

Armed Forces Tribunal, Kolkata Regional Bench

O.A. No. 104/2016

On this the 14th day of September, 2016

Coram: Hon'ble Justice Amar Saran, Member (Judicial)

Hon'ble Lt. Gen Gautam Moorthy, Member (Administrative)

Col. Sanjeev Malhotra (Retired), Service No. IC-45586N, since re-employed with the Indian Army, Present address: EME Branch, Headquarters, Eastern Command, Fort William, Kolkata - 700 021, West Bengal

.....Applicant

By Legal Practitioner: Sri Suman Basu

Versus

1. Union of India, through, Secretary, Ministry of Defence, Government of India, Sena Bhawan, New-Delhi, 110 105
2. Chief of Army Staff, Army Head Quarters, South Block, Govt. Of India, New Delhi - 110 011
3. Adjutant General, Integrated HQ of Ministry of Defence (Army), Defence HQ, Post Office: New Delhi - 110 011
4. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Near Sadar Bazar, Allahabad, U.P., Pin: 211014
5. Principal Controller of Defence Accounts, (Officers), Golibar Maidan, Pune, Maharashtra, Pin - 411001
6. Ms Chunu Bhutia, D/O Late Sri LT Nadik of address, near PHC Area, Upper Pedong, Dist.:Darjeeling, Pin -734311, West Bengal
7. Kalimpong Tribal Welfare Association, (Presently known as Darjeeling District Tribal Welfare Association), Kalimpong, Tamang Gompa Area, Khasmahal, Below Municipality Office, Kalimpong, Dist. Darjeeling, Pin: 734 301, West Bengal
8. District Magistrate, Govt. off West Bengal, Lebong Cart Road, Dist. Darjeeling, Pin: 734 301 West Bengal

.....Respondents

By Legal Practitioner: Sri Sudipto Panda, authorized by OIC Legal (AFT), HQ, B.A. for Respondents 1 to 4

ORDER

Per Justice Amar Saran, Member (Judicial)

1. The applicant who is a retired Colonel (presently re-employed with the EME branch, Eastern Command Headquarters at Fort William Kolkata) has preferred this Original Application under section 14 of the Armed Forces Tribunal Act 2007 praying *inter alia* for a direction to Respondent No. 4 (Principal Controller of Defence Accounts (Pension) Allahabad to delete the name of Private Respondent No. 6 (Ms Chunu Bhutia) from the Pension Payment Order of the applicant and for setting aside the nominations by the applicant in favour of Respondent No. 6 from his service records. He had also sought interim directions for the above reliefs.
2. It may be mentioned that the applicant has earlier filed W.P. 13021 (W) of 2016, Col. Sanjeev Malhotra (Retired) v. Union of India & Ors. before the Kolkata High Court which was dismissed by an order dated 25.7.2016 with the observations that the Court was not inclined to entertain the writ petition for correction of the service records, which fell within the ambit of the Armed Forces Tribunals Act, and the petitioner was at liberty to seek appropriate remedy in accordance with law, if so advised.
3. The contentions of the learned Counsel for the applicant were that the Respondent No. 6 had kept the applicant in the dark about her subsisting marital status with another person at the time of her marriage to the applicant in 1990. As per the law laid down by the Apex Court in "*Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and Anthr.* (1988) 1 SCC 530, that a marriage in contravention of clause (1) (i) of section 5 of the Hindu Marriage Act, 1955 because one of the parties had a spouse living at the time of the marriage was void *ab initio* under section 11, and there was no need even for obtaining a Court order for declaring the marriage null and void.
4. Learned counsel for the respondents submitted that the applicant had voluntarily entered into matrimony with the respondent 6, with full awareness regarding her past matrimonial status, and he was estopped from pleading the illegality of his marriage with the respondent 6 at this stage. In any case it was for the appropriate civil courts to pronounce on the legality of the marriage, and that the Apex Court decision relied upon by the applicant did not apply to the facts of this case and hence the relief prayed for could not be granted.
5. After examining the petition and the material filed along with the same, and the contentions of counsel for the parties, we are of the view that no case for issuing notice to the respondents or for granting any relief to the applicant is made out, especially at this stage.
6. A perusal of the documents filed by the applicant in the petition show that the applicant was fully aware of the matrimonial status of the Respondent 6, when he married her on 23rd August, 1990. His claim in para 4.3 of the OA, that he realized that his marriage with Ms. Chunu Bhutia was void *ab initio* in the light of "disclosures that subsequently came to the knowledge of the applicant" and in para 4.11, that in the recent past he had come across information that Ms Chunu Bhutia was

