(1986) 09 CAL CK 0021

Calcutta High Court

Case No: A.O.D. No. 343 of 1976

Sridhar Dey		APPELLANT
	Vs	
Kalpane Dey		RESPONDENT

Date of Decision: Sept. 22, 1986

Acts Referred:

- Evidence Act, 1872 - Section 4
- Hindu Marriage Act, 1955 - Section 17, 9
- Penal Code, 1860 (IPC) - Section 494, 495

Citation: 91 CWN 456

Hon'ble Judges: Shyamal Kumar Sen, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: M. Mitra, Sujit Kumar Lalik and Asit Kumar Sengupta, for the Appellant;Aloke Nath Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

1. In assailing the decree for the restitution of conjugal rights granted by the trial judge u/s 9 of the Hindu Marriage Act in favor of the respondent-wife and against the appellant - husband, Mr. Mitra, the learned Counsel for the appellant-husband, has very seriously urged that there was no marriage in fact between the parties to warrant the decree and that, even if there was a marriage in fact, there was no marriage in law as ceremonies essential to constitute a Hindu marriage have not been if there was a marriage in fact, there was no marriage in law as ceremonies essential to constitute a Hindu marriage have not been proved to have been performed in this case. Having heard the learned counsel for both the parties considerable length and having gone through the records ourselves, we are, however, satisfied that a marriage, both in fact and in law, between the parties has been satisfactory proved to warrant he decree under appeal.

2. As to the marriage in fact, the evidence adduced by and on behalf of the petitioner in support of the marriage is good in quality and great in quantity. It is great in quantity because as many as 15 witnesses have been examined on behalf of the petitioner; it is good in quality because a great deal of the evidence has come from persons who are likely to know about the facts and yet are independent and have no personal interest in the petitioner''s case. PW-2 Manick, who attended the marriage as the barber for the bride groom-respondent, PW-3 Gobindalal who attended the marriage as a co-villager of the respondent, PW-4 Budded who attended the Bowbhat ceremony as a co-villager of the respondent, PW-5 Gadadhar who also attended the marriage and is a resident of a neighboring village, PW-6 Ramaprassanna and PW-7 Dharanidhar who are residents of the neighboring village and who attended the marriage as belonging to the bride groom''s party, PW-9 Ramgopal who is a co-villager of the petitioner and who attended the marriage, PW-11 Dwijapada who is he post Master of the petitioner''s village, PW-13 Biseswar who is resident of the neighboring village who attended the marriage and PW-14, another co-village who attended the marriage, have all stated, clearly, categorically and consistently, that the petitioner Kalpana was married to the respondent Sridhar and that they all attended the marriage ceremony. We have not been able to find any reason to disbelieve all these witnesses and to reject their testimony. PW-1, the petitioner herself and PW-15, her father, have also deposed about the marriage in appreciable details. The petitioner, when she deposed, was a young girl of 17/18 years and her father and other members of he family reside in a village in the District of Birdhum. The outlook, the way of life, the social prejudices of the village societies even today being as they are, it is difficult to believe that the petitioner and her father would falsely claim the respondent to have been married to the petitioner at this great risk that if the case failed, the petitioner would lose all the chances of being suitably married in her whole life.

3. Of the 5 witnesses examined on behalf of the respondent, D W 1 Gopal and D W 2 Durgapada have clearly admitted that they were asked by the respondent to depose that there was no marriage between the petitioner and the respondent while DW 3 Laxminarayan and DW 5 Shyamapada are the sister''s husband and the maternal uncle of the respondent and DW 4 Sridhar is the respondent himself. Therefore, while the first two witnesses are not at all reliable, the remaining 3 witnesses are not also disinterested and independent. The respondent DW-4, While denying any marriage between him and the petitioner has stated that the petitioner''s father, PW 15, proposed to the mother of the respondent for the marriage of his daughter with the respondent, but his mother refused, but though it is in evidence that the mother was about 60/61 years in age and can move about, she has not been examined as a witness.

