

CONVERSION AND POLYGAMY

Sarla Mudgal v. Union Of India, 1995 (3) Scale 286 — A Comment

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① Marriage laws in India have unequivocally shown a clear preference for monogamous marriages,¹ with the notable exception of Muslim law which permits polygamy. Except Muslim law, every other personal law and the secular law of marriage in India, render the bigamous marriage not only void,² but also criminal under Sections 494 and 495 Indian Penal Code, 1860.³

② Again, barring Muslim law⁴ none of the personal laws treats conversion by a spouse, from his/her religion to another religion, as a ground for automatically dissolving the marriage. Under other personal laws conversion of spouse is only a ground for divorce to the aggrieved spouse.⁵

Because of the fact that Muslim law in India allows polygamy, a husband who intends to contract a bigamous marriage finds conversion to Islam as the easiest way out to enter into another marriage, without divorcing his wife under the earlier monogamous personal law. Can such a husband be held guilty of bigamy under Section 494 IPC?

This is exactly the question which was raised in *Sarla Mudgal v. Union of India*.⁶ In this case, a Hindu husband married under Hindu law, solemnized the second marriage according to Muslim law after effecting conversion to Islam. On being prosecuted for bigamy under Section 494 IPC,⁷ he contended that being a Muslim he could contract second marriage and IPC would not be applicable to him.

An examination of the Section 494 of IPC may help us to find a solution to this issue. The ingredients of the Section as pointed out by the Court are: (1) having a husband or wife living, (2) marries in any case, (3) in which such marriage is void, (4) by reason of its taking place during the life of such husband or wife.

It may be noted here, that the expression “marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife” in Section 494 IPC, means that a person who marries second time during the life of his or her first spouse would be punished under the Section, only if such second marriage is not recognised by his or her personal

law. The above expression merely emphasises the fact that unless a person is prohibited by the law to which he is subject in the matters of marriage and divorce from marrying more than one wife, he is not to be punished under Section 494 IPC.⁸ It is because of this reason that no Muslim male (marrying according to Muslim law) can be punished under Section 494 for taking the second or third or the fourth wife.

It is a well settled principle of matrimonial jurisprudence that in connection with marriage the personal law must be applied.⁹ In testing whether the first marriage of a Hindu husband with a Hindu woman was subsisting or not at the time of his second marriage with a Muslim women, after he became a convert to Islam, the principles of Hindu law should be applied; but in testing the validity of his second marriage, the principles of Muslim law should be applied.¹⁰

In other words, in the case of second marriage after conversion, the question whether a person's second marriage is void for deciding whether he should be exposed to the penalty of Section 494 IPC, involves reference to the personal laws of the parties to the second marriage. Thus, unless and until the second marriage of the apostate is void under the personal laws of the parties to the second marriage, the requirements of Section 494 are not fulfilled and consequently there could be no prosecution.

In *Sarla Mudgal* case their Lordships of the Supreme Court, while ruling that all the four ingredients of Section 494 are satisfied observed :

"A second marriage by an apostate under the shelter of conversion of Islam would nevertheless be a marriage in violation of the provisions of the Act."¹¹

(i) This observation is surprising. It is not understood as to how the validity of the second marriage be judged according to Hindu Marriage Act. Although Hindu Marriage Act makes monogamy a rule of law, there is no provision by which the second marriage, solemnized outside Hindu law, can be rendered void. This is evident from an analysis of the relevant provisions of the Hindu Marriage Act.

According to Section 5(i), marriage may be solemnized between two Hindus, if neither party has a spouse living at the time of the marriage.

Section 11 rendering such marriage void provides *inter alia*, that 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 the condition specified in clause (i) of Section 5.

Section 17 of the Act providing punishment for bigamy states that any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living, and the provisions of Sections 494 and 495 of the Indian Penal Code, 1860, shall apply accordingly.

One of the grounds of divorce under Section 13(1)(ii) is that the other party has ceased to be a Hindu by conversion to another religion.

It is clear from the above provisions of Hindu Marriage Act (hereinafter referred to as HMA) that the scope of the Act is limited only to the marriages between two Hindus. If a man and a woman, both Hindus, want to marry, then one of the requirements of a valid marriage under the Act is that neither of them should have a spouse living. If any of them has a spouse living, then the requirements of clause (i) of Section 5 is not satisfied, and marriage becomes void under Section 11 and subject to penalty under Section 17 of the HMA and Section 494 IPC. In case of the marriage of apostate husband with a Muslim woman, none of the parties to the marriage is Hindu, therefore the provisions of HMA making the second marriage void and penal, are not applicable to such marriage.

The Supreme Court has made reference to some old cases to emphasise that conversion to another religion by one or both the Hindu spouses does not dissolve the marriage and therefore the second marriage is void. Interestingly, however, all the cases referred by the Court are those cases where the apostate wife after embracing Islam contracted the second marriage. Since Muslim law does not recognise the right of Muslim woman to have more than one husband, the second marriage was held void and consequently the offence of bigamy was made out. But, not even a single case has been mentioned by the Court where the apostate was the husband.

