1951 SCC OnLine Bom 72 : AIR 1952 Bom 84 : (1951) 53 Bom LR 779 : 1952 Cri LJ 354

In the High Court of Bombay

BEFORE CHAGLA, C.J. AND GAJENDRAGADKAR, J.

The State of Bombay

Versus

Narasu Appa Mali … Accused.

Criminal Appeal No. 231 of 1951 (with Criminal Appeal No. 173 of 1951; Criminal Ref. No. 16 of 1951 and Criminal Revn. Appln. No. 198 of 1951)

Decided on July 24, 1951

CHAGLA, C.J.:— These two appeals and one application for revision and one reference raise the same question with regard to the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. In appeal No. 231 of 1951 the Sessions Judge of South Satara held that the Act was invalid and acquitted the accused. Government have preferred an appeal from the order of acquittal. In appeal No. 173 of 1951 the Magistrate, First Class, Kaira, also took the same view and from his order of acquittal Government have also appealed. In the application for revision the Resident Magistrate, Mehsana, convicted the accused under S. 5 of the Hindu Bigamous Marriages Act and sentenced him to six months' rigorous imprisonment and a fine of Rs. 100. An appeal was preferred to the Sessions Judge, Mehsana, and the learned Session Judge dismissed the appeal. In reference No. 16 of 1951 the Sessions Judge, South Satara, has referred to us the order of conviction passed by the Resident Magistrate, First Class, Miraj convicting accused No. 2 under S. 5 of the Hindu Bigamous Marriages Act and accused Nos. 3 and 4 under S. 6 of the Hindu Bigamous Marriages Act and sentencing each of them to rigorous imprisonment for one day and a fine of Rs. 50.

2. The Act is placed on the statute book in order to provide for the prevention of bigamous marriages among Hindus, and by the definition section "Hindus" include Sikhs, Jains, Buddhists followers of the Arya or Brahmo Samaj or convert Hindus. Section 4 renders bigamous marriages void if they are contracted within the State after the coming into force of the Act and if they are contracted beyond the limits of the State after the coming into force of the Act and either or both the contracting parties to such marriage are domiciled in the State. Section 5 provides that notwithstanding any law, custom or usage to the contrary, whoever not being a minor (and a minor is a person under 16 years of age) contracts a bigamous marriage shall, on conviction, be punishable with imprisonment for a term which may extend to seven years and shall also be liable to fine. Section 6 penalizes persons who perform, conduct or abet any bigamous marriage in the State. Section 7, with which we are not concerned, provides penalty for a person having charge

of a minor concerned in a bigamous marriage, and S. 9 makes the offences

cognisable.

3. The Act is challenged as contravening the fundamental rights guaranteed under Arts. 14, 15 and 25 of the Constitution. As Art. 25 has a considerable bearing on the argument advanced in respect of Arts. 14 and 15, it would be better perhaps to deal with that article first. Article 25(1) confers upon all persons the right to freedom of conscience and the right freely to profess, practice and propagate religion. That right is not an absolute or unlimited right. In the first place, it is subject to public order, morality and health. In the second place, it is subject to the other provisions of Part III—in other words, the right to profess, practise and propagate religion can only be exercised without contravening any of the fundamental rights embodied in Part III of the Constitution. The right under Art. 25 (1) is further subject to the right of the State to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice, and it is further subject to the right of the State to provide by legislation for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

4. It has been urged before us that among Hindus the institution of marriage is a sacrament, and that marriage is part of Hindu religion which is regulated by what is laid down in the Shastras. It is further pointed out that a Hindu marries not merely for association with his mate, but in order to perpetuate his family by the birth of sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having someone who can offer oblations to his own shade when he is dead and to the shades of his ancestors, and that there is no heavenly region for a sonless man. Therefore, the institution of polygamy is based upon the necessity of a Hindu obtaining sons for the sake of religious efficacy.

5. Now 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. A very interesting and instructive case is to be found in the American Reports, viz. *Davis* v. *Beason*, (1889) 133 U.S. 637. In that case it was contended that polygamy was part of the creed of the Mormon Church and any legislation which penalises polygamy to the extent that it affected Mormons was contrary to the First Amendment of the Constitution which provided that Congress shall not make any law respecting the establishment of religion or forbidding the free exercise thereof. This argument was rejected, and Mr. Justice Field delivering the opinion of the Court pointed out that (p. 640):

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter."

