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# The Significance of Arun kumar V. Inspector General of Registration's Case in the Indian Society

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JAY GAJBHIYE<sup>1</sup>

## ABSTRACT

*“The case of Arunkumar v. Inspector General of Registration is the first judgment in India where the right to marry under Article 21 of the constitution has been affirmed for transgender persons and holding that ‘bride’ under the Hindu Marriage Act would cover transgender persons who identify as women. The Court affirmed Ms. Sreeja’s self-identification as a woman and recognized her right to self-identify her gender and be included, along with other intersexes/transgender persons who identify as women, within the definition of “bride”. It noted the violation of her fundamental rights by the State authorities that refused to register her marriage. As such, the current litigation strategy for gender diverse litigants is to continue perpetuating the myth that sex is fixed and inevitable, and, therefore, rightly and morally justifiable when persons of one sex or the other are discriminated against based on this unalterably fixed identity.”*

**Keywords:** Transgender, Bride, Equality, Hindu, NALSA, Discrimination, Self-determination.

## I. BACKGROUND OF THE CASE

Mr. Arunkumar married Ms. Sreeja in a temple in Tuticorin (Tamil Nadu). Arunkumar was assigned male at birth whereas Sreeja was born with an intersex condition. While she was assigned gender female at birth, at school she was registered as male and had a male name. In her Aadhar card, her identity was displayed as transgender. Arguably, her socially perceived gender was that of male and that is why even though her birth certificate records her gender as female when she adopts a female name and marries a man the issue becomes one of transgender marriage and not marriage between two persons of different sexes in the case. The marriage was performed according to Hindu rites and customs and certified as validly performed by the administrative officer of the village. However, the temple authorities declined to vouch for the marriage. This fact raises some questions. Whose authorization: the administrative officer’s or the temple authorities, is necessary to claim that marriage is performed as per Hindu rites and customs. This question is not raised in the case but given

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that the judgment does not question the validity of the marriage on this count, arguably, a marriage can be said to perform according to Hindu rites and customs even if just the administrative officer (not usually an authority on religious rites) certifies it so in opposition to the temple authorities. Moving ahead from this digression, the couple was required to register their marriage as per “Rule 5(1)(a) of the Tamil Nadu registration of Marriage Rules, 2009”<sup>2</sup>. When they approached the Joint Registrar for the same, he opposed to registering it. The couple met with a similar refusal when they appealed their decision before the Registrar of the District. They challenged the decision of the Registrar in a writ of mandamus filed in the Madras High Court.

The learned Government Advocate appearing for the respondents submitted that “Section 7 of the Tamil registration of Marriages Act, 2009”<sup>3</sup> confers power to the registrar of marriages to refuse registration. He could do so if he is satisfied that the marriage between the parties was not performed as per the personal laws of the parties, any custom or usage, or tradition. As per “Section 7(1)(c)”<sup>4</sup> of the act, if the documents tendered before the Registrar of Marriages do not prove the marital status of the parties, he can refuse to register the marriage. In this case, the authorities of the temple, where the marriage between the parties was said to have been solemnized, had not issued any certificate indicating the performance of the marriage. He further contended that as per “Section 5 of the Hindu Marriage Act, 1955”<sup>5</sup>, the bridegroom must have completed the age of 21 years while the bride must have completed the age of 18 years at the time of marriage. To understand the meaning of the expression “Bride”, in the order impugned in this writ petition, Oxford Advanced Learner’s Dictionary of Current English was referred to. The term “Bride” can only refer to a “Woman on her wedding day”. In the case, on hand, the second petitioner Sreeja is a transgender and not a woman. Thus the statutory requirement set out in Section 5 of the Hindu Marriage Act, 1955 has not been fulfilled. Therefore, the learned Government Advocate wanted this Court to sustain the orders impugned in this writ petition and dismiss the writ petition.

## **II. ISSUES OF THE CASE**

The primary issue before the Court was whether the term ‘Bride’, as mentioned in Section 5 of the Hindu Marriage Act, 1955 (HMA) meant only women, or included transgender persons as well, given that Sreeja was a transwoman.

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<sup>2</sup> Rule 5(1)(a) of the Tamil Nadu registration of Marriage Rules, 2009- Procedure for Registration of Marriage.

<sup>3</sup> Section 7 of the Tamil registration of Marriages Act, 2009- Power to refuse registration of marriage.

<sup>4</sup> Section 7(1)(c) of the Tamil registration of Marriages Act, 2009- the documents tendered before him do not prove the marital status of the parties.

<sup>5</sup> Section 5 of the Hindu Marriage Act, 1955- Conditions for a Hindu marriage.

- **Who is a “Bride”?**

It was contended on behalf of the authorities that as per Section 5 of the Hindu Marriage Act, 1955, the “bride” must have completed that age of 18 years, and further that the term “bride” can only refer to a “woman on her day of the wedding”. It was contended, that Sreeja is not a woman, but a transgender.

