Ceremonies and Their Rigidity in a Hindu Marriage

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Abstract

Section 7 (2) of the Hindu Marriage Act, 1955 (the act) enlists the ceremonies that are to be performed to solemnize a Hindu Marriage. Section 7 (1) of the act allows the solemnization of a marriage in accordance to customary rights and ceremonies of either party. The term custom has been defined in section 3 (a) of the Act whereby any rule that: has been continuously and uniformly observed for a long time in a community; is not unreasonable or opposed to public policy and has not been discontinued by the family. Before the act came into force, the nature of the Hindu Marriage was more spiritual than contractual, testament to this is the deliberations of the committee on the Hindu Code Bill. By this analogy, the importance placed on ceremony in a Hindu Marriage ought to be lessened as compared to the era before the act. The courts in India however, have exercised rigidity in stressing on customs for the want of proof for the solemnization of a marriage. This is puzzling when courts before the enactment have construed customs liberally in presuming the solemnization of a marriage in law if marriage had happened in fact. In recent years, instances bigamous marriages have not been solemnized by the court for the want of proof of valid ceremonies. The recent rigidity has led to women bearing the brunt of having to prove ceremonies in a marriage in order to obtain maintenance or prosecute the husband in cases of bigamy. In this paper, I critique the recent rigidity citing the intention of our law makers and precedents from the pre-enactment era. I also argue how intention in a marriage can prove to be of valid proof in solemnizing a marriage.

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Introduction

The Hindu Marriage Act was not enacted when William Shakespeare wrote the above phrases in the historical play HenryV, but it cannot escape ones notice the striking relevance of these words with respect to the way courts have construed Section 7 (2) of the Hindu Marriage Act. Section 7 (2) of the Hindu Marriage Act,[2] 1955 (the act) enlists the ceremonies that are to be performed to solemnize a Hindu Marriage. Section 7 (1) of the act allows the solemnization of a marriage in accordance to customary rights and ceremonies of either party. The term custom has been defined in section 3 (a) of the Act whereby any rule that: has been continuously and uniformly observed for a long time in a community; is not unreasonable or opposed to public policy and has not been discontinued by the family. Although section 3 (a) gives such a discretion to decide the customs, it has been used very sparingly by the courts. This is because as Flavia Agnes argues in her article 'Hindu Men, Monogamy and Uniform Civil Code', "the Supreme Court ground down the customs and rituals of a pluralistic society into an absurd notion of uniformity by enforcing upon them rituals which were traditionally confined only to higher castes of specific regions. If a community observed a custom which is contrary to the shastric ritual, the custom had to be privileged enough to attract the attention of a legal scholar, who would then have the good sense to mention it in a law text and further, it should have remained static down the ages".[3] The words of the section 3(a) on the face of it create an ambiguity in terms of what has to be construed as custom. This ambiguity provides ample scope for a Hindu man to escape both from the criminal consequences of a bigamous marriage and from the economic responsibility towards the second wife.[4] In the midst of the ambiguity, in the following paper, I will examine how the rigidity of the courts as regards ceremonies is inconsistent with court rulings before the enactment of when the nature of the Hindu Marriage was more religious than contractual. I shall also examine how ascertaining the intention to marry in the solemnization of a Hindu marriage can assist in removing this ambiguity.

The Liberal Approach

Before the enactment of the Hindu Marriage Act, 1955 (the enactment) the courts had taken a liberal approach towards construing the requirement of ceremonies in the solemnization of a marriage. Some of these cases are laid down henceforth. In the case of *Bai Diwali v.*

[2] Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955(India), Section 7(2).
[3]Flavia Agnes, *Hindu Men, Monogamy and Uniform CivilCode,* 30(50) ECONOMIC AND POLITICAL WEEKLY 3238, 3239(1995).
[4]*Id*. at 3238.

