

Ram Chandra Bhattacharjee Vs. Manju Bhattacharjee

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Court : Kolkata

Decided On : Sep-17-1974

Reported in : AIR1975Cal118

Judge : C.N. Laik, Acg. C.J. and ;N.C. Mukherji, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2 - Order 41, Rule 33;
;Hindu Law

Appeal No. : First Appeal No. 660 of 1971 (Matrimonial)

Appellant : Ram Chandra Bhattacharjee

Respondent : Manju Bhattacharjee

Advocate for Def. : Chandidas Roy Choudhury, Adv.

Advocate for Pet/Ap. : Asutosh Ganguly and ;Rabindra Kumar Mookerjee, Advs.

Disposition : Appeal allowed

Judgement :

Laik, Ag. C.J.

1. Let a man who has finished his studentship of the Vedas or sacred literature take a spouse, an auspicious woman, who is not defiled by connection with another man, is agreeable, non-sapinda, younger in age and shorter in stature,

free from disease, is born from a different Gotra and Pravaran, is beyond the fifth and the seventh from the mother and from the father respectively. So that is how the ancient law givers of India directed a groom to choose his bride. Marriage, according to Hindu Law was sacred and it is the religious duty of the father to give his daughter in marriage to a suitable person.

2. It is useful to observe the circumstances dealt with by my learned brother, which have given rise to this appeal. They provide useful materials for the student of social conditions namely that, whether a valid marriage has been performed in Gandharya form between the parties, being Vaidik Bhattacharjee Brahmins of Bhatapara.

3. Besides the old Smriti writings of Mann with Medhatithi's commentaries and his Samhitas translated by Manmatha Nath Dutt Shastri and the writings of Kulakbhata. Gautam, Bandhayana, Vasistha, Vishnu, Yainavalkya, Narada, Yama, Devala. Sulapani and the recent Digests of Colebrooke and Morley, Sacred Books of the East by Max Muller and the texts of Macnaughten, Hindu Law and Custom by Dr. Jolly, Trevelyan and J. C. Ghose's texts on Hindu Law, Banerjee's Marriage and Stridhan and besides the recent texts of Mayne and Mulla -- if a student in law wants to track out the forms of marriage specially in Gandharva form, in the most remote ages and regions, he will have to go through the Dharma Shastras, Vyavastha Chandrika by Shyama Charan Sarkar, and Vivada Ratnakar of Chandreswar and Vivada and Vyavahara and Kritya and Sradh Chintamani by Vachaspati Misra (particularly for the Mithila School of Hindu Law), Raghunandan on his Udbahatawitta, Risley's Tribes and Castes of India and Law and Customs on Hindu Castes by Arthur Steel.

4. Out of the eight kinds of marriage laid down by the ancient Hindu Law givers, four only were in approved forms viz., Brahma, Daiva, Arsha and Prajapatya. The last four forms viz., Gandharva, Asura, Rakshasa and Paisacha are now regarded as disapproved forms though Vachaspati Misra in his Vivada Chinta-manj gives a very high position to Gandharva marriage. Mayne commented upon these forms as founded upon different views of the marriage relation, that they belong to different stages of society and that their relative antiquity is exactly the inverse

ratio to the order in which they are mentioned above.

5. In the Gandharva form of marriage, the general idea of recent past is that it is the union of a man and woman by their mutual desire apparently for the purpose of amorous embraces and effected by consummation. It, therefore, originates from purely sensual desire of both the man and woman, unregulated indulgence of lust, though not exactly like the sudden lust of the Orangoutang. In the previous state or society, the Gandharva form of marriage was prevalent among the warrior class, which assumes a friendly, though perhaps stealthy intercourse between man and woman before their union and in which the inclinations of the female were consulted. Permanence was not a necessary element in this transaction. The bride was not given away by the father to the bride-groom. It was contrary to the principles of Patria Potestas. The rights of the parents over their daughters were unknown or disregarded. Minors cannot perform this form of marriage. It is a quasi-marital union.

6. In the Mithila School of Hindu Law, Gandharva form of marriage is not considered as invalid. The Patna High Court in Kamani Devi v. Kameshwar Singh, ILR 25 Pat 58 = (AIR 1946 Pat 316) held that the relationship of husband and wife, created by such a marriage is binding against each other and the husband cannot escape his liability of maintaining his wife married in Gandharva form. The said High Court went further and held that the celebration of Gandharva form of marriage must be attended with nuptial rites and ceremonies including Homa (invocation before the sacred fire) and Saptapadi (the taking of seven steps by the bride-groom and the bride together) for its validity, This was approved by the Supreme Court in the case of Bhaurao v. State of Maharashtra, : 1965 CriLJ544 .

