

HIGH COURT OF MADHYA PRADESH
F.A. No. 159/2014
(*RajKumar Raghuvanshi {Lakhera} Vs. Smt. Radha Lakhera & Anr.*)

Gwalior, Dated : 18.09.2018

Per Justice Vivek Agarwal

Appellant present in person.

None for the respondents.

This First Appeal has been filed by the appellant under Section 19 of Family Court Act, 1984 challenging the order dated 03.05.2014 passed by the Court of Additional Principal Judge, Family Court, Gwalior, in Case No. 204/2011 (Smt. Radha Lakhera Vs. Rajkumar Raghuvanshi {Lakhera}).

Vide impugned order an application, moved by Smt. Radha Lakhera and her minor daughter Priyanka Lakhera seeking maintenance under Section 125 of Cr.P.C., has been allowed and Court directed that present appellant, who was non-applicant before the Family Court, shall pay monthly maintenance to the tune of Rs. 2,500/- per month in favour of applicant No.1-Smt. Radha Lakhera and Rs. 2,500/- per month for maintenance of applicant No. 2-Kumari Priyanka Lakhera @ Gungun.

It is appellant's contention that in fact marriage of respondent No.1 was solemnized with his elder brother Kamlesh Lakhera on 02.07.2002 as per Hindu customs and traditions and therefore, respondent No.1 is neither his legally married wife nor respondent No. 2 is his daughter. It is also submitted that that since there is no decree of divorce between respondent No. 1 and Kamlesh Lakhera, therefore, respondent No. 1 cannot be deemed to be wife of the appellant fastening responsibility to pay maintenance. It is

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submitted that learned Family Court has not appreciated the evidence, which has come on record, in a proper manner and in fact his elder brother Kamlesh Lakhera has already filed an application under Section 9 of Hindu Marriage Act for restitution of conjugal rights with respondent No. 1. It is also submitted that no documentary evidence has been produced by respondent No.1 to support her contention that she is married wife of the present appellant. In view of such facts, prayer has been made to accept the appeal and set aside the order dated 03.05.2014.

Perusal of record from the learned Family Court and the statements given by the applicant, her witnesses, pointed out that as per Ex.P/6 and Ex.P/7, present appellant, who has been marked as 'A' and 'E' respectively, has been shown performing Ring ceremony with respondent No.1, who has been marked as 'B' in Ex.P/6. Similarly, in Ex.P/9, present appellant has been shown applying Betrothal *Sindoor* (Vermilion) in the hair-parting (*Maang*) of respondent No. 1. As per Ex.P/5, doctor had opined on 12th November, 2007 that Kamlesh is a case of Erectile Dysfunction (E.D).

As per order-sheet dated 14.09.2011 (Ex.P/13) of Case No. 06/2010-Kamlesh Vs. Smt. Bittan from the Court of Special Judge (E.C.) Act, Banda, it is apparent that learned Presiding Officer of such Court had observed that applicant was not appearing before the Court for last several dates and did not appear on 14.09.2011, therefore, application was

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dismissed for want of prosecution.

Smt. Radha Lakhera (P.W.1) admitted that she belongs to backward community and as per social mores prevalent in their society, there is a provision of '*Chod-Chutti/Talaak*' (separation/Divorce) and '*Vida-Vivah*' with the consent of both the families. She admitted that on 02.07.2002 her marriage was performed with Kamlesh and photographs of such marriage are Ex.P/2 and Ex.P/3. During her stay with Kamlesh when she discovered that he is impotent, thereafter, she narrated this fact to her family members when it was decided that with the consent of all the family members belonging to both the parties, separation be obtained and on 01.11.2002 as per their religious customs, separation was made and announced in the society. On 02.11.2002, her '*Vida-Vivah*' was performed with Rajkumar in presence of members of both the family and photographs of '*Vida-Vivah*' are from Ex.P/6 to Ex.P/11. Therefore, from 02.11.2002 Rajkumar became her husband and Kamlesh her brother-in-law. On 01.03.2004 from this wedlock one daughter Priyanka was born. It is submitted that after birth of the girl, Rajkumar started harassing her that she did not produce a boy and started beating her and thereafter she was thrown out of her matrimonial home. It is also mentioned that at the time of birth of child, Rajkumar only made the hospital authorities to write name of Kamlesh and even in the voter list, name of the husband of respondent No.1 is mentioned as Kamlesh. She is uneducated and unemployed. It is also