The Supreme Court found support in a judgment of the Madras High Court,¹² wherein a Division Bench of the High Court dealing with a marriage under the Special Marriage Act, 1872 held :

“The Special Marriage Act clearly contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion. Such a person commits bigamy if he marries again during the lifetime of his spouse and it matters not what religion he professes at the time of the second marriage....”

The Supreme Court's reliance on this decision does not appear to be appropriate in as much as the provisions of Special Marriage Act are different from those of the HMA which came to be adverted to in *Sarla Mudgal*. The relevant provisions of Special Marriage Act, 1872 under which the Madras

decision was given are :

Section 2 (corresponding to Section 4(a) of the 1954 Special Marriage Act) provides that marriage may be celebrated under this Act when neither party at the time of the marriage, has a husband or wife living.

Section 15 (corresponding to Section 43 of the 1954 Special Marriage Act) lays down that every person who, being at the time married, procures a marriage of himself to be solemnized under this Act shall be deemed to have committed an offence under Section 494 or Section 495 of the Indian Penal Code, as the case may be, and the marriage so solemnized is void.

Section 16 (corresponding to Section 44 of 1954 Special Marriage Act) is important in our context, according to which every person married under this Act who, during the lifetime of his or her wife or husband contracts any other marriage, shall be subject to the penalties provided in Sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

It was on the basis of these provisions, that the Madras High Court has held, that the persons married under the Special Marriage Act could not escape from its provisions by changing religion. A person married under the Act commits bigamy and is subject to penalties provided in Section 494 IPC, if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of second marriage.

Unfortunately, however, there is no provision in the HMA corresponding to Section 16 of 1872 Special Marriage Act (Section 44 of 1954 Special Marriage Act). The HMA, does not render a bigamous marriage outside the Act, a void marriage.

Admittedly, in *Sarla Mudgal*, the second marriage of the apostate husband was not under the HMA but was under the Muslim law. The validity or the invalidity of the second marriage of the apostate Hindu husband could, therefore, not be said to be in violation of the HMA, as seemingly held by the honourable Supreme Court in the decision.¹³

In India, in the absence of a uniform matrimonial law, the validity of a marriage (be it the first marriage or the second marriage) depends upon two factors. First, the religion of parties to the marriage and secondly, the performance of ceremonies constituting the marriage. Validity of the marriage is always seen with reference to the personal law of the parties to the marriage. In this case, if the validity of the second marriage of the apostate Hindu husband has to be seen, it will be with reference to the law of the parties to the second

marriage i.e. the apostate husband and the Muslim women. HMA may not help to test its validity. It may be noted that under Section 11 of the HMA a petition for nullity of bigamous marriage can only be filed "by either party thereto, against the other party." For example A, a Hindu man who is lawfully married to B, a Hindu woman, marries again C, a Hindu woman, then, the above marriage between A and C is void, as at the time of this marriage B was alive. However, in this illustration B can not present a petition for nullity of marriage (of A and C) under the HMA. This petition can only be filed by A or C, that too against C or A, as the case may be.¹⁴

Viewed in this perspective it is difficult to understand as to how in the absence of any specific provision under the HMA, the second marriage of an apostate husband be in violation of the provisions of the Act and illegal qua his first wife. The decision of the Supreme Court appears to be unconvincing in this respect.

Under Hindu law, conversion of a spouse does not have the effect of dissolving a Hindu Marriage.¹⁵ On the other hand, in Muslim law, the renunciation of Islam by husband operates as automatic dissolution of marriage.¹⁶ Suppose A, a Muslim husband by embracing Hinduism marries a Hindu girl under the Hindu Marriage Act. His second marriage will not be a bigamous marriage and he would not be liable for prosecution under Section 494 IPC. It is so, because at the time of his second Hindu Marriage, his first Muslim marriage is dissolved automatically on his conversion and consequently the Muslim woman had lost the status of a spouse. Under Hindu law, however, conversion of a spouse is merely a ground of divorce. And this ground is available only to the non-convert spouse. The convert spouse himself/herself cannot avail this ground either.

In the opinion of the Hon'ble Supreme Court, "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".¹⁷ Assuming however, as ruled by the Court that the second marriage by the convert during the subsistence of his first marriage was void in terms of Section 494 IPC, all the four ingredients of the section are not fulfilled.

One of the requirements of the section relates to the meaning of the expression "marries in any case". This expression came up for interpretation before the Supreme Court in *Bhaurao Shanker Lokhande v. State of Maharashtra*,¹⁸ wherein a bench of three judges observed :

"Prima facie the expression "whoever marries" must mean 'whoever ... marries validly' or 'whoever... marries and whose marriage is a valid one.' If the marriage is not a valid one, according to the law applicable to the

parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises".¹⁹

Now, it has to be seen, whether in the case in hand, this requirement of Section 494 IPC has been fulfilled. This depends upon whether at the time of second marriage the husband in question was treated by the Court as Muslim or Hindu. Hon'ble Justice Kuldeep Singh has not made it clear in his judgment whether the conversion of the apostate husband was bad or the conversion was recognised but not the right to marry again. If the Court has tested the genuineness of the conversion which was not inspired by religious feelings but was resorted to merely with the object of creating a right to have more than one wife, then the husband never became Muslim. He remained Hindu. However the ceremonies of second marriage were not according to Hindu rites. Therefore the requirements of Section 17 of Hindu Marriage Act by which Section 494 IPC is made applicable are not fulfilled.

