

Need for Amendment in Section 17 of the Hindu Marriage Act, 1955

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Abstract: Hindu marriage joins two individuals for life, so that they can pursue *dharma* (duty), *artha* (possessions), *kama* (physical desires), and *moksha* (ultimate spiritual release) together. It is a union of two individuals as husband and wife, and is recognized by law. In Hinduism, marriage is followed by traditional rituals for consummation. In fact, marriage is not considered complete or valid until consummation. It also joins two families together. This research paper is a doctrinal research that aims to address the main issue of the need for amendment in section 17 of Hindu Marriage Act, 1955 with respect to section 7 of the same act. It seeks to identify the shortcomings in section 17 of Hindu Marriage Act. The scope of this research paper is limited to the legislations formulated within India and specifically for Hindus only. The following research paper will analyze various sections of Hindu Marriage Act such as section 5, 7 and 7, all of which are related to marriage and bigamy. It will start by tracing the history and development of laws related to bigamy in India with the help of various case laws. Further, in this paper, the issue in punishing the offenders of bigamy will be analyzed. That is, while entering into second marriage, if someone does not follow all the ceremonies required for a Hindu marriage to be valid, then he will not be considered to have committed bigamy at all, even though he had the intention of doing so. For establishing this aspect, certain landmark cases have been used which clearly highlight the need for amendments in the section 17 of Hindu Marriage Act. Following this, the paper will end with probable solutions which are some amendments which can be made in section 17 of Hindu Marriage Act. In the conclusion, the importance of Hindu marriage will be highlighted and more emphasis will be laid on the need of amendment keeping in mind the mental trauma suffered by the other spouse and the intention of the offender to remarry.

Keywords: amendment, bigamy, ceremonies, Hindu marriage

INTRODUCTION

Hindu marriage a religious sacrament in which a man and a woman are bound in permanent relationship for the physical, social and spiritual purposes. When compared to western countries, Hindu marriage is not merely a matter of social contract entered into for mutual convenience. Its purpose, accordingly, is not to allow mere physical pleasure to the individuals but to ensure his spiritual growth. There are three aims of a Hindu marriage – *dharma*, *praja* and *rati sukam*. Out of these, *dharma* is given the first place, '*rati*' or pleasure is given the third place, and '*praja*' or progeny is given the second place. Hindu marriage is deemed valid and complete only when certain religious rituals such as '*kanyadan*', '*Panigrahana*', '*Saptapadi*' etc. are duly performed by a Brahmin in front of the holy fire. If not so performed, the legal validity of the marriage itself may be called into question. The main aims of the Hindu marriage are: '*dharma*', '*praja*' and '*rati*'.

The ancient Hindu society has witnessed polygamy and the order continued to the phase even immediately prior to Hindu Marriage Act of 1955¹. Polygamy existed which was an uncomfortable situation for all involved but was not directly condemned though strict practice of monogamy was praised. Now it is not purely a religious act, marriage now results because of mutual consent of two parties and regulated by law.

¹ Hereafter referred to as HMA 1955.

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Under the current Hindu Law of India, second marriage is completely illegal. We have it governed by HMA 1955. In the Act under Section 5(i) is the first condition of monogamy² that is, neither party should have a spouse living at the time of marriage. If this is condition is not fulfilled, then such a marriage is considered to be a void marriage. Such a marriage is nullified on petition by a party against the other party under Section 11 of the same act. This act of remarrying in the life time of the existing spouse is called bigamy which is punishable under Section 17 of the same Act. Section 17 redirects to Section 494[2] of the Indian Penal Code, 1860. Section 494[3] IPC makes bigamy punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable with fine for whoever “marries in any case,” but is already having a husband or the life living. To solemnize the marriage again, the previous marriage has to be undone which can only be done by the court of competent authority as per the conditions prescribed under law.

There are three conditions that are to be fulfilled to prove bigamy. Firstly, the first spouse should be living at the time of the marriage of the other spouse to a man or a woman, as the case may be. Secondly, that person validly solemnizes second marriage. Lastly, both marriages, that is, the one with first wife and the one with the subsequent wife are valid. That means that they are according to the ceremonies prescribed in Section 7 of the Act.

