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Evolution or Devolution of Rights of Third Gender in the Indian Legal System?

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ABSTRACT

This article examines the Hindu Marriage Act, 1955 and the Fundamental Rights guaranteed by the Indian Constitution in the case of Arunkumar & Sreeja v. Inspector General of Registration & Ors. The case's legal implications, including Section 5 of the Hindu Marriage Act and Articles 14, 19(1)(a), 21, and 25 of the Constitution, are examined in this case comment. It contends that refusing to register their marriage amounted to a violation of their fundamental rights to equality, freedom of speech, individual autonomy, and the exercise of religion. The paper emphasizes the necessity for evolving legislation to take into account the shifting socioeconomic landscape and provide equal rights to all people, regardless of their gender identification, in its conclusion.

Keywords: *Hindu Marriage Act, Sexual Identity & Gender Expression, Third Gender, Evolution of Laws, Indian Legal System.*

I. INTRODUCTION

This paper analyzes various aspects of the Hindu Marriage Act, 1955 and the Fundamental Rights through the case of Arunkumar & Sreeja v. Inspector General of Registration & Ors. This essay provides the reader with a deeper understanding of the Section 5 of Hindu Marriage Act, 1955 and Article 14, 19(1)(a), 21 & 25 of the Constitution of India.

The Hindu Marriage Act, 1955 came into force on 18th May 1955 which deals the laws related to the Hindu Marriages in India. The said act put forth the provisions for validity, registration, ceremonies of marriage among Hindus and others, separation and divorce amongst many others.² Hindu marriage is considered to be sacrament or a samskara i.e. it is considered to be the basis of social organization.

Herein, we'll discuss the case of Arunkumar & Sreeja v. Inspector General of Registration and Ors. through FIRAC.

¹ Author is a student at Jindal Global Law School, India.

² The Hindu Marriage Act, No. 25 of 1955, India Code

II. FACTS

Petitioner –

1. Mr. Arunkumar
2. Ms. Sreeja

Respondents –

1. The Inspector General of Registration
2. The District Registrar, Tuticorin & District
3. The Joint Registrar, Tuticorin & District
4. The Secretary to Government, Health and Family Welfare Department, Gov. Tamil Nadu
5. The Director, Ambedkar Foundation, Ministry of Social Justice and Empowerment

Herein, Mr. Arunkumar (hereby first petitioner) was male by birth while Sreeja was an intersex meaning she was born with genitalia that neither belonged to male nor female but was assigned as female at birth. In addition to this, she was registered as a male in her school but her identity on Aadhaar Card was mentioned as Transgender.

Both the petitioners Mr. Arunkumar & Ms. Sreeja married in a temple as per the rites and rituals of Hindus in the presence of administrative officer in Tuticorin. The on-record gender and one perceived by the society caused her marriage to be a transgender and not a marriage of people with two different sexes. Questions were raised on their marriage in terms of the validity as the authorities of the temple declined to guarantee that the marriage was valid and was performed as per the rituals.

But the issue rose when they went to the register their marriage according to the Rule 5(1)(a) of Tamil Nadu Registration of Marriage Rules, 2009.³ The joint registrar denied registering this marriage under the Section 7 of the above said act stating that the grounds of the marriage were unsatisfactory.⁴ They filed a petition appealing to the refusal by the Joint Registrar to the District Registrar but were refused here as well. To this refusal, they filed a writ of Mandamus challenging the decision of the Registrar in Madras High Court.⁵

³ Tamil Nadu Registration of Marriage Act, 2009, § 7, No. 21, Acts of Tamil Nadu State Legislature

⁴ Id.

⁵ Arunkumar and Sreeja v. Inspector General of Registration & Ors. WP (MD) No. 4125 of 2019, [dated 22-04-2019]

III. ISSUES

- Whether the term “bride” extends to transgender person as per the Section 5 of the HMA, 1955?
- Whether the Fundamental rights of the petitioner were infringed as guaranteed in the Constitution of India i.e., **Article 14, 19(1)(a), 21 & 25** based on the sexual identity and gender expression?

