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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 910/2024 & CM APPL. 3776/2024**

NEETU GROVER ..... Petitioner

Through: Mr. Tushar Kumar, Mr. Junaid Qureshi, Ms. Dishani Guha, Ms. Varnika Bajaj and Mr. Rishub Kapoor, Advocates

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Apoorv Kurup, CGSC, R-1/UOI with Mr. Akhil Hasija, Advocate and Ms. Archana Surve, GP

% Date of Decision: 22nd January, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T(ORAL)

CM APPL. 3776/2024 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

W.P.(C) 910/2024

1. By way of the present writ petition filed under Article 226 of the Constitution of India, the Petitioner inter-alia seeks issuance of an appropriate writ for striking down Section 5 (v) ('Impugned Section') of the Hindu Marriage Act, 1955 ('HMA Act').

Arguments of the Petitioner

2. Learned counsel for the Petitioner states that the personal facts of the Petitioner show that though her marriage with her distant cousin Mr. Gagan Grover was solemnized with the mutual consent of the families and by

conducting the religious ceremony in presence of members of the civil society, Mr. Gagan Grover has succeeded in having the marriage declared null and void by seeking a declaration from a competent Court under Section 5(v) of the HMA Act. He states that the Petitioner has become a victim of a fraud perpetuated by Mr. Gagan Grover and his family members who induced her to believe in the validity of their marriage but have since been released from legal obligations associated with a valid marriage due to the invocation of the impugned Section of the HMA Act.

2.1 He states that marriages amongst blood relatives is an established practice in southern states of India more specifically in Tamil Nadu and Karnataka. He states that in the said regional States the said marriages are protected due to the proof of custom; however, in the case of the Petitioner, due to her inability to prove the existence of the custom in her community; during trial her marriage with Mr. Gagan Grover has been declared null and void. He states that therefore the impugned Section is violative of Article 14 of the Constitution of India.

2.2 He states that despite existence of Section 5(v) of the HMA Act, marriages are commonly solemnized between parties who are related to each other as *sapindas*, even in the absence of proof of custom and it is prevalent in the civil society. Therefore, the impugned Section needs to be struck down to protect the interest of such women. He states that the striking down of the impugned Section is necessary to liberalize the citizens and to protect the affected women.

Analysis and Findings

3. This Court has considered the submissions of the learned counsel for the Petitioner and perused the record.

4. As is evident from prayers (ii) and (iii) of this petition, the Petitioner is effectively aggrieved by the judgment and decree dated 23.10.2007 passed by a competent Court in HMA No. 396/2003 declaring that the marriage between the Petitioner and her distant cousin Mr. Gagan Grover was solemnized in contravention of Section 5(v) of the HMA Act and therefore, null and void. The said judgment of the competent Court was impugned by the Petitioner in MAT.APP. (F.C.) 35/2023; however, the said appeal as well has been dismissed by the Division Bench of this Court vide judgment dated 09.10.2023.

5. In the facts of Petitioner's case, the competent Courts have returned a finding of fact that both the Petitioner and Mr. Gagan Grover fall within the prohibited category of *sapindas* as recognised under Section 5(v) of the HMA Act and therefore the marriage was null and void. Further, after examining the evidence led by the Petitioner the said Courts have held that the Petitioner was unable to prove the existence of a custom or usage[1] of marriage within the *sapindas* in the community of the parties, and, therefore held that Petitioner's marriage with Mr. Gagan Grover is not saved by the exception of custom or usage.

6. The Petitioner seeks to challenge Section 5(v) of the HMA Act on the ground that though her marriage with her distant cousin Mr. Gagan Grover was consensual, he has abdicated his responsibilities towards the Petitioner and her son by taking recourse to the impugned Section. The Petitioner does not deny knowledge of the existence of the prohibition by impugned Section but pleads parental consent as the basis for justifying her marriage with her

[1] The expression 'custom' and 'usage' signify any 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. Hindu Law, Sir

cousin despite the prohibition in law. The Petitioner has sought to allege that the existence of the said provision is an instrumentality of exploitation in hands of men such as her distant cousin. No other grounds for challenging the constitutional validity of the impugned Section are raised.

7. There is a presumption in favour of the constitutionality of the statute enacted by the Parliament. The grounds on which the statute enacted by the Parliament can be declared unconstitutional are well-settled as enunciated in the judgment of the Supreme Court in ***Dr. Jaya Thakur v. UOI & Ors[2].***

8. A Statute can be declared as unconstitutional only if the Petitioners make out a case that the Legislature did not have the legislative competence to pass such a Statute or that the provisions of the Statute violate the Fundamental Rights guaranteed under Part-III of the Constitution of India or that the Legislature concerned has abdicated its essential legislative function or that the impugned provision is arbitrary, unreasonable or vague in any manner. D.D. Basu in Shorter Constitution of India (16th Edn., 2021) has enumerated the grounds on which a law may be declared to be unconstitutional as follows:-

> *(i) Contravention of any fundamental right, specified in Part III of the Constitution.*
> *(ii) Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the Seventh Schedule, read with the connected articles.*
> *(iii) Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a legislature e.g. Article 301.*
> *(iv) In the case of a State law, it will be invalid insofar as it seeks to operate beyond the boundaries of the State.*

Dinshaw Fardunji Mulla, 24th Edition, page 846, s.3.
[2] (2023) 10 SCC 276.

