IN THE HIGH COURT OF TRIPURA
AGARTALA

WP(C) NO.170 OF 2012

Smti. Laxmi Mog,
wife of late Thaingya Mog,
Ex. Constable, Vill & P.O. Kalashi,
P.S. Baikhora, Belonia, District : South Tripura

.....Petitioner

– Vs –

1. The State of Tripura,
represented by Secretary,
Home Department,
Government of Tripura,
P.O. Kunjaban,
Agartala, Tripura West

2. The Director General of Police,
Government of Tripura, Agartala,
Near Fire Brigade Office,
P.O. Agartala, District : West Tripura

3. The Superintendent of Police,
South Tripura, Udaipur,
P.O. R.K. Pur, District: South Tripura, now Gomati

4. The Accountant General (A& E) Tripura, Agartala,
P.O. Kunjaban, Agartala, West Tripura

5. The Senior Accounts Officer,
Office of the Senior Deputy Accountant
General(A&E),Tripura,
P.O. Kunjaban, Agartala, West Tripura

6. Smti. Chaingoyen Mog,
wife of late Thaingya Mog, Ex. Constable,
Vill & P.O. Kalashi, Baikhora, District: South Tripura

.....Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. K. Roy, Advocate

For the respondents : Mr. B. Dutta, Advocate
Mr. A. Roy Barman, CGC
Mr. R.C. Debnath, Advocate

Date of hearing & order : 25.08.2015

Whether fit for reporting :

Yes	No

JUDGMENT & ORDER (ORAL)

Heard Mr. K. Roy, learned counsel appearing for the petitioner as well as Mr. B. Dutta, learned State counsel for the respondent Nos. 1, 2 and 3, Mr. A. Roy Barman, learned CGC appearing for the respondents No. 4 and 5 and Mr. R.C. Debnath, learned counsel appearing for the respondent No.6.

2. Here is a dispute which arises for adjudication before this court under its extraordinary jurisdiction in terms of Article 226 of the Constitution between two ladies who have claimed to be the wives of one Thaingya Mog who died on 20.11.2008. Late Thaingya Mog was serving as a Constable under the Department of Home. After his death a survival certificate was issued by the Sub-Divisional Magistrate, Shantirbazar, South Tripura under No. F.(2)/SDM/STB/SFC/2007/75 dated 22.09.2009 referring the petitioner as well as Smt. Chaingoya Mog, the respondent No.6 respectively as the second wife and the first wife of late

Thaingya Mog. However, named of their children are also incorporated in the said survival certificate. So far the status of the children are concerned there is no dispute. Even according to Mr. Roy, learned counsel appearing for the petitioner, no dispute exists between the petitioner and the respondent No.6, as they have arrived at an amicable settlement. Both of them are agreeable to share the pension equally. Even some amount, out of the DCRG and other retiral benefit, was released to the petitioner without any objection from any parties. But when the question of release of the pension emerged, despite the declaration filed by the respondent No.6 and others that the petitioner is the second wife of late Thaiongya Mog, the Accountant General, Tripura has raised objection by the communication dated 14.07.2010 (Annexure-R-1 to the counter-affidavit filed by the respondent Nos. 1, 2 and 3). From the office of the Senior Deputy Accountant General (A&E), Tripura. It has been communicated that in terms of the provisions of CCS (Pension) Rules, 1972 which has been adopted by the Govt. of Tripura, the second wife cannot be granted any family pension as the second wife is not a legally married wife under the Hindu Marriage Act, 1955. Marriage by a Hindu after the commencement of Hindu Marriage Act, 1955, during the life-time of the first wife, will be a nullity and will have no legal effect. From the office of the Accountant General, Tripura, it has been

clearly opined that only the first wife, the respondent No.6 would be entitled to receive the family pension on account of death of late Thainga Mog, Ex-constable of police.

3. Mr. K. Roy, learned counsel has referred to the provision of Rule 54(7)(a)(i) of the CCS (Pension) Rules, 1972 which, however, provides that where the family pension is payable to more widows then one, the family pension shall be paid to the widows in equal share. According to Mr. Roy, learned counsel appearing for the petitioner, since late Thaingya Mog had left two widows, both the widows are entitled to get equal share of the pension of late Thaingya Mog.

