

In Re, Smt. Amina

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Court : Mumbai

Decided On : Aug-02-1991

Reported in : AIR1992Bom214

Judge : D.R. Dhanuka, J.

Acts : [Constitution of India](#) - Articles 12, 13, 14, 17, 19(1), 363, 366(22), 368 and 372; Guardian and Wards Act, 1890; [Indian Succession Act, 1925](#) - Sections 51; [Government of India Act, 1935](#); Bombay Prevention of Hindu Bigamous Marriages Act, 1946; Code of Criminal Procedure (CrPC) , 1908 - Sections 384 - Order 21, Rule 15(1)

Appeal No. : Guardianship Petition No. 86 of 1991

Appellant : In Re, Smt. Amina

Advocate for Pet/Ap. : A.J. Rizvi,;Suraj M. Shah,;S.P. Pandya and;Ms. Nirmala Chugani, Advs. and;A.S. Bobade, Adv. General

Judgement :

ORDER

OF REFERENCE

1. This petition raises the following important questions of Constitutional law of great public importance:--

(a) Whether 'personal laws' are subject to Part III of the [Constitution of India](#)?

(b) Whether the High Court has no jurisdiction to examine the question as to whether the impugned provision of 'personal law' is in conformity with [Constitution of India](#) or not and is bound to enforce it as it is, even if it appears to be repugnant to one or other of the fundamental rights guaranteed under Part III of the [Constitution of India](#)?

(c) Whether the provisions of Sunni Muslim 'Personal Law' sought to be enforced in the Courts of Law to the effect that a son is entitled to double the share than that of a daughter on inheritance is violative of Article 14 of the [Constitution of India](#)?

2. On or about 23rd April 1991, Mr. A. J. Rizvi, the learned Advocate for the petitioner, presented this petition to me on behalf of Smt. Aminabai widow of Ismail Shaikh for being appointed as a guardian of two minors, Master Mohmood Ismail Shaikh and Kum. Shabana Ismail Shaikh, under Guardian and Wards Act VIII of 1890. By this petition, the petitioner has sought directions against the State Bank of India, Jacob Circle Branch, to deposit the amounts of Term Deposit Receipts as also Monthly Interest Deposit Scheme receipts along with interest etc. with the office of the Accounts Officer, High Court, Bombay. By this petition, the petitioner sought a further direction from the Court to the effect that the amounts which may be received by the Accounts Officer, High Court, Bombay, may be reinvested with any of the nationalised Banks in the name of the said minors till they attain majority or till their marriage, whichever was earlier, in the ratio of 2:1 of the total estate of the deceased, 'the son getting double the share than that of the daughter as applicable under the Mohammedan Law'. By this petition, the petitioner sought directions to the effect that the interest accrued on the amounts so invested may be handed over to the petitioner for the purpose of spending the same for the education, maintenance and upkeep of the said two minors. When this petition was placed before me for passing of an order, my immediate reaction was to the effect that the provision of Personal Sunni Muslim Law relied on by the petitioner to the effect that the son was entitled to double the share than that of the daughter on inheritance was perhaps violative of Article 14 of the [Constitution of India](#). It is a known fact that some of the decided cases have taken the view that

Personal Laws are not subject to fundamental rights and are thus incapable of being challenged on the ground of the same being violative of the doctrine of equality enshrined under Article 14 of the [Constitution of India](#). It did occur to me then and there that the question was far too important and the founding fathers of our Constitution never intended to exempt any law of any kind, not even the custom or usage having the force of law, from the basic requirement of constitutional law that every law and law in force must necessarily conform to the fundamental rights enshrined in Part III of the [Constitution of India](#). I requested the learned Advocate for the petitioner to issue a letter of request on behalf of the Court to Shri A. S. Bobde, the learned Advocate-General, for his assistance, views and contribution on the questions of public importance. Mr. A. S. Bobde, the learned Advocate-General, was kind enough to appear as amicus curiae and give his valuable assistance to the Court and cite several authorities on the subject. I passed order dated 17th May, 1991 on the petition keeping in substance the questions formulated in this order of reference open.

3. Section 51 of the [Indian Succession Act, 1925](#) reads as under:--

'51. Division of a male intestate's property among his widow, children and parents.--

(1) Subject to the provisions of sub-section (2), the property of which a male parsi dies intestate shall be divided--

(a) whether he dies leaving a widow and children, among the widow and children, so that the share of each son and of the widow shall be double the share of each daughter, or

(b) where he dies leaving children but no widow, among the children, so that the share of each son shall be double the share of each daughter.

