Supreme Court of India
Smt. Sarla Mudgal, President, ... vs Union Of India & Ors on 10 May, 1995

Equivalent citations: 1995 AIR 1531, 1995 SCC (3) 635

Author: K Singh

Bench: Kuldip Singh (J)

PETITIONER:
SMT. SARLA MUDGAL, PRESIDENT, KALYANI & ORS.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT10/05/1995

BENCH:
KULDIP SINGH (J)
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KULDIP SINGH (J)
SAHAI, R.M. (J)

CITATION:
1995 AIR 1531 1995 SCC (3) 635
JT 1995 (4) 331 1995 SCALE (3)286

ACT:

HEADNOTE:

JUDGMENT:

THE 10TH DAY OF MAY, 1995 Present:

Hon'ble Mr. Justice Kuldip Singh Hon'ble Mr. Justice R.M. Sahai Mr. D.N. Diwedi, Additional Solicitor General, Mr. V.C. Mahajan, Mr. Shankar Ghosh, Mr. R.K. Garg, Sr. Advs., Ms. S. Janani, Mr. P. Parmeswaran, Mr. R.P. Srivastava, Ms.

A. Subhashini, (Ms. Janki Ramachandran, Mr. K.J. John,) Advs. (N.P.), Mr. Shakeel Ahmed Syed, Advs. with them for the appearing parties.

J U D G M E N T S/O R D E R The following Judgments/Order of the Court were delivered: Smt. Sarla Mudgal, President, Kalyani and Ors.

Versus.

Union of India & Ors.

(W.P.(C) No.347/90, W.P. (C) No.509/92 and W.P. (C) No.424/92) J U D G M E N T Kuldip Singh, J.

"The State shall endeavour to secure for the citizens a uniform civil code through-out the territory of India" is an unequivocal mandate under Article 44 of the Constitution of India which seeks to introduce a uniform personal law - a decisive step towards national consolidation. Pandit Jawahar Lal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954, said "I do not think that at the present moment the time is ripe in India for me to try to push it through". It appears that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians". The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the Hindu Marriage Act, 1955. The Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.

The questions for our consideration are whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continue to be Hindu? Whether the apostate husband would be quilty of the offence under Section 494 of the Indian Penal Code (IPC)?

These are four petitions under Article 32 of the Constitution of India. There are two petitioners in Writ Petition 1079/89. Petitioner 1 is the President of "KALYANI"

- a registered society - which is an organisation working for the welfare of needy-families and women in distress. Petitioner 2, Meena Mathur was married to Jitender Mathur on February 27, 1978. Three children (two sons and a daughter) were born out of the wed-lock. In early 1988, the petitioner was shocked to learn

that her husband had solemnised second marriage with one Sunita Narula @ Fathima. The marriage was solemnised after they converted themselves to Islam and adopted Muslim religion. According to the petitioner, conversion of her husband to Islam was only for the purpose of marrying Sunita and circumventing the provisions of Section 494, IPC. Jitender Mathur asserts that having embraced Islam, he can have four wives irrespective of the fact that his first wife continues to be Hindu.

Rather interestingly Sunita alias Fathima is the petitioner in Writ Petition 347 of 1990. She contends that she along with Jitender Mathur who was earlier married to Meena Mathur embraced Islam and thereafter got married. A son was born to her. She further states that after marrying her, Jitender Prasad, under the influence of her first Hindu-wife, gave an undertaking on April 28, 1988 that he had reverted back to Hinduism and had agreed to maintain his first wife and three children. Her grievance is that she continues to be Muslim, not being maintained by her husband and has no protection under either of the personal laws.

Geeta Rani, petitioner in Writ Petition 424 of 1992 was married to Pradeep Kumar according to Hindu rites on November 13, 1988. It is alleged in the petition that her husband used to maltreat her and on one occasion gave her so much beating that her jaw bone was broken. In December 1991, the petitioner learnt that Pradeep Kumar ran away with one Deepa and after conversion to Islam married her. It is stated that the conversion to Islam was only for the purpose of facilitating the second marriage.