There is another level where there is battle to give an evidentiary support to prove that second marriage was validly solemnized. The onus to prove is entirely on the aggrieved. Like in case of *Surajmani Stella Kujur v. Durga Charan Hansdah*³, where the court denied bigamy in the absence of specific pleading, evidence and proof of the alleged custom making second marriage void. Also in case of *Bhaurao Shankar Lokhande v. State of Maharashtra*⁴ where court stated that the mere fact of a man and a women living together as a husband and wife does not at any rate normally give them the status of husband and wife even if they hold themselves like one in front of the society. In either conditions whether bigamy proved or not second wife is left with fewer protections. Since the second marriage was not conducted properly, that is all the essential ceremonies were not performed, therefore, it was held that the second marriage was invalid and the husband was not convicted for bigamy at all even though he had the intention to marry again.

ORIGIN AND DEVELOPMENT OF BIGAMY LAWS IN INDIA

Until 1955, Hindu marriages were polygamous and hence Hindu men did not attract the penal provision of section 494 of IPC. The HMA 1955 for the first time laid down the principle of monogamy. In the year 1974, in the report of the Committee on the Status of Women - 'Towards Equality' showed the rate of polygamous marriages among Hindus, Muslims and tribal for the period 1951-60. According to the report, 5.06% of Hindus, 4.31 of Muslims and 17.98 % of tribal were involved in polygamy⁵. A decade after the enactment of the code which was hailed as modern, progressive and pro-women, the Supreme Court decided the first case under the new act, which set the seal upon monogamy of the Hindu male. The case was *Bhaurao Shankar Lokhande v. State of Maharashtra*⁶. The court laid down that the two essential ceremonies for a valid Hindu marriage are - invocation before the sacred fire, that is '*vivaha homa*' and seven steps round the fire by the groom and the bride, that is, '*saptapadi*'.

In the following year the apex court decided another case of *Kanwal Ram*⁷. The parties belonged to a village in Himachal Pradesh among whom a customary form of marriage called '*praina*' is recognized which doesn't include *saptapadi*. Pooja at the entrance and bowing at the hearth were essential ceremonies. The husband was convicted by the judicial commissioner of Himachal Pradesh. But in

² Strict monogamy was first introduced in Bombay Province in 1948 and in Bengal Province in 1946. Act of 1955 followed them.

³ AIR 2001 SC 938.

⁴ AIR 1965 SC 1564.

⁵ Agnes Flavia, Hindu Men, Monogamy and Uniform Civil Code, Economic and Political Weekly, Vol. 30, No. 50 (Dec. 16, 1995), pp. 3238-3244, Stable URL: <https://www.jstor.org/stable/4403569> Accessed: 21-08-2018 12:13 UTC.

⁶ *Supra* note 4.

⁷ *Kanwal Ram and Ors. v. The H P Administration* (AIR 1966 SC 614).

appeal the Supreme Court acquitted him on the ground that conviction based on a statement of the accused that he had sexual relationship with the alleged bride and admission that the remarriage was performed after the first marriage was dissolved had not been testified. The court also ruled that an admission from the second wife cannot be relied upon as evidence against *Kanwal Ram* and further it cannot even be relied upon against the second wife. Relying upon *Bhaurao*⁸, the court held that to prove a second marriage, essential ceremonies constituting it must be proved.

