PETITIONER:
BHAURAO SHANKAR LOKHANDE & ANR.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA & ANR.

DATE OF JUDGMENT:
01/02/1965

BENCH:
DAYAL, RAGHUBAR
BENCH:
DAYAL, RAGHUBAR
MUDHOLKAR, J.R.
RAMASWAMI, V.

CITATION:
1965 AIR 1564 1965 SCR (2) 837
CITATOR INFO :
R 1966 SC 614 (6,8)
R 1971 SC1153 (14)
R 1979 SC 713 (5)

ACT:
Indian Penal Code, 1860 (45 of 1860), s. 494-Whether second marriage required to be 'valid' for offence to be committed-Therefore whether essential ceremonies must be performed-Hindu Marriage Act, 1955, s. 17-Marriage 'solemnised'-Meaning of-Hindu.
Hindu Law-'Gandharva' marriage-Whether usual essential ceremonies necessary-Modification by custom considered.

HEADNOTE:
Appellant No. 1 was convicted of an offence under s. 494 I.P.C. (and appellant No. 2 of abetting him) for going through a marriage which was, void by reason of its taking place during the life-time of a previous wife.
It was contended on behalf of the appellants that in law it was necessary for the prosecution to establish that the alleged marriage had been duly performed in accordance with the essential religious rites applicable to the form of marriage gone through. On the other hand it was urged by the State that for the commission of an offence under s. 494, it was not necessary that the second marriage should be a valid one and a person going through any form of marriage during the life-time of the first wife would commit the offence; and that in any event, in the present case the rites necessary for a 'Gandharva' form of marriage, as modified by custom prevailing among Maharashtrians, had been duly observed.
HELD: (i) Prima facie, the expression 'whoever-marries' in s. 494 must mean 'whoever-marries validly' or 'whoever-marries and whose marriage is a valid one. If a marriage is not a valid one according to the law applicable to the parties, no question arises of its being void by reason of its taking place during the life of the husband or wife of the person marrying, [839 C-D]
(ii) For a marriage between two Hindus to be void by virtue of s. 17 of the Hindu Marriage Act, 1955, two conditions are required to be satisfied, i.e. (a) the marriage is

solemnised after the Act; and (b) at the date of such marriage, either party has a spouse living. Unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to be 'solemnised' within the meaning of s. 17. Merely going through certain ceremonies, with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom. [839 G-H; 840 A-C]

(iii) The two ceremonies essential to the validity of a Hindu marriage, i.e. invocation before the sacred fire and sapatapadi, are also a requisite part of a 'Gandharva' marriage unless it is shown that some modification of these ceremonies has been introduced by custom in any particular community or caste. It was not disputed that in the present case these two ceremonies were not performed when the appellant No. 1 married a second time and the evidence on record did not establish that these essential ceremonies had been abrogated by custom. The prosecution had therefore failed to establish that the second marriage was performed in accordance with the customary rites applicable. [840 H: 84 A-C; 843 E-G]

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Mullas Hindu Law, 12th Edn. pp. 605 and 615, relied upon.

(iv) The facts that the two essential ceremonies may not have been performed for a period of five or seven years could not be said to have established a custom as contemplated by s. 3(a) of the Hindu Marriage Act, 1955. [843 C-E]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 178 of 1963.

Appeal by special leave from the judgment and order dated August 19, 1963, of the Bombay High Court in Criminal Revision Application No. 388 of 1963.

S. G. Patwardhan and M. S. Gupta, for the appellants.

W. S. Barlingay, B. R. G. K. Achar for R. H. Dhebar, for respondent No. 1.

The Judgement of the Court was delivered by

Raghubar Dayal, J. Bhaurao Shankar Lokhande, appellant No. 1, was married to the complainant Indubai in about 1956. He married Kamlabai in February 1962, during the lifetime of Indubai. Deorao Shankar Lokhande, appellant No. 2, is the brother of the first appellant. These two appellants, together with Kamlabai and her father and accused No. 5, a barber, were tried for an offence under S. 494 I.P.C. The latter three were acquitted by the Magistrate. Appellant No. 1 was convicted under S. 494 I.P.C. and appellant No. 2 for an offence under S. 494 read with S. 114 I.P.C. Their appeal to the Sessions Judge was dismissed. Their revision to the High Court also failed. They have preferred this appeal by special leave.

