Gujarat High Court
Bai Jivatbai Jethmal vs Milkiram Deepchand And Anr. on 7 September, 1960
Equivalent citations: 1961 CriLJ 469
Author: Raju
Bench: Miabhoy, Raju
JUDGMENT Raju, J.

1. This is an appeal by one Bai Jivatbai agairtst the acquittal of respondents Nos. 1 and 2 by the learned Sessions Judge of Bhavnagar, who set aside their conviction by the learned First Class Magistrate Bhavnagar, who had convicted respondent No. 1 under Section 494, Indian Penal Code, for having contracted a marriage with respondent No. 2 during the life time of the first wife Bai Jivatbai, the complainant present appellant. He convicted respondent No. 2 for having abetted respondent No. 1 in the offence of contracting a second marriage with her.

2. The appellant's case was that her husband, respondent No. 1 had on 28-7-57 contracted a second marriage with respondent No. 2 which was bigamous. She examined herself and witnesses to prove the second marriage of respondent No. 1 with respondent No. 2 and also to prove that there was no customary right of divorce in the community to which the parties belonged, viz., Sindhi Lohana. The defence was that the first marriage between respondent No. 1 and the complainant was dissolved by a 'Farkati' Ex. 11, which was executed by the complainant herself and attested by her father and by some elders of the community. The defence examined witnesses to prove that in their community there was a customary right of dissolution of marriages by customary divorce. As regards the Farkaty Ex. 11, on which the defence places reliance, and which had been produced by the complainant herself, the case of the complainant was that when she executed that document, she was under the impression that it related to arbitration and that the execution of this Farkati deed was brought about by mis-representation and deception. In this connection, the complainant had filed another complaint No. 705/57 against her Husband and others for cheating her and for fraudulently taking her thumb impression on the divorce deed, Ex. 11. The accused in that case were discharged, and a revision application made to the High Court against the order of discharge was dismissed by the High Court. The learned Magistrate who tried the complaint for bigamy believed the witnesses produced by the complainant, disbelieved the defence witnesses and held that there was no customary right of dissolution of marriages by divorce, that the marriage between the respondent No. 1 and respondent No. 2 on 28-7-57 was proved and that therefore respondent No. 1 was guilty under Section 494, Indian Penal Code. He convicted respondent 2, the second wife, under Section 494 read with Section, 114, Indian Penal Code, for having abetted the first respondent. In appeal, the learned Sessions Judge held that the custom of divorce in the community of the parties was proved by the defence witnesses and also by Ex. 36, the priest, who was examined for the complainant. Having held that a custom of divorce had been proved, the learned Sessions Judge acquitted both respondent No. 1 and respondent No. 2. The original Complainant Bai Jivatbai has now come in appeal to the High Court and challenges the order of the learned Sessions Judge, acquitting both the respondents.

3. It is urged by the learned Counsel for the appellant that the prosecution witnesses are all elders of the community, that they testify to the absence of any customary right of divorce, that even the

defence witnesses have refered to instances of divorce not earlier than 15 years prior to their deposition in 1957, that in the case of custom, it must be ancient, and that in the instant case it is not proved that the custom was ancient. He also contends that the burden of proving the existence of a valid customary right of divorce is on the accused. He also contends that this burden is on accused under Section 106 of the Evidence Act. The learned Counsel for the appellant does not urge that the Farkati Ex. 11 had not been executed voluntarily.

4. In reply, the learned Counsel Mr. C.N. Shah for the respondents, has raised the following contentions:

1. That the customary right of divorce has been proved by both the complainant and the defence witnesses: (2) that at least there is reasonable doubt as to the existence of the custom and in view of the reasonable doubt, the accused were rightly acquitted by the learned Sessions Judge; and (3) that when a person is alleged to have committed a criminal offence, it is necessary to prove mens rea. The complainant herself has produced the Farkati deed at Ex. 21, on which she is said to have put her thumb impression. In that deed it is stated that there was a customary right of divorce in the community.

