2023:DHC:7359-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: August 09, 2023***

Pronounced on: October 09, 2023

\+ MAT.APP.(F.C.) 35/2023 & CM APPL. 23982/2015

NEETU GROVER ...... Petitioner

Through: Mr. Prerna Arora, Ms. Devika Gupta & Ms. Mallika Saxena, Advocates

Versus

GAGAN GROVER .....Respondents

Through: In person with Mr. Nikilesh Ramachandran, Mr. Shubham Seth, & Mr. Anuj Panwar, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The present appeal under Section 28 of the Hindu Marriage Act, 1995 read with Sections 11 and 23 of the Act has been filed seeking setting aside/quashing of the judgment and decree of nullity dated 23.10.2007 in HMA No.396/2003 whereby marriage between the parties has been declared null and void.

2. The parties to the present petition were married as per Hindu rites and ceremonies on 04.12.1998 in Delhi and out of this wedlock a female child was born on 28.08.1999. The respondent-husband has preferred a petitioner to declare the marriage between the parties as void *ab initio* being in

contravention of subsection 4 of Section 5 of the Hindu Marriage Act.

3. The learned trial Court while passing the impugned judgment noted the contention of respondent-husband, which in nutshell is as under:-

i. The respondent has alleged that the appellant-wife was aggressive, non-adjusting and demanding since the beginning of their marriage.

ii. The father of appellant-wife happens to be the cousin of his father.

iii. On the silver jubilee celebration of the parents of respondent-husband, both the families agreed for marriage of appellant with respondent and engagement rings were exchanged at that celebration itself.

iv. The marriage between the parties was solemnised on 04.12.1998.

v. The respondent has claimed that he was a big support for the parents of appellant-wife. On 25.02.1999 when respondent-husband along with his father was going to their shop at Chandani Chowkj, an accident took place wherein he lost his father on the spot. The incident shook the entire family and since respondent-husband had also sustained grievous injuries, there was no one to take care of the business. The husband claimed to have fractured his leg but the appellant-wife did not support him and also her behaviour towards him and his family caused mental agony.

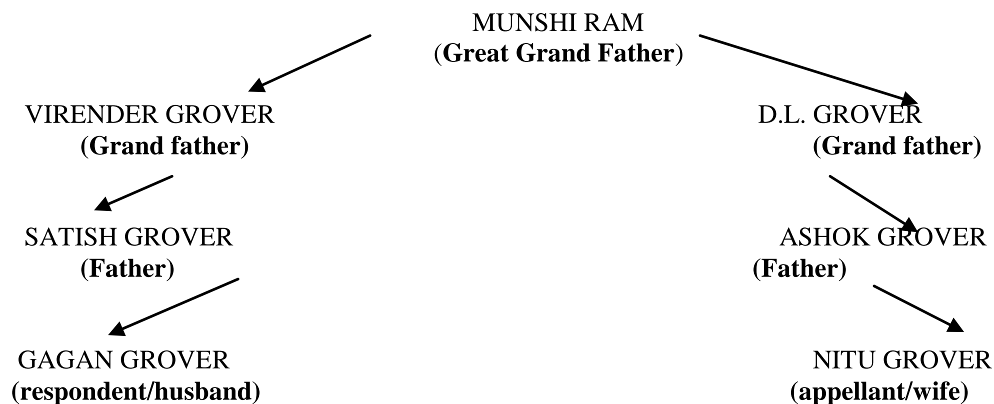
vi. The appellant-wife pressurised respondent-husband to take over the entire business and have a separate residence from his mother, however, when respondent-husband refused, she left her matrimonial home in April, 1999 on the pretext of visiting gynaecologist and did not come back till May, 1999 on the ground that there were many complications in her pregnancy and she was advised bed rest. Respondent-husband alleged that at the relevant time, he was completely on bed and his mother used to take care of the family business. Even on her return to her matrimonial house, the appellant-wife frequently quarrelled with respondent-husband to take a separate house. On 12.07.1999, she again went to her parents' house on the ground that she needed rest and required help of her mother during pregnancy.

vii. Respondent-husband claims to have taken care of his wife during her pregnancy and hospitalisation and birth of the child. On 30.08.1999, when she was discharged from the hospital, she refused to go to her matrimonial home on the pretext that she did not want his mother and sister to touch the baby.

viii. The respondent-husband claimed that he contacted his wife on many occasions to perform rituals, customary functions after the birth of the child, however, she refused to come back to her matrimonial house.