The third leading case is of *Priya Bala Ghosh v. Suresh Chandra Ghosh*⁹. The wife relied upon husband's admission in maintenance proceedings where he had stated that due to the wife's conduct he was compelled to remarry. The priest who performed the second marriage did not elaborate on the ceremonies, but merely stated that the marriage had been solemnized according to Hindu rites. The wife pleaded that the performance of essential ceremonies must be presumed. The trial court convicted the husband and second wife to one year of rigorous imprisonment and a fine of Rs 500 half of which was to be paid to the first wife. In appeal, the sessions court upheld the conviction. The conviction was set aside by the Calcutta High Court. The Supreme Court confirmed the acquittal and held: There is no dispute about the second marriage having been performed during the subsistence of the first marriage. But relying upon *Kanwal Ram* the court held that admission by the husband in proceedings for maintenance is not sufficient; further, reaffirming the decision in *Bhaurao* held that proof of solemnization of second marriage in accordance with essential religious rites is a must for conviction. The court further ruled that the sole responsibility of proving the offence with the clinching proof is upon the complainant, that is, the first wife.

Two more cases were decided by the Supreme Court in 1979. In *Lingari Obuilamma v. L Venkata Reddy and Ors.*¹⁰, the parties belonged to the Reddy community. The prosecution contended that the essential ceremony was putting a yarn thread and not performance of *saptapadi* and *homa*. One of the witnesses stated: Among *kapus*, each community performs the marriage according to their own custom. The *kapus* have only yarn thread instead of *mangal sutram*. There was no custom of *agni gundam* which is going round the sacred fire. In appeal the Supreme Court upheld the acquittal on the ground that there was no evidence of any custom amongst Reddy which outweighed the written text of law. The prosecution relied upon a decision of Andhra Pradesh High Court in *Dolgonti Raghava Reddy*¹¹ which had held that among the *reddy* community of Telangana, *saptapadi* and *homa* were not essential for a valid marriage. But the court ruled that since this case concerned *Reddys* not of Telangana, the same rule could not apply.

In the same year, the Supreme Court also decided the case of *Gopal Lal v State of Rajasthan*¹². The parties belonged to *telli* caste of Rajasthan. The husband remarried according to the local custom of '*nata*' marriage. Two essential ceremonies of a *nata* marriage are that the husband takes a pitcher of water which is placed on the bride's head and the bride wears the '*chura*' (bangles) presented by the husband. The lower courts held that the second marriage was performed according to the custom of *nata* marriage prevalent in the *telli* community and convicted the husband to two years' rigorous imprisonment and a fine of Rs 2,000. The Supreme Court, at long last, recognized the validity of a local custom and the proof of the same having been performed. But the court reduced the sentence to one year.

A recent judgement in this regard is that of *S. Nagalingam v. Sivagami*¹³, in which because of a state amendment in section 7 of the Act, the husband was convicted for bigamy. The husband had remarried while his first wife was still alive and when he was sued in court, he took the defense that *saptapadi*, which is an essential ceremony of marriage has not been performed. Therefore, the marriage is not valid. However, the honorable judge held that because the parties belonged to Tamil Nadu, the

⁸ *Supra* note 4.

⁹ AIR 1971 SC 1153.

¹⁰ AIR 1979 SC 848.

¹¹ In Re *Dolgonti Raghava Reddy*, AIR 1968 AP 117.

¹² AIR 1979 SC 713.

¹³ AIR 2001 SC 3576.

state amendment for Tamil Nadu under section 7 applies to the party according to which *saptapadi* is not an essential ceremony for *suymariyathai* and *seerthiruththa* marriages. Thus, it was held that the second marriage was valid because all the ceremonies had been followed and the husband was charged for bigamy.

NEGATIVE IMPACT OF SECTION 7 OF THE HINDU MARRIAGE ACT

The HMA 1955 provides for essential conditions for the validity of a Hindu Marriage, Registration of Hindu Marriages, Restitution of Conjugal Rights, Judicial Separation, Nullity of Marriage, Divorce etc. By virtue of section 5 of the HMA 1955, a marriage will be valid only if both the parties to the marriage are Hindus. If one of the parties to the marriage is a Christian or Muslim, the marriage will not be a valid Hindu marriage. Section 5 clause (i) states that none of the spouse may marry if he or she has spouse who is alive. This provision prohibits bigamy. The marriage should be monogamous. Under the Hindu Law a person can validly marry if he or she is either unmarried or divorced or a widow or a widower. If at the time of the performance of the marriage rites and ceremonies either party has a spouse living or the earlier marriage had not already been set aside, the later marriage is void¹⁴. A bigamous marriage is null and void and is made punishable.¹⁵

