Dr.Surajmani Stella Kujur vs Durga Charan Hansdah & Anr on 14 February, 2001

Equivalent citations: AIR 2001 SUPREME COURT 938, 2001 (3) SCC 13, 2001 AIR SCW 711, (2001) 2 JT 631 (SC), 2001 (3) SRJ 313, 2001 CALCRILR 205, 2001 SCC(CRI) 1305, 2001 (3) LRI 1443, 2001 (2) SCALE 21, (2001) 1 MARRILJ 429, (2001) 1 CGLJ 356, 2001 ALL MR(CRI) 464, 2001 CRILR(SC MAH GUJ) 280, 2001 (2) JT 631, 2001 (1) MARR LJ 429, (2001) SC CR R 497, (2001) 1 DMC 291, (2001) 57 DRJ 842, (2001) 2 GUJ LR 929, (2001) 1 HINDULR 335, (2001) 2 MADLW(CRI) 682, (2001) MAD LJ(CRI) 429, (2001) MATLR 213, (2001) 2 ORISSA LR 33, (2001) 20 OCR 613, (2001) 1 RECCRIR 851, (2001) 2 SCJ 281, (2001) 1 CURCRIR 208, (2001) 1 SUPREME 681, (2001) 1 RECCIVR 766, (2001) 2 SCALE 21, (2001) 42 ALLCRIC 1089, (2001) 42 ALL LR 847, (2001) 2 ALL WC 969, (2001) 89 DLT 836, (2001) 2 CAL HN 26, (2001) 3 ALLCRILR 413, (2001) 3 BLJ 536, (2001) 1 ALLCRIR 804, (2001) 1 CRIMES 263, 2001 (1) ANDHLT(CRI) 262 SC, (2001) 1 BOM CR 609

Bench: K.T.Thomas, R.P.Sethi

CASE NO.:
Appeal (crl.) 186 of 2001
Special Leave Petition (crl.) 2436 of 2000

PETITIONER:
DR.SURAJMANI STELLA KUJUR

Vs.

RESPONDENT:
DURGA CHARAN HANSDAH & ANR.

DATE OF JUDGMENT: 14/02/2001

BENCH:
K.T.Thomas, R.P.Sethi

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J SETHI,J.

Leave granted. Who is a "Hindu" for the purposes of the applicability of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act")? is a question of law to be determined in this appeal. Section 2 of the Act specifies the persons to whom the Act is applicable. Clauses (a), (b) and (c) of Sub-section (1) of Section 2 make the Act applicable to a person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj and to persons who is a Buddhist, Jaina or Sikh by religion. It is also applicable to any other person domiciled in the territories of India who is not a Muslim, Christian, Parsi or Jew by religion. The applicability of the Act is, therefore, comprehensive and applicable to all persons domiciled in the territory of India who are not Muslims, Christians, Parsis or Jews by religion. The term "Hindu" has not been defined either under the Act or Indian Succession Act or any other enactment of the Legislature. As far back as in 1903 the Privy Council in Bhagwan Koer v. J.C. Bose & Ors. [ILR (XXXI) Calcutta Series 11] observed: "We shall not attempt here to lay down a general definition of what is meant by the term 'Hindu'. to make it accurate and at the same time sufficiently comprehensive as well as distinctive is extremely difficult. The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the Chamaras who profess Hinduism, but who eat beef and the flesh of dead animals, are however low in the scale included within its pale. It is easier to say who are not Hindus, not practically and separation of Hindus from non-Hindus is not a matter of so much difficulty. The people know the differences well and can easily tell who are Hindus and who are not."

The Act, is, therefore, applicable to: "(1) All Hindus including a Virashaiva, a Lingayat, a Brahmo, Prarthana Samajist and an Arya Samajist.

(2) Budhists (3) Jains (4) Sikhs"

> In this appeal the parties are admittedly tribals, the appellant being a Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a further notification in terms of Sub-section (2) of Section 2 of the Act. It is not disputed before us that in the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two Tribals, who otherwise profess Hinduism, but their marriage being out of the purview of Hindu Marriage Act, 1955 in light of Section 2(2) of the Act, are thus governed only by their Santal Customs and usage". The appellant has, however, relied upon an alleged custom in the Tribe which mandates monogamy as a rule. It is submitted that as the respondent has solemnised a second marriage during the subsistence of the first marriage with the appellant, the second marriage being void, the respondent is liable to be prosecuted for the offence punishable under Section

494 of the Indian Penal Code. No custom can create an offence as it essentially deals with the civil rights of the parties and no person can be convicted of any offence except for violation of law in force at the time of commission of the act charged. Custom may be proved for the determination of the civil rights of the parties including their status, the establishment of which may be used for the purposes of proving the ingredients of an offence which, under Section 3(37) of the General Clauses Act, would mean an act or omission punishable by any law by way of fine or imprisonment. Article 20 of the Constitution, guaranteeing protection in respect of conviction of offence, provides that no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence. Law under Article 13 clause (3) of the Constitution means the law made by the Legislature including intravires statutory, orders and orders made in exercise of powers conferred by the statutory rules. The expression "custom and usage" has been defined under Section 3(a) of the Act as: "the expression 'custom' and 'usage' and rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family."

