Before M. Jeyapaul & Raj Mohan Singh, JJ.

SUKHBIR SINGH—*Appellant*

versus

MANDEEP KAUR—Respondent

FAO-M No.88 of 2010

May 16, 2016

Hindu Marriage Act, 1955 – S.4, 11 and 19 – Application filed by wife declaring marriage a nullity as husband was married earlier – Husband stressed on Panchayati divorce based on custom – No evidence in respect of general applicability vis-à-vis the existence and prevalence of custom in the area, therefore, no such presumption can be drawn in favour of Appellant-husband – Appeal dismissed.

Held, that secondly, learned counsel for the appellant by referring to Section 4, 11 and 29 of the Hindu Marriage Act tried to convince this Court that by virtue of custom prevailing in District Amritsar, District Jalandhar and other districts, a general presumption has to be drawn that according to Sikh custom amongst Jat Sikhs, customary divorce can be taken as a judicial notice. Learned counsel for the appellant contended that the evidence on record was sufficient to show the existence of custom amongst Jat Sikhs under which a marriage could be dissolved by Panchayat divorce. Learned counsel emphasized that the very fact that dissolution of marriage amongst Jat Sikhs has been taking place even after the enactment of the Act is in itself a strong proof of its recognition by the community concerned. We are afraid, that there is no evidence of general application on record. The statement of RW5 if scrutinized clinically, it would show that the witness remained Sarpanch of the village for some time and in his village, only he was instrumental in giving divorce being member of the Panchayat. He pleaded custom of the village and not that of area and district. The pleadings in terms of written statement are conspicuously missing. The requirement of law in terms of Section 29 (2) of the Hindu Marriage Act has not been spelled out, nor particulars of custom and its enforcement and application in the area viz village, district and state have come forth on record.

(Para 14)

Further held, that so far as taking of judicial notice of existence of custom is concerned, no such judicial notice can be taken on vague

pleadings which were not supplemented by any cogent evidence on record. The recognition of custom by the Courts is based on cogent material on record and it cannot be presumed on vague pleadings and evidence. It is true that when a custom has been recognized by the Court, it passes into the law and the proof becomes unnecessary under Section 57(1) of the Evidence Act. We are afraid that judicial notice can only be taken on the existence of proof of custom prevailing in the area and its existence on record by way of reliable evidence. There cannot be any denial to the proposition as propounded in *Ujagar Singh v. Mst. Jeo*, AIR 1959 SC 1041 but no such general presumption with regard to taking judicial notice can arise as per circumstance of the present case.

(Para 17)

Dhirinder Chopra, Advocate, *for the appellant.*

Harkaran Singh, Advocatefor the respondent.

RAJ MOHAN SINGH, J.

(1) Vide this common judgment, we propose to decide FAO No.M-88 of 2010 titled as ***Sukhbir Singh*** *versus* ***Mandeep Kaur and FAO No.M-89 of 2010*** titled as ***Sukhbir Singh*** *versus* ***Mandeep Kaur. FAO No.M-88 of 2010*** has arisen out of judgment dated 13.10.2009 passed by the trial Court in a petition under Section 11 of the Hindu Marriage Act, 1955 filed by Mandeep Kaur whereas FAO No.M-89 of 2010 has arisen out of judgment dated 13.10.2009 passed by the trial Court in a petition under Section 9 of Hindu Marriage Act, 1955 filed by Sukhbir Singh. Since the controversy is inter-se between the same parties, facts are being culled out from FAO No.M-88 of 2010.

(2) Mandeep Kaur filed petition under Section 11 of the Hindu Marriage Act, 1955 for declaring the marriage between the parties as nullity. She pleaded that the marriage of respondent (Mandeep Kaur) was solemnized with the appellant (Sukhbir Singh) on 07.07.2004 by way of Anand Karaj Ceremony. They lived together as husband and wife and out of this wedlock, one son Karanpreet Singh took birth who was residing with the respondent at the time of filing of the petition. Mandeep Kaur came to know that Sukhbir Singh was already married with one Kuldeep Kaur daughter of Gian Singh resident of village Bilga and had not obtained any divorce from her earlier wife through process of the Court.She alleged that soon after the marriage, Sukhbir Singh and his family members started raising

demands of dowry and maltreating her. She was given beatings and they demanded Rs. 20,000/- from her parents, despite showing incapacity of her parents to fulfil the demand, there was no change in the behavior of the husband and his family. She kept on tolerating the behaviour with a hope that better sense would prevail upon him at any time but she was turned out from the house on July, 2010 after giving merciless beatings. Mandeep Kaur also alleged that she was living with her parents at Village Dharamkot and was entitled to decree of nullity of marriage and divorce on the ground of cruelty and concealment of first marriage. She also filed an application under Section 125 Cr.P.C. as well as criminal complaint in the court of Judicial Magistrate Ist Class, Moga.

