# BIGAMY : A CONJUNCTURE FOR DECONSTRUCTION

## I The objective

THE PREVAILING method of interpreting a valid Hindu marriage to construct the offence of bigamy[1] is problematic. The Supreme Court of India[2] has emphasised the strict proof of essential ceremonies of *homa* and *saptapadi* for a valid Hindu marriage. Such a form-based determinacy has given enough scope to the accused to defeat the charge of bigamy without caring for either the position of the first wife or the status of the second one.[2a] The aim of this paper is to highlight the contradictions involved in construction of the substance of bigamy under the Indian Penal Code 1861 (IPC) and to suggest deconstruction[3] as a critical method of discovering the reality of the crime. It is significant that in construction of the offence of bigamy the courts have to deal with the absent marriage to solve the present problem. Hence, the present is to be deconstructed in terms of the past to comprehend the social reality. The normative stress in this approach is to assert that rules of law, by invoking form-determined foreclosures, should not defy the living realities and needs of human life.

## II Construction on the basis of pre-determined form

First of all can be cited *Bhaurao's* case[4] as a a 'type case' of pre-closed and form-determined construction of the marriage. A series of other cases will also be discussed to strengthen the methodological viability of deconstruction.

In *Bhaurao Shanker Lokhande*,[5] the appellant Bhaurao was married to Indubai in 1956 and again he married Kamalabai in 1962 during the lifetime of the first wife Indubai. The facts clearly reveal that the accused was intending to marry Kamla and both of them went through some form of marriage. To defeat the charge of bigamy, validity of the second marriage was challenged by the appellant on the ground that the essential ceremonies for a valid marriage were not performed. On the other hand, it was contended for the state that it was not necessary for commission of the offence of bigamy under section 494, IPC that the second marriage was a valid one

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1. See, s. 494, Indian Penal Code; ss. 5, 7, 11, 17, Hindu Marriage Act 1955.

2. *Infra* note 4 at 1566.

2a. "A Round Up of Bigamous Marriages", in J. Duncan M. Derrett, *Essays in Classical and Modern Hindu Law*, vol. IV, p. 90 (1978).

3. The term deconstruction, here, need not be confused with its connotation in the contemporary movement of literary criticism. See, Martin Gray, *A Dictionary of Literary Terms* 61-62 (1984).

4. *Bhaurao Shankar Lokhande* v. *State of Maharashtra*, A.I.R. 1965 S C. 1564.

5. *Id.* at 1566.

and that a person going through any form of marriage during the lifetime of the first wife would commit the offence even if the second marriage be void according to the law applicable to the person.

The Supreme Court held that for the offence of bigamy both the marriages must be valid according to the law applicable to the parties. The fact of their living as husband and wife and its recognition by the society was irrelevant in the eyes of law.[6]

In *KanwalRam*,[7] Kubja was married to Sadh Ram in 1940-41 and she married a second time one Kanwal Ram in 1955 after the coming into force of the Hindu Marriage Act 1955. They went through the customary form of marriage *praina* recognised by their community. Besides going through a form of marriage, the accused Kanwal Ram admitted his sexual relationship with Kubja (second wife) and the second marriage was also admitted by some witnesses in a proceeding for restitution of conjugal rights initiated by her first husband.

For absence of some essential ceremonies the Supreme Court declared the second marriage not to be validly performed. Allowing the appeal, it observed :

> In a bigamy case, the second marriage as a fact, that is to say, the ceremonies constituting it must be proved....[A]dmission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case.[8]

The judicial approach, in the above cases,[9] depending upon 'form based' determinacy of a valid marriage has been, (*i*) delinked from the social reality of Indian life; and (*ii*) unfavourable to those who, however, cannot contract the second marriage with hyper-technical sensibility and adequate advice and support. The Supreme Court has not shown the slightest compunction in dismissing the charges against the accused and cared neither for the position of the first wife, nor showed interest in the status of the second one.[10]