4. In the aforesaid facts, the respondent-husband filed petition before the

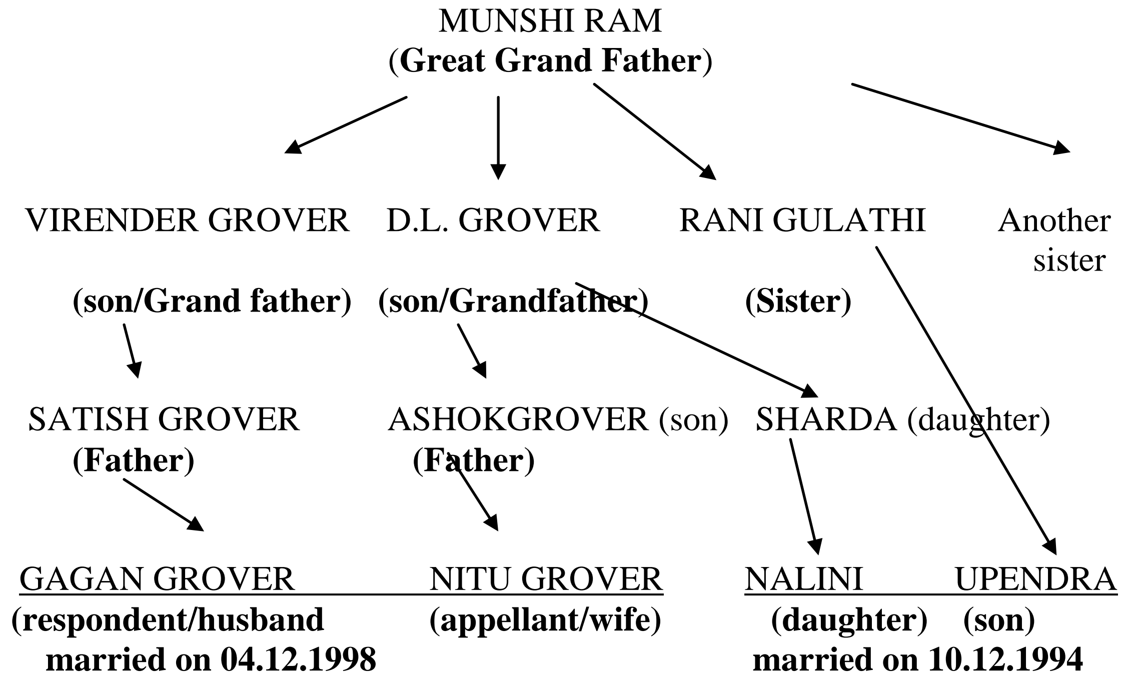
learned trial court seeking nullity of marriage with respondent under Section 11 of the Hindu Marriage Act, 1955, being in contravention of conditions specified in Clause (i) of Section 5 of the Act. The petitioner did not take grounds of cruelty while seeking divorce but stated that his relation with his wife falls within the degree of prohibited relationships, as parties were *sapindas* of each other. In support of his claim, the petitioner relied upon the following tree:-



5. The respondent-husband claimed before the learned trial court that the marriage falls within the degree of prohibited relationship as they are the children of brothers and in the fourth degree of prohibited relationship from the father's side.

6. On the other hand, the appellant-wife in her written statement before the learned Family Court averred that the petition filed by respondent-husband was *mala fide*, as on 15.01.1998 when she had gone to stay at his house on the asking of her parents, the respondent had committed rape upon her and so, her parents had no alternative except to marry her with the respondent. The appellant described many instances of such marriages within the degree of prohibited relationship which were permitted by custom and usage in the caste community of the parties. The appellant in her written

statement pleaded that the respondent had not shown the true position of marriage in the family and showed the position of tree as under:-



7. Besides above, the appellant in her additional written statement gave more instances of such marriages within *sapinda* performed in her family and relations, which the learned trial court has taken note of in Para-13 of the impugned judgment.

8. The appellant before the learned trial court though admitted her marriage with the respondent-husband falls within the fourth degree of prohibited relationship from the side of father, however, stated that these are the customs and usages governing the parties, which permit such marriages.

9. On the basis of pleadings raised by the parties, the learned trial court framed the following issues for determination:-

> *(i) Whether the parties are within the prohibited relationship or are sapindas of each other? OPP*
>
> *(ii) If issue No.1 is answered in affirmative, whether there was/is custom or usage governing each of the parties permitting marriage between them? OPR*

10. In support of his case, the respondent examined himself as PW-1 and no other evidence was led on his behalf. The appellant besides examining herself as RW-1, got examined seven more witnesses in support of her case.