Sushmita Ghosh is another unfortunate lady who is petitioner in Civil Writ Petition 509 of 1992. She was married to G.C. Ghosh according to Hindu rites on May 10, 1984. On April 20, 1992, the husband told her that he no longer wanted to live with her and as such she should agree to divorce by mutual consent. The petitioner was shocked and prayed that she was her legally wedded wife and wanted to live with him and as such the question of divorce did not arise. The husband finally told the petitioner that he had embraced Islam and would soon marry one Vinita Gupta. He had obtained a certificate dated June 17, 1992 from the Qazi indicating that he had embraced Islam. In the writ petition, the petitioner has further prayed that her husband be restrained from entering into second marriage with Vinita Gupta.

Marriage is the very foundation of the civilised society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilisation can exist.

Till the time we achieve the goal - uniform civil code for all the citizens of India - there is an open inducement to a Hindu husband, who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim. Since monogamy is the law for Hindus and the Muslim law permits as many as four

wives in India, errand Hindu husband embraces Islam to circumvent the provisions of the Hindu law and to escape from penal consequences.

The doctrine of indissolubility of marriage, under the traditional Hindu law, did not recognise that conversion would have the effect of dissolving a Hindu marriage. Conversion to another religion by one or both the Hindu spouses did not dissolve the marriage. It would be useful to have a look at some of the old cases on the subject. In Re Ram Kumari 1891 Calcutta 246 where a Hindu wife became convert to the Muslim faith and then married a Mohammedan, it was held that her earlier marriage with a Hindu husband was not dissolved by her conversion. She was charged and convicted of bigamy under Section 494 of the IPC. It was held that there was no authority under Hindu law for the proposition that an apostate is absolved from all civil obligations and that so far as the matrimonial bond was concerned, such view was contrary to the spirit of the Hindu law. The Madras High Court followed Ram Kumari in Budansa vs. Fatima 1914 IC 697. In Gul Mohammed v. Emperor AIR 1947 Nagpur 121 a Hindu wife was fraudulently taken away by the accused a Mohammedan who married her according to Muslim law after converting her to Islam. It was held that the conversion of the Hindu wife to Mohammedan faith did not ipso facto dissolve the marriage and she could not during the life time of her former husband enter into a valid contract of marriage. Accordingly the accused was convicted for adultery under Section 497 of the IPC.

In Nandi @ Zainab vs. The Crown (ILR 1920 Lahore 440, Nandi, the wife of the complainant, changed her religion and became a Mussalman and thereafter married a Mussalman named Rukan Din. She was charged with an offence under Section 494 of the Indian Penal Code. It was held that the mere fact of her conversion to Islam did not dissolve the marriage which could only be dissolved by a decree of court. Emperor vs. Mt. Ruri AIR 1919 Lahore 389, was a case of Christian wife. The Christian wife renounced Christianity and embraced Islam and then married a Mohomedan. It was held that according to the Christian marriage law, which was the law applicable to the case, the first marriage was not dissolved and therefore the subsequent marriage was bigamous.

In India there has never been a matrimonial law of general application. Apart from statute law a marriage was governed by the personal law of the parties. A marriage solemnised under a particular statute and according to personal law could not be dissolved according to another personal law, simply because one of the parties had changed his or her religion.

In Sayeda Khatoon @ A.M. Obadiah vs. M. Obadiah 49 CWN 745, Lodge, J. speaking for the court held as under:

> "The parties were originally Jews bound by the Jewish personal law... The Plaintiff has since been converted to Islam and may in some respects be governed by the Mohammedan Law.. The Defendant is not governed by the Mahommedan Law.. If this were an Islamic country, where the Mahommedan Law was applied to all cases where one party was a Mahommedan, it might be that plaintiff

> would be entitled to the declaration prayed for. But this is not a Mahommedan country; and the Mahommedan Law is not the Law of the Land.. Now all my opinion, is it the Law of India, that when any person is converted to Islam the Mahommedan Law shall be applicable to him in all his relationships?.. I can see no reason why the Mahommedan Law should be preferred to the Jewish Law in a matrimonial dispute between a Mahommdan and a Jew particularly when the relationship, viz.: marriage, was created under the Jewish Law.. As I stated in a previous case there is no matrimonial law of general application in India. There is a Hindu Law for Hindus, a Mahommedan Law for Mahommedans, a Christian Law for Christians, and a Jewish Law for Jews. There is no general matrimonial law regarding mixed marriages other than the statute law, and there is no suggestion that the statute law is applicable in the present case.. It may be that a marriage solemnised according to Jewish rites may be dissolved by the proper authority under Jewish Law when one of the parties renounces the Jewish Faith. It may be that a marriage solemnised according to Jesish rites may be dissolved by the proper authority under Jewish Law when one of the parties renounces the Jewish Faith. It may be that a marriage solemnised according to Mahommedan Law may be dissolved according to the Mahommedan Law when one of the parties ceases to be a Mahommedan. But I can find no authority for the view that a marriage solemnized according to one personal law can be dissolved according to another personal law simply because one of the two parties has changed his or her religion."

