2025:DHC:10580-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment reserved on: 06.11.2025***
Judgment pronounced on: 28.11.2025

\+ MAT.APP. (F.C.) 281/2024 & CM APPL. 48706/2024

SMT. SUSHMA .....Appellant

Through: Mr. SC Singhal, Mr. Parth Mahajan, Ms. Garvita Bansal and Mr. Ritvik Madan, Advocates.

versus

SH. RATTAN DEEP & ANR. .....Respondents

Through: Mr. Mrinal Singh and Ms. Priya Rani Jha, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

ANIL KSHETARPAL, J.

1. Through the present Appeal, the Appellant assails the correctness of a judgment and decree dated 07.06.2024 [hereinafter referred to as 'Impugned Judgment'] passed by the Family Court while granting declaration to the effect that her alleged marriage with the Respondent No.1 was void as it was solemnized in contravention of Section 11 read with Section 5(1) of Hindu Marriage Act, 1955 [hereinafter referred to as 'HMA'].

2. The following two questions require adjudication in the present Appeal:

i. Whether the Appellant has successfully proved that 'custom' constitutes sufficient ground to take Panchayati Divorce among the 'Jat' community, thereby dissolving the marriage? and

ii. If the answer to the first question is in the affirmative, whether there was Panchyati Divorce amongst the Appellant and the Respondent No.1.

3. In order to comprehend the issues involved in the present case, the relevant facts in brief are required to be noticed.

4. The Appellant was previously married to Sh. Sanjay, whereas the Respondent No.1 was also previously married to some else. The Appellant claims that her marriage with Sh. Sanjay was dissolved by a customary divorce on 23.05.2009, whereas the Respondent No.1 claims that his marriage was dissolved by a Competent Court on 25.05.2009 and that he has a daughter from previous marriage. The Appellant and the Respondent No.1 entered a matrimonial alliance on 16.05.2010 and out of the wedlock, Mr. Daksh (son) was born on 15.03.2011.

5. Respondent No.1 filed a previous Petition under Section 13(1)(ia) of the HMA, which was later withdrawn since the parties settled the dispute and started co-habiting together. However, on 12.10.2012, the Appellant left her matrimonial home. Respondent No.1 claims knowledge of the fact that the Appellant was not

previously divorced on 25.09.2013, whereas he filed the Petition on 10.10.2013.

6. The Appellant took a stand that the factum of her previous divorce was brought to the notice of the Respondent No.1 and his family and thereafter, they entered into the matrimonial alliance. The Appellant also stated that she had taken divorce from her previous husband on 23.05.2009 as per custom prevailing in their community. Apart from alleging cruelty at the hand of the Respondent No.1, the Appellant also submitted that the Respondent No.1 and his family members demanded dowry and wanted that the Appellant should take her share in the properties of her father.

7. Upon analysing the pleadings, the Family Court culled out the following issues:

i. Whether a customary divorce is permissible in the caste/community of the parties?

ii. If the answer to additional issue no. 1 is in affirmative, whether the respondent had obtained the customary divorce from her husband on 23.05.2009?

8. Respondent No.1 entered the witness box as PW-1, whereas the Appellant examined five witnesses including herself appearing as RW-1. The father of the Appellant, Sh. Ranbir Singh, appeared as RW-2 and the uncle of the Appellant, Sh. Balwan Singh, appeared as RW-3. The Appellant also examined Sh. Om Prakash and Sh. Rajbir as RW-4 and RW-5 respectively.

9. The Appellant has produced a photocopy of the alleged Deed of Divorce which has not been exhibited, however, has been marked as 'X'. On its careful reading, it is evident that it is only an agreement/mutual settlement between the Appellant and her previous husband. This agreement is scribed by Sh. Ramchandar Dahiya, and signed by three witnesses, namely Sh. Hawa Singh, Sh. Mahender Singh and Sh. Rajpal. However, neither the scribe nor any of these witnesses have been examined in this matter.