7. In Uttar Pradesh, however, it was held by the Oudh Chief Court that the Gandharva form of marriage was even in ancient days considered lawful only for the warrior tribe but it has become obsolete (AIR 1930 Oudh 426). Similar is the view of the Madras High Court that amongst the Hindus, the Gandharva form of marriage is now obsolete and Abdur Rahim, J., held that among the Kambala caste the marriage in Gandharva form was not valid. Miller, J., only observed in that case that it was doubtful whether the marriage in the Gandharva form was

legal in the present day. That was the decision in 1913 reported in 24 Mad LJ 271. In 1925 the Madras High Court held that so far as the said eight forms of marriages referred to in the Shastras are concerned it is now accepted law that all except the Brahma and Asura forms are obsolete (AIR 1925 Mad 497) After referring to this decision, Rao, J. of the Madras High Court in *Deivaini v. Chidambaram*, : AIR1954 Mad657 also quoted the decision of the Allahabad High Court in *Bhaoni v. Maharaja Singh*, ILR 3 All 738 which condemned the Gandharva form of marriage in strong terms by describing it as nothing more or less than concubinage and that it had become obsolete as a form of marriage. Rao, J., however, observed that these learned Judges did not refer to any text or the opinion of the text writers on this question and pointed out that the Gandharva form of marriage is not obsolete in the State of Madras as yet.

8. In Bengal, Gandharva form of marriage was sometimes confused with Vaishnava form of marriage prevalent in the said province by 'Kanthi Badal' and/or exchange of garlands. It is a special form of marriage which is validated by custom among the Bairagis. Vide in the goods of Sourabmoni Dassi, AIR 1920 Cal 620, *Lalit Mohan v. Shyamapada*, : AIR1952 Cal771 . It is a special form of marriage which is validated by custom among the Bairagis. The Supreme Court dealt with the ingredients of Asura form of marriage in the case of *Veerappa v. Michael*, reported in : AIR 1963 SC933 but not Gandharva form of marriage.

9. The Hindu Marriage Act no doubt does keep alive custom but the requirements of a valid custom are that it has been continuously and uniformly observed for a long time and it is certain and not unreasonable or immoral or opposed to Statute or public policy and the custom must have obtained the force of law. A few of the customs such as presence of a Brahmin Priest, a barber, a Thakur, chanting of Mangal Astaks, striking or touching the foreheads of both the bridegroom and the bride, blowing of a pipe (Bher), performance of the marriage in a temple, exchange of garlands, throwing out a feast, might be mentioned.

10. Custom is not however part of the Hindu law. Dr. Derrett pointed out in his 'Introduction to Modern Hindu Law' the operation of custom in India now is very restricted and having regard to the provisions of the Hindu Marriage Act, 1955, the

prohibitive degrees of marriage and the right to dissolution by caste tribunal of one's marriage appeared to be some of the few topics only in which custom may be properly pleaded today. In all other respects So far as marriage is concerned, custom is abrogated by the Code (Taro v. Darshan.). No party can invoke any custom in support of a particular form of marriage unless the custom is proved by evidence and it stands the test of certainty, continuity, reasonableness, etc.. as mentioned above. No ceremonies which are customary to either party will be valid as marriage ceremony. Individuals or even groups cannot invent, marriage ceremonies either. It is doubtful whether even the conventions or representatives of entire sub-caste can validly alter their customary ceremonies.

11. In so far as the law is administered in India unto the present day, even after the passing of the Special Marriage Act and Hindu Marriage Act, the following principles about the Gandharva form of marriage are to be followed:

(i) Marriages in Gandharva form though have fallen into disuse in West Bengal are not altogether obsolete in all the States of India, and particularly between the parties governed by the Mithila School of Hindu Law.

(ii) A marriage in Gandharva form may be completed by the performance of ceremonies, other than Homa and Saptapadi where it is allowed by the custom of the caste to which the parties belong.

(iii) Custom, however, to be valid and to have the force of law, it must be continuous for a long time, uniform, certain, moral, reasonable and not opposed to public policy and not in derogation of Hindu Law or Statute. There must be evidence to sustain the custom.

