

Krishna Obroi Vs. Vijay Kumar Obroi

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Court : Delhi

Decided On : Feb-24-1970

Reported in : ILR1970Delhi301

Judge : V.S. Deshpande, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 7

Appeal No. : Regular Appeal No. 169 of 1967

Appellant : Krishna Obroi

Respondent : Vijay Kumar Obroi

Advocate for Pet/Ap. : V.D. Mahajan and; Bikram Singh, Advs

Judgement :

V. S. Deshpande, J.

(1) What is a Hindu marriage A contract or a sacrament How is this question answered by section 7 of the [Hindu Marriage Act, 1955](#)? These are some of the questions of great public importance arising in this appeal. The respondent is Vijay Kumar Obroi (hereinafter called Obroi) while the appellant is Miss Krishna Godwani (hereinafter called Miss Godwani) who was described as Mrs. Krishna Obroi in the suit filed by Obroi against her and this description has stuck to her in this appeal.

(2) Obroi knew Miss Godwani who was a working girl. On the 17th March 1965, Obroi made an application to the President. Arya Samaj, Kalkaji, New Delhi, that he wished to be married to Miss Godwani according to Vedic rites and that the Purohit should be permitted to perform the marriage ceremony in the Arya Samaj temple. Miss Godwani countersigned the application and also endorsed thereon that the facts were correct and that she was going to marry Obroi of her own free-will and that she was aged 23 years. And soon thereafter the two went to the Arya Samaj Mandhir and underwent the alleged marriage which is the subject of dispute.

(3) On 27-4-1965, Obroi filed a petition for the restitution of conjugal rights against Miss Godwani alleging that the marriage between them was solemnised on the 17th of March 1965 in Arya Samaj, Kalkaji, New Delhi, duly performed and witnessed by the Priest and the other office-bearers of the Samaj in accordance with the Hindu rites; that after the marriage, the place of the co-habitation of the parties has been M-21 and M-22 Jangpura Extension: that Miss Godwani left him recently without any reasonable excuse whatsoever. Hence the petition for restitution of conjugal rights.

(4) The defense by Miss Godwani was that no legally valid marriage was ever solemnized between the parties. The fact of marriage was absolutely denied. Whatever has been done by Obroi was a complete fraud on Miss Godwani and not at all binding on her; there was no valid marriage between the parties; Obroi exercised coercion, undue influence fraud and misrepresentation on Miss Godwani and thereby tried to ruin her. She denied that she co-habited with Obroi and that she left him without any reasonable excuse.

(5) In the trial Court, the evidence adduced by each party was to the following effect. .For Obroi :-AW1 Hira Nand Shastri, the Purohit of the Arya Samaj Mandhir. stated that he got the parties married on the 17th of March 1965 and that he performed the ceremonies. AW. 2 Sliri Sabharwal, Advocate, President of the Arya Samaj at Kalkaji stated that he was present throughout the marriage which was performed according to Arya Samaj rites. AW. 3 Inder Sen Kohli, Secretary of the Arya Samaj, merely stated that the marriage was celebrated on 17th March 1965

in the Arya Samaj Mandhir. AW. 4 Obroi stated that he was married to Miss Godwani according to Vedic rites, and that the marriage was performed by AW. I Hira Nand Shastri. For Miss Godwani : -RW. I Nathu Ram said that the Purohit lit the are and performed Havana reading some 'manthras'. Kanyadan, Panigrahana and Saptapadi were not performed. The Purohit did not perform these ceremonies which should have been performed by him. He only read 'manthras' and performed the ceremony. RW. 2 Godwani, father of Miss Godwani said that on the 17th of March 1965 Miss Godwani returned home late and straight went to the bed. Next morning, she was not cheerful and remained on leave. A few days later, she complained that Obroi was troubling her and he made a report to the police against him. RW. 3 Miss Krishna Godwani said that she kept sitting in the Arya Samaj Mandhir where the Purohit lit the fire and read some 'manthras' but no Kanyadan, Panigrahana or Saptapadi took place. In her crossexamination, she was specifically asked and she stated that after the Havana, nothing else happened in the Arya Samaj Mandhir and thus confirmed her statement that Kanyadan, Panigrahana and Saptapadi were not performed at all.

(6) The learned trial Court held that there was no fraud, misrepresentation or undue influence practiced by Obroi on Miss Godwani and that she was a party to the application made by Obroi that they wanted to get married in the Arya Samaj Mandhir. He also held that Miss Godwani was married to Obroi. The argument of the learned counsel for Miss Godwani that the essential ceremonies of the marriage, namely, the Kanyadan and the Saptapadi, were not performed and there was no marriage according to Hindu rites was rejected by the learned Judge in the following words which are self-contradictory and. thereforee, unintelligible.

