urge those points before the Industrial Tribunal in order to enable him to arrive at a correct determination of the allocable surplus to be shared by the workmen in terms of clause 13 of the agreement dated October 26, 1967. It is, however, made clear that the road tax will be deducted out of the gross profits and "the year 1966-67" will be taken as the period from November 1, 1966 to March 31, 1967.

(10) For the reasons given above, this writ petition is accepted to the extent indicated above and the award of the Industrial Tribunal dated January 20, 1968 and published in the Haryana Government Gazette (Extraordinary), dated February 6, 1968, is hereby quashed. The case is remanded to the learned Industrial Tribunal to decide it afresh in the light of the observations made above. Since the points were not free from difficulty, I leave the parties to bear their own costs.

N. K. S.

APPELLATE CIVIL

Before H. R. Sodhi, J.

BUDHAN,—*Appellant.*

versus

MAM RAJ,—*Respondent.*

First Appeal From Order No. 62 (M) of 1968

September 25, 1969.

Hindu Marriage Act (XXV of 1955)—Sections 5, 9, 10 and 13—Petition for restitution of conjugal rights—Invalidity or voidability of marriage on ground of age—Whether can be pleaded in defence.

Held, that a marriage may not be valid if not performed between parties who have not attained the requisite age as prescribed by section 5 of Hindu Marriage Act, 1955, but the invalidity or voidability of the marriage cannot be pleaded in defence in answer to a petition for restitution of conjugal rights under section 9 of the Act. Section 9 provides for relief by way of restitution of conjugal rights and sub-section (2) thereof lays down that nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be ground for judicial separation or for nullity of marriage or for divorce. The fact that a marriage has been solemnised in violation of the conditions laid down under section 5 of the Act regarding the age of the parties has not been made a ground either for judicial separation or for divorce under sections 10 and 13 of the Act. It is also not a

ground for decree of nullity under section 11 of the Act. Hence in a petition for restitution of conjugal rights, it is not open to the respondent to plead that the marriage was solemnised between spouses who had not attained the requisite age. (Para 6)

First Appeal from the order of the Court of Shri C. D. Vashishta, Sub-Judge, 1st Class, Ambala City (with delegated powers of district Judge) dated 30th April, 1968, passing a decree for restitution of conjugal rights in favour of Mam Raj, petitioner and against Budhan, respondent along with the costs of this petition under section 9 of the Hindu Marriage Act 1955, as prayed in this petition, and further ordering that the necessary complaint under section 193 Indian Penal Code be prepared against the respondent and her witnesses for giving intentionally false evidence in these Judicial proceedings and the same be instituted for trial in a competent criminal court at Ambala, according to law.

HARBANS LAL, ADVOCATE, for the appellant.

G. S. GREWAL, ADVOCATE, for the respondent.

JUDGMENT

SODHI, J.—This is an appeal by Smt. Budhan against whom a decree for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1955 (hereinafter called the Act), was passed by the trial Court. It was alleged by Mam Raj petitioner (respondent) in the aforesaid petition that the marriage between him and Smt. Bhudan was solemnised on June 19, 1965, at village Gondpura, tehsil Naraingarh, and that both of them last lived together as husband and wife at village Talheri, tahsil and district Ambala, after marriage.

(2) The case of the petitioner is that the respondent without any reasonable excuse withdrew from his society under the influence of her father and mother who seemed to be determined to marry her to some other person. It is alleged that the petitioner made efforts with the parents of the respondent to send her back but to no effect. A petition for restitution of conjugal rights was consequently filed. The respondent resisted the petition and pleaded that the marriage though arranged for June 19, 1965, was never in fact, solemnised as the parents of the boy had practised a fraud. The plea is that some other boy was shown to the bride and the marriage party did come with the present petitioner on June 19, 1965, but the marriage was not performed. In other words, the status of the petitioner and the respondent as husband and wife was denied. It was also contended that the petitioner was a minor, hardly 12 years of age

and the respondent was also about 15/16 years of age at the time of the alleged marriage, and that no marriage could, therefore, validly take place. On the pleadings of the parties the following issues were framed:—

(1) Whether the parties Mam Raj and Budhan were, in fact, married on June 19, 1965?

(2) If issue No. 1 is proved, whether the marriage is void as alleged by the respondent in para No. 3 of the reply?

(3) Relief.

(3) The trial Court found issue No. 1 in favour of the petitioner and issue No. 2 against the respondent. A decree for restitution of conjugal rights was, therefore, passed.

(4) The only question that requires determination in this appeal is as to whether the marriage between the parties was actually solemnised on June 19, 1963 or not. It is common ground between the parties that the *brat* did come to the village of the bride on June 19, 1965 but the dispute is regarding the *pheras* being performed or not after the arrival of the marriage party on the ground that the boy turned out to be different from the one that was originally shown at the time of fixing up engagement. There is no documentary evidence os the record except etter Exhibit A1, which is said to have been scribed by the pandit on behalf of the respondent and addressed to the petitioner fixing the date of marriage between the parties. Nothing turns on this letter as it is nobody's case that the marriage was not arranged or fixed for June 19, 1965 at village Gondpura. Oral evidence was led by both the parties regarding the factum of marriage. The trial Court relying on the circumstances of the case has believed the evidence produced by the petitioner, and in my opinion, rightly. The story of the respondent seems to be a fabricated one and quite false. The version of the petitioner is supported by AW 1, Balak Ram who is a pandit and performed the *pheras* ceremony. He is the person who also wrote the letter Exhibit A. 1. According to him he was the only pandit working at the time of the marriage as the respondent party had no pandit of their own. The statement of this witness is corroborated by AW. 2, who is a Sarpanch of the *gram panchayat*. There is yet another witness A.W. 3 Mukhatiara who supports the case of the petitioner and is quite independent. There is no reason to disbelieve his testimony and the trial Court has