Section 7 of HMA 1955 deals with the ceremonies of a valid Hindu marriage. It lies down that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Thus, the customary rites and ceremonies of any one of the parties of such marriage must be followed. It is clarified by Section 7 that where such rites and ceremonies include the *saptapadi* (i.e., taking seven steps by the bridegroom and bride jointly before the sacred fire), the marriage becomes complete and binding only when the seventh step is taken. It should also be seen that the Act does not prescribe any special ceremony for a Hindu marriage. It is to be noted that even the *saptapadi* is not obligatory under the Act. The Act only lays down when the marriage is deemed to be complete in cases where the *saptapadi* is included in the rites and ceremonies of either party to the marriage.

Bigamy is an offence against Marriage under both HMA as well as under IPC. Bigamy is one of the grounds to seek divorce under HMA 1955. The second wife is entitled for maintenance, she is not entitled for property rights. In August 2009, the Law Commission of India recommended that bigamy should be made a cognizable offence. Section 17 of HMA penalizes bigamy¹⁶. It states that 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. This punishment has been prescribed in sections 494 and 495 of the Indian Penal Code.

From the cases mentioned above one can see that this section becomes an obstacle in punishing the person who has committed the offence of bigamy. This is because though a person may have the intention to marry again, he cannot be convicted for the same even in the situations where he/she has taken positive steps towards entering into the second wedlock. The offender gets acquitted just because he/she failed to follow some ceremony during the marriage which nullifies the second marriage, thus relieving the offender of any charge of bigamy against him/her.

No thought or effort has been directed to rectify the lacunae of the Act. All customary forms as well as '*shastric*' rituals were acknowledged by the Act as valid forms of 'solemnizing' it. Since the Act recognized all customary forms of marriage and divorce, the uniformity among Hindus was a legal fiction created by the Act. The ambiguity of the Act provided ample scope for a Hindu man to escape both from the criminal consequences of a bigamous marriage and from the economic responsibility

¹⁴ Section 5(i) of HMA 1955.

¹⁵ Rao Rama T. S., Conflict of Laws in India, Journal of Foreign and International Private Law, 23. Jahrg., H. 2 (1958), pp. 259-279, Mohr Siebeck GmbH & Co. KG, Stable URL: <https://www.jstor.org/stable/27873899> Accessed: 15-08-2018 06:24 UTC.

¹⁶ Law Commission of India, Preventing Bigamy via Conversion to Islam - A Proposal for giving Statutory Effect to Supreme Court Rulings, Report No. 227, August 2009.

towards the second wife. Prior to the Act, since polygamy was validated by the ancient Hindu law and customs, women in bigamous marriages had a right of residence and maintenance. By introducing monogamy, women in bigamous relationships lost their right to maintenance, legitimacy and respectability.

Thus, that is how Section 7 of the Act becomes an obstacle in punishing the wrongdoer. In most of the cases, it is the woman who has to suffer. In some cases, the second wife is not entitled to property rights or maintenance rights¹⁷. There is a col between the expository law and social realism. When it comes to second wife, there are no marital rights which are bestowed upon the women who tie a knot with a man having a wife living at the time. There are various social stigmas attached to the woman who is a second wife to a man. But this does not stop the practice of bigamy. This lacuna is also a cause of injustice that prevails in many lives in form of ravishment. The party accused of committing bigamy comfortably argue that the second marriage is void in the eyes of law or there was no proper ceremony to prove that second marriage was solemnized, so allegations of bigamy don't have a lawful stand¹⁸. But this does not change the reality that there is a woman who is socially a wife. Though there are various judicial interpretations that provide second wife with maintenance but that purely depends on the discretion of the judges and has to statutory recognition¹⁹.