'WHEN'Havan' ceremony was performed and the manthras were recited, what was the difficulty in not performing the 'Saptapadi' ceremony. In the case of Hindu marriage only the ceremony of 'Saptapadi' is essential. The perusal of section 7 of the Hindu Marriage Act would show that a marriage contemplated by this Act in order 'to be a valid marriage must be one which is solemnized in accordance with the customary rites and ceremonies of either party thereto and that such marriage is complete and binding only when the ceremony including 'Saptapadi' are perforsmed'.

(7) The trial Court granted a decree for restitution of conjugal rights.

(8) Miss Godwani has appealed against the decree. In this appeal, Dr. V. D. Mahajan, learned counsel for the appellant, has confined his attack on the decree to one single ground, namely, that the ceremony of Saptapadi was absolutely essential to constitute a Hindu marriage. None of the ceremonies like Kanyadan, Panigrahana and Saptapadi were performed and, therefore, was no marriage at all between the parties.

(9) The learned counsel for the respondent met this argument by the following alternative pleas namely :- Either that the essential ceremonies including the Saptapadi should be presumed to have been performed or that whatever ceremonies were performed were sufficient to constitute a valid marriage. Two questions, therefore, arise for decision namely :- (1) What ceremonies were actually performed at the alleged marriage between the parties (2) Whether they constituted a valid marriage

(10) The first question is one of fact. In the petition, Obroi has stated that he was married to Miss Godwani 'in accordance with the Hindu rites' and not according to any special different customary rites. It is well-established that in the absence of a custom to the contrary, the rites essential for a Hindu marriage are two, namely :- (a) the invocation before the sacred fire, i.e., Homam; and (b) taking of seven steps round the fire by the bride and bridegroom, i.e., Saptapadi.

(11) If any authority were needed, the statement of law in Mulla's Hindu Law, 13th Edition, page 638, to this effect may be seen. It was expressly approved by the Supreme Court in Bhaurao Shankar Lokhande v. The State of Maharashtra : 1965 CriLJ544 and in Kanwal Ram v. The Himachal Pradesh Administration : 1966 CriLJ472 . The vague pleading by Obroi of marriage, therefore, according to 'Hindu rites' could at best amount to saying that the Homam and the Saptapadi were both performed. But neither Obroi nor any of his witnesses in their evidence stated that Saptapadi was at all performed. As the Priest in the Arya Samaj Mandhir must have been accustomed to perform marriages, the presumption would be that he performed these two ceremonies. But the Priest does not say what ceremonies he performed. I would have been glad to presume that he per-

formed the essential ceremonies but for the following reason AW. 2 Shri Sabharwal states that marriage was performed according to Arya Samaj rites. It is not known whether he wanted to draw a distinction between Hindu rites and Arya Samaj rites. He does not state what the rites were. AW. 3 does not say anything about the marriage rites whereas AW. 4 merely states that the marriage was according to Vedic rites. Considering the whole of the evidence adduced on behalf of Obroi, therefore, there is not a word stating that either the Homam or the Saptapadi was performed at all, unless this has to be presumed by the general statement that Arya Samaj rites and Hindu rites were performed and further to be presumed that they were the same as the Hindu marriage rites of the Homam or Saptapadi. When marriage has taken place a long time ago and the parties have been co-habiting since then, there is a strong presumption that the parties were validly married. But in the present case, the parties only signed an application and went to the Arya Samaj Mandhir where only the Homam ceremony was performed, but no Saptapadi was performed as is clear from the evidence of Miss Godwani and her witness RW. 1 Nathu Ram. According to her father's evidence, she straightaway came home the same day and the parties, therefore, never co-habited at all. The petition for restitution of conjugal rights was filed a month after the marriage. In these circumstances, there is no scope for drawing the presumption of the validity of the marriage. The factum of the marriage having been denied by Miss Godwani, Obroi was bound to prove the same. Against the general evidence adduced for Obroi, the specific evidence of Miss Godwani and RW. 1 Nathu Ram is that Saptapadi was not performed at all. RW. 1 Nathu Ram was not cross-examined as to his denial of the performance of Saptapadi. Miss Godwani was cross-examined and she stuck to her evidence that after the Havana, nothing happened meaning thereby that Saptapadi was not performed.