### III Form v. intention

Deconstruction in judicial behaviour has not been new and when *Bhaurao*[11] was being decided in the Supreme Court there was no dearth of English and Indian cases whereupon reality of the second marriage may have been constructed on the basis of 'substance'. For instance, in

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6. *Id.* at 1565.
7. *Kanwal Ram* v. *H.P. Administration*, A.I.R. 1966 S.C. 614.
8. *Id.* at 615.
9. *Supra* notes 4 and 7; *Priyabala Ghosh* v. *Suresh Chandra Ghosh*, A.I R. 1971 S.C. 1153.
10. *Supra* note 2.
11. *Supra* note 4

*R* v. *Robinson*,[12] it was held that the validity of the second marriage did not affect the decision regarding the offence of bigamy. If it appears that the parties are contracting a second marriage and go through ceremonies, the offence is complete. This construction is preferred for, even if the the second marriage is valid, it is void *ab initio vis-a-vis* the first valid marriage. It is a paradox[13] that the court goes on constructing the second marriage on the essentials of a valid marriage.

As far back as in 1876 the Punjab High Court in *Gurubaksh Singh* v. *Sham Singh*[14] held :

> If the first marriage is valid, it would be bigamy to marry again notwithstanding any special circumstances which independently of the bigamous character of marriage may constitute a legal disability in the parties or *make the form of* marriage resorted to inapplicable to their cases.[15]

It was settled law that the word 'marry' implies going through a form of marriage whether the same is in fact valid or not.[16] In *Emperor* v. *Soni*,[17] the second marriage was challenged on the ground that though performed through *homa* and recital of *mangalas-takas* yet some essential ceremonies of Hindu marriage were not performed. The Nagpur High Court held that the presence of some sort of ceremony was sufficient to prove the charge of bigamy.

Emphasising the significance of such a construction, it was observed in *Piari* v. *Faquir Chand*[18] that if the accused persons are allowed to repudiate the second marriage by *alleging some defect in form or invalidity on the ground of consanguinity, religion, etc.*,[19] the result would be not only to defeat the purpose for which section 494, IPC was enacted but also to encourage repudiation of subsequent marriages.[20]

The stand taken by courts in the above cases reveals the paradox of primacy between form *versus* intention or substance. The courts refused to allocate primacy to form in absolute terms irrespective of the intention of the party contracting marriage. The courts asserted that 'undesirable

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12. (1938) 1 All E.R. 301; *R* v. *Allen*, (1872) L.R. I.C.C.R. 367 26 L.T. 664; *R* v. *Brown*, (1843) 1 Car. & Kir. 144.

13. George P. Fletcher, "Paradoxes in Legal Thought", 85 *Colum. L Rev.* 1263 at 1268 (1985).

14. 19 Pun. Re. 1876.

15. *Ibid.*

16. *Sant Ram* v. *Emperor*, A.I.R. 1929 Lah. 713; *Tahar Khan* v. *Emperor*, A.I.R. 1918 Cal. 136; see also, *Govt. of Bombay* v. *Ganga*, I.L.R. 4 Bom. 330; *Emperor* v. *Lazar*, I.L.R. 30 Mad. 550.

17. A.I.R. 1936 Nag. 13.

18. A.I.R. 1961 Pun. 167.

19. Emphasis added.

20. *Supra* note 18 at 170;

results' would follow if form is emphasised in exclusion of intention.[21] Our effort was, thus, to find a vital link of deconstruction in the judicial opinion itself.

## IV Orientation towards deconstruction

Another significant judicial development is the presumption of solemnised marriage if performed through some prevalent form, and when the parties have been living as man and wife.

In *Gopal Lal* v. *State of Rajasthan*,[22] Gopal Lal, married the complainant Kanchan in 1963 and a child was born. Soon thereafter the parties appeared to have fallen out and parted company. During the subsistence of the first marriage Gopal Lal contracted a second marriage according to the custom prevailing amongst *Tellis* commonly known as *nata* marriage. The Supreme Court convicted the accused of bigamy on the ground that the second marriage was valid as both the ceremonies, required in that community, were performed.