(iv) Minors cannot perform this type of marriage.

(v) There is no necessity of formal transfer of the dominion of the daughter by the parents to the husband.

(vi) A bare agreement coupled with declaration and even living together as husband and wife after the exchange of garlands and rings are insufficient to establish a valid marriage under the Gandharva form. The doctrine of 'factum

valet' cannot be invoked in such circum-stances either.

(vii) Gandharva form of marriage should not be regarded as concubinage or quasi-marital union, more so in the context of the modern Society and in the background of the forward thinking of the present law givers. The possibility of legal validity of this form of marriage in the whole of India in near future even without being backed by custom, is too notorious to be ignored. In a sense. Gandharva form of marriage is trying to come bark very fast pushing parental domination to the background. It would not then cast social slight upon the Vaidik Bbattacharjee Brahmins of Bhatpara.

12. For the reasons aforesaid and as detailed by my learned brother. I refuse in agreement with him to recognise the marriage in the present case as having any legal validity furthering the above tests I would allow the appeal without any order for costs. Only one gleam of light relieves the gloom of this misreable story in the instant case, that is the non-intercourse by the appellant.

13. But I should sound a note of warning that cases based on the ideals of humanity would have little hope of success among the family, whose attitude and behaviour show little care for the health and happiness of their daughters. For the time being doubtless attempts must be limited to arousing some sense of dignity and not to convert what is intended to be a sacrament into a commercial transaction.

14. With these observations I close.

N.C. Mukherji, J.

15. This appeal arises out of a suit for maintenance against the defendant at the rate of Rs. 100/- per month and for arrears of maintenance on declaring that the plaintiff is the married wife of the defendant according to Gandharva form. There was also a prayer for a mandatory injunction compelling the defendant to marry the plaintiff according to the present Hindu Law and a permanent injunction so that the defendant during his life cannot marry any other girl.

16. The learned Judge declared the marriage of the plaintiff with the defendant and it was ordered that the plaintiff be entitled to her maintenance to the tune of Rs. 100/- per month and to recover the arrears of maintenance at the same rate. Being aggrieved this appeal has been filed by the defendant Ram Chandra Bhattacharjee.

17. The case of the plaintiff - in brief is that he was married with the defendant in the Gandharva form by exchange of garlands in presence of witnesses. That the defendant is her sister's husband's brother. The defendant used to visit plaintiff's father's house at Bhatpara very often and to stay there. As such intimacy grew up between the parties. The defendant promised to marry the plaintiff and prevailed upon the plaintiff to live as husband and wife for two months in January/February, 1965. It is stated that the defendant actually married the plaintiff in Gandharva form by exchanging garlands in presence of brother and cousins of the defendant and made the plaintiff understand that the defendant is really the husband of the plaintiff. That there was sexual intercourse between the parties and as a result the plaintiff conceived. The matter was leaked out and the defendant requested the plaintiff's father to get the consent of the defendant's parents with regard to the formal marriage. The plaintiff's father approached the defendant's father but the latter did not agree. The plaintiff gave birth to a male child on 25-9-65. The baby died after a few months. The defendant was again reminded to fulfil his promise but to no effect. The plaintiff having no other alternative served a registered letter on the defendant and his father on 11-5-67 demanding the completion of the marriage and maintenance. That letter was not replied to. Subsequently the plaintiff brought this suit on 11th of May 1969.

18. The appellant contested the suit by filing a written statement. In the written statement he denied all the allegations made in the plaint. He admits that he used to know the plaintiff being his relation and, in fact, some intimacy grew up between him and the plaintiff. He also admits that there was exchange of several letters between the parties. There was a proposal of marriage from the plaintiff's side but that never matured. It is true that the defendant in January/February 1965 stayed for about 20 days at Bhatpara, but that he so lived in the house of his elder brother just adjacent to the house of the plaintiff's father. The allegations that the

defendant promised to marry the plaintiff and that there was a Gandharva form of marriage and that there was sexual intercourse between the parties as a result of which the plaintiff conceived have all been seriously challenged.

