Delhi High Court
Balwinder Singh vs Gurpal Kaur on 14 August, 1984
Equivalent citations: AIR 1985 Delhi 14, 1985 (8) DRJ 66, 1984 RLR 653
Author: J Jain
Bench: J Jain
JUDGMENT J.D. Jain, J.

(1) This appeal is directed against judgment and decree dated 8th April 1982 of an Additional District Judge (Miss Usha Mehra), whereby she declared the marriage solemnised between the parties on 7th April 1975 in accordance with Hindu rites and ceremonies (Anand Karaj) as null and void and granted a decree of nullity of marriage in favor of the respondent wife.

(2) The undisputed facts of this case are that the marriage between the appellant and the respondent was solemnised in accordance with Hindu rites and ceremonies (Anand Karaj) on 7th April 1975 at Sant Nagar, New Delhi. The parties lived together as husband and wife uptil 26th April 1977. There is no issue out of the wedlock although the respondent conceived from the appellant twice or thrice but there was abortion every time. On 19th November 1979 the respondent made a petition under Section 11 of the Hindu Marriage Act (hereinafter referred to as the Act) for a declaration that the marriage between the parties was null and void inasmuch as the appellant had a living spouse at the time of their marriage. It was averred that at the time of their marriage the appellant had represented that his earlier marriage with Smt. Paramjit Kaur had been validly dissolved but she came to know later on that Smt. Paramjit Kaur was still alive and that her marriage with the appellant had not been dissolved in accordance with law. Hence the marriage between the parties was null and void being against the specific prohibition contained in Section 5 of the Act-

(3) The petition was contested tooth and nail by the appellant who took the stand that his marriage with his first wife Smt. Paramjit Kaur had been duly dissolved in accordance with customs whi (4) In her replication the respondent denied the existence of any custom or usage having the force of law under which the first wife of the appellant could be divorced otherwise than in accordance with the provisions of the Act. She further asserted that no written document dissolving the marriage between the appellant and his first wife was ever shown to her or her kith and kin before she was married with the appellant. The learned Additional District Judge has found that the evidence adduced by the appellant was not sufficient and reliable enough to establish the existence of the customs amongst the sikh Jats of Distt. Amritsar to which District the appellant and his parents belong, under which the marriage between the appellant and his previous wife could be dissolved otherwise than through court as per the provisions of the Act. Hence, she has held that the marriage between the appellant and his first wife Smt. Paramjit Kaur was still subsisting when the marriage between the parties was solemnised and as such it was null and void.

(5) I have heard the attorney of the appellant at length and gone through the entire evidence on the record. However, there is no appearance on behalf of the respondent despite due service. Repeated efforts were made to send actual date notices also by registered A.D. post but in vain.

(6) Section 5 of the Act lays down the conditions precedent for solemnisation of a Hindu marriage, one such condition being that that a marriage may be solemnised between any two Hindus if neither party has a spouse living at the time of the marriage. It is thus manifest that in case the marriage of the appellant and his previous wife had not been dissolved legally and validly, it would be deemed that he had a spouse living at the time of his second marriage with the respondent. As a necessary corollary the marriage between the parties will have to be held to be null and void. So, the most crucial question which falls for determination in this appeal is whether there exists a custom or usage having the force of law amongst the sikh Jats of District Amritsar, to which District the appellant belongs, under which the marriage between the appellant and his first wife could be legally dissolved otherwise than under the provisions of the Act. Incidentally it also raises a question as to whether such a customs, if established, would still survive notwithstanding the provisions of Section 4 which gives over-riding effect to the provisions of the Act and in effect repeals all existing laws whether in the shape of an enactment, customs or usage etc. which are inconsistent with the Act. The said Section opens with the words "Save as otherwise expressly provided in this Act." These words make it abundantly clear that the matters expressly saved from the operation of the Act, continue to be governed by the previous law, statutory or otherwise Section 29 of the Act contains savings. Its Sub-section (2) reads as under :

"Nothing contained in this act shall be deemed to affect any right recognised by customs or conferred by any special enactment to obtain the dissolution of Hindu marriage, whether solemnised before or after the commencement of this Act."

