**BOMBAY HIGH COURT**

Jina Magan Pakhali

Vs

Bai Jethi

(Divatia, J.)

03.02.1941

**JUDGMENT**

**Divatia, J.**

1. This appeal arises in a suit by the plaintiff-appellant against his wife for restitution of conjugal rights. The only question in the appeal is whether the plea of the defendant that she has already been divorced from the plaintiff has been established. The lower appellate Court has held, differing from the trial Court, that the defendant had been validly divorced by the plaintiff according to the custom of the caste and that the latter was not, therefore, entitled to the relief prayed for.

2. The finding of the lower appellate Court on the evidence is that both the parties belonging to the Pakhali caste of Ahmedabad were married to each other when they were children, that on August 17, 1935, there was a meeting of the caste panch where a divorce was granted with the consent of both the parties and two mutual documents were executed by the brothers of the plaintiff and the father of the defendant as the parties were considered to be minors. On the question of minority there is some confusion in the judgment of the lower Court where at one place they are described as minors and at another place the husband is described as a major. It appears from the certificates of birth produced in evidence that the husband as well as the wife had finished eighteen years of age when the divorce was granted. In the eye of law, therefore, they must be treated as majors. The defendant had, however, pleaded in the written-statement that according to the custom of the caste if either the husband or the wife had not attained the age of twenty-one, a petition was made to the caste on their behalf by their guardians and that the guardians can ask for or give a divorce on behalf of the minors. That point, however, is not material in view of the fact that on the finding of the lower Court the husband, who was above eighteen years of age and capable of giving consent, was1 present at the meeting and did give his consent asked for by the defendant's father on her behalf. The evidence of the headman of the caste, which has been believed by the lower Court, shows that the husband duly gave his consent, but he said that the writing would be signed by his elder brothers who were present there. It is

true that there is no specific finding as to whether the wife gave her consent, but there would be no question of that in view of the fact that the defendant was also present in the caste meeting and her father himself wanted the divorce for his daughter on account of desertion as well as on the ground of the marriage being ill-matched. The learned Judge, therefore, on this evidence as well as on the several instances of custom relied upon on behalf of the defendant, held that the custom had been proved and that the wife having been validly divorced from the husband, the plaintiff was not entitled to restitution. On behalf of the plaintiff much reliance was placed in the lower Court on the decision of this Court in *Keshav Hargovan v. Bai Gandi*[1]. That was a case of parties of the same caste in the same town. It was held there that a custom stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, cannot be recognised by the Court as it was immoral or opposed to public policy as well as repugnant to Hindu law. The previous case law on this point was reviewed, and the ground of the decision is that the caste cannot give a divorce without the consent of the party which is going to be divorced. Undoubtedly that is a correct principle. The caste has no jurisdiction to force a divorce upon an unwilling party. But the case would be otherwise where the party against whom divorce is sought according to custom gives his or her consent and the consent is given in the presence of the caste panch. All the previous cases discussed in Keshav Hargovan v. Bai Gandi, and relied upon here also were either civil or criminal cases in which the wife remarried without a valid divorce in the sense that it was not granted with the consent of the husband. But it seems to me that in those castes where the custom of divorce exists and where the consent of the spouse, who is to be divorced, has been proved, it would be permissible for the other spouse, if she is the wife, to remarry, and such custom of divorce cannot, in my opinion, be regarded as contrary to Hindu law.

3. Mr. Purshottam on behalf of the appellant contends that the institution of divorce itself is opposed to the spirit of Hindu law, and that there is no decision of any Court in India which holds a custom of divorce as valid. I think that would be going too far. As observed in Tagore Law Lectures, 1908, on Customs and Customary Law in British India, "divorce is not contemplated by the Hindu law but it is not repugnant to its principles, and if there be a well established custom in its support, it may override the general provisions of that law." Sir William Strange in his treatise on Hindu law also says that in the lowest classes divorce is attainable between a husband and wife provided it is allowed by the custom of, the caste. There have been many cases in our Courts arising out of divorce in the lower castes. In all these cases even where it is held that the divorce had not been properly granted, it has been taken for granted that the custom of divorce can validly exist in a particular community, especially if it is a shudra community, but that divorce could not be forced by the caste against the unwilling person. In *Rahi v. Govind*[2] it was held that a shudra woman, who was married to another person by pat marriage, without having received a chhor chiti (i.e. release) from her first husband, could not validly remarry another person because there was no valid divorce. At page 114 of the judgment there is a quotation from Steele's Law and Customs of Hindu Castes to the effect that "all the lower castes admit the second marriage of wives in particular instances, and of widows, the ceremonies at which differ

