ANDHRA PRADESH HIGH COURT

Gogireddy Sambireddy

Vs

Gogireddy Jayamma

(K Rao,C.J. Chinnappa Reddy and A Reddy, JJ.)

07.07.1970

JUDGMENT

Chinnappa Reddy, J.

1. A Hindu wife aggrieved by her husband's conduct in marrying a second wife laid a complaint against him for an offence under Section 494, I. P. C. , read with Sections 11 and 17 of the Hindu Marriage Act, 1955. In this application under Section 561-A, Criminal P. C. the husband seeks to have the proceedings against him quashed on the ground that Sections 11 and 17 of the Hindu Marriage Act are ultra vires and unconstitutional as they offend Article 15 (1) of the Constitution. We may at once state that though the Act has been on the statute book for fifteen years no one thought worth while all these years to challenge the vires of these provisions either in this court or elsewhere. It has not fallen to this petitioner to question the vires of these provisions.

2. Sri P. A. Chowdary, learned counsel for the petitioner, argued that while the personal law of the Hindus prior to 1955 and the personal law of the Muslims always permitted polygamy, the Hindu Marriage Act made the Hindu marriage monogamous while the Muslim marriage was left untouched. The effect of making the Hindu marriage monogamous was that it exposed Hindus to Section 494, I. P. C. while Muslims continued unexposed. A statute which so exposed Hindus to a prosecution under Section 494, I. P. C. to which they would not be so exposed if they are Muslims, was a statute which discriminated against Hindus on the ground of their religion only and, therefore, offended Article 15 (1) of the Constitution. Sri Chowdary urged that a provision which made the same act an offence if committed by a Hindu but not so if committed by a Muslim was patently discriminatory on the ground of religion only. He contended that a criminal law, unlike personal law, must be uniform and that it was not permissible to have one criminal law for the Hindus and another criminal law for the Muslims. He contended that it was permissible to amend personal laws but submitted that it was not open to the Legislature under the guise of amending one of the several personal laws prevailing in the land, to subject the persons governed by that personal law to a penal law without at the same time subjecting others governed by other personal laws to the same penal law. He further urged that a law which made an act an offence if committed by a person subject to a particular personal law but not by others hurt the unity ad integrity of the nation and was destructive of the secular character of the State. He draw our attention to Article 44 of the Constitution which prescribes that the State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India.

3. To understand and consider the submissions made by the learned counsel, it will be useful if we refer to the relevant constitutional and statutory provisions and their extent and scope. Article 14 of the Constitution assures to all persons equality before the law and equal protection of the laws. It is now well settled that while Article 14 forbids class legislation, it does not forbid a reasonable classification for the purposes of legislation, provided that the classification is founded on an intelligible differentia and that differentia has a rational relation to the object of the statute. The classifications may be founded on different bases such as geographical, historical, occupational or the like. It may even be based on religion. See for instance the case of Moti Das v. S. P. Sahi where it was held that the exclusion of Sikh religious trusts from the applicability of the Bihar Hindu religious Trusts Act did not offend Article 14 of the Constitution as the organization of Sikh religious trusts was essentially different from the organization of Hindu Religious trusts and the Legislature apparently thought that Sikh religious trusts did not require the same protections as Hindu Religious trusts. On the same analogy it must be held the Legislature may determine which religious community is ready for social reform and make laws accordingly.

4. But Article 15 (1) of the Constitution says, "the State shall not discriminate against the citizen on grounds only of religion, race, caste, sex, place of birth or any of them." Thus while religion, race, caste, sex and place of birth may furnish a legitimate basis for classification for the purposes of Article 14 so far as citizens are concerned, Article 15 (1) forbids a classification on the ground only of religion, race caste, sex, place of birth or any of them. It should also be noted that while the word "discriminate" is not used in Article 14, the expression "discriminate against" is C. J., explained the distinction between Article 14 and Article 15 in Kathi Raning Rawat v. State of Saurashtra, , He said:

> "All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination' does not occur in Article 14. The expression 'discriminate against' is used in Article 15 (1) and Article 16 (2) and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavorably from others."
> Discrimination thus involved an element of unfavorable bias and it is in that sense the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 15, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those Articles. But the position under Article 14 is different. Equal protection claims under that Article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the Legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies."