Instead of emphasising the two essential ceremonies, the Supreme Court in *Lingari Obulamma* v. *Venkata Reddy*,[23] where the spouses to the spouses to the second marriage were *Reddys* of Telangana in Andhra Pradesh, held that *saptapadi* and *datta homa* were not necessary. It was sufficient to put the 'yarn thread' instead of *mangal sutra*.[24]

It is true that in the above decisions the two *Shastric* ceremonies were not treated as essentials. Under section 7 of the Hindu Marriage Act 1955, these elements are not absolutely necessary, and a valid marriage can be performed according to *non-Shastric* elements in favour of prevailing customary rites and rituals. One probable effect is that *Shastric* requirements have, however, been abandoned in cases within the purview of that section, but the Supreme Court has overemphasised them as evident in *Bhaurao*,[25] *etc.*

In *Sindhiya Devi* v. *State of U.P.*[26] out of the two essential ceremonies, only *bhanwar* (*saptapadi*) was in evidence and there was other circumstantial evidence, *e.g.*, the *dola* was brought, marriage was performed by *purohit*, *bhanwaren* had taken place and *kanyadan* was done. It was also in evidence that full *vivah* was read and it had taken a few hours. The Allahabad High Court held the second marriage to be valid even in absence of the other essential ceremony (*homa*). It observed :

> [T]est for the purposes of Section 494 I.P.C. is: Will the union through the alleged marriage constitute a valid marriage if the

21. *Supra* note 18.
22. A.I.R. 1979 S.C. 713.
23. A.I.R. 1979 S C. 848; *Re Dolgonti Raghava Reddy*, A I R. 1968 A P 117.
24. *Ibid.*
25. *Supra* note 4.
26. (1974) Cr. L.J. 1403.

> other spouse were not living. This can be determined by applying the test: Will the wife, if the former were not living, be entitled to claim maintenance as a married wife? and will their children born of the union be deemed born in or out of wedlock? if these tests are satisfied it may be open to the court, even when considering the factum of marriage for purposes of Section 494 I.P.C., to draw on presumption of necessary ceremonies being undergone on the factum of marriage being established.[27]

Where there was evidence of cohabitation between the complainant wife and the accused husband, as also of the latter and his alleged second wife, and there was further evidence that they had the reputation of being related as husband and wife, the Calcutta High Court presumed the solemnisation in *Binapani Devi* v. *Banerjee*.[28]

We can discern a judicial crisis. On the one hand the courts have required strict proof of essential ceremonies to establish the charge of bigamy, on the other, when it comes to proof of celebration of marriage for the purposes of applying section 125, Criminal Procedure Code 1973 for maintenance under the processual jurisdiction, they have not insisted upon actual proof of essential ceremonies. This anomaly could be resolved by a method of deconstruction to establish the substance of the marriage in the offence of bigamy also. If it is not done, the prevailing dichotomy between substantive and processual interpretation of marriage will provide an incentive to open hetaerism and concubinage.[29] In this regard Justice V.R. Krishna Iyer's remarks are appositive. He observed :[30]

> Discrepancies do not necessarily demolish testimony; delay also does not necessarily spell unveracity and tortured technicalities do not necessarily upset conviction when the Court has

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27. *Id.* at 1405.