6. He further pointed out that the First Amendment could not be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. He further pointed out that (p. 640):

> "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."

7. Further on he states (p. 640):

"Laws are made for the government of actions, and while they cannot interfere

with mere religious belief and opinions, they may with practices."

8. It is only with very considerable hesitation that I would like to speak about Hindu religion, but it is rather difficult to accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. That same religion also recognizes the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the frame-work of monogamy.

9. But even assuming that polygamy is recognized 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 an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Art. 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion. 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 upon the statute book in order to advance the welfare of the State. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State,

then it is not for the Courts of law to sit in judgment upon that decision. Therefore, in our opinion, this legislation does not contravene Art. 25(1) of the Constitution.

10. Coming to Arts. 14 and 15(1), it should be borne in mind that these articles are two facets of the same fundamental right. Both emphasise the equality before the law. It is true that whereas Art. 14 confers the right upon every person, the right given under Art. 15(1) is confined to the citizens of India. But if there is any discrimination in law, then the law would not have an equal application to all persons, unless the discrimination can be justified on some reasonable basis or the distinction made has some reasonable relation to the subject of the legislation. Article 15(1) further emphasises the fact that any discrimination which is based *only* on the ground of religion, race, caste, sex or place of birth can never be a reasonable discrimination. Article 15(1) itself assumes that there may be discrimination on other grounds. But whether such discrimination is good or not would depend upon the principles applicable to the construction of Art. 14. As I just said, it would depend upon the discrimination being based not upon arbitrary, capricious or oppressive grounds, but grounds which are reasonable.

11. Now, what has been argued before us is that the Hindu community in Bombay has been picked out for this legislation prohibiting polygamy. It is pointed out that polygamy is prevalent and permissible among Muslims living in the State of Bombay and yet the Muslims may marry more than one wife with impunity while a Hindu doing the same is made liable to severe penalty. It is impressed upon us that

our Constitution sets up a secular State, that Art. 44 contains a directive to the State to secure for the citizens a uniform Civil Code throughout the territory of India, and still the State of Bombay by this legislation has discriminated between Hindus and Muslims only on the ground of religion and has set up a separate Code of social reform for Hindus different from that applicable to the Muslims. The Solicitor General has argued that if monogamy is a measure of social reform and that measure is made applicable to Hindus only, the Hindus cannot complain that they have been discriminated against. According to him the expression "discriminate" suggests some infirmity or some disability being cast upon the person discriminated against. Perhaps that is not quite a satisfactory answer because we have to consider Arts. 14 and 15(1) together, and even apart from discrimination if a law did not operate equally upon all citizens, then it would be bad unless we could find some reasonable basis for excluding a section of the community from the operation of the law.

12. There can be no doubt that the Muslims have been excluded from the operation of the Act in question. Even S. 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 legislation permitting 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 Art. 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 Hindus 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.

13. We heard a very able argument from Mr. Shah and he strenuously urged that even assuming the State was justified in legislating only with regard to Hindus, no distinction should have been made with regard to the punishment imposed for contravening a bigamous marriage between Hindus and members of other communities who were equally prohibited from contracting bigamous marriages. It is pointed out

that under the Hindu Bigamous Marriages Act the offence is made cognisable. Under the Penal Code cognizance of the offence can only be taken at the instance of an aggrieved party. Further, under the Indian Penal Code the offence of bigamy is compoundable. It is not so under the Hindu Bigamous Marriages Act and our attention is also drawn to the fact that the punishment with regard to abetment is different in the two pieces of legislation. The reason for making the offence cognizable and non-compoundable under the Hindu Bigamous Marriages Act is obvious. The Penal Code is dealing with communities which have been monogamous for a long period and whose religions also impose the rule of monogamy. The Hindu Bigamous Marriages Act is attempting to bring about social reform in a community which has looked upon polygamy as not an evil institution, but fully justified by its religion. It is also introducing this measure of social reform in a community where the women have looked upon their husbands with reverence and respect. Instances are not unknown where Hindu wives themselves have insisted upon their husbands marrying a second wife in order that sons may be born to them. Therefore, if prosecution for bigamy was to lie at the instance of the aggrieved Hindu wife, there might have been hardly any prosecution at all, and if offences under the Hindu Bigamous Marriages Act were made compoundable, most Hindu wives out of respect for their husbands would have compounded the offences. Therefore to make this social reform effective a more severe law was necessary. With regard to the difference in punishment for abetment, it will be noticed that under the Hindu Bigamous Marriages Act an abettor is more widely defined than under the Penal Code.

