

(1958) 01 GAU CK 0008
In the Gauhati High Court

Haisnam Baruniton Singh

APPELLANT

Vs

Thokchom Ningol Haisnam Ongbi Bhani Devi and Others

RESPONDENT

Date of Decision : 30-01-1958

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 25, 372

Citation : AIR 1959 Guw 20 : (1959) CriLJ 493

Hon'ble Judges : J.N. Datta, J.C.

Bench : Single Bench

Judgement

J.N. Datta, J.C.

1. This is a some what unusual application u/s 561-A of the Cr. P. Code for quashing the proceedings u/s 494 IPO that are going against the applicant and some others in the court of the Magistrate, at the instance of his first wife the complainant,

2. It is an admitted fact that the complainant Thokcho Ningol Haisnam Ongbi Bhani Devi was legally married to the applicant, the main accused, in 1952. The applicant, who is an Assistant Engineer in the PWD of the Manipur Administration, again married in 1956, Thounaojam Ningol Haisnam Ongbi Ibechaobi Devi, one of the accused in the criminal case, which led to the institution of the above-mentioned prosecution.

According to the applicant, he had divorced the complainant according to the prevailing custom in 1954 and if that is proved, and found to be a valid divorce, then admittedly he committed no offence when he married the other lady in 1956. I mention it incidentally only, but we are not concerned with that question in this application, because by this application the contention raised on behalf of the applicant, is that even if the first marriage subsisted and subsists he has not committed any offence in contracting the second marriage.

3. We all know that under the personal law of the Hindus, which the parties admittedly are, there was no limit to the number of lawfully married wives a

Hindu could have. We equally well know that this state of things was put an end to in 1955 by the enactment of the Hindu Marriage Act (Act go. Order 1955). The relevant part of Section 5 of that Act runs as follows:

5. Conditions for a Hindu marriage--A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) x x x

4. Attention may also be drawn to Section 4 of the Act, which abrogated the old law personal or otherwise or custom or usage, which was in force in the past, but is inconsistent with the provisions of the said Act.

5. It will be thus clear that a Hindu commits the offence of bigamy punishable u/s 494 IPC if after this Act came into force, he marries second wife, during the life time of his first wife, unless it can be shown, as is the case of the applicant that the Act in question is void.

6. The learned Counsel urged that the Hindu Marriage Act, 1955 was ultra vires the Constitution of India and in support of his contention he advanced two points namely:

(i) That the Act discriminates between Hindus and Muslims, the latter being still free to take more than one wife according to their personal law and thus offends the provisions of Article 15(1) of the Constitution.

(ii) That the population of the Union Territory of Manipur, according to the census Order 1951 consisted of 2,83,685 males and 2,93,950 females that is, there was a preponderance of females by 10,265 over the male population. If therefore a man was restricted to one wife only, the excess number of females could not hope to get married and satisfy their biological needs in lawful wedlock with the result that such a situation was bound to lead to immorality, and traffic in human beings, against which the Constitution had set its face.

7. I may at once express, that I was not impressed with the arguments advanced in support of these contentions, and the very foundation of the second point is fallacious. Much was said about the sexual needs of human beings, and the evils of prostitution and support was tried to be drawn from works of authors like Sigmund Freud and Bertrand Russell. Even a reference was made to Kinsey's Report. But I do not think that they help the applicant on the point actually involved. Neither can I subscribe to the view that a woman who cannot get married must go wrong or become a prostitute.

8. Morality is not always connected with the physique and one thing evolution through the ages has done to mankind is to bring under greater control the physical aspect of matters and to subordinate it to the mind. If it were not so we would not find unchaste married women and chaste widows or unmarried women. It cannot therefore be asserted that marriage is the panacea for all

moral evils.

Similarly, the contention that the increase in the divorce rate, and the flourishing state of prostitution in several countries where monogamy prevails is due to the rule of one wife at a time, can hardly be accepted. The increase in the divorce rate, rather indicates that marriage alone is not the solution.

9. Learned Counsel asserted that marriage was nothing but a lawful means of satisfying lust. He even at one stage went to the length of characterising it as a form of legal prostitution. If so, one can very well ask the question, whether it is not more desirable to restrict it than to give legal sanction for its being practised more widely. It is not unlikely that this was one of the most important considerations, which set the public opinion against the old institution of more-than-one-wife, and the idea of having several wives at the same time became repugnant to a person of education and culture.

