

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 1079 of 1989

(With W.P. (C) Nos. 347/1990, 424/1992 and 509/1992)

[1995] 3 SCR 842 | (1995) 3 SCC 635 | 1995 INSC 363 | AIR 1995 SC 1531

Smt. Sarla Mudgal, President, Kalyani & Others

... Petitioners;

Versus

Union of India & Others

... Respondents.

Bench: Hon'ble Mr. Justice Kuldeep Singh and Hon'ble Mr. Justice R.M. Sahai

Date of Decision: May 10, 1995

Subject: Hindu Marriage Act, 1955 — Sections 11 & 13; Indian Penal Code, 1860 — Section 494; Constitution of India — Articles 25 & 44 (Uniform Civil Code) — Conversion of Hindu Husband to Islam without Dissolving First Marriage.

REPORTABLE SUMMARY & RATIO DECIDENDI

Held: A Hindu marriage solemnized under the Hindu Marriage Act, 1955 can only be dissolved on any of the grounds specified under Section 13 of the Act. Till the time a Hindu marriage is dissolved under the Act, none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under Hindu law.

A second marriage of an apostate husband married under Hindu law—contracted during the subsistence of the earlier Hindu marriage—is illegal and void under Section 494 of the Indian Penal Code (IPC), and the husband is liable to be prosecuted and punished for bigamy. The Supreme Court emphasized the urgency of enacting a Uniform Civil Code under Article 44 of the Constitution to protect women from exploitation resulting from conflicting personal laws.

J U D G M E N T

THE 10TH DAY OF MAY, 1995 Present:

It is, thus, obvious from the catena of case-law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu Law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under

the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.

The position has not changed after coming into force of the Hindu Marriage Act, 1955 (the Act) rather it has become worse for the apostate. The Act applies to Hindus by religion in any of its forms or developments. It also applies to Buddhists, Jains and Sikhs. It has no application to Muslims, Christians and Parsees. Section 4 of the Act is as under:

A marriage solemnised, whether before or after the commencement of the Act, can only be dissolved by a decree of divorce on any of the grounds enumerated in Section 13 of the Act. One of the grounds under Section 13 (i) (ii) is that "the other party has ceased to be a Hindu by conversion to another religion". Sections 11 and 15 of the Act is as under:-

"Void marriages:- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 ."

It is obvious from the various provisions of the Act that the modern Hindu Law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under section 13 of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the provisions of the Act and as such would be nonest. Section 494 Indian Penal Code is as under:-

It is no doubt correct that the marriage solemnised by a Hindu husband after embracing Islam may not be strictly a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy.

The expression "void" for the purpose of the Act has been defined under Section 11 of the Act. It has a limited meaning within the scope of the definition under the Section. On the other hand the same expression has a different purpose under Section 494 , IPC and has to be given meaningful interpretation.

The expression "void" under section 494 , IPC has been used in the wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494 , IPC.

A Hindu marriage solemnised under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of Section 494 , IPC. Any act which is in violation of mandatory provisions of law is per-se void.

The real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-bye to the substance of the matter and acting against the spirit of the Statute if the second marriage of the convert is held to be legal.

We also agree with the law laid down by Chagla, J. in *Robasa Khanum vs. Khodabad Irani* 's case (supra) wherein the learned Judge has held that the conduct of a spouse who converts to Islam has to be judged on the basis of the rule of justice and right or equity and good conscience. A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494 , IPC.

Looked from another angle, the second marriage of an apostate-husband would be in violation of the rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry again without getting his marriage under the Act dissolved. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as such would be void.

The interpretation we have given to Section 494 IPC would advance the interest of justice. It is necessary that there should be harmony between the two systems of law just as there should be harmony between the two communities. Result of the interpretation, we have given to Section 494 IPC, would be that the Hindu Law on the one hand and the Muslim Law on the other hand would operate within their respective ambits without trespassing on the personal laws of each other. Since it is not the object of Islam nor is the intention of the enlighten Muslim community that the Hindu husbands should be encouraged to become Muslims merely for the purpose of evading their own personal laws by marrying again, the courts can be persuaded to adopt a construction of the laws resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law.

All the four ingredients of Section 494 IPC are satisfied in the case of a Hindu husband who marries for the second time after conversion to Islam. He has a wife living, he marries again. The said marriage is void by reason of its taking place during the life of the first wife.

We, therefore, hold that the second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of Section 494 IPC.

We may at this stage notice the Privy Council judgment in *Attorney General Ceylon vs. Reid* (1965 Al. E.R. 812). A Christian lady was married according to the Christian rites. Years later she embraced Islamic faith and got married by the Registrar of Muslim Marriages at Colombo according to the statutory formalities prescribed for a Muslim marriage. The husband was charged and convicted by the Supreme Court, Ceylon of the offence of bigamy under the Ceylon Penal Code. In an appeal before the Privy Council, the respondent was absolved from the offence of bigamy. It was held by Privy Council as under :-

Despite there being an inherent right to change religion the applicability of Penal laws would depend upon the two personal laws governing the marriage. The decision of Privy Council was on the facts of the case, specially in the background of the two personal laws operating in Ceylon. Reid's case is, thus, of no help to us in the facts and legal background of the present cases.

Coming back to the question "uniform civil code" we may refer to the earlier judgments of this Court on the subject. A Constitution Bench of this Court speaking through Chief Justice Y.V. Chandrachud in *Mohd. Ahmed Khan vs. Shah Bano Begum* AIR 1985 SC 945 held as under:

There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning.

Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."

In *Ms. Jordan Diengdeh vs. S.S. Chopra* AIR 1985 SC 935 O. Chinnappa Reddy, J. speaking for the Court referred to the observations of Chandrachud, CJ in *Shah Bano Begum* 's case and observed as under:

One wonders how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu law - personal law of the Hindus - governing inheritance, succession and marriage was given go- bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.

Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 , 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India.

It has been judicially acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers. It can be superseded by the State just as it can prohibit human sacrifice or the practice of "Suttee" in the interest of public order. Bigamous marriage has been made punishable amongst Christians by Act (XV of 1872), Parsis by Act (III of 1936) and Hindus, Buddhists, Sikhs and Jains by Act (XXV of 1955).

Political history of India shows that during the Muslim regime, justice was administered by the Qazis who would obviously apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system, more or less, continued during the time of the East India Company, until 1772 when Warren Hastings made Regulations for the administration of civil justice for the native population, without discrimination between Hindus and Mahomedans. The 1772 Regulations followed by the Regulations of 1781 whereunder it was prescribed that either community was to be governed by its "personal" law in matters relating to inheritance, marriage, religious usage and institutions. So far as the criminal justice was concerned the British gradually superseded the Muslim law in 1832 and criminal justice was governed by the English common law. Finally the Indian Penal Code was enacted in 1860. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion. It would be necessary to emphasise that the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.

The Successive Governments till-date have been wholly re-miss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.

We, therefore, request the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and "endeavour to secure for the citizens a uniform civil code through the territory of India".

We further direct the Government of India through Secretary, Ministry of Law and Justice to file an affidavit of a responsible officer in this Court in August, 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a "uniform civil code"

New Delhi;
May 10, 1995.

.....J.
(Kuldip Singh)

.....J.
(R.M. Sahai)