

Asha Rani Vs. Gulshan Kumar

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Court : Punjab and Haryana

Decided On : Jan-30-1995

Reported in : AIR1995P& H287; II(1995)DMC198; (1995)110PLR21

Judge : Dr. Sarojnei Saksena, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 11, 12, 12(1), 28 and 29(2); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125

Appeal No. : F.A.F.O. No. 139-M of 1992

Appellant : Asha Rani

Respondent : Gulshan Kumar

Advocate for Def. : R.N. Moudgil, Adv.

Advocate for Pet/Ap. : Arvind Mittal, Adv.

Judgement :

1. The appellant-wife has filed this appeal under S. 28 of the Hindu Marriage Act (in short the 'Act').
2. Unassailed facts are that the appellant was married to the respondent on 1-10-1989. She was earlier married to Rajinder Kumar son of Devi Dayal of village Jandiala near Nakodar.

3. The respondent filed a petition under Ss. 11 and 12 of the Act alleging that when his marriage was performed with the appellant as per Hindu rites and rituals, at that time, he was not informed by the appellant or by her parents that she was already married to one Rajinder Kumar, who is still alive and the marriage is subsisting. The appellant lived with him for one month. In January, 1990 he came to know of her earlier marriage with Rajinder Kumar. He immediately left the appellant at her parental home. Since then she is residing there. If at the time of marriage he would have known that the appellant was a married woman and her former husband is alive, he would have not consented to marry her. Thus by concealing this material fact, his consent to marriage was obtained by fraud. The respondent visited the appellant's parental home and on his protest, the appellant's father assured him to settle the matter. He took a Panchayat in the last week of July, 1990, but again same assurance was advanced. Subsequently, the appellant filed a petition under S. 125, Cr.P.C. against the respondent claiming maintenance. Hence he prayed that his marriage with the appellant be declared null and void,

4. The appellant in her written reply alleged that the fact of her earlier marriage with Rajinder Kumar was disclosed to the respondent before her marriage with him. Her earlier marriage was dissolved by the community on 19-3-1989 as per the prevailing custom of their community. Hence when she was married to the respondent, her earlier marriage was not subsisting. Thus the allegation of practising fraud on the respondent is denied. It is also denied that her marriage with the respondent is null and void.

5. On appraisal of the evidence adduced by the parties, the trial Court came to the conclusion that the appellant has failed to prove that her earlier marriage with Rajinder Kumar was validly dissolved as per custom prevailing in the community of the parties. Issue No. 1 was decided in favour of the respondent that when his marriage was performed with the appellant her earlier marriage was subsisting and on this count the, marriage was declared null and void.

6. The appellant's learned counsel contended that the appellant has proved that there is custom in their community in which a marriage can be dissolved before

respectables in a Panchayat. A document to that effect was also executed which is Ext.R-1. She has proved the execution of this document as well. The alleged custom is proved by her independent witness Kashmiri Lal (RW-3). The trial Court has wrongly disbelieved this witness. It is also pointed out that in the copy of the petition given to the appellant duly signed by his counsel there is an allegation that the respondent and the appellant lived together as husband and wife for 7 months though in the judgment this period is mentioned only one month. They were married on 1-10-1989. Till January, 1990 they lived together. Thus even if it is to be believed that the appellant was married earlier and her marriage was subsisting on 1-10-1989, the respondent has condoned that alleged fraud and hence he co-habited with the appellant till January, 1990. He has further pleaded that he took a Panchayat to the appellant's parental home with a view to get this marriage annulled. Thus tacitly he has admitted the alleged custom prevailing in their community for dissolution of marriage. The appellant has already proved that even at the time of her marriage, this fact of her earlier marriage and dissolution thereof was brought to the knowledge of the respondent. She has given birth to a female child. The respondent was not satisfied with the dowry given in her marriage and after the birth of the female child, he declined to rehabilitate Her. When she filed a petition under S. 125, Cr.P.C. claiming maintenance, the petition under Ss. 11 and 12 of the Act was filed by him as a counter-blast.

7. The appellants learned counsel has relied on Smt. Kanta Rani v. Sat Pal, 1988 Marriage LJ 114 (Punj & Har) and Harish Uppal v. Neera Dixit, 1989 Marriage LJ 633 (Delhi). He pointed out that in Kanta Rani's case (supra) the marriage was dissolved by executing a document as is proved in this case and after her marriage with the appellant her earlier marriage was dissolved by obtaining a valid decree from the Court and on these facts a single Bench of this High Court held that the fact of her marriage is of no use to the husband which has already been declared null and void by a competent Court. In Harish Uppal's case (supra), it was held that even if there was any concealment about the issue of marriage, the same is not so material for declaration of marriage to be invalid under Ss. 11 and 12(1)(c) of the Act. In that case also, such a petition was filed under S. 125, Cr.P.C. by the wife, The Court further held that the husband is trying to take advantage of his own wrongs by his conduct towards his wife. Hence, he was held

not entitled to the relief prayed for on that score.

8. The respondent's learned counsel submitted that the appellant has alleged that her earlier marriage with Rajinder Kumar was dissolved under a custom prevalent in the community, but she has utterly failed to prove that custom. Hence, according to him, the trial Court has rightly held that she has failed to prove that her earlier marriage was dissolved under any customary mode. The trial Court has rightly held that when the appellant was married to the respondent, her earlier marriage with Rajinder Kumar was subsisting and Rajinder Kumar was and is still alive. Hence, her marriage with the respondent was void under S. 11 of the Act. He also pointed out that the authorities relied upon by the appellant's learned counsel are distinguishable on facts.