AMENDMENT REQUIRED IN BIGAMY LAWS

There is necessarily a need for amendment in laws related to bigamy in order to remove the lacuna or the anomaly mentioned previously. In case the husband commits bigamy, both the wives can be at a loss. Loss of first wife is natural and is visible to all. However, when it comes to the second wife, in India, second wife is socially condemned. She doesn't have a husband whom she can call so. Future and identity of her off spring is always in fog. She may be abandoned any time and left financially paralyzed. Who is to blame for a life she lives on the edge? Is the man who escaped his responsibility coward to accept it? Or her suffering is purely her fault because she chooses to co-habit with a man already married?

In order to remove this anomaly, the government can introduce such an amendment in the HMA 1955 by which even a single step taken towards remarrying is punishable. That is, even if any of the spouse approaches a priest or any other appropriate authority with the intention of marrying again when the first spouse is still alive, then he or she should be liable to be punished. The court should not wait for the man to complete his marriage, that is fulfil all the conditions to declare his second marriage valid and then only punish him for bigamy. This affects the other spouses adversely. This is because in some cases it may also happen that the second spouse may not be aware that the person to whom he or she is getting married to already has a living spouse and he or she is being fraudulently induced to enter into the wedlock²⁰. That is why, any step taken towards bigamy should be made punishable.

Further, the punishment for bigamy as given in sections 494 and 495 of the Indian Penal Code should be increased to discourage this practice. The section says that 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 simple or rigorous imprisonment for a term extending up to seven years, and shall also be liable to fine. The term of rigorous imprisonment which is of seven years as of now should be increased to at least 10 years keeping in mind the trauma suffered by the other party, regardless of the fact whether it is the first or the second spouse.

It is obvious that to hold a person guilty under this section it is necessary to prove that the previous marriage of the accused was valid and subsisting. Naturally, in the event of the previous marriage

¹⁷ David Pearl, Polygamy and Bigamy, The Cambridge Law Journal, Vol. 35, No. 1 (Apr., 1976), pp. 48-50, Stable URL: <https://www.jstor.org/stable/4505897> Accessed: 15-08-2018 06:30 UTC.

¹⁸ *Id.*

¹⁹ *Supra* note 14.

²⁰ Dhagamwar Vasudha, Panch Parmeshwar, Economic and Political Weekly, Vol. 44, No. 31 (AUGUST 1-7, 2009), pp. 13-16, Stable URL: <https://www.jstor.org/stable/25663382> Accessed: 15-08-2018 06:23 UTC.

being illegal and thus non-existent, contracting another marriage would not bring the accused within the purview of this section. This is clear from the words 'whoever marries' which means whoever marries validly or whoever marries and whose marriage is a valid one. If there is no valid marriage, there is no marriage in the eye of law. Thus, if the first marriage is not performed properly according to the ceremonies, then if a person marries again, he or she will not be considered to have committed bigamy at all. Thus, an amendment should be made which protects not only the first spouse, but also the second spouse as well. And, in case of women, if the first marriage is valid due to which the second wife suffers, then a provision should be made under which the second wife should be entitled to some relief in terms of monetary aspect. Otherwise, if the first wife is not the legal wife due to failure to follow certain essential ceremonies as per section 7 of HMA 1955, then she should get compensation. Even if one of the two marriages is deemed to be invalid, still it should be considered that the offender has committed bigamy. This is because he or she had all the intentions to deceive either or both of the two spouses and enter into a new wedlock fraudulently. Therefore, intention is a crucial factor which should be taken into account while punishing the offender.

So, the crux of all these arguments presented is that the point of ceremonies should not be considered at all only while discussing upon the validity of marriage in case of bigamy. In other cases of deciding upon the validity of a monogamous marriage, it should be seen that all the required essential ceremonies are strictly followed.

CONCLUSION

The purpose of any law or any act always is to achieve social justice which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. The supreme Court is supposed to bridge the gap between the law and society. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality which is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to changing needs of society. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law. Foundation of Hindu personal law spring is humanistic. Therefore, the legislature should definitely try to bring about any amendment in the existing laws under bigamy and should act as judicious spectators in such a case by not giving the judgements insensitively without even taking into account, the trauma which the other party undergoes.

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