14. It has then been argued with great ingenuity by Mr. Shah that by reason of the Constitution the Muslim personal law which permits polygamy has become void and therefore the Act has discriminated in applying to Hindus. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent wish the provisions of Part III, shall, to the extent of such inconsistency, be void; and what is contended is that the institution of polygamy offends under Art. 15(1) inasmuch as a Muslim male is permitted to hive more than one wife whereas a Muslim woman is restricted to one husband. It is therefore submitted that the very institution of polygamy discriminates against women only on the ground of sex. The first question—and it is a question of very considerable importance—that we have to consider is whether in the expression "all laws in force" appearing in Art. 13(1) "personal laws" were included. The Solicitor General draws our attention to the definition of "laws in force" to be found in Art. 13(3)(b) and that definition is:

> "'Laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

15. It is clear that this is an inclusive and not an exhaustive definition of "laws in force." Therefore, at first blush it may appear that "all laws in force," giving that expression its natural meaning, would include personal laws because they were laws which were in force in the territory of India. The argument is also attractive for another reason. There was no reason why the Constituent Assembly should have made any distinction between statutory law and personal law as far as fundamental

rights were concerned. The efficacy of fundamental rights should be no less when considered in the context of personal laws than it is when considered in the context of statutory laws. But on a careful consideration of the matter we regret that the argument of Mr. Shah must be rejected. Article 13(2) of the Constitution deals with prospective laws and it provides that

> "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void,"

and "law" is also defined in that article as including any Ordinance, order, bye-law, rule, regulation; notification, custom or usage having in the territory of India the force of law. The Solicitor General's contention is that this definition of "law" only applies to Art. 13(2) and not to Art. 13(1). According to him it is only the definition of "laws in force" that applies to Art. 13(1). That contention is difficult to accept because custom or usage would have no meaning if it were applied to the expression "law" in Art. 13(2). The State cannot make any custom or usage. Therefore, that part of the definition can only apply to the expression "laws" in Art. 13(1). Therefore, it is clear that if there is any custom or usage which is in force in India which is inconsistent with the fundamental rights, that custom or usage is void. "Laws in force" was separately defined in order to emphasise the fact that even though a law may not be in operation at all or may be in operation in particular areas, even so it should be considered to be a law in force for the purpose of Art. 13(1). If custom and usage is included in Art. 13(1), then it is urged that personal law is nothing else than custom or usage. That is an erroneous view. Custom or usage is deviation from personal law and not personal law itself. The law recognises certain institutions which are not in accordance with religious texts or are even opposed to them because they have been sanctified by custom or usage, but the difference between personal law and custom or usage is clear and unambiguous.

16. That this distinction is recognised by the Legislature is clear if one looks to the language of S. 112, Government of India Act, 1915. That section deals with the law to be administered by the High Courts and it provides that the High Courts shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject. Therefore, a clear distinction is drawn between personal law and custom having the force of law. This is a provision in the Constitution Act, and having this model before them the Constituent Assembly in defining "law" in Art. 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This, in our opinion, is a very clear pointer to the intention of the Constitution-making body to exclude personal law from the purview of Art. 13. There are other pointers as well. Article 17 abolishes untouchability and forbids its practice in any form. Article 25(2)(b) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Now, if Hindu personal law became void by reason of Art. 13 and by reason of any of its provisions contravening any fundamental right,

then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravened Arts. 14 and 15. This clearly shows that only in certain respects has the Constitution dealt with personal law. The very presence of Art. 44 in the Constitution recognizes the existence of separate personal laws, and Entry No. 5 in the Concurrent List gives power to the Legislatures to pass laws affecting personal law. The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is made with regard to it and leave it to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform Code. Our attention has been drawn to S. 292, Government of India Act, 1935, which provides that all the law in force in British India shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and S. 293 deals with adaptation of existing penal laws. There is a similar provision in our Constitution in Art. 372(1) and Art. 372(2). It is contended that the laws which are to continue in force under Art. 372(1) include personal laws, and as these laws are to continue in force subject to the other provisions of the Constitution, it is urged that by reason of Art. 13(1) any provision in any personal law which is inconsistent with fundamental rights would be void. But it is clear from the language of Arts. 372(1) and (2) that the expression "laws in force" used in this article does not include personal law because Art. 373(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment, and surely it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community. Although the point urged before us is not by any means free from difficulty, on the whole after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in Art. 13(1).

17. Even assuming that personal law was included, the question still remains to be considered as to whether polygamy would be bad as contravening Art. 15(1) of the Constitution. It is urged that polygamy discriminates against women only on the ground of sex. This argument, in our opinion, overlooks the history of polygamy as a social institution. Polygamy is justified, if at all, on social, economic and religious grounds and hardly ever on grounds of sex. In the modern world polygamy may seem to be an anachronism and may seem to be based on outdated and outworn ideas. When, however, it is found recognised in any personal law, it is based on considerations which were very vital and compelling to those who believed and who still believe in the sanctity of their personal law. Therefore, it would be difficult to say that the institution of polygamy would constitute a discrimination against members of one sex only on the ground of their sex.

18. Under the circumstances, we are of the opinion that the Hindu Bigamous Marriages Act, 1946, is a valid Act.

19. The result is that appeal No. 231 of 1951 preferred by the State must succeed and the order of acquittal passed by the Sessions Judge. South Satara at Sangli must be set aside and the order of conviction and sentence passed by the Resident Magistrate, First Class, Miraj will be restored. Appeal No. 173 of 1951 also filed by the State must succeed and the order of acquittal passed by the Magistrate, First Class, Kaira, will be set aside. Revision Application No. 198 of 1951 preferred by the accused will be dismissed and the order of conviction and sentence passed by the Resident Magistrate, First Class, Mehsana, will be confirmed. Reference No. 16 of 1951 made by the Sessions Judge, South Satara, will be rejected and the order of conviction and sentence passed by the Resident Magistrate, First Class, Miraj will be

confirmed.

20. GAJENDRAGADKAR, J.— I agree. I have had the advantage of reading the judgment just delivered by the learned Chief justice. I, however, wish

to express my conclusions on some of the points urged before us in these appeals.

21. The validity of the Bombay Prevention of Hindu Bigamous Marriages Act, XXV of 1946, has been challenged before us principally on two grounds. It is first contended that the personal laws applicable to the Hindus and Mahomedans in the Union of India are subject to the provisions contained in Part III of the Constitution of India and as such they would be void to the extent to which their provisions are inconsistent with the fundamental rights guaranteed by Part III. It is then argued that in so far as both these personal laws allow polygamy but not polyandry, they discriminate against women only on the ground of sex. If that is so, the provisions of the personal law permitting polygamy offend against the provisions contained in Art. 15(1) and as such are void to that extent under Art. 13(1). In other words, after the commencement of the Constitution bigamous marriages amongst the Hindus as well as the Mahomedans became void and the Hindus and Mahomedans who entered into such bigamous marriages became liable to be punished under S. 494, Penal Code; and yet, the impugned Act specifically provides for the punishment of the Hindus alone; that is how it discriminates against the Hindus solely on the ground of religion. The grievance is that the impugned Act should have provided for the punishment both against Hindus and Mahomedans who would contract bigamous marriages. The same argument has been put before us in an alternative form. If the personal laws applicable to the Hindus and Mahomedans did not become void in respect of their provisions permitting bigamy, it is conceded under this alternative argument that it would be open to the State Legislature to prevent bigamous marriages amongst its citizens; but the argument is that the State Legislature should have been content with providing that such bigamous marriages are void and should have left the parties entering into such marriages to be dealt with under the provisions of the Indian Penal Code. It is pointed out that in providing for the punishment of bigamous marriages the impugned Act contains provisions which are very severe, and in so far as these stringent provisions are intended to be applied only against the Hindus, they constitute discrimination against them only on the ground of religion. The grievance is that the Hindus have not been treated in the same manner in which the Parsis or Christians are dealt with under the Indian Penal Code.