accepted the same. The learned counsel for the appellant has not been able to persuade me that there are any good reasons for rejecting the statements of these witnesses. A.W. 4 is also quite reliable. Rula Ram, AW 5, is the father of the petitioner. He gave the age of the boy as 18 years at time of the marriage. The petitioner also appeared as AW. 8 in support of his case. It is highly improbable that the marriage party had gone to the village of the bride but no ceremony was actually performed. If any such fraud had taken place as alleged by the respondent, complaints would have been made to the *panchayat* or local officials, but nothing was done on the side of the respondent. What seemed to have happened is that after marriage the respondent discovered that two fingers of the hand of the petitioner were missing and it was suspected to be a case of leprosy. The witnesses for the petitioner have admitted that two of the fingers of one hand of the petitioner are not existing and that respondent was not sent by her parents on the ground that the petitioner was suffering from leprosy. There is no evidence on the record to establish that petitioner is really suffering from leprosy.

(5) The respondent's evidence consists of RW. 1 Banarsi Dass, RW. 2 Bilasa, R.W. 3 Jangu, RW 4 Rulia, RW. 5 Tej Ram and respondent herself as RW. 6. It is admitted that the *brat* did come in their village and had their dinner. It is, however, denied that any *pheras* were performed. The age of the girl according to these witnesses was about 16 years. Most of the witnesses under stress of cross-examination seemed to have made statements which are clearly false. There are material discrepancies in their statements which stamped their testimony with incredibility. The respondent even denied her engagement. She went on saying 'no' to almost every question put in cross-examination. Tej Ram, father of the respondent made a most improbable statement. He stated that he did not see the bride-groom before fixing up his daughter nor did he know the name of the father of the boy who was shown to the brother of the respondent. It is not easy to believe that a person who gives his daughter in marriage will fix his daughter without knowing the name of the boy or his father. I have been taken through the evidence by the learned counsel for the appellant but he has not been able to advance any cogent reasons which could persuade me to take a different view from that of the trial Court in regard to the assessment of oral evidence. The learned counsel has contended that even if it be held that the marriage was actually solemnised, it was not a valid marriage as both the parties to the same had not completed the age fixed

by law. He has drawn my attention to section 5 of the Hindu Marriage Act which lays down the conditions requisite for a valid marriage. It lays as under:—

> "5. A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely:—
>
> * * *
>
> (ii) the bride-groom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;
>
> * * *

(6) A marriage may not be valid if not performed between parties who have not attained the requisite age as prescribed by law but the invalidity or voidability of the marriage cannot be pleaded in defence in answer to a petition for restitution of conjugal rights. Sub-section (2) of section 9 which provides for relief by way of restitution of conjugal rights is in the following terms :—

> "(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

Section 10 deals with the grounds on which judicial separation can be had and section 13 states the grounds on which a marriage can be dissolved by a decree of divorce. The fact that a marriage has been solemnised in violation of the conditions laid down under section 5 regarding the age of the parties has not been made a ground either for judicial separation or for divorce in either of these provisions of law. It is also not a ground for decree of nullity. Section 11 provides for cases when a marriage solemnised after the commencement of the Act shall be null and void on a petition presented by either party thereto and violation of clauses (i), (iv) and (v) of section 5 alone has been considered to be that contravention which entitles a party to marriage to obtain a decree of nullity. Here, again clause (iii) which deals with the condition as to age of both the spouses has not been made a ground for nullity. It must, therefore, be held that in a petition for restitution of conjugal rights, it is not open to the respondent to plead that the marriage was solemnised between spouses who had not attained the requisite age.

(7) The learned counsel for the appellant has vehemently submitted that the order of the trial Court directing prosecution of the respondent and all the witnesses appearing for her for the alleged offence of intentionally giving false evidence should not be maintained. The trial Court does not appear to have appreciated that section 479(A) has been introduced in the Code of Criminal Procedure whereby it is provided that notwithstanding anything contained in sections 476 to 479 inclusive a civil, a revenue or criminal Court can order prosecution for perjury only if it records a specific finding in its judgment that a witness has intentionally given false evidence in any stage of the judicial proceedings and that for eradication of evil of perjury and in the interest of justice, it is expedient that such witness should be prosecuted for offence which appears to have been committed by him. The trial Court in the instant case has not said that for the eradication of evil of perjury, the prosecution of the witnesses is necessary. Be that as it may, no hard and fast rule can be laid down as to when prosecution should be launched and it depends upon the facts and circumstances of each case. To determine whether a prosecution is expedient in the ends of justice, the Court concerned is expected to exercise a careful and balanced judgment weighing several factors including the nature of the case and parties before the Court. The mere fact that a Court has disbelieved some witnesses is no ground by itself for ordering prosecution. It is true that the respondent has failed to prove her case but there are certain circumstances to be found in her evidence which go to show that there was some dispute about the petitioner suffering from leprosy. It was a matrimonial cause in which a greater caution had to be exercised in ordering the prosecution of either of the spouses for what appears to be intentional false statements. In my opinion, the order for the prosecution of the respondent and witnesses produced by her cannot be sustained on the ground that the trial Court has not complied with the requirements of section 479 (A) and also because it is not in the interest of justice to prosecute the respondent and her witnesses. It may be mentioned that respondent is a young girl of hardly 16 years of age and unfortunately matrimonial dispute arose which drove the parties to Court.

(8) For the foregoing reasons and with the modification in the judgment of the trial Court to this effect that the order of the prosecution of the respondent and her witnesses is set aside, the appeal fails with no order as to costs.

N.K.S.