

LEGALFOXES LAW TIMES

ACCEPTING TRANS-WOMAN AS A “BRIDE”

A STEP TOWARDS PROGRESSIVE SOCIETY

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Arun Kumar v. Inspector General of Registration, (2019) WP(MD) No.4125

ABSTRACT

The Madras High Court in a path-breaking judgment standardized the marriage between a man and a transgender-women. It deciphered the word 'bride' under the Hindu Marriage Act,1955, along these lines enlarging its degree. The court cited Mythological sagas and took the guide of past decisions so as to perceive the privilege to self-determination and the domain of self-governance.

This comment contends that this judgment has re-asserted the right to privacy. The right to pick a life partner is reliant upon the capacity of the person to settle on decisions. This decision likewise sets up a point of reference to authorize same-sex marriages,, and gives a chance to scatter contentions that confine the equivalent. It re-attests the principle of dynamic realisation of rights, which should be able to alter legislation in order to protect the LGBT community’s fundamental rights The remark additionally examines the privilege to self-identification determination/right to self-assurance, in harmony with the new Transgender Persons (Protection of Rights) Act

The case note will further understand even after legalising the transgender marriage, the country is not accepting them. Thus it becomes crucial for us to understand the shortcomings and this landmark case sets a precedence, a stepping stone towards accepting the LGBTQ.

KEY FACTS:

Arun kumar got married to Sreeja, a transwoman, on 31 Oct 2018 at a temple in Tuticorin, according to Hindu rituals and customs. After they presented a notice for the enlistment of the wedding to the Joint Recorder No. 2 of Tuticorin, the registrar wouldn't enrol it. The petitioners challenged this action before the District Registrar of Tuticorin vide proceedings dated 16 Nov 2018 who successively confirmed the Joint Registrar's decision on 28 December 2018.

ISSUE:

The major issue before the Court was whether the term 'bride', as mentioned in Section 5 of the Hindu Marriage Act (HMA)¹ meant only women, or included transgender persons in the section too, as Sreeja was a transwoman.

The Second issue concerns Srija's fundamental rights. Whether her fundamental rights were violated by the decision of the inspector general of registration or not. The fundamental rights in question were her right to equality under article 14, right to live with dignity under article 21, and right to freedom under article 19 of the Indian Constitution.

Who is a "bride"

It was argued on behalf of the authorities that as per Section 5 of the Hindu Marriage Act, 1955, the "bride" should have completed the age of 18 years, additionally that the term "bride" can only be referred to a "woman on her marriage". For Srija, it was stated, is not a woman, but a transgender.

The Court did not accord with such a contention. It banked on the path-breaking decision of *National Legal Services Authority v. Union of India*², where the Supreme Court has upheld the

¹ THE HINDU MARRIAGE ACT, 1955 ARRANGEMENT OF SECTIONS PRELIMINARY SECTIONS 1. Short title and extent. 2. Application of Act. (n.d.). [online] Available at: http://legislative.gov.in/sites/default/files/A1955-25_1.pdf [Accessed 18 Jun. 2020].

² *National Legal Services Authority v. Union of India* [2014] 438 (SCC)5

transgender persons' right to decide their self-identified gender. That decision has also been stated in *K.S. Puttaswamy (Privacy-9 J.) v. Union of India*³, and also in *Navtej Singh Johar v. Union of India*⁴. In the case in hand, the Court noted that: “the term ‘bride’ stated in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or inflexible meaning.” It was seen that a statute must be construed in the light of the lawful system as it exists presently. It was also observed that in *Shafin Jahan v. Asikan K.M*⁵, “the right to marry a person of one’s choice was held to be intrinsic within the ambit of Article 21 of the Constitution”⁶.

“It has been long, the transgender persons/intersex people have been withering in the margins⁷. The Constitution of India is an authoritative document. It is welcoming them to come out and join the mainstream. Hence, it would be odd to retract transgenders for the benefit of the social organisations which are in mainstream.

The Court held: “ the expression ‘bride’ mentioned in Section 5 of the Hindu Marriage Act, 1955 will have to comprise in its meaning not only a woman but should also include a transwoman”⁸.

³ *K.S. Puttaswamy (Privacy-9 J.) v. Union of India* [2017] 10(SCC)1

⁴ *Navtej Singh Johar v. Union of India* [2018]10(SCC)1

⁵ *Shafin Jahan v. Asikan K.M*[2018]16(SCC)368

⁶ KM, A. (2018). *Right To Choose Life Partner Is A Fundamental Right, Consent Of Family, Community, Clan Not Necessary For Marriage Between Two Adults: SC [Read Judgment]*. [online] www.livewlaw.in. Available at: <https://www.livewlaw.in/right-choose-life-partner-fundamental-right-consent-family-community-clan-not-necessary-marriage-two-adults-sc-read-judgment/> [Accessed 19 Jun. 2020].

