ARTICLE 44 : A DEAD LETTER?

I Introduction

THE SUPREME Court of India, in a thought provoking judgment in *Sarla Mudgal's* case,[1] once again, stressed the need for a Uniform Civil Code (UCC). The Courts epoch makng decision has forcibly drawn the moribund attention of the Government of India towards the sorry plight of Article 44 of the Indian Constitution. The dynamic and apposite attitude adopted by the Supreme Court has certainly sent right signals by sending shock waves into the camps of power-monger political tribe and religious fundamentalists. Constitution came into force in 1950. Since then, Article 44 has been gathering dust with no government at the Centre ever having any guts and wisdom to touch it. Figuratively speaking, it has remained a *dead letter*. The tragic situation certainly buries the spirit of the Constitution a thousand fathoms deep. The sensational verdict has stolen the show by throwing light on the unused area of the Constitution. *Albeit* the court's observation *vis-a-vis* Article 44 are only *obiter dictum* in nature, it has drawn the attention of the nation towards the unfinished agenda of the Constitution.

Here, it may not be out of place to quote Justice Kuldip Singh's observation:

> Pandit Jawaharlal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code in Parliament in 1954, said 'I donot think at the present moments the time is ripe in India for me to try to push it through'. It appears that even 41 years thereafter, the rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments which have come and gone - have so far failed to make any effort towards unified personal law for all Indians.[2]

The present paper is an attempt aimed at appreciating the think tan attitude initiated by the Apex Court. The instant decision speaks volumes for the activist and trend-setting approach adoted by the highest court of the land.

II Sarla Mudgal's case : a historic verdict

This case arose out of the writ petitions moved under Article 32 of the Constitution by several petitioners. The first petitioner being the resident of 'KALYANI' - A Registered Welfare Organisation dedicated to the cause of women. The second petitioner, Meena Mathur, was married to Jitender Mathur on 27.2.1978. Children were born out of the wedlock. After that things changed to

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1. *Sarla Mudgal, President, Kalyani* v. *Union of India*, (1995) 3 S.C.C. 635.
2. *Id.* at 639.

her detriment. Wedlock proved to be a deadlock. In early 1988, the petitioner was shocked to learn that her husband had solemnised a second marriage with one Sunitha Narula *alias* Fathima. The marriage was solemnised after they converted themselves to Islam and adopted Muslim religion. According to the petitioner, conversion of her husband to Islam was only for the purpose of marrying Sunitha and circumventing the provisions of section 494 of IPC. Jitender Mathur asserts that having embraced *Islam*, he can have four wives irrespective of the fact that his first wife continues to be a Hindu. Rather interestingly, Sunitha *alias* Fathima is another petitioner. She contends that she along with Jitender Mathur who was earlier married to Meena Mathur embraced Islam and thereafter got married. Son was born to her. After this Jitender Mathur, under the influence of his first Hindu wife gave an undertaking on 28.4.1988 that he had reverted back to Hinduism, and had agreed to maintain his first wife and children. Her grievance is that she continues to be a Muslim and is not being maintained by her husband and has no protection under either of the personal laws.

Geetha Rani, another petitioner, was married to Pradeep Kumar according to Hindu rites on 13.11.1988. In December, 1991. she learnt that Pradeep Kumar ran away with one Deepa and after conversion to Islam married her. She contends that the conversion to Islam was only for the purpose of facilitating the second marriage. Sushima Ghosh is another petitioner who was married to G.C. Ghosh according to Hindu rites on 10.5.1984. In 1992, he asked her for divorce by mutual consent for which the petitioner did not agree. After that the husband told her that he had embraced Islam and would soon marry one Vinitha Gupta. The petitioner has prayed that her husband be restrained from entering into a second marriage with Vinitha Gupta.

