

**(1992) 03 SHI CK 0014**  
**In the High Court Of Himachal Pradesh**  
**Case No : C.M.P. (Main) No. 332 of 1988**

Marian Eva and Another

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

**Date of Decision :** 06-03-1992

**Acts Referred:**

Foreign Marriage Act, 1969 — Section 3, 3(2)  
Special Marriage Act, 1954 — Section 4, 6(3)

**Citation :** AIR 1993 HP 7 : (1992) 2 DMC 142 : (1992) 2 ShimLC 404

**Hon'ble Judges :** Kamlesh Sharma, J

**Bench :** Single Bench

**Advocate :** D.N. Sharma, for the Appellant; M.V. Sharma, A.A.G., for the Respondent

**Final Decision :** Allowed

## Judgement

Kamlesh Sharma, J.—The petitioners are aggrieved of the order dated 15-7-1988 of Special Marriage Officer, Shimla (Urban), Sub-Division, Shimla, appointed under the Special Marriage Act, whereby he has refused to solemnise their marriage under the Special Marriage Act on the ground that since petitioner No. 1 is a permanent resident of Germany, it is not possible to transmit a copy of notice to Marriage Officer of the District within whose limit, petitioner No. 1 permanently resides, as provided u/s 6(3) of the Special Marriage Act. He has assumed that no marriage Officer under the Special Marriage Act has been appointed in Germany by the Government of India. The order dated 15-7-1988 of Special Marriage Officer, Shimla, was challenged before the District Judge in appeal filed u/s 8(2) of the Special Marriage Act, but it has been dismissed as not maintainable vide judgment dated 25-8-1988 passed by the District Judge, Shimla. Now, by way of this petition under Article 227 of the Constitution of India, the petitioners have prayed for quashing the order dated 15-7-1988 of Special Marriage Officer, Shimla and for directions to him to solemnise the marriage of the petitioners in accordance with Special Marriage Act.

2. I have heard learned counsel for the parties and gone through the record. The admitted facts are that on 30-6-1988, both the petitioners jointly gave notice on the prescribed form u/s 5 of the Special Marriage Act to the Marriage Officer, Shimla, District Shimla, of their marriage intended to be solemnised under the said Act. As petitioner No. 2 has been residing in Shimla on the address given in the notice since his childhood, the Marriage Officer, Shimla, District Shimla, appointed under the Special Marriage Act, 1954, has the jurisdiction to solemnise the marriage of the petitioners under the said Act. Petitioner No. 2 is a Tibetan National though he is born, brought up and educated in Shimla. At the time of giving notice, he was 23 years of age and unmarried. His occupation was business. So far petitioner No. 1 is concerned, she is a German National. She was on tour to India and residing in Shimla from 9-4-1988. At the time of giving notice, she was 27 years of age and unmarried. Her occupation is nursing. She had declared herself a permanent resident of Germany. All these particulars they had filled in the notice.

3. Before examining the legality of the impugned order of Special Marriage Officer, Shimla, it is necessary to refer to some provisions of Special Marriage Act to find out whether the marriage between the petitioners could be solemnised or not. Section 4 of the Special Marriage Act provides conditions relating to solemnisation of Special Marriage and is as under :--

"4. Conditions relating to solemnisation of special marriage :--

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:

(a) Neither party has a spouse living;

(b) neither party -

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity or epilepsy;

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends,

Explanation -- In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied -

(i) that such rule has been continuously and uniformly observed for a long time among those members;

(ii) that such rule is certain and not unreasonable or opposed to public policy; and

(iii) that such rule, is applicable only to a family, has not been discontinued by the family."

4. Under this Section, marriage between any two persons can be solemnised if neither party has spouse living, neither party is suffering from disabilities mentioned in Sub-sections (b) and (d) and the male has completed the age of 21 years and female the age of 18 years. From the words "persons" used in this Section, it is clear that for solemnisation of marriage under the Special Marriage Act, it is not necessary that either one of the parties or both the parties should be citizen of India. In other words, marriage under the Special Marriage Act may be solemnised between two citizens of India or two foreigners or between a citizen and a foreigner. This is further clear from Section 1(2) of the Special Marriage Act, whereby it has been extended to whole of India except the State of Jammu and Kashmir and applies also to citizens of India domiciled in the territories to which the Act extends and who are in the State of Jammu and Kashmir. Therefore, the Special condition that both parties should be Indian citizens applies only where this Act is made applicable to territories of Jammu and Kashmir. In the present case, both the parties are foreigners and fulfil the condition laid down in Sections 4(a) and 4(c), and do not suffer from any disability stated in Sections 4(b) and 4(d) of the Special Marriage Act, therefore, their marriage can be solemnised under the Special Marriage Act.

5. Section 5 of the Special Marriage Act provides that -

"When a marriage is intended to be solemnised under the Act, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer of the District in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given."

In the present case, such a notice was given to the Special Marriage Officer, Shimla, District Shimla, as petitioner No. 2 has been residing, in Shimla since his childhood.

6. On receipt of notice of a marriage intended to be solemnized under the Special Marriage Act, the Marriage Officer is required to proceed with publication of such notice as prescribed under Section 6 of the Special Marriage Act. Section 6 of the Special Marriage Act is as under :--

"6. Marriage Notice Book and publication-

(1) The Marriage Officer shall keep all notices given u/s 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

(2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

(3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given u/s 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office."