4. It is not in dispute that both the petitioner and the respondent No.6 filed an application to the Superintendent of Police, South Tripura, Udaipur for release of their pension and other retiral benefits on account of late Thaingya Mog. Later on, one Deputy Secretary to the Govt. of Tripura, by the communication dated 27.11.2010 written to the Director General of Police, West Tripura Agartala (Annexure R-5 to the counter-affidavit), observing that the Law Department opined that the second wife will not be entitled to the family pension as she is not the legally wedded wife. However, the 'rival-claimant' may get her right, if it is established in the court of competent Jurisdiction.

5. By filing a separate affidavit, the respondents No. 4 and 5 stood by what they opined by their said communication dated 14.07.2010. They have categorically asserted that the second wife, the petitioner herein, cannot be considered as the legally married wife and as such she is not entitled to get any share of the pension scheme or any part of retiral benefits. Mr. Roy, learned counsel has submitted that according to the customary laws prevailed in the 'Mog' community, the polygamy is permitted and as such what has been observed by the office of the Accountant General, Tripura, that in terms of the Hindu Marriage Act, the second wife cannot be considered as the legally married wife is not applicable so far the petitioner is concerned. They are not strictly Hindu in terms of the Hindu Marriage Act. In support of his contention, he has relied a decision of the apex court in **Surajmani Stella Kujur vs. Durga Charan Hansdah,** reported in **AIR 2001 SC 938**. In that case, the question that had fallen for consideration of the apex court is that where by the customary laws, the bigamy is permitted whether for contracting the second marriage, someone can be prosecuted or convicted under Section 494 of the IPC. The conclusion was that in case someone fails to prove that under the customary laws the bigamy is not prohibited, or the customary laws does not prohibit solemnisation of the second marriage, no offence of bigamy cannot be held to have

been proved. While coming to that conclusion, the apex court has observed on considering the various provisions of Hindu Marriage Act, and the Hindu Succession Act read with the General Clauses Act as under:

> **2. Who is a "Hindu" for the purposes of the applicability of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") is question of law to be determined in this appeal.**
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> **3. Section 2 of the Act specifies the persons to whom the Act is applicable. Clauses (a), (b) and (c) of sub-section (1) of Section 2 make the Act applicable to a person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj and to persons who is a Buddhist, Jaina or Sikh by religion. It is also applicable to any other person domiciled in the territories of India who is not a Muslim, Christian, Parsi or Jew by religion. The applicability of the Act is, therefore, comprehensive and applicable to all persons domiciled in the territory of India who are not Muslims, Christians, Parsis or Jews by religion.**
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> **4. The term "Hindu" has not been defined either under the Act or Indian Succession Act or any other enactment of the Legislature. As far back as in 1903 the Privy Council in Bhagwan Koer v. J. C. Bose, (ILR (1904) 31 Calcutta 11) observed:**
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> **"We shall not attempt here to lay down a general definition of what is meant by the term "Hindu' to make it accurate and at the same time sufficiently comprehensive as well as distinctive is extremely difficult. The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the Chamaras who profess Hinduism, but who eat beef and the flesh of dead animals, are however low in the scale included within its pale. It is easier to say who are not Hindus, not practically and separation of Hindus from non-Hindus is not a matter of so much difficulty. The people know the differences well and can easily tell who are Hindus and who are not."**

5. The Act, is, therefore, applicable to:

"(1) All Hindus including a Virashaiva, a Lingayat, a Brahmo, Prarthana Samajist and an Arya Samajist.

(2) Buddhists
(3) Jains
(4) Sikhs"

6. In this appeal the parties are admittedly tribals, the appellant being an Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a further notification in terms of sub-section (2) of Section 2 of the Act. It is not disputed before us that in the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two Tribals, who otherwise profess Hinduism, but their marriage being out of the purview of Hindu Marriage Act, 1955 in light of Section 2(2) of the Act, are thus governed only by their Santal Customs and usage."