4. The totality of the evidence leaves us in no doubt that there was a marriage between the petitioner and the respondent as alleged in the petition. But Mr. Mitra has argued that respondent as alleged in the petition. But Mr. Mitra has argued that

even assuming that there was marriage between the parties, the marriage was not valid and legal to sustain a decree for restitution of conjugal rights as the ceremonies essential for a valid Hindu marriage have not been proved to have been performed. We have our doubts as to whether the respondent can be allowed to put forward such a case. Both in his pleading as well as at the trial, the only case made out by the respondent is an out-right denial of the marriage in fact and it was never his case at any stage that though there was a marriage in fact, the marriage was not legal and valid as the essential ceremonies were not performed. To allow the respondent to press such a case not made out by him in the pleading or the evidence would be causing gravest possible prejudice to the petitioner. The respondent having altogether denied the factum of marriage, and not its legality on the ground of non-performance of essential ceremonies, if the factor of marriage appears to have been proved, we would presume, in the absence of evidence to the contrary, due performance of all ceremonies necessary to constitute the marriage. Mr. Mita has, however, urged that in a matrimonial proceeding, both the factum and the validity of the marriage must be affirmatively proved by positive evidence before any relief can be granted on the basis of the marriage, and, therefore, no relief could be granted in this case as the performance of he essential ceremonies of the marriage has not been proved. We are afraid that Mr. Mitra has stated the proposition too broadly and we are of the view that unless the legality of he marriage is disputed on he specific ground of non-performance of essential ceremonies, a party proving the factor of marriage need not specifically prove further that all he ceremonies necessary to validities the marriage were also performed and in such a case, on the proof of the factor of marriage, a court shall presume performance of all essential ceremonies. The decision of our pre-independence and post-independence apex Courts are clearly to that effect. As to the presumption of due performance of ceremonies essential to constitute a marriage, the Privy Council ruled in 1911 in Mouji Lal v. Chandrabati, (I.L.R. 38 Cal 700 at 707) that "to matters of form and ceremony, the established presumption in favor of marriage applies" and the Supreme Court has also endorsed the aforesaid proposition of law in A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael etc., , Where relying on the aforesaid Privy Council decision, it has been ruled (at 945) that "where it is proved that marriage was performed in fact the court will also presume that the necessary ceremonies have been performed." And if the Court will have to presume due performance of ceremonies, then according to the principles of law o evidence as embodied in Section 4 of the Evidence Act, the court will have to regard such performance as proved, unless and until they are disproved.

5. It must be noted that long before the aforesaid Privy Council decision in Mouji Lal (supra), a Division Bench of this Court adopted and applied that principle in a case relating to restitution of conjugal rights in the century-old decision in Brindabun Chandra v. Chandra (I. L. R. 1885 Cal 140). In that case the lower appellate court dismissed the suit as there was no positive evidence that Saptapadi was performed,

but the Division Bench on second appeal held that the lower appellate court having found that "there was a marriage", "Ought to have presumed, in the absence of anything to the contrary, that the marriage was good in law and hat all the necessary ceremonies were performed" and for this he Division Bench relied on an earlier decision of the Privy Council in Inderan v. Rama Swamy (1869 13 M.I.A. 141 at 158). In another Division Bench decision of this Court decided in the same year in 1885 in Lopez v. Lopez (I.L.R. 12 Cal 706), which also arose out of a suit filed by the wife for restitution of conjugal rights, the wife was the sister of the deceased wife for the respondent and under the rule of the Church of Rome governing the marriage, the marriage could not be valid without a proper dispensation from the Ecclesiastical authority. But even though no such dispensation was proved in this case, the Division Bench presumed that such dispensation necessary to validities the marriage had been obtained as the presumption of every thing necessary to give validity to a marriage is one of very exceptional strength". Relying on the decision of the House of Lords in Piers v. Piers (2, H. L. C. 331), the Division Bench ruled further that evidence to rebut such presumption in favor of everything necessary to validate the marriage must be "strong, distinct, satisfactory and conclusive," "Clear, distinct and satisfactory" and that "a presumption of this sort in favor of marriage can only be negative by disproving every reasonable possibility.'' These two Division Bench decisions of this Court in Brindabun Chandra (supra) and in Lopaz (supra) are, therefore, clear authorities for the proposition that in suits for restitution of conjugal rights, once the fact of celebration of a marriage is proved, the court shall presume everything necessary to validate the marriage including the performance of essential ceremonies.