10. While answering the Issue No.1, the Family Court held that the custom of taking customary divorce has been successfully established, whereas while answering the Issue No.2, the Family Court held that the respondent failed to produce any valid '*panchayatnama*' and thus alleged customary divorce through panchayat on 23.05.2009 could not be established. Consequently, while returning the finding that the marriage between the Appellant and the Respondent No.1 was in contravention of Section 5(i) of the HMA, the family court annulled it under Section 11 of the HMA.

11. Before proceeding further, it is appropriate to take note of statutory provisions of the HMA:

> *"**4. Overriding effect of Act.** —Save as otherwise expressly provided in this Act, —*
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> *(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;*
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> *(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.*
>
> *HINDU MARRIAGES*

5. Conditions for a Hindu marriage.—*A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—*

(i) neither party has a spouse living at the time of the marriage;

[(ii) at the time of the marriage, neither party—

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity]

(iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

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11. Void marriages.—*Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.*

xxxx xxxx xxxx

29. Savings.—*(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste.*

(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.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be

null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954, (43 of 1954) with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

12. It is evident that by virtue of Section 4 of the HMA, it was declared on the enforcement of the HMA that 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 the HMA shall cease to have effect with respect to any matter for which this provision is made in HMA. However, the opening words of Section 4 that save the provisions as provided in the HMA are relevant.

13. Section 29 of the HMA saves any right recognised by custom or conferred by any special enactment to obtain dissolution of a Hindu marriage. Hence, the customary divorce, if validly proved, is saved by the provision of the HMA. Before delving deeper into how custom ought to be proved, it is significant to iterate how courts have interpreted 'custom':

14. In ***Bhimashya and Others v. Janabi (Smt) Alias Janawwa***[1], the Supreme Court held:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and fourthly, it must be

[1] (2006) 13 SCC 627

certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

15. In ***Gokal Chand v. Parvin Kumari***[2], the Supreme Court declared that:

"A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' should not be strictly applied to Indian conditions."

16. However, to prove custom, the parties are required to lead cogent evidence. It is not sufficient to prove custom of dissolution of marriage by examining few witnesses. It is expected from the parties to prove the prevalence of customary divorce in their area/community by producing judgments that recognise their custom and show past instances of customary divorce in the community.

17. One of the ways to prove the custom is reference to any text or interpretation of Hindu law or usage for long period of time. Once the Court is called upon to declare that there exists a custom which is contrary to the codified law, the burden of proof is heavy upon the party asserting custom. Custom cannot be extended by analogy and it cannot be established by a priori method. ***Uzagar Singh v. Mst. Jeo***[3] laid down that the ordinary rule is that a custom, general or otherwise, has to be proved under Section 57 of the Evidence Act, 1872. This fact has been laid down by the Court from time to time in the following manner:

17.1 The Supreme Court in ***Saraswathi Ammal v. Jagadambal And***

[2] AIR 1952 SC 231
[3] AIR 1959 SC 1041

Another[4] held as follows:

> *"Privy Council in Abdul Hussein Khan v. Soma Dero(1). It was there said that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be estabished inductively, not deductively and it cannot be established by a priori methods. Theory and custom are antitheses, custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another. A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same-custom."*

17.2 An identical view has been taken by the Supreme Court in ***Salekh Chand (Dead) By Lrs v. Satya Gupta And Ors***[5]. In ***Yamanaji H. Jadhav v. Nirmala***[6], the Supreme Court reiterated this principle in the context of the Act, holding as follows:

> *"As per the Hindu Law administered by courts in India, divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Public policy, good morals and the interests of society were considered to require and ensure that if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which if not proved will be a practice opposed to public policy. .... It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of*

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[4] 1953 SCR 939
[5] (2008) 13 SCC 119
[6] (2002) 2 SCC 637

law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequence of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law."

17.3 The Gujarat High Court in ***Bhartiben W/O Amitbhai Vitthalbhai*** held that:

"13. It is well settled principles of law as laid down by the Supreme Court that prevalence of customary divorce in the community to which the parties belong, contrary to general law of divorce must be specifically pleaded and established by person propounding such custom. In our view, in the absence of any proper pleadings on behalf of the plaintiff in the plaint about the then alleged existing custom and customary divorce in the Leuva Patel Community, the plaintiff could not have led any oral evidence on the said issue."