7. The appellant has, however, relied upon an alleged custom in the Tribe which mandates monogamy as a rule. It is submitted that as the respondent has solemnised a second marriage during the subsistence of the first marriage with the appellant, the second marriage being void, the respondent is liable to be prosecuted for the offence punishable under Section 494 of the Indian Penal Code.

8. No custom can create an offence as it essentially deals with the civil rights of the parties and no person can be convicted of any offence except for violation of law in force at the time of commission of the act charged. Custom may be proved for the determination of the civil rights of the parties including their status, the establishment of which may be used for the purposes of proving the ingredients of an offence which, under Section 3(37) of the General Clauses Act, would mean an act or omission punishable by any law by way of fine or imprisonment. Article 20 of the Constitution, guaranteeing protection in respect of conviction of offence, provides that no person shall be convicted

of any offence except for violation of law in force at the time of commission of the act charged as an offence. Law under Article 13 Clause (3) of the Constitution means the law made by the Legislature including intravires statutory, orders and orders made in execise of powers conferred by the statutory rules.

8. The expression "custom and usage" has been defined under Section 3(a) of the Act as:

"the expression 'custom' and 'usage' and rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family;

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family."

9. For custom to have the colour of a rule or law, it is necessary for the party claiming it to plead and thereafter prove that such custom is ancient, certain and reasonable. Custom being in derogation of the general rule is required to be construed strictly. The party relying upon a custom is obliged to establish it by clear and unambiguous evidence. In Ramalakshmi Ammal v. Sivnatha Perumal Sethuraya, (1870-72) 14 Moo. Ind. App 570 at P. 585) held:

"It is of the essence of special usage modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

10. <u>This Court in Mirza Raja Pushpavati Vijayaram Gajapathi Raj v. Pushavathi Visweswar Gajapathiraj Rajkumar of Viziangram (AIR 1964 SC 118) again reiterated the same position of law regarding the establishment of custom upon which a party intends to rely.</u>

11. The importance of the custom in relation to the applicability of the Act has been acknowledged by the Legislature by incorporating Section 29 saving

the validity of a marriage solemnised prior to the commencement of the Act which may otherwise be invalid after passing of the Act. Nothing in the Act can affect any right, recognised by custom or conferred by any said enactment to obtain the dissolution of a Hindu Marriage whether solemnised before or after the commencement of the Act even without the proof of the conditions precedent for declaring the marriage invalid as incorporated in Section 10 to 13 of the Act.

12. In this case the appellant filed a complaint in the Court of Chief Metropolitan Magistrate, New Delhi stating therein that her marriage was solemnised with the respondent in Delhi "according to Hindu rites and customs". Alleging that the respondent has solemnised another marriage with the Accused No. 2, the complainant pleaded:

"That the accused No. 1 has not obtained any divorce thro' the Court of Law upto this date and hence the action of the accused No. 1 is illegal and contravene the provision of law as laid down under Section 494, I.P.C."

13. Nowhere in the complaint the appellant has referred to any alleged custom having the force of law which prohibits the solemnisation of second marriage by the respondent and the consequences thereof. It may be emphasised that mere pleading of a custom stressing for monogamy by itself was not sufficient unless it was further pleaded that second marriage was void by reason of its taking place during the life of such husband or wife. In order to prove the second marriage being void, the appellant was under an obligation to show the existence of a custom which made such marriage null, ineffectual, having no force of law or binding effect, incapable of being enforced in law or non-est. The fact of second marriage being void is a sine qua non for the applicability of Section 494, I.P.C. It is settled position of law that for fastening the criminal liability, the prosecution or the complainant is obliged to prove the (sic) The appellant herself appears to be not clear in her stand inasmuch as in her statement in the Court recorded on 24th October, 1992 she has stated that "I am a Hindu by religion." The complaint was dismissed by the trial Court holding, "there is no mention of any such custom in the complaint nor there is evidence of such custom. In the absence of pleadings and evidence reference to Book alone is not sufficient." The High Court vide the judgment impugned in this appeal held that in the absence of notification in terms of sub-section (2) of Section 2

