

Sharad Dutt Vs. Kiran

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Court : Delhi

Decided On : Nov-03-1997

Reported in : II(1997)DMC643

Judge : A.K. Srivastava, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 5, 11 and 13

Appeal No. : FAO No.4 of 1995

Appellant : Sharad Dutt

Respondent : Kiran

Advocate for Pet/Ap. : Mr. R.L. Tandon and; Mr. Girdhar Govind, Advs

Judgement :

A.K. Srivastava, J.

1. This appeal has been filed against the judgment and order dated 30.11.1994 passed by Shri S.N. Chopra, Additional Sessions Judge, New Delhi in HMA No. 584/88, Sharad Dutt v. Smt. Kiran. By the impugned order, the petition of the appellant for getting his marriage with the respondent annulled by a decree of nullity under Section 11 of the Hindu Marriage Act (for short 'the Act') has been dismissed on merits. It was found to suffer from laches as well. The alternative prayer of the appellant for getting divorce on the grounds of cruelty and desertion

has also been negated by the learned Trial Court.

2. During the course of argument, in appeal, learned Counsel for appellant gave up the ground of desertion for seeking divorce and relied only on the main prayer in the petition for annulment of marriage under Section 11 of the Act and in the alternative for divorce under Section 13 of the Act on the grounds of cruelty only.

3. In order to appreciate the issues involved in this appeal, it would be pertinent to state the facts of the case in brief. The parties to this appeal got married on 9.12.1984. Appellant's mother is sister of respondent's father. They are thus, admittedly, first cousins within the definition of 'prohibited degrees of relationship' given in Clause (g) of Section 3 of the Act. The fore-fathers of the parties were residing in District Jhang (now in Pakistan) which had a population of Hindus, Muslims besides other communities. Among the Hindus, there were Brahmins, called Panch-Jatia Brahmins consisting of five sub-castes, namely: Jaitely, Trikhas, Mohlas, Jhingan and Kumarias. The appellant is Jhingan and the respondent was Jaitely before marriage. After marriage, the appellant and the respondent lived as husband and wife in appellant's house for some time and the respondent admittedly, left the matrimonial home on 24.6.1985. Since then the parties have never lived together and consequently did not discharge their marital obligations to each other. As is apparent, disputes arose between the parties between 9.12.1984 and 24.6.1985. Efforts in vain are alleged to have been made for amicable settlement in the interest of both the parties. The respondent approached the Indian Women Welfare Association by her letter dated 26.6.1986. On 3.4.1987 an out of Court agreement reached between the parties (admittedly signed by the respondent) in the following terms:

'AAJ SANSTHA KE SADASYON AUR NIMINLIK HIT SADASYON KE SAAMNE KIRAN APNE DAHEJ KA SARA SAAMAAN LEKAR JA RAHI HAI. 14,000 RUPAIY (CHAUDHA HAZAAR RUPAIY) KA CHEQUE SANSTHA KE NAAM SE DIYA JA RAHA HAI, JO KIRAN KO TALAQ KE SAMEY DE DIYA JAYAGA. AB KISI BHI TARAH KA LEN DEN BAKI NAHIN RAHA AUR NAHI KOI VYAKTI KISI TARAH KA KOI CASE KARENGE. STRIDHAN SAHIT SAB KUCHH VAPIS LE LIYA GAYA HAI.'

(Ex. PW 14/B at Page 711 of the paper book).

4. Mangalsutra was, no doubt, kept by mother of the appellant on the pretext that since there ceased to be any relationship of husband and wife between the appellant and the respondent it was no longer needed by the respondent but later on, admittedly, when subsequent complaints were made by the respondent the same was returned to the respondent in the Dowry Cell.

5. From the aforesaid out of Court settlement, the parties appeared to have agreed to bring to an end to the marriage by mutual consent, but it appears that the respondent did not agree to file a joint petition for divorce by mutual consent. Appellant's Advocate gave a notice to the respondent on 11.6.1988 (Ex. P.W.8/1). In response the respondent filed a complaint to the Deputy Commissioner of Police, Crime against Women, Police Headquarters, New Delhi on 11.7.1988. Thereafter, another complaint was made by respondent on 1.8.1988 to the Police. On the basis of these two complaints, the proceedings before the Crime against Women Cell Started but nothing came out. Seeing the attitude of the respondent that she was not prepared to move a joint petition for divorce by mutual consent, the appellant moved the aforesaid petition for annulment of marriage under Section 11 of the Act and in the alternative for divorce under Section 13 of the Act on 12.9.1988.