18. Now, the stage has come to analyse the evidence led by the Appellant to prove prevalence of customary divorce amongst the Jat community. RW-2 and RW-3 are the father and maternal uncle of the Appellant respectively and are interested witnesses. RW-4 is an 80-year old man, who was Deputy Sarpanch of the village. However, RW-4 did not attend the alleged meeting of the Panchayat wherein the divorce was granted to the Appellant from previous husband. RW-5 has also admitted that he never attended the alleged meeting of the Panchayat. Apart from referring to other instances of grant of Panchayati Divorce to few persons, the Appellant has not produced any evidence, including text, to show that Panchayati Divorce was being granted in the community from a very long time. The Appellant has also not produced any Panchayati decision in this regard.

19. Thus, the evidence led by the Appellant to prove the prevalence of custom of dissolving the marriages through Panchayat falls short of

the legal requirement to prove the same. The Appellant has also not examined the scribe, Sh. Ramchander Dahiya, and the three witnesses namely Sh. Hawa Singh, Sh. Mahender Singh and Sh. Rajpal, who allegedly signed as witnesses to the document dated 25.09.2013. The details of the alleged Panchayat meeting and the members who attended the meeting have not been disclosed. Though, the Issue No.1 was decided in favour of the Appellant by the Family Court, however, the same being erroneous is liable to be set aside, though no cross-objections or cross-appeal has been filed by the Respondent No.1.

20. Order XLI Rule 22 read with Order XLI Rule 3 of the Code of Civil Procedure, 1908 enables the Courts to pass appropriate judgment irrespective of appeal or cross-objections. Moreover, the Respondent No.1 has no right to file an appeal against finding in a particular issue as his Petition for declaring that his marriage with the Appellant was void, has been allowed by the Family Court.

21. The Appellant has only produced an agreement which has been styled as Deed of Divorce executed on 25.09.2013. We have already expressed our opinion that this document is a mere agreement/mutual settlement between the Appellant and her previous husband, which is attested by three witnesses. It has been recited in the said agreement that the parties have decided to dissolve their marriage by this agreement. However, there is no reference to any Panchayat or meeting of the respectables of the area. The original copy of the agreement dated 25.09.2013 has also not been produced. Neither the scribe nor the witnesses to this agreement have been examined. Such agreement does not fulfil the requirement of the customary divorce as

alleged. Thus, the finding of the Family Court under Issue No. 2 is upheld.

22. Learned counsel for the Appellant has submitted that the parties married in the year 2010 and out of the said wedlock, Mr. Daksh (son) was born on 15.03.2011. Learned counsel has now submitted that the marriage between the parties cannot be annulled in this manner and that the family court's decree be set aside.

23. This Court has examined the argument advanced by the learned counsel for the Appellant, however, finds no merit in the same. Section 11 of the HMA explains void marriages. It is evident that if any marriage is solemnized amongst the Hindus in contravention of any one of the conditions specified in clauses (i), (iv) and (v) of section 5 of the HMA, such marriage is null and void and not voidable.

24. The Appellant has failed to prove that she was divorced from her previous husband as per custom. Hence, in view of Section 5(i) of the HMA, the Appellant could not solemnize the marriage with the Respondent No.1. Learned counsel for the Appellant has not challenged the correctness of finding of the Family Court which says that the Respondent No.1 came to know on 25.09.2013 about the fact that the Appellant had not obtained divorce from her previous husband. The Respondent No.1 filed the petition in October, 2013, which is within the prescribed period of limitation.

25. In view of the aforegoing discussion, this Court does not find any reason to interfere with the Impugned Judgment passed by the

Family Court.

26. Accordingly, the present Appeal, along with the pending application, is dismissed.

ANIL KSHETARPAL, J.

HARISH VAIDYANATHAN SHANKAR, J.

NOVEMBER 28, 2025
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