> **of the Act no case for prosecution for the offence of bigamy was made out against the respondent because the alleged second marriage cannot be termed to be void either under the Act or any alleged custom having the force of law.**
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> **14. In view of the fact that parties admittedly belong to the Scheduled Tribes within the meaning of Clause (25) of Article 366 of the Constitution as notified by the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990 passed in terms of Article 342 and in the absence of specific pleadings, evidence and proof of the alleged custom making the second marriage void, no offence under Section 494 of the Indian Penal Code can possibly be made out against the respondent. The Trial Magistrate and the High Court have rightly dismissed the complaint of the appellant.**
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> **15. Learned Counsel appearing for the appellant, however, submitted that even if the second marriage was not void for the purposes of attracting the applicability of Section 494 and holding the respondent guilty of bigamy, the appellant is entitled to maintenance, succession and other benefits on account of her being the legally wedded wife of the respondent. We cannot adjudicate upon such a proclaimed right of the appellant. The appellant is at liberty to get her right established by way of civil proceedings in a competent Court of jurisdiction. If any such proceedings are initiated, the same would be decided on their merits in accordance with the principles of pleadings and proof, not being influenced by any of the observations made by the trial magistrate or the High Court."**

6. Mr. Roy, learned counsel has further relied on a decision of the Gauhati High Court, Agartala Bench which then was exercising its jurisdiction in the State of Tripura in **Chelfru Mog vs. State of Tripura and Others** reported in **(2000) 2 GLR 604**. In that case the High Court considered whether violation of Rule 21 of the Tripura Civil Services (Conduct) Rules, 1988 was a misconduct

for an officer from the Mog community or can he be punished? Rule 21 of the Tripura Civil Services (Conduct) Rules, 1988 provides that:

> **"(1) No Government employee shall enter into, or contract, marriage with a person having a spouse living; and**
>
> **(2) No Government employee having a spouse living, shall enter into, or contract, a marriage with any person;**
>
> **Provided that the Government may permit a Government employee to enter into, or contract, any such marriage as is referred to in Clause (1) or Clause (2) if it is satisfied that-**
>
> **(a) such marriage is permissible under the personal law applicable to such Government employee and the other party to the marriage; and (b) there are other grounds for so doing;"**

Having regard to that provisions of law, the Gauhati High Court has observed as under :

> **"Rule 21 of the rules as such does not appear to be absolute. It leaves certain discretion on the Government to give permission on judging the fact situation as indicated in Clause (a) and (b) above. It is the Government alone who is to judge the situation keeping in mind the personal law applicable to the employee and the other parties and other analogous grounds. The rule requires a permission to be obtained/granted by the Government. It may be prior or ex-post facto. It does not indicate that such permission must always be prior permission as was held by the appellate authority. Rule 21 of the rules at least does not indicate that such permission has to be always confined to prior permission. The rule only confers the discretion on the Government for granting permission. The discretion reposed is not arbitrary discretion. The discretion is to be exercised justly, reasonably and fairly and that must conform to the spirit of the law by assigning reason so that discretion exercised does not turn in to an abuse or misuse of its power. Rule 21 of the rules has its own meaning and content that speaks of restraint and discipline. The provision is obviously used to maintain the discipline in the establishment as well as to retain the peace and harmony of the society. The provision is to be interpreted balancing the relevant factors of discipline and control in the establishment, family peace, the facts situations etc."**

7. According to Mr. Roy, learned counsel, in the Mog community bigamy is permitted and both the widows, the petitioner and the respondent No.6, are living together with their children and there is no social prohibition against them.

8. From the other side, Mr. B. Dutta, learned counsel has stoutly refuted such claim. According to Mr. Dutta, learned counsel that in a writ proceeding the court cannot come to a finding whether in the Mog community, bigamy is permitted or not because for the customary laws of the Mog community there is no codified instruments available in the State of Tripura and as such even if the customary law permits a Mog male to contract second marriage during subsistence of his first marriage that has to be established in the competent civil court where necessary evidence has to be laid. But, Mr. Dutta, learned counsel has submitted that there is no ambiguity in the Rule 54 of the Central Civil Services (Pension) Rules,1954. According to Mr. Dutta, learned counsel, sub rule 7(a)(i) has been provided to cover the widows whose marriages were contracted before the Hindu Marriage Act, 1955 was enacted. In that case, only in case of more than one widow, the pension would be equally distributed, but if the marriages are contracted after the introduction of Hindu Marriage Act, 1955, sub rule 7(a)(i) does not have any application. In that case only the first wife would be

entitled, not the second or third wive, even if they are living peacefully under the same roof.