6. When the Authorities of the Crime against Women Cell did not proceed against the appellant and her relatives in the aforesaid two complaints dated 11.7.1988 and 1.8.1988 made to them by the respondent and advised her to go to the Civil Court, the respondent filed a private complaint against the appellant, his mother, his uncle and his aunt under Sections 406/498-A of the Indian Penal Code and under Section 6 of the Dowry Prohibition Act in the Court of Chief Metropolitan Magistrate, Delhi. A copy of that private criminal complaint is at pages 449-465 of the paper book of the Trial Court though not formally proved. The appellant and his relatives moved to the High Court for quashing of that private criminal complaint and by judgment dated 24.2.1993 that complaint was quashed by this Court by R.L. Gupta, J. The judgment and order is Ex. P.W.12/1 at pages 765-771 of the paper book of the Trial Court. The following was observed in the aforesaid

order quashing the criminal complaint of the respondent:

'From the above writing, its quite clear that in the presence of the office holders of the Women Welfare Association, respondent had received all her dowry articles and she said that nothing more remained due. inspire of that she again started harassing the petitioner saying that she had not been given her Mangalsutra. Then on 4.8.1988 she received one Mangalsutra in the office of the ACP, Anti-Dowry Cell from petitioner No.1. But it is not understood why she mentioned in this writing that she had received the same without prejudice to her right to recover the list of her jewellery presented to her by her in-laws at the time of her marriage. The report of the Anti-Dowry Cell (Annexure C at page 19) also indicates that the enquiries conducted by them indicate that there was no evidence of the commission of offences under Sections 498-A/406, IPC.

It is rather strange that despite having recovered everything allegedly given in dowry and having executed a receipt in the presence of the once holders of the Women Welfare Association, the respondent is not satisfied and rather she still has harassed the petitioners by filing the present complaint. I am, thereforee, of the view that the summoning order by the learned Magistrate on the basis of such a complaint was not called for. thereforee, the complaint and the order passed by learned Magistrate are hereby quashed.'

7. A special leave petition against the aforesaid order was filed by the respondent in the Supreme Court but the same was dismissed on 26.11.1993. A copy of the order of the Supreme Court is Ex. PW 12/2. Review application was also dismissed. Filing of criminal complaint, quashing of the same by this Court, filing of an SLP in the Supreme Court and the same being dismissed and review application also being dismissed has been admitted by respondent in her statement before the Trial Court at pages 128-129. The statement is reproduced as below:

ereafter, I filed private complaint before the Magistrate against the petitioner, his mother, aunt and uncle Jagdish Chander u/Sections 498/406, IPC. They were summoned and they furnished bail. They faced the trial for two years. Complaint was quashed by the High Court. I filed SLP in the Supreme Court. That was also

dismissed. Review was filed by me but it was dismissed. '

8. After giving the facts and the brief history of the case, I would now come to the precise disputes for disposal in this appeal. The issues are as follows:

(1) Whether the marriage between the parties can sustain because of any custom/usage between the parties? If not, whether the appellant is entitled to annulment of the marriage with the respondent under Section 11 of the Act

(2) Whether the petition of the appellant before the Trial Court could be rejected on the grounds of laches

(3) Whether the appellant, in the alternative, is entitled to get divorce under Section 13 of the Act on the grounds of cruelty allegedly committed by the respondent.

9. After formulating the issues involved, I would now proceed to decide the same one by one.

Issue No. 1:

Admittedly, the parties are within the degrees of prohibited relationship as the appellant's mother and respondent's father are real sister and brother. The term 'degrees of prohibited relationship' is defined in Clause (g) of Section 3 of the Act to include children of brother and sister. Section 5 of the Act provides that one of the conditions for the Hindu marriage is that parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two. Section 11 of the Act says that any marriage solemnised after the commencement of this Act shall be null and void if it contravenes one of the conditions specified in Clauses (i), (iv) and (v) of Section 5. Clause (iv) of Section 5 says that the parties to a Hindu marriage shall not be within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two.

10. thereforee, in view of the aforesaid legal position and the facts being admitted that the parties are within the degrees of prohibited relationship, the only question to be decided is whether any custom or usage governing each of the parties

permits of a marriage between the two.

11. In her written statement the stand taken by the respondent was as follows:

'The contents of para 5 of the petition are correct to the extent that the parties to the petition are within the degrees of prohibited relationship; however, it is submitted that the marriage between the parties is being governed by the customs as well as usage governing each of them and permits a marriage between the parties as detailed below:

The fore-fathers of the petitioner as well as the respondent are originally residents of Jhang (now in Pakistan) and it had a total population of about 25,000, comprising of Hindus, Muslims, besides other communities which were in minority. There was no custom or any usage of any marriage amongst the Hindus and Muslims. Both the communities were almost in equal proportion in the said area of Jhang.

