



TAKING OFFENDING SPOUSE SERIOUSLY

I Introduction

THE SUPREME Court in a catena of cases categorically held that conviction for the offence of bigamy,¹ requires proof of the fact that, (a) the accused spouse must have contracted the first marriage, (b) while the first marriage was subsisting the spouse concerned must have contracted the second marriage, and (c) both the marriages must be valid in the sense, that the necessary ceremonies, required by the personal law governing the parties had been duly performed.² The accused persons in almost all these cases, have been acquitted on the ground that the prosecution has failed to prove relevant ceremony that is required to constitute the respective valid marriage. However, in each and every case the prosecution has proved solemnisation of other ceremonies indicating the factum of marriage beyond reasonable doubt. Apparently the Supreme Court, in none of these cases, has considered the tenability of convicting accused persons for the offence of attempt to commit bigamy.

This lapse on the part of the Supreme Court has widely been criticised.³ Particularly Justice A.M Bhattacharjee's article⁴ deserves special mention, in

1 See, s 494 of the Indian Penal Code (the 'Code')

2 The Supreme Court in *Bhaurao Shankar Lokhande v State of Maharashtra*, A I R 1965 S C 1564, *Kanwal Ram v The Himachal Pradesh Administration*, A I R 1966 S C 614, *Priya Bala Ghosh v Suresh Chandra Ghosh*, A I R 1971 S C 1153, *Lingari Obulamma v Venkara Reddy*, A I R 1979 S C 848, *Gopal Lal v State of Rajasthan*, A I R 1979 S C 713 unequivocally held that, in order to invoke s 494 of the Code it must be proved beyond reasonable doubt, that both the marriages were according to the law and depending upon the law or custom governing the parties. For a detailed analysis of these decisions, see, S V Joga Rao, "Offence of Bigamy Judicial Approach", *CULR* 289 (1989)

3 *Ibid* In this paper, the author has observed that, "When a person does not follow the ceremonies but starts living with a second woman he escapes from the clutches of the law of bigamy. The judiciary had a golden opportunity to bring such person under the offence of attempting to commit the offence of bigamy by virtue of s 222(3) of the Code of Criminal Procedure, which say that a person charged with an offence can be convicted of an attempt to commit such offence without any separate charge. Instead of giving direction to this effect the Supreme Court has been insisting on the form or ceremonies. Because of such judicial interpretations, persons are taking undue advantage intentionally and deliberately omitting the essential ceremonies in order to avoid punishment. In the interests of justice, social values and morality there is a need for amendment to s 494 of the Code and s 17 of the Hindu Marriage Act 1955 as follows (i) The definition of the 'Offence of Bigamy' may be amended in such a way as to include marriages, which were celebrated or contracted defectively or where there is intentional omission of certain essential ceremonies, (ii) The expression 'Solemnized' occurring in s 17 may be substituted by the expression either contracted or goes through a form of marriage. *Id* at 301-2

4 Justice A M Bhattacharjee, "Supreme Court on Bigamy", *A I R (Jn)* 25-9 (1983)



which he lamented the failure of Supreme Court to apply its mind to the issue pertaining to the offence of attempt to commit bigamy.⁵

Be that as it may, it so happened, Justice A. M. Bhattacharjee was called upon to decide the same issue. Quite unexpectedly, this ruling has gone unnoticed to far.⁶

This paper aims at probing and finding a solution to the interpretational conundrum faced by the learned judge.

II Issues identified

In *Subhir Kumar Kundu alias Sambhu v. State of West Bengal*,⁷ the parties intended to marry, made all preparations and many of the marital rites like performance of *homa* and chanting of mantras, putting of vermilion, *Sampradan*, the bride going or being taken around the bride-groom seven times, a custom in Bengali Hindus, were proved to have been performed. The accused-petitioner was convicted by the trial court under section 494 of the Code and conviction and sentence as well have been affirmed in appeal.⁸

In the second appeal while assailing the conviction, the High Court was called upon to decide the legality of the trial court's decision and affirmation of the same by the appellate court.⁹

While overruling the lower court's decision, Justice Bhattacharjee after analysing relevant Supreme Court decisions held that the conviction cannot be sustained as the prosecution failed to prove solemnisation of essential ceremony as applicable to the parties, namely, *saptapadi*.¹⁰