It is therefore contended that the complainant, who has admitted the existence of a customary right of divorce, cannot now prosecute the accused. It is also contended that in the complaint also it is stated that no Farkati was passed by the complainant. It. is urged that this should be read as an admission by the complainant that there was a customary right of divorce and the right of parties to dissolve their marriages by Farkati deeds,

5. We hold that in this case there are no compelling reasons to set aside the order of acquittal of respondents Nos. 1 and 2 for the following reasons: No doubt, the witnesses for the complainant have testified to the absence of any custom of divorce in the Sindhi ohana Community to which the appellant and the respondents Nos.1 and 2 belong. In her complaint and in her evidence the complainant has stated that there is no custom of the divorce in their Community, The mere tact that she had stated in the complaint that no Farkati had been passed by her cannot be treated as an admission that there was a customary right of divorce by Farkati in the community. In any case such an admission in the complaint cannot be conclusive in a criminal case when both the complainant and the defence have actually led voluminous evidence to prove the existence and non-existence of such a custom. Similarly, the statement in the Farkati deed that there is a customary right of divorce may be taken into consideration. But, it cannot be conclusive in a criminal case when both the parties have led evidence on the point. Such statements cannot debar her from prosecuting her husband for bigamy.

6. It is conceded by Mr. C.N. Shah, the learned counsel for the respondents that the defence witnesses have given instances of private divorce,1 which do not take us to more than a few years before the partition of 1947. It is conceded that the instances given carry us back at the most about 15 to 20 years.

7. The contention of Mr. Shah the learned Counsel for the respondents is that the finding that there is a custom is a finding of fact and that in an appeal from acquittal the High Court should not differ from a finding of fact. A finding of fact by a subordinate Court should not be interfered with in an appeal of acquittal by the High Court unless there are compelling reasons. If there are compelling reasons, even a finding of fact can be set aside by the High Court in an appeal from acquittal. But there must be compelling reasons to do so. The learned Sessions Judge has accepted the evidence of all the defence witnesses. But as stated by the learned Counsel for the respondents they merely testify to the existence of such customary divorce during the last 15 to 20 years. As observed by 'the Privy Council in Mt. Subhani v. Nawab AIR 1941 PC 21, 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" cannot apply to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient; but it is not of the essence of this rule that the antiquity must, in every case, be carried back to a period beyond the memory of man - still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of particular district.

This case has been followed in Bari Rajeshwar v. Tukaram Lahanu 61 Bom LR 1041 :. Custom is defined in the Hindu Marriage Act, 1955, in Section 3(a) as a rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in. any local area, tribe, community, group or family. Before a custom of private divorce can be held to be proved, it must therefore be proved that it was observed continuously and uniformly for a long time and has thereby obtained the force of law in any local area, tribe, community group or family. We are not prepared to hold that even if the evidence of the defence witnesses is accepted, as the learned Sessions Judge has done, it is sufficient to prove such a custom. The instances given by the defence witnesses, most of which are after 1947, and a few of which are 2 to 3 years prior to Partition of 1947, cannot establish such a custom as referred to in Section 3(a) of the Hindu Marriage Act, 1955 as observed by the Privy Council in AIR 1941 PC 21. We are not differing from the learned Sessions Judge on his appreciation of evidence. We hold that the learned Sessions Judge has obviously erred in holding that the instances carrying us back at most 15 to 20 years are sufficient to prove such a customary right in this community.

8. It is contended by the learned Counsel for the respondents that the evidence of the defence witnesses at least raises a reasonable doubt as to the existence of the customary right of divorce and therefore in view of the general principle of criminal law, the accused must be acquitted. If there is a reasonable doubt as to the existence of a customary right of divorce, and if the burden of proving such a right is on the defence, then the reasonable doubt would mean that the burden is not discharged. It is contended by the learned Counsel for the appellant that the burden of proving customary right of divorce, which]' is pleaded by the defence, is on the defence. But it is urged by Mr. Shah. the learned Counsel for the respondents, that this burden is on the complainant. We have to refer to the provisions of Section 494, I. P. Code, in order to decide this question. Section 494 reads as under:

Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place daring the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