(7) On a plain reading of this sub-section it is manifest that a marriage may still be dissolved in accordance with a custom governing the parties or under any other law providing for the same. The opening words of this Subsection "Nothing contained in this Act shall be deemed to affect any right" leave no room for doubt that the provisions of the Act do not nullify that existence of any custom which confers a right on a party to obtain dissolution of a Hindu marriage. Thus, the validity of any customs recognising the right to dissolve a marriage is expressly saved by this sub-section. As a necessary corollary it follows that it would not be necessary for the parties in any such case to go to court to obtain divorce on grounds recognised by custom and it would be open to dissolve the marriage out of court in accordance with such custom. The custom must, of course, be a valid custom. It would be pertinent to notice here that dissolution of marriage by divorce is unknown to Hindu Law. However, in certain communities divorce was recognised by custom and the courts upheld such custom when it was not opposed to public policy. Obviously it is in this background that the social customs and usages which have on account of continuous and uniform observance over the years acquired force of law amongst certain communities have been expressly saved by Sub-section (2) of Section 29. The net result will be that a Hindu marriage may be now dissolved either under Section 13 of the Act or under any special enactment or in accordance with any custom applicable to the parties. Reference in this context may be made with advantage to Rano Devi v. Rishi Kumar, (1981) 1 Divorce and Matrimonial Case 357, in Which a learned Judge of Jammu and Kashmir High Court took a similar View. Says he :

"IT(Section 29(2) clearly says that a marriage may be dissolved in accordance with a customs governing the parties, or under any other law providing for the same. This sub-section is couched in

a strong language and says that notwithstanding anything contained in the act including Sections 4 and 13, a Hindu marriage may be dissolved even under the customary law of the parties, by adopting a mode different from the one provided under the Act. This is what has happened here also. Instead of approaching the District Court in a petition under Section 13, the parties by mutual agreement, dissolved their marriage by executing a deed of divorce a moder permissible under the custom followed by them."

(8) Thus, Section 29(2) of the Act does not disturb the petition a customary divorce occupied before the Act came into force. In order, however, that the exception carved out by Section 29(2) operates, it must be found- as a tact that there had been, in fact, such customary divorce or dissolution of a Hindu marriage.

(9) That brings me to the main question, viz. whether there exists a custom amongst the sikh Jats of District Amritsar, to which the appellant and his parents belong, under which he could validly dissolve his previous marriage with Paramjit Kaur. Para 72 of "Digest of Customary Law" by Sir W.H. Rattigan which has been always treated as an authoritative exposition of the custom prevailing in Punjab and has been accepted as such by courts in India runs as under :

"Amongest Mohammadans of all classes a man may divorce a wife without as signing any reason ; but this power' in the absence of a special custom, is not allowed to Hindus, nor to females of any class."

(10) Obviously this paragraph is in complete accord with the notions of general Hindu Law. So, it cannot be said that there is any general custom amongst Hindus which recognised or permitted dissolution of marriage between Hindus. At the same time) existence of any special custom to that effect is not ruled out and if any special custom under which divorce can be resorted to even by the Hindus is established it will certainly have the force of law. In the remarks recorded by Rattigan below this paragraph, it is stated that amongst the Hindu Jats of erstwhile Malerkotla State the customs of divorce was permissible. He has further noticed that in all the districts surrounding Jullundur the custom of divorce prevails in almost identical terms. The husband is entitled to turn out his wife and if he does so, she is entitled to re-marry He has cited certain reported cases in support of this view. The aforesaid paragraph was noticed by the Supreme Court in Gurdit Singh v. Mst. Angrez Kaur & others, . The parties in that case were residents of District Jullundur and a question arose whether in that district a Hindu Jat could divorce his wife. On a consideration of the aforesaid paragraph and the remarks recorded by Rattigan there under their Lordships of Supreme Court said that :

