Ahmedabad Women Action Group (Awag) and Others

Vs

Union of India, Lok Sevak Sangh and Others

Vs

Union of India, Young Women Christian Association (Ywca) and Others

Vs

Union of India

Writ Petitions (C) No. 494 Of 1996 With Nos. 496 and 721 of 1996

(Sujata V. Manohar, S. P. Kurdukar JJ)

24.02.1997

JUDGMENT

VENKATASWAMI, J.

1. All these writ petitions are filed as public interest litigation. In WP (C) No. 494 of 1996, the reliefs prayed for are as follows :

> (a) to declare Muslim Personal Law which allows polygamy as void as offending Articles 14 and 15 of the Constitution;
>
> (b) to declare Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, as void, offending Articles 13, 14 and 15 of the Constitution;
>
> (c) to declare that the mere fact that Muslim husband takes more than one wife an act of cruelty within the meaning of clause VIII(f) of Section 2 of Dissolution of Muslim Marriages Act, 1939;
>
> (d) to declare that Muslim Women (Protection of Rights on Divorce) Act, 1986 is void as infringing Articles 14 and 15;
>
> (e) to further declare that the provisions of Sunni and Shia laws of inheritance which discriminate against famales in their share as compared to the share of males of the same status, void as discriminating against females only on the ground of sex.

2. In Writ Petition (C) No. 496 of 1996, the reliefs prayed for are the following :

> (a) to declare Sections 2(2), 5(ii) and (iii), 6 and Explanation to Section 30 of the Hindu Succession Act, 1956, as void offending Articles 14 and 15 read with Article 13 of the Constitution of India;

(b) to declare Section 2 of the Hindu Marriage Act, 1955, as void offending Articles 14 and 15 of the Constitution of India;

(c) to declare Sections 3(2), 6 and 9 of the Hindu Minority and Guardianship Act read with Section 6 of the Guardians and Wards Act void;

(d) to declare the unfettered and absolute discretion allowed to a Hindu spouse to make testamentary disposition without providing for an ascertained share of his her spouse and dependent, void.

3. In Writ Petition (C) 721 of 1996, the reliefs prayed for are the following :

(a) to declare Sections 10 and 34 of the Indian Divorce Act void and also to declare Sections 43 to 46 of the Indian Succession Act void.

4. At the outset, we would like to state that these writ petitions do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involve issues of State policies with which the Court will not ordinarily have any concern. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court held that the remedy lies somewhere else and not by knocking at the doors of the courts.

5. In Maharshi Avadhesh v. Union of India [1994 Supp (1) SCC 713] this Court while dismissing a petition under Article 32 of the Constitution held as follows : (SCC p. 714)

"This is a petition by a party in person under Article 32 of the Constitution. The prayers are twofold. The first prayer is to issue a writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India. The second prayer is to declare the Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15, Fundamental Rights and Articles 44, 38, 39 and 39-A of the Constitution of India. The third prayer is to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and right of Muslim women and against their protection. These are all matters for legislature. The Court cannot legislate in these matters. The writ petition is dismissed."

6. In Reynold Rajamani v. Union of India [(1982) 2 SCC 474] this Court while dealing with the scope of Sections 7 and 10 of the Indian Divorce Act, 1869 held as follows : (SCC pp. 478-79, paras 4 and 6)

"It cannot be denied that society is generally interested in maintaining the marriage bond and preserving the matrimonial state with a view to protecting societal stability, the family home and the proper growth and happiness of children of the marriage. Legislation for the purpose of dissolving the marriage constitutes a departure from that primary principle, and the legislature is extremely circumspect in setting forth the grounds on which a marriage may be dissolved. The history of all matrimonial legislations will show that at the outset conservative attitudes influenced the grounds on which separation to divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the adult parties directly involved. But although the grounds for divorce have been liberalised, they nevertheless continue to form an exception to the general