19. In the plaint the plaintiff's clear case is that she was married with the defendant according to the Gandharva form. In Prayer (b) she wanted a declaration from the Court to the effect that the plaintiff is the married wife of the defendant according to the Gandharva form. In this connection Prayer (c) may be referred to which is a prayer for mandatory injunction compelling the defendant to marry the plaintiff according to the present Hindu Law and a permanent injunction so that the defendant during his lifetime cannot marry any other girl. This shows that the admitted case of the plaintiff is that no marriage according to Hindu rites was performed between the parties. At the trial the plaintiff put up her prayer for permanent injunction as she came to know at the time of deposition that the defendant married another girl about 2 years back. In her evidence the plaintiff came up with a story that on 31st March, 1965, a marriage took place before a Purohit in presence of the witnesses and the marriage was an approved form of Hindu marriage. There were Saptapadi and Sampradan. If it was the definite case of the plaintiff that the marriage which was performed between her and the defendant was simply a Gandharva form of marriage, it is not understood how the learned Court could allow the plaintiff to adduce evidence in order to prove that a regular form of marriage was performed between the parties. The learned Judge finds as follows:-- 'It is therefore found that when in the plaint there is a story of Gandharva marriage by exchanging garlands without reference to any ceremonies the plaintiff led evidence contrary to the plaint story giving an idea to us that proper ceremonies took place to complete a formal marriage according to Hindu rites of approved marriage. A reasonable suspicion arises as to whether a Gandharva marriage as I have stated above without ceremonies is marriage at all and if it is no marriage the plaintiff will be at best a concubine and no more than that'. After observing as above the learned Judge goes on to discuss about the presumption in favour of the valid marriage and the legitimacy of the offspring. The learned Judge finds that from evidence, both documentary and oral, presumption of valid marriage can be made in favour of the plaintiff. The learned Judge refers to the letters Ext. 2 series and on reading the letters he comes to the conclusion

that the defendant assured marriage. If that is so, then it is very clear that there was no marriage between the parties, it is simply an assurance on the part of the defendant. There is absolutely no evidence from which it can be said that the parties lived together as husband and wife and from which a presumption of valid marriage can be drawn in favour of the plaintiff. The only evidence that has been adduced in this case is that for about 20 days in the month of January/ February 1965 the defendant stayed at Bhatpara in his brother's house, which is adjacent to the house of his plaintiff's father, and during his stay there he came to be intimately acquainted with the plaintiff. From the number of letters Ext. 2 series written by the defendant to the plaintiff it is seen that the defendant was in deep love with the plaintiff and he was very eager to marry the plaintiff. The first letter is Ext. 2 which is dated 2nd March, 1965. Ext. 2 (a) is dated 11th March, 1965, Ext. 2 (b) is dated 12-4-65, Ext. 2 (c) is dated 10-5-1965, Ext. 2 (d) dated 14-5-1965, Ext. 2 (e) is dated 28-5-1965, Ext. 2 (f) is dated 21-5-1965, Ext. 2 (g) is dated 1-6-1965, Ext. 2 (h) is dated 15-6-1965. Even upto 15-6-1965 there is nothing to show that the defendant had any knowledge about the conception of the plaintiff. In June, 1965, the plaintiff was in an advanced stage of pregnancy as she gave birth to a child in September, 1965. If the defendant would have known about the fact of plaintiff's pregnancy he could not have written letters in the tone in which they have been written. The letters specially Exhibits 2 (e) and 2 (g) very clearly indicate that the defendant did not commit sexual intercourse with the plaintiff though he was eager to commit the same in future. It is true that the letters indicate that the defendant was very much willing to marry the plaintiff but he mentioned about some obstacles in the finalisation of marriage, namely, the prior consent of his parents and the marriage of his sister Tuni which should take place earlier. The mere fact that the defendant was in love with the plaintiff and was very much eager to have her company cannot in any way prove that there was already a marriage between the parties. The letters Ext 2 series on which the plaintiff relied completely disprove the fact of marriage, From the evidence on record it must be said that it has not at all been proved that the plaintiff and the defendant for about 2 months lived as husband and wife and had sexual intercourse The plaintiff's case in the plaint that there was a Gandharva form of marriage by exchange of garlands in presence of witnesses was given a go-by at the trial

where the plaintiff wanted to improve upon her case and tried to prove that there was a regular form of marriage according to Hindu rites. The portion of evidence regarding Hindu marriage was inadmissible and moreover it has not at all been proved. For all the reasons stated above we find that it has not been proved in this case that there was any marriage between the parties whether in Gandharva form or in any other form. That being so, the plaintiff is not entitled to any relief.

20. In the result the appeal is allowed on contest. The judgment and decree passed by the learned Subordinate Judge are hereby set aside. The plaintiff's suit is dismissed. There will be no order for costs in this appeal.

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