6. A later Division Bench of this Court in Suryamoni v. Kali Kanta (I.L.R. 1900 28 Cal 37), may however, appear to have taken a somewhat different view. That was also a case arising out of a suit for restitution of conjugal rights where the Division Bench observed (at page 50) that "in this case, the validity and legality of the marriage is one of the most essential points in issue and we cannot hold that we are entitled to presume from the mere finding that the marriage was celebrated, that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed." Now if this later Division Bench in Suryamoni (supra) has stated something contrary to or inconsistent with what has been consistently laid down in the two earlier Division Bench decisions in Brindabun Chadra (supra) and in Lopez (supra), it would be difficult to accept the same as a binding precedent for our purpose. Then again, the ratio of the decision in Suryamoni (supra) may also be taken to have been considerably shaken by the later decision of the Privy Council in Mouji Lal (Supra) and of the Supreme Court in Veerappa (supra) which have ruled that once it is proved that the marriage was performance of the ceremonies. The earlier Division Bench decisions in Brindabu Chandra (supra) and in Lopez (supra), which ruled that on proof of he factum of marriage including the performance of ceremonies, are in perfect consonance with the later decisions of the privy Council in Mouji Lal (Supra)

and of the Supreme Court in Veerappa (Supra) and must therefore govern us in proceedings relating to restitution of conjugal rights, But we must, however, note that the decision in Suryamoni (Supra) is also distinguishable on facts as in Suryamoni (supra), the validity and legality of the marriage was specifically disputed (at 38,50) and the observations made therein as noted hereinabove would have to be understood in that context. In the case at hand, however, as already noted, the validity and legality of the marriage itself has not been denied either in the pleading or in the evidence and that being so, the ratio in Suryamoni (supra) cannot apply to the facts of the case at hand, even if it is otherwise a binding authority. The same comments would also apply to the single Judge decision of the Allahabad High Court in Smt. Bibbe Vs. Smt. Ram Kali and Others, on which very strong reliance has been placed by Mr. Mitra to fortify his submissions that in this case the performance of the essential ceremonies were required to be positively proved. In that case also, the validity and legality of the marriage was specifically disputed in the pleadings and, therefore, even accepting in to be the law that where the legality and validity of the marriage is disputed, the ceremonies necessary to constitute a valid marriage must be positively proved de hors any presumption, the same can not apply to the case at hand where, as already noted, the validity and legality of the marriage has not been challenged by the respondent either in he pleading or in the evidence.

7. Mr. Mitra however, has placed strong reliance on a later decision of the Supreme Court in Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another, and has very seriously contended on the authority of the said decision that a Hindu Marriage, if disputed, can not taken to have been proved unless the two essential ceremonies therefore, namely, the Vevah-Homa and the Saptapadi, are proved to have been performed. While it is true that there are observations to that effect in Bhaurao (supra), it must be noted that the case arose out of criminal prosecution for bigamy u/s 17 of the Hindu Marriage Act, which has made the provisions of Section 494 and 495 of the penal Code applicable to any marriage "solemnized" after the commencement of the Act if on the d ate of such marriage either party had a husband or a wife living. The Supreme Court pointed out (at Para 5) that "the word "Solemnize" means, in connection with a marriage, "to celebrate the marriage, with proper ceremonies and in due form" and therefore "unless the marriage is celebrated or performed with proper ceremonies and in due form, it cannot be said to be Solemnized". The Supreme Court accordingly ruled that in a prosecution u/s 17 of the Hindu Marriage Act, which requires a marriage to be "Solemnized" at a time when either party had a spouse living, the offending marriage must be proved to have been celebrated with proper ceremonies and in due form. As it would appear form the judgment (supra, para 9), it was "not disputed "in that case that the two essential ceremonies of a Hindu marriage, namely the Vivaha-homa and the Saptapadi were not performed and the witnesses on being cross-examined clearly admitted that those ceremonies were not-performed as according to them they were not necessary in a Gandharva form

of marriage. The Supreme Court, however, held that those two ceremonies wear essential in Gandharva marriage also and according to the Supreme Court, the prosecution failed, as he offending marriage was not proved to have been solemnized, as admittedly the requisite ceremonies were not performed. In Bhaurao (supra), therefore, the non-performance of the essential ceremonies having been admitted, there could be no scope for the application of he principle discussed hereinabove and reiterated by the Supreme Court in Veerappa v. Michael (Supra) that "where it is proved that the marriage was performed in fact, the court will also presume that the necessary ceremonies have been performed." The non-performance of the ceremonies having thus been admitted and performance of the ceremonies having thus been disproved, there was obviously no scope for the operation of the presumption in favor of due performance of he marriage ceremonies.