The only contention raised for the appellants is that in law it was necessary for the prosecution to establish that the alleged second marriage of the appellant No. 1 with Kamlabai in 1962 had been duly performed in accordance with the religious rites applicable to the form of marriage gone through. It is urged for the appellants that the essential ceremonies for a valid marriage were not performed during the proceedings which took place when appellant No. 1 and Kamlabai married each other. On behalf of the 'State it is urged that the proceedings of that marriage were in accordance with the custom prevalent in the community of the

appellant for gandharva form of marriage and that therefore the second marriage of appellant No. 1 with Kamlabai was a valid marriage. It is also urged for the State that it is not necessary for the commission of the offence under S. 494 I.P.C. that the second
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marriage be a valid one and that a person going through any form of marriage during the life-time of the first wife would commit the offence under s. 494 I.P.C. even if the later marriage be void according to the law applicable to that person.

> Section 494 I.P.C. reads :
> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during 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."

Prima facie, the expression 'whoever.... marries' must mean 'whoever marries-validly' or 'whoever.... marries and whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.

Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955, which made a second marriage of a male Hindu, during the life-time of his previous wife, void. Section 5 of the Hindu Marriage Act provides that a marriage may be solemnized between any two Hindus if the conditions mentioned in that section are fulfilled and one of those conditions is that neither party has a spouse living at the time of the marriage. Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of ss. 494 and 495 I.P.C. shall apply accordingly. The marriage between two Hindus is void in view of s. 17 if two conditions are satisfied : (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February 1962 cannot be said to be 'solemnized', that marriage will not be void by virtue of s. 17 of the Act and s. 494 I.P.C. will not apply to such parties to the marriage as had a spouse living.

L4Sup./65-7
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The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized'. It is therefore essential, for the purpose of s. 17 of the Act, that the marriage to which s. 494 I.P.C. applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and

in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies Prescribed by law or approved by any established custom.

We are of opinion that unless the marriage which took place between appellant no. 1 and Kamlabai in February 1962 was performed in accordance with the requirements of the law applicable to a marriage between the parties, the marriage cannot be said to have been 'solemnized' and therefore appellant no. 1 cannot be held to have committed the offence under s. 494 I.P.C.

We may now determine what the essential ceremonies for a valid marriage between the parties are. It is alleged for the respondent that the marriage between appellant no. 1 and Kamlabai was in 'gandharva' form, as modified by the custom prevailing among the Maharashtrians. It is noted in Mullas Hindu Law, 12th Edition, at p. 605 :

> "The Gandharva marriage is the voluntary union of a youth and a damsel which springs from desire and sensual inclination. It has at times been erroneously described as an euphemism for concubinage. This view is based on a total misconception of the leading texts of the Smritis. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste."
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> At p. 615 is stated :
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> "(1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely-
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> (1) invocation before the sacred fire, and
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> (2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.
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> (2) A marriage may be completed by the performance of ceremonies other than those referred to in subsection (1), where it is allowed by the custom of the caste to which the parties belong."

It is not disputed that these two essential ceremonies were not performed when appellant no. 1 married Kamlabai in February 1962. There is no evidence on record to establish that the performance of these two essential ceremonies has been abrogated by the custom prevalent in their community. In fact, the prosecution led no evidence as to what the custom was. It led evidence of what was performed at the time of the alleged marriage. It was the counsel for the accused in the case who questioned certain witnesses about the performance of certain ceremonies and to such questions the witnesses replied that they were not necessary for the 'gandharva' form of marriage in their community. Such a statement does not mean that the custom of the community deemed what took place at the 'marriage' of the appellant no. 1 and Kamlabai, sufficient for a valid marriage and that the performance of the two essential ceremonies had been abrogated. There ought to have been definite evidence to establish that the custom prevalent in the community had abrogated these ceremonies for such form of marriage.

What took place that night when appellant no. 1 married

Kamlabai, has been stated thus, by P.W. 1 :

> "The marriage took place at 10 p.m. Pat-wooden sheets-were brought. A carpet was spread. Accused no. 1 then sat on the wooden sheet. On the other sheet accused no. 3 sat. She was sitting nearby accused no. 1. Accused no. 4 then performed some Puja by bringing a Tambya-pitcher. Betel leaves and coconut was kept on the Tambya. Two garlands were brought. Accused no. 2 was having one-and accused no. 4 having one in his hand. Accused no. 4 gave the garland to accused no. 3 and accused no. 2 gave the garland to accused no. 1. Accused nos. 1 and 3 then garlanded each other. Then they each struck each other's forehead."