(2) Where a male parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share of a daughter.'

This Court has jurisdiction to determine the constitutional validity of Section 51 of the Indian Succession Act. The questions still arise as to whether personal law to the same effect is immune from challenge under Article 13 of the [Constitution of India](#) and need not conform to fundamental rights

4. It is well-settled that every action of the State-legislative, executive or judicial must necessarily conform to the [Constitution of India](#) including Chapter on fundamental rights enshrined in Part III of the [Constitution of India](#). Article 12 of the Constitution defines 'State' in widest sense so as to ensure supremacy of the constitutional law in every walk of life. Pre-constitutional laws are void to the extent of their inconsistency with the provisions of Part III. Article 13(1) of the Constitution takes within its sweep 'all laws in force'. In my judgment, pre-Constitutional laws as well as post-constitutional laws must conform to fundamental rights, to whichever category of 'Law' it may belong to. Article 13(3) and Article 13(4) of the Constitution are relevant for determining the scope and ambit of Article 13(1) of the Constitution. Article 13(3)(a) of the Constitution defines the expression 'law' used in the said Article so as to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law. The said definition is an inclusive definition. Article 13(3)(b) of the Constitution defines the expression 'laws in force' used in the said Article so as to include laws passed by a legislative or other competent authority. Article 13(3)(b) of the Constitution takes within its sweep any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. Article 13(4) of the Constitution provides that the Constitution Amending Act falling under Article 368 of the Constitution shall not be governed by Article 13. The validity of a Constitutional Amendment Act is liable to be judged with reference to the yardstick of 'basic structure' evolved by the highest Court of our country in the case of *Keshavanand Bharati v. State of Kerala*, . Article 13(2) of the Constitution imposes a constitutional prohibition on the State from making any law which takes away or abridges the right conferred by Part III and declares that any law made in contravention of the said clause shall be void to the extent of its contravention. Article 372 of the Constitution continues all laws which were in force on the date of Constitution coming into force until altered, repealed or amended subject to other provisions of the Constitution. The Constitutional law is the supreme law of the

land. No law whether made by a legislature or Judge made, customary or otherwise, can be enforced by any Court in our country if it is inconsistent with or repugnant to guarantee of fundamental rights unless expressly saved under a specific provision of the Constitution itself, like Articles 31A, 31B and 31C.

5. Item 5 of List III appended to the Seventh Schedule of our Constitution corresponds to items 6 and 7 of List III of [Government of India Act, 1935](#). The said item reads as under:--

'5. Marriage and divorce, infants and minors, adoption, wills, intestacies and succession, joint family and partition, all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law.'

Hindus and Muslims are undoubtedly governed by personal laws. Such personal laws are partly based on ancient religious texts and commentaries, but not wholly. Well established customs and usages to the contrary override religious texts. Modern legislations amending personal laws sometimes provide for saving of pre-existing customs and usages subject to qualifying conditions. Thus the statutory laws, ancient personal laws and customs and usages having force of law are intertwined and intermingled.

6. According to my study of the subject, 'personal laws' are 'law' and 'laws in force' under Article 13 of the [Constitution of India](#) and are enforceable in Courts subject to provisions of the Constitution and not otherwise. Even customs and usages having the force of law are void if found inconsistent with any of the fundamental rights guaranteed by the Constitution. It could not be the intention of founding fathers of our Constitution to create any immunity in favour of personal laws.

7. Mr. H. M. Seervai, the eminent Constitutional jurist, has opined in his standard work 'Constitutional Law of India', 3rd Edition, at page 401, that personal law is law within the meaning of the said expression as defined in Article 13 of the Constitution. In *State v. Harsu Appa Mali*, , Chagla, C. J. and Gajendragadkar, J., while considering the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. Observed that personal law was not included in 'law in force'

within the meaning of the said expression as defined under Article 13(3)(b) of the Constitution. The Hon'ble Judges observed that Article 17 providing for abolition of untouchability indicated that the personal laws were not included in the expressions 'law' or 'law in force' as defined in Article 13 of the Constitution. The learned Judges observed that if personal laws were intended to be made subject to fundamental rights, incorporation of Article 17 abolishing untouchability in the Constitution would have been unnecessary. With great respect and reverence to the learned Judges, this reasoning appears to me to be totally incorrect. Mr. Seervai has said so in his learned and scholarly work known as 'Constitutional Law of India' at page 401 of its 3rd Edition. I am in respectful agreement with the opinion of Mr. Seervai. Having regard to the rampant evil of untouchability, it was considered necessary to make special reference to the evil of untouchability, abolish the same and make it punishable. The Constitution makers provided for abolition of untouchability by a Constitutional provision in view of the historical importance of the subject. Mr. Seervai has rightly referred to entry 5 of list III appended to Schedule 7 of the Constitution support of his submission contained in his scholarly work that personal law was 'law' within the meaning of Article 13 of the Constitution and was subject to fundamental rights. The teamed author, Mr. Seervai, has expressed his opinion on the subject as under:--

'.... .personal law of a community is 'law'and is 'law in force' or 'existing law', within the meaning of the Constitution.'

