



**REGULATING MARRIAGE AND DIVORCE –
NEED FOR A COMPREHENSIVE
LEGISLATION**

WE HAVE a bunch of marriage and divorce laws. Different they are in their forms, contents and application. We have laws not only for Hindus and Muslims but also for Parsis and Christians, separate and distinct to suit the needs of each community. But there is no uniformity in this diversity, though.

The directions issued by the Supreme Court in *Smt. Seema v. Ashwani Kumar*,¹ assume a lot of importance in this respect. For the first time the Indian Supreme Court has called upon the states and the centre to require by law, registration of marriages in India irrespective of the caste and religion of the parties. In order to strengthen its views the court commanded to its aid the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which together with two declaratory statements stipulate that marriages should be registered. Indeed, India has agreed on principle that compulsory registration of marriages is highly desirable. However, it has made a reservation saying that it is not practical in a vast country like India with its variety of customs, religions and level of literacy (The government has expressed reservation to this very clause to make registration of marriage compulsory). It is interesting to see that the issue cropped up in a transfer petition and the court rightly took note of the problem confronting authorities dealing with matrimonial disputes. It is a matter of satisfaction that without exception, the states and the union territories have indicated their stand to the effect that registration of marriages is highly desirable. The court could, therefore, issue instructions for legislation without being criticized on the ground of violating the norm that court shall not issue direction for legislation. The court has located the power of the state in list III of the VIIth schedule of the Constitution, which in entry 30 helps the states to legislate on vital statistics including registration of births and deaths. It has also found that registration of marriages would go within the ambit of the expression “vital statistics”. The court has identified four states in India viz., Maharashtra, Karnataka, Himachal Pradesh and Andhra Pradesh

1. 2006 (2) SCALE 333.



which as on date require the marriages to be registered.² In Assam, Bihar, West Bengal, Orrisa and Meghalya, registration of marriages has been made optional. The court has cited many legislations including the Christian Marriage Act, 1872 and the Parsi Marriages and Divorce Act, 1936, requiring registration of marriages. Under section 8 of the Hindu Marriage Act, 1955 it is left open for each state to decide whether registration of marriages is to be made under state rules. However, it is optional for the parties either to solemnize the marriage before the registrar for registering or after performing the marriage ceremony in accordance with customary rites. In some states, though the law requires registration of marriage, those provisions are not enforced as in the case of Muslim marriages in Jammu and Kashmir. In fact, section 3 of the Jammu and Kashmir Registration of Marriages Act, 1981 provides that marriage contracted between Muslims after the commencement of the Act shall be registered in the manner provided therein within 30 days from the date of conclusion of the *nikah* ceremony. Not satisfied with this survey Arjit Pasayat J fell back on the reports of the National Commission for Women and essayed on the relevance of legislation. The NCW report highlight the importance of registration of marriage by pointing out that it helps prevention of:

- (a) Child marriages
- (b) Marriages without the consent of the parties
- (c) Illegal bigamy/polygamy
- (d) Protection of the interests of married women, widows
- (e) Deterring men from deserting wives
- (f) Sale of children, *etc.*

Pasayat J examined the usefulness of registration citing the problem of proof of marriage. It is true that in many matrimonial cases the existence of marriage is denied. If the marriage is registered, it may provide evidence of the marriage having taken place and would provide a rebuttable presumption. Though it may not be a proof of the marriage it has great evidential value in matters relating to marriage disputes. No doubt, in many respects it would be beneficial for the community if the marriages are compulsorily registered. Therefore, the court has issued the following directions:

- (i) The procedure for registration should be notified by respective States within three months from today. This can

2. Bombay Registration of Marriages Act, 1953; the Karnataka Registration of Marriages “Registration and Miscellaneous Provisions” Act, 1976; the Himachal Pradesh Registration of Marriages Act, 1996; and the Andhra Pradesh Compulsory Registration of Marriages Act, 2002.



be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.

- (ii) The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated. The consequence of non-registration of marriages or for filing false declaration shall also be provided for in the said Rules. Needless to add that the object of the said Rules shall be to carry out the directions of this Court.
- (iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.
- (iv) Learned counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

Though one may doubt the desirability of the court issuing directions for legislation it has to be appreciated that Pasayat J chose to issue the directions after noting the consensus among the states for legislation. In this context one is tempted to draw the attention of the states and the centre to another important aspect of matrimonial disputes. The courts pass innumerable orders granting maintenance to wives – divorced wives included. But very few get enforced. Sometimes the husbands are not financially capable to pay. Sometimes they deliberately avoid payment because of the hatred they have against the wives and children. In both the situations it is the wives who are at the receiving end. Section 125 (3) Cr PC envisaged this situation and therefore enacted thus:-

If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.



