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Smt. Rano Devi Vs. Rishi Kumar

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Court : Jammu and Kashmir

Decided On : May-26-1980

Reported in : AIR1981J& K2

Judge : I.K. Kotwal, J.

Acts : Jammu and Kashmir Hindu Marriage Act, 1955 - Sections 4, 9, 13 and 29

Appeal No. : First Misc. Appeal No. 2 of 1978

Appellant : Smt. Rano Devi

Respondent : Rishi Kumar

Advocate for Def. : Inderjit Gupta, Adv.

Advocate for Pet/Ap. : J.L. Seghal, Adv.

Disposition : Appeal dismissed

Judgement :

I.K. Kotwal, J.

1. This appeal raises two important questions : One, about the interpretation of Sections 4 and 29 (2) of the Jammu and Kashmir Hindu Marriage Act, 1955 (hereinafter the Act), and the other, about the jurisdiction of a court, trial or appellate, trying a case under the Act, to entertain and adjudicate upon a plea of

prior dissolution of a marriage in accordance with a custom governing the parties.

2. The appellant brought a petition under Section 9 of the Act against her husband, the respondent, for a decree for restitution of conjugal rights on the ground that he had withdrawn from her society without reasonable excuse and was no longer willing to accept her as his wife. The defence set up by the respondent was that she was a woman of bad character, who had been living in adultery with one Dalip Singh, as a consequence whereof, the marriage was dissolved by mutual agreement of the parties through execution of 'Tyagpattar' (Deed of divorce), pursuant to a custom governing the parties. It was further pleaded that the fact of her illicit relations with Dalip Singh was also admitted by the appellant in an affidavit sworn by her on 28-9-1971, as well as, in an agreement which she executed in favour of the respondent on 5-2-1972. One of the issues framed in the petition was :

'Whether the petitioner out of her own free will obtained a divorce from the respondent as per custom between the parties and executed agreement dated 5-2-1972 and as such the present petition is not maintainable OPR'

3. The parties joined the issue. Whereas the respondent examined a few witnesses besides appearing in the witness box himself, the appellant examined none, so much so, that she did not even appear to record her own statement. Since she had denied being in possession of the 'Tyagpattar', the trial court allowed the respondent to lead secondary evidence in regard to its execution and contents. The trial court, on consideration of the evidence, held the customary divorce established and consequently dismissed the appellant's petition. The appellant has come up in appeal against this order.

4. Appearing for the appellant, Mr. Sehgal has not disputed the findings of fact recorded by the trial court, and rightly so, because there is unimpeachable evidence to support the same. He has frankly conceded that execution of the documents, namely, the affidavit sworn by the applicant on 28-9-1977 admitting therein the fact of her living in adultery, the deed of agreement executed by her on 5-2-1972 containing her admission that she had been divorced by the respondent with her consent and the 'Tyagpattar' executed by the respondent on 5-2-1972 and

signed by the appellant dissolving the marriage between the parties, stand amply proved. His contention, however, is that the 'Tyagpattar' did not have the effect of dissolving the marriage, as it was none of the modes provided under the Act for dissolution of a Hindu Marriage, adding, that even if it was so, a matrimonial court did not have the jurisdiction to entertain such a plea and adjudicate upon it, which Under Section 9 of the Code of Civil Procedure, was within the jurisdiction of an ordinary Civil Court alone. In any case, argued the learned counsel, all the necessary ingredients of a valid custom neither having been pleaded nor proved by the respondent, the judgment of the trial court was liable to be set aside. In support of his first contention Mr. Sehgal has relied upon the provisions of Section 4, which, for ready reference, is reproduced as below :

