

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 2346 of 2018

**Smt. Krishna Veni
Vs.
The Union of India and others**

For the petitioner	:	Mr. Gunjan Shah, Mr. Vinit Kumar Choubey
For the respondent nos. 1, 2 and 4	:	Mr. Kumarjyoti Tiwari
For the respondent no.9	:	Mr. Subrata Roy
Hearing concluded on	:	10.02.2021
Judgment on	:	18.02.2021

Sabyasachi Bhattacharyya, J:-

1. The present challenge has been preferred by Smt. Krishna Veni, the second wife of Sardar Natha Singh (since deceased), who was a freedom fighter getting pension from the Central Government under the Swatantra Sainik Samman Pension Scheme, 1980 till his demise on August 25, 1984. The petitioner, relying on a deed of declaration of divorce, purportedly executed by respondent no.11, the first wife and Sardar Natha Singh, the husband of the petitioner, claimed widow pension under the said Scheme, which was refused by a communication dated March 6, 2012 issued by the Assistant Secretary to the Government of West Bengal on the ground that such deed of divorce dated December 19, 1956 was not acceptable under

the Hindu Marriage Act, 1955, in the absence of a decree for divorce obtained from a competent court of law.

2. Learned counsel submits that the petitioner and her deceased husband were governed by customs of Jat Sikhs, which permit such a divorce. As such, the petitioner claims that Section 29(2) of the Hindu Marriage Act, 1955 is attracted. Sub-section (2) of Section 29 of the Act provides that nothing contained in the Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of the Act.
3. It is further argued that respondent no.11 had initiated litigation against her husband, late Sardar Natha Singh, during the latter's lifetime, for which payment of pension to respondent no.11 under the said Scheme was stopped by the authorities. In support of his contentions, learned counsel cites the judgment of *Gurdit Singh vs. Mst. Angrez Kaur and others*, reported at AIR 1968 SC 142, wherein the Supreme Court approved of the proposition that evidence could be accepted on prevalence of custom in the Jullundur District, to lend validity to such a divorce without following the provisions of divorce as stipulated in the Hindu Marriage Act, 1955.
4. Learned counsel next relies on *Balwinder Singh vs. Smt. Gurpal Kaur*, reported at AIR 1985 Delhi 14, for the proposition that a divorce deed executed between spouses and duly attested by a notary public, if sanctioned by the customs of the parties, would render the marriage dissolved.

5. Learned counsel for the petitioner next cites *Doddi Appa Rao vs. General Manager, Telecom, Rajahmundry*, reported at (2000) 1 CCC 146, wherein the Andhra Pradesh High Court held, on the basis of a decree passed by a civil court, that the marriage between the parties was dissolved as per caste custom and usage.
6. Counsel next relies on another judgment of the Andhra Pradesh High Court, reported at 1992 (3) ALT 733 [*G. Thimma Reddy and others vs. The Special Tahsildar, Land*], wherein the court held, on the basis of a registered deed and exclusive possession of the wife over the lands given to her under settlement, that a valid divorce had taken place as per the customs of the parties. The evidence of witnesses was also considered therein.
7. As such, it is argued by the petitioner that the respondent-authorities unlawfully withheld widow pension to the petitioner under the 1980 Scheme.
8. Learned counsel appearing for respondent nos.1, 2 and 4 submits that the petitioner's claim for widow pension was rightly rejected, since the validity of the divorce by the deed of declaration, produced by the petitioner, was not established by the petitioner. Learned counsel relies on *Subramani and others vs. M. Chandralekha*, reported at (2005) 9 SCC 407, for the proposition that a custom, to be upheld, is to be pleaded and proved by the party relying on the same.
9. However, learned counsel advances a suggestion that the widow pension can be distributed equally between the first and second wives of the deceased freedom fighter if the court so directs.