Sayeda Khatoon's case was followed with approval by Blagden, J. of the Bombay High Court in Robasa Khanum vs. Khodadad Bomanji Irani 1946 Bombay Law Reporter 864. In this case the parties were married according to Zoroastrian law. The wife became Muslim whereas the husband declined to do so. The wife claimed that her marriage stood dissolved because of her conversion to Islam. The learned Judge dismissed the suit. It would be useful to quote the following observations from the judgment:

> "We have, therefore, this position - British India as a whole, is neither governed by Hindu, Mahommedan, Sikh, Parsi, Christian, Jewish or any other law except a law imposed by Great Britain under which Hindus, Mahomedans, Sikhs, Parsis, and all others, enjoy equal rights and the utmost possible freedom of religious observance, consistent in every case with the rights of other people. I have to decide this case according to the law as it is, and there seems, in principle, no adequate ground for holding that in this case Mahomedan law is applicable to a non- Mahomedan.. Do then the authorities compel me to hold that one spouse can by changing his or her religious opinions (or purporting to do so) force his or her newly acquired personal law on a party to whom it is entirely alien and who does not want it? In the name of justice, equity and good

> conscience, or, in more simple language, of common sense, why should this be possible? If there were no authority on the point I (personally) should have thought that so monstrous an absurdity carried its own refutation with it, so extravagant are the results that follow from it. For it is not only the question of divorce that the plaintiff's contention affects. If it is correct, it follows that a Christian husband can embrace Islam and, the next moment, three additional wives, without even the consent of the original wife."

Against the judgment of Blagden, J. appeal was heard by a Division Bench consisting of Sir Leonard Stone, Chief Justice and Mr. Justice Chagla (as the learned Judge then was). Chagla, J. who spoke for the Bench posed the question that arose for determination as under: "what are the consequences of the plaintiff's conversion to Islam?". The Bench upheld the judgment of Blagden, J. and dismissed the appeal. Chagla, J. Chagla, J. elaborating the legal position held as under:-

> "We have here a Muslim wife according to whose personal law conversion to Islam, if the other spouse does not embrace the same religion, automatically dissolves the marriage. We have a Zoroastrian husband according to whose personal law such conversion does not bring about the same result. The Privy Council in Waghela Rajsanji v. Shekh Masludin expressed the opinion that if there was no rule of Indian law which could be applied to a particular case, then it should be decided by equity and good conscience, and they interpreted equity and good conscience to mean the rules of English law if found applicable to Indian society and circumstances. And the same view was confirmed by their Lordships of the Privy Council in Muhammad Raza v. Abbas Bandi Bibi. But there is no rule of English law which can be made applicable to a suit for divorce by a Muslim wife against her Zoroastrian husband. The English law only deals and can only deal with Christian marriages and with grounds for dissolving a Christian marriage. Therefore we must decided according to justice and right, or equity and good conscience independently of any provisions of the English law. We must do substantial justice between the parties and in doing so hope that we have vindicated the principles of justice and right or equity and good conscience... It is impossible to accept the contention of Mr. Peerbhoy that justice and right requires that we should apply Muslim law in dealing this case. It is difficult to see why the conversion of one party to a marriage should necessarily afford a ground for its dissolution. The bond that keeps a man and woman happy in marriage is not exclusively the bond of religion. There are many other ties which make it possible for a husband and wife to live happily and contentedly together. It would indeed be a startling proposition to lay down that although two persons may want to continue to live in a married state and disagree as to the religion they should profess,