(3) On notice, Sukhbir Singh contested the petitionand alleged that Mandeep Kaur cannot be allowed to take advantage of her own wrong. She herself left the society of the husband without any rhyme or reason. Panchayats were convened but she refused to return to matrimonial home. Sukhbir Singh also filed petition under Section 9 of the Hindu Marriage Act. He alleged that Mandeep Kaur was duly informed about his earlier marriage and dissolution thereof by mutual consent and compromise which was duly reduced into writing in the presence of Panchayat according to custom of divorce existed amongst Jat Sikhs. After the marriage both live happily for a period of one year and she gave birth to two children one male child and one female child. Unfortunately, the female child could not survive after the birth. Appellant- husband had suffered injuries in the accident and was bed ridden. In such like situation, Mandeep Kaur left the society of Sukhbir Singh and the minor child. Many a time Panchayat was convened to bring her back in the matrimonial home but she refused on every occasion. Mandeep Kaur did not carefor the minor child and Sukhbir Singh brought up the child. He further pleaded that on the request of Mandeep Kaur, he had taken a house on rent at Dharamkot and she started doing job in Batra Nursing Home and thereafter, she started coming late at night and used to leave the house at night time. She insulted and ill treated the husband in the presence of friends and relatives. She did not change her attitude, even her boss was a frequent visitor in the house during night hours. Sukhbir Singh further claimed that actual date of marriage was 07.08.2004 instead of 07.07.2004. By refuting all the allegations, he sought dismissal of the petition under Section 11 of the Hindu Marriage Act.

(4) On filing replication and completion of pleadings

between the parties, both the parties went to trial on followingissues:-

> {1}. Whether the petitioner is entitled toa decree for nullity of marriage under theprovisions of Section 11 of the Hindu Marriage Act on the ground that the respondent was already married at the time of his marriage with the petitioner? OPP.
>
> {2}. Relief.

(5) Both the parties led evidence. Trial Court ultimately accepted the petition filed by Mandeep Kaur thereby declaring the marriage to be nullity as it was in contravention of the conditions as specified in Section 5 of the Hindu Marriage Act.

(6) We have heard learned counsel for both the parties.

(7) Learned counsel for the appellant has vehemently stressed upon Panchayati divorce which is not uncommon in this part of country as per custom prevailing in a particular society. In order to appreciate his contention, it would be necessary to have a glance over the bare provisions of law in terms of Section 4 and 29 of the Hindu Marriage Act.

(8) Section 11 of the Hindu Marriage Act mandates that any marriage solemnized after the commencement of Hindu Marriage Act, 1955 shall be null and void and may be so declared by decree of nullity on presentation of petition by the aggrieved party, if, it contravenes any one of the conditions specified under Clauses (i) (iv) and (v) of Section 5. Sub Section (i), (iv) and (v) of Section 5 show that amarriage may be solemnized between two Hindu if neither party has a spouse living at the time of marriage, the parties are not within the decree of prohibited relationship unless the custom or usage governing each of them permitting a marriage between the two and the parties are not spindas of each other, unless the custom or usage governing each of them permitting a marriage between two. Sub section (i) of Section 5 is attracted to the situation where neither party has a spouse living at the time of marriage, the marriage will be declared nullity if it contravenes sub section (i) of Section 5.

(9) Section 29 of the Hindu Marriage Act deals with savings wherein it is provided that a marriage solemnized between Hindu before the commencement of this Act, whichis otherwise valid, shall not be deemed to be invalid or ever tohave been invalid by reason only of the fact that party thereto belong to the same gotra or belong to different religions,caste or sub divisions of the same caste. Sub section

(2) of Section 29 prescribes that nothing contained in this Act shall be deemed to effect any right recognized by custom or conferred by any such enactment to obtain dissolution of a Hindu marriage whether solemnized before or after the commencement of this Act.

(10) By relying upon sub section (2) of Section 29, learned counsel for the appellant contended that overriding effect in terms of Section 4 of Hindu Marriage Act does not apply to a case falling under category of Section 29 sub section (2) of Hindu Marriage Act.

(11) Learned counsel for the appellant by referring to the testimonies of Amrik Singh, RW5 Sarpanch of the village contended that the marriage of Sukhbir Singh with Kuldip Kaur was dissolved by Panchayati divorce and such a customwas prevailing in the village. The witness admitted in his cross-examinaion that he became Sarpanch of the village for the third time. No record was maintained by the Panchayat in the form of register to show the number of divorces facilitated by the Panchayat. He admitted that he was instrumental in getting divorce in fifteen cases, though no entry was made in the proceeding book. He also admitted that out of nine members Panchayat, five members participated, but their signatures were not taken. Only the parties had affixed their signatures. The witness further submitted that there was a custom in the village Thala, District Jalandhar, according to which divorce is given with the intervention of Panchayat. After writing between the parties, they were not told that they will have to move to Court for getting divorce. The controversy involved herein squarely rested upon the validity of such Panchayati divorce in the context of alleged custom of the village. The custom has to be pleaded and proved in the case.