> principle favouring the continuation of the marital tie. In our opinion, when a legislative provision specifies the grounds on which divorce may be granted they constitute the only conditions on which the court has jurisdiction to grant divorce. If grounds need to be added to those already specifically set forth in the legislation, that is the business of the legislature and not of the courts. It is another matter that in construing the language in which the grounds are incorporated the courts should give a liberal construction to it. Indeed we think that the courts must give the fullest amplitude of meaning to such a provision. But it must be a meaning which the language of the section is capable of holding. It cannot be extended by adding new grounds not enumerated in the section.
>
> Miss Thomas appeals to us to adopt a policy of 'social engineering' and to give to Section 7 the content which has been enacted in Section 28 of the Special Marriage Act, 1954 and Section 13-B of the Hindu Marriage Act, 1955, both of which provide for divorce by mutual consent. It is possible to say that the law relating to Hindu marriages and to marriages governed by the Special Marriage Act presents a more advanced stage of development in this area than the Indian Divorce Act. However, whether a provision for divorce by mutual consent should be included in the Indian Divorce Act is a matter of legislative policy. The courts cannot extend or enlarge legislative policy by adding a provision to the statute which was never enacted there."

7. In Pannalal Bansilal Pitti v. State of A.P. [(1996) 2 SCC 498] validity of Sections 15, 16, 17, 29(5) and 144 of the A.P. Charitable Hindu Religious and Endowments Act, 1987 were challenged. Inter alia this Court held : (SCC p. 510, para 12)

> "The first question is whether it is necessary that the legislature should make law uniformly applicable to all religious or charitable or public institutions and endowments established or maintained by people professing all religions. In a pluralist society like India in which people have faith in their respective religions, beliefs or tenets propounded by different religions or their offshoots, the founding fathers, while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different languages and dialects in different regions and provided a secular Constitution to integrate all sections of the society as a united Bharat. The directive principles of the Constitution themselves visualise diversity and attempted to foster uniformity among people of different faiths. A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."

8. In State of Bombay v. Narasu Appa Mali [AIR 1952 Bom 84 : 53 Bom LR 779], Chagla, C.J., while considering the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, observed as follows :

> "... 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 up on the statute book in order to advance the welfare of the State."

It was further observed that :

> "There can be no doubt that the Muslims have been excluded from the operation of the Act in question. Even Section 494, Penal Code, which makes bigamy an offence applies to Parsis, Christians and others, but not to Muslims because polygamy is recognised as a valid institution when a Muslim male marries more than one wife. The question that we have to consider is whether there is any reasonable basis for creating the Muslims as a separate class to which the laws prohibiting polygamy should not apply. Now, it is an historic fact that both the Muslims and the Hindus in this country have their own personal laws which are based upon their respective religious texts and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds. Article 44 itself recognises separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy the privilege of a common Uniform Civil Code applicable to all its citizens irrespective of race or religion. Therefore, what the Legislature has attempted to do by the Hindu Bigamous Marriages Act is to introduce social reform in respect of a particular community having its own personal law. The institution of marriage is differently looked upon by the Hindus and the Muslims. Whereas to the former it is a sacrament, to the latter it is a matter of contract. That is also the reason why the question of the dissolution of marriage is differently tackled by the two religions. While the Muslim law admits of easy divorce, Hindu marriage is considered indissoluble and it is only recently that the State passed legislations permitted divorce among Hindus. The State was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work social reform; another may not yet be prepared for it; and 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. From these considerations it follows that if there is a discrimination against the Hindus in the applicability of the Hindu Bigamous Marriages Act, that discrimination is not based only upon ground of religion. Equally so if the law with regard to bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds."

Gajendragadkar, J., in his concurrent but separate opinion expressed the same view by observing as follows :

> "The next question is whether this Act discriminates against the Hindus in reference to the Christian and the Parsi citizens of this State, insofar as it subjects the Hindus alone to the specially severe provisions as to punishment and procedure. It is true that whereas under the general criminal law the offence of bigamy is congnizable only on the complaint of the wife, the impugned Act makes it cognizable so that the