married to one R.N. Singha, who was alive at the time of his marriage, (although he had died a few year earlier) are contradicted by the disclosures and documents annexed with the petition by the applicant himself. Thus Annexure A1 to the O.A., is a certificate of the "Kalimpong Tribal Welfare Association" dated 23.8.1990 declaring Chunu Bhutia a divorcee as per the local tribal traditions. In the Resolutions dated 23.8.90 (Annexure A2) under the Chairmanship of Ex Maj. S.R. Bhutia, signed by a number of army and other persons it is clearly mentioned that the applicant who was having an affair with Chunu Bhutia for the last 6 months was fully aware of her background and liabilities, and was still keen to marry her as per the Bhutia tribal customs, and thereafter the marriage was voluntarily performed by the applicant with Respondent No. 6. Also admittedly Chunu Bhutia had two living daughters at the time of her marriage, which was also indicative of the Respondent No. 6's earlier marriage. Therefore the applicant's statement that he was kept in dark about Respondent 6's marital status at the time of her marriage to the applicant, and had only recently learnt about this fact, cannot be accepted at its face value.

7. The decision of the Apex Court in *Yamunabai Anantrao Adhav (supra)* refers to a marriage between two persons in accordance with Hindu rites, (and not in accordance with tribal customs as in the present case) whereupon the marriage is held void from the inception in view of s. 5(1)(i) of the Hindu Marriage Act, 1955 as one of the parties has a spouse living at the time of marriage, so as to disentitle the subsequent wife from claiming maintenance under section 125 Cr.P.C. Thus the law report clarifies in para 8 at page 536 of SCC, "*We therefore, hold that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is not entitled to the benefit of section 125 of the Code.*" (Emphasis added)
8. We are also of the view that the attempt of the applicant in seeking to walk out of a marriage by trying to adopt this short cut of asking respondent No. 4 to delete the name of Respondent No. 6 from his Pension Payment Order, and also to allow him to unilaterally withdraw the nomination in her favour after his retirement from service is a wholly *mala fide* exercise. Likewise the applicant's plea to Respondent No. 7 (Kalimpong Tribal Welfare Association) to confer a divorce from Respondent No. 6 after he was dissatisfied with Respondent 6 after living with her for 26 years, who had even given birth to his two now grown up male children, and his present attempt to abandon her in this manner, by taking specious pleas alleging non-legality of the marriage in the evening of her life, (when Respondent No. 6 is 58 years in age) is extremely harsh and oppressive and can never be countenanced in law or by society. It also amounts to approbating and reprobating at the same time, which is impermissible, or as the Latin maxim puts it, "*Qui approbat, non reprobat*" - one who approbates cannot reprobate.
9. It may be noted that the Protection of Women from Domestic Violence Act, 2005 has conferred protection, compensation for violence, rights for residence and use of joint household items, and restrictions on alienation of the same without the consent of the woman sharing the common household, rights to maintenance, not only to wives, but also for women who have relationships with the male partner, "in the nature of marriage," such as live-in couples.

10. In *Dhannulal & Ors vs. Ganeshram & Anr*, C.A. No. 3410 of 2007, with 3411 of 2007 decided on 8.4.2015 the Apex Court relying on the Privy Council decision in *A.Dinahamy vs. W.L. Balahamy*, AIR 1927 PC 185 has held that when a man and woman live together for a long period of time, and produce children and are recognized socially as a couple, the presumption has to be made that the woman was legally married and not living in a stage of concubinage and inheritance right would flow from the relationship. *"It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time."* A very heavy onus based on unimpeachable evidence is required from the person who seeks to question the origin and legality of the relationship.
11. At any rate it is for a Civil Court which has to pronounce on the legality or validity of the marriage, the law or custom under which the marriage was performed, whether either of the parties had a spouse living at the time of the marriage, the effect of having a spouse living under the law applicable to the parties entering into a matrimonial relationship. Also whether the marrying partner had earlier divorced the spouse. On the basis of bald and belated *ex-parte* assertions that the other party was married at the time of the marriage of the applicant with the respondent 6, as in the present case, we are of the opinion that the marriage between the parties cannot summarily be declared a nullity by means of this application and the name of the Respondent No. 6 cannot be deleted from the PPO of the applicant.
12. We therefore find no good ground to grant the reliefs sought for by the applicant. The application has no force and it is dismissed.

(Lt Gen Gautam Moorthy)
Member (Administrative)

(Justice Amar Saran)
Member (Judicial)