⁷ Jain, R. (2019). *Transgenders & others who identify as women will now be “brides” under Hindu Marriage Act*. [online] ThePrint. Available at: <https://theprint.in/india/governance/transgenders-others-who-identify-as-women-will-now-be-brides-under-hindu-marriage-act/225545/> [Accessed 17 Jun. 2020].

⁸ SCC Blog. (2019). *Madras HC | Transgender female is a “bride” under Hindu Marriage Act; no impediment in registration of transgenders marriage*. [online] Available at: <https://www.scconline.com/blog/post/2019/04/25/madras-hc-transgender-female-is-a-bride-under-hindu-marriage-act-no-impediment-in-registration-of-transgenders-marriage/> [Accessed 19 Jun. 2020].

It would also comprise an intersex person/transgender person who identifies herself as a woman. It is crucial to understand how the person perceives themselves.

Gender is different from Sex

Gender and sexuality were averted to be two interlinked studies. Gender is about the social construction shaped by cultural processes. Even if nature has created biological diversity, human-kind has created hierarchy in sexes, thus only labelling two binary sexes- male and female. The court stated that a person's sex is biologically determined at the time of birth, not so in the case of gender.

Mythological instances were seen in order to substantiate the claim of an existence of a third category (outside the male-female binary)-Transgender persons. These were entitled to legal protection of laws in all angles of state activity.

“Transgender persons fall inside the term ‘person’ and hence allowed to avail legal protection of laws in all spaces of State activity as understood by any other citizen of this country”.

DECISION:

The Court held that a marriage celebrated between a male and a transwoman, both from Hindu religion, should be a valid marriage. The Court asserted that transgender persons had the right to choose their self-identified gender, as decided by the Supreme Court in *NALSA v Union of India*, which has been restated in *Justice K. Puttaswamy v Union of India* and further in *Navej Singh Johar v Union of India*. The Court then asserted that ‘sex and gender are not one and the same’, where a person's sex is biologically determined at the time of birth, which is not the case for gender. The Supreme Court had held that Article 14 of the Constitution of India, which confirms that the State shall not deny to ‘any person’ equality before the law or equal protection of the laws within India would be applicable to transgender persons also. The Supreme Court in *NALSA* had asserted that transgender persons would be considered in the expression ‘person’ and would be allowed to legal protection of laws in all spaces of State activity as enjoyed by other citizens of the country, and thus discrimination based up on sexual orientation or gender identity would impede equality before law and equal protection of laws and will violate Article 14.

The Court also depended on the observations of the Supreme Court in *NALSA* where it was decided that gender identity lies at the root of one's personal identity, gender expression and

presentation and has to be protected under Article 19(1)(a); and secondly, that identification of one's gender identity lies at the heart of the fundamental right to dignity, which is protected under Article 21 of the Constitution. The Supreme Court asserted that self-determination of gender is an integral part of personal autonomy and self-expression and falls within the ambit of personal liberty under Article 21 of the Constitution of India. Accordingly, the Madras High Court noted that Sreeja's choice to express her gender identity as that of a woman falls within the area of her personal choice and cannot be questioned by the State authorities.

The Court then stated Article 16 of the Universal Declaration of Human Rights, which involves the right to marry as a human right as well as *Shafin Jahan v Asokan K.M. and Ors.* held that right to marry a person of one's wish was held to be fundamental to Article 21 of the Constitution of India. The Court went on to state the case of Justice K. Puttaswamy where the Supreme Court cited the US Supreme Court decision in *Obergefell v Hodges*⁹ in which the Court had observed that it would be contrary to the right to privacy with respect to other matters of family life and not with respect to the decision to enter the relation that is the basis of the family in the social community..

The Court held that both petitioners were of the Hindu religion and their right to practice Hindu religion is realised under Article 25 of the Constitution of India. Held that the right of transgender persons to marry has been respected by the Supreme Court, they have to be included in the purview of the Hindu Marriage Act. The Court stated that rejecting the petitioners' Hindu marriage violates their fundamental right to practice their religion under Article 25 of the Constitution of India.

The Court because of this stated that turning down to register the marriage of Ms. Sreeja would lead to a infringement of her fundamental rights under Articles 14, 19(1)(a), 21 and 25 of the Constitution of India and thus, cancelled the orders of the Joint Registrar No. 2 and the District Registrar of Tuticorin and directed the Joint Registrar No. 2 to register the marriage of the said parties.