4. Overriding effect of the Act. --Save as otherwise expressly provided in this Act.--

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act'. Amplifying his argument, Mr. Sehgal has contended that the Act being exhaustive, not only of the rights, but also of the remedies, available to the parties governed by it, they cannot travel beyond the Act and rely upon any other law, custom or usage, in order to get a relief which is available to them under the Act. For that, they have to rely upon the Act itself. Dissolution of a marriage, which is valid at its inception, could be claimed under Section 13 of the Act, arugued the learned counsel, and that too, only on one or more of the grounds mentioned in it, and by following the procedure laid down in the Act itself, and not by invoking any custom permitting dissolution of a marriage by execution of a deed of divorce simpliciter. A petition under Section 13 has to be made in a competent matrimonial court to seek a decree for divorce dissolving the marriage, and no party, after the commencement of the Act, argued the learned counsel, can take recourse to any other law, or custom having the force of law, to obtain dissolution of a Hindu marriage by any other means, including execution of a deed of divorse.

For this, the learned counsel sought to draw support from Clause (a) of Section 4. In my opinion, this contention even though ingenious is yet untenable.

5. The Act is a codifying enactment, which not only confers rights but also provides the remedies for enforcing the same. Section 4 which has 'overriding effect of Act' as its appellation, operates in two ways. In the first place it nullifies all pre-existing laws, custom or usage having the force of law, dealing with a matter, for which a provision has been made in the Act. Consequently, if a provision exists in pre-existing law, or custom which also exists in the Act, former must give way to the latter. This is what has been in fact provided in Clause (a). Seemingly, the object behind it is to avoid duplicity, uncertainty and confusion. In the second place, it renders all pre-existing laws unenforceable to the extent those are inconsistent with the provisions of the Act. The Act is no doubt exhaustive in so far as the matters with which it deals are concerned. Consequently, it is exhaustive in regard, for example, to the conditions which are essential for a valid marriage (Section 5), persons who can act as guardians in marriages of minors (Section 6), the ceremonies which are to be performedin a Hindu marriage (Section 7), the grounds upon which a decree for restitution of conjugal rights (Section 9), or a decree for divorce (Section 13), may be obtained. Nobody can travel behind the peripheries of these sections to obtain any relief thereunder, even though such a relief may be had on any other ground, or through any other means, under any other law or custom having the force of law. A decree for restitution of conjugal rights, for instance, could be obtained under the Hindu Law by filing an ordinary suit in a Civil Court including that of a Munsiff. But, after the commencement of the Act, such a decree can be had only by filing a petition under Section 9 and that too in the court of a District Judge or any other court specially empowered to try such petitions, because a provision relating to this matter exists in the Act. Similarly a Hindu could take more than one wife under the Hindu Law, but the same being inconsistent with the provisions of the Act, which prohibits bigamy, the Hindu Law will cease to have effect to that extent after the commencement of the Act.

6. Dissolution of marriage is unknown to Hindu Law, though in some cases, a Hindu marriage may be dissolved by custom. Mr. Sehgal would have been perfectly right in contending that a Hindu marriage could be dissolved only by

making a petition in a competent court under Section 13, and that too, on one or more of the grounds mentioned in it, and on no other ground, had there been no other provision in the Act, permitting dissolution of a Hindu marriage in a manner, or on a ground, other than the one provided in the Act. Section 29 (2), however, provides complete answer to Mr. Bengal's contention. It reads as under :--

'29. Savings. -- (1) x x x

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.'

It clearly says that a marriage may be dissolved in accordance with a custom governing the parties, or under any other law providing for the same. This sub-section is couched in a strong language and says that notwithstanding anything contained in the Act, including Sections 4 and 13, a Hindu marriage may be dissolved even under the customary law of the parties, by adopting a mode different from the one provided under the Act. This is what has happened here also. Instead of approaching the District Court in a petition under Section 13, the parties, by mutual agreement, dissolved their marriage by executing a deed of divorce -- a mode permissible under the custom followed by them. The trial court was, therefore, right in dismissing the appellant's petition on the ground that since the marriage between the parties already stood dissolved through a customary divorce, no decree for the restitution of conjugal rights could be passed in her favour.