complaint of the wife is unnecessary to start the proceedings against the offending husband. The offence of bigamy is compoundable under the general criminal law; but not under the impugned Act; and the word 'abettor' under the impugned Act is also wider than under the Indian Penal Code. These provisions in fact are alleged to constitute discrimination against the Hindus. In dealing with this question, however, it must be remembered that the Legislature may have thought that the evil of bigamy prevailing amongst the Hindus could not be effectively put down unless the offence was made cognizable and unless amongst the abettors were included even the priests who officiate at Hindu marriages. As I have already mentioned, Hindu marriage is a sacrament and did not a contract and the sentimental love and devotion of the Hindu wife for her husband is well known. Legislature may well have thought that it would be futile to make the offence of Hindu bigamy punishable at the instance of the wife because Hindu wives may not come forward with any complaint at all. Amongst the Christians and the Parsis, monogamy has been practised for several years and marriage amongst them is a matter of contract. Amongst them divorce is permissible, whereas amongst the Hindus it was not permissible for so many years. If the Legislature acting on these considerations wanted to provide for a special procedure in dealing with bigamous marriages amongst the Hindus it cannot be said that the Legislature was discriminating against the Hindus only on the ground of religion. It was for the Legislature to take into account the social customs and beliefs of the Hindus and other relevant considerations before deciding whether it was necessary to provide for special provisions in dealing with bigamous marriages amongst them. That clearly is the province of the Legislature and with the propriety of their views or their wisdom Courts are not concerned. I, therefore, hold that there is no substance in the argument that the penal provisions of the impugned Act constitute discrimination against the Hindus only on the ground of religion ....

There is one more point with which I would like to deal. It has been argued before us that the impugned Act should have been made applicable to the Mahomedan citizens of the State of Bombay. It is said that if the impugned Act constitutes a measure of social reform, there is no reason why the State Legislature should not have given the Mahomedan community the benefit of this social reform. The Union of India is a secular State and the State Legislature was wrong in making a distinction between its citizens on the ground of religious differences and in applying the provisions of the impugned Act only to Hindus. In part this argument is political and as such we are not concerned with it. But part of the argument is based upon the provisions of Article 14 of the Constitution of India and it is necessary to deal with this aspect of the argument."

The learned Judge further observed as follows :

"But it is argued that even as to this social reform, the State Legislature should have made it all pervasive and should not have left the Mahomedans outside its ambit. That, as I have already said, is party a political, and partly a legal argument. Whether it was expedient to make this Act applicable to the Mahomedans as well as to the Hindus would be a matter for the Legislature to consider. It is now well settled that the equality before the law which is guaranteed by Article 14 is not offended by the impugned Act if the classification which the Act makes is based on reasonable and rational considerations. It is not obligatory for the State Legislature always and in

> every case to provide for social welfare and reform by one step. So long as the State Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended. The State Legislature may have thought that the Hindu community was more ripe for the reform in question. Social reformers amongst the Hindus have agitated for this reform vehemently for many years past and the social conscience of the Hindus, according to the Legislature, may have been more in tune with the spirit of the proposed reform. Besides, amongst the Mahomedans divorce has always been permissible and marriage amongst them is a matter of contract. If the State Legislature acting on such considerations decided to enforce this reform in the first instance amongst the Hindus, it would be impossible in my opinion to hold that in confining the impugned Act to Hindus as defined by the Act it has violated the equality before law as guaranteed by Article 14. In my opinion, therefore, the argument that Article 14 is violated by the impugned Act must fail."

Gajendragadkar, J. also expressed his opinion on the question whether Part III of the Constitution applies to personal laws. The learned Judge observed as follows :

> "... The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topic falling under personal law in item 5 in the Concurrent List - List III. This item deals with the topics of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law and yet the expression 'personal law' is not used in Article 13, because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression 'laws in force'. Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Article 13(1) at all."

9. In Krishna Singh v. Mathura Ahir [(1981) 3 SCC 689 : AIR 1980 SC 707] this Court while considering the question whether a Sudra could be a religious order and become a Sanyasi or Yati and, therefore, installed was as a Mahant of the Garwaghat Math according to the tenets of the Sant Mat Sampradaya, inter alia held as follows : (SCC p. 699, para 17)

> "It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judges failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the

> personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except, where such law is altered by any usage custom or is modified or abrogated by statute."

10. In Sarla Mudgal v. Union of India [(1995) 3 SCC 635 : 1995 SCC (Cri) 569] this Court observed : (SCC pp. 649-50, para 33)

> "Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a 'common civil code' for the whole of India."