(12) Learned counsel for the respondent Obroi argued that Miss Godwani had not pleaded that there was no marriage but her defense was that her marriage was invalidated by fraud, coercion or undue influence. I am unable to agree. In the defense, Miss Godwani clearly denied the factum of the marriage itself. Alternatively she said that whatever happened did not amount to marriage. On these pleadings, it was absolutely necessary for Obroi to prove the factum of marriage. Neither he nor the Purohit nor Shri Sabharwal could state what

ceremonies were performed. Obroi, therefore, clearly failed to discharge the burden of proof resting on him. On the other hand. Miss Godwani has proved clearly that Saptapadi was not performed at all and she was supported by RW. 1 Nathu Ram on this point. It is true that in the cross-examination of the Priest, Shri Sabharwal and Obroi, learned counsel for Miss Godwani did not probably ask a specific question whether Saptapadi was performed or not. I think, he was well-advised in refraining from doing so. For. if in the examination-in-chief, these witnesses did not say that the essential ceremonies were performed, there was no occasion for such questions being asked in the cross-examination. It is only if the general evidence could have amounted to a statement that essential ceremonies were performed, that cross-examination could have been directed to show that essential ceremonies were not performed. But a general evidence that a marriage was performed according to Arya Samaj rites or Vedic rites did not amount to saying that Honiam and Saptapadi were performed. therefore, no questions in cross-examination need have been asked as to whether these rites were performed. On the contrary, when Miss Godwani and RW. 1 Nathu Ram stated in the defense evidence that Saptapadi was not performed, it was clearly the duty of Obroi and his counsel to ask these questions to these witnesses in their cross-examination. The very fact that no such question was asked shows that Obroi did not dispute the fact that Saptapadi was not performed. The only question in cross-examination on this point asked to Miss Godwani was as to what happened after the Homam. She was not asked whether Saptapadi was or was not performed. I, therefore, find that there was a written agreement between Obroi and Miss Godwani to marry according to Hindu rites but actually the Homam only was performed. Saptapadi was not performed at all.

(13) The question of law, therefore, is whether the agreement to marry followed by the Homam ceremony without the Saptapadi ceremony constituted a valid marriage between the parties. What is a Hindu marriage The [Hindu Marriage Act, 1955](#), does not define it. It no where states that it is constituted by a mere contract to marry. On the other hand, sections 5, 10, 11, 12, 13, 17, 18, 19 and 29 all refer to marriage as being "solemnized".

(14) The agreement of parties to marry or a contract of marriage is only a condition precedent for the solemnization of the marriage as would be shown by section 5(iv) of the Act. It is not enough if the parties merely consent to the contract of the marriage. They must further consent to its solemnization. This is why under section 12(1)(c) of the Act, the validity of a Hindu marriage may be impugned by showing that fraud or force was used to obtain the consent from either party not to the formation of the contract of marriage, but to its solemnization as was held in *Amar Nath De v. Smt. Lajjabati Devi* : AIR1959 Cal778 an authority which is preferable not only on general considerations of public policy (Derrett-Introduction to Modern Hindu Law, page 194) but also according to the correct construction of section 7 of the Hindu Marriage Act. to the decision in *Bimla Bai v. Shankar Lal* : AIR 1959 MP8). This forcefully brings out the point that marriage is constituted not by the contract to marry but by its solemnization.

(15) Throughout the Hindu Marriage Act, therefore, the marriage is regarded as an act which is 'solemnized' in the sense that it is something which is formally done or performed or celebrated.

(16) The meaning of 'solemnization' of marriage is to be found in section 7 of the Act which is as follow :

'7.(1) A Hindu marriage may be solemnized in accordance with the customary rites and 'ceremonies' of either party thereto. (2) 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.'

(17) The Hindu Marriage Act, according to its preamble, is an Act to amend and codify the law relating to marriage among Hindus. Under the Hindu Law prior to the Act also, the Hindu marriage consisted in its solemnization. It is well-known that Hindu Law is primarily a customary law. The rules of Hindu Law are derived more from Sadachar (practice of good people) than from any other source. The Shastric injunctions as to law are themselves based on the customs and usages of the people. They were not something divorced from the practices of the people. The smritis themselves recognised that the customs must be enforced and that

they either override or supplement the *smrithis* (Mayne on Hindu Law and Usage, 11th Edition by N. Chandrashekar Ayer, page 58). But the general customary Hindu Law itself may be overridden by a special custom which departs from the general customary law in respect of a locality, a class or a family. The legal position prior to the Act, therefore, was that a Hindu marriage was to be performed according to a special custom, if there was any. In the absence of a special custom to the contrary, a Hindu marriage is to be performed according to the general Hindu law which is based on the general customary law of the Hindus. It is well-known that it was the common custom of the Realm in England which became the common law of that country. therefore, the common law could as well have been called the common customary law of England. It is in this sense that the Hindu Law could as well have been called the common customary law of the Hindu, which can be overridden in a particular locality class or family by a special custom prevailing therein.

