

[2023 LiveLaw \(SC\) 848](#)

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
SURYA KANT; J., DIPANKAR DATTA; J.

September 18, 2023

CRIMINAL APPEAL NO.2905 OF 2023 (Arising out of SLP(Criminal) No.968 of 2023)

SANJANA KUMARI versus VIJAY KUMAR

Hindu Marriage Act, 1955; Section 29 (2) - A Hindu marriage can be dissolved through a customary divorce deed, provided the existence of such a customary right is established. (Para 6)

(Arising out of impugned final judgment and order dated 31-08-2022 in CRMMO No.428/2019 passed by the High Court Of Himachal Pradesh At Shimla)

For Petitioner(s) Mr. Ajay Marwah, AOR Mr. Karan Thakur, Adv. Mr. Swaroopanand Mishra, Adv.

For Respondent(s) Mr. Sudhir Thakur, Sr. Adv. Ms. Shagun Thakur, Adv. Ms. Ameyavikrama Thanvi, AOR

ORDER

1. Leave granted.

2. The High Court of Himachal Pradesh vide impugned order dated 31.08.2022, has, in exercise of its power under Section 482 of the Code of Criminal Procedure, 1973, quashed the order dated 31.05.2019 passed by the Judicial Magistrate First Class, Kandaghat, District Solan, H.P., whereby an application moved by the respondent-husband for dismissing the Complaint filed by the appellant under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short "D.V. Act"), was rejected. Consequently, the High Court has quashed the complaint filed by the appellant under Section 12 of the D.V. Act. The High Court has also set aside the order of the Judicial Magistrate, whereby interim maintenance of Rs.3000/- per month was granted to the appellant.

3. It is not in dispute that the marriage between the parties was solemnized on 11.03.2011. The respondent claims that a "Customary Divorce Deed" was executed between the parties on 05.01.2014, which is duly signed by them, parents of the appellant, father of the respondent, and the members of the Gram Panchayat. The respondent, thereafter, entered into a second marriage on 02.04.2018.

4. The appellant then filed a complaint against the respondent on 18.06.2018 before the local police, which was forwarded along with a report to the Judicial Magistrate First Class, Kandaghat, resulting in the initiation of proceedings against the respondent under Section 12 of the D.V. Act. The respondent moved an application for dismissal of the above-stated complaint and relied upon the customary divorce deed dated 05.01.2014. The learned Judicial Magistrate turned down the said application and further granted interim maintenance of Rs.3,000/- per month to the appellant.

5. The above-stated order was successfully challenged by the respondent before the High Court, primarily on the strength of the customary divorce deed said to have been executed between the parties on 05.01.2014.

6. There is no doubt that Section 29(2) of the Hindu Marriage Act, 1955 (for short, 'the 1955 Act') provides that, "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". While construing the effect and import of the above provision, this Court has held time and

again that spouses can have a valid divorce through a customary divorce deed, provided they prove that it was an established custom.

7. In **Yamanaji H. Jadhav v. Nirmala , (2002) 2 SCC 637**, the wife had filed a suit for declaration and pleaded that the customary divorce deed entered into by her was invalid in law. Having found that the lower court did not deal with the issue of validity of customary divorce properly, this Court remanded the matter to the trial court observing as follows:-

“7. In the view that we are inclined to take in this appeal, we do not think it is necessary for us to go into the contentions advanced by the learned counsel for the parties in this case, because we find that the courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties to this litigation belong to. 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 the 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. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. In the instant case, we have perused the pleadings of the parties before the trial court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was ever pleaded by the defendant as required by law or any evidence was led in this case to substantiate the same. It is true that in the courts below 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 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 consequences of there 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...”

(Emphasis supplied)

8. In **Subramani v. M. Chandralekha, (2005) 9 SCC 407**, a property dispute arose in which the respondent claimed right over the property by virtue of being married to one Kandaswamy. The appellant argued that she did not have the right because she was divorced by a customary divorce deed. In this context, this Court held that:-

“9. It is not disputed before us that as per Hindu law 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. Hindus after the coming into force of the Hindu Marriage Act, 1955 (for short “the Act”) can seek to put an end to their marriage by either obtaining a declaration that the marriage between them was a nullity on the grounds specified in Section 11 or to dissolve the marriage between them on any of the grounds mentioned in Section 13 of the Act. Section 29 of the Act saves the rights recognised by custom or conferred by special enactment to obtain the dissolution of marriage, whether solemnised before or after commencement of the Act...

10. It is well established by a long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. The High Court came to the conclusion that the appellants failed to either plead the existence of a custom in their community to dissolve the marriage by mutual consent or to prove the same by leading cogent evidence.”

(Emphasis supplied)

9. To the same effect is the view taken by a coordinate Bench in **Swapnanjali Sandeep Patil v. Sandeep Ananda Patil, (2020) 17 SCC 510**.

10. There can be thus no doubt that the party who places reliance on customary divorce deed is obligated to establish that such custom is allowed by a practice that has been uniformly observed for a long time and such custom is not unreasonable or opposed to public policy and thus the validity of such customary divorce is duly protected by the exception carved out in Section 29(2) of the 1955 Act.

11. The issue whether the parties are governed by the custom under which a divorce can be obtained without recourse to Sections 11 and 13 of the 1955 Act, is essentially a question of fact which is required to be specifically pleaded and proved by way of cogent evidence. Such question can ordinarily be adjudicated only by a civil court. May be in the peculiar facts and circumstances of a case, the validity of a customary divorce deed can be examined even by a court other than the Civil Court in some collateral proceedings. But that is not the question which falls for our consideration in these proceedings.

12. It is apparent in the instant case that the proceedings under the D.V. Act are still pending final adjudication. Even if assuming that the learned Judicial Magistrate is vested with jurisdictional competence to determine the validity of a customary divorce deed, yet no such determination could take place merely on an application moved by the respondent-husband. The respondent is obliged to lay proper foundation in pleadings, impeccable evidence to prove long time custom and then establish that their marriage was validly dissolved by resorting to customary rights. Unless the respondent proves prevalence of the custom in conformity with public policy and consequential enforceability of the divorce deed dated 05.01.2014, there is a statutory presumption of subsisting marriage between the parties. In that case, the complaint under the D.V. Act cannot be quashed at the threshold, on the ground of its nonmaintainability. The High Court thus legally erred in assuming the validity of customary divorce deed 05.01.2014 and then in proceeding to quash the proceedings under the D.V. Act on the premise that the parties are no longer legally wedded husband and wife. Such an inference can be drawn only after the respondent successfully proves the validity and enforceability of customary divorce deed dated 05.01.2014. We reiterate that the onus to prove the customary divorce deed lies on the respondent who is relying upon the same, and on the appellant to prove to the contrary.

13. For the reasons afore-stated, however, without expressing any views on the validity of the customary divorce deed dated 05.01.2014, we allow this appeal in part; set aside the impugned order dated 31.8.2022 and remit the case to the High Court to decide CRMMO No.428 of 2019 afresh without placing any reliance on the customary divorce deed dated 05.01.2014. In other words, the question of validity of the customary divorce deed dated 05.01.2014 shall be left to be determined by the court of competent jurisdiction, in accordance with law. As a necessary consequence, the interim maintenance granted to the appellant by the learned Judicial Magistrate on 31.05.2019 is restored. The arrears, if any, shall be paid by the respondent within one month. The parties are directed to appear before the High Court on 30.10.2023.