of alleged custom. One of those witness is her own mother, and therefore, naturally she was bound to support the daughter. As regards other witnesses are concerned two of them are the persons who had taken similar kind of divorce i.e. on notarized document. One was the social worker from the same community and others are the advocate and stamp vendor who were the part of execution of that document. What is emerging from the testimony of all these persons is that, whatever they are saying can relate to at the most ten to fifteen years prior to their deposition and not beyond that. When custom has to be ancient and from time immemorial, the testimony of these witnesses cannot be considered at all. The learned First Appellate Court had not taken into consideration the basic requirements for the proof of a 'custom'. Merely because certain class of people from the community are adhering to that practice that does not become custom, unless it is in existence since time immemorial or ancient. Interesting point to be noted is that, one of the witness was the ex-husband of the wife who has produced the original divorce deed on

record (Exhibit 86). He in his cross examination has admitted that, he has no documentary evidence to prove that, there is custom of "Panch Farkat" in their community. The said social worker who has been examined in this case is aged 50 only and even if we consider his testimony as it is, it can be seen from his testimony that in his community some adopt the said method of getting a document executed regarding divorce and some are approaching Court. That means, he is not sure about the alleged custom. Merely by saying that, since last many years the said practice is being adopted in the said community and giving vague statements would not prove the 'custom'. In aforesaid case of *Sau. Shalini Dhanraj Shirsat Vs. Dhanraj Tukaram Shirsat (Supra)* the Division Bench of this Court has held that,

"The evidence in the present case shows that the wife has not led any evidence to show existence of any customary divorce prevailing in her community. No document is filed relating to the period prior to the passing of the Act. In our view, the evidence both oral and documentary is too short to prove that there was a customary divorce practice prevailing in the community. The wife has not examined any elderly person from the community who could have deposed in support of the custom prevailing for obtaining customary divorce. Though, Section 29 (2) of the Hindu Marriage Act protects customary divorce, it is obligatory on the party relying on the said custom to prove the existence of custom, that it is ancient, certain and reasonable and it

does not oppose to the public policy."

In that case also the wife had taken plea of execution of 'Farkatnama' by custom. Here in this case though evidence has been led by the wife, the social worker aged 50 cannot be said to be an elderly person who could have authoritatively made that statement. Though he has stated that, he is acting as a leader of the community yet he cannot be taken as an authority to say something about "custom prevalent in his community".

15. Further reliance can be placed on the decision of this Court in *Kashibai Namdeo Jadhav and Ors. Vs. Yamunabai Namdeo Jadhav and Ors.*, reported in 2016 (3) Bom.C.R. 42, wherein note has been taken of the decision in, *Yamunaji H. Jadhav Versus Nirmala*, reported in 2003 (1) Bom.C.R. 192 (S.C.), wherein it has been held that,

"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. The custom is explanation to the general law of divorce."

16. In that case, also there was a plea that in 'Maratha' community

there is a recognized custom to dissolve a marriage privately before panchas. No doubt on the basis of evidence, the Court had come to the conclusion that, it has not been proved, however what requires to be taken note of, which can be made applicable to this case is, that though case was made out that deed of divorce was executed before panchas; yet panchas were not examined, and therefore, the marriage was held to be null and void when it was contracted when the spouse was living. At the cost of repetition it can be said that, though in the written statement-cum-counter claim, the wife had come with a case that, she had taken "Panch Farkat", she has not led any evidence by examining those panchas in whose presence the divorce was taken. On the contrary it appears that, the divorce was only on the basis of that document (Exhibit 86) which was admittedly executed before an advocate which was prepared by that advocate and it was notarized. Such document cannot sever the relationship or the marital tie. Such mode has no legal force and such practice is against the public policy. It will have to be concluded, therefore, that the wife in this case, had living spouse at the time when she performed marriage with the present petitioner on 15-05-2007 and the said earlier marriage was subsisting.