The learned author has rightly observed in paragraph 9.146 of the said book as under:--

'We have seen that there is no difference between the expression 'existing law' and 'law in force' and consequently. Personal law would be 'existing law' and 'law in force'. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them.'

8. Mr. A. S. Bobde, the learned Advocate-General, has argued the matter as amicus curiae and assisted the Court by his erudite research on the subject and invited my attention to several authorities. Mr. Bobde submits that personal laws

are subject to fundamental rights and the view taken by our High Court in Narsu Appa Mali's case requires reconsideration and is erroneous.

9. The Constitution is a living document. It is impossible to ignore patent discrimination resulting from some of the provisions of personal laws sought to be enforced in our Courts. Some of these provisions appear to be clearly unjust as for example:

- (i) a Mohammedan male being entitled to marry four wives;
- (ii) a Mohammedan husband being entitled to divorce his wife unilaterally by pronouncing of the word 'Talaq' thrice;
- (iii) gross inequality and inequity in matter of inheritance merely on ground of sex;
- (iv) provisions of old Hindu law depriving of their right to inherit the property of their father if the demand left a widow and a son behind him.

10. Traditional personal laws applicable to Hindus as well as Muslim discriminated amongst the male and the female heirs merely on the ground of sex. Personal laws as enforced in our Courts were based partly on ancient texts subject to the overriding effect of customs. It was held by the Privy Council in one of its oldest cases that clear proof of custom and usage outweighed the written text of law. The discrimination between the male and female heirs merely on the ground of sex was carried forward in the pre-independence legislation. Section 61 of the [Indian Succession Act, 1925](#) enacts similar rule of intestate succession. The question to be asked is as to whether personal laws are not subject to fundamental rights although customary laws and statutory laws are subject to fundamental rights.

11. In view of the subsequent judgment of the Supreme Court, part of the reasoning, which impelled the Division Bench of our High Court in Narsu Appa Mali's case (supra) to take the view that personal law was not subject to fundamental rights, no longer holds the field.

12. In Dasaratha Rama Rao v. State of Andhra Pradesh, AIR 1961 SC 67, S. K. Das, J. observed, in paragraph 9 of his judgment, as under :

'Article 13 of the Constitution lays down inter alia that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with fundamental rights, shall, to the extent of the inconsistency, be void. In that Article 'law' includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right.'

Traditional personal laws are held to be subject to customary laws. If customs and usages having force of law are subject to fundamental rights, there is no reason why the traditional personal law should not yield to fundamental rights.

13. In *Sant Ram v. Labh Singh*, it was argued that Article 13(1) of the Constitution was governed by Article 13(3)(b) and the phrase 'laws in force' as defined in Article 13(3)(b) did not take any account of custom or usage. It was therefore argued that even if a customary law violated fundamental rights, it could not be declared void under Article 13(1). This plea was rejected by the Court. The Hon'ble Mr. Justice Hidayatullah, speaking for the Bench, observed at page 316 (of AIR):

'Custom and usage having in the territory of India the force of law must be held to be contemplated by the expression 'all laws in force'.'

It was held that both the definition contained in clause (1) and clause (2) of Article 13 of the Constitution controlled the meaning of the Article. Customary law of pre-emption was held void as violative of Article 19(1)(g). By this time, it is well settled that customary law is within the ambit of Article 13(1) of the Constitution.

14. Article 13(3)(a) of the Constitution defines the expression 'laws' for purpose of the said Article so as to include custom or usage having the force of law. The said definition reads as under:--

' 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;'

Article 13(3)(b) of the Constitution defines the expression 'laws in force' for purpose of the said Article as under:--

' 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.'

The above referred definition of 'laws in force' does not specifically refer to 'custom or usage' having the force of law. Both the definitions are inclusive definitions and are subject to the context as usual. In paragraph 20 of the judgment in Narsu Appa Mali's case (supra), the Hon'ble Division Bench observed as under at page 91 (of AIR 1952):--

'Therefore, there can be no doubt that both the personal laws cannot be said to have been passed or made by a legislature or other competent authority and do not fall within the purview of the expression 'laws in force'.'