> their marriage must be automatically dissolved. Mr. Peerbhoy has urged that it is rarely possible for two persons of different communities to be happily united in wedlock. If conversion of one of the spouses leads to unhappiness, then the ground for dissolution of marriage would not be the conversion but the resultant unhappiness. Under Muslim law, apostasy from Islam of either party to a marriage operates as a complete and immediate dissolution of the marriage. But s.4 of the Dissolution of Muslim Marriages Act (VIII of 1939) provides that the renulciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. This is a very clear and emphatic indication that the Indian legislature has departed from; the rigor of the ancient Muslim law and has taken the more modern view that there is nothing to prevent a happy marriage notwithstanding the fact that the two parties to it professed different religious.. We must also point out that the plaintiff and the defendant were married according to the Zoroastrian rites. They entered into a solemn pact that the marriage would be monogamous and could only be dissolved according to the tenets of the Zoroastrian religion.

It would be patently contrary to justice and right that one party to a solemn pact should be allowed to repudiate it by a unilateral act. It would be tantamount to permitting the wife to force a divorce upon her husband although he may not want it and although the marriage vows which both of them have taken would not permit it. We might also point out that the Shariat Act (Act XXVI of 1937) provides that the rule of decision in the various cases enumerated in s.2 which includes marriage and dissolution of marriage shall be the Muslim personal law only where the parties are Muslims; it does not provide that the Muslim personal law shall apply when only one of the parties is a Muslim." (the single Judge judgment and the Division Bench judgment are reported in 1946 Bombay Law Reporter 864) In Andal Vaidyanathan vs. Abdul Allam Vaidya 1946 Madras, a Division Bench of the High Court dealing with a marriage under the Special Marriage Act 1872 held:

> "The Special Marriage Act clearly only contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion. Such a person commits bigamy if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of the second marriage. Section 17 provides the only means for the dissolution of a marriage or a declaration of its nullity.
> Consequently, where two persons married under the Act subsequently become converted to Islam, the marriage can only be dissolved under the provisions of the Divorce Act and the same would apply even if only one of them becomes converted to Islam. Such a marriage is not a marriage in the Mahomoden sense which can be dissolved in a Mahomedan manner. It is a statutory marriage

> and can only be dissolved in accordance with the Statute: ('41) 28 A.I.R.1941 Cal. 582 and (1917) 1 K.B. 634, Rel. on; ('35) 22 A.I.R. 1935 Bom. 8 and 18 Cal. 264, Disting."

It is, thus, obvious from the catena of case-low that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu Law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.

The position has not changed after coming into force of the Hindu Marriage Act, 1955 (the Act) rather it has become worse for the apostate. The Act applies to Hindus by religion in any of its forms or developments. It also applies to Buddhists, Jains and Sikhs. It has no application to Muslims, Christians and Parsees. Section 4 of the Act is as under:

> "Overriding effect of Act. save as otherwise expressly provided in this Act,-
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

A marriage solemnised, whether before or after the commencement of the Act, can only be dissolved by a decree of divorce on any of the grounds enumerated in Section 13 of the Act. One of the grounds under Section 13 (i) (ii) is that "the other party has ceased to be a Hindu by conversion to another religion". Sections 11 and 15 of the Act is as under:-

"Void marriages:- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5."

"Divorced persons when may marry again.- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, of there is such a right of appeal the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

It is obvious from the various provisions of the Act that the modern Hindu Law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under section 13 of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the provisions of the Act and as such would be nonest. Section 494 Indian Penal Code is as under:-

> "Marrying again during lifetime of husband or wife. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The necessary ingredients of the Section are: (1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void; (4) by reason of its taking place during the life of such husband or wife.

It is no doubt correct that the marriage solemnised by a Hindu husband after embracing Islam may not be strictly a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy.

The expression "void" for the purpose of the Act has been defined under Section 11 of the Act. It has a limited meaning within the scope of the definition under the Section. On the other hand the same expression has a different purpose under Section 494, IPC and has to be given meaningful interpretation.

The expression "void" under section 494, IPC has been used in the wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494, IPC.

A Hindu marriage solemnised under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of Section 494, IPC. Any act which is in violation of mandatory provisions of law is per-se void.

The real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-bye to the substance of the matter and acting against the spirit of the Statute if the second marriage of the convert is held to be legal.

