matter which the Superintendent of Police or any competent authority in this behalf is entitled to determine. It will be open to them after following the procedure prescribed in Chapter XVI to dispense with the services of the petitioner if they are of the opinion that he is not a suitable person to be retained in the police force. We are only striking down the order because the order could not be passed under rule 12.21.

(7) For the reasons recorded above, we allow this petition and quash the impugned order, but in the circumstances of the case we will make no order as to costs.

R.N.M.

REVISIONAL CRIMINAL

Before A. D. Koshal, J.

PRITAM SINGH,—*Petitioner*

versus

SHMT. SOWARNI,—*Respondent*

Criminal Revision No. 893 of 1967

August 30, 1968.

Hindu Marriage Act (XXV of 1955)—Ss. 4 and 29(2)—Dissolution of a Hindu Marriage on the ground allowed by custom—Whether permitted—such dissolution—Whether must be obtained through Court—Custom (Punjab)—Marriage—Dissolution of—Sainis of Gurdaspur Tehsil—Repudiation of wife by husband—Whether dissolves marriage.

Held, that section 29(2) of Hindu Marriage Act does not envisage dissolution only by a court according to the provisions of the Act. The word "obtain" is no doubt there but then the forum from or the procedure by which the dissolution of a Hindu marriage is to be obained, is not indicated in the clause. The section lays down that no provision of the Act shall affect any right recognised by custom, etc., to obtain the dissolution of a Hindu marriage. This clearly means that the manner in which the dissolution of marriage is to come about remains the same as was recognised by the custom in question. No distinction is made between the right itself and the manner in which it is to be exercised. A custom which recognises the dissolution of a Hindu marriage has been left untouched by the Act in all its aspects. The provisions of section 4 of the Act, therefore, do not present any hurdle in the way of the dissolution of a Hindu marriage if it is obtained in the manner recognised by custom and not through Court.

(Para 14)

Held, that according to custom prevailing amongst Sainis of Gurdaspur Tehsil repudiation of the wife by the husband dissolves the marriage between them and that such repudiation may be oral and need not be evidenced by a deed of release.

(Paras 18 and 19)

Petition under Section 439 Criminal Procedure Code for revision of the order of Shri Udham Singh, Sessions, Judge, Gurdaspur, dated 7th February, 1967, affirming that of Shri Jatinder Singh, Judicial Magistrate, 1st Class, Gurdaspur, dated 31st January, 1966, ordering that the respondent (Shri Pritam Singh) should pay a sum of Rs. 20 as maitenance allowance for Shmt. Swarni and Rs. 18 as maintenance allowance for Shisho, his daughter per mensem.

J. L. GUPTA, AND BALRAM K. GUPTA, ADVOCATES, for the Petitioner.

H. R. AGGARWAL, ADVOCATE, for the Respondent.

JUDGMENT

KOSHAL, J.—This petition for revision has arisen from proceedings under section 488 of the Code of Criminal Procedure which were initiated by means of an application, dated the 25th of July, 1964, filed by Shrimati Swarni, respondent claiming maintenance for herself and her minor daughter named Shisho on the plea that Pritam Singh, petitioner was her (the respondent's) husband and the father of Shisho and that he had failed to maintain them for a period of 2½ years preceding the commencement of the proceedings. It was mentioned in the application that the petitioner was employed at a salary of Rs. 100 per mensem and was also in possession of landed property which gave him an income of Rs. 5,000 or 6,000 per annum. It was prayed that a monthly maintenance allowance of Rs. 50 for the respondent and one of Rs. 20 for Shisho be awarded.

(2) The case of the petitioner was that no marriage between the parties had ever taken place and that the respondent was really the wife of one Kartar Singh, who was alive.

(3) The respondent produced five witnesses including herself in support of her claim. She stated in the witness-box that she was married to the petitioner when she was 20 years old and that Shisho was his daughter. She further stated that the petitioner had turned out her and her daughter and that he had not been maintaining them. She added that she and her daughter needed a monthly allowance of Rs. 38 as her parents were old and could not maintain her. She repudiated the suggestion that she was previously married to Kartar Singh of village Nanowal.

(4) Kartar Singh (P.W. 2), ex-Panch of village Kahnuwan supported the case of the respondent and stated that she was married to the petitioner about eight years earlier whereafter she resided with

her husband at the latter's house and gave birth to a daughter. He further deposed that the petitioner had turned out the respondent and since then she had been residing with her parents. The witness pleaded ignorance about any previous marriage of the respondent.

(5) Manjit Singh (P.W. 3) also supported the respondent's case but admitted in cross-examination that she was previously married to Kartar Singh, son of Dalip Singh of Nanowal, who was alive and had married another woman. The witness expressed his ignorance about the respondent having been divorced by Kartar Singh. Practically to the same effect was the testimony of Mathra Singh (P.W. 4). Charan Singh (P.W. 5) was merely tendered for cross-examination without any question having been put to him by either side.

