
(1957) 03 AHC CK 0007

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 340 of 1956

Ram Prasad Seth

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-03-1957

Acts Referred:

Constitution of India, 1950 — Article 25, 25(2)

Hindu Marriage Act, 1955 — Section 10, 13, 5, 9

Uttar Pradesh Government Servants (Conduct) Rules, 1956 — Rule 27

Citation : AIR 1957 All 411 : (1957) 27 AWR 420 : (1957) 2 LLJ 172

Hon'ble Judges : Mehrotra, J

Bench : Single Bench

Advocate : A.P. Pandey, A.P. Gupta, D. Sanyal and Brijlal Gupta, for the Appellant; A.P. Singh Chauhan and Bhagwan Das Gupta and Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Mehrotra, J.—This is a petition under Article 226 of the Constitution praying that the orders dated the 13th July, 1955 and 4th of November, 1955 be quashed and further for a writ of mandamus commanding the State of U. P. to dispose of the petitioner's applications dated the 24th April, 1955 and 4th August, 1955 in accordance with the personal law as laid down in the Dharam Shastras as the provisions of Sections 5, 9, 10 and 13 and other provisions of the Hindu Marriage Act, 1955 are ultra vires of the Constitution particularly when they debar the petitioner to exercise his fundamental rights guaranteed by the Constitution.

The reliefs which I have quoted above on the face of it appear to be very widely worded but the direction or the orders which the petitioner really asks this Court to issue will be clear from the facts which have been set out in the affidavit filed along with this petition and are mentioned below.

2. The petitioner passed the examination of the Civil Engineering from the Thomson College, Roorkee in or about the year 1936 and is at present occupying

the post of Sub-Divisional Officer, Public Works Department, working at Karan-prayag in the district of Garhwal. In the year 1934 he was married to Smt. Shanti Devi who has been impleaded as opposite party No. 3 to this petition, and had four children born of her. According to the petitioner the opposite party No. 3 after the birth of the girl miscarried five times during the period between 1960 and 1954.

The petitioner contends that according to the Hindu Dharam Shastras he cannot attain salvation without a son and that a number of religious obligations will remain unfulfilled unless there is a male child in the family. Having that in mind the petitioner asked the opposite party No. 3 to consent to his marrying again and she willingly gave her consent but subsequently she changed her mind and refused to give her consent under the influence of her brother. The petitioner, however, settled his marriage with certain family of his community. The opposite party No. 3 requested the State Government to ask the petitioner to refrain from marrying.

The petitioner was, therefore, served with a telegraphic message from the Chief Engineer, Public Works Department, to the effect that he should not marry a second wife without obtaining the permission of the State Government. On the 24th April the petitioner made an application to the State Government for permission to take a second wife. Another application to the same effect on the 10th July, 1955 was made by his father. At that time Hindu Marriage Bill was pending before the Parliament. After the passing of the Hindu Marriage Act the petitioner was informed that he could not be permitted to marry.

The Hindu Marriage Act was passed on the 18th May, 1955. On the 4th August, 1955 the petitioner submitted another application enquiring from the Chief Engineer the reasons on which the conclusions had been arrived at against the petitioner. To that letter he received a reply on the 22nd November 1955 to the effect that the grounds could not be supplied to him. By a Government order dated the 31st of January 1955 in exercise of the powers conferred by the proviso to Article 309 of the Constitution the Governor of U. P., was pleased to make the following amendment in the Government Servants Conduct Rules:

"After rule 26, the following as new rule 27 was added: Bigamous marriages. No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government notwithstanding that "such subsequent marriage is permissible under the personal law for the time being applicable to him."

The validity of this rule has also been challenged by this writ petition. In effect, therefore, the petitioner is challenging the validity of rule 27 and also certain provisions of Hindu Marriage Act.

3. The petitioner has contended that the rule which provides that a Government servant cannot marry a second wife during the presence of the first wife without the permission of the State Government infringes the fundamental right

guaranteed to the petitioner under Article 25 of the Constitution. It was contended by the Standing Counsel that it is open to an employer to retain as a condition of service that the employee must obtain permission before he marries a second time during the presence of his first wife and an employee having entered into service under that condition cannot turn round and say that such a condition is invalid as it contravenes the provisions of the Constitution.