5. Next., the expression used in Article 15 (1) is 'on grounds only of' and not the expression 'on grounds of'. The word 'only' is significant. It shows that the discrimination forbidden by the Article is discrimination based solely on the ground of religion etc, and on other ground. If the discrimination is based on other grounds as well then Article 15 (1) does not hit the statute. In Anjali Roy v. State of West Bengal, Chakravarti, C. J., observed:

> "Of paramount important in clause (1) are the words "discrimination" and " only". What

the article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article. All differentiation in the Article. All differentiation is not discrimination, but only such differentiation as is invidious and as is made, no because any real difference in the conditions or natural difference between the persons dealt with makes different treatment necessary, but because of the presence of some characteristic or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiation made as a justifying reason. Next, the discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article."

Similarly in Yusuf Abdul Aziz v. State, , Chagla, C. J., and Gajendragadkar, J. said, "Now, it is apt very often to be overlooked that Article 15 (1) speaks of discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. If religion, race, caste, sex, place of birth is merely one of the factors which the Legislature has taken into consideration, then it would not be discrimination only on ground of that fact, but if the Legislature has discriminated only on one of those grounds and no other factor could possibly have been present, then undoubtedly the law would offend against Article 15 (1)."Like observations were made in Dattatreya v. State of Bombay, and State v. Vithal, AIR 1952 Bom 451. The decisions in ; and were noticed by their Lordships of the Supreme Court in State of Bombay v. Bombay Education Society, . Their Lordships did not disapprove the decisions but distinguished them on the ground that those cases were concerned with Article 15 (1) of the Constitution while they were considering Article 29 (2). They pointed out that while Article 15 (1) dealt with discrimination generally Article 29 92) dealt with denial of admission into educational institutions of certain kinds. They held that irrespective of the object of the statute, if the immediate ground and direct cause for the denial of admission into the specified educational institutions was religion race, caste or language of the citizen, then there was a denial of the fundamental right guaranteed by Article 29 (2). The position therefore is that in order to successfully claim the right under Article 15 (1) of the Constitution it must be shown that there is discrimination and not mere differentiation, that the discrimination is based on grounds of race, religion, caste, sex or place of birth and that no other considerations contributed to the discrimination. Even if the rule applicable to cases coming under Article 29 (2) is applied to cases under Article 15 (1) is must be shown that religion, race, sex caste or place of birth is the immediate ground and direct cause for the discrimination.

6. Section 494, I. P. C. in so far as it is relevant states "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 lifetime of such husband or wife, shall be punished." On the face of the it Section 494 is not discriminatory since it makes no reference to the religion of either spouse. At this juncture itself we would like to remove the misconception that no Muslim can ever be punished under Section 494 and that no Hindu could be punished under Section 494 prior to the Hindu Marriage Act. A Muslim wife marrying during the subsistence of an earlier marriage can always be punished. So, too, we presume, a Muslim husband marrying a fifth wife during the subsistence of the four earlier marriages. That must follow since Section 9. I. P. C. prescribes that words importing the singular number include the plural number and therefore the word 'wife' in Section 494, I. P. C. must include wives. On that, however, we express no final opinion. Against a Muslim who

marries under the Special Marriage Act is liable to punishment under Section 494 if he marries again during the subsistence of the first marriage (Section 44 of the Special Marriage Act). Similarly even prior to the Hindu Marriage act, a Hindu wife could always be punished for Bigamy. A Hindu, like any one else, who married under the Special Marriage, Act could also be punished for Bigamy. Amongst the Hindus, the marriage of Nairs and others governed by the Marumakkathayam Law of Kerala have been strictly monogamous since the Madras Marumakkathayam Act, 1932, which prohibited polygamy. It is therefore incorrect to say that prior to the Hindu Marriage Act no Hindu could be punished for Bigamy even as it is incorrect to say that no Muslim can be punished for Bigamy.