(6) Certified copy (described by the learned Judicial Magistrate, who decided the case in the first instance as Exhibit P.A., but which does not bear any Exhibit mark) of an entry in the birth register maintained at Police Station Kahnuwan in district Gurdaspur was also produced on behalf of the respondent. This entry states that a daughter named Shisho was born to the respondent on the 7th of March, 1958. The name of the father of Shisho is stated in the entry as Pritam Singh, son of Jhanda Singh of Nawan Pind and that of the informant as Khushia chowkidar. The entry is dated the 22nd of March, 1958.

(7) Four witnesses were examined on behalf of the petitioner. All of them stated that the parties had never been married to each other nor had lived as husband and wife and that the respondent was the wife of Kartar Singh, above-mentioned. Shanker Singh (R.W. 2), however, made certain admissions which are material and may be quoted :

" * * * * * *

> Kartar Singh, is alive. A woman is living with him, but I do not know her name. Kartar Singh, married her about 6 or 7 years ago. * * * *
> * * * * * *
>
> Kartar Singh had given up the applicant about six months prior to the second marriage. This he did in the presence of the Panchayat. Thereafter he did not claim the applicant. So long as the applicant lived with him, no child was born to her. * * * *
> * * * * ... *

(18) Shri Jatinder Singh, Judicial Magistrate 1st Class, Gurdaspur, who decided the case by his order, dated the 31st of January, 1966, found that the respondent was previously the wife of

Kartar Singh, above-mentioned who, however, divorced her whereafter the respondent married the petitioner and that Shisho was born to the respondent from the loins of the petitioner after the marriage of the parties had taken place. Relying upon *Ishar Singh* v. *Musammat Budhi* (1). (Further appeal No. 294 of 1910 erroneously described by him as case No. 294 of 1913) he held that amongst Sikh Jats of Tehsil Shakargarh, district Gurdaspur, a woman expelled and repudiated by her husband, was free to remarry and become the lawful wife of another and that the custom must be presumed to be the same in the case of the parties who are Sainis of district Gurdaspur, Sainis having no higher standard of civilisation than the Jats of the region in question. Accordingly, he regarded the marriage between the parties as lawful. He further found that Shisho was the petitioner's legitimate child and that the petitioner had failed to maintain his wife and daughter. In this view of the matter he awarded a monthly allowance of Rs.20 to the respondent and one of Rs. 18 to Shisho.

(9) The petitioner went in revision to the Sessions Court at Gurdaspur. Shri Udham Singh, Sessions Judge, Gurdaspur, by his order, dated the 7th of February, 1967, maintained all the findings of the learned Judicial Magistrate whose order was upheld. It is against the order of the learned Sessions Judge, Gurdaspur, that the petitioner has come up in revision to this Court.

(10) Learned counsel for the petitioner contended in the first instance that no marriage between the parties was proved. I do not find myself in agreement with him. The testimony of the four witnesses produced on behalf of the respondent (including herself) makes it abundantly clear, when coupled with the entry from the birth register mentioned above that the parties were married to each other round about the year 1956-57 and no cogent reason has been put forward before me to come to a finding different from the one arrived at by the two Courts below.

(11) The main contention raised on behalf of the petitioner was two-fold. It was urged that the repudiation of the respondent by Kartar Singh must be deemed to have taken place after the Hindu Marriage Act came into force on the 18th of May, 1955, and that no customary divorce could be effected after that date in the case of Hindus. It was further contended that custom could not be extended

(1) 125 Pb. Weekly Reporter 1913.

by analogy and that the rule of custom applied to Jats of Shakargarh Tehsil in Gurdaspur District in *Ishar Singh* v. *Musammat Budhi* (1) (supra) would not obtain in the case of the parties before me who are admittedly Sainis. The contention has no force as would be clear from the discussion that follows.

(12) Reliance on behalf of the petitioner is placed on clause (a) of section 4 of the Hindu Marriage Act which runs thus:

"4. 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 :

* * * * * *".

(13) It has been argued that this provision makes ineffective any custom in force immediately before the commencement of the Act. This argument, however, takes no note of the opening clause of the section comprised of the words "Save as otherwise expressly provided in this Act". Sub-section (2) of section 29 of the Act furnishes an express provision which enacts an exception to clause (a) of section 4 and runs thus :

"29. (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."

(14) Learned counsel for the petitioner tried to wriggle out of the provisions of this clause by arguing that it envisaged dissolution only by a Court according to the provisions of the Hindu Marriage Act itself. Emphasis was laid by him on the word "obtain" occurring in the clause. I have carefully considered the argument, but I am unable to accept it. The word "obtain" is no doubt there, but then the forum from or the procedure by which the dissolution of a Hindu marriage is to be obtained, is not indicated in the clause. On the other hand, what is stated is that no provision of the Act shall affect any right recognised by custom, etc., to obtain the dissolution of a Hindu marriage. This clearly means that the manner in which the dissolution is to come about remains the same as was recognised by the custom in question. No distinction is made between the right itself and the manner in which it is to be exercised and it clearly appears to me that a custom which recognises the dissolution of a

Hindu marriage has been left untouched by the Act in all its aspects. The provisions of section 4 of the Act, therefore, do not present any hurdle in the way of the custom relied upon by the respondent being applied in the present case.