That amongst the Hindus, there was a very small community of Brahmins and there was no permissible or otherwise any marital relationship amongst the Brahmins and Non-Brahmins. The forefathers of the parties in the above noted petition were Panch-Jatia Brahmins consisting of 5 sub-castes, namely, Jaitleys, Trikhas, Mohla, Jhingan and Kumaria. Out of these 5 sub-castes, Kumaria were non-existent and the marriages amongst Brahmins were to be solemnised amongst the remaining 4 sub-castes of Brahmins, of which only Jaitleys and Jhingans were in little majority and Trikhas and Mohlas were also comparatively very small.

That since ancient times, the marriages amongst first cousins as well as the marriages between the uncle and niece or between aunt and the nephew, within the prohibited degree of relationship was not only permissible, but was considered to be the best one. The said custom is not only the ancient, but it is a reasonable, in view of the circumstances and the conditions prevailing all around surrounding the small community of the Brahmins living in a Muslim dominated area of Distt. Jhang, which has been demonstrated subsequently. The reasonableness of the custom is being demonstrated with the help of marriages amongst the fore-fathers

of the parties to the present petition. This custom has continued and has been observed without any interruption since ancient times as far back as the memory of the parties to the present petition goes and it has been observed without interruption. The said custom is also certain in respect of its nature as well as in respect of the locality where it has been observed and followed by the Brahmins living therein. The said custom is also uniform, delictory and it is neither immoral or opposed to public policy nor delegatory to any statute and further the same is being saved by the said Hindu Marriage Act and creates an exception in view of the Rules of the said custom. The customary marriage amongst the parties is a source of Hindu Dharma and it is being recognised since ancient times and even at present it is of immense value.'

12. On perusal of the aforesaid, the stand taken by the respondent in nutshell appears to be that since the ancient times the marriages between first cousins were permissible in Panch-Jatia Brahmins of District Jhang, that it formed into ancient custom, in view of the circumstances and conditions prevailing all around surrounding the small community of Brahmins living in Muslim dominated area of Jhang and that the said custom is well established, recognised and reasonable amongst Brahmins of the community to which the parties belonged. Learned Counsel for respondent contended that the said custom had been followed without interruption over the years and thereby got the sanctity of law and was not opposed to any public policy.

13. In proof of the aforesaid alleged custom/usage, the respondent in her written statement gave 43 instances of marriages out of which 13 were said to be prior to partition i.e. 1947 and 30 were said to be after the partition. Oral evidence was led to prove those 43 marriages. The learned Lower Court after consideration of the evidence on record came to a conclusion that it was proved on record that marriages amongst persons within prohibited degrees of relationship had taken place amongst Panch-Jatia Brahmins of Jhang before the partition as well as after the partition.

14. The learned lower Court in its judgment has observed that 'From the evidence on record of parties, the solemnisation of marriages amongst cousins almost

similarly placed as the parties herein is established from the marriages of Kanchan referred to by PW 1, 3-4 marriages after 1947 referred to by PW 2 an Advocate and the person who performed role of father of the petitioner at the marriage of parties, marriage of Vinod before 1947 referred to by PW 3, that of Shadi Lal cousin of PW 3 referred to by PW 3 that of Veera Bai before 1947 referred to by PW 7, Jagat uncle of father of petitioner referred to by PW 8 petitioner that of RW 1 himself aged 72 years that of Mohan Lal cousin of RW 1 referred to by RW 1 that of Mastan Chand referred to by RW 2 that of Sita Ram RW 10 himself that of Baldev Raj RW 11 himself that of brother of Baldev Raj referred to by RW 11 that of Kuldip Sharma referred to by RW 10 and the two marriages referred to by R 10 Pandit in his list mark X and that of Amar Nath Jaitley RW 11 (para 14).

15. The aforesaid findings and conclusion of the Trial Court have been vehemently attacked by learned Counsel for appellant before me.

16. Before deciding this issue I will first discuss as to what is the requirement to prove existence of custom/usage. Section 3 of the Act is Clause (a) defines custom/usage as follows:

'(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.