Society changes from time to time, and so do the ideas of morality and moral values, and laws which have to serve them, must be adjusted accordingly. It was in these circumstances that the law in question was passed. Laws cannot be more than utilitarian, that is, based on the theory of greatest good to the greatest number, and it is well nigh impossible to frame such a perfect law which will be advantageous to every one in every respect.

10. Nor should any serious consideration be given to the argument of the learned Counsel that marriage being a sacrament among the Hindus, and being primarily intended for the performance of rituals, bigamy amongst them should be permitted, as it has the added advantage of solving the problem which arises, when the population of females is more than that of the males. Any law, therefore, which restricts this liberty should be struck down.

First, it hardly lies in the mouth of the present applicant to advance this contention, when he does not admit that his first marriage subsists, and secondly as already stated all this depends on the ideas of the society as it advances for better or worse.

It hardly needs to be pointed out that in the present age and present times no one marries for the purpose of facility in the performance of religious ceremonies, rather the question of marriage has become a question of personal economics. The argument also fails to take into consideration the wishes and desires of the women of the country, who are advancing every day, and as is well known have become strongly against the old institution of bigamy.

11. Again, where is the guarantee, that even if monogamy were not enforced, a married man will be coming forward to take a second wife or more wives so that the excess number of unmarried women might be absorbed. Bather ninety-nine chances out of hundred that the man and his first wife would fall out, thus leading to the break up of their house and the attendant misfortunes for their children, because in modern times looking to the stage of advancement at which

the Hindu society has reached, it will be a rare case, if not impossible, that a wife would agree to live with her husband even when he has taken another wife.

12. It is common knowledge that many young men and women of marriageable age do not enter the domain of matrimony either by choice, or due to circumstances which are within or without their control, and there is no law to force them to marry. It will be thus obvious that statistics alone cannot clinch the matter when there is always a considerable percentage of the mate population of marriageable age unmarried. How can a single woman then get up and say that she cannot find a husband, and therefore, the law of monogamy should be done away with?

13. The percentage of the excess of female population over the male population according to the census figures Order 1951, is also such it is less than 4 p.c. that it should not give cause for any alarm because the figures must include) quite a large number of children also, and this difference in the number of males and females cannot always be constant.

It is therefore nothing but far-fetched to say that the law imposing monogamy will lead to immorality or give a flip to prostitution. It is more a matter of human nature and the remedy lies in bringing to bear upon it sobering influences as the whole history of evolution of mankind shows and not in enlarging the scope for it.

14. An attempt was also made to show that the custom or personal law of the Manipur was preserved and safe-guarded under the Manipur Constitution Act (1947) and Section 42 of the Manipur (Courts) Act, 1955, and reliance was placed on *Ram Manohar Lohia v. S. Sundaram* (S) AIR 1955 Man 41, to show that the said Constitution Order 1947. was never repealed. But that very ruling shows that those provisions only of that Constitution will continue to remain which are not inconsistent with the provisions of the Indian Constitution under Article 372 of the latter.

That is a proposition which was not disputed, but under Article 372 of the Indian Constitution such laws which were in force before the Constitution of India came in force will continue in force only till they are altered or repealed or amended by a competent Legislature. Now the power to legislate on the subject of marriage and divorce and also all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Indian Constitution subject to their personal law, vests in the Parliament as well as State Legislatures, by virtue of its inclusion in the Concurrent List (No. III) in the 7th Schedule to the Constitution (see Item No. 5).

They can therefore legislate on these matters and the effect of such legislation will naturally be the repeal of the old law or personal law, which existed before on the subject. In the present case. Section 4 of the Hindu Marriage Act, 1955, made this further clear. Section 42 of the Manipur (Courts) Act, 1955, also preserves the custom or personal law only to the extent they have not been altered or abolished by a legislative enactment.

15. Article 25(2) of the Constitution of India also gives the State ample power to make laws governing such matters even if they were to be treated as part of the Hindu religion. There is thus no force in the contention of the applicant that the Hindu Marriage Act, 1955, should be struck down on this ground namely that immorality will be the necessary result of it. I need not therefore discuss the cases cited by the learned Counsel, and which are not to the point, and relate to custom etc. as administered in civil courts.

16. Coming to the first point, I consider that the applicant stands in that connection also on weak ground. The fundamental right conferred by Cl (1) of Article 15 of the Constitution is conferred on a citizen as an individual, and may in that sense be called to be "personal," and the use of the word "only" in that clause clearly means that no person of a particular religion caste etc, shall be treated unfavourably when compared with persons of other religions and castes, simply on the ground that he belongs to a particular religion or caste etc. In other words it means that other qualifications being equal, the race, religion etc. of a citizen shall not be a ground of preference or disability. That is, discrimination on other grounds or , considerations than those mentioned in the Article is permissible and will not be unconstitutional.

17. Similarly the guarantee of equal protection extended by Article 14 of our Constitution while prohibiting class legislation, does not forbid classification on reasonable grounds of distinction. It only lays down that all persons subjected to such legislation shall be treated alike under like circumstances and conditions as regards the privileges-conferred and liabilities imposed, and what Article 14 tries to prevent is that no person or class of persons, shall be singled out as a special subject for discrimination and hostile legislation. If therefore the classification is arbitrary and without any basis, then only it will attract the provisions under Article 14; otherwise not see *Charanjit Lal v. Union of India* AIR 1951 Section 41.

18. In a Bombay case reported in *The State of Bombay Vs. Narasu Appa Mali*, in which the validity of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946, was involved, the observations of their Lordships were as follows:

5. Now a sharp distinction must be drawn between religious faith and belief and religious-practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole. A-very interesting and instructive case is to be found in the American Reports, viz. *Davis v. Beason* (1889) 133 U.S. 333. In that case it was contended that polygamy was part of the creed of the-Mormon Church and any legislation which penalises polygamy to the extent that it affected Mormons was contrary to the First Amendment of the Constitution which provided that Congress shall not make any law respecting the establishment of religion or forbidding the free exercise thereof. This argument was rejected, and Mr. Justice Field delivering the opinion of the Court pointed out that (p. 640):

"The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.

He further pointed out that the First Amendment could not be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. He further pointed out that (p. 640):

Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

Further on he states (p. 640):

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices

It is only with very considerable hesitation that I would like to speak about Hindu religion, but it is rather difficult to accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognizes the necessity of son for religious efficacy and spiritual salvation. That same religion also recognises the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the frame-work of monogamy.

7. But even assuming that polygamy is a recognized institution according to Hindu religious practice, the right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world to-day admits that monogamy is a very desirable and praiseworthy institution. If therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion. A question has been raised as to whether it is for the Legislature to decide what constitutes social reform, It must not be forgotten that in a democracy the Legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put upon the statute book in order to, advance the welfare of the State. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of law to sit in judgment upon that decision. Therefore, in our opinion, this legislation does not contravene Article 25(1) of the Constitution.

19. The further observations in that case were to the effect, that Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise, and Article 14 is not offended if the classification is based on reasonable and rational considerations, which matters were for the Legislatures to decide,

20. To the same effect, was the decision reported in *Srinivasa Aiyar Vs. Saraswathi Ammal*, in which the Madras Hindu (Bigamy Prevention and Divorce) Act Order 1949 was held not to offend Articles 15 and 25 of the Constitution. It was held in that case, and I am in respectful agreement with that view, that an Act which amend or alters or repeals parts or whole of the personal law of Hindus which is different from the personal law of the Muslims, cannot be said to be discriminating between Hindus and Muslims on the ground of religion: see also *Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt and Another Vs. The Commissioner, Hindu Religious Endowments, Madras and Others*,

21. The same view further finds support from the following observations in the case reported in *Ram Prasad Seth Vs. State of U.P. and Others*,

It is not necessary for me to refer to a number of cases on this point. It is sufficient to state that it is well settled that in a democratic State the legislature represents the will of the people and as such is responsible for the welfare of the State and it is for the legislature to lay down the policy that the State should pursue. It cannot, therefore, be said that if the legislature as the law making authority regards a particular measure as a measure of social reform the Courts should not say that it should not be regarded as a measure of social reform. The fact that according to Hindu Shastras the marriage is a sacrament and is regulated by the Shastras and that essential principle underlying a Hindu marriage is the perpetuation of family by birth of sons nonetheless the marriage is a social institution and it may be for the welfare of the State to control such an institution and to bring about measures of reforms which the legislature's wisdom thinks proper to do in the interest of the State.

22. Applying the above tests, it cannot be said by any stretch of imagination that the Hindu Marriage Act, 1955, which imposes monogamy on the Hindus, offends the provisions of Article 15 or of Arts, 14 Order 25 of the Constitution of India.

23. In the result this application must fail and is dismissed.