11. The learned Family Court observed that both the issues were interlinked and that the fathers of the parties were real brothers and so, the marriage between the parties fell within the meaning of sub-clause (f) of Section 3 of the Act, which defines the terms of degrees of prohibited relationships. The learned trial Court after adducing the evidence led by the parties and other material placed on record held as under:

> *"37. From the evidence brought on record and its cumulative effect on behalf of the respondent do not show that there was any continuous and uniformly observed custom for a long time permitting marriages between the Grovers though admittedly Grover is a sub-caste of Aroras. These witnesses also do not give the source or sources from which they had obtained the desired knowledge about the existence of such customs or usage permitting the marriages between Grovers. At the same time no grounds have been given by them on the basis of which the opinion is based. It is also not proved that they had deprived such knowledge of person or persons other than them. The only exception is that these witnesses have*

> *proved their own marriages which were falling within the degree of prohibited relationship and out of these witnesses only one witness RW4 namely Pankaj Grover has proved his marriage belonging to Grover sub-caste, but this was a sole marriage performed in the year 1994 and he had also not given any support to the contention that such marriage had been performing since long in the Grovers. No derived knowledge has also been shown permitting such marriages. Nothing on record has come out that any such custom or usage permitting such marriages has obtained the force of law and is universally applied to Grovers.*
>
> *XXXXXX*
>
> *42. From the above cross-examinations it is amply clear that none of the witnesses have personally attended any marriage solemnized between Grover and Grover though they have stated that Grovers are the sub-caste of Aroras yet they could not specify as to the customs and ceremonies performed by the two castes and sub-castes are absolutely similar or not. It is probable that Grovers are having different customs and traditions then that of Aroras and it cannot be ruled out that Grovers are not as modern in their approach as that of Aroras who may be less orthodox.*

12. With aforesaid observations learned trial court held that though marriage of both the parties was solemnized with the consent of their parents, however, the same is not covered under the customs and usage as contemplated under the Act. The trial court rejected appellant’s claim that respondent cannot be permitted to take advantage of his own wrong and

held that from social point of view this contention may have some substance but when the law does not permit such marriage, the only corrorally is to declare such marriage null and void under Section 11 of the Act. The, trial court, thus, held that the appellant-wife failed to prove her case within the ambit of Section 11 of the Act and declared the marriage between the parties as null and void.

13. With regard to interim maintenance under Sections 24 & 26 of the Act, the learned trial court vide impugned judgment held that since the marriage between the parties was held null and void and *void-ipso-jurie*, it was not appropriate to delve upon this issue. The trial court further held that no evidence with regard to income of respondent (husband) had come on record and; however, once the marriage is declared null and void in the eyes of law, the party concerned is not entitled to any maintenance.

14. The grounds on which the impugned judgment dated 23.10.2007 has been assailed by the appellant before this Court are that the learned trial court did not consider the issue as to whether such kind of marriages were performed in the "Grovers" which is a sub-caste of Arora, which fact in fact has been admitted both the sides. Appellant has claimed that the witnesses examined before the learned trial court had stated that such marriages are customary in "Aroras".

15. Appearing on behalf of appellant, learned counsel submitted that the learned trial court has held that the appellant has been able to show only five such marriages, although appellant has sited eleven such marriages having been performed, which are admitted by respondent in his rejoinder.

16. Learned counsel submitted that Section 3 of the Act defines

custom/usage as to *“any rule which, having been continuously and uniformly observed for a longtime, has obtained the force of law among Hindus in any local area, tribe, community, group or family.”* It was submitted that the learned trial court has erroneously failed to make any observation on the issue of interim maintenance observing that no documentary evidence of income of respondent has come on record, whereas at the time of fixing of interim maintenance, the respondent had himself admitted his income as Rs.2,00,000/- per annum. It was submitted that the learned trial court ought to have decided the issue of payment of maintenance before deciding the case on merits. Hence, setting aside of impugned judgment and decree dated 23.10.2007 passed by the learned trial court is sought by the appellant.

17. To the contrary, the stand of respondent-husband is that the relationship of appellant and respondent falls within the degree of prohibited relationship as they are the children of brothers and in the fourth degree of prohibited relationship from fathers’ side and are, therefore, *sapindas* to each other.

18. Learned counsel appearing on behalf of respondent submitted that learned trial court has rightly observed that there was no continuous or uniformly observed custom prevailing for a long-time permitting marriage between the Grovers and none of the witness gave the source or sources from which they had obtained the desired knowledge about the existence of such custom or usage permitting the marriage between Grovers.

19. Next submitted that the customs are to be established inductively and cannot be a matter of mere theory and in the present case the appellant had failed to prove existence of such custom.

20. With regard to issue of maintenance, learned counsel relied upon Hon'ble Supreme Court's decision in ***Savitaben Somabhai Bhatia Versus State of Gujarat & Ors*** [(2005) 3 SCC 636] wherein it has been held that if a marriage is a complete nullity in the eyes of law, the woman cannot be said to be a wife and the scope of the Section 125 Cr.P.C. as well as the provisions of Hindu marriage Act cannot be enlarged relating to maintenance or permanent alimony. Therefore, in cases where marriages are null and void in the eyes of law, the parties therein cannot reap the benefits of such maintenance. Hence, dismissal of the present appeal is sought.