Mr. Dutta, learned counsel has further submitted that in the case of **Rameshawari Devi vs. State of Bihar** reported in **AIR 2000 SC 735,** the apex court has unequivocally held that only the legally married first wife would be entitled to get the pension, not the other lady.

9. Mr. Roy Barman, learned Central Government Counsel has submitted that according to Rule 54 of the Central Civil Services (Pension) Rules, 1972 as adopted in the State of Tripura, the petitioner is not entitled to get any pension. Only the respondent No.6 is entitled to get, as undisputedly she is the legally married wife of the deceased constable of police.

10. Having regard to the rival contentions, projected by the learned counsel for the petitioner and the respondents, this court has scrutinised the records carefully. It is true that both the petitioner and the respondent No.6, by making a joint application raised their claim for the pension. Even in the declaration filed through the respondent No.6, the petitioner has been shown as “the second wife” of the deceased, Thaingya Mog. Whether this claim advanced in the form of declaration or by filing a representation is adequate enough to show that as per the customary law as prevailed in the Mog community, which is

recognised in the State of Tripura as the Scheduled Tribe in terms of Article 142 of the Constitution of India, the bigamy is permitted in the Mog community. The answer must be in the negative.

11. Mr. Roy, learned counsel appearing for the petitioner has candidly admitted that the customary laws prevailed in the Mog community has not been codified as yet. These are the oral traditions which are usually followed by the community. In absence of any codified law, it is not expected that such prescription should be followed by the Government Officers. The exception has been culled out in Rule 27 of the Tripura Civil Services (Conduct) Rules, 1988 which has left the space for the male to practice the bigamy if permitted by the community only on taking prior or the ex post facto permission from the competent authority, if he is a govt. employee. Only by taking permission, a tribal officer, who is an employee may contract bigamy. He can in the eventuality only escape the departmental action for committing mis-conduct, otherwise the Rule 21(1) would equally be applicable even to the tribal officer or the employee for contracting or practising bigamy. What the apex court has observed in **Surajmani Stella Kujur vs. Durga Charan Hansdah** is of far more consequential. It has been observed that there must be specific pleading and that pleading must be a establish by leading adequate evidence firstly, to

establish that the customary laws permit a member of that community which is recognised as the scheduled tribe to practice bigamy and secondly, that he has practised bigamy in terms of the customary law, meaning that he can only practise bigamy within that community which has permitted and the marriage must be confined to that community only. A person from the particular community cannot contract the second marriage or the multiple marriage outside his community. Otherwise, the customary laws will have no force to allow him to escape the provisions of the general law either in the penal code or any other subsidiary or the fundamental rules.

12. Having regard to all these aspects, this court is of the view that the petitioner cannot claim as a matter of right that she is entitled to receive the pension with the respondent No. 6 in equal share and accordingly this petition is dismissed.

However, liberty is reserved for the petitioner to approach the competent civil court to establish that the bigamy is permitted in the Mog community and Thaingya Mog, since deceased, had married her in terms of the customary law. If that is so established, in the considered opinion of the court, Rule 54(7)(a)(i) shall equally be applicable for the petitioner and the respondent No.6. Thus, when the pension would be released in favour of the respondent No.6, the respondent Nos. 1, 2 and 3 shall obtain an indemnity bond in terms of Section 125 of the

Indian Contract Act from the respondent No.6 that if any civil court of the competent jurisdiction declared the status of the petitioner as the legally wedded wife of Thaingya Mog in terms of the customary laws prevalent in the Mog community, in that event the respondent No.6 shall share the pension equally with the petitioner and she must give the half portion of the pension, by that time, she would receive through the petitioner. However, if there is no difficulty for the respondent No.6 to share his pension with the petitioner, she may share the same informally. But no order can be passed in this respect by this court for the reasons as stated above.

There shall be no order as to costs.

JUDGE

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Moumita