It appears however, that his conversion was not attacked but only his right to marry again as is evident from the following observation of the Court :

"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 earlier marriage under the Act dissolved".²⁰

This shows that the Supreme Court is blowing hot and cold in the same breath. On the one hand it is giving the right to embrace Islam, on the other hand it is denying the rights under the new religion on the basis of the old religion. Either a person can be held to be Muslim or non-Muslim. He can't be recognised Muslim for some purposes but non-Muslim for other purposes.

Though the Hon'ble Supreme Court claims that all the four ingredients of Section 494 IPC are satisfied viz. (i) he has a wife living, (ii) he marries again, (iii) the marriage is void, (iv) by reason of its taking place during the life of the first wife,²¹ it is shocking that it has not touched the second requirement on which there is a plethora of consistent case law from the highest court.

To sum up, Justice Kuldeep Singh has made an attempt to bring harmony between two systems of law, but unfortunately, his judgment has resulted in hotch potch. The judgment has touched and decided many vital issues, but the ruling is not supported by satisfactory interpretation of personal laws. It is submitted with due respect, that academically it is not a convincing judgment for the reasons stated above.

NOTES AND REFERENCES

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1. See Section 5(i), HINDU MARRIAGE ACT, 1955; Section 4, SPECIAL MARRIAGE ACT, 1954; Section 4, PARSİ MARRIAGE AND DIVORCE ACT, 1936; Section 60, CHRISTIAN MARRIAGE ACT, 1872.

2. Section 11, HINDU MARRIAGE ACT; Section 24, SPECIAL MARRIAGE ACT; Section 4, PARSI MARRIAGE AND DIVORCE ACT; Section 19(4), THE INDIAN DIVORCE ACT, 1869.
3. Section 17, HINDU MARRIAGE ACT; Sections 43 and 44, SPECIAL MARRIAGE ACT; Section 5, PARSI MARRIAGE AND DIVORCE ACT.
4. Renunciation of Islam by a Muslim husband automatically dissolves the marriage, whereas the renunciation of Islam by a Muslim wife does not have the same effect. See Section 4, THE DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939.
5. Section 13(1)(ii), HINDU MARRIAGE ACT; Section 32(j), PARSI MARRIAGE AND DIVORCE ACT; Section 10, INDIAN DIVORCE ACT.
6. 1995(3) Scale at 286. The Judgment delivered in this case becomes significant, as it has expressed concern over the Government's inaction in the matter of providing Uniform Civil Code and called for having a fresh look at Article 44. It also directed the Government of India through Secretary, Ministry of Law and Justice to file an affidavit in the Court by August 1996, indicating therein the steps taken by the Government of India towards securing a Uniform Civil Code for the citizens of India.

However, in a recent Review Petition filed in respect of the Supreme Court's aforesaid decision, Justice Kuldeep Singh has orally resiled his earlier stand on Uniform Civil Code issue and described the earlier observations as obiter dicta only.

7. Section 494 IPC states that : Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.
8. See *Mst. Payari v. Faquir Chand*, AIR 1961 Punj 167 at 168-170.
9. See *Advocate Gen. of Bombay v. Jimbabai*, 41 Bom 181; *Datta v. Sen*, ILR(1939) 2 Cal 12 at 16.
10. See *Budansa Rowther v. Patima Bi*, AIR 1914 Mad 192 at 194.
11. *Supra* n. 6 at 291.
12. *Andal Vaidyanathan v. Abdul Allam Vaidya*, AIR 1946 Mad 446.
13. This is further evident from its observation : "The second marriage of an apostate would therefore be illegal marriage *qua* his wife who married him under the Act, and continues to be his Hindu wife. Between the apostate and his Hindu wife, the second marriage is in violation of the provisions of the Act and as such would be *non-est*." *Supra* n.6 at 293.
14. See *Kedar Nath v. Suprana*, AIR 1963 Pat 311.
15. *Supra* n. 5.
16. *Supra* n. 4.
17. *Supra* n. 6 at 294.
18. AIR 1965 SC 1564 at 1565.
19. This ruling has been consistently followed by the Supreme Court in later cases. See *Kanwal Ram v. H.P. Admn.*, AIR 1966 SC 614; *Priya Bala v. Suresh Chander*, AIR 1971 SC 1153; *Shanti Dev v. Kanchan*, AIR 1991 SC 816; *Laxmi Devi v. Satya Narayan*, (1994) 5 SCC 545.
20. *Supra* n. 6 at 294.
21. *Id.* at 295.