22. Now, in dealing with these arguments the first point which falls to be considered is whether the personal laws applicable to the Hindus and Mahomedans are laws in force within the meaning of Art. 13(1) of the Constitution. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part. III, shall, to the extent of such inconsistency, be void. The expression "laws in force" is thus defined by Art. 13(3)(b):—

> "'Laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, not withstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

23. There can be no doubt that the personal laws are in force in a general sense; they are in fact administered by the Courts in India in matters falling within their purview. But the expression "laws in force" is, in my opinion, used in Art. 13(1) not in that general sense. This expression refers to what may compendiously be described as statutory laws. There is no doubt that laws which are included in this expression must have been passed or made by a Legislature or other competent authority, and unless this test is satisfied it would not be legitimate to include in this expression the personal laws merely on the ground that they are administered by Courts in India. Article 372 which provides for the continuance in force of existing laws and their adaptation uses the expression "all the law in force" and defines it in terms substantially similar to those of Art. 13(3)(b). It seems to me that the provision for the adaptation of the laws in force could not have been intended to apply to the personal laws in this country. The President's power to make adaptations and modifications was clearly intended to apply to the statutory law and it is the statutory law which is intended to be included in the expression "laws in force" in Art. 13(1).

24. It is well-known that the personal laws do not derive their validity on the ground that they have been passed or made by a Legislature or other competent authority in the territory of India. The foundational sources of both the Hindu and the Mahomedan laws are their respective scriptural texts. The primary sources of Hindu law are the Srutis and the Smritis. It is true that in the course of its development spreading over several centuries the Srutis and the Smritis were followed by several other texts and commentaries with the result that in administering Hindu law Courts had often to consider these latter texts and commentaries. As early as 1868 their Lordships of the Privy Council had stated in *Collector of Madura* v. *Moottoo Ramalinga Sathapathy*, 12 Moo. Ind. App. 397 that the duty of a Judge who is under the obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal. In fact, the different schools and sub-schools of Hindu law which are recognised by our Courts

are distinguished solely on the ground of the different texts to which they owe allegiance. What is true of Hindu law is equally true of Mahomedan law. As has been pointed out by that eminent Judge and jurist Ameer Ali:

> "The Mahommedan Law is founded essentially on the Koran. It contains the fundamental principles which regulate the various relations of life; the religious, civil, and criminal laws which provide for the constitution and continuance of the body politic; and even the germs of political rules and social economy. The absence of a systematic arrangement, which has frequently been considered as its greatest defect, is explained by the circumstance that the Code was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated, not simultaneously as a completed Code of Law, but in accordance with the exigencies of the moment and the requirements of each special case." ("Mahommedan Law" by Syed Ameer Ali (1885), Vol. I, p. 8.)

25. Therefore, there can be no doubt that both the personal laws cannot be said to have been passed or made by a Legislature or other competent authority and do

not fall within the purview of the expression "laws in force."

26. It is, however, argued that in construing the expression "laws in force" we must also bear in mind the definition of the word "law" which is contained in Art. 13. Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and it provides that if any law is made in contravention of this clause, it would be void to the extent of such contravention. Article 13(3)(a) then defines "law" and it says that the word "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. Article 13(2) is clearly prospective and the effect of its provisions is that if any law is made hereafter by the State on the ground that it is based on custom or usage having the force of law, the law would not be valid if it takes away or abridges the fundamental rights. The Constitution has thus made it clear that no custom or usage having the force of law can validly be made the basis of any law in future if such custom or usage offends against the fundamental rights. Thus far there is no difficulty. But the argument is that the personal laws must be deemed to be included in the expression "laws in force" on the ground that whatever is included in the word "laws" in Art. 13(3)(a) must automatically be held to be included in the expression "laws in force" in Art. 13(3)(b). I feel considerable difficulty in accepting this argument. If custom or usage having the force of law was really included in the expression "laws in force," I am unable to see why it was necessary to provide for the abolition of untouchability expressly and specifically by Art. 17. This article abolishes untouchability and forbids its practice in any from. It also lays down that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. Untouchability as it was practised amongst the Hindus owed its origin to custom and usage, and there can be no doubt whatever that in theory and in practice it discriminated against a large section of Hindus only on the ground of birth. If untouchability thus clearly offended against the provisions of Art. 15(1) and if it was included in the expression "laws in force", it would have been void under Art. 13(1). In that view it would have been wholly unnecessary to provide for its abolition by Art. 17. That is why I find it difficult to accept the argument that custom or usage having the force of law should be deemed to be included in the expression "laws in force." But even if this view is wrong, it does not follow that personal laws are included in the expression "laws in force." It seems to me impossible to hold that either the Hindu or the Mahomedan law is based on custom or usage having the force of law. No doubt, in both these laws custom is a source of law. In Hindu law in particular, custom is recognised as one of the sources of law, and indeed the dictum of the Privy Council that under the Hindu system of law clear proof of usage will outweigh the written text of the law is too well-known: *Collector of Madura* v. *Moottoo Ramalinga Sathapathy*, (12 Moo. Ind. App. 397). But it is necessary to examine what this means. When Hindu law recognises the validity of a custom, it means that on proof of a valid custom, departure from Hindu law is permitted. The tests of a valid custom are well settled. These customs have to be ancient, certain and reasonable, and it is also well settled that being in derogation of the general rules of law they must be construed strictly vide *Hurpurshad* v. *Sheo Dyal*, 3 Ind. App. 259 at p. 285. But save and except for the departures from the general rules of Hindu law which are permitted on the ground of custom, the remaining field of Hindu law is covered by the scriptural texts themselves, and so it would not be possible to hold that either the Hindu law or the Mahomedan law is solely or even principally based upon custom or usage having the force of law. In my opinion, therefore, both the Hindu and the Mahomedan laws are not "laws in force" within the meaning of Art. 13(1) and their provisions permitting polygamy would not be void

even if it is assumed that they offend against Art. 15(1) of the Constitution.

27. Article 44 of the Constitution is, in my opinion, very important in dealing with this question. This article says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. In other words, this article by necessary implication recognises the existence of different codes applicable to the Hindus and Mahomedans in matters of personal law and permits their continuance until the State succeeds in its endeavour to secure for all the citizens a uniform civil code. The personal laws prevailing in this country owe their origin to

scriptural texts. In several respects their provisions are mixed up with and are based on considerations of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour must hereafter be to secure a uniform civil code throughout the territory of India. It is not difficult to imagine that some of the members of the Constituent Assembly may have felt impatient to achieve this ideal immediately; but as Art. 44 shows this impatience was tempered by considerations of practical difficulties in the way. That is why the Constitution contents itself with laying down the directive principle in this article. In my opinion, the provisions of this article support the conclusion that the personal laws are not included in the expression "laws in force" in Art. 13(1).

28. The legislative history with regard to the personal laws also leads to the same inference. Clause 15 of Bengal Regulation IV of 1793 had provided that:

> "In suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which the judges are to form their decisions."

29. When these provisions were ignored by the Calcutta High Court, their Lordships of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, 11 Moo. Ind. App. 551 at p. 614 reversed the conclusion of the Calcutta High Court and in very strong terms emphasised the importance of giving full effect to them. Their Lordships took the view that nothing was more likely to give just alarm to the communities concerned than to learn by a judicial decision that their law, the application of which had been thus secured to them, was to be overridden upon a question which so materially concerned their domestic relations. The jurisdiction of the Supreme Courts of Judicature which had been established in this country was derived from the provisions of Stat. 13 Geo. III, O. 63, and it was controlled by Ss. 17 to 20 of Stat. 21 Geo. III, C. 70. These latter provisions directed that the Hindu and Mahomedan laws of succession and contract had to be preserved. The Charter of the Supreme Courts reproduced the same provisions. It is true that none of these provisions expressly refers to marriages or to religious institutions; but judicial decisions have consistently interpreted these provisions as including marriage and other religious institutions. In *In re Kahandas Narrandas*, 5 Bom. 154 West, J. was called upon to construe these provisions, and after a careful examination she learned Judge came to the conclusion that the specification of

matters of succession and matters of contract as matters to be governed by native laws and usages, might be construed as an indication of a wider operation of those laws and usages intended to be secured by the statute. West, J. pointed out that the general rule was that the private law of a community is not affected by a change of rulers and the provisions in question had to be construed in the light of this general rule. Consistently with this position S. 112, Government of India Act, 1915, laid down that in suits against the inhabitants of Calcutta, Madras or Bombay, the High Courts shall, in matters of inheritance and succession to land, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and where the parties are subject to different laws or customs, according to the law or custom of the defendant. It would be noticed that this section makes a distinction between personal law and custom having the force of law, and it would be pertinent to point out that whereas custom having the force of law is included within the definition of the word "law" as used in Art. 13(2), no reference is made to personal law by the said definition. The effect of the provisions contained in S. 223, Government of India Act, 1935, was substantially the same. Therefore, in my opinion the legislative history with regard to personal laws indicates that they were always treated as valid in regard to the matters falling within their purview and Courts were directed to administer the provisions of these laws in dealing with such matters. The Constitution of India itself recognises the existence of these personal laws in terms when it deals with the topics 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 Art. 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 Art. 13(1) at all.

30. I would, however, like to add that even if it is held that personal laws fall within Art. 13(1), I am not satisfied that the provisions of these personal laws permitting polygamy, amount to a discrimination against women only on the ground of sex. It has often been emphasised in interpreting Art. 15(1) that the importance of the word "only" should not be minimised; this word in fact can be described as the keyword in the article. It is not all discriminations which may, incidentally and in a subsidiary way, be referable to religion, race, caste, sex or place of birth that are prohibited. It is only when discrimination against a citizen can be referred to no other reasonable ground that it falls within the mischief of Art. 15(1). There can be

little doubt that the institution of marriage like all social institutions is the result of contemporary social conditions. The rules prescribed for marriages are determined by the social and economic condition of the society. In dealing with these rules, it is also necessary to remember the obvious natural differences between the sexes themselves and considerations which may legitimately arise from these differences. It may well be that when polygamy was allowed both amongst Hindus and Mahomedans, these material conditions may have justified the rule as to polygamy. So far as the Hindus are concerned, Dr. Kane in his History of Dharmasastra has critically examined all the material texts bearing on the question of polygamy and has come to the conclusion that "one must not be carried away by the notion that marrying many wives was either very common or was not looked down upon amongst the Hindus. (Vol. II, Part I, p. 553). With this conclusion I respectfully agree. It is true that right down from the Vedic times we find several texts permitting polygamy and in that sense it cannot be denied that polygamy was not prohibited at any stage. But, on the other hand, the impression which one forms on looking at all the texts is that monogamy was always treated as an ideal. Some texts have in fact condemned polygamy in unmistakable terms. The Apastamba Dharma Sutra, for instance, prescribes that one who abandons his (faultless) wife should put on the skin of an ass with the hair outside and should beg for alms at seven houses for six months (1, 10, 28, 19). Marriage amongst the Hindus has been treated as a sacrament and the birth of a son has always been held to be a source of spiritual benefit by the Hindu texts. The Hindu texts, therefore, permitted a Hindu to marry a second wife in case his first wife does not give birth to progeny or more particularly to a son. Manu and Yajnyavalkya both say that a husband may supersede his wife and marry another if she drinks wine, suffers from a disease of long standing, is deceitful, is extravagant in expenditure, speaks harsh words and gives birth to female children only (Manu v. 80, Yaj. I, 80). It is unnecessary to refer to the other texts bearing on this point; but the conclusion seems to me to be inevitable that these texts, however harsh they may appear in permitting polygamy, cannot be said to have discriminated against women only on the ground of sex. The desire for a son who, according to the texts, confers spiritual benefit upon his ancestors was principally responsible for the permission granted to Hindu husbands to marry a second time, and if that is so, it would not be possible to hold that in granting such permission Hindu law discriminated against women solely on the ground of sex. Incidentally it may be pointed out that both according to Steel ("Law and Custom of Hindoo Castes," p. 168, Edn. of 1868) who had very great opportunities for observing the practices of numerous castes in the State of Bombay and according to the Imperial Gazeteer of India (Vol. I, p. 482), although in theory polygamy was allowed amongst the Hindus, its incidence in practice was not very wide. In my opinion, therefore, the provisions of the personal laws permitting polygamy cannot be said to offend against Art. 15(1). It is quite true that the social and economic conditions which may once have justified these provisions are not present to day and that a reform in that direction is overdue. But the impugned Act itself attempts to make such a reform and in substance it seeks to remove the hardships and disabilities from which Hindu women were suffering so long.

31. In my opinion, therefore, even if the personal laws are held to fall within Art. 13(1), the material provisions of these laws permitting polygamy do not offend against Art. 15(1) and are therefore not void. In that view of the matter, it is impossible to hold that the impugned Act discriminates against the Hindus in preference to the Mahomedans.

32. The next question is whether this Act discriminates against the Hindus in reference to the Christian and the Parsi citizens of this State, in so far 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 cognizable 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

Page: 94

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 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. I may incidentally point out that the word "Hindu," as used in the Act, is not confined only to Hindus as commonly understood, but it includes Sikhs, Jains Buddhists, the followers of the Arya or Brahmo Samaj and converts to Hinduism.