The Court held: “Seen in the light of the march of law, the expression ‘bride’ occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman. The duly consideration is how the person perceives herself.”

- **Ban on sex reassignment surgeries on children**

The Supreme Court in the NALSA case categorically stated that no one shall be forced to undergo medical procedures, including SRS, sterilization, or hormonal therapy, as a requirement for legal recognition of their gender identity. The High Court, however, noticed that the mandate in NALSA Case was not being honored. The Court directed the Government of Tamil Nadu to issue a Government Order to effectively ban sex reassignment surgeries on infants and children. The Secretary to Government, Health, and Family Welfare Department was directed to file a compliance report within 8 weeks.

“Any intersex child is entitled to and must stay within the folds of its family. The running away from the family to the margins and beyond is a fatal journey that must be arrested. Time has come when they are brought back from the margins into the mainstream.”

- **The financial incentive for inter-caste marriage**

The Court noted Arunkumar is a Hindu Kuravan and Sreeja belongs to the Saiva Vellar community. The Government of India has introduced the “Dr. Ambedkar Scheme for Social Integration through Inter-Caste Marriages” to encourage inter-caste marriages. Arunkumar and Sreeja were held to be entitled to get a financial incentive as set out in the said scheme. They were permitted to apply to the Director, Ambedkar Foundation, who shall on being satisfied with their eligibility, disburse the incentive amount.

### **III. PETITIONER’S ARGUMENTS**

- The petitioner’s lawyer argued that gender identity, therefore, lies at the core of one’s identity, gender expression, and presentation and, therefore, it will have to be

protected Under “Article 19(1)(a) of the Constitution of India”<sup>6</sup>. The state cannot prohibit, restrict, or interfere with a transgender’s expression of such personality, which reflects that inherent personality.

- “Article 21”<sup>7</sup> protects the dignity of human life, one’s autonomy, one’s right to privacy, etc. The right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.
- Both the petitioners herein profess Hindu Religion. Their right to practice Hindu Religion is recognized under “Article 25 of the Constitution of India”<sup>8</sup>. The Hindu Marriage Act is a personal law of the Hindus. Therefore, their fundamental right under Article 25 has also been infringed in this case.
- “Article 14”<sup>9</sup> which provides Equality before Law has also been infringed by the authorities by restricting them to marry.

#### **IV. RESPONDENT’S ARGUMENTS**

- The learned Government Advocate argued that Section 7 of the Tamil Nadu Registration of Marriages Act, 2009 confers power to the Registrar of Marriages to refuse registration. He could do so if he is satisfied that the marriage between the parties was not performed as per the personal laws of the parties, any custom or usage, or tradition.
- As per Section 7 (1) (c) of the Act, if the documents tendered before the Registrar of Marriages do not prove the marital status of the parties, he can refuse to register the marriage.
- The authorities of the temple, where the marriage between the parties was said to have been solemnized, had not issued any certificate indicating the performance of the marriage.
- The term “Bride” can only refer to a “Woman on her wedding day”. In the case, on hand, the second petitioner Sreeja is a transgender and not a woman. Thus the

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<sup>6</sup> Article 19(1)(a) of the Constitution of India- All citizens shall have the right to freedom of speech and expression.

<sup>7</sup> Article 21 of the Constitution of India- Protection of life and personal liberty, No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>8</sup> Article 25 of the Constitution of India- Freedom of conscience and free profession, practice and propagation of religion.

<sup>9</sup> Article 14 of the Constitution of India- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

statutory requirement set out in Section 5 of the Hindu Marriage Act, 1955 has not been fulfilled.

## V. LEGAL ASPECTS

- **Fundamental Right to Gender Identity:** Ignoring the first contention, the court focussed on the second one and refused to accept it in the light of the NALSA decision. The NALSA decision had stated that transgender persons have a fundamental right to decide their gender identity as either man, woman, or third gender. Incidentally, the court also found support for this legal proposition in Hindu tradition and cited the story of Aravan and Shikhandi and modern neuroscience of Prof. V.S. Ramachandran which validates the argument of internal and external gender mismatch experienced by the transgender population.

- **Right to Equality:** The court also referenced NALSA to reiterate that the fundamental right to equality was available to “all persons” and not just men and women. Therefore, Article 14 finds discrimination based on gender identity unconstitutional.

- **Dignity and Privacy:** The court also found, following NALSA, that gender identity discrimination offends the fundamental right to dignity and privacy protected under Article 21.

- **Fundamental Right to Gender Expression:** The court also reiterated NALSA in saying that gender expression and presentation are protected under Article 19(1(a) of the constitution, and the State could not “prohibit, restrict or interfere” with a transgender person’s expression of the same.

### **There were two propositions of law and one guiding principle of interpretation.**

1. **The right to marry:** Accordingly, the court ruled that the construction of the word “bride” could not be static and had to be interpreted as per the current conditions. Accordingly, given that transgender persons have the fundamental right to a self-identified gender, