

Mt. Kanchanu and anr. Vs. Naresh

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Court : Himachal Pradesh

Decided On : Apr-06-1949

Reported in : AIR1949HP1

Appellant : Mt. Kanchanu and anr.

Respondent : Naresh

Judgement :

Bannerji, J.C.

1. This is an appeal from a judgment and decree of the Chief Court, Chamba, dated 9th chet 2003, reversing a judgment and decree of the District Judge, dated 21st Maghar 2003, and restoring the decree of Subordinate Judge dated 32nd Jeth 2003, by which the suit of the plaintiff was decreed.

2. The plaintiff, Naresh, brought a suit in the Court of the Subordinate Judge for the restitution of conjugal rights. He alleged that in Bhadon 1995 B., according to the custom of the illaqa, he eloped with one Mt. Hiri, a minor from the lawful guardianship of her mother, Mt. Kanchanu. Soon afterwards, he and his father, Paras Ram, visited the house of Mt. Kanchanu and performed the ceremony of 'Patiara. It may be mentioned here that the ceremony of 'Patiara' is a ceremony of appeasement. Its main purpose is to seoure the consent of the parents of the girl abducted or kidnapped. As observed in the Judicial committee File No. 21 of 2003, Hira v. Matlali and Mt. Bhagwantu etc., it is necessary for this ceremony that the

party guilty of the crime should offer a goat and some provisions to propitiate the wrath of the parents or guardians and offer some ornaments called 'Bandah' or 'Juth' to the aggrieved girl in order to please her.

3. It is further alleged by the plaintiff that after the ceremony of 'Patiara', a marriage ceremony, generally called 'Jhanjrara' was performed in the presence of a priest. The plaintiff lived with his bride, Mt. Hiri, defendant 2, till chet 1995, when she was allowed to go to her mother for confinement. As she did not return to the plaintiff, he commenced a suit for the restitution of conjugal rights in Jeth 1996. Between Jeth 1996 and Kartik 1996, either she must have gone to her husband of her own free will or she might have again been kidnapped by the plaintiff. In Kartik 1996, the mother made a complaint charging the plaintiff with an offence under Section 363, Penal Code, Both the complaint and the plaintiff's suit for restitution of conjugal rights were compromised (Ex. P.A). The plaintiff alleged that during his conviction and sentence of two years' rigorous imprisonment for theft, Mt. Hiri used to visit him in jail and that she lived with his parents. After his release, Mt. Hiri lived with him. On 29th Asoj 2001, her mother, Mt. Kanchanu, defendant 1, took her away and refused to let her go to him.

4. The defendants resisted the suit saying that there was no 'Patiara' nor was there any valid marriage of 'Jhanjrara'. They alleged that Mt. Hiri was a minor and she was kidnapped by the plaintiff.

5. The trial Court decreed the suit of the plaintiff on the ground that the 'Patiara' ceremony was proved and that the 'Jhanjrara' ceremony was substantiated by the 'Khewat' issued to the parties as a kind of marriage certificate.

6. On appeal, the District Judge found that the abduction of Mt. Hiri, defendant 2, took place when she was only thirteen years as proved from the medical certificate granted by C.M.O. dated 26th poh 1996 in criminal file No. 138/96. He further found that the 'Patiara' ceremony was not in accordance with law as laid down by Sir Jai Lal in the Judicial committee Appeal No. 24 of 2003, mentioned above. He further found that there was no proper 'Jhanjrara' marriage. In his judgment he observed that the evidence of the witnesses of the plaintiff, P.W. &, Dhoom and the Priest Janta, P.W., 5 and the plaintiff's maternal uncle, Molam, P.W. 7 was not

reliable. In his opinion the compromise, Ex. P.A. did not prove the marriage. In the compromise Mt. Kanchanu condoned the crime of abduction. He characterised the compromise as illegal because it purported to absolve the plaintiff from a criminal liability for a non-compoundable offence (Section 368, Penal Code). There is no mention in the compromise that by virtue of it, Mt. Hiri should return to the plaintiff as his wife. The learned Judge further found that the 'Khewat' was not proved and exhibited. Moreover, in the 'Khewat' the guardian of the girl, namely Mt. Kanchanu, did not put her signature. Discussing the entire evidence, he came to the conclusion that there was no marriage and that the compromise was illegal and accordingly dismissed the suit.

7. Against this judgment, the plaintiff appealed to the Chief Court. The learned Chief Judge observed that he had abducted Mt. Hiri and soon after performed 'Patiara' and then there was a marriage ceremony of 'Jhanjrara' and the preparation of 'Khewat' followed. In his judgment he remarked as follows:

There is no doubt of the 'Jhanjrara' having taken place in Asoj 1995, when the mother was present and these ornaments were given and the feast was done.

8. He, however, agreed with the learned Judge that the 'Khewat' was not proved and that there was false entry in it, having described Mt. Hiri's age as twenty. He relies on giving of the ornaments which according to him is significant and proof of marriage though, 'the making of 'Khewat' according to the robkar is optional.' As regards the requisites of 'Patiara', he does not follow the ruling of the Judicial Committee. In conclusion he observes:

From the previous litigation, facts and circumstances of the case, I have no difficulty in holding that the girl was abducted in Bhadon 1995. Plaintiff and his father did approach for 'Patiara' and gave ghee and bread, Later in Asoj, 'Jhanjrara' was performed when the mother was present and the ornaments were given.

Finally, with the observation, that

There is good deal of immorality in Churah, it is flagrant and annoying and when the marriage is proved, it is necessary that the discretionary power be used in granting a decree for restitution to save the society as a whole and the families from degradation and to check the immorality because to let the woman get away from the bonds of tie and settled life may result in encouraging prostitution and ultimate misery after the age of youth is over and may undermine-generally the character of the youth,

he accepted the appeal and decreed the suit.

9. In the argument before me, the learned Counsel for the plaintiff relied upon the custom' obtained in that illaqa, namely, Churah, which he describes as 'peculiar' and binding. According to him, a person elopes or to put it bluntly,, kidnaps a girl, makes offerings of appeasement to the aggrieved guardians or parents, as the case may be, in the Bhape of 'Patiara' and then-follows it up with a form of marriage ceremony called 'Jhanjrara' and gets a 'Khewat' prepared, by fair or foul means. He is then in a position to defy the world that he has committed no crime. He proves to the world that he is a respectable person and comes to the Court to vindicate his right when the so-called wife deserts him or returns to her parents on the realisation that her husband is an impostor.

10. The elementary principle of law is that a custom cannot override the Statute. It has nowhere been suggested that the Penal Code was not enforced in the State during the period, when kidnapping or abduction occurred. It is on record that the guardian, Mst. Kanchanu, defendant 1, laid a complaint against the plaintiff in Kartik 1996. True that she did not move the Court against the first kidnapping or abduction but when the second kidnapping took place she did make a complaint to the Court. But the Court having understood the decision of the authorities with regard to the 'peculiar' custom did not take action to bring the guilty person to justice under the Penal Code. She was permitted to compromise out of Court.

11. It may be stated that neither kidnapping nor abduction is a compoundable offence. This compromise is certainly invalid: see Bhowanipur Banking Corporation Ltd. v. Durgeshnandani Dassi . Both kidnapping and abduction are offences under the Statute and it was the duty of the prosecution to have brought

to the notice of the Court and it was the duty of the Court to have punished the person guilty of such an offence.

12. Therefore, the custom of elopement or in plain language kidnapping or abduction preceding a 'Patiara' or a 'Jhanjrara' is not only a custom against morality and public policy but it is against the penal law that is enforced in the State. It has been rightly observed by the learned District Judge that 'the compromise being illegal cannot be an evidence of any contract of marriage between the parties'. But even assuming that the plaintiff was guilty of crime, when he was not pursued and brought to justice, could he rely upon the subsequent conduct of the defendants in giving Mst. Hiri in marriage with him?

13. Marriage is a status out of social contract. Either it is a sacrament according to the Hindu law or a contract under a Statute or dependent upon a special or local custom. When it is a contract civil, the plaintiff might insist that this status might be declared by the Court to be valid. In my opinion, his position will be correct. This marriage, according to the 'so called' custom, is based upon a criminal offence and therefore, illegal. Even assuming that the elopement was of such a nature as only bordering on crime, then the plaintiff must succeed, if he can prove that the marriage was according to the custom prevalent in the society of which he is a member. For the purpose of ascertaining whether 'Patiara' ceremony was properly performed, I have to depend upon the learned judgment of the judicial committee Noa. 23 and 24 of 2003, decided by Sir Jai Lal. According to him, 'Patiara' consists of two parts, firstly, the appeasement of the parents or the guardian and secondly, appeasement of the girl. In this case, there is no evidence to show, even if we accept that ghee and provisions were accepted by the mother, Mst. Kanchanu that any ornament was offered to the girl, which is called 'Bandah' or 'Juth', the acceptance of which would be a token of her acceptance of the man as her husband. The learned Judicial Committee has further observed:

Without the co-existence of both these ceremonies at matrimonial connection between the parties does not come into existence as is recognised by custom.

Therefore, it can be safely inferred that the 'Patiara' ceremony was defective and a matrimonial connection did not come into existence on that date. As to the

ceremony of 'Jhanjrara', I may state at once that the witnesses of the plaintiff are thoroughly unreliable and the learned District Judge was right in dismissing them. The 'Khewat' has not been exhibited and I agree with the learned District Judge that it has not been proved.

14. In my opinion, the plaintiff has not been able to prove that he is entitled to the restitution of conjugal rights.

15. After having committed a crime, he cannot be heard to say that his crime has been condoned and that he is entitled to be declared husband of the minor girl whom he has wronged irreparably.

16. If the Courts and authorities have given effect to the Penal Code that has been in force in the State, this immoral and illegal custom could have been nipped in the bud. But they have gone on perpetuating this custom, always piously hoping that by ordering restitution of conjugal rights, they will be discouraging persona from taking the law into their own hands and contracting abominable alliance based on self-condemned ceremonies like 'Patiara' and 'Jhanjrara'. If they had only enforced the law, they could have had no occasion to resort to such observations as are found in the concluding portion of the judgment of the learned Chief Judge, which I have quoted above.

17. The appeal succeeds. I shall advice the Chief Commissioner to allow this appeal, declare the so-called alliance which goes by the name of 'Patiara' marriage void, illegal and inoperative and recall the judgment and decrees of the Chief Court and the trial Court and affirm the judgment and decree of the Court of the District Judge, with this modification that there was no legal marriage, as recognised by custom in the illaqa, and that such marriage being illegal, void and inoperative in law shouldF be annulled. In the special circumstances of the case, there shall be no order as to the costs of this appeal in this Court.