If a male person is to be convicted for having committed an offence under Section 494, Indian Penal Code, the prosecution has to prove (1) that he had contracted a marriage; (2) that at that time he had a wife living; and (3) that the second marriage is void by reason of its taking place during the life time of such wife. These are the only ingredients which the prosecution has to prove in a prosecution under Section 494, I. P. Code. The Indian Penal Code does not contemplate the proof of any other ingredients such as mens rea or intention of knowledge. As stated above, the prosecution, has to prove that the second marriage was void by reason of its taking place during the life time of the first wife. In the case of Hindus, after the Hindu Marriage Act of 1955, in view of the provisions in sections Section 11 and 17 of the Hindu Marriage Act any marriage, solemnized after the Hindu Marriage Act, 1935 would be null and void, if it contravenes any of the conditions specified, amongst other clauses, in Clause (1} of Section 5, which provides that a marriage between two Hindus should not be solemnized if either party has a spouse living at the time of the marriage. Section 29 of the same Act provi3es that nothing contained in the Hindu Marriage Act shall be deemed to affect any right recognised by custom or conferred by special enactment to obtain the dissolution of the Hindu Marriages solemnized before or after the commencement of the Act, In a prosecution under Section 494, I. P. Code, the prosecution, has to prove that the first spouse was living at the time of the second marriage and further that the second marriage was void by reason of its taking place during the life time of the first husband or wife. A marriage continues to be a marriage until it is dissolved. A marriage can be dissolved by resort to a Court of law or by customary right of divorce, where such a right is proved. In order, therefore to prove that the second marriage was void the prosecution must prove (1) that there was a first marriage; (2) that the first marriage was not dissolved by law; (3) that the parties to the first marriage did not have the customary right of dissolution of marriage; or that they did have the customary right of divorce but the marriage was not in fact dissolved by act of parties based on a customary right of divorce. in a case where there was a deed of divorce the prosecution must prove that the marriage could not be dissolved by customary right of divorce.

9. The learned Counsel for the appellant, however, contends that the burden is on the accused in view of the provisions of Section 106 of the Evidence Act. The question whether there is a customary right of divorce in the community to which the parties belong is not a matter of special knowledge of the accused. It is a matter within the knowledge of all the persons belonging to the community, and, therefore, Section 105 has no applicability, and in a prosecution under Section 494, I. P. Code, when reliance is placed by the defence on a Farkati between the parties the burden is on the complainant to prove that there was no customary right of divorce in the community. In fact, the Farkati, Ex. 11, was produced by the complainant herself in her deposition. It is therefore clear that in such a case the complainant must prove that there was no customary right of divorce and that therefore the Farkati has no effect in law. that therefore the first marriage was not dissolved and that consequently the second marriage was void.

10. The learned Sessions Judge has not believed the evidence of the witnesses for the complainant and we are not prepared to differ from his appreciation of evidence. Ex. 36, the priest, Dayaldas, who was examined for the complainant, has admitted that certain persons of the Sindhi Lohana community had given divorce and contracted re-marriage. The learned Sessions Judge also accepted the evidence of the defence witnesses and we are not prepared to differ from his appreciation of evidence of these witnesses. As the burden is on the complainant to prove that there was no customary right of divorce in the caste to which the parties to the first marriage belonged, it cannot be said that the complainant has proved beyond reasonable doubt that there was no customary right of divorce against the community to which the parties belong...

11. The contention that the Farkati was induced by misrepresentation and fraud had not been taken up before the learned Sessions Judge. It is also conceded before us by the learned counsel for the appellant that on the evidence it cannot be held to have been proved that it was the result of deception or fraud.

12. Mr. Choksi, the learned counsel for the State has drawn our attention to the case of R. v. Dolman 1949-1 All E R 813, wherein it was observed that on a charge of bigamy it is a good defence if the accused person can prove that at the time of the second marriage he had reasonable cause to believe, and honestly believed, that the first marriage was void on the ground that the woman he then married was already married to another man. Such a case would clearly invite the application of Section 79 of the Indian Penal Code, as also the case of Sajuddi Mandal v. F.L. Cork, 19 Cri. LJ 681 : AIR 1919 Cal 930. As we have come to the conclusion that the complainant has not proved beyond reasonable doubt that the second marriage was void, it is not necessary to consider the question whether the provisions of Section 79 of the Indian Penal Code would apply to a case like the present one.

13. The complainant has not proved his case beyond reasonable doubt. We therefore refuse to interfere with the judgment o the learned Sessions Judge and dismiss the appear.