9. The appellant has pleaded in her reply that there is a custom in the community of the parties that the marriage can be dissolved through the intervention of Panchayat and respectables of Biradari outside the Court and accordingly her earlier marriage with Rajinder Kumar was dissolved by the community on 19-3-1989. To prove this dissolution of marriage, she has produced a photo copy of a deed alleged to have been executed by her and Rajinder Kumar on 19-3-1989. Original is not produced. It is alleged that the original was given to the respondent, but no notice was given to him to produce the original. Hence the trial Court has rightly held that the document Ext.R-1 is not legally proved. Further about this custom, respondent Gulshan Kumar while appearing as PW 1-has clearly stated in his cross-examination that there is no such custom in their community. Against her pleadings, the appellant while appearing as RW-1 has stated that her marriage with Rajinder Kumar was dissolved in a Panchayat. She has also stated that marriage can be dissolved by a Panchayat in her Biradari. Ex.R-1 is the copy of the Divorce Deed. No other document is produced by her. She does not say that this document was executed in the community or it was accepted by the community. Admittedly, the parties are Arora Khatri by caste. Anokh Chand (RW-2) has stated that the appellant obtained a divorce from Rajinder Kumar in a Panchayat which even she has not stated. This witness failed to produce any other Divorce Deed by which any other marriage was dissolved in Panchayat. Kashmiri Lai (RW-3) has stated in examination-in-chief that Asha Rani obtained

divorce from her first husband by executing a deed. He has further stated that the divorce is prevalent in their community in the Panchayat which is a custom in their families. The appellant has not alleged any such family custom. In the cross-examination, Kashmiri Lal (RW-3) has given only one instance of such a divorce between Des Raj and one girl of Nakodar. He has neither disclosed the caste of these persons, nor he even knows the name of the girl. He has no knowledge of any other instance in which such a divorce was given in Panchayat.

10. A custom must be proved to be ancient, certain and reasonable if it is to be recognised and acted upon by Courts of Law. The specific family custom pleaded in a particular case should be proved by the party pleading it. It must be proved that the custom 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 the particular family. Custom no doubt can be proved by oral evidence of witnesses acquainted with custom, instances and general pronouncements. Section 29(2) of the Act does not disturb the position which a customary divorce occupied before the enactment of the Act. In order that the exception operates, it must be found as a fact that there had been fact such customary divorce or dissolution of a Hindu marriage. In this case, I have discussed the evidence adduced by the appellant about the alleged customary mode of dissolution of marriage. Appraising that evidence, it is rightly held by the trial Court that neither the existence of the custom nor the fact of divorce is established. Since the appellant pleaded a custom of dissolution which is altogether derogatory to general Hindu Law the burden was on her to prove the existence and the incidents of the alleged custom which must measure up to the essentials of a valid custom and be ancient, certain and reasonable. Custom cannot be extended by analogy nor one custom deduced from another.

11. The facts of Harish Uappal (1989 Marriage LJ 633) (Delhi) and Smt. Kanta Rani's cases (1988 Marriage LJ 113) (Punj & Har) (supra) are distinguishable. In Smt. Kanta Rani's case the alleged concealment was held not proved. It was further held that her marriage had already been dissolved by a writing in the presence of respectables and a decree of divorce was also obtained by her previous husband whereby their marriage stood dissolved. Thus, it was held that

the marriage was not subsisting between Kanta Rani and Sat Pal. They lived together as husband and wife for over one year- The petition was dismissed on account of delay and conduct of the petitioner husband. In Harish Uppal's case (supra) certificate of alleged previous marriage of Neera Dixit was filed, but it was held that this marriage was declared null and void by a Court of competent jurisdiction. Neera Dixit filed a petition under S. 125, Cr.P.C. Thereafter as a counter-blast the husband Harish Uppal filed a petition for annulment of marriage under Ss. 11 and 12(1)(c) of the Act. Taking into consideration his own wrongs by his conduct towards his wife, the petition was dismissed under S. 23(1)(a) of the Act on the ground that he cannot take advantage of his own wrongs.

12. In this case, no doubt, at the time of arguments, the appellant's learned counsel pointed out that in copy of the petition given to the appellant by the respondent's counsel, it is specifically mentioned that after marriage the appellant and the respondent resided together for 7 months, but the respondent's counsel produced his own copy wherein corrections have been made in paras 3 and 4 of the petition and instead of 7 months, one month is written and instead of January, 1990, November 1989 is written. Be that as it may, it is neither party's case that they lived together for 7 months. Even the appellant has stated on oath that she lived in her matrimonial home for 4 months. It is obvious from the averments in the husband's petition that they were married on 1-10-1989 and in January, 1990 he got the knowledge of her earlier marriage with Rajinder Kumar and thereafter he left her at her parental home. In this connection, it was also argued that in the petition, the petitioner husband has pleaded that in July, 1990 he went to the appellant's parental home and asked her father to annul the marriage. Thus, impliedly he has admitted the alleged custom. To my mind, the above argument is devoid of any substance. In such a vague manner existence of custom cannot be deduced and acted upon and the appellant herself has utterly failed to prove the alleged custom. She has not pleaded that simply by executing a deed the marriage can be dissolved under any custom prevalent in their community. She has only tried to prove the document Ext.R-1, which too is not legally proved. Instances of alleged custom are also not proved.

13. Accordingly, I find that the appeal is meritless. The trial Court has rightly allowed the respondent's petition under S. 11 of the Act. Hence the appeal is hereby dismissed.

14. Appeal dismissed.

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