For custom to have the colour of a rule or law, it is necessary for the party claiming it to plead and thereafter prove that such custom is ancient, certain and reasonable. Custom being in derogation of the general rule is required to be construed strictly. The party relying upon a custom is obliged to establish it by clear and unambiguous evidence. In Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya, [14 Moo. Ind. App. 570 at p.585] held: "It is of the essence of special usage modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

This Court in Mirza Raja Pushpavati Vijayaram Gajapathi Raj & ors. v. Sri Pushavathi Visweswar Gajapathiraj Rajkumar of Vizianagram & Ors. [AIR 1964 SC 118] again reiterated the same position of law regarding the establishment of a custom upon which a party intends to rely. The importance of the custom in relation to the applicability of the Act has been acknowledged by the Legislature by incorporating Section 29 saving the validity of a marriage solemnised prior to the commencement of the Act which may otherwise be invalid after passing of the Act. Nothing in the Act can affect any right, recognised by custom or conferred by any said enactment to obtain the dissolution of a Hindu Marriage whether solemnised before or after the commencement of the Act even without the proof of the conditions precedent for declaring the marriage invalid as incorporated in Sections 10 to 13 of the Act. In this case the appellant filed a complaint in the Court of Chief Metropolitan Magistrate, New Delhi stating therein that her marriage was solemnised with the respondent in Delhi "according to Hindu rites and customs". Alleging that the respondent has solemnised another

marriage with the Accused No.2, the complainant pleaded: "That the accused No.1 has not obtained any divorce thro' the Court of Law upto this date and hence the action of the accused No.1 is illegal and contravene the provision of law as laid down under Section 494 IPC."

Nowhere in the complaint the appellant has referred to any alleged custom having the force of law which prohibits the solemnisation of second marriage by the respondent and the consequences thereof. It may be emphasised that mere pleading of a custom stressing for monogamy by itself was not sufficient unless it was further pleaded that second marriage was void by reason of its taking place during the life of such husband or wife. In order to prove the second marriage being void, the appellant was under an obligation to show the existence of a custom which made such marriage null, ineffectual, having no force of law or binding effect, incapable of being enforced in law or non- est. The fact of second marriage being void is a sine qua non for the applicability of Section 494 IPC. It is settled position of law that for fastening the criminal liability, the prosecution or the complainant is obliged to prove the existence of all the ingredients constituting the crime which is normally and usually defined by a statute. The appellant herself appears to be not clear in her stand inasmuch as in her statement in the court recorded on 24th October, 1992 she has stated that "I am a Hindu by religion". The complaint was dismissed by the trial court holding, "there is no mention of any such custom in the complaint nor there is evidence of such custom. In the absence of pleadings and evidence reference to Book alone is not sufficient". the High Court vide the judgment impugned in this appeal held that in the absence of notification in terms of sub-section (2) of Section 2 of the Act no case for prosecution for the offence of bigamy was made out against the respondent because the alleged second marriage cannot be termed to be void either under the Act or any alleged custom having the force of law. In view of the fact that parties admittedly belong to the Scheduled Tribes within the meaning of clause (25) of Article 366 of the Constitution as notified by the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990 passed in terms of Article 342 and in the absence of specific pleadings, evidence and proof of the alleged custom making the second marriage void, no offence under Section 494 of the Indian Penal Code can possibly be made out against the respondent. The Trial Magistrate and the High Court have rightly dismissed the complaint of the appellant. Learned Counsel appearing for the appellant, however, submitted that even if the second marriage was not void for the purposes of attracting the applicability of Section 494 and holding the respondent guilty of bigamy, the appellant is entitled to maintenance, succession and other benefits on account of her being the legally wedded wife of the respondent. We cannot adjudicate upon such a proclaimed right of the appellant. The appellant is at liberty to get her right established by way of civil proceedings in a competent court of jurisdiction. If any such proceedings are initiated, the same would be decided on their merits in accordance with the principles of pleadings and proof, not being influenced by any of the observations made by the trial magistrate or the High Court. There is no merit in this appeal which is accordingly dismissed.