7. So far Sub-section (1) of Section 6 of Special Marriage Act is concerned, the Marriage Officer is to keep the record of notices received u/s 5 by entering true copy of every notice in a book prescribed for that purpose called the Marriage Notice Book, which is open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same. Further, under Sub-section (2) of Section 6 of Special Marriage Act, the Marriage Officer concerned is to get published every notice received u/s 5 by affixing its copy on some conspicuous place of his office. Under Sub-section (3) of Section 6 of Special Marriage Act, if either of the parties to the intended marriage is not permanently residing within the local limits of the Marriage Officer, who has received notice u/s 5 of the Special Marriage Act, the Marriage Officer is required to transmit the notice to the Marriage Officer of the District within whose limits such party is permanently residing and that Marriage Officer shall get the copy of the -notice affixed to some conspicuous place of his office. In the present case, the Special Marriage Officer, Shimla, found it not possible to comply with Sub-section (3) of Section 6 of Special Marriage Act as according to him, no Marriage Officer has been appointed by Government of India in Germany, where one of the parties to the intended marriage i.e. petitioner No. 1 is permanently residing. According to him, by not complying with this provision, he might be held liable and penalised as provided u/s 46 of the Special Marriage Act, which is as under:--

"46. Penalty for wrongful action of Marriage Officer -

Any marriage officer who knowingly and wilfully solemnises a marriage under this Act -

(1) without publishing a notice regarding such marriage as required by Section 5; or

(2) within thirty days of the publication of the notice of such marriage; or

(3) in contravention of any other provision contained in this Act, shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both."

8. Marriage Officers for the purpose of Special Marriage Act are appointed under the Act by the State Government for the whole or any part of the State by notification in the Official Gazette. Under Sub-section (2) of Section 3 of the Special Marriage Act, for the citizens of India domiciled in Jammu and Kashmir to which this Act may be extended, it is the Central Government who issues the notification specifying such officers of the Central Government as it may think fit to be the Marriage Officers of the State or any part thereof. For performing marriages outside India, where one of the parties to the marriage is an Indian citizen, there is the Foreign Marriage Act, 1969. Marriage under this Act is also solemnised by a Marriage Officer in a foreign country, who is a diplomatic or consular officer appointed by the Central Government by notification in the Official Gazette, as provided u/s 3 of the Foreign Marriage Act. It is further explained in Section 3 of Foreign Marriage Act, 1969 that "diplomatic officer" means an ambassador, envoy, minister, high commissioner, commissioner, charge d'affairs or other diplomatic representative or a counsellor or secretary of an embassy, legation or high commission. Therefore, from joint reading of Section 3(2) of Special Marriage Act and Section 3 of Foreign Marriage Act, 1969 it can be safely presumed that Central Government might have appointed its diplomatic or consular officers at abroad as Marriage Officers for solemnising marriages under the Special Marriage Act. It is another thing that neither the Special Marriage Officer, Shimla nor the parties have cared to get information in this regard.

9. Assuming, there is no Marriage Officer appointed by the Central Government in Germany for performing the marriage under the Special Marriage Act, it was the duty of Special marriage Officer, Shimla to refer the matter to the Central Government to seek its advice on the analogy as provided u/s 10 of the Special Marriage Act, 1954, which is as under :--

"10. Procedure on receipt of objection by Marriage Officer abroad -

Where an objection is made u/s 7 to a Marriage Officer in the State of Jammu and Kashmir in respect of an intended marriage in the State and the Marriage Officer, after making such inquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer who shall act in conformity with the

decision of the Central Government."

10. It is correct that in the present case, no objection was made u/s 7 of Special Marriage Act to the Special Marriage Officer, Shimla, as envisaged u/s 10 of the said Act, but the problem posed to him was very much similar. The Special Marriage Officer was rightly cautious that he might not contravene the provision of Sub-section (3) Section 6 of Special Marriage Act and make himself liable to penalty provided u/s 46 of the said Act, but he was too technical to refuse the petitioners to solemnise their marriage instead of making enquiries and seeking guidance from the Central Government. The intention of petitioners to marry was throttled at the threshold for no fault of theirs, but because the Special Marriage Officer, Shimla did not care to find out whether their marriage could be solemnised under the Special Marriage Act, 1954 or not.

11. In view of the above discussion, I need not examine the legality of the judgment dated 25-8-1986 of the District Judge, as instead of remanding the appeal to him for fresh decision, this Court thinks it proper to remand the matter to Special Marriage Officer, Shimla with the following directions :--

(1).To give notice to the petitioners at the permanent address of petitioner No. 2 in Shimla, whether they are still interested in solemnisation of their marriage under the Special Marriage Act, if yes, they within one month from the receipt of the notice of Special Marriage Officer will file fresh notice u/s 5 of Special Marriage Act.

(2) On receipt of notice u/s 5 of Special Marriage Act, the Special Marriage Officer, Shimla, will immediately refer the matter to the Central Government to find out whether any Marriage Officer under the Special Marriage Act has been appointed in Germany and if not, such a Marriage Officer may be appointed to enable him to send copy of notice u/s 5 for affixation to some conspicuous place of his office as provided under Sub-section (3) of Section 6 of Special Marriage Act.

(3) The Central Government will deal with the reference of Special Marriage Officer, Shimla as if it is made u/s 10 and apprise him of its decision within a reasonable period.

(4) On receipt of advice from the Central Government, the Special Marriage Officer, Shimla will proceed with solemnisation of the marriage of the petitioners in accordance with the provisions of Special Marriage Act.

12. In the result, the petition is allowed, and the order dated 15-7-1988 of special Marriage Officer, Shimla, is set aside. The case is remanded back to him for proceeding with it in accordance with the directions stated hereinabove.

13. There is no order as to costs.