III A catena of case law

The absense of UCC gives rise to piquant, unwarranted and ugly situations. The present case bears testimony to this view. In the words of the court :

> Marriage is the very foundation of civilised society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilization can exist. Till the time, we achieve the goal-uniform civil code for all the citizens of India-there is an open inducement to Hindu husband who wants to enter into a second marriage while the first marriage is subsisting to become a Muslim. Since monogamy is the law for Hindus and the Muslim Law permits as many as four wives in India, errand Hindu husband embraces Islam to circumvent the provisions of the Hindu law and to escape from penal consequences.[3]

3 *Supra* note 1 at 640.

Much misapprehension prevails about bigamy in Islam. Ironically, Islamic countries like Syria, Tunisia, Morocco, Pakistan, Iran *etc.*, have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely curtailed to check the misuse and abuse of this obnoxious practice. The tragedy is that a secular country like India is still lagging behind in according red carpet welcome to article 44.

According to the doctrine of indisssolubility of marriage, under the traditional Hindu law conversion to another religion by one or both the Hindu spouses did not dissolve the marriage. The following cases could be cited as precedents.[4] In *Ram Kumari's* case[5] where a Hindu wife converted to Muslim faith and then married a Muslim, it was held that her earlier marriage with a Hindu husband was not dissolved by her conversion. She was charged and convicted of bigamy under section 494 of IPC. The Madras High Court followed suit in *Fathima's* case.[6] In *Gul Mohd's* case,[7] a Hindu wife was fraudulently taken away by the accused, a Muslim, who married her according to Muslim law after converting her to Islam. It was held that the conversion of the Hindu wife to Mohammedan faith did not *ipso facto* dissolve the marriage and she could not during the life time of her former husband enter into a valid contract of marriage. Accordingly, the accused was convicted for adultery under section 494 of IPC.

In *Nandi's* case,[8] Nandi, the wife of the complainant, changed her religion and became a Mussalman and thereafter married a Mussalman named Rukan Din. She was charged with an offence under section 494 of IPC. The *Ruri's case*[9] was the case of a christian wife, who had christianity and embraced Islam and then married a Mohammaden. It was held that according to the christian marriage law, which was the law applicable to the case, the first marriage was not disolved and therefore the subsequent marriage was bigamous. The decision in *Sayeda Khatoon's* case,[10] did not make any departure from the path laid down by the earlier rulings. The decisions in the subsequent cases were also to the same effect, *e.g.*, in *Robasa Khanum's case,*[11] where the parties were married according to Zorastrian law. The wife became a Muslim whereas the husband declined to do so. She claimed that her marriage stood dissolved because of her conversion to Islam. This argument could cut no ice with the learned judge, Justice Blagden. As a result, the case was dismissed. On an appeal, a Division Bench consisting of Sir Leonard Stone C.J. and Justice Chagla upheld the decision delivered by Justice Blagden.

Justice Chagla, also, rightly maintained that the conduct of a spouse who converts to Islam has to be judged on the basis of the rule of *justice, right or equity and good conscience.* A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is not a dispute 'where the parties are muslims', and therefore the decision need not be on the touchstone of 'Muslim personal law'. In

4. As cited and relied on by the Supreme Court in *Sarla Mudgal, ibid.*
5. In re *Ram Kumari*, (1891) I.L.R. 18 Cal. 264.
6. *Budansa* v. *Fathima*, (1994) 22 I.C. 697.
7. *Gul Mohd.* v. *Emperor*, A.I.R. 1947 Nag. 121.
8. *Nandi* v. *Crown*, A.I.R. 1920 Lah. 440.
9. *Emperor* v. *Ruri*, A.I.R. 1919 Lah. 389, 48 I.C. 493 : 20 Cr LJ 3.
10. *Say Khatoon* v. *M. Obadiah* eda, 49 C.W.N. 745.
11. *Robasa Khanum* v. *Khodadad Bomanji Irani*, (1946) 48 Bon. L.R. 64.