Then alternatively, the High Court was urged to consider the tenability of convicting the accused-petitioner for the offence of attempt to commit bigamy,¹¹ as the factum of marriage as such has been proved beyond reasonable doubt.¹²

Justice Bhattacharjee after analysing a number of Supreme Court decisions,¹³ came to the conclusion that solemnisation of various ceremonies had constituted the offence of attempt 'to commit bigamy'.¹⁴ However, in view of the following reasons held that the plea is liable to be rejected :

- (a) Section 511 of the Code is only applicable to the offences punishable by the Code and Hindu Marriage Act 1955¹⁵ is a 'Special law',¹⁶

5 *Id* at 29

6 It is surprising that even in the *Annual Survey of India Law*, the case does not find a mention (Both the volumes of 1991 and 1992 and in the areas of Criminal law, Hindu law and Women and the law)

7 1992 Cri L J 1502 (per A M Bhattacharjee and Ajoy Nath Ray JJ)

8 *Id* at 1504

9 *Ibid*

10 *Supra* note 7 at 1508

11 See, s 494 read with s 511 of the Code

12 *Supra* note 7

13 For instance, *Abhyananda Mishra*, A I R 1961 S C 1968, *Malkiat Singh*, A I R 1970 S C 713
etc

14 *Ibid*

15 References hereinafter to the 'Act' are to the 'Hindu Marriage Act 1955'

16 See, s 41 of Code



- (b) Sections 494 and 495 of the Code have been engrafted in section 17 of the Act¹⁷ by virtue of legislative reference. Therefore, the offence of bigamy is no more a part of the 'Code' but that of the 'Act';
- (c) Unless and until an enabling provision¹⁸ in the Act facilitates such interpretation, the accused can not be convicted for the offence of attempt to commit bigamy.¹⁹

III Issues analysed

Now we are left with the onerous, though not impossible task of constructing a viable interpretation which would hopefully convince the Supreme Court to overrule Justice Bhattacharjee's interpretation.²⁰

Ultimately the interpretational dilemma of the learned Justice boils down to the issue of whether the Hindu Marriage Act 1955 can be construed as special law or not? At the outset, it is necessary to bear in mind, the scope, object and application of the Code on the one hand and of the law in question, on the other.

Incorporation of provisions by reference is a common device of legislative drafters.²¹ This is normally adopted with a view to avoid technical, time consuming and cumbersome parliamentary procedure. This kind of legislative reference has received widespread criticism in UK.²² There are decisions to the effect that the provisions that are incorporated by way of legislative reference become integral part of the Act and also the Act acquires a separate entity from that of the statute or code from where the provisions have been borrowed.²³ The process of incorporation of provision by reference enables the judge to rely upon the interpretation already made under the earlier statute or code. However, the judge is expected to appreciate the purpose behind such incorporation, in the context of legislative object, scope and application of the law in which such incorporation has been made.²⁴ Say for instance, illustratively speaking, a particular provision from Indian Penal Code, (IPC) is incorporated by way of legislative reference in the Prevention of Food Adulteration Act (PFA).²⁵ While the interpreting incorporated provision in the PFA, already obtaining interpretation of the provision under IPC may be relied upon. Because, here the purpose behind such incorporation is to engraft a particular provision, which would eventually become an integral part of the Act. For the purposes of IPC the PFA is a special law *i.e.*, only applicable

17. See, s. 17.

18. Bhattacharjee J. gave example of s. 78 of the Essential Commodities Act 1955, which punishes attempt to commit offences envisaged under the Act. According to the reasoning advocated by this author, this example is a perfect one. But it does not fit within the framework suggested by him.

19. *Supra* note 7 at 1509-10.

20. *Ibid.*

21. See, Francis Bennion, *Statutory Interpretation* 522 (2nd ed. 1992).

22. See, *Knill v. Towse*, (1889) 24 Q.B.D. at 195-196; *Willingale v. Norris*, (1909) 1 K.B. 57 at 61; *Woolley v. Moore*, (1953) 1 Q.B. 43 at 46.