- 10.** For Section 29(2) of the 1955 Act to be invoked, it has to be established by the party relying on a custom that the right of the party was recognized by custom, to obtain the dissolution of a Hindu marriage. In the present case, the petitioner did not approach the civil court for declaration regarding validity of the divorce deed.
- 11.** There was nothing to prevent the petitioner from approaching the competent civil court for such declaration. The burden and initial onus lies on the petitioner to prove the existence of a custom having the force of law, to be proved by evidence - oral or documentary - in order to attract the benefit of Section 29(2) of the Hindu Marriage Act.
- 12.** Section 2(1)(b) of the Hindu Marriage Act, 1955 stipulates that the Act applies to Sikhs as well. Thus, the provisions of the Act, including Section 13 thereof (pertaining to divorce), applies to Sikhs in general. Admittedly, the petitioner, respondent no.11 and their deceased husband are/were Sikhs by religion. Hence, the marriage between the respondent no.11 and her deceased husband could only be dissolved by a decree of divorce passed by a competent court on any of the grounds as mentioned in Section 13 of the Act, unless the existence of any contrary custom was proved by evidence.
- 13.** In order to justify an exception to Section 13 within the purview of Section 29(2), the petitioner had to approach a civil court and establish by evidence that the dissolution of the marriage between the respondent no.11 and her deceased husband was recognized by custom. All Sikhs do not come within the purview of such exception, unless any custom to the contrary is proved by cogent evidence. The

respondent-authorities do not have the jurisdiction in law to decide the matrimonial status of the private parties and/or the validity of the deed of declaration, which could only be done by adduction of adequate evidence before a civil court. Unfortunately, neither does the writ court, with its constraints in taking evidence on disputed questions of fact, has the scope to decide such issue.

- 14.** In *Gurdit Singh (supra)*, the Supreme Court was dealing with an issue which arose in a civil suit. The trial court had decreed the marriage-in-question to be valid. The appellate court reversed such decree on the premise that the marriage between the parties was invalid, being not justified by any custom. Upon the issue being remitted to the trial court, after giving the parties an opportunity to lead further evidence, the trial court answered the issue regarding the existence of such custom in the negative, which was endorsed by the appellate court. In second appeal, the High Court held that a custom was proved under which Mst. Angrez Kaur, respondent could validly marry Sunder Singh, even though her first husband was alive. While considering such matter, the Supreme Court observed that the witnesses examined on behalf of the appellant had admitted the existence of a custom permitting the Hindu husband to divorce his wife. Upon such premise, the Supreme Court proceeded to endorse such view.
- 15.** In *Balwinder Singh (supra)*, the matter in issue before the Supreme Court also arose from a civil suit, wherein the trial court declared the marriage solemnized between the parties in accordance with Hindu rites and ceremony as null and void and granted a decree of nullity of

marriage. The appellate court had found that the evidence adduced by the appellant was not sufficient and reliable enough to establish the existence of the custom amongst the Sikhs Jats of District Amritsar to which District the appellant and its parents belonged, under which the marriage between the appellant and his previous wife could be dissolved otherwise than through court as per the provisions of the Hindu Marriage Act.

- 16.** While dealing with such question, the Delhi High Court considered the evidence adduced by the parties and sanctioned the dissolution of marriage by execution of a deed of divorce.
- 17.** The Andhra Pradesh High Court, in *Doddi Appa Rao (supra)*, was also considering a case where a civil court had decreed a suit for declaration that the marriage of the plaintiff and the defendant therein was dissolved as per caste custom and usage. In such context, it was held by the Division Bench of the Andhra Pradesh High Court that the Central Administrative Tribunal ought to have honoured such decree.
- 18.** In *G. Thimma Reddy (supra)*, the learned Single Judge considered several factors apart from the registered deed of divorce, including that the factum of divorce was disregarded on a flimsy ground that the stamp affixed to the document of divorce was in the name of a wrong person. The court also took into consideration the fact that the spouses were living separately and in possession of lands settled in their favour, for which no need for divorce was there. Oral evidence was also adduced by several witnesses, one of them a caste elder who had also attested the document. P.Ws 1 to 3 therein spoke of existing

custom in the caste of the spouses sanctioning such divorce. Moreover, the adjudication in the said report was in the context of a land dispute between the parties.