7. This brings me to the alternative plea of Mr. Sehgal that a matrimonial court has jurisdiction to entertain and adjudicate upon those grounds only, which are provided in the Act. Dissolution of a marrige on the ground of a customary divorce not being one of the defences open to a respondent in a petition for a decree for restitution of conjugal rights under Section 9, the trial court, argued the learned counsel, had no iurisdiction to entertain the same and decline relief to the appellant on its basis. This ground, even if it was available, ought to have been pressed into service in an ordinary suit to declare the marriage dissolved, maintained Mr. Sehgal. In support of his contention, he has relied upon a Single

Bench decision of the High Court of Raiasthan in Damodar v. Urmila AIR 1980 Rai 57, wherein it has been observed :

'.....The words 'every petition under this Act' occurring in this section have reference clearly to tbe petitions under Sections 9 to 13 of the Act. The Act does not make any provision for the grant of relief to a spouse interested in getting a declaration that he or she, has already obtained dissolution of marriage according to custom or usage from the community Panchayat and that the said dissolution is valid and binding on the two spouses. Similarly, there is no provision in the Act to enable a spouse, against whom a petition is filed by the other spouse under any of the sections from 9 to 13, to raise a plea in defence that he or she has already obtained dissolution of the marriage from the community Panchayat or the like according to customgoverning the parties, and that, therefore, the marriage is no longer subsisting. It can, therefore, be safely held that the Act which deals with certain matrimonial disputes among the Hindus does not make any provision for adjudication of a claim of defence, that the marriage between the contending parties already stands dissolved by virtue of the decision of private forum like the Panchayat of the tribe, community, group or family, as the case may be. Such adjudication can, therefore, be obtained only from the civil court and not from the matrimonial court under the Act.'

With respect, if I may say so, the law in this authority has been stated by the learned Judge too narrowly. A petition under Section & or for that matter one under Section 13, pre-supposes an existing valid marriage. That no such marriage exists, either because it never took place, or because it was dissolved under a custom or any other special enactment, is one of the formidable defences open to the opposite party to non-suit the petitioner. Even if such a defence has not been specifically provided in Section 9, it is still there by necessary implication. If a Court has jurisdiction under any special enactment to decide a particular matter, it has by necessary intendment the jurisdiction to decide all such matters which are incidental to it. Any other interpretation is likely to create anomalous situations. A man may, for instance, lay a totally baseless claim against a woman that she is his legally wedded wife and file a petition under Section 9 against her for a decree for restitution of conjugal rights. Section 9, interpreted in the way suggested by Mr.

Bengal, strictly speaking does not speak of a defence open to her that no marriage actually took place between the parties. She can have no other defence to the petition. Does it mean that she should first suffer a decree for restitution of conjugal rights to be passed against her and then approach a Civil Court for getting it set aside Take another instance. A man files a petition for a decree for restitution of conjugal rights against a woman. The defence set up is that the marriage stood already dissolved by a customary divorce which is not a defence strictly permissible under Section 9. Does it mean that she should first allow a decree to be passed against her by the District Judge andthen get it set aside even by a Munsiff in a regular suit Non-existence of a marriage pleaded on its non-performance or any other legal ground is definitely a -defence open to a party in a petition under Section 9 and a matrimonial court can, and indeed is bound, to entertain it and mould its decree or order in accordance with its adjudication on it.

8. Lastly Mr. Sehgal argued, even though half heartedly, that the necessary ingredients of a custom that it was ancient, certain and not opposed to public policy have not been proved in the instant case, as such, no notice of the same could have been taken by the trial Court. I do not find any force in this contention as well. There is evidence in regard to the existence of the custom set up, which stands un-rebutted. It may not be so categoric, still it is not so cryptic as to be thrown overboard. It is in evidence that the custom exists and some instances too have been quoted in this behalf. The divorce was given not only with the consent of the appellant, but also at her insistence, and she too had signed the deed as a token of its acceptance. Mr. Sehgal is, therefore, not right in contending that necessary ingredients of the custom have not been proved.

9. For the foregoing reasons the appeal fails, which is dismissed accordingly, but in the circumstances of the case, without any order as to costs.

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