In effect this argument is that what the State Government is doing is only enforcing a certain term of the conditions of service. It may, therefore, legitimately be argued that the rules made in exercise of the powers under Article 309 of the Constitution by the Governor are laws within the meaning of section 13 and If they infringe any of the fundamental rights guaranteed under part 3 of the Constitution, they can be held as invalid and any order passed in the exercise of that rule by the State or by the authorities can be quashed by this Court under Article 226 of the Constitution. It is, therefore necessary to go into the question whether the rule is violative of the fundamental right guaranteed under Article 25 of the Constitution.

4. Another argument which was advanced by the Standing Counsel may be referred at this stage. It was contended by him that in any case it is not open to the petitioner to ask for a declaration that the provisions of the Hindu Marriage Act are unconstitutional. It is open to the petitioner to remarry and if and when proceedings are started for violation of the provisions of the Hindu Marriage Act it may be open to the petitioner to challenge the validity of those provisions but it is not open to the petitioner to ask for a declaration about the validity of the provisions of the Act on the ground that the permission has been refused.

The argument in substance is that it is in effect asking this Court to enter into the validity of the reasons on which the permission has been refused. The argument is plausible on the face of it but in any case as the petitioner is entitled to the consideration of the tact whether the rules are violative of the provisions of Article 25 of the Constitution or not, the reasoning will mutatis mutandis apply to the provisions of the Act:

5. Article 25 of the Constitution of India is as follows:

25 (1) "Subject to public order, morality and health and to the other provisions of this Part all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

"(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law--

(a) regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform of the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I--The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II--In Sub-clause (b) of Clause (2) the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

The question, therefore, to be considered is whether the right to marry a second wife in the presence of the first wife can be regarded as a religious belief and any restriction placed on such a right is hit by Article 25 of the Constitution. The other question which is to be considered is whether such a religious belief is contrary to public order and to any other provisions of part 3 of the Constitution. Secondly if the rule is covered by the exceptions enumerated in Sub-section 2 of Article 25 of the Constitution. The petitioner in his supplementary affidavit filed certain extracts from the Manusmriti, Yagnavalkayasmriti, Dattak Mimansa, Yatrisahinta etc., and the argument is that one of the essential parts of the Hindu religion is that a Hindu is permitted to marry a second wife in the presence of the first wife if his first wife is incapable of bearing a male child.

6. The contention raised by the petitioner is that under Article 25 of the Constitution all persons are not only entitled to freedom of conscience which implies freedom to have any religious faith and belief but also the right to freely profess, practise and propagate religion subject to public order, morality and health and the other provisions of Part III of the Constitution. Reference was made to the case of Commissioner Hindu Religious Endowments v. Lakshmindra Thirtha, reported in AIR 1954 SC 282 (A). Particular attention was drawn to the following passage at p. 290 of the report:

"The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion"."

Their Lordships of the Supreme Court, however, after quoting certain passage from the judgment of Latham, C. J. of the High Court of Australia in the case of Adelaide Company v. Commonwealth, 67 CLR 116 (B) observed that these observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 25 on grounds of public order, morality and health, Clause (2) (a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by Sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. In that case it was further observed:

"What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious

sect of the Hindus prescribe that offerings of food should be given to the idol at particular hour of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities."

Dealing with the question "what then are matters of religion" it was observed at p. 290 of the report as follows:

"Religion is certainly a matter of faith with individuals or communities and it is necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observations, ceremonies and modes of worship which are regarded as integral parts of religion; and these forms and observances might extend even to matters of food and dress.""

In another case of *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, their Lordships of the Supreme Court observed that:

"Religion is not necessarily theistic; there are well known religions in India like the Buddhism and Jainism which do not believe in the existence of God or of any intelligent First Cause. A religion has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it is not correct to say that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well.

The article protects acts done in pursuance of religious belief as part of religion. For, religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines."