This provision came to be interpreted by the Supreme Court in *Kuldeep Kaur v. Surinder Singh*,³ wherein it categorically ruled that the liability of the husband to pay maintenance cannot be satisfied by sending the person to jail. Imprisonment should be resorted to only as a measure to make the party to pay the maintenance. It was a case where the husband argued that his liability for the failure of paying maintenance stood satisfied by way of his imprisonment. The import of section 125(3) Cr PC was spelt out by the Supreme Court thus:⁴

A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is '*mode of enforcement*'. It is not a '*mode of satisfaction*' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance, who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability, which he has refused to discharge. Be it also realized that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance 'without sufficient cause' to comply with the order. It would indeed be strange to hold that a person who 'without reasonable cause' refuses to comply with the order of the Court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail.

The provision gives an impression that the maximum time of imprisonment would be one month, which could further be reduced if payment is made prior to the completion of the term. In fact this position must have prompted the lower courts to treat it as a punishment, a sort of fine and made them to declare that the debt of maintenance has been discharged. This view could be supported on the basis of section 421 Cr PC made for the recovery of amount due by the court. In terms of section 125 (3) Cr PC it is after the execution of the warrant that one has to be sent to the prison. It is in this context that the problem of recovery arises. If he is to go to jail for want of money will he be covered by the provision of the Civil Procedure Code or will he be treated as an offender and find his way to the criminal court? If he is covered by the civil procedure he is to go to a civil prison after following the procedure laid down in the Civil Procedure Code. If he is covered by the latter his imprisonment

3. AIR 1989 SC 232.

4. *Id.* at 235.



would make him clear of the debt. In practice it is seen that persons imprisoned under section 125 (3) are treated as any other prisoners. And their liability appears to stand discharged by the imprisonment. However, *Kuldeep Kaur v. Surinder Singh* has overturned this position. Imprisonment is to be taken as a *quasi* method to effect recovery rather than as a punishment over the failure to make payment. Many questions arise in this context.⁵

If a person who has no property or employment is to be in jail till he makes the payment how can he find resources to effect payment? How can he earn while he is in jail? Is he not liable to make payment even during his imprisonment? Will those arrears make him to go back to jail if at all he is released at any time? Are we not punishing his dependents by putting him in jail? Are we not feeding him for his failure to make up the grade as a normal citizen.

If the person had already effected divorce and remarried, his position becomes worse. His new family may be constrained to live without the support of the head who has to be in the jail for failing to maintain his divorced wife. Are we not indirectly encouraging destitution of his new family to maintain while coercing him not to destitute the members of his first family? Is it desirable to send such a person to prison when we try to avoid imprisonment of persons who are convicted of crime? The purpose of referring to this decision in this context is to remind the authorities that it is high time that they come up with a comprehensive legislation laying down the *modus operandi* to be adopted for ensuring that married persons do not avoid payment of maintenance to their wives and children, even if they fail state should see that they do not starve.

It may perhaps go a long way if the state creates a board to look after destitute women, children and parents. The state can indeed fund the board as in the case of wakf board. It can also create a fund by way requiring the parties to pay a fee at the time of registration of marriage. One may not find it inappropriate to pay a small sum when he overspends on luxurious items on celebrating the marriages. Similarly it may be provided in the law that at the time of granting divorce the party seeking divorce should pay a fees/transfer some property in favour of the board which in turn, as already mentioned, may be made responsible for paying maintenance allowance to destitute women and children.

If rules are to be issued for registration of marriages, the state governments will have to resort to a laborious task of framing rules under different statutes applicable to different communities, because rule making is a process of subordinate legislation under enabling statutes. A comprehensive legislation and the rules framed under it may

5. *Supra* note 3.



alone help to have a uniform pattern in legislation. A certificate indicating the registration of the marriage should be insisted upon by the court as a necessary document of marriage. Also, it may be necessary particularly in similar cases to insist upon the petitioners to affix their photographs in the *vakalatnama* to identify them.

The Supreme Court's efforts should be applauded. And the state should make efforts to resort to subordinate legislation. A comprehensive legislation is the desideratum.

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