21. The submissions advanced by learned counsel appearing from both the sides were heard at length and the impugned judgment as well as trial court record has been carefully perused.

22. The rationale behind challenge to the impugned judgment, declaring the marriage between the parties being null and void, is that they are *sapinda* within the meaning of Clause (v) of Section 5 of the Hindu Marriage Act, 1955.

23. The provisions of Section 5 of the Hindu Marriage Act, 1955, define the conditions for a Hindu Marriage. Sub clause (v) of Section 5 of the Act provides that the parties shall not be *sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.* Meaning thereby, the marriage of any bride and groom, who happen to be cousins, within the meaning of *sapinda*, cannot be solemnized by law and

will be legally void.

24. Section 3(f) of Hindu Marriage Act, 1955 defines *sapinda*, which reads as under:-

> *"(i) "Sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of assent through the father, the line being traced upward in each case from the person concerned, who is to be counted as the first generation;*
>
> *(ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them;"*

25. To establish as to whether both the parties are s*apindas* of each other, the relationship is traced upward, considering each of them as first generation. The Hindu Marriage Act, 1955 restricts the definition of *sapinda* only upto third generation of the mother and fifth generation of the father. However, marriage in a *sapinda* relationship is permissible if the tradition or custom permits such a relation. Sub clause (iv) of Section 5 of the Act provides that the parties are not within the degree of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two.

26. Section 3(a) of the Act, defines custom and usage as under:-

> *"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:*
> *Provided that the rule is certain and not unreasonable or opposed to public policy; and Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family"*

27. Whether or not a marriage falls within the meaning of *sapinda*, has to be therefore established by finding out the customs in force in the family, tribe or the group, which by afflux of time has obtained the force as the law.

28. In the case of ***Sharad Dutt Vs. Kiran***1997 SCC OnLine Del 837, wherein similar issue about the marriage of the parties who belonged to Jhang Community and were related as *sapindas,* was considered by a Coordinate Bench of this Court and it was observed that any marriage performed after the enactment of Hindu Marriage Act, 1955 would not be valid if it is in violation of the conditions as mentioned in Section 5 of the Act. Marriage can be accepted as valid only if it is protected by any custom or usage existing prior to the enforcement of the Act. After referring to Section 3(a) of the Act, the Coordinate Bench observed that for a custom to be recognized as a law, there should be clinching evidence to establish that it rests upon continuity, uniformity and longevity.

29. In the present case, the appellant has though examined herself and other six witnesses to show that there existed a custom of marriage within the *sapinda*. However, these marriages have been performed pursuant to coming into force the Hindu Marriage Act, 1955. Appellant-wife and

respondent-husband, both being fourth in generation to their fathers, who happen to be real brothers, clearly fall within the category of *sapinda*. Accordingly, in the considered opinion of this Court, appellant has not been able to establish her case that her marriage with respondent is an exception to the definition of *sapinda.* Hence, we do not find any error in the judgment passed by the learned trial court whereby the marriage between appellant and respondent has been held to be null and void.

30. So far as the aspect of interim maintenance and other rights of the son of the parties born out of this wedlock is concerned, the observations of the Hon'ble Supreme Court in a recent decision in ***Revanasiddappa and Another Vs. Mallikarjun and Others*** 2023 SCC OnLine SC 1087 assumes importance. The Constitution Bench of the Hon'ble Supreme Court in ***Revanasiddappa (Supra)*** while answering a reference made by Three Judge Bench, pertaining to rights of the child under Section 16(3) of the Act, who are born to parents whose marriage is *null* and *void* under Section 11 of the Hindu Marriage Act, 1955 or a decree of nullity has been granted under Section 12 in respect of a voidable marriage; has held that a child who is conferred with legitimacy under sub-section (1) and sub-section (2) of Section 16 will be on par with other legitimate children in the context of recognising the entitlements of such a child in the property of their parents and not *qua* the property of a third person. Further held that though the relationship between the parents may not be sanctioned by law but the birth of a child in such relationship must be viewed independently and provisions of Section 16(3) of the Act do not impose any restriction on the property right of such children, except limiting it the property of their parents and

hence, such children will have a right to whatever becomes the property of their parents, whether self acquired or ancestral.

31. In the present case, the marriage between has been declared null and void having fallen within the category of *sapinda*, however, there is no dispute to the legitimacy of the child. The child son of the parties was born in the year 1999 and is major and entitled to his rights as per law.

32. With observations as aforesaid, the present appeal and pending application are accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 09, 2023
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