17. Now it is required to be seen as to whether she had suppressed the said fact from the petitioner/ husband at the time of that marriage and whether the petition filed by the husband can be

said to be within limitation. The husband has contended and deposed that, he came to know about the fact of first marriage of his wife only when the quarrel broke between him and wife on 02-02-2013. He contends that, thereafter he made investigation and came to know about the other details. The wife says that, she had disclosed everything to the husband at the time of settlement of marriage. The husband obviously denied the suggestion to that effect in his cross, however it is to be noted that he has not examined anybody else to support his contention or even in contemplation of the fact that the wife would lead evidence to prove that, at the time of settlement of marriage such fact was disclosed to the husband. He admits in his cross examination that, his marriage with wife was performed in a temple in the form of "Shiv Vivah". In fact it ought to have been extracted by the concerned Court who was recording the evidence as to what is the meaning of "Shiv Vivah"; may be by asking Court question. But it appears that, the learned First Appellate Court has tried to extract it at the time of submissions of arguments before him and it has been specifically observed that, both the learned advocates representing the respective parties submitted that the mode and ceremony of "Shiv" marriage is marriage like a marriage of "Gandharva" marriage which generally followed in cases of second marriage of either of the spouses. That means, this fact is even admitted by the advocate

who was representing the husband before the First Appellate Court. Independently also it is to be noted that, the wife has examined D.W.3 Devidas Arjun Patil and D.W.4 Kishor Laxman Aadhav who were present at the time of marriage. They are not related to the wife but the father of the wife was their friend. Both of them have stated that, information regarding first marriage of wife was given to the husband at the time of marriage. In the cross-examination except denial there is nothing. There was no reason to disbelieve these two persons. Therefore, taking into consideration the said admission given by the husband and the evidence that has been led by the wife in her testimony as well as by examining two witnesses on the point, it will have to be held that the wife had given knowledge about the alleged divorce between her and the first husband to him prior to the marriage. Here it is to be noted that, though the wife has not been able to prove the custom yet from the evidence regarding intimation about the said information to the husband prior to the marriage reveals that, even the husband was under the impression that the said divorce document which has been got executed between wife and first husband, was a correct document and then he did not question the legality of the same. Therefore, the knowledge of the husband regarding first marriage of the wife will have to be attributed to the date of his marriage, and therefore, the petition that has been filed by him for annulment of

marriage on 01-03-2013 was beyond the period of limitation.

18. The period of limitation that is prescribed for filing such petition for declaration of divorce is one year and for that purpose the learned First Appellate Court has rightly considered Section 12 and 23 of the Hindu Marriage Act. The evidence on the point of knowledge adduced by the husband is absolutely not acceptable and it cannot prove that for the first time he came to know about the first marriage of wife on 02-02-2013 when the quarrel broke out between them. The learned Trial Court had not considered the said point in proper perspective and thus the petition filed by the husband for getting the marriage annulled is beyond the period of limitation.

19. Important point to be noted is that, in the cross-examination husband admits that, he has two sons out of the said marriage. He has though denied the allegation about harassment by him to the wife yet he admits about the complaint lodged by the wife against him and then police allowing him his liberty on furnishing bond of good behaviour. He also admits that, wife used to come voluntarily to reside with him after the compromise when she had filed complaint with Womens' Cell with the Police Station. He has also admitted that, twice before the Court when the talks of compromise were going on, the wife had stated that she wants to go back for

cohabitation but then he has refused to take her back. Thus the conduct of the husband shows that, now he wants to get rid of the wife; so also the sons for a reason which was in fact in his knowledge, when he performed marriage with the wife but accepted the said divorce and then performed marriage. Therefore, though the wife had failed to prove the custom and she had leaving spouse when her marriage with the present petitioner had taken place, yet the petition will have to be dismissed on the ground that it is beyond period of limitation.

20. Now turning towards the counter claim, as aforesaid the wife has every desire to resume cohabitation, however the husband is not allowing. As aforesaid and at the cost of repetition when he had the knowledge about the alleged divorce, yet he performed marriage with the wife, cohabited for about seven years with her and now for the reason which could have been available to him about six years earlier, he is refusing the cohabitation. Therefore, the decree of restitution of conjugal rights passed by the learned First Appellate Court in view of the counter claim deserves to be upheld. The points are therefore, answered as (1) in the negative, (2) in the affirmative, (3) in the negative, (4) in the negative and (5) in the affirmative.

21. For the above said reasons there is absolutely no reason to

interfere the decree that has been passed by the First Appellate Court. There is no merit in the present appeals and they are therefore dismissed with costs. In view of the dismissal of the appeals, the pending civil applications, stand disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.