> *(v) That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body.*

9. Whenever constitutionality of a provision is challenged on the ground that it infringes a fundamental right, the direct and inevitable effect/consequence of the legislation has to be taken into account. The Supreme Court in ***Namit Sharma vs. Union of India, (2013) 1 SCC 745*** has held as under:-

> *"20. Dealing with the matter of closure of slaughterhouses in Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat [(2008) 5 SCC 33] , the Court while noticing its earlier judgment Govt. of A.P. v. P. Laxmi Devi [(2008) 4 SCC 720] , introduced a rule for exercise of such jurisdiction by the courts stating that* ***the court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the court should declare a provision to be unconstitutional****....."*
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> (emphasis supplied)

10. We are of the considered opinion that, no tenable grounds in law for challenging the said impugned provision have been placed before this Court during arguments or pleaded in the petition.

11. It is apposite as this juncture to refer to the impugned Section 5(v) of the HMA Act which reads as under:

> *"5.* ***Conditions for a Hindu marriage****.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*
>
> *(i) neither party has a spouse living at the time of the marriage;*
> *ii) at the time of the marriage, neither party: (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity;*
> *(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;*

> *(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;*
> ***(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two****"*
>
> (Emphasis Supplied)

The impugned sub-Section enacts that no marriage can be solemnized between parties who are related to each other as *sapindas*, unless such marriage is sanctioned by usage or custom governing the parties. The custom which permits marriage between persons who are *sapindas* of each other must fulfil the requirements of proof of a valid and existing custom as envisaged in impugned Section and under Section 3 (a) of the HMA Act, which defines the expressions 'custom' and 'usage'.[3]

12. In the context of the challenge to the restrictions in the impugned Section, it would be appropriate to refer to the concurring opinion of Hon'ble P.S. Narasimha, J in the judgment of Supreme Court in ***Supriyo alias Supriya Chakraborty & Anr. v. Union of India*[4]*,*** wherein the Hon'ble Judge has held that the right to marriage is a statutory right subject to State's regulation. The findings in the said binding opinion which are relevant to the challenge raised in the present writ petition read as under:

> *"585. At the outset, I will set out my conclusions, which are also in complete consonance with that of Justice Bhat in his opinion.*
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> *……*
>
> *c. There is no unqualified right to marriage guaranteed by the Constitution, that qualifies it as a fundamental freedom. With respect to this, I agree with the opinion of Justice Bhat, but will supplement it with some additional reasons.*

[3] Hindu Law, Sir Dinshaw Fardunji Mulla, 24th Edition, page 868, s.5.9.
[4] 2023 SCC OnLine SC 1348 at paragraphs 70 to 74

> *d. The right to marriage is a statutory right, and to the extent it is demonstrable, a right flowing from a legally enforceable customary practice. In the exercise of such a right, statutory or customary, the State is bound to extend the protection of law to individuals, so that they can exercise their choices without fear and coercion. This, in my opinion, is the real import of the decisions in Shafin Jahan v. Asokan K.M.1283 and Shakti Vahini v. Union of India….*

Marriage as Social Institution and the Status of the Right to Marry

586. There cannot be any quarrel, in my opinion, that marriage is a social institution, and that in our country, it is conditioned by culture, religion, customs and usages. It is a sacrament in some communities, a contract in some other. State regulation in the form of codification, has often reflected the customary and religious moorings of the institution of marriage. An exercise to identify the purpose of marriage or to find its 'true' character, is a pursuit that is as diverse and mystic as the purpose of human existence; and therefore, is not suited for judicial navigation. But that does not render the institution meaningless or abstract for those who in their own way understand and practice it.

587. In India, the multiverse of marriage as a social institution, is not legally regulated by a singular gravitational field. Until the colonial exercise of codification of regulations governing marriage and family commenced, the rules governing marriage and family, were largely customary, often rooted in religious practice. This exercise of codification, not always accurate and many a times exclusionary, was the product of the colonial desire to mould and reimagine our social institutions. However, what is undeniable is that, impelled by our own social reformers, the colonial codification exercise produced some reformatory legislative instruments, ushering in some much-needed changes to undo systemic inequalities. The constitutional project that we committed ourselves to in the year 1950, sought to recraft some of our social institutions and within the first half decade of the adoption of the Constitution, our indigenous codification and reformation of personal laws regulating marriage and family was underway.