- 19.** As such, in each of the judgments cited by the petitioner, a valid decree, sectioning the respective documents of divorce, had been passed by competent civil courts. In the present case, however, no such decree was obtained by the petitioner.
- 20.** That apart, it is pleaded by the writ petitioner herself that the Government of India, Ministry of Home Affairs, New Delhi, sanctioned payment of political pension to the first wife, that is, respondent no.11 with effect from August 26, 1984 by a letter dated February 14, 1986 and Pension Payment Order was issued accordingly in favour of respondent no.11. For whatever reason such pension might have been withheld subsequently, the initial grant of pension to respondent no. 11 is an endorsement of the fact that the first wife was found eligible for such pension by the respondent authorities and she had already started getting pension.
- 21.** It is relevant to mention here that a suit-in-question was filed by respondent no.11, inter alia, for declaration that she was the only married wife and the only widow of Sardar Natha Singh (since deceased) and was entitled to widow pension and that the present petitioner was not the wife and widow of Sardar Natha Singh. Learned counsel for the petitioner argues that the said suit was dismissed for default and the subsequent restoration application filed by respondent no.11 met with the same fate. As such, it is contended that

respondent no.11 is debarred from raising the contentions on which declaration was sought by her in the dismissed suit.

- 22.** Order IX Rule 9 of the Code of Civil Procedure debars a plaintiff from bringing a fresh suit in respect of the same cause of action in the event of dismissal of a suit for default. However, it is well-settled that such a dismissal, *ipso facto*, would not take away the right of the plaintiff which was under consideration in the suit. Such right, if available otherwise to the plaintiff in accordance with law, subsists despite the dismissal of the suit for default. The plaintiff in such a suit may very well raise a defence on the basis of such right in a different suit or legal action and/or may agitate the same right in a suit filed by her on a subsequent cause of action.
- 23.** Thus, in the present case, the dismissal of the suit of respondent no.11 for default does not preclude the said respondent from staking her claim before any authority other than a civil court, that too in a suit filed by her on the self-same cause of action, and/or setting up a defence in the writ petition on the basis of such claim.
- 24.** In the utter absence of any evidence, let alone conclusive, that the divorce decree executed purportedly between respondent no.11 and her deceased husband was endorsed by any valid custom, the exception envisaged in Section 29(2) of the 1955 Hindu Marriage Act would not be attracted. Thus, the spouses had to revert back to Section 13 of the Act, which sanctions dissolution of marriage only by a decree of divorce, for the dissolution of marriage to be valid in the eye of law.

- 25.** Such facts, coupled with the fact that pension was granted earlier in favour of respondent no.11 upon a valid sanction being issued by the respondent-authorities, it would be unjust to deprive respondent no.11 from such pension at the behest of the petitioner, merely on the basis of the petitioner's assertion on oath in this writ petition that a deed of divorce, supported by valid and recognized customs, was executed between respondent no.11 and her deceased husband.
- 26.** I must note that, in view of the long-pending litigation between the private parties, it would be lucrative to direct pension to be paid equally between the petitioner and respondent no.11. However, such a course of action would be grossly illegal. Although my empathy goes fully with the petitioner, who is an unemployed lady of about 63 years as per her own affidavit, this court does not have the power to enact law but is bound by the provisions of law as the Parliament, in its wisdom, chose to promulgate. Where a conflict arises between individual conscience of the concerned Judge and judicial conscience, supported by law of the land, the former has to give way to the latter.
- 27.** In such view of the matter, the writ petition fails. Accordingly, WPA No.2346 of 2018 is dismissed on contest without any order as to costs.
- 28.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)