33. 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 Art. 14 of the Constitution of India and it is necessary to deal with this aspect of the argument.

34. Article 25 of the Constitution guarantees freedom of conscience and free profession, practice and propagation of religion to all the citizens of the Union of

India. But this article itself makes it perfectly clear that the freedom guaranteed by it is subject to some exceptions. First and foremost, this freedom is subject to public order, morality and health, as well as to the other provisions of Part III. Then it is also subject to the provisions of Art. 25(2) by which the State is given full power to make laws providing for social welfare and reform. In other words, if the State makes a law for social welfare and reform, it would not be a proper argument against the validity of such legislation to urge that the measure of social welfare and reform impinges upon the religious freedom of any section of the citizens of India. Religion in a modern democratic State is purely a matter of the individual and his God; with the religious beliefs of the citizen and his religious practices normally the State would not interfere. But if these religious beliefs or practices conflict with matters of social reform or welfare on which the State wants to legislate, such religious beliefs or practices must yield to the higher requirements of social welfare and reform. This, in my opinion, is the plain meaning of the provisions of Art. 25(1) and Art. 25(2) read together. If that is so, it is futile to contend that in passing the present Act the State Legislature has trespassed upon the religious beliefs of the Hindus.

35. But apart from that, I am not prepared to hold that the impugned Act infringes upon the religious beliefs or practices of the Hindus. I do not deny that marriage under Hindu law is a matter of sacrament and I concede that the Hindu texts have emphasised the importance of a son for the purpose of spiritual benefit. But it must be remembered that the ancient Sanskrit texts made no distinction between religion and its practice on the one hand and matters of positive or civil law on the other. The study of any of the Smritis or other Sanskrit texts of Hindu law would show that the ancient Hindu writers discussed all problems in religious terms. The whole of the human activity from the birth of a person to his grave is given a religious complexion, and in dealing with all actions in human life considerations of religion and metaphysics are throughout mixed up. It is, therefore, necessary to distinguish between matters which legitimately fall within the ambit of religion and its practice and those that do not. Speaking for myself, I would not be prepared very easily to accede to the argument that legislative interference with the provisions as to marriages in fact constitutes an infringement of the Hindu religion or its practice. Besides, even from the strictly orthodox point of view bigamy was never a matter of obligation; it was permissive and permissive under certain conditions and for a certain object. If the principal object of permitting polygamy was to attempt to obtain a son, the same object could well be served by adoption. It is well recognised that the adopted son under the Hindu texts confers the same spiritual

benefit which a natural born son does. Therefore, in my opinion, there is no substance in the argument that by prohibiting bigamy the State Legislature has infringed upon Hindu religion or its practice. But as I have already said, even if the State Legislature has infringed upon Hindu religion or its practice as alleged, it would be perfectly competent for the State Legislature to do so, if it is legislating for social welfare and reform. It would be impossible to contend that in passing the impugned Act the State Legislature was not providing for social welfare or reform. In fact, in so far as the impugned legislation removes the disabilities and hardships caused by polygamy to women, it in effect brings the Hindu law in conformity with the fundamental rights guaranteed to women along with the men in this country.

36. 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 partly 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 Art. 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 Art. 14. In my opinion, therefore, the argument that Art. 14 is violated by the impugned Act must fail.

37. In the result I agree with the learned Chief Justice in holding that the impugned Act is valid and must be enforced.

38. Per *Curiam*: In appeal No. 231 there is a finding that accused No. 1 married a second wife with the consent and approval of his first wife. In those circumstance we do not think that a sentence of imprisonment is justified. Therefore, we will alter that sentence to one merely of fine and impose a fine of Rs. 100 in default simple imprisonment for one month. With regard to accused Nos. 5, 6 and 7, we do not think a sentence of imprisonment should be imposed. We, therefore, alter the sentence to one of fine and impose a fine of Rs. 50 on accused No. 5 and a fine of Rs. 20 each on accused Nos. 6 and 7, in default one week's simple imprisonment.

39. In revision application No. 198 we will alter the sentence by sentencing accused No. 1 for a period of imprisonment already undergone by her, and we will alter the sentence of fine to Rs. 25.

40. In appeal No. 173 accused No. 1 is sentenced to one month's simple imprisonment and accused No. 2 to pay a fine of Rs. 25.

D.H.

Order accordingly.

———