After determining this concern, the Court decided to resolve a second issue on sex reassignment surgery (SRS) or Intersex Genital Mutilation (IGM) of intersex children. The Court directed out that according to the judgement in *S. Amutha v C. Manivanna Bhupathy* consent of a parent cannot be proclaimed as the consent of the child and as decided in *NALSA* no one shall be forced to undergo medical procedures as a need for lawful recognition of their gender. The Court asked the Government of Tamil Nadu to circulate a Government Order to prohibit SRS on intersex infants and children. The Court made an another observation that parents must be encouraged to feel that the birth of an intersex child is not a matter of shame and left it to the Government to launch

⁹ *Obergefell v Hodges* [2015] 576 US

awareness programmes. The Court also noticed that since Arun Kumar was from an SC community, the couple were eligible for obtaining financial incentives under the Dr. Ambedkar Scheme for Social Integration through Inter-Caste Marriages¹⁰.

CAN IT BE CONSIDERED AS A STEP TOWARDS SAME-SEX MARRIAGES?

The family, marriage, procreation and sexual orientation are all intrinsic to the dignity of a person. The right to marry should be linked with the right to privacy. Privacy allows the ability of each to make decisions .

Anyways ,this decision certains marriage socially acceptable. It has set a precedent for transgender persons to get married without any hesitation or being discriminated. Further , it has provided a base to banish arguments that hinders same-sex marriages. There is a apt push in lesbian, gay, bisexual and transgender rights. Modernising the thought process of the society would require patience. Hence, it's need of the hour, same sex marriages should be legalized in India in order to change the social stigma.

ANALYSIS

A very pivotal step for the Indian transgender community, the Madras high court directed authorities to register a marriage between a man and a trans woman.

The Madras tribunal on Monday held that the term 'bride' within the Hindu wedding Act, thatcodifies the laws associated with weddingwithin the Hindu community in India, may alsosee a trans woman and doesn't have to be compelled to be restricted to somebody born a woman.

Cited past judgments of the Supreme Court in NALSA, Puttuswamy (privacy case) and also theSection 377 repeal, and even quoted Hindu epics just like the Mahabharatam, declaring that the

¹⁰PRADHAN MANTRI YOJANA. (2017). *Dr. Ambedkar Scheme for Inter-Caste Marriages (Dalit)*. [online]

Available at: <https://www.pradhanmantriyojana.co.in/dr-br-ambedkar-inter-caste-marriages-scheme-dalit> [Accessed 17 Jun. 2020].

'personhood' of transgender persons has been recognised below the Indian Constitution. "Gender identity falls among the domain of her personal autonomy and involves her right to privacy and dignity¹¹. It's not for the State authorities to question this self-determination of the second petitioner herein¹²

This is the primary judgment in India where the right to marry underneath Article 21 of the constitution has been thoroughbred for transgender persons and holding that 'bride' below the Hindu wedding Act would cowl transgender persons who determine as women.

The Court isn't breaking any new ground. it's simply stating the apparent. The court aforesaid rather eloquently and melted our heart within the method. The transgender community has been fighting for his or her basic human rights for a jiffy and this type of backing may additionally facilitate create such marriages more socially acceptable by the end of the day.

CONCLUSION

To sum up I would like to call attention to the principle of progressive realisation of rights that was initiated in this judgment. Also, reiterated that the human rights of the LGBT community are safeguarded, irrespective of the fact that the majoritarian point of view objects it. The judgment can uphold additional progressive modification in laws with regards to problems concerning adoption, surrogacy and more. Most society networks perceive the need to adopt a child, and aspire for a family.

As India shifts towards a liberal era, where economic, educational and societal evolutions are on the leap, there are contradictions that lie within the fetters of beliefs, customs and traditions. The evolution definitely would not take place in one day. It is vital to keep up the perception of equality, liberty and justice- the allegiance.

There is freedom of choice and liberty is that is the basic part of the constitution. The Transgender Persons (Protection of Rights) Act ought to be amended, and will appropriately able legal gender

¹¹ Staff, S. (n.d.). *Madras High Court orders authorities to register a marriage between a man and a transwoman*. [online] Scroll.in. Available at: <https://scroll.in/latest/921058/madras-high-court-orders-authorities-to-register-a-marriage-between-a-man-transwoman> [Accessed 17 Jun. 2020].

¹² TheLeaflet. (2019). *Transgenders have marriage rights under the Indian Constitution, says Madras High Court*. [online] Available at: <http://theleaflet.in/transgenders-have-marriage-rights-under-the-indian-constitution-says-madras-high-court/> [Accessed 17 Jun. 2020].

recognition, not simply impose abusive preconditions like medical procedures, and authoritarian administrative documentation. Right to recognition may be a basic facet of declaratively the value of an individual.

The orthodox notions of gender-identity have to be compelled to prevail with the spirit of transformative constitutionalism and constitutional morality.



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