Relying upon these observations it was strongly contended by the counsel for the petitioner that the faith that a person unless he has a male child cannot get religious salvation is not only a matter of belief but the right to marry in the presence of a first wife and the actual marriage is also an integral part of the Hindu religion. Such a practice is nothing but a propagation of religion and is protected under Article 25 of the Constitution. The texts which have been referred to by the petitioner and which are set out as a part of the schedule to the affidavit filed by the petitioner, no doubt emphasise the need of a Hindu to have a son in order to achieve religious efficacy and spiritual salvation but the Hindu law further gives power to adopt a son and an adopted son is in the same position as a natural son.

Under the circumstances it cannot be said that it is obligatory as an integral part of a Hindu religion to marry in the presence of the first wife if from the first wife a Hindu has no male child. Particular emphasis was laid on a passage from Yagnyawalkya Smriti which provides that

"in the presence of a wife who is addicted to intoxicants, is ill, thrifty and produces only a female child and bears malice towards her husband, the husband can marry a second time."

This also to my mind only permits a second marriage in certain circumstances but it cannot be regarded as an integral part of a Hindu religion. In this connection the opposite party relied upon the case of State of Bombay v. Narasu Appa Mali, reported in AIR 1952 Bom 84 (D), where dealing with the Hindu Bigamous Marriages Act it was held that:

"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. It is rather difficult to accept the proposition that polygamy is an integral part of Hindu religion."

7. Mr. Pandey who appears for the petitioner has contended that in view of the observations of the Supreme Court in the case referred to by me earlier this dictum of the Bombay High Court that what is protected under Art 25 is only a religious belief and the doctrine and not religious practice cannot be accepted. The acts according to the case of the Supreme Court which are performed in pursuance of a particular religious belief are as much a part of the religion as the belief itself. It is true that the Supreme Court has laid down that Article 25 also protects religious acts. The acts done in pursuance of a particular belief are as much a part of the religion as belief itself but that to my mind does not lay down that polygamy in the circumstances such as of the present case is an essential part of the Hindu religion. The presence of a son may be essential to achieve religious salvation but that does not necessarily mean that in the presence of a wife who has a living female child and there being a right to adopt a second marriage is so obligatory so as to form part of the Hindu religion.

Even, however, assuming the contention of the petitioner to be correct that in such circumstances a second marriage is a part of the Hindu religion, the rule made by the State Government and the provisions of the Hindu Marriage Act are protected under Clause (2) of Article 25. Article 25, Clause (2) (b) provides that:

"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

In this connection it was urged by the counsel for the petitioner that among the Hindus, marriage is not a matter of contract. It is a sacrament and as such any law dealing with the marriage cannot be regarded as providing for social welfare and reform. To my mind there is no substance in this contention either. Even if the marriage may be regarded a sacrament among the Hindus but nonetheless the marriage is a social institution and any law made by the State relating to the marriage cannot be regarded anything than providing for social welfare and reform. In the Bombay case (D) which I have already referred to it was held that:

"Even assuming that polygamy is a recognised 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 in which the State is vitally interested. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform and 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."

It may not be universally recognised but still it has been admitted by a large volume of world opinion that monogamy is very desirable and praiseworthy institution. If under the circumstances the law-makers decide to enact a law which has the effect of making Hindus monogamists it can only be regarded as a measure of social reform within the competence of the State. It was contended that it is just and proper for this Court to consider whether a particular measure can be regarded as a social reform or for the welfare" of the society and that cannot be left to the exclusive discretion of the legislature.

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.

8. In the case of Srinivasa Aiyar Vs. Saraswathi Ammal, a similar view was taken and after giving my careful consideration to the argument advanced by Mr. Pandey I have come to the conclusion that the act of performing a second marriage in the presence of the first wife cannot be regarded as an integral part of Hindu religion nor can it be regarded as practising or professing or propagating Hindu religion which is protected under Article 25 of the

Constitution. Even if bigamy be regarded as an integral part of Hindu religion the impugned rule is protected under Article 25(b) of the Constitution.

9. There is, therefore, no force in this petition and it is accordingly rejected with costs.