"INRattigan's book. by itself, we are unable to find any proposition laying down that, in the district of Jullundur, there is any custom among Hindu Jats permitting divorce as claimed by respondent No. 1 .....Rattigan's book on 'Customary Law' in these circumstances, appears to us to be of little help in arriving at a conclusion about the existence of a custom on divorce amongst the Jats in Jullundur District"

(11) Reliance was also placed in the said case on the entry in Riwaj-i-am that the customs divorce among Hindu did not exist in Jullundur District. However, Riwaj-i-am of the Jullundur District was not considered as a re- , liable or a trustworthy document. The Supreme Court, therefore, taking note of the entries in the Riwaj-i-am of the neighbouring districts and relying on oral evidence of instances of divorce amongst Hindus held that a custom existed among the Hindu Jats of Jullundur District which permits a valid divorce by a husband of his wife which dissolves the marriage. The following observations of their Lordships are very pertinent to note :

"The first piece of evidence consisted of the Riwaj-i-am of the neighbouring districts where there was a clear record that the custom of divorce among Hindu Jats existed. The existence of such a custom in the neighbouring districts, which surround the Jullundur District all around, is certainly a relevant consideration for an inference that such a custom may be prevalent in the Jullundur District also, particularly in view of Rattinga's opinion that the custom is primarily tribal though also local."

(12) These observations manifestly show that the existence of a custom permitting dissolution of marriage by divorce amongst Hindu Jats does obtain in the districts surrounding Jullundur District. Admittedly District Amritsar adjoins District Jullundur. Similarly, districts Hoshiarpur and Ludhiana adjoin District Jullundur. No doubt, the appellant has not placed on record the Riwaj-i-am of any of these districts but their non-production would not warrant any adverse inference against him because from the foregoing observations of their Lordships it is manifest that such a custom does exist in the districts surrounding Jullundur which would naturally include District Amritsar. The learned Additional District, Judge, therefore, slipped into an error in drawing an adverse inference against the appellant on account of non-production of Riwaj-i-am of District Amritsar by him and in taking the view that the observations of the Supreme Court did not specifically refer to District Amritsar and were too general in nature. It may, however, be pertinent to notice here some cases in which the prevalence of such a customs was judicially recognised. In Mst. Jassan v. Nihala & others, 78 Punjab Record 1889, it was held that among Bajwa Jats a custom of divorce exists and that after a divorce in writing the divorced wife can enter into a valid marriage. In Sunder v. Nihala & others, 84 Punjab record, 1889, the question was if similar custom obtained amongst Chimmah and Ghumman Jats of Sialkot. Their Lordships answered the question in the affirmative. They inter alia, adverted, to Mst. Jassan's case (supra) in this context. Both these authorities were subsequently followed by Harrison and Addison, JJ. in Basant Singh & mother v. Bhagwan Singh & another, Air 1933 Lahore 755, which was also a case of Sialkot district. Their Lordships, inter alia, observed that "Jats notions of sexual merality are lax."

(13) Lachu v. Dal Singh, 33 Punjab Record 1896 was a case of Ghuman (Hindu) Jats of Gurdaspur District. It was not, strictly speaking, a case of divorce but Mst. Chandi who was originally wife of one Kharak Singh had gone to live with one Ishar Singh after the former had left her and his village. In these circumstances, it was held that there had been such a repudiation of the wife by the husband as amounted to a divorce. Said Roe, Chief Justice:

"Divorce is not recognised eo, nomine by Hindu Jats. On the other hand, they are certainly not bound by the Hindu Law, which refuses to recognise divorce or widow marriages. The Hindu Jats

are governed by their own tribal law... ... .It is in no way repugnant to the spirit of this law that a man who takes a wife should have the power or repudiating her, and that, when so repudiated she should be free to many another man. That custom acknowledges this power is clear ....."

