Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Case Comment: Shafin Jahan vs Ashokan K.M: The Right to Marry

Bhaskar Vishwajeet[a]

[a]OP Jindal Global University, Sonipat, India

Received 19 April 2022; *Accepted* 07 May 2022; *Published* 13 May 2022

INTRODUCTION

Marriage has always been central to human existence. The act of union cuts through constructions of society like class, caste, wealth, etc. The universality of marriage is part of higher human ambition. This ambition can be better understood as a pursuit of 'human character'. A major desire in this quest for gratification or happiness is marriage. It is a key to the many locks of ambition that one desires to flaunt or possess as a member of society. In that vein, marriage is also not singular in meaning, it has a plural character to it. One of the merits of human progress has been the development of the rule of law and institutions which protect interactions. Contemporary society thus, owing to its **mechanised** nature, wants to manifest civil rights by way of marriage, i.e. state benefits like joint-property ownership, tax incentives, etc. Further, marriage is the fulfillment of the desire for expression. Every individual wants to express their will to their society, marriage being foremost in solidifying an identity for others to reckon with. Religion is also important to this ordeal as it is considered a pivot for everyone. Marriage is an extension of one's faith's teachings, Hindu law considers it a sacrament, not a

civil contract. One desires religious affirmation to reinforce their identity and be satisfied. In a civilised society, everyone has an equal right to desire these. Thus, marriage is an operation of life, liberty, and dignity. Marriage although, has never been devoid of patriarchal regulation. **Sylvia Walby** defines patriarchy as a "system of social structures based on power relations between men and women, with the men dominating." These power relations have been an integral part of the culture of marriage in India as well. Their **institutionalisation** is sinister, as the message then, is of creating an objective standard. Such skewed standards have no place in the distribution of justice, for justice aims to minimize their effect. It is also important that we must create safeguards, to at least question them.

BACKGROUND

In ***Shafin Jahan v Ashokan K.M.***[1], the apex court had been tasked with investigating a possible question of forced consent. ***Akhila Ashokan*** (later Hadiya Jahan) was the daughter of **K.M. Ashokan**. She converted to Islam during her internship at a homeopathy institute in Coimbatore. At the age of 25, she married a Muslim man, Shafin Jahan. On knowing this, her father, Ashokan moved to the High Court to file a writ of *habeas corpus (a writ to produce one's person)*, requesting the production of his daughter on the ground that her marriage was not valid and that she had been confined by Shafin Jahan. The High Court's division bench **rejected** his writ petition on finding that Hadiya (the erstwhile Akhila) had married Shafin Jahan of her own volition and had converted to Islam as a right. This was a practice of the right of self-determination and as such Shafin Jahan cannot be ordered to restore her to Ashokan as he had not confined her in the first place. Following this, Ashokan filed a **second** writ petition of habeas corpus, stating that his daughter had been coerced to consent to conversion to Islam as a part of a *greater plot* by certain groups and that she could be transported out of the country. The High Court taking cognizance of this placed Hadiya under surveillance. Her marriage to Shafin Jahan was of great importance in the course of this surveillance and investigation into her alleged forced conversion. The Kerala High Court invoked its authority under the doctrine of *parens patriae* and annulled the marriage (making it that the marriage did

[1] *Shafin Jahan v Ashokan K.M. & Ors.* (2018) Criminal Appeal No. 366/2018

not happen in the first place) between Shafin and Hadiya (Akhila). Stating that her being **24**makes her '**weak'** and '**vulnerable' to exploits.** Shafin Jahan filed an appeal against the annulment in the Supreme Court. The Supreme Court bench, comprising **ChiefJusticeArun Mishra and Justices, A.M. Khanwilkar, and D.Y. Chandrachud**heard the appeal. It was held that the Kerala High Court had **over-exercised its jurisdiction and was not right** to annul the marriage and in accepting the second habeas corpus plea to the extent it did. The bench also restored Hadiya's marriage with Shafin Jahan. The fundamental canvas of the Supreme Court's verdict can be traced to personal laws. Namely, the Hindu Marriage Act, Mahomeddan personal laws, and the Special Marriage Act of 1954 (which permits interreligious and inter-caste marriages), which categorically speak about the age of majority and consent. In the **Hindu Marriage Act, Section 5**[2] lays down a requirement of capacity to give consent (5(a) and 5(b))[3] and a minimum age of majority for the bride, which is 18. Mahomedan or Muslim law considers a marriage or *nikah* to be a contract, for an offer of marriage there must be an acceptance at the same instance. It requires both parties to be adults and to act **out of their free will**. Lastly, the **Special Marriage Act** in **Section 4**[4] states that neither party to a marriage should be insane, below the age of majority (**18**) in a woman's case, and suffering from a mental disorder when considering consent. These personal laws are laying down an objective metric to assess the quality of consent and capacity of an individual, a fact which eludes the Kerala High Court when it accepts Ashokan's plea.