(15) My attention has been drawn to the following observations in *Ishwar Singh* v. *Smt. Hukam Kaur* (2):—

> "Even if the opposite party's allegations are held to be true, it is difficult to hold that that will amount to a divorce within the meaning of section 13 of the Hindu Marriage Act, 1955 because a divorce which could result in the dissolution of a solemnized marriage has to be obtained by one of the two parties on presentation of a petition from a competent Court. So long as such a divorce has not been obtained, the previous marriage subsists and, therefore, the second marriage cannot be contracted by a Hindu so long his spouse is living."

(16) Learned counsel for the petitioner interpreted these observations to mean that even a divorce recognised by custom would be ineffective after the passing of the Hindu Marriage Act unless it was obtained in accordance with the provisions of the Act from a competent Court. Such an interpretation, however, is wholly unwarranted. No question of custom arose in that case and Brahma Pal, the previous husband of the opposite party therein, was presumably a Hindu not governed by any custom recognising divorce. . That case, therefore, is of no assistance to the case of the petitioner.

(17) Coming to the second part of the main contention of learned counsel for the petitioner, I would observe that he is on sure ground when he says that custom cannot be extended by analogy. However, that makes matters no easier for him as I find that the custom actually obtaining amongst the Sainis of the Gurdaspur Tehsil is the same as was found to exist in the case of Jats of Shakargarh Tehsil in *Ishar Singh* v. *Musammat Budhi* (1) (supra). Reference in this connection may be made to various parts of Section III of "Customary Law of the Main Tribes in the Gurdaspur District" by F.W. Kennaway, Volume XII. This treatise was published in 1913. Question and Answer 3(b) appearing in the said section provide the relevant material and may be reproduced :

> "*Question* 3(b).—(1) May a man be married at the same time to any two women who stand in such a degree of relation

(2) A.I.R. 1965 All. 464.

to each other as that if one of them had been a male, they could not have married ?

(2) May a man marry again a woman he has divorced ? Does it make any difference if she has been married to another and divorced by him or separated from him by his death in the interval between her divorce from her first husband and his second marriage to her? Is any distinction taken if the wife has not been three times irreversibly divorced ?

(3) Are the degrees prohibited by consanguinity also prohibited by forsterage ? Are there any exceptions to the rule ?

Answer 3(*b*).—(1) There is no such restriction among the Hindus. The Muhammadans follow the Muhammadan Law.

(2) A Muhammadan can remarry a divorced woman only under the conditions imposed by the Muhammadan Law. Among the Hindus the custom of divorce does not generally exist; but the following tribes state that the wife can be repudiated by the execution of a deed of release :—

(1) Labanas of the Gurdaspur and Shakargarh tahsils.

(2) Hindu Jats of the Batala and Gurdaspur tahsils.

(3) Sainis, Bhats, Lohars and Tarkhans of the Gurdaspur tahsil.

All these tribes with the exception of the Labanas and Sainis state that a wife so repudiated can be taken back by mutual consent.

(3) The Muhammadan tribes follow the Muhammadan Law. Among the Hindu tribes marriage with a foster sister is prohibited, but there is no prohibition as to her *got*."

(18) Learned counsel for the petitioner had to concede that a custom of divorce amongst Sainis of the Gurdaspur Tehsil must be deemed proved by what is stated in Answer 3(b) but he contended that the custom envisaged the execution of a deed of release which was wanting in the present case and that, therefore, the respondent

could not be taken to have been validly divorced. I am of the opinion, however, that the execution of a deed of release as mentioned in Answer 3(b) is not *sine qua non* for an effective divorce but is only one of the instances of evidence of a divorce. I am fortified in this opinion by Question and Answer No. 1 of the same section :

> "*Question* 11.—What are the formalities which must be observed to constitute:—
>
> (1) a revocable,
>
> (2) an irrevocable divorce?
>
> *Answer* 11.—Among the Hindu tribes recognizing divorce or the release of the wife the execution of a deed of release is considered sufficient. As regards the question whether a wife so released can be taken back, *vide* answer to question 3(b) (2), section III, part I. The Muhammadan tribes follow the Muhammadan Law in regard to the matters referred to in this question.'

(19) What is stated here that the execution of a deed of release "is considered sufficient" amongst the Hindu tribes recognising divorce. It follows that other modes of evidencing divorce are not ruled out, especially if they constitute better proof. In the present case the repudiation was proclaimed by Kartar Singh, in the presence of the village Panchayat which appears to me to be at least as effective a mode of creating evidence of divorce as that in which a deed of release comes into existence. I find it established, therefore, that the explusion and repudiation of the respondent by Kartar Singh, was an effective divorce recognised by custom so that she was free to remarry.

(20) From what I have stated above, it follows that the respondent has not only proved that she married the petitioner and bore him Shisho but also that the marriage between the parties was valid according to the custom followed by the tribe to which they belong.

(21) No other point has been urged before me. In the result, therefore, the petition fails and is dismissed.

R. N. M.