Moti,[5]the Bombay High Court held "If the evidence was sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always drawn that they were duly completed until the contrary was shown." In the case of *Inderun v. Ramaswamy*,[6]the Madras High Court held: "when you once get to this, namely, that there was a marriage in fact, there would be a presumption of there being a marriage in law."This position was affirmed in the case of *MoujiLal v. Chandrabati*,[7]where the court said "to such matters of form and ceremony the established presumption in favour of marriage undoubtedly applies". Even after the enactment, there have been certain cases where the courts have refrained from taking a rigid position on customs. In the case of *Kastoori Devi v. Chiranjilal*,[8]the Allahabad High Court held that "A witness of marriage is not required to prove all the details which taken together constitute vivahsanskar or marriage under the Hindu Law. If the fact of the ceremony having taken place is proved, the law will presume that the ceremony was complete and regular in every respect". Further the proposition of presumption of marriage in law from marriage in fact was affirmed in the post enactment case of *Veerappa v. Michael*[9]in 1963.Additionally, before the enactment, there was an extremely strong presumption in the favour of the validity of a marriage, if from the time of the alleged marriage, the parties are recognized by all persons concerned as man and wife and are described as the same in important documents and on important occasions.The same was also affirmed by the Orissa High Court in the case of *Subarna v.Arjuno*.[10]Even post the enactment, in the case of *Nirmala v. Rukminibai*[11]the Karnataka High Court held "When there is a cohabitation of a man and a woman as husband and wife, a presumption arises to the effect that there was a valid marriage between the parties". Notwithstanding the aforementioned precedents, Section 50 of the Indian Evidence Act, 1872 requires the taking of cognizance of a relationship between two persons while ascertaining their marriage. Such an ascertainment however is not sufficient under the same provision to prove a marriage under the sections of the Indian Penal Code that deal with bigamy.

The Recent Rigidity

The rigidity in construing custom as an essential requirement in a Hindu marriage stems from the non-application of the doctrine of factum valetpost the enactment. The doctrine of factum

[5]22 Bom 509 (1898).
[6](1869) 13 MIA 141.
[7](1911) ILR 38 Cal 700.
[8]AIR 1960 All 446.
[9]AIR 1963 SC 933.
[10]AIR 1951 Ori 337.
[11] AIR 1994 Kant 247.

valetwhereby in the absence of pleadings and necessary evidence, the solemnization of marriage is inferred does not apply post the application of the act.If there are certain essential ceremonies, which are necessary for a marriage, the non-observance of those ceremonies or religious rights cannot be overlooked by applying the doctrine of factum valet.Further, the apex court has, in a series of recent decisions, taken a rigid approach by mandating the performance of ceremonies for the proof of validity of a Hindu marriage. In the case of *Bhaurao Shankar Lokhande v. State of Maharashtra*,[12] the Supreme Court held "it follows, therefore, that unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to be solemnized……. 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".Later in the case of *PriyaBalaGhosh v. Suresh Chandra Ghosh*,[13]the apex court cited various previous rulings to affirm the position that mere admission of marriage by both parties cannot validate the marriage and what needs to be looked into is whether the necessary ceremonies took place or not. Further in a clear departure from the position of strong presumption of marriage in the pre-enactment era, the apex court in the case of *SurjitKaur v.Garja Singh*,[14] said "mere living as husband and wife does not, at any rate, confer the status of wife and husband". What can be inferred from these cases is that the apex court has affirmed the rigor vis-à-vis the ceremonies that are required for the solemnization of a Hindu Marriage and has also upheld a strong presumption against marriage even if an inconsequential aspect of a custom is omitted by the parties to a Hindu marriage. In doing so the Hindu marriage apart from the conditions mentioned in section 5 of the act, has boiled down to certain ceremonies whether or not the parties intended to marry or cohabit. It is true that as early as the time of Rig Veda, the Hindu marriage had assumed the sacred character of a sacrament and sanction of religion.However the Hindu Marriage Act, 1955 transformed a Hindu marriage from an ancient and vedic 'sanskar' or sacrament to a marriage that was more contractual than religious[15]; despite this the courts in the pre-enactment era were liberal in construing ceremonies in validating a Hindu marriage. In addition, despite the Hindu Law Committee endorsing the view that the Hindu marriage was sacramental and not contractual in nature, in its initial report on the draft Hindu Code Bill in the year 1941, it expressly upheld the doctrine of factum valetin its marriage law. Although the Hindu Marriage Bill introduced in 1952 and later adopted,

[12]1965 AIR 1564.
[13]1971 AIR 1153.
[14]AIR 1994 SC 135.
[15]*Supra Note* 3, at 3238.

