

(2016) 11 KAR CK 0091

In the Karnataka High Court

Case No : Writ Petition No. 43528 of 2015 (GN-FC)

Anupam Agarwal

APPELLANT

Vs

Mickey Agarwal

RESPONDENT

Date of Decision : 24-11-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 25
Hindu Marriage Act, 1955 — Section 13

Citation : (2017) 1 DMC 837

Hon'ble Judges : Ashok B. Hinchigeri, J.

Bench : Single Bench

Advocate : Mr. Anupam Agarwal, Party-in-Person, for the Petitioner; Mr. Ajith Achappa, Advocate, for the Respondent No. 1; Mr. Krishna S. Dixit, ASG, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Ashok B. Hinchigeri, J.—The petitioner - party-in-person Sri Anupam Agarwal, is seeking the relief of declaration that Section 13 of the Hindu Marriage Act, 1955 ("the said Act" for short) is ultra vires of the Constitution of India. He submits that as per the Hindu religion, marriage is a sacrament. The husband and wife in this world would remain so in the next world also. Therefore the law cannot provide for the dissolution of the marriage.

2. The petitioner submits that Section 13 of the said Act dealing with the dissolution of the marriage amongst the Hindu is opposed to Article 25 of the Constitution of India. He submits that the law cannot be enacted to regulate the religious affairs. In support of his submissions, he relies on the following decisions:

(i) AIR 1962 MADRAS 400-B. Sivanandy v. P. Bhagavathyamma.

(ii) LAWS (PVC) 1901 35-Tekait Mon Mohini Jemadai v. Basanta Kumar Singh.

(iii) AIR 1979 All 316-Gopal Krishan Sharma v. Dr. Mithilesh Kumari Sharma.

3. He submits that the Law Commission has already submitted the report that the children would suffer, if their parents' marriage is dissolved. He submits that the State cannot be permitted to dissolve the marriage to bring about order in the society.

4. Mr. Krishna S. Dixit, the learned Assistant Solicitor General of India appearing for the respondent No. 2 submits that, if a party was permitted to contract multiple marriages according to his personal law, he cannot agitate the same under the codified regime. He relies on the Bombay High Court's decision in the case of *State of Bombay v. Narasu Appa Mali* reported in AIR 1952 BOMBAY 84, wherein it is held that even assuming that polygamy is a recognised institution according to Hindu religious practise, the right of the State to legislate on questions relating to marriage cannot be disputed. He brings to my notice the Apex Court's judgment in the case of *Naveen Kohli v. Neelu Kohli* reported in I (2006) DMC 489 (SC)=III (2006) SLT 43=128 (2006) DLT 360 (SC)=(2006) 4 SCC 558 to advance the submission that the Apex Court has not only been approving of the existing law on divorce but has laudably suggested to the Parliament that an amendment for dissolution of the marriage on the ground of the break-down of marriage irretrievably, be incorporated under Section 13 of the said Act. Paragraph Nos. 72, 74, 75 and 91 of the said decision read out by him are extracted herein below:

"72. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The Court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

91. Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate

irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps."

5. Mr. Ajith Achappa, the learned Counsel for the respondent No. 1 submits that the Hon"ble Supreme Court and the various High Courts have upheld the validity of Section 13 of the said Act.

6. The submissions of the learned Counsel have received my thoughtful consideration. It is trite that a legislation can be invalidated only on two grounds: (a) if the legislation violates any provision of the Constitution (b) if it is without the legislative competence. No third ground is available for declaring the law to be invalid.

7. I am not in a position to give acceptability to the submission of the petitioner that Section 13 of the said Act contravenes the provisions contained in Article 25 of the Constitution of India.

8. On the alleged ground that Section 13 of the said Act impliedly derecognizes the marriage amongst the Hindus as a sacrament, this Court's interference is not warranted. The statute can always extinguish the customary law and the customary right.

As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, although the Act does not actually extinguish the custom by express words.

9. An operative Act is the expression of the will of the sovereign Legislature; it overrides the consistent provisions of the existing personal law. The personal law cannot be repugnant, contrariant or derogatory to the statute.

10. It may not be out of context to refer to the Hon"ble Supreme Court's decision in the case of Smt. Parayankandiyal Eravath Kanapravatt Kalliani Amma and Others v. K. Devi and Others reported in 1996 (SLT Soft) 1567=AIR 1996 SC 1963. In the said case, the Hon"ble Supreme Court negated the submissions that a person can be permitted to acquire a second wife during the life-time of the first wife and during the subsistence of the first marriage, just because the second marriage was customarily permitted under certain circumstances and for some purposes in the era of pre Hindu Marriage Act, 1955. As the codified law prevails over all other laws, be they are ecclesiastical, personal or customary, the rights which the parties had before the commencement of the said Act do not remain alive. The practices and customs, even if traceable to religion, stand abrogated or destroyed, if they run contrary to the statutory provisions, unless the custom is saved or preserved by a statute. The previously existing rights do not survive, as they are superceded by the statute.

11. The submission of Mr. Anupam Agarwal that the State has no power to dissolve the marriage also fails in view of the power conferred by the legislature

upon the Courts for the dissolution of the marriage. His submission that the Law Commission has also submitted the report that the dissolution of the marriage leads to miseries for the children is correct, but on that ground the invalidating of Section 13 of the said Act is not warranted. It is for the Legislature to act on the inputs received from the Law Commission and make the provisions for alleviating the miseries of the children of the divorced parents.

12. In the result, I dismiss this petition. No order as to costs.