11. However, none of the decisions referred to above were placed before the Division Bench as they find no mention in the separate judgments of Kuldip Singh, J. and R. M. Sahai, J. That is because there was no occasion to consider whether Part III of the Constitution of India had any application to personal laws or not. Suffice it to say that we are satisfied that the arguments advanced before us as pointed out at the outset involve issues, in our opinion, to dealt with by the legislature.

12. We may further point out that the question regarding the desirability of enacting a Uniform Civil Code did not directly arise in that case. The questions which were formulated for decision by Kuldip Singh, J. in his Judgment were these : (SCC p. 639, para 2)

> "[W]hether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise a second marriage ? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be a Hindu ? Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC)" ?

13. Sahai, J. in his separate but concurring judgment referred to the necessity for a Uniform Civil Code and said : (SCC p. 652, para 44)

> "... The desirability of uniform code can hardly be be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of graining personal mileage rise above and awaken the masses to accept the change."

14. Sahai, J. was of the opinion that while it was desirable to have a Uniform Civil Code, the time was yet not ripe and the issue should be entrusted to the Law Commission which may examine the same in consultation with the Minorities Commission. That is why when the Court drew up the final order signed by both the learned Judges it said "the writ petitions are allowed in terms of the answer

to the questions posed in the opinion of Kuldip Singh, J". These questions we have extracted earlier and the decision was confined to conclusions reached thereon whereas the observations on the desirability of enacting the Uniform Civil Code were incidentally made.

15. In Madhu Kishwar v. State of Bihar [(1996) 5 SCC 125] this Court while considering the challenge made to certain provisions of the Chotanagpur Tenancy Act, 1908 (6 of 1908) observed as follows : (SCC pp. 134-35, paras 4-6)

> "It is worthwhile to account some legislation on the subject. The Hindu Succession Act governs and prescribes rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put on a par with a male heir. Next in the line of numbers is the Shariat law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of Section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the Official Gazette. Section 3(2) further provides that in the Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females. General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundanti cautela. Even under Section 3 of the Indian Succession Act the State Government is empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region.
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> In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judically enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and Governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist court, apolitical as it avowedly, is could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in

whatever measure be the concern of the court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self-restraint. We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on p. 36 (para 46) of his judgment that under the circumstances it is not desirable to declare the customs of tribul inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the court.

With regard to the statutory provisions of the Act, he has proposed to the reading down of Sections 7 and 8 in order to preserve their constitutionality. This approach is available from P. 36 (paras 47, 48) onwards of his judgment. The words 'male descendant' wherever occurring, would include 'female descendants'. It is also proposed that even though the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 in terms would not apply to the Scheduled Tribes, their general principle composing of justice, equity and fair play would apply to them. On this basis it has been proposed to take the view that the Scheduled Tribe women would succeed to the estate of paternal parent, brother or husband as heirs by intestate succession and inherit the property in equal shares with the male heir with absolute rights as per the principles of the Hindu Succession Act as also the Indian Succession Act. However much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route or return on the court's entering the thicket, it is far better that the court kept out of it. It is not far to imagine that there would follow a beeline for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are, indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, over and above the available legislation, should normally be avoided. We are thus constrained to take this view, even though it may appear to be conservative for adopting a cautious approach, and the one proposed by our learned brother is, regretfully not acceptable to us."

16. As a matter of fact the constitutionality of Section 10 of the Indian Divorce Act was challenged by an aggrieved husband and this Court in Anil Kumar Mahsi v. Union of India [(1994) 5 SCC 704] held as follows : (SCC p. 708, paras 8-9)

"Taking into consideration the muscularly weaker physique of the women, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are made available to the wife and not to the husband for seeking dissolution of the marriage. For the same reasons, it can hardly be said that on that account the provisions of Section 10 of the Act are discriminatory as against the husband.

We, therefore, find that there is no substance in the challenge by the petitioner-husband to the vires of the provisions of Section 10 as being discriminatory against the husband and, therefore, violative of Article 14 of the Constitution."

17. So far as the challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 is

concerned, we understand that the said issue is pending before the Constitution Bench. We therefore, do not see any reason to multiply proceedings in that behalf.

18. In the result and having regard to the earlier decisions of this Court noticed above, we decline to entertain these writ petitions. Accordingly, these writ petitions are dismissed.