(14) Ishar Singh & others v. Budhi & another, 177 Punjab Law Reporter 1913, is another case of sikh Jats of Gurdaspur District. Following Lachu's case (supra), it was held by their Lordship that :

"We find it proved that Mussammat Budhi was expelled and repudiated by Ganda Singh and we think that by customs this left her free to marry again."

(15) From these and other authorities cited by Rattigan in paragraph 72 of his 'Digest of Customary Law' it is abundantly clear that among sikh Jats who held very liberal views on questions relating to marriage and whose notions of sexual morality are lax, dissolution of marriage by divorce or even by mere repudiation of wife by husband is well recognised by custom. Significantly, the respondent in the instant case belongs to Bajwa community and there is no reason to assume that their community would not be governed by the same custom which obtains amongst Bajwa Jats of District Sialkot. As observed by the Supreme Court in Gurdit Singh's case (supra), custom is primarily tribal through also local.

(16) Besides that, the appellant has adduced oral evidence to prove various instances of dissolution of marriage by divorce by means of a written document pertaining to District Amritsar itself. Ex. Rw 2/1 (also Ex. RW/6 1) is an affidavit jointly sworn by S/Shri Niranjan Singh Gill (RW 2), Joginder Singh (RW 8) and Sardul Singh (RW 7) in which they have recited as many as 22 instances of District Arnritsar relating to dissolution of marriage out of court by a written instrument or otherwise in accordance with the alleged custom obtaining amongst the sikh Jats of the said District. All the three persons have deposed to the correctness of these instances during their examination in chief in court. During his cross-examination Niranjan Singh stated that Teja Singh S/o. Mohan Singh tor, daughter of Harbans Singh. Lamberdar and daughter of Joginder Singh had obtained divorce outside the court. However, he admitted that no divorce took place in his own brotherhood either through court or out of court. Suraj Singh (RW 3) also deposed that in Jat families the divorce outside courts was permissible as per custom. He asserted that he was a Jat by caste but he expressed his inability to give any instance of his brotherhood or relatives who had sought divorce outside the court. Shri Joginder Singh (RW 6) is a resident of the same village Varna to which the appellant belongs. His Gotra too is the same, viz., Sarain. He, inter alia, deposed that Lehna Singh Chaudhary, who is Member Parliament had contracted second marriage after the dissolution of his first marriage outside court. During cross-examination he asserted that his own daughter obtained divorce outside the court when she was about 17/18 years. He had brought the document to prove the factum of dissolution of his daughter's marriage by means of written document outside court but there was no further cross-examination with regard to the same. Similarly Sardul Singh (RW 7), who belongs to the same village as appellant and is of same Gotra while testifying to the correctness of the affidavit (Ex. Rw 6/1), asserted that Lachhman Singh, Member Parliament, who belongs to their caste, had obtained divorce from his wife outside the Court. During his cross-examination he explained that the said customs had been in existence since time immemorial. He further amplified that daughters of Lachhman Singh and Bachan Singh, who were his real uncles, had also obtained

divorce outside the court. Harbans Singh (RW 8) is a Sikh Jat belonging to village Mehta in District Amritsar. He too has lent support to the appellant's case about the existence of a custom under which a sikh Jat can obtain divorce outside the court. According to him, one Harbhajan Singh, who too belonged to his village got a divorce in the Panchayat outside the Court. Further his own brother-in-law got divorce outside the court. During cross-examination he explained that Harbhajan Singh was living next door to him in village Mehta. He was born and brought up in that very village and his ancestors too had been living there. However he could not give any other instance of divorce outside the court. Swaran Singh (RW 9) is also a resident of village Varna to which the appellant belongs. He deposed that his aunt got divorce outside the court. During cross-examination he stated that his aunt was about 35 years of age but he did not know at what age she got married. He also admitted that the divorce of his aunt did not take place in his presence but asserted that the said fact was told to him by his aunt herself. Further he corroborated the testimony of Joginder Singh that his daughter Gurdeep Kaur had obtained divorce outside the court. He went to the extent of saying that no one from their village ever went to the court to seek divorce.