23. See, A.E. Randall (ed.), *Beal's Cardinal Rules of Legal Interpretation* 428 (1924).

24. *Ibid.*

25. See, s. 5 of Code.



to a particular subject. According to section 5 of the Code, the Code does not *affect* the special laws. Similarly, invoking section 511 of the Code is ruled out, as PFA is a special law. Therefore, unless and until, a similar provision (like section 511) is introduced, the person charged under a particular offence under the PFA cannot be convicted for an attempt to commit such offence with the help of section 511 of the Code.²⁶

In fact Justice Bhattacharjee also has reasoned on these lines,²⁷ of course, with one difference, which is fundamental in character. In the above illustrated instance, both the legislations are criminal statutes, but in the case in hand, it is not so.

Let us explain further. By and large, the legislative process of incorporating a provision by reference, is premised upon a fundamental principle, namely, both the legislations broadly belong to one category of legislative policy and object. Like, for instance, criminal statutes, legislations pertaining to industrial or labour relations or say personal laws. In such a case, the legislation in which such provision has been incorporated, can be construed as a special law, because it is applicable to a particular subject, of course, falling within the confines or overall domain of legislative policy or object. If this requirement is satisfied, the process of incorporation results in engrafting of the provision. However, this does not mean to say that the process of incorporation by legislative reference cannot take place in a legislation which falls outside the domain of similar or shared legislative policy or objective. It is possible, but, the purpose behind such incorporation is to be noted. Normally, in such kind of cases, the purpose would be merely to provide information about the provision in the earlier legislation, nothing more, nothing less.

Let us apply the above analysis to the case in hand. The issue is, whether Hindu Marriage Act 1955 can be construed as special law²⁸ or not for the purpose of the Code. In the light of the above reasoning, the Hindu Marriage Act cannot be construed as special law for the simple reason that, both the Code and the Act do not share similar legislative object.²⁹ One may advance argument about the relevance of penal provisions in a statute like Hindu Marriage Act. This is true that, there may be penal provisions in a statute, which in essence, do not belong to the category of criminal statutes. For example, section 18 of the Act³⁰ deals with punishment for contravention of certain other conditions for Hindu Marriage.³¹ But, introduction of a provision which deals with punishment for contra-

26. *Supra* note 11.

27. *Supra* note 19.

28. *Supra* note 16.

29. That is to say, the legislative objects and reasons of the Act do not reflect that of the Code. For details see, the preamble of the Act.

30. The dictum in *P O Han's* 15 Cri.L.J. 13 clearly says, "Special law as defined in Section 41 only meant, enactments such as Excise Act, the Opium Act and the Cattle Trespass Act, which create fresh offences other than those made punishable under the Code...". However, the later part of this ruling has been disputed in *Hakam Khuda Yar Khan v. Emperor*, A.I.R. 1940 Lah. 129.

From both the rulings above quoted, it would be reasonable to infer that, special law connotes a particular law which creates offences or which is penal in character.

31. This provision has not been incorporated by legislative reference.



vention of certain statutory mandates, does not alter, change or modify the legislative objective. That is to say, these provisions do not enable the Act to be labelled as a criminal statute³². The test of predominant objective is to be taken into consideration.

IV Alternative interpretation suggested

The analysis makes it clear that, for the purposes of the Code, the Hindu Marriage Act cannot be construed as special law. If it is not a special law, naturally, the purpose of engrafting section 494 of the Code into the Act is merely to provide information. Therefore, whenever a spouse commits bigamy as defined under section 17 of the Act, i.e., section 494 of the Code, he or she would be charged under section 494 of the Code and prosecuted accordingly.

In the absence of proof as to the solemnisation of an essential ceremony according to the custom as applicable to the parties to constitute a valid marriage, undoubtedly, the court is entitled by virtue of section 222(3) of the Code of Criminal Procedure 1973³³ to convict the accused for the offence of attempt to commit bigamy under section 494 read with section 511 of the Code, provided if there is adequate evidence to prove solemnisation of the other ceremonies indicating "attempt to commit bigamy".

It is hoped that this reasoning would convince the Supreme Court to 'take the offending spouse seriously' in future. Let us wait and watch.

*S V Joga Rao**

32 It is necessary to note that the jurisdiction to deal with an offence under section 17 of the Act read with section 494 of the Code will be governed by section 177 of the Code of Criminal Procedure and not section 19 which deals with jurisdiction and procedure. For details see, *Krishnaswami v Krishnaswami* A I R 1967 Mad 241. This is just to indicate overall legislative object of the Act.

33 See, *supra* note 3.

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