7. Before we turn to the provisions of the Hindu Marriage Act, 1955, we could like to refer to the state of the affairs that existed before the passing of this Act. The position before India attained independence was that the alien Rulers accepted the existence of different religious beliefs and distinct personal laws. Queen Victoria in her famous proclamation of 1858 assured her Indian subjects that 'none be in any wise favoured, none molested or disquieted by reason of their Religious Faith or observance; but that all shall alike enjoy the equal and impartial protection of the law" and further that 'in framing and administering the law, due regard be paid to the ancient Rights, Usages and Customs of India.' And so it came to pass that the people of India continued to practice different religious and were subject to distinct personal laws. When the Constitution came to be made there were a multitude of religious and a multitude of personal laws. But it must not be supposed hat the personal laws were coincidental with religious faiths. Hindu Law, in particular governed not only Hindus but also Sikhs. Jains and Buddhists. It governed Lingayats, a body of dissenters who deny the validity of caste distinctions. It governed progressive sects like Brahmo and Arya Samahists. It also governed persons professing other religious beliefs if such was their customary law and if there was no statute governing them. In fact, until the other day, that is until the passing of the Shariat Act, several Muhammadan communities such as the Khojaha, the Cutchi Memons, the Borahs and the Halai Memons were governed by Hindu Law in matters of succession and inheritance. On the other side of the picture were undoubted Hindus like the Nairs and other non-Brahamin Hindu castes of Malabar, Cochin and Travancore who were governed by the Marumakkathayam Law and not by the Hindu Law. The Bunts and some other communities of Kanara were governed by the Aliasanthana Law and not by the Hindu Law. Several agricultural communities in the Punjab were governed by Customary Law and not by the Hindu Law. It is also well known that generally in South India in matters of marriage etc., it was the Customary Law rather than the Hindu Law that the prevailing. This led Sir Gooroodas Bannerjee in his Tagore Law Lecture on 'Marriage and Stridhana' to remark "The difference between the customary law of marriage and the general Hindu Law on the subject is no-where so considerable or so strongly marked as in Southern India." Thus it is clear that the body of personal law known as Hindu Law was neither the personal law of all Hindus, nor was it the personal law exclusively of Hindus. It did not apply to several Hindus in important matters and it applied to several non-Hindus in important matters. Such was the Hindu Law before 1955.

8. Of the several communities in India, Christian marriages were strictly monogamous. Parsi marriages though originally polygamous were made monogamous in the year 1865 on the demand of the community itself. Jewish marriages have been monogamous for centuries notwithstanding the patriarchs of the old Testament who took several wives. Hindu marriages were polygamous, polygamy was the exception rather than the rule. With great justification the late Rt. Hon. V. S. Srinivasa Sastri told the Rau Committee, "I thought that the pride of Hinduism

was that although polygamy was permitted in theory, it was monogamy which was actually practised" The Rau Committee, we may mention here, was appointed by the Government of India in `941 to report on the proposal for codification of Hindu Law. In their report the Rau Committee observed that the weight of evidence, written and oral adduced before hem was preponderantly in favour of monogamy. The orthodox as well as the reformer wanted that monogamy, already the rule in practice should be translated into a rule of law. Thus the Bombay prevention of Hindu Bigamous Marriage Act. 1946, the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 and the Saurashtra Prevention of Hindu Bigamous Marriage Act, 1950. The situation was ripe for introducing the social reform of monogamy on an All India basis by making a law applicable e to every one governed by the Hindu Law. Public opinion was strongly in its favour and local States. The stage was thus set for the Hindu Marriage Act of 1955.

9. The Hindu Marriage Act was passed in 1955 to amend and codify the law relating to marriage among Hindus but it should at once be stated that the expression 'Hindu' is defined by Section 2, sub-section (3) of the Act to include "a person who, though not a Hindu by religion, is, nevertheless, a person to whom this act applies by virtue of the provisions contained in this section." Section 2 (1) provides for the application of the Act to (a) all Hindus including Veera Shaivas, Lingayats, and those belonging to the Brahmo, Prarthana or Arya Samaj Sects (b) Buddists. Jains and Sikhs and (c) all other persons domiciled in India who are not Muslims, Christians Parsis or Jews, unless it is proved that such persons would not have been governed by the Hindu Law or any custom or usage treated as part of that law. Thus a 'Hindu' for the purposes of the Hindu Marriage Act is not strictly a Hindu. He may be a non-Hindu like a Buddist, Jaina or Sikh or he may be a non-Hindu who is also not a Christian. Muslim, Jew or Parsi, but who is domiciled in India. The Act applied to all persons to whom the Hindu Law was previously applicable whether they are Hindus or not. Section 5 of there Act prescribes the conditions which have to be fulfilled for the solemnization of a marriage between two Hindus, that is, between two persons defined as Hindus by section 2 (3) of the Act. The first condition is that time of the marriage. Section 11 states "any marriage solemnised after the commencement of this act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (I), (iv) and (v) of Section 5". Therefore, a marriage between two Hindus is null and void if either of them has a spouse living at the time of marriage. That is sufficient to attract the penal consequences prescribed by Section 494, I. P. C. The legislature, however, also enacted Section 17 which states "any marriage between two Hindus solemnised 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 I. P. C. shall apply accordingly".