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In cross-examination this witness stated:

> "It is not that Gandharva according to our custom is performed necessarily in a temple. It is also not that a Brahmin Priest is required to perform the Gandharva marriage. No 'Mangala Ashtakas' are required to be chanted at the time of Gandharva marriage. At the time of marriage in question, no Brahmin was called and Mangala Ashtakas were chanted. There is no custom to blow a pipe called 'Sher' in vernacular."

Sitaram, witness no. 2 for the complainant, made a similar statement about what happened at the marriage ceremony and further stated, in the examination-in-chief :

> "Surpan is the village of accused no. 3's maternal uncle and as the custom is not to perform the ceremony at the house of maternal uncle, so it was performed at another place. There is no custom requiring a Brahmin Priest at the time of Gandharva."

He stated in cross-examination :

> "A barber is not required and accused no. 5 was not present at the time of marriage. There is a custom that the father of girl should make to touch the foreheads of the girl and boy to each other and the Gandharva is completed by the act."

It is urged for the respondent that as the touching of the forehead by the bridegroom and the bride is stated to complete the act of Gandharva marriage, it must be concluded that the ceremonies which, according to this witness, had been performed, were all the ceremonies which, by custom, were necessary for the validity of the marriage. In the absence of a statement by the witness himself that according to custom these ceremonies were the only necessary ceremonies for a valid marriage, we cannot construe the statement that the touching of the foreheads completed the gandharva form of marriage and that the ceremonies gone through were all the ceremonies required for the validity of the marriage.

Bhagwan, witness no. 3 for the complainant, made no state-ment about the custom, but stated in cross-examination that it was not necessary for the valid performance of gandharva marriage in their community that a Brahmin priest was required and mangala ashtakas were to be chanted. The statement of Jeebhau, witness no. 4 for the complainant, does not show how the custom has

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modified the essential forms of marriage. He stated in cross-examination :

> "I had witnessed two Gandharvas before this. For the last 5 or 7 years a Brahmin Priest, a Barber and a Thakur is not required to perform the Gandharva but formerly it was essential. Formerly the Brahmin used to chant Mantras and Mangala ashtakas. It was necessary to have a maternal uncle or any other person to make touch the foreheads of the sponsors together. A Brahmin from Kasara and Dhandana comes to our village for doing rituals but I do not know their names."

This statement too, does not establish that the two essential ceremonies are no more necessary to be performed, for a Gandharva marriage. The mere fact that they were probably not performed in the two Gandharva marriages Jeebhau had attended, does not establish that their performance is no more necessary according to the custom in that community. Further, Jeebhau has stated that about five or seven years earlier the performance of certain ceremonies which, till then, were essential for the marriage, were given up. If so, the departure from the essentials cannot be said to have become a custom, as contemplated by the Hindu Marriage Act.

Clause (a) of s. 3 of the Act provides that the expressions 'custom' and 'usage' signify any 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.

We are therefore of opinion that the prosecution has failed to establish that the marriage between appellant no. 1 and Kamlabai in February 1962 was performed in accordance with the customary rites as required by s. 7 of the Act. It was certainly not performed in accordance with the essential requirements for a valid marriage under Hindu law.

It follows therefore that the marriage between appellant no. 1 and Kamlabai does not come within the expression 'solemnized marriage' occurring in S. 17 of the Act and consequently does not come within the mischief of S. 494 I.P.C. even though the first wife of appellant no.1 was living when he married Kamlabai in 1 February 1962.

We have not referred to and discussed the cases referred to in support of the contention that the 'subsequent marriage' referred

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to in s. 494 I.P.C. need not be a valid marriage, as it is unnecessary to consider whether they have been correctly decided, in view of the fact that the marriage of appellant no. 1 with Kamlabai could be a void marriage only if it came within the purview of s. 17 of

the Act.

The result is that the conviction of appellant no. 1 under s. 494 I.P.C. and of appellant no. 2 under s. 494 read with s. 114 I.P.C. cannot be sustained. We therefore allow their appeal, set aside their convictions and acquit them. The bail bonds of appellant no. 1 will stand discharged. Fines, if paid, will be refunded.

Appeal allowed.

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