such cases, the court shall act and the judge shall decide according to *justice, equity and good conscience.* The second marriage of a Hindu husband after embracing Islam would attract the penal punishment under section 494 of IPC.[12] So the pith and substance of the judgment is that under the Hindu personal law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was *no automatic dissolution of the marriage.* There is no change in the position even after the adoption of the Hindu marriage Act 1955. A marriage solemnised whether before or after the commencement of the Act, can only be dssolved by a *decree of divorce* on any of the grounds enumerated in section 13 of the Act. One such ground under section 13(1) (*ii*) is that "the other party has ceased to be a Hindu by conversion to another religion". Till the time a Hindu marriage is dissolved under the Act, none of the spouses can contract a second marriage. The *ratio decidendi* is that the second marriage by a convert would be in violation of the Hindu Marriage Act 1955 and as such *void* in terms of *section 494 of IPC.* The apostate husband would be held guilty of offence under the said provision as the ingredients of section 494 are tested and satisfied in the instant case.

IV Uniform Civil Code — a dream yet to be realised

All laws including penal laws are applied to one and all in this country without any distinction as to religion, race, caste, creed, sex, *etc.* The anomaly is that it is not so appropos of Muslim personal law. The matters *vis-a-vis* marriage, inheritance, divorce, conversion, *etc.*, in the Muslim religion are governed by their personal law. There is an urgent need to rectify this uneven and higgledy-piggledy situation so as to bring light in the lives of Muslim womenfolk in India. One country and one law shall be the lodestar. Personal laws must make room for UCC. Secularism is one of the basic features of the Constitution.[13] The introduction of UCC would certainly be in conformity with the tenets of secularism. Turning a Nelson's eye by the rulers at the Centre towards the constitutional goal under article 44 would tantamount to a fraud on the Constitution. It is high time that life is infused into it. The Supreme Court of India has been, time and again, drawing the diligence of the government towards UCC whenever it is faced with a ticklish issue like the present one. In fact UCC was not an issue before the court in *Sarla Mudgal's* case[14] But the honourable judges were compelled by the peculiar piquant facts of the case to air their views on the paramount need for UCC.

A Constitution Bench of the court speaking through Justice Y.V. Chandrachud in *Shah Bano Begum's* case[15] rightly observed:

> It is also a matter of regret that Article 44 of our Constituton has remained a dead letter.... It provides that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territoty of India'. There

12. See, s. 494 I.P.C.
13. *S.R. Bommai* v. *Union of Inda*, J.T. 1994 (2) S.C. 215.
14. *Supra* note 1.
15. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 S.C.C. 556.

> is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalities to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. *It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country,and unquestionably, it has the legislative competence to do so.*

Justice Chinnappa Reddy in *Chopra's* case[16] rightly maintained (while referring to Justice Y.V. Chandrachud's observations in *Shah Bano Begum's* case):

> It was just the other day that a Constitution Bench of this court had to emphasise the urgency of infusing life into Article 44 of the Constitution.... The present case is yet another which focusses on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of uniform civil code is exposed by the facts of the present case....

V Conclusion

At this juncture, Justice Kuldip Singh's candid observations deserve and demand to be accorded a red carpet welcome.He stated:

> The traditional Hindu Law - Personal Law of the Hindus- governing inheritance, succession and marriage was given a go by as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of uniform personal law in the country.[17]

The learned judge proceeded further to observe that those who preferred to remain in India after partition, were aware of the fact that Indian leaders did not believe in two nation or three-nation theory and also that in the Indian Republic there would be only one nation-Indian Nation and no community could make a claim tobe a separate entity on the basis of religion.[18] Justice Kuldip Singh's observations are nothing but calling a spade a spade. Not only a lawman, even a layman, could appreciate this judgment. It would sound apposite to conclude with Justice Y.V. Chandrachud's observations. The honourable judge observed : thus we understand the difficulties involved as regards bringing persons of different faiths and persuasions together on a common platform. However, a beginning had to be made if the Constitution was to have any meaning.[19]

*D. Sura Reddy**

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16 *Jordan Diengdah* v *S S. Chopra*, (1985) 3 S.C C. 62.

17. *Supra* note 1 at 649.

18. *Id.* at 650.

19. *Supra* note 15 at 572-3.

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