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deposed that Non-applicant - Rajkumar is engaged in the business of bengals (chudiyas) at Banda, has his own shop and earns Rs. 20-25 thousands per month. Besides this, he is engaged in the work of property dealing and also has income from interest. Similar is the statement of Sarla Devi (P.W.2), mother of Radha Lakhera. There is no cross-examination on these two witnesses.

Perusal of order-sheets reveal that on 04.12.2009, respondent No.1/applicant had requested the Court that non-applicant is deliberately avoiding service of summons and therefore, notices be issued by ordinary, registered post and Dasti mode. Thereafter, it has come on record that on 03.03.2010 order-sheet was recorded at 4.45 pm. that appellant/non-applicant had refused to take registered notice and therefore, he was proceeded ex-parte. Thereafter, on 26.03.2010, non-applicant had appeared with his counsel Shri M.A. Shah and his signatures are available on the order-sheet. He had filed an application for urgent hearing so also an application under Order 9 Rule 7 of CPC. On 10.11.2010 case was dismissed for want of prosecution. Thereafter, order was passed by this High court on 04.02.2011 in Criminal Revision No. 933/2010. On 10.03.2011 case was restored. Notices were again issued for service on non-applicant on 24.06.2011 and then, non-applicant had appeared before the Court on 13.10.2011 through his counsel. On 02.11.2011 non-applicant was present in person and had filed his reply. Thereafter, he remained absent on

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25.11.2011, 09.12.2011 and 19.12.2011 when interim application for maintenance was rejected. Thereafter, on 13.05.2013 non-applicant was proceeded ex-parte and thereafter evidence of the applicant was recorded on 25.04.2014 and impugned order was passed. It has come on record that ex-parte evidence was recorded and it was never challenged through any cross-examination as the appellant remained absent despite service of notices. No application is on record seeking setting aside of ex-parte order.

Secondly, when this Court asked the appellant as to whether he is willing to undergo DNA test so to confirm paternity of respondent No. 2, he did not show any inclination. There is no challenge to the evidence, which has been recorded before the learned Family Judge specially to the fact that in their community, which is categorized under OBC community there is no such tradition of '*Chod-Chutti*' and '*Vida-Vivah*'. There is no challenge to the pleadings of impotency of Kamlesh. There is no challenge to the fact that application allegedly filed by Kamlesh under Section 9 of Hindu Marriage Act, was dismissed for want of prosecution. There is no documentary evidence to show that any steps were ever taken by Kamlesh to get it restored and also there is no documentary evidence to deny the photographs contained in Ex.P/6 to Ex.P/11 showing performance of various ceremonies like Ring ceremony, Garlanding ceremony or Vermilion ceremony being performed by *Devar* as the appellant claims himself to be in Lakhera community and not

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by the husband as is the tradition in other similarly situated communities.

Reliance can be placed on the judgment of Hon'ble Supreme Court in case of **Gurdit Singh Vs. Mst. Angrez Kaur & Others** as reported in **AIR 1968 SC 142**, wherein it has been held that if a custom exists among the Hindu Jats of the Jullundur district which permits a valid divorce by a husband of his wife which dissolves the marriage, then on the dissolution of such marriage the divorced wife can enter into a valid marriage with a second husband in the lifetime of the first husband. In fact, Section 29(2) of the Hindu Marriage Act, 1955 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 solemnised before or after commencement of this Act". Thus, it is apparent that even Hindu Marriage Act, 1955 recognizes rights of dissolution of marriage by custom.

In view of such facts and evidence, which has come on record and which has remained un-rebutted, the order of maintenance holding the present appellant husband of respondent No. 1 and father of respondent No. 2 does not call for any interference and therefore, the First Appeal fails and is dismissed.

(Sanjay Yadav)
Judge

(Vivek Agarwal)
Judge