We also agree with the law laid down by Chagla, J. in Robasa Khanum vs. Khodabad Irani's case (supra) wherein the learned Judge has held that the conduct of a spouse who converts to Islam has to be judged on the basis of the rule of justice and right or equity and good conscience. A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, IPC.

Looked from another angle, the second marriage of an apostate-husband would be in violation of the rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry again without getting his marriage under the Act dissolved. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as such would be void.

The interpretation we have given to Section 494 IPC would advance the interest of justice. It is necessary that there should be harmony between the two systems of law just as there should be harmony between the two communities. Result of the interpretation, we have given to Section 494 IPC, would be that the Hindu Law on the one hand and the Muslim Law on the other hand would operate within their respective ambits without trespassing on the personal laws of each other. Since it is not the object of Islam nor is the intention of the enlighten Muslim community that the Hindu husbands should be encouraged to become Muslims merely for the purpose of evading their own personal laws by marrying again, the courts can be persuaded to adopt a construction of the laws resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law.

All the four ingredients of Section 494 IPC are satisfied in the case of a Hindu husband who marries for the second time after conversion to Islam. He has a wife living, he marries again. The said marriage is void by reason of its taking place during the life of the first wife.

We, therefore, hold that the second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of Section 494 IPC.

We may at this stage notice the Privy Council judgment in Attorney General Ceylon vs. Reid (1965 Al. E.R. 812). A Christian lady was married according to the Christian rites. Years later she embraced Islamic faith and got married by the

Registrar of Muslim Marriages at Colombo according to the statutory formalities prescribed for a Muslim marriage. The husband was charged and convicted by the Supreme Court, Ceylon of the offence of bigamy under the Ceylon Penal Code. In an appeal before the Privy Council, the respondent was absolved from the offence of bigamy. It was held by Privy Council as under :-

> "In their Lordship's view, in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. It such inherent right is to be abrogated, it must be done by statute."

Despite there being an inherent right to change religion the applicability of Penal laws would depend upon the two personal laws governing the marriage. The decision of Privy Council was on the facts of the case, specially in the background of the two personal laws operating in Ceylon. Reid's case is, thus, of no help to us in the facts and legal background of the present cases.

Coming back to the question "uniform civil code" we may refer to the earlier judgments of this Court on the subject. A Constitution Bench of this Court speaking through Chief Justice Y.V. Chandrachud in Mohd. Ahmed Khan vs. Shah Bano Begum AIR 1985 SC 945 held as under:

> "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made is the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil

> Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."

In Ms. Jordan Diengdeh vs. S.S. Chopra AIR 1985 SC 935 O. Chinnappa Reddy, J. speaking for the Court referred to the observations of Chandrachud, CJ in Shah Bano Begum's case and observed as under:

> "It was just the other day that a Constitution Bench of this Court had to emphasise the urgency of infusing life into Art. 44 of the Constitution which provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." The present case is yet another which focuses .. on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of a uniform civil code is exposed by the facts of the present case. Before mentioning the facts of the case, we might as well refer to the observations of Chandrachud, CJ in the recent case decided by the Constitution Bench (Mohd. Ahmed Khan vs. Shah Bano Begum)."

One wonders how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu law - personal law of the Hindus - governing inheritance, succession and marriage was given go- bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.

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 alongwith 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.

It has been judicially acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers. It can be superseded by the State just as it can prohibit human sacrifice or the practice of "Suttee" in the interest of public order. Bigamous marriage has been made punishable amongst Christians by Act (XV of 1872), Parsis by Act (III of 1936) and Hindus, Buddhists, Sikhs and Jains by Act (XXV of 1955).

Political history of India shows that during the Muslim regime, justice was administered by the Qazis who would obviously apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system, more or less, continued during the time of the East India Company, until 1772 when Warren Hastings made Regulations for the administration of civil justice for the native population, without discrimination between Hindus and Mahomedans. The 1772 Regulations followed by the Regulations of 1781 whereunder it was prescribed that either community was to be governed by its "personal" law in matters relating to inheritance, marriage, religious usage and institutions. So far as the criminal justice was concerned the British gradually superseded the Muslim law in 1832 and criminal justice was governed by the English common law. Finally the Indian Penal Code was enacted in 1860. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion. It would be necessary to emphasise that the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.

The Successive Governments till-date have been wholly re-miss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.

We, therefore, request the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and "endeavour to secure for the citizens a uniform civil code throught the territory of India".