In paragraph 21 of its judgment, the Hon'ble Division Bench dealt with the submission that 'whatever was included in the word 'laws' in Article 13(3)(a) must automatically be held to be included in the expression 'laws in force' in Article 13(3)(b) of the Constitution.' The Division Bench rejected this submission. The Division Bench also held that 'the custom or usage having the force of law' was not included in the expression 'laws in force'. In light of this construction of the expressions 'law' and 'laws in force' used in Article 13(3)(a) and 13(3)(b) of the Constitution, the Division Bench held that personal laws were not subject to fundamental rights.

15. To my mind, the interpretation of the expressions 'law' and 'laws in force' used in the said Article by the Hon'ble Supreme Court in Sant Ram v. Labh Singh, (supra) is directly contrary to the Bombay view in Narsu Appa Mali's case (supra). On this aspect, the Bombay view does not hold the field. The question still remains as to whether the ultimate view of Division Bench in Narsu Appa Mali's case to the effect that 'personal laws are not subject to fundamental rights' represents the correct law or deserves to be overruled by a larger Bench.

16. In my view, the question involved is a question of public importance and is required to be re-examined by a larger Bench. I totally agree with the view

expressed by Shri H. M. Seervai, the constitutional jurist of eminence in his standard work 'the Constitutional Law of India' that the above referred judgment takes an erroneous view of the constitutional law and the personal laws are subject to fundamental rights.

17. It is of considerable significance to refer to the judgment of 7 Judges of the Hon'ble Supreme Court in the case of A. R. Antulay v. R.S.Nayak . In this judgment, it was held by the majority that the Court could not pass an order or issue a direction which would be violative of fundamental rights of the citizens. It appears to be the modern trend of juristic thought that the expression 'State' as defined in Article 12 of the Constitution includes judiciary also. Personal laws are not made by the legislature but are enforced by Courts. The questions to be asked is as to whether the Court can be asked to enforce a provision of personal law which appears to be repugnant to the fundamental rights. In my view, personal laws shall have to yield to fundamental rights and all laws, whether made by the legislature or otherwise, must necessarily conform to fundamental rights.

18. Shri A. S. Bobde, the learned Advocate-General for the State of Maharashtra, has invited my attention to large number of decided cases and particularly the judgment of the Supreme Court in Krishna Singh y. Nathura Ahir . In this judgment, both the High Court of Allahabad as well as the Supreme Court took the view that according to the well-established customs, a Sudra could be ordained to a religious order and become a Sanyasi or Yati and the other religious texts therefore did not hoed the field. In paragraph 38 of his judgment, A. P. Sen, J., speaking for the Bench of the Supreme Court, relied on the judgment of the Privy Council in Collector of Madura v. Moothoo Ramalinga, (1867) Moo IA 397, in support of the view that clear proof of usage will outweigh the written text of law. It is more than clear both from the judgment of the High Court of Allahabad, which was under appeal before the Supreme Court in the above case, as well as from the judgment of the Supreme Court that the question as to whether personal laws were subject to fundamental rights did not arise at all for consideration of the Court. It was, however, observed in the passing by the Hon'ble Supreme Court, in paragraph 17 of its judgment, as under:--

'In our opinion, the learned Judges (meaning thereby the learned Judges of High Court of Allahabad who decided the case reported in) failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties.'

According to my humble study, no such question arose for decision before the High Court of Allahabad or before the Supreme Court. I have read and reread the judgment of the Supreme Court as well as the judgment of the High Court of Allahabad and I do feel that the above referred observation was not necessary for decision of the case before the Court as no such question arose before the Court and no arguments appear to have been addressed to the Supreme Court or to the High Court of Allahabad on this aspect of the matter. It is not permissible to me, sitting as a single Judge of the High Court, to comment on the above quoted view expressed by the Supreme Court. The Apex Court itself has observed in a catena of cases decided by it that the observations made by the Court not necessary for disposal of the matter before it will not constitute 'law declared' under Article 161 of the Constitution and will not bind as a precedent. In paragraph 6 of the judgment in the case of Raipur Ruda Meha v. State of Gujarat, , the Hon'ble Mr. Justice Fazal Ali observed as under at Pages 1708 (of AIR):--

'Neither in the application for adducing additional grounds or in the order of the Court directing the matter to be placed before the Constitution Bench, there was any reference to the validity of S. 384 of the Cr. P. C. Neither was it pleaded during the arguments that S. 384 of the Cr. P. C. is ultra vires of the Constitution. As the question of validity of S. 384 of the Cr. P. C. was neither raised nor argued, a discussion by the Court after 'pondering over the issue in depth would not be a precedent binding on the Courts. The decision is an authority for the proposition that R. 15(1)(c) of O.XXI of the Supreme Court Rules should be read down as indicated in the decision.'