17. therefore, the customs/usage contended by the rspondent is to be tested on the touchstone of the aforesaid definition of custom/usage. As per reading of the definition it is to be found that there are five ingredients of the aforesaid definition, namely, (i) it has been continuously and uniformly observed for a long time; (ii) it has obtained the force of law among Hindus in any local area, tribe, community, group or family; (iii) it is certain; (iv) it is not unreasonable or opposed to public

policy; and (v) in case of a rule applicable only to a family, it has not been discontinued by the family.

18. From the above, the first requirement to prove a custom/usage is that there should be clinching evidence before the Court to establish that the rule upon which the alleged custom rests had been continuously and uniformly observed for a long time and has obtained the force of law.

19. During the course of arguments, for convenience sake, the learned Counsel for respondent on the basis of the evidence on record, prepared and submitted for consideration two lists of marriages to establish the alleged custom/usage. The first list covers those marriages which has been performed prior to the partition of the country in 1947 and the second list covers the marriages, which were performed after the partition.

20. During the course of arguments, the learned Counsel for appellant scrutinised one by one the 13 given illustrations of marriages said to be amongst prohibited degrees of relationship amongst Panch-Jatia Brahmins of Jhang prior to the partition of the country (in the first list given by the learned Counsel for respondent). He successfully pointed out that out of the 13 alleged marriages, 11 were not performed amongst the first cousins in Panch-Jatia Brahmins of Distt. Jhang and the rest two were not performed prior to 1947. Learned Counsel for respondent on such thread bare scrutiny made by learned Counsel for the appellant conceded that the List I prepared by him did not contain any marriage between the first cousins amongst Panch-Jatia Brahmins on any date prior to the partition of the country in 1947. thereforee, this much is established that the respondent could not give any illustration of marriage between first cousins amongst Panch-Jatia Brahmins of District Jhang prior to the partition of the country in the year 1974.

21. From the written statement of the respondent the main thrust appears to be that in view of the peculiar situation prevailing in District Jhang (now in Pakistan). Panch-Jatia Brahmins of District Jhang had adopted a practice of marriages between first cousins, between uncle and niece, between aunt and nephew, within the prohibited degrees of relationship. It has also been averred in the written

statement that in view of the circumstances and the conditions prevailing all around surrounding the smallest community of Brahmins living in a Muslim dominated area of Jhang, the said custom of marriages amongst persons within the prohibited degrees of relationship was a reasonable one. From such pleadings, the definite case of the respondent was that prior to the partition in the year 1947, Panch-Jatia Brahmins in District Jhang were permitting marriages of parties within the prohibited degrees of relationship but from the evidence on record of the case it is to be found that not a single illustration of any marriage between first cousins in District Jhang amongst Panch-Jatia Brahmins prior to the partition of the country has been proved. In such a situation, how can it be believed that because of the prevailing condition in all around surrounding the small community of Brahmins in District Jhang which was Muslim dominated area there had developed a rule of marriages between first cousins amongst panch-Jatia Brahmins of District Jhang. Further, how can it be accepted that the custom/usage contended by the respondent had been since ancient times and the same is an ancient custom. In my opinion, the respondent has miserably failed to prove that in any period prior to the partition of the country in 1947 there had been any rule amongst the Panch-Jatia Brahmins of District Jhang permitting marriage between first cousins.

22. The learned Counsel for the appellant argued that when there had not been any such rule prior to the year 1947 where was any question of the same being observed by the Panch-Jatia Brahmins after the year 1947.

23. Learned Counsel for the appellant after making a close scrutiny of List II which according to the learned Counsel for respondent contained illustrations of thirty-three marriages amongst persons within prohibited degrees of relationship in the Panch-Jatia Brahmins of District Jhang, after partition of the country, contended that after partition there had been 11 marriages between first cousins in Panch-Jatia Brahmins of District Jhang. Learned Counsel for respondent did not controvert to that factual position and accepted that there were only 11 instances of marriages between first cousins amongst the Panch-Jatia Brahmins of District Jhang after the partition of the country. Thus the final position which emerges is that the respondent could prove only eleven marriages between first cousins

amongst Panch-Jatia Brahmins of District Jhang after partition of the country. The particulars of the marriages are given in the Chart below:

CHART

Sl. Husband's Name Year and date witnesses of

No. name of marriage who proved
the marriage

1. 2. 3. 4. 5.

1. Yogesh Pal Kanchan could not be PW 1 and RW6

Jaitley ascertained

from the

evidence on

record.

2. Om-Prakash Vimla Devi 1962 PW 7

3. Baldev Raj 1980 PW 7, RWs 6,

Jaitley Veerawati 9 and 11.