marked an important break with the colonial legal precedent of factum valet, void marriages as defined in the act are considered to have kept alive key aspects of the factum valetprinciple. Now, given the enactment, the courts have little reason to weigh the performance of ceremonies in a strait jacket manner in order to validate a Hindu marriage. However, due to the adamancy of the courts, ceremonies in due form have become essential to solemnize a Hindu marriage. This presents a unique problem which is, a Hindu husband can live in a polygamous marriage with impunity so long as he does not perform the requisite ceremonies. The Hindu male at such circumstances is at an advantage whilst the women (either from the second marriage or the first marriage) are at the risk of invalidating her marriage. Whilst in the case of *Dwarika Prasad Satpathy v. BidyutPrava Dixit and Anr.*,[16]the Supreme Court held that the standard of proof for marriage is not as strict for proceedings for maintenance under Section 125 of the Criminal Procedure Code (CrPC) in contrast to the bigamy provision under Section 494 of the Indian Penal Code, one fails to understand why the substratum of the Hindu marriage in terms of proof must vary for a criminal offence as compared to a civil obligation. One solution to this seems to be mandating registration to substitute ceremonies as proof for a marriage. Following the case of *Seema v. Ashwani Kumar*,[17]where the Supreme Court held "it would be in the interest of the society if marriages are made compulsorily registrable", the Law Commission in its 211th report recommended a law to make the registration of marriages compulsory for everyone irrespective of their religion. In response to this, the government tabled a bill in 2012, the bill however lapsed at the end of the 15thLokSabha. Despite the law commissions report and the Supreme Court ruling, only four states have made such registration compulsory. Moreover, it is unclear whether a registration certificate would substitute the performance of ceremonies for the proof of validity in a Hindu marriage.

Intention to Marry as a Proof for Solemnization

While registration of marriages can serve as proof for the solemnization of marriage, determining the element of intention in a marriage can also serve as proof for the same. To put that into context, it is argued that examining the intention to cohabit after the performance of ceremonies for the sake of solemnization can constitute good proof of a marriage between two Hindus. This would be irrespective of the veracity of the ceremonies performed. This is not to say that ceremonies ought to be disregarded in toto, but to presume a marriage is solemnized if there was an intention to cohabit and if certain ceremonies are performed in

[16](1999) 7 SCC 675.
[17]2006, 2 SCC 578.

pursuance of marriage. However, as mentioned earlier, in the case of *BhauraoLokhande*,[18]the Supreme Court has disregarded intention while deciding the validity of a marriage. Contrary to this, in a very recent case of *NayanabenRatilalGohel v. State of Gujarat*,[19] the Gujarat High Court held "by giving expression of their unmistakable intention to marry in unquestionable documents it must be possible in a knowledge society for a young man and woman, who do not deny their religion, to enter valid matrimony". The court also said "we can certainly foresee a future date where emphasis and accent will not be on performance of empty rituals which may not have relevance in the modern society. The search in future will certainly be to unambiguous evidence of intention to create and enter such formal relationship of marriage. Expressed intention in undisputed documents may have to be given due weight undoubtedly in the proof of marriage in future".Although this matter also concerned maintenance under Section 125 of the CrPC, it is a remarkable step ahead in accepting intention as a standard of proof for a marriage.Further, the Supreme Court in a slew of cases has recognized the intention to marry in deciding a conviction for rape. In the case of *Dilip Kumar v. State of Bihar*,[20]the appellant had sexual intercourse with the victim several times by making a promise that he will marry her. The question before the court was whether consent was obtained fraudulently. The court held that so long as there was an intention to marry the victim and such an intention was acted upon, there was valid consent and no rape. In the case of *State of U.P. v. Naushad*,[21]the Supreme Court held where there was no intention to marry and a promise to marry was made and as a result the consent for a sexual intercourse is obtained, the person who makes the promise in such a case is liable for rape. In the two aforementioned cases the Supreme Court has implicitly upheld the requirement of intention while deciding a promise to marry. There is thus no reason to disregard the element of intention as proof for the solemnization of marriage. This is because it would be hypocrisy on the laws' part to suggest that an intention to marry justifies a promise to marry while acquitting a convict for rape but the same does not justify a marriage that does not happen without the requisite ceremonies. Therefore, intention needs to be read within the framework of section 7(2) of the act.

Conclusion

Considering the authorities cited and arguments made, it is clear that the inflexibility practiced by courts in solemnizing a Hindu marriage is inconsistent with the previous rulings

[18]1965 AIR 1564.
[19]2017 IndlawGuj 1304.
[20](2005) 1 SCC 88.
[21]Cr A. NO.1949 OF 2013.

of Indian courts on the requirement of ceremonies to solemnize a marriage at a time when the Hindu marriage was more of a religious ceremony than a contract. It is important for the courts to adhere to this change in the nature of the Hindu marriage post enactment. It cannot be stressed enough that in deciding the validity of a Hindu marriage, the courts must take a liberal view in terms of ceremonies and thrust the importance of intention. While the Gujarat High Court has espoused the deliberation on the element of intention to constitute proof in a Hindu Marriage, one can only hope that a similar view is reinforced by the apex court as and when it has been seized of a matter warranting its attention on this subject.