(17) As against this, the respondent and her witnesses have simply denied the existence of any such custom. Gopal Singh (Public Witness 4) is an ex-police employee. He is a Sikh Jat and is resident of village Beriyan District Amritsar. He asserted that there was no custom prevailing in his village under which divorce could be sought outside the court. Similarly, Ajit Singh Grewal (Public Witness 5), who is a practicing advocate at Jullundur, deposed that there was no custom prevailing amongst sikh Jats of District Jullundur under which divorce could be obtained outside the court. 'During cross-examination he went to the extent of saying that there is no customary law in Punjab of taking divorce outside the court by sikh Jats. However, he conceded that there may be such a custom in other communities. Obviously, the deposition of this witness runs counter to the decision of the Supreme Court in Gurdit Singh's Case (supra) and no weight can, therefore, be attached to his testimony.

(18) The learned Additional District Judge has rejected the evidence of various RWs, adverted to above, on the grounds that (1) Riwaj-i-am of District Amritsar had not been produced (ii) the instanced given by various RWs were quite recent whereas the customs must be proved to be so ancient and immemorial that the memory fails to remember its origin and that (iii) neither the appellant nor his witnesses explained that the aforesaid customary law was applicable to the sub-caste i.e. Sarain Gotra, to which the appellant belonged. These observations apparently stem from mis-reading of evidence. It bears repetition that the sub-caste of Joginder Singh (RW 6) and Sardul Singh (RW 7) is the same as that of the appellant. They hail from the same village and are members of the same brotherhood. They have given specific instances of their own close relatives i.e. daughter of Joginder Singh and cousin sisters of Sardul Singh, who had obtained divorce outside the court. I see no reason to doubt the veracity of their testimony which has been virtually allowed to go unchallenged in this respect. The other witnesses too have given some specific instances mentioned above. Under these circumstances, it was not at all necessary for the appellant to examine the persons who were parties to the dissolution of marriage under customary law personally. It is enough that the testimony of the witnesses actually examined is based on personal knowledge. Their evidence cannot be discarded as mere heresay. It may be pertinent to observe that under Section 48, Evidence Act opinion evidence of a witness on the existence of a family or

community custom is admissible. One of the modes of proving custom is by the opinion of persons likely to know its existence. His personal knowledge is only relevant for determining the weight to be attached to his evidence. The weight of his evidence would naturally depend on the position and character of the witness and of the persons on whose statements he has formed his opinion but he cannot be confined to instances in which he has personally known the usage or custom exercised as a matter of fact. In Ahmad Khan & Other v. Mst ChanniBibi, Air 1925 Privy Council 267, it was held that :

"Atribal or family custom excluding a daughter or sister from inheritance, in favor of collaterals may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. No specific instances need he proved."

(19) Reference in this context may be made to Garurudhwaja Parshad Singh v. Saparandhwaja Parshad Singh, (1900)10 Madras Law Journal 267, in which it was held by the Privy Council that an opinion of a witness as to the existence of a family custom based upon information derived from deceased persons is relevant and admissible in evidence. The instant case stands on a very firmer footing inasmuch as PWs 6, 7 and 8 have given instances of per- sons who are closely related/well acquainted with them and naturally they would be having personal knowledge about the same. That apart, as observed above, the observation of the Supreme Court about the prevalence of such a customs in the districts surrounding Jullundur District render it highly problem that such a custom must be in vogue in District Amritsar. In other words, the evidence of these witnesses derives sufficient support from the observations of their Lordships of the Supreme Court and the decided cases alluded to by me above.