4. Kishan Chanchal could not be PW 7, RWs 6, 9

Jaitley ascertained

from the

evidence on

record.

5. Sita Ram Shakuntala Probable PW5 and RW 10

Jaitley Jaitley year of

marriage 1960.

6. Ram Labhaya Santosh could not be RW8

Trikha Jhingan ascertained

from the

evidence

on record.

7. Kuldip Sharma Probable year RWs 6 & 9

Jaitley of marriage

1969.

8. Amongst issues of two sisters 15.2.1990 (See page 163 of the paper book) RW 12.

9. Amongst the children of two sisters RW 12

10. Amarnath - 1954 PW 11.

Jaitley

11. Om Prakash Vidya could not be RW 12

Jhingan Jaitley ascertained

from the

evidence on

record. RW 12.

Thus out of the aforesaid eleven marriages, six marriages were performed in the years 1954, 1960, 1962, 1969, 1980 and 1990 and regarding the rest five, the date or year of marriage cannot be ascertained from the evidence on record.

24. From the evidence on record it is also to be found that one Ram Dayal was married with Kaushlya Devi and they being first cousins were within the prohibited degree of relationship but there is no evidence on record to prove that they are Panch-Jatia Brahmins. Learned Counsel for the respondent urged before me that Ram Dayal and Kaushlya Devi are Panch-Jatia Brahmins. Even if that be, from the evidence on record it cannot be ascertained as to when these two persons got married to each other. thereforee, even if these two persons are accepted as Panch Jatia Brahmins, the total illustrations of marriages between first cousins amongst Panch-Jatia Brahmins after partition of the country would be only twelve. Out of these twelve, admittedly from the record, five marriages were performed after the enforcement of the Hindu Marriage Act, that is to say, after 18th May, 1955. Out of the rest seven, as per evidence on record, one was admittedly performed before the enforcement of the Hindu Marriage Act and regarding the rest six there is no evidence on record to show as to when they were performed, either before or after the enforcement of Hindu Marriage Act.

25. Thus the relevant 12 after partition marriages proved by the respondent would go to show that one marriage was performed before the enforcement of the Act, five were performed after the enforcement of the Act and regarding the rest six there is no proof whether they were performed before or after the enforcement of the Act. In the absence of any proof of the date/year of marriage, the rest six illustrations of marriages cannot be presumed to have been performed prior to the enforcement of the Hindu Marriage Act. No such presumption can be made adversely against the appellant as the burden to prove the customs lies on the respondent.

26. Marriage amongst the prohibited degree of relationship amongst Hindus is prohibited under the Hindu Marriage Act. Any such marriage performed after the enforcement of the Hindu Marriage Act would not be a valid marriage. Such marriages can be accepted as valid only when they are protected by any custom

or usage existing prior to the enforcement of the Act. It is very clear that any marriage prohibited by the Act cannot form the basis of a custom or usage as it would, being prohibited, be an invalid marriage. Thus out of the twelve aforesaid illustrations of marriage proved on record, eleven are post Hindu Marriage Act and only one is pre Hindu Marriage Act. One such illustration of marriage between first cousins amongst the Panch-Jatia Brahmins of District Jhang cannot, in my opinion, form custom of marriages between first cousins amongst Panch-Jatia Brahmins of Jhang. It would, in any opinion, not fulfill the touchstone and the ingredients as detailed at pages 14 and 15 of this judgment.

27. Learned Counsel for the respondent urged before me that the respondent could not, inspire of best efforts, know of marriages between first cousins amongst Panch-Jatia Brahmins while the community was staying in Jhang prior to the partition of the country as after partition, the Panch-Jatia Brahmins of District Jhang fled away from Pakistan and got scattered in India having lost contact with each other. This argument does not appeal to me because persons belonging to the community of Panch-Jatia Brahmins of District Jhang entered in witness box before the Trial Court, some of them, namely, PW 1. Charanjit Lal Bakshi, PW 2 Jagdish Chander, PW 3. Jaswant Rai Sethi and PW 11 Smt. Vidya Devi are quite old, their respective ages being 89 years, 87 years, 74 years and 72 years in the year 1991 when the evidence was recorded in this case before the Trial Court. Hence the plea of the respondent's Counsel in this para is not accepted.