8. This decision in Bhaurao (supra) has been followed by the Supreme Court in the later decisions in Kanwal Ram and Others Vs. The Himachal Pradesh Admn., , in Priyabala v. Suresh Chandra (AIR 1971 S.C. 1153) and in Gopal Lal Vs. State of Rajasthan, And it appears to have been reiterated that u/s 17 of he Hindu Marriage Act the offending second marriage must be proved to have been solemnized and a marriage can not be taken to have Solemnized unless essential ceremonies are proved to have been performed. All these decisions relate to criminal prosecutions for bigamy and, as is well-known, the standard of proof in a civil or criminal trial are materially different and while preponderance of probability is good enough for a decision in civil jurisdiction, in a criminal trial affecting liberties of the citizen, the offence charged must be proved beyond all reasonable doubt. This has also been very succinctly pointed out by the Supreme Court in Dr. N.G. Dastane Vs. Mrs. S. Dastane, where it has been ruled that the civil standard of proof of preponderance of probabilities, and not the criminal standard of proof beyond reasonable doubt, applies to matrimonial proceedings under the Hindu Marriage Act and that it would be wrong to import criminal standard in trials of a purely civil nature, In Kanwal Ram (Supra) as well as in Priya Bala (Supra) also, the distinction has been scrupulously maintained and in both the case even admission of marriage, which is sufficient to prove marriage for civil matrimonial dispute, has been ruled to be not sufficient to prove marriage in prosecutions for bigamy or adultery. The requirements of a criminal prosecution as to the positive proof of essential ceremonies as laid down in Bhaurao (supra), Kanwal Ram (supra) and Priya Bala (supra) can not, therefore, be imported in a civil proceeding for restitution of conjugal rights unless the performance of those ceremonies is specifically disputed and in such a civil proceeding we would have to govern ourselves by the Division Bench decisions of this court in Brindabun Chandra (supra) and Lopez (supra), which have been reinforced by the later decisions of the Privy Council in Mouji Lal (supra) and of the Supreme Court in Veerappa (supra), and we would take the law to be that once the factor of marriage is proved, everything necessary to validities such marriage,

including the observation of essential ceremonies, shall be presumed, particularly in a case like the one at hand where the legality and the validity of the marriage has not been impugned either in the pleadings or in the evidence on the ground of non-performance of necessary ceremonies or otherwise.

9. It must, however, be noted that in this case though the essential ceremonies have not been specifically spelt out by the witnesses, PW-5, PW-6, PW-7, PW-8, PW-9, and PW-15 have categorically stated that all the formalities of the marriage were observed and performed and the marriage was celebrated according to Hindu rites and there was absolutely no cross-examination whatsoever of any of these witnesses on this evidence. We are of opinion that in the absence of any cross-examination on the point or any suggestion to the contrary, the evidence was sufficient to prove performance of all essential ceremonies particularly when considered in the light of the presumption operating in favor of due performance of such ceremonies when a marriage is proved to have taken place in fact.

10. It is true that the petitioner, while deposing as PW-1, stated in her examination-in-chief that "all the formalities of the marriage except ''Home'' were performed". It is in evidence that the petitioner, was aged about 12/13 years only at the time of her marriage and her age was about 17/18 years when she deposed in court. We are inclined to think that it was not possible for a rustic village girl of 12/13 years of ago to understand what was Vivaha Home and what were its characteristics. As already noted, it is the unchallenged evidence of so many witnesses that all the formalities of the marriage were performed. It is also the evidence of PW-6 that "marriage was celebrated according to Hindu rites" and "there were Hastabandhani, Sindurdan and Saptapadi". It is obvious that a Hindu marriage can not be celebrated without Vivaha-Home, and Saptapadi which is taking of seven stamps together by the bride and the bride-groom before the Homagni or the sacred fire. The marriage could not be celebrated according to Hindu rites and all the formalities could not be performed and Saptapadi could not have taken place without Vivaha-Home. We are, therefore, satisfied that the expression "except Home" was used by the petitioner without understanding its implication and, at any rate, we are not disposed to place any reliance on that statement of the petitioner who was only 12/13 years old at the relevant time as against the consistent statement of the other independent witnesses as to the performance of all the essential ceremonies. It is not at all expected that the petitioner, who is fighting her case for restitution of conjugal rights against her husband who has denied the marriage, would herself and on her own state in her examination-in-chief that such an essential ceremony as the Home was not performed, if she really understood what she said.

11. We are accordingly of the opinion that the learned Judge was right in holding that the petitioner was duly married to the respondent and rightly passed the decree under appeal. Mr. Mitra has very fairly conceded that the sole defense of the

respondent being that there was no marriage between the parties, if the marriage between the parties stands proved on the evidence on record, the respondent would not have any defense to resist a decree for restitution of conjugal rights as in that case the respondent cannot but be held to have denied his society to the petitioner without any reasonable cause.

We therefore dismiss the appeal with costs and affirm the judgment and decree under appeal.

Shyamal Kumar Sen, J.

Appeal dismissed.