(20) The upshot of the whole discussion, therefore, is that there is ample oral as well as other evidence on record to warrant the conclusion that there does exist a custom amongst sikh Jats of District Arnritsar under which a marriage can be dissolved out of court preferably through a written instrument. The very fact that dissolution of marriage amongst sikh Jats of that district has been taking place even after the enactment of the Act is in itself a strong proof of its recognition by the community concerned. It would show that despite the relief of dissolution of marriage by divorce being available under the Act people still prefer to resort to customary law rather than seek redress in a court of law under the Act. So, the mere fact that the appellant has not furnished any old instance would not undermine the evidentiary value of the instances cited by various witnesses in court ; rather they tend to establish beyond doubt that such a custom is firmly rooted and is still prevalent despite the remedy of divorce being available under statutory law. Hence, I hold accordingly.

(21) Lastly, it is to be seen whether there has been, in fact, dissolution of marriage between the appellant and his former wife Smt. Paramjit Kaur, as alleged. Reliance in this context is placed by the appellant on the divorce deed dated 2nd of December 1972 (Ex.R1/A) which was executed between him and his previous wife. It is duly attested by a notary public. The appellant has, inter alia, deposed that the said deed was executed at Delhi and it was signed by him, his father, his first wife and her lather. The learned Additional District Judge however seems to have doubted due

execution of this document and has observed that this document being in favor of the appellant himself he could not have proved the same by his own testimony alone and he ought to have examined any of the attesting witnesses, especially when neither Smt. Paramjit Kaur nor any of her relatives was summoned by him to prove the factum of divorce by mutual consent. Obviously she has slipped into a grave error of law in discarding the evidence of the appellant on this score. There is no requirement of law that an attesting witness to a document like an agreement of divorce must be examined to prove its execution. Further no obligation was cast on the appellant to call either Paramjit Kaur or some relation of hers to prove the factum of divorce. Indeed, the document or the factum of dissolution of marriage between the appellant and Paramjit Kaur has not been called in question by the latter. She is not even a party to this litigation. Prima facie, therefore, the testimony of the appellant himself must carry full weight and there is no reason to doubt his credit worthiness on this point. If at all it was for the respondent to have called Paramjit Kaur or any other witness to rebut the evidence of the appellant, especially when, according to her, it was from Paramjit Kaur herself that she came to know that she (Paramjit Kaur) had not been legally divorced and that she was still legally wedded wife of the appellant. Indeed, this assertion of the respondent appears to be highly doubtful because it is nobody's case that after the marriage of the appellant with the respondent, Paramjit Kaur ever endeavored to come and live with the appellant. Only the daughter of Paramjit Kaur from the appellant and been living with them ever since their marriage. It certainly passes one's comprehension that Paramjit Kaur would not have made an attempt to live with the appellant or claim maintenance from him if she had not been divorced in accordance with customary law. Indeed, the whole case of the appellant is that some litigation was going on between him and his first wife when they agreed to dissolve their marriage by mutual consent. He has deposed that he had filed an application for restitution of conjugal rights whereas she had made an application for grant of maintenance. These facts have been recited in details in Ex. R 1/A itself. Further it may be noticed that according to Niranjan Singh (RW 2), Smt. Paramjit Kaur had re-married at village Jhubal, District Amritsar about seven years ago. He has asserted that he met Smt. Paramjit Kaur at Taran Taran and she has got a child from her second marriage. For reasons best known to the respondent, the deposition of this witness on this point has been allowed to go unchallenged. Under these circumstances, I see no reason whatsoever to doubt the credibility of appellant's deposition with regard to the factum of dissolution of his marriage with Paramjit Kaur as also the execution of the deed of divorce. Ex. R 1/A, by both of them. Since, it is respondent's own case that the factum of divorce had been duly intimated by the appellant to her brother etc. before her marriage with the appellant, the question of any fraudulent concealment or suppression of true facts does not arise.

(22) To sum up, therefore, this appeal succeeds. The judgment as well as decree under appeal is hereby set aside and the petition of the respondent for divorce is hereby dismissed with costs.