28. The learned Counsel for the respondent on the basis of statements given by PW 1 Charanjit Lal Bakshi, PW 2 Jagdish Chander, PW 3 Jaswant Rai Sethi, PW 4 Om Prakash Jaitley, PW 8 Sharad Dutt, PW 11 Smt. Vidya Devi, RW 2 Arun Jaitley, RW 5 Kiran Dutta, RW 6 Arun Jaitley, RW 7 Vinay Kumar Sharma, RW 8 Anil Sharma, RW 9 Smt. Kanta, RW 11 Baldev Raj Jaitley and RW 10 Kuldeep Sharma Jaitely, has also vehemently contended before me that there is opinion evidence in the case to prove the contended custom/usage. They relied upon specific portions of the statements of the aforesaid witnesses may be stated as follows:

29. PW 1 Charanjit Lal Bakshi stated that the marriage between the parties was settled with the consent of both families and that he had not raised any objection to the marriage, the same being amongst first cousins. PW 2 Jagdish Chander stated that he was agreeable on certain conditions for the marriage between the parties and that he did not raise any objection to the marriage because of deference to the last wish of the father of the petitioner. PW 3 Jaswant Rai stated that he had not raised any objection regarding the marriage of the parties being first cousins and had admitted that he had married his daughter with his sister's son. PW 4 Om Prakash Jaitely stated that he attended the marriage between the parties and did not raise any objection to the same. PW 8 Sharad Dutt (the petitioner-appellant), stated that his consent for the marriage was obtained by respondent's brother saying that such marriages had been taking place in their community. PW 11 Smt. Vidya Devi stated that her husband's last wish was that the petitioner should marry with the respondent if the respondent's father was adamant for the marriage.

30. R.W. 2 Arun Jaitely stated that both the parties were interested in marriage, none of the relatives objected to the marriage on the grounds of the relationship between the parties and that in his community marriages between cousins had been and even now been taking place. R.W. 5 Kiran Dutt (respondent) stated that since she became of knowledgeable age she had been hearing that in her family marriages amongst close relations were taking place and that such marriages were still being performed. RW 6 Arun Jaitley stated that the contended custom was quite old and that as per his knowledge the custom had been followed by his fore-father and father. RW 7 Vinay Kumar Sharma stated that the custom of marriage amongst first cousins have been continuously followed without break. RW 8 Anil Sharma stated that in their families marriages amongst first cousins was a common affair and the custom was very old and was being followed without any objection. RW 9 Smt. Kanta Trikha stated that except between the real sister and brother, marriage in their family can be performed with any relation. RW 11 Baldev Raj Jaitley stated that in their family marriages between first cousins were customary and were not considered bad. RW 10 Kuldeep Sharma Jaitely stated that in his community in District Jhang, there was a custom of marriage amongst first cousins and such marriages were considered legal by way of custom.

31. Learned Counsel for respondent also relies on a certificate (Ex. RW 1/1) issued by Shri S.P. Harjan, General Secretary; Jhang Biradari, Lajpat Nagar, New Delhi (at page 667 of the lower Court record). It speaks about the contended custom.

32. According to the provisions of Sections 48 and 51 of the Evidence Act, 1872 when a Court has to form an opinion as to the existence of any general custom, the opinion as to the existence of such custom of persons, who would be likely to know of its existence are relevant and whenever the opinion of any person is relevant the grounds on which such opinion is based is also relevant.

33. At the very outset, I may say that so far as opinion about custom is concerned, no much reliance can be placed on the statements of RW 6 Arun Jaitely, RW 7 Vijay Kumar Sharma, RW 8 Anil Sharma, RW 9 Smt. Kanta, RW 11 Baldev Raj Jaitley and RW 10 Kuldeep Sharma Jaitely because none of them is old enough to give evidence of custom. On the dates of their respective statements in the Court below in the year, 1992, their respective ages were approximately 45 years, 36 years, 32 years, 40 years, 36 years and 42 years. In my opinion, they cannot be material witnesses to prove the contended custom which is said to have been developed amongst Panch-Jatia Brahmins of District Jhang (now in Pakistan) much prior to the year 1947 (the year of partition of the country).

34. On the other hand, I find that PW 2 Jagdish Chander categorically stated that till he migrated to India there had not been any instance of marriage between first cousins in Panch-Jatia Brahmins and there was no custom even in West Pakistan amongst Panch-Jatia Brahmins to perform marriage between the first cousins. PW 3 Jaswant Rai Sethi also stated that he had no knowledge about marriage which took place at Jhang amongst the first cousins and that it was wrong to say that there was any custom of marriage between first cousins in his Biradari. PW 4 Om Prakash Jaitley showed his ignorance about marriages having taken place between first cousins in the Biradari. The respective ages of PW 2 and PW 3 were 89 and 74 on the re-spective dates on which they gave their statements before the Court below in the year 1992.