588. ***Even when our own constitutional State attempted codification and reform, it left room for customary practices to co-exist, sometimes providing legislative heft to such customary practices. Section 5(iv), section 5(v), section 7, and section 29(2) of the Hindu marriage Act, 1955 are illustrative in this regard.*** *Similarly, the Special marriage Act, 1954 in provisos to sections 4(d) and section 15 (e) saves customary practices, without which the marriage would have been otherwise null and void. Same is the case with the proviso to section 4(d) of*

the Foreign marriage Act, 1969. Legislative accommodation of customary practices is also reflected in section 5 of the Anand marriage Act, 1909.

589. The legal regulation of the institution of marriage as it exists today, involves regulation of the solemnisation or ceremony of marriage, the choice of the partner, the number of partners, the qualifying age of marriage despite having attained majority, conduct within the marriage and conditions for exit from the marriage.

590. As to ceremonies and solemnisation, Section 2 of the Anand marriage Act, 1909, section 3(b) of the Parsi marriage and Divorce Act, 1936, section 10, 11 & 25 of the Indian Christian marriage Act, 1872 and section 7 of the Hindu marriage Act, 1955 explicitly recognize the central role that religious ceremonies play in solemnisation of marriages. The Muslim Personal Law (Shariat) Application Act, 1937 clearly saves the application of personal law to marriages, including the nature of the ceremony. Viewed in this perspective, the diverse religious practices involved in solemnizing marriages are undeniable.

591. The choice of the partner is not absolute and is subject to two-dimensional regulations: (i) minimum age of partners and (ii) the exclusions as to prohibited degrees. *There is a differential minimum age prescription for male and female partners in most legislations. Thus males, who have otherwise attained the age of majority, cannot marry under these enactments, even though they exercise many other statutory and constitutional rights when they attain the age of eighteen.*

592. ***The concept of prohibited degrees of relationship, is statutorily engraved in*** *section 5 of the Anand Marriage Act, 1909, section 3(a) of the Parsi Marriage and Divorce Act, 1936,* ***section 5(iv) and (v) of the Hindu Marriage Act, 1955*** *and sections 4(d) & section 15(e) of the Special Marriage Act, 1954.* ***Persons who have attained the requisite age of marriage under these enactments, have their choice and consenting capacities restricted, to this extent****.*

593. ***In my considered opinion, the institutional space of marriage is conditioned and occupied synchronously by legislative interventions, customary practices, and religious beliefs.*** *The extant legislative accommodation of customary and religious practices is not gratuitous and is to some extent conditioned by the right to religion and the right to culture, constitutionally sanctified in Articles 25 and Article 29 of the Constitution of India. This synchronously occupied institutional space of marriage, is a product of our social and constitutional realities, and therefore, in my opinion, comparative judicial perspectives offer little assistance.* ***Given this nature of marriage as an institution, the right to***

choose a spouse and the right of a consenting couple to be recognized within the institution of marriage, cannot but be said to be restricted."

(Emphasis supplied)

13. The impugned Section has been dealt with in the aforesaid opinion of the Hon'ble Judge and its regulatory nature has been noted with approval at paragraph 591 therein. The discussion in the aforesaid concurring opinion of the judgment negates the challenge raised by the Petitioner on the grounds of violation of Article 21 of the Constitution of India inasmuch as the Hon'ble Judge has held that the choice of a partner in marriage is not absolute and is subject to regulations, which includes the exclusions to prohibited degrees. The Supreme Court in the aforesaid opinion noted that Section 5(v) of HMA Act is the State's intent at societal reform through codification. We are of the opinion that if the choice of a partner in a marriage is left unregulated incestuous relationship may gain legitimacy.

14. In the light of the analysis above, in the present writ the Petitioner has failed to set out any grounds for challenging the prohibition encapsulated in the impugned Section. The Petitioner in the writ petition has failed to plead any legal grounds for challenging the restriction imposed by the impugned Section. The petition neither identifies the basis of the said restriction imposed by the State and nor enlists any cogent legal ground for challenging the said impugned Section. This Court is unable to accept the contention of the Petitioner that the impugned section is violative of Article 14 of the Constitution of India as the exception in the impugned Section is only for marriages between persons on the basis of custom having force of law, which requires stringent proof and its existence is to be adjudicated upon by Court of law. The Petitioner was unable to prove existence of custom in the

facts of her case and has relied upon consent of parents which cannot take the place of custom.

15. This Court therefore, finds no merit in the challenge to Section 5(v) of the HMA Act in the present writ petition.

16. With respect to the relief sought at prayer (iii) the same are sought specifically against Mr. Gagan Grover and his family members who are not parties to this petition and therefore, cannot be granted by this Court on this ground alone. Needless to state that the Petitioner will be at liberty to initiate appropriate legal proceedings against Mr. Gagan Grover before an appropriate forum in accordance with law.

17. Further, prayer no. (ii) cannot be maintained in view of the judgment of the Division Bench dated 09.10.2023 as the declaration that the marriage was in contravention of Section 5(v) has attained finality.

18. With the aforesaid direction the present petition and applications stand disposed of.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

JANUARY 22, 2024/hp/sk

Click here to check corrigendum, if any