28. 1983 Cr. L.J. 1440 at 1444; see also, *Veerappa Chettiar* v. *Michael*, A.I.R. 1963 S.C. 933; *Mauri Lal* v. *Chandrabati Kumari*, 38 I.A. 122; *Rajopal Pillai* v. *Pakkiamammal*, (1968) 2 M.L.J. 411; *Nagarajamma* v. *State Bank of India*, A.I.R. 1961 A.P. 320; *Bachu Bhai* v. *Bai Dhanlaxmi*, A.I.R. 1961 Guj. 141; *Taylor* v. *Taylor*, (1961) 1 All E.R. 55; *Deivanai Achi* v. *Chidambaram Chettiar*, A.I.R. 1954 Mad. 657; *Gokal Chand* v. *Parvin Kumar*, A.I.R. 1951 Mad. 403; *Subarna* v. *Arjuno*, A.I.R. 1951 Orissa 337; *Nagachari* v. *Butchayya*, A.I.R. 1948 Mad. 198; *Siva Kumari* v. *Udeya Pratap Singh*, A.I.R. 1947 All 314; *Thimmalai Naicher* v. *Ethirajammah*, A.I.R. 1946 Mad. 466; *Watson* v. *Tate*, (1937) 3 All E.R. 105; *Ma Wun Di* v. *Ma Kin*, 35 I.A. 41; *Thampson Longham* v. *Thompson*, 91 L.T. 680; *Bai Divali* v. *Moti Karsen*, I.L.R. 22 Bom. 509.

29. It has been observed: "It is well known that solemn taking of women as concubines is an institution of Hindu usage, with which the Anglo-Hindu Law has failed to cope adequately." See, J. Duncan M. Derrett, "If a Christian Woman Marries a Hindu solely in a Hindu Ceremony of Marriage is she entitled to an Order for Maintenance under section 488 of the Criminal Procedure Code", I *M.L.J.* 1 at 8 (1970).

30. *Narotam Singh* v. *State of Punjab*, A.I.R. 1978 S.C. 1542 at 1543.

had a perspicacious, sensitive and correctly oriented view of the evidence and probabilities to reach the conclusion it did.

It emerges from the above discussion that strict proof of the two essential *Shastric* ceremonies mentioned in *Bhaurao*[31] lose their significance, *first*, in marriages which are performed through customary rites and rituals recognised by the community of the parties and, *second*, in situations where solemnisation is presumed due to proof of the factum of performance in a form applicable to the spouses. All the preceding decisions could support our contention that 'form' preclosure is not a necessary condition of reconstruction of the second marriage. The intention and substance of the marriage, if given primacy, would serve the cause of court and justice in furtherance of social defence.

## V Indeterminacy of form

The sources of 'form' of Hindu marriage are the sacred texts. For a valid Hindu marriage, according to the Supreme Court,[31a] the *Shastric* ceremonies of *homa* and *saptapadi* are necessary. Reference to *Shastric* position in connection with the rites of marriage is suggestive of the fact that great divergence prevails among different commentators and there is lack of unanimity regarding essential ceremonies.[32] *Homa* and *saptapadi* are procedurily very difficult religious ceremonies involving various processes, steps and *mantras* to be recited. These procedures are quite unknown to an ordinary man and its *Shastric* factum can hardly be proved to the *Shastric* satisfaction.[33]

If *homa* and *saptapadi* are accepted as essential ceremonies for a valid Hindu marriage, the Supreme Court may require the valid establishment of fire and also *Shastric* conformity of various components of *saptapadi*. It is submitted that such an *ad infinitum* search for provability will, ultimately, reduce the validity of a marriage to pedantry. It is not our intention to apply the method of deconstruction to such marriages which are clandestine marital innovations or mock marriages, performed fraudulently or dishonestly to defeat the matrimonial rights and obligations as they could squarely be dealt with under other provisions of the IPC.[34]

## VI Conclusion

This paper has a limited objective and attempts to bring to light the

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31. *Supra* note 4.

31a. *Ibid.*

32. P V. Kane, *History of Dharmasastra*, vol. II, pt 1, p 527 (1941).

33. *Id.* at 534.

34 See section 496, IPC, wherein it is an offence to have a marriage ceremony fraudulently gone through without lawful marriage.

pedantocracy inherent in reconstruction of the second marriage in order to establish the offence of bigamy on the basis of predetermined forms. Though the courts have decided cases without following strict proof of the form of marriage, yet the fallacy of form had not been demolished. Reconstruction of the second marriage, on the basis of form, is neither a reliable construct nor does it serve the ends of social justice. Deconstruction, therefore, may be an alternative to make the reality emerge out of the facts in evidence without any preconceived form.

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