(18) Does section 7 of the Act amend the previous Hindu Law or merely codify the same Section 3(a) of the 'Act defines the expressions 'custom' and 'usage' to signify a local, tribal, communal, group or family customs, all of which may be called special customs as distinguished from the general Hindu law. Under section 4(a) any rule of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act ceases to have effect with respect to any matter for which provision is made in the Act-'Save as otherwise expressly provided in this Act'.

(19) Section 7 of the Act refers to customary rites and ceremonies of either party to the marriage. The operation of these customary rites and ceremonies is expressly saved by section 7. The answer which must, therefore, follow is that section 7 does not amend the Hindu law in respect of these customary rites and ceremonies but on the other hand, codifies the pre-existing law. According to the pre-existing Hindu law, the validity of the marriage depended entirely on the question whether the customary rites and ceremonies were performed or not. Their performance was mandatory to the validity of the marriage. Section 7(1) says a Hindu marriage 'may' be solemnized in accordance with the customary rites and ceremonies, inasmuch as under the pre-existing Hindu law, the performance

of the customary rites and ceremonies was obligatory and also because the operation of these customary rites and ceremonies is expressly saved by section 7. The meaning of 'may' in section 7(1) would therefore have to be 'shall' or 'must'. If the legislature had intended that it should be optional to the parties to perform the marriage either under the customary rites and ceremonies or otherwise, then the legislature would have meant to make a revolutionary change in the pre-existing Hindu law. But the language of section 7 does not give any indication that such a clean break from the past law was intended by the legislature. The [Hindu Marriage Act, 1955](#), occupies only a part of the general Hindu law. It has, therefore, to be considered in the overall setting of the wider Hindu law. The principle as to the construction of such a statute is expressed by Sir Carleton Kemp Allen in his 'Law in the Making' 7th Edition at page 456 as follows :

'THERE is the dominant principle, never absent from the minds of the judges, that the common law is wider and more fundamental than statute, and that wherever possible legislative enactment should be construed in harmony with established common law principles rather than in antagonism to them. A general intention is presumed in the legislature to fit new enactments into the general structure of the law and to effect no more change than the occasion strictly demands'.

(20) Doubtless this principle has sometimes led to strained and grudging constructions as I had occasion to show in an Article 'Extrinsic Aid in the Construction of Statutes' 11 Journal of the Indian Law Institute 123 (1969) at page 129. But as Sir Allen observes at page 457 of his book, 'in reality it is an essential guiding rule, for without it. the continuity of legal development would be imperilled'. Sir John Romilly M. R. put it more strongly in *Minet v. Leman* (1855) 20 Beav. 268 by saying that 'the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched'.

(21) In an Article published in Air 1961 Jour 84, it was suggested that section 7 made the performance of the customary rites and ceremonies optional in a Hindu marriage. A contrary view was expressed in another Article published in Air 1962

Jou 27. But the real objection to the view that section 7 dispenses with the obligation to perform a Hindu marriage by customary rites and ceremonies is that such a view directly conflicts with the Scheme of the Act, the several provisions of which (referred to above) speak of the 'solemnization' of a Hindu marriage. Unless a marriage is performed by some ceremonies, it could not be said to be solemnized as is required by these provisions of the Act. If some ceremonies must be performed, then section 7 specifies those ceremonies. They cannot be any other than the 'customary rites and ceremonies of either party' to the marriage. I, therefore, conclude that section 7 merely codifies the pre-existing Hindu law and does not amend it.

(22) On this finding, it is not difficult to give a proper meaning to section 7. Section 7(1) seems to refer to the special customary rites and ceremonies, which may prevail in a locality, class or family and which may override the general Hindu customary law to the contrary. Section 7(2) means that where the customary law requiring the solemnization of a marriage by Saptapadi is not overruled by a special custom under section 7(1) then the general custom of Saptapadi must be observed and in the absence of a special custom to the contrary, the ceremony of Saptapadi is absolutely essential in the solemnization of the marriage.

(23) In the present case neither Obroi nor Miss Godwani has pleaded that there was any special custom of the community of either of them according to which the marriage could have been performed. On the contrary, Obroi has referred generally to 'Hindu rites' according to which the marriage was to be performed. Saptapadi was an essential component of the 'Hindu rites' constituting the marriage. As Saptapadi was not performed, the attempted marriage was contrary to section 7(2) of the [Hindu Marriage Act, 1955](#). The result is that there was no marriage at all between Obroi and Miss Godwani. Their status, therefore, is that they continued to be unmarried. The decree of the trial Court is, therefore, set aside and the suit by Obroi for the restitution of conjugal rights is dismissed. The appeal is allowed with cost throughout in the above terms. Counsel's fee Rs. 200.00.