In Madhav Rao Jivasi Rao v. Union of India , the Hon'ble Mr. Justice J. C. Shah observed as under at page 578 (of AIR):--

'The question as to the jurisdiction of the Courts to entertain a claim for payment of Privy Purse did not fall to be determined in Nawab Usman Ali Khan's case, . The only question raised was whether the Privy Purse was not capable of attachment

in execution of the decree of a Civil Court, because of the specific exemption of political pensions under Section 60(1)(g) of the Code of Civil Procedure. In Kunwar Shri Vir Rajendra Singh's case, the Court did not express any opinion that Article 366(22) was a provision relating to a covenant within the meaning of Article 363. In that case the petitioner who was not recognised as a Ruler by the President abandoned at the hearing of his petition his claim to the privy purse payable to the Ruler of Dholpur, and pressed his claim by succession under the Hindu Law to the private property of the former Ruler. The Court was not called upon to decide and did not decide that Article 366(22) was a provision relating to a covenant within the meaning of Article 363. It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.'

In paragraph 546 of his judgment *A.D.M. Jabalpur v. S. Shukla*, the Hon'ble Mr. Justice P. N. Bhagwati, while analysing the well known Privy Purse case reported in , observed that the observations of a Judge in a judgment must be related to the precise issues before him.

19. In *Dalbir Singh v. State of Punjab*, A. P. Sen, J. in his minority judgment, in paragraph 22. Observed as under:--

'It is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi.'

With all respect, it appears to me to be too obvious that the case before the Supreme Court in *Krishna Singh v. Mathura Ahir* (supra) was not decided on the basis that personal laws were not subject to fundamental rights, but was decided on the basis that the traditional law could not operate in view of established customs and usage to the contrary.

20. The learned Advocate General has rightly relied on several passages from various standard works on Hindu Law and Mohammedan Law in support of his

submission that custom is a source of personal law. Chapter III of Mayne's Treatise on Hindu Law and Usage, 11th Edition, deals with the subject of custom as a source of Hindu Law. At page 57 of Mayne's Hindu Law, it is observed as under:--

'As the already been pointed out, the Smritis and Digests were largely based upon customary law.... Even where a custom exists in derogation of the law laid down in the Smritis, it is none the less a source of law governing the Hindus, The Smritis repeatedly insist that custom must be enforced and that they either override or supplement the Smriti rules.'

It is clear from the above passages and from reading of Chapter III of the said works that custom is an important source of traditional personal law and it is so recognised by judicial decisions as well as legislations. Paragraph 35 of Chapter III of the said work reads as under:--

'Fullest effect is given to custom both by Courts and by legislation: The judicial committee in the Ramnad case said: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of the law'.'

21. Reference may be made to Mulla's Principles of Hindu Law, 16th Edition, by Shri S. T. Desai at page 56. The learned author has rightly described custom as a source and constituent part of law. At the said page, the learned author has inter alia observed as under:--

'Ancient custom is generally regarded as a just foundation of many laws in every system of jurisprudence ... '

22. In case of Mohammedan Law also, custom is well recognised source and foundation of personal law.

23. It is well settled that custom or usage having force of law must yield to fundamental rights and operate subject to the overriding provision of Article 13 of the Constitution. The question to be asked is: Did the Constitution framers intend that customary law should operate subject to Article 13 of the Constitution but not the personal laws of which one of the major source is custom? To my mind, with

respect, the answer to the question is too obvious and the Constitution-framers did not intend to exclude personal laws from ambit of Article 13 of the Constitution. It is not necessary to emphasise that the Court must avoid an interpretation which would create anomaly as far as possible.

24. In view of the above discussion, I direct that the papers be placed before the Honourable Chief Justice. I recommend that the Honourable Chief Justice may kindly consider constituting a larger Bench of at least three Judges to decide the questions referred to in paragraph 1 of this order of reference in public interest as in my opinion, with respect, the Division Bench judgment of our High Court in Narsu Appa Mali's case does not lay down the law correctly and the observations of the Supreme Court on the subject do not amount to 'law declared' under Article 141 of the [Constitution of India](#).

25. I am thankful to the learned Advocate General who has given considerable assistance to the Court in this matter.

26. Issue of certified copy expedited.

27. Order accordingly.