in many respects from those at a first marriage." There is also a reference therein to instances in which it was allowed, in the cases of women whose husbands were living; but in such cases the proper course would appear to be for the first husband to give the wife a chhor chithi, or a writing of divorcement, and generally the concurrence of the caste was required, but not invariably. On the particular facts of that case, it was held that the consent of the husband had not been obtained, and that, therefore, the divorce was invalid, but it was observed that in the lower castes especially the custom of divorce by giving a chhor chithi was in existence. Similarly, the decision, in *Reg. v. Sambhu Raghu*[3] also proceeds on the ground that the consent of the husband had not been obtained, and it was observed:--"The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry." The decision in Emperor v. Bai Ganga (1916)19 Bom. L.R. 56 also proceeds on the same ground. There the husband was absent in South Africa and it was held that the caste had no authority to grant divorce without his consent. On the other hand, it has been held in *Sankaralingam Chetti v. Subban Chetti*[4] that there is nothing immoral in a caste custom, by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage. I may state that there is a recent decision of the Privy Council in *Gopi Krishna Kasaudhan v. Musammat Jaggo*[5] in which their Lordships confirmed the finding of the trial Court to the effect that in the community of the parties, who were vaishyas, it was proved that abandonment or desertion of the wife by her husband dissolves the marriage tie, and sets her free to contract another marriage. It is true that it was not contended there that the custom, especially in the regenerate classes, was against Hindu law. Nevertheless, it is remarkable that such' a plea had not been taken if that custom was supposed to be against the spirit of Hindu law.

4. In my opinion, the lower Court has rightly distinguished the decision in Keshav Hargovern v. Bai Gandi, on the ground that there the consent of the husband was not taken by the caste and here the consent has been proved. It would have been another matter if it had been proved that the caste procured the husband's consent by pressure or coercion, but there is no evidence to show that, and it seems to have been a free and voluntary consent.

5. It is next argued that the lower Court was wrong in holding the custom proved in this particular community. It is not clear on the evidence as to whether the persons belonging to the Pakhali caste are shudras or kshatriyas. Some have described themselves as Rajput Pakhalis. In Borrodaile's Gujarat Caste Rules, Vol. II, there appears to be a statement to the effect that in this Pakhali caste there was no system of natra, i.e. re-marriage, during the husband's life-time, and that it is not the practice for a wife to dissolve the marriage tie during the husband's lifetime. In the book on Tribes and Castes of Bombay by R.E. Enthoven, Vol. I, there is a reference to the Pakhali caste. It is there observed as follows with regard to this community (p. 180):--
A husband can divorce a wife on the ground of her misconduct. A wife can divorce a husband if he ill-treats her. A divorced woman has to pay a fine of from Rs. 100 to 200 to the caste-people in order to remain in the caste.

6. In the present case, the learned Judge has held, relying upon the instances adduced by the defendant, that the custom of granting divorce in this community does exist, and as the consent of the husband has been given, it would not be against the spirit of Hindu law.

7. In my opinion, therefore, the lower Court was right in holding that in the present case the custom of divorce has been proved, that the consent of the husband has also been proved, and that therefore the divorce being legal and valid, the plaintiff is not entitled to the relief of restitution of conjugal rights.

8. The decree of the lower appellate Court is, therefore, confirmed and the appeal is dismissed with costs.

Cases Referred.

1(1915) I.L.R. 39 Bom. 538, s.c. 17 Bom. L.R. 584
2(1875) I.L.R. 1 Bom. 97
3(1876) I.L.R. 1 Bom, 347
4(1894) I.L.R. 17 Mad. 479
5(1936) L.R. 63 I.A. 295