ANALYSIS

In the interlocutory stage, the Kerala High Court, while it was right in practising **Article 226**[5] of the Constitution (a provision which allows High Courts to issue writs such as habeas corpus), produced Hadiya to gain clarity on the facts of her marriage, made a significant error in **expanding this practice of authority to further probe the marriage and its operation**. The origins of this 'over practice can be traced to Hadiya's father, Ashokan's pleas (**Respondent 1**) in the court. They were based on the *alleged affection* he shared with his daughter and how she

[2] Hindu Marriage Act, 1955, s 5
[3] Hindu Marriage Act, 1955, s 5(a), and 5(b)
[4] Special Marriage Act, 1954, s 4
[5] Constitution of India, 1950, art. 226

should have consulted with her parents before proceeding with the conversion and marriage. The court was seemingly oblivious to the fact that Ashokan was influenced by the social discourse around a conspiracy and made that plea. The Supreme Court was right in taking note of this and striking it down as conjecture. That Ashokan pleaded for her to be returned and that she should have asked for their permission before marrying is an unfortunate display of the over-protective intent practised by families which have girl children. Every facet of the girl's life is *controlled and determined* by the patriarchal head of the family. This was reinforced with the later realized (second plea) notion of the risk of social radicalization. The Kerala High Court seems to have missed the letter and spirit of the personal laws which affirmed Hadiya's choice as she was a major of sound mind and accepting the second writ of habeas corpus to continue the investigation was a glaring error and a blot on constitutional authority, instead it confirmed Ashokan's beliefs. Even surprising was the link that the High Court drew, between the **second** habeas corpus petition and the *welfarist approach* under the *Parens Patriae* jurisdiction. The *Parens Patriae*doctrine, which is only reserved for **exceptional** cases that concern the **capacity** of individuals who may not be majors or are mentally sound, should **not** have been exercised in Hadiya's case. Hadiya was well above the age of majority (24) and had been cleared by a psychiatric evaluation as mentally sound, a testament to her unequivocal expression of her choice and autonomy to marry Shafin and convert. Parens patriae enables courts to act as guardians in certain cases where public interest has to be secured. It is provided for by the Indian Constitution and its preamble.

This guardianship cannot be abused at the expense of abandoning the very fact which invokes it, that is capacity. Saying that Hadiya, *despite being 24*, was a weak and vulnerable lady and that its best she remains with her parents was an explicit undermining of her agency. We begin to see hints of *institutionalised patriarchy* here. It manifested itself to thwart the operation of judicial objectivity and to allure the adjudicators to its charms. These charms are **affirmations of power, prestige, and identity** that may provoke the inner father/brother/husband/son to feel responsible and act, often surpassing standards. On *Parens Patriae* therefore, the Supreme Court said that this was an inaccurate estimation of the extent to which the doctrine operates

and that it must also survive the constitutional test of privacy under Article 21.[6] On developing the discourse around the **right to marry**, the court held that the excess of annulling Hadiya's marriage was **inapposite** to Article 21 of the Constitution. The apex court quoted from the **Puttuswamy**[7] judgement, a landmark case that read the *right to privacy* into **Article 21** (the right to life, personal liberty, and dignity). The Supreme Court said that an extension of the right to privacy was the right to marry a person of one's choice. At the same time, a learned addition to this was the backing provided by **Article 25**[8] that one has the right to profess, practice, and propagate religion. This caveat strengthened the fact that Hadiya's choice in both realms, that is, in *marriage and converting to religion* was **sacrosanct** and that her consent was inviolable.

CONCLUDING REMARKS

The astute manner in which the Supreme Court set aside the Kerala High Court's judgement and reinstituted Hadiya and Shafin's marriage is a welcome sight in Indian jurisprudence. There have been numerous instances when reading of legislative intent has hindered the judiciary's intent to 'innovate' and expand provisions for all. Most recently, in *Abhijeet Iyer Mitra v Union of India*[9], the Solicitor General, arguing for the Central Government, said that marriage was only between heterosexual people and only a biological man and woman could marry. Such statements indicate the tension which the authorities have with the law and the great strides which have been taken concerning the right to marry. ***Shafin Jahan v Ashokan K.M.*** is a watershed moment in common law precedents, for it has the potential to rewrite the definition of family. A wider definition will enable the courts to be more perceptive and open the gates of matrimony for many more. For that though, these anxieties between legislative intent and the law will need to be ironed out. The push for same-sex marriages could also gain support by resounding the merits of Shafin Jahan and the fundamental right to marry, as the

[6] Constitution of India, 1950, art. 21

[7] *Justice K.S.Puttaswamy (Retired). v Union of India And Ors.* (2017) Writ Petition (Civil) No. 494/2012

[8] Constitution of India, 1950, art. 25

[9] *Abhijit Iyer Mitra and Ors. v Union of India* (2022) Writ Petition (Civil) No. 6371/2020

decriminalization of Section 377[10] has still left those who want to get married hanging, uncertain about the validity of their marriage. At the same time, anti-conversion ordinances[11] being introduced in states to prevent conversion for marriages may be rendered void when tested for constitutionality, as they seem to dilute consent according to the same lines as the Kerala High Court in this case. The logic seems to be the preservation of culture. Rather, the intent of anti-conversion regulations seems to be a *manufacturing of consent*, an idea again at odds with Article 21. Eventually, any conduct-based right that is an extension of Article 21 must be perceived from a layered lens of individual identity. That is to say a person's individuality and positioning in their immediate surroundings are of utmost importance in adjudicating possible violations of their rights. Academia has accounted for such an approach by furthering critical studies of gender, race, etc. The law, however, needs to broaden its recognition of identity. In a bid to modernise and simplify judicial infrastructure, the substantive content of our laws also needs to harmonise the inherent conflicts concerning one's societal position. In this regard, an intersectional layover of identity will facilitate the judiciary's understanding of the various strands of influence that may lead to fundamental right violations.

[10] Indian Penal Code, 1860, s 377
[11] Himachal Pradesh Freedom of Religion Act, 2019