(12) Looking to the pleadings of the appellant being respondent in the original petition i.e. the written statement filed by him before the trial Court, we found that in the preliminary objections of the amended written statement, Sukhbir Singh submitted that a compromise was effected for divorce with his earlier wife which was reduced into writing in the presence of Panchayat according to the custom of divorce existing amongst Sikh Jats and therefore, the marriage between the parties was dissolved. The pleadings are conspiciously silent about the prevailing custom of the area, rather the evidence of RW5 was to the effect that according to custom of the village, such type of divorce was permissible. Heavy onus was rested upon the appellant to plead custom which was in existence, prior to coming into

force of the Act and operation of custom throughout the area. The custom has not been pleaded by Sukhbir Singh in the written statement with all necessary particulars, so as to attract the protection in terms of Section 29 (2) of the Hindu Marriage Act. Except inadequate statement of RW5, there was no proof of existence of custom in the area and prevalance thereof at the relevant time.

(13) Learned counsel for the appellant by ***citing Gurdit Singh*** *versus* ***Mst. Angrez Kaur and others***[1] tried to impress upon the Court that in matrimonial disputes of District Jalandhar, there was a custom amongst Hindu Jats of Punjab for dissolution of marriage by way of custom. The existence of custom has to be proved in terms of pleadings and evidence. The cited case was a case of Hindu Jats of Punjab which has no bearing in the present case as per the requirement of law.

(14) Secondly, learned counsel for the appellant by referring to Section 4, 11 and 29 of the Hindu Marriage Act tried to convince this Court that by virtue of custom prevailing in District Amritsar, District Jalandhar and other districts, a general presumption has to be drawn that according to Sikh custom amongst Jat Sikhs, customary divorce can be taken as a judicial notice. Learned counsel for the appellant contended that the evidence on record was sufficient to show the existence of custom amongst Jat Sikhs under which a marriage could be dissolved by Panchayat divorce. Learned counsel emphasized that the very fact that dissolution of marriage amongst Jat Sikhs has been taking place even afterthe enactment of the Act is in itself a strong proof of itsrecognition by the community concerned. We are afraid, that there is no evidence of general application on record. The statement of RW5 if scrutinized clinically, it would show that the witness remained Sarpanch of the village for some time and in his village, only he was instrumental in giving divorce being member of the Panchayat. He pleaded custom of the village and not that of area and district. The pleadings in terms of written statement are conspiciously missing. The requirement of law in terms of Section 29 (2) of the Hindu Marriage Act has not been spelled out, nor particulars of custom and its enforcement and application in the area viz village, district and state have come forth on record.

(15) Similarly, by citing ***Balwinder Singh*** *versus* ***Smt.***

[1] 1968 AIR (SC) 142

Gurpal Kaur[2] ***Smt. Rita Rani*** *versus* ***Ramesh Kumar***[3] ***Jasbir Singh*** *versus* ***Inderjit Kaur***[4] ***and Smt. Ass Kaur (deceased) through Lrs*** *versus* ***Kartar Singh (dead) through Lrs & ors***[5] learned counsel for the appellant emphasized that customary divorce is not uncommon in India, provided evidence of its existence and application are brought on record. Since no evidence has come on record in respect of its general applicability vis-a-vis the existence and its prevalance in the area, therefore, no such presumption can be drawn in favour of the appellant. In ***Smt. Ass Kaur*** *(supra),* the Hon'ble Supreme Court dealt with a case of Hindu Succession Act, wherein applicability of customary law was excluded in terms of Section 4 of Hindu Succession Act. The observations of the Hon'ble Apex Court were in the context of taking judicial notice of such custom in terms of Section 57 of the Evidence Act, where the custom was repeatedly recognized by the Courts. In the instant case, no such presumption was attracted in view of lack of pleadings as well as evidence on record to show general recognition of custom in the area. The evidence on record was totally wanting and the statement of RW5 was also discrepant vis-a- vis maintenance of record and prevalence of the customthroughout the area.

(16) Learned counsel for the appellant further relied upon ***Salig Ram*** *versus* ***Munshi Ram and another***[6] which was a case of succession to property according to riwaj-i-am as to custom amongst Brahamans and Khatris of District Amritsar. Since the custom has to be pleaded in respect of particular area and that has to be brought on record by way of convincing evidence, therefore, the aforesaid cited precedents in this context, has no relevance.

(17) So far as taking of judicial notice of existence of custom is concerned, no such judicial notice can be taken on vague pleadings which were not supplemented by any cogent evidence on record. The recognition of custom by the Courts is based on cogent material on record and it cannot be presumed on vague pleadings and evidence. It is true that when a custom has been recognized by the Court, it passes into the law and the proof becomes unnecessary under Section

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[2] 1985(1) HLR 369
[3] 1995 (3) RRR 261
[4] 2003 (2) HLR 654
[5] 2007 (3) RCR (Civil) 369
[6] AIR 1961 SC 1374

57(1) of the Evidence Act. We are afraid that judicial notice can only be taken on the existence of proof of custom prevailing in the area and its existence on record by way of reliable evidence. There cannot be any denial to the proposition as propounded in ***Ujagar Singh*** *versus* ***Mst. Jeo***[7] but no such general presumption with regard to taking judicial notice can arise as per circumstances of the present case.

(18) Taking entire stock of the facts and circumstances, we do not find any substance in this appeal and the same is accordingly dismissed.

Shubreet Kaur

[7] AIR 1959 SC 1041