35. The statements of witnesses on whom reliance has been placed by the learned Counsel for the respondent to prove the alleged custom do not show that they made the statements on the basis of their personal knowledge based on certain facts about the alleged custom. These witnesses do not give the source/sources from which they gathered the relevant information about the existence of the contended custom/usage. No grounds have been given by them on the basis of which the opinion is based. To prove a custom in the present case, the burden was on the respondent to prove that the alleged custom was being followed continuously, uniformly and since long before 1947 in District Jhang (now in Pakistan). None of these witnesses have stated that they had themselves known the alleged custom having been continuously and uniformly followed from before 1947. Nor they say that they have derived knowledge from any person/persons, who were alive prior to 1947.

36. The aforesaid statements relied upon by the respondent in my view, cannot form into an opinion evidence about the contended custom. The most which can be understood from the aforesaid statements is that some of these witnesses did not object to the marriage. Not objecting to a marriage which is prohibited by law would not constitute an opinion about custom/usage as contemplated under the Act.

37. So far as the relied upon certificate issued by the General Secretary, Jhang Biradari is concerned, I may at the very outset say that it cannot be relied upon. The person who issued the certificate was not examined by the respondent and thus the petitioner-appellant had no opportunity to cross-examine him. The certificate lacks in material particulars as it neither gives the grounds for issuing such certificate nor it gives the illustrations of marriages amongst first cousins which had been performed prior to 1947 and after 1947. This certificate is said to have been supported by RW 12 Harish Katyal, but I am constrained to say that reliance on the testimony of RW 12 cannot be made to agree with the said certificate.

38. From the above, it is clear that the respondent cannot rely on any opinion evidence about existence of any contended custom/usage regarding marriage

between first cousins amongst the Panch-Jatia Brahmins of District Jhang.

39. Even though the parties gave consent to the marriage and the parents of the parties were also agreeable for the marriage, it cannot be accepted that there had been custom/usage of marriage amongst first cousins. Similarly, if the relations of the parties who attended the marriage did not object to the marriage, such no objection from them would not constitute a custom/usage to the effect as contended by the respondent.

40. Learned Counsel for the respondent also contended that the petitioner appellant cannot take advantage of his own wrong. He says that the petitioner firstly married the respondent fully well knowing that she was his first cousin and then did not keep her as his wife and now he is claiming nullity of marriage under Section 11 of the Act. According to him, the petitioner-appellant should not now be allowed to take the plea of nullity of marriage. From social point of view, such contention may be found to have some force but when on legal analysis the marriage between the parties is not found to be valid, the petitioner-appellant cannot be refused the prayer made by him in that respect. If the law does not permit a marriage it is to be declared a nullity under Section 11 of the Act.

41. Accordingly, the issue is answered in favor of the appellant.

Issue No. 2:

Having heard the learned Counsel for the parties, I am of the view, that the petition of the appellant could not have been rejected by the Court below on the grounds of laches. It may be mentioned that no objection was raised by the respondent before the Trial Court that the petition suffered from laches and the same was, therefore, liable to be dismissed. Rather it is to be found that in para 15 of the petition, it was specifically stated that there had not been any unnecessary or improper delay in filing the petition and in reply to that para 15, the respondent stated 'Referring to para 15 of the petition, it is submitted that the petition is frivolous and needs to be dismissed'. The petitioner in his replication reiterated the contents of para 15 of the petition. The learned lower Court did not also frame any issue whether the petition was liable to be dismissed on grounds of delay. Thus

there appears to be no need to go into the question whether the petition was liable to be dismissed on the grounds of laches or delay on the part of the appellant but in view of the fact that the Court below found the petition liable to be dismissed on the grounds of laches/delay, it would be appropriate to go into the merits of the matter.

42. The facts of the case, as already stated, are these. The marriage between the parties was solemnised on 9.12.1984. The respondent left the matrimonial home on 24.6.1985 as a result of some lack of harmony between the parties. On 30.6.1985 respondent's brother wrote to the appellant 'we will discuss the matter in detail when I visit Delhi but if you feel nothing much can be done about the whole thing then I will suggest, let us finish the matter as it is rather mud slinging and causing each other and should avoid long litigation and settle amicably in the interest of both the parties'. The respondent made a complaint to the Indian Women Welfare Association by her letter dated 24.6.1986. As out of Court agreement reached between the parties on 3.4.1987 in the terms, namely, 'AAJ SANSTHA KE SADASYON AUR NIMINLIK HIT SADASYON KE SAAMNE KIRAN APNE DAHEJ KA SARA SAAMAAN LEKARJA RAHI HAI. 14,000 RUPAIY (CHAUDHA HAZAAR RUPAIY) KA CHEQUE SANSTHA KE NAAM SE DIYA JA RAHA HAI, JO KIRAN KO TALAQ KE SAMEY DE DIYA JAYAIGA. AB KISI BHI TARAH KA LEN DEN BAKI NAHIN RAHA AUR NAHI KOI VYAKTI KISI TARAH KA KOI CASE KARENGE. STRIDHAN SAHIT SAB KUCHH VAPIS LE LIYA GAYA HAI.'