Section 17 is a mere statement of the effect of section 15 (sic) (Section 11?) read of section 15 (1). Even without section 17 a Hindu husband or wife marrying a second time during the life marrying a second time during the life time of a spouse would by reason of Section 15 (sic) (Section 11?) of the Act, be guilty of an offence under Section 494, I. P. C. That is also conceded by the learned counsel for the petitioner. The question now is whether Sections 15 (sic) (Section 11?) and 17 offend Article 15 (1) of the Constitution. In order that the petitioner may succeed he must establish that the Legislature has made fan invidious discrimination on the ground of religion only. It must be shown that there is a discrimination in the sense explained by Patanjali Sastri, C. J. in and that the discrimination is not based on any ground other than religion.

10. We have already referred to the circumstances that there was a multitude of personal laws when the Constitution was made. The Constitution makers could not do otherwise than accept the position which was then obtaining. It is true that the Republic of India as established by the Constitution is undoubtedly secular in character. It is also true that Article 44 of the Constitution casts on the State a duty to secure for the citizens a uniform Civil Code throughout the territory of India. But this does not mean that the Parliament and the Legislature of the State are debarred from recognizing the existence of different systems of personal law prevailing in the country. The very power given to the Parliament and the State Legislatures to legislate in respect 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 the Constitution subject to their personal law." (Schedule 7, List III, Item 5) clearly indicates that the Constitution recognises the existence of distinct and separate personal laws and the need to codify, modify, amend or abrogate the same. In fact, Article 25 (2) of the Constitution prescribes that the freedom of conscience and the right freely to profess, practise and propagate religion guaranteed by the first part of Art. 25 are subject to the making of laws by the State providing for social welfare and reform. The Hindu Marriage act introducing as it does the principles of monogamy is undoubtedly a law providing for social welfare and reform as contemplated by Article 25 (2) of the Constitution. It is a legislation intended for the benefit of the class of persons to whom there act is applicable. It will be a travesty of the truth to say that it is directed against that class and discriminates against them. The legislation brings the persons to whom it applies on a line with Christians, Parsis, Jews, Nairs and others who are already monogamous. Thus it is a step towards the establishment of a uniform Civil Code, the cherished goal of article 44 of the Constitution. True, the Muslims are left out, but as we pointed out earlier the persons governed by the Hindu law were ripe for the social reform and in choosing them for the reform and in be said that Parliament was discriminating against them. We pointed out earlier that the Hindu Law did not apply exclusively to Hindus and that it did not also apply to all Hindus either. The Hindu Law was a body of personal law applicable to Hindu as well as several non-Hindu communities. We also pointed out that the Hindu Marriages Act also is not confined in its application to persons professing the Hindu religion only. Both the Hindu Law and the Hindu Marriage Act are ;personal laws applicable to Hindus as well as to some non Hindus. The Hindu Marriage Act is an act amending the body of personal law known as Hindu Law. Not adherence to religion but subjection to a certain personal law is the basis of the classification made by the Hindu Marriage Act. It cannot therefore be said that the classification is based on religion only. Our conclusions are supported by the views expressed by Satyanarayana Rao and Rajagopalan, JJ. in Srinivasa Ayyar v. Saraswathi Ammal, and by Chagla. C. J., and Gajendra Gadkar. J in State of Bombay v. Narasu Appa Mali, . These two decisions it may be noted were considered by their Lordships of the Supreme Court in along with Anjali Roy v. state of West Bengal ; *Yusuf Abdul Aziz v. State, and state v. Vithal*[1]*,*

11. In the light of the foregoing discussions it is our view that sections 5 (1) 15 (sic) (Section 11?) and 17 of the Hindu Marriage Act introduce a social reform for the benefit of a class of persons to which the act applies and that nothing can be further from the truth than to say that they discriminate against that class. The classification made by the Act is based on subjection to personal law and not adherence to religion. We, therefore, hold that the impugned provisions do not offend article 15 (1) of the Constitution. We do not consider it necessary to go into the polemics of that is criminal law and whether it is hurtful to the unity and integrity of the nation to make an act a crime if committed by some and not by others. Those are questions for legal and

political philosophers and not for us. We have only to decide the question whether Sections 11 and 17 of the Hindu Marriage Act offend Article 15 (1) of the Constitution and that question we have decided. The Criminal Miscellaneous Petition is, therefore, dismissed.

12. Petition dismissed.

Cases Referred.

[1]AIR 1952 Bom 451