IV. RULE

- **As per the “Section 5(iii) of the Hindu Marriage Act**, A marriage may be solemnized between any two Hindus, if the bridegroom has completed the age of [twenty-one years] and the **bride**, the age of [eighteen years] at the time of marriage.”⁶
- **Article 14** of the Indian Constitution states that no one should be deprived of “equality before the law or equal protection of the laws within the territory of India”.⁷
- **Article 19 (1)(a)** of the Indian Constitution provides the freedom of expression.⁸
- **Article 21** of the Indian Constitution puts forth that no one should be deprived of their personal liberty.⁹
- **Article 25** of the Indian Constitution states that everyone has the right to practice their own religion.¹⁰
- **Section 7** of the Tamil Nadu Registration of Marriage Act 2009 provides the registrar with the powers to refuse registration of marriage.¹¹

V. ANALYSIS

Mr. Arunkumar and Ms. Sreeja were denied the registration of Marriage by the registrar stating that the solemnization did not take place and doesn’t fulfill the criteria of “Bride”, as per the Section 5 of the HMA as she was not a woman but a transwoman.¹² But as per the case of **National Legal Services Authority v. Union of India**, the Supreme Court gave the landmark judgment and identified transgender as “Third Gender” and all the laws that are put forth in the

⁶ Id.

⁷ India Const. art. 14

⁸ India Const. art. 19 § 1, cl. a

⁹ India Const. art. 21

¹⁰ India Const. art. 25

¹¹ Tamil Nadu Registration of Marriage Act, *supra* note 2

¹² The Hindu Marriage Act, No. 25 of 1955, India Code § 5

Constitution of India will be applicable to the same.¹³

The petitioners contended by way of the Article 19 (1)(a) of the Indian Constitution which says that there should be no interference with the Transgenders expression, and they can express the gender and can present the sexual identity they want. Individuals have the right to self-determination of gender identity and denying the registration of marriage on the grounds of being a transwoman is against the right to personal liberty and dignity provided to every person under the Article 21 of the Constitution of India.

Furthermore, Article 25 of the Indian Constitution provides individuals to profess and practice any religion which the petitioners did, and the supreme court too had extended the Right to Marriage to transgenders as well. The transgender community is suppressed even though there are laws that are enacted for them to live with equality and freedom just like the rest of us. The Indian Society is pretty adamant to changes specifically when it comes to gender and religion. It is said that as time passes we should too, but this is clearly not the case here. There are many laws enacted providing relief for transgenders which lack the implementation across the Indian Territory. As per the case facts, even though both the petitioners have followed the rites and rituals as per the HMA i.e., marriage solemnized in a temple. Thereby, denying them the registration has infringed the fundamental right under Article 25 of the Constitution. Moreover, this restraint of marriage by the registrars has also infringed the right to equality before law under Article 14.

The argument the respondents made was that there wasn't enough proof of their solemnization of the marriage in the temple which I feel is not relevant since the Administrative Officer of that village has already given the required proof. In addition to this, the other argument made was that Ms. Sreeja does not fulfill term "Bride" under Section 5. I believe that this is not interpreted correctly here. Nowhere it is written that a transwoman is not considered as a woman, and they cannot marry under the said act. As in the case of *Navtej Singh Johar v. Union of India*, it states that "sex and gender are not the same."¹⁴ Sex is determined at birth whereas one can express their gender identity as a male, female and third gender.¹⁵

The Hindu Marriage Act was enacted in 1955. Even if it were to be argued that there wasn't much awareness in 1950s regarding the third genders. But the Hindu law has evolved from the mythologies which also proves that there have been instances wherein the Hindu Deities have performed a role as a Transgender. Keeping this in mind, if the drafters would have clearly

¹³ National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC 1863

¹⁴ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321

¹⁵ National Legal Services Authority, *supra* note at 12

specified that only a woman and man can marry under the HMA i.e., a “Bride” & a “Bridegroom,” then it would have been a different case. But since this specification is missing in the act restraining the couple the right to marriage and registering the same is totally absurd and is constitutionally wrong. It is reasonable enough that no one could have thought that the Third Gender would get legal recognition in 1955. The case is of 2019 before which we have had many landmark judgments such as the **NALSA Judgment, Navtej Singh Johar v. Union of India, Justice K.S. Puttaswamy v. union of India** which have a binding value are still not being followed in the regular affairs of such instances. If these were followed then there wouldn't have been any case of such regard. I think the law should be evolved over the period of time according to the current conditions and requirements of the society. And the same has to be changed across all the states which the legislation has clearly failed to do so in this case.

VI. CONCLUSION

The court after hearing arguments put forth by the petitioner and respondents held that the here the fundamental rights are infringed, and the term “Bride” extends to a transwoman as thereby the marriage solemnized by Hindu Male and Hindu Transwomen is valid.

To sum up the response paper, the following review critically analyzes various sections governing the Hindu Marriages and Fundamental Rights by way of Arunkumar and Sreeja v. Inspector General of Registration & Ors. This case is one of its kind and provides relief in terms of marriages under the HMA to the transgender community as in the precedent by the Madras High Court. The societal mindset given in the Indian Context will take some time to change but I believe that in the upcoming years we'll see more of woman and transgender communities representing and running the countries provided such backing from the above-mentioned landmark judgments in Indian Judiciary.