We further direct the Government of India through Secretary, Ministry of Law and Justice to file an affidavit of a responsible officer in this Court in August, 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a "uniform civil code" for the citizens of India. Sahai, J. in his short and crisp supporting opinion has suggested some of the measures which can be undertaken by the Government in this respect.

Answering the questions posed by us in the beginning of the judgment, we hold that the second marriage of a Hindu- husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC.

The question of law having been answered we dispose of the writ petitions. The petitioners may seek any relief by invoking any remedy which may be available to them as a result of this judgment or otherwise. No costs. Smt. Sarla Mudgal, President Kalyani & Ors. etc. etc. Vs.

Union of India & Ors.

J U D G M E N T R.M. SAHAI, J.

Considering senstivity of the issue and magnitude of the problem, both on the desirability of a uniform or common civil code and its feasibility, it appears necessary to add a few words to the social necessity projected in the order proposed by esteemed Brother Kuldip Singh, J. more to focus on the urgency of such a legislation and to emphasise that I entirely agree with the thought provoking reasons which have been brought forth by him in his order clearly and lucidly.

The pattern of debate, even today, is the same as was voiced forcefully by the members of the minority community in the Constituent Assembly. If, `the non-implementation of the provisions contained in Article 44 amounts to grave failure of Indian democracy' represents one side of the picture, then the other side claims that, `Logical probability appears to be that the code would cause dissatisfaction and disintegration than serve as a common umbrella to promote homogeneity and national solidarity'.

When Constitution was framed with secularism as its ideal and goal, the consensus and conviction to be one, socially, found its expression in Article 44 of the Constitution. But religious freedom, the basic foundation of secularism, was guaranteed by Articles 25 to 28 of the Constitution. Article 25 is very widely worded. It guarantees all persons, not only freedom of conscience but the right to profess, practice and propagate religion. What is religion? Any faith or belief. The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And external expression of it were protected by guaranteeing right to freely, practice and propagate religion. Reading and reciting holy scriptures, for instance, Ramayana or Quran or Bible or Guru Granth Sahib is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to a temple, mosque, church or gurudwara.

Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before Qazi are as much matter of faith and conscience as the worship itself. When a Hindu becomes convert by reciting Kalma or a Mulsim becomes Hindu by reciting certain Mantras it is a matter of belief and conscience. Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of

faith. Reason and logic have little role to play. The sentiments and emotions have to be cooled and tempered by sincere effort. But today there is no Raja Ram Mohan Rai who single handed brought about that atmoophere which paved the way for Sati abolition. Nor is a statesman of the stature of Pt. Nehru who could pilot through, successfully, the Hindu Succession Act and Hindu Marriage Act revolutionising the customary Hindu Law. The desirability of uniform Code can hardly 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 gaining personal mileage rise above and awaken the masses to accept the change.

The problem with which these appeals are concerned is that many Hindus have changed their religion and have become convert to Islam only for purposes of escaping the consequences of bigamy. For instance, Jitendra Mathur was married to Meena Mathur. He and another Hindu girl embraced Islam. Obviously because Muslim Law permits more than one wife and to the extent of four. But no religion permits deliberate distortions. Much misapprehension prevails about bigamy in Islam. To check the misuse many Islamic countries have codified the personal Law, `Wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context'. But ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. `But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression'. Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about the comprehensive legislation in keeping with modern day concept of human rights for women.

The Government may also consider feasibility of appointing a Committee to enact Conversion of Religion Act, immediately, to check the abuse of religion by any person. The law may provide that every citizen who changes his religion cannot marry another wife unless he divorces his first wife. The provision should be made applicable to every person whether he is a Hindu or a Muslim or a Christian or a Sikh or a Jain or a Budh. Provision may be made for maintenance and succession etc. also to avoid clash of interest after death.

This would go a long way to solve the problem and pave the way for a unified civil code.

Smt. Sarla Mudgal, President Kalyani and Ors.

Vs.

Union of India & Ors.

(W.P. (C) No.347/90, W.P. (C) No.509/92 and W.P. (C) No.424/92).

O R D E R For the reasons and conclusions reached in separate but concurring judgments the Writ petitions are allowed in terms of the answers to the questions posed in the opinion of Kuldip Singh, J.