

Vaibhav Jain & Anr vs Union Of India & Anr on 14 October, 2020

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw, Asha Menon

\$~VC-1 & 2

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P. (C) 7657/2020

VAIBHAV JAIN & ANR.

..... Petitioners
Through: Dr. Menaka Guruswamy, Sr.
Advocate with Ms. Arundhati Katju,
Mr. Govind Manoharan & Ms.
Surabhi Dhar, Advocates along with
Vaibhav Jain and Parag Mehta
(Petitioners in item 1) and Dr. Kavita
Arora and Ms. Ankita Khanna
(Petitioners in Item 2).

Versus

UNION OF INDIA & ANR.

..... Respondents
Through: Mr. Raj Kumar Yadav, Sr. Panel
Counsel for R/UOI.

+ W.P. (C) 7692 /2020
DR. KAVITA ARORA & ANR

..... Petitioners
Through: Dr. Menaka Guruswamy, Sr.
Advocate with Ms. Arundhati Katju,
Mr. Govind Manoharan & Ms.
Surabhi Dhar, Advocates.

Versus

UNION OF INDIA & ANR

..... Respondents
Through: Mr. Kirtiman Singh, CGSC for
R/UOI.
Ms. Sangita Rai, Advocate for
R-2/GNCTD.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

W.P. (C) Nos. 7657/2020 & 7692/2020

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ORDER

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14.10.2020

[VIA VIDEO CONFERENCING]

C.M. Appln. Nos. 25338/2020 & 25339/2020 (Exemption from filing certified/typed/translated/legible/dim/redacted copies of the annexures and from filing apostilled affidavits) in W.P. (C) 7657/2020; AND, C.M. Appl. No. 25396/2020 (Exemption from filing certified/dim/ illegible/translated copies of the Annexures) in W.P. (C) 7692/2020

1. Allowed, subject to just exceptions and as per extant rules.

2. The applications are disposed of.

W.P. (C) 7657/2020 & W.P. (C) 7692/2020

3. The petitions impugn the provisions of the Foreign Marriage Act, 1969 and the Special Marriage Act, 1954 respectively, to the extent they do not provide for registration/recognition of same sex marriages and seek a direction to the respective respondents to register the marriages of the petitioners under the statutes aforesaid.

4. We have enquired from the senior counsel for the petitioners, that the petitioners having not availed of the statutory remedy of appeal provided in both Statutes, how the writ petitions, impugning non-registration of marriage applied for by the parties in the two petitions, are maintainable.

5. The senior counsel for the petitioners has contended that since the authorities under the Foreign Marriage Act and the Special Marriage Act have refused to even entertain the application of the petitioners for registration of the marriage and have returned the same and there is no order of refusal to register the marriage, the statutory remedy of appeal is not available. Reliance is placed on *Osnat Alis Vs. Union of India* MANU/DE/1433/2003, amongst other judgments.

6. The Foreign Marriage Act, as per its preamble, was enacted to make provision relating to marriages of citizens of India outside India. The Special Marriage Act, as per its preamble, was enacted to provide a special form of a marriage in certain cases, for the registration of such and certain other marriages and for divorce. Neither of the said Statutes define 'marriage'.

7. The Foreign Marriage Act, as aforesaid, is enacted only to make provisions for registration of marriages of citizens of India outside India and which registration, being in accordance with the Indian Law, would be valid and recognizable in India as proof of marriage. Registration thereunder, outside India, can be sought as long as one of the parties seeking registration of marriage is a citizen of India. The same, while laying down the conditions to be fulfilled, while prescribing the marriageable age refers to 'bridegroom' and 'bride' and which words in our prima facie view refer to a man and a woman. Yet another condition is that the parties are not within the degrees of prohibited relationship and it is further clarified that where the 'personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degree of prohibited relationship'. Though it is the case of the parties in WP (C) No. 7657/2020 that the Local Laws of the foreign country where they sought registration, permit same sex marriage but the requirement as aforesaid is of prohibition as per the

personal law. Personal Law of a person of Indian region, in spite of acquisition of Foreign Citizenship, in our prima facie view, does not change. Marriage thereunder can also be refused to be registered on the ground of the same being inconsistent with International Law or the comity of Nations. It needs consideration, whether registration of a marriage not permitted in India, can be granted under the said Statute.

8. Similarly, the Special Marriage Act, while prescribing the conditions relating to solemnization of marriage, while prescribing age, refers to male and female. Yet another condition is of the parties not being within the degrees of prohibited relationship and which degrees also are in the context of a man and of a woman and the customary law applicable to them.

9. Hindu marriage, as per our understanding, is neither contractual nor statutory and is a sacrament. The law governing marriages, in our prima facie view, merely govern certain aspects of marriage and otherwise only codify the customary law.

10. Again, in our prima facie view, the petitions do not contain a challenge to the concept of marriage under the Personal/Customary Laws and which in our view, as understood today, do not recognize same sex marriage and which in our understanding is the root cause for the refusal to even entertain applications for registration of marriage and which refusal are impugned in these petitions.

11. We have thus enquired from the senior counsel for the petitioners, that the challenge brought before this court by these petitions though undoubtedly worthy of consideration, suffers from this lacunae and without meeting which, any adjudication of the petitions may not be complete or may pose a challenge. We have further enquired, whether not it is apposite that the amendment if any required to the petitions, to fulfil the said lacunae, is carried out at this stage.

12. The senior counsel for the petitioners contends that marriage under the two statutes does not rely on any customary law, and with particular reference to Special Marriage Act, contends that the purport of bringing the said legislation was to permit marriages outside the customary laws.

13. The counsels for the respondents appear on advance notice.

14. We have also enquired, whether any other matter entailing the same issue is pending consideration.

15. It is informed that a Public Interest Litigation (PIL) is perhaps still pending but in which no person affected, as the parties hereto, are a party.

16. Issue notice.

17. Notice is accepted by the counsels for the respondents Union of India (UOI) and the Government of NCT of Delhi (GNCTD).

18. Counter affidavits be filed within four weeks. Rejoinders, if any be filed within further four weeks thereafter.

19. List for hearing on 8th January, 2021.

RAJIV SAHAI ENDLAW, J ASHA MENON, J OCTOBER 14, 2020 ck/pkb