43. The respondent did not join in filing a joint petition for divorce by mutual consent and consequently, the appellant's Advocate gave a notice to her on 11.6.1988. Reply to that notice was not given. Rather a complaint against the appellant was filed on 11.7.1988 to DCP, Crime against Women Police Headquarter Women Cell. On 1.8.1988, the respondent made another complaint against the appellant. Proceedings before the Cell continued without any fruitful result. The appellant filed the petition under consideration on 12.9.1988.

44. From the above facts, it would appear that the appellant was all along trying for an amicable settlement out of Court, especially when in the year 1985 itself, there

was a thinking of putting an end to the marriage to avoid mud slinging and long litigation. Thereafter the parties reached an out of Court settlement on 3.4.1987 in which it was specifically stated that a cheque of Rs.14,000/- was being given in the name of the Sanstha to be handed over to the respondent at the time of divorce. Thus it is apparent that in the year 1987, parties were agreeable for divorce. It further appears that when the respondent did not sign the joint petition for divorce by mutual consent, the appellant's Counsel gave a notice to the respondent. It also appears that when the appellant lost hope of divorce by mutual consent, he had to perforce file the petition which is for consideration before me in this appeal.

45. In these circumstances, the appellant cannot be said to be guilty of delay or laches as contemplated under Section 11 of the Act and this issue is decided accordingly.

Issue No. 3.

This issue is based on the alternative plea taken by the appellant for obtaining divorce under Section 13 of the Hindu Marriage Act on the grounds of cruelty allegedly committed by the respondent. The learned lower Court is of the view that the appellant could not prove cruelty as alleged.

46. I have gone through the evidence on record and the discussions made by the learned lower Court on this issue and I am in agreement with the findings given by the trial Judge. It appears that the learned Counsel for the appellant himself was not sure whether the evidence given by the appellant before the Trial Court regarding cruelty allegedly committed by the respondent prior to the filing of the petition was enough to prove cruelty on the part of the respondent and that is why he has vehemently relied on the evidence on record relating to the alleged cruelty on the part of the respondent on a date or dates after filing of the petition. The learned Counsel for the respondent contended before me that under law any alleged acts of cruelty after filing of the petition could not be taken into consideration for deciding the petition. To meet that objection, the learned Counsel for the appellant relied on several decisions of various Courts to urge before me that in a divorce petition acts of cruelty committed after filing of the petition can be considered. The respondent was, therefore, given opportunity to rebut the

evidence of the appellant regarding the alleged acts of cruelty on the part of the respondent after filing of the petition. The respondent availed the opportunity and made written submissions to meet the evidence on record in that respect. In fact, the appellant for the purpose is relying on some of the documents which have been filed by the respondent regarding the judicial proceedings taken by the respondent in the lower Courts, High Court and the Supreme Court. A mention of these judicial proceedings have been made by me in this judgment where I have given the facts of the case.

47. I have carefully considered the evidence on record and I am of the view that considering the nature of the proceedings, it cannot be said that those acts of the respondent could be termed as mental cruelty inflicted on the appellant. When a party to a marriage files complaint and goes into litigation and is having the benefit of legal advice the litigation is bound to be taken to its logical end even though the party has to go to the Supreme Court. No doubt such litigation leads to expenditure and labour but it may not amount to mental cruelty.

48. Consequently, this issue is decided against the appellant.

49. In view of the discussion made on the issues framed by me in this appeal, the appellant is entitled only to a decree of nullity under Section 11 of the Act and he is not entitled to the relief of divorce on the grounds of cruelty. The findings of the learned Trial Court regarding laches on the part of the petitioner-appellant cannot be sustained. Consequently, the appeal is partly allowed. The marriage between the parties is annulled under Section 11 of the Act. The rest of the petition is dismissed.

The appellant has been paying certain interim maintenance and costs of litigation to the respondent. In the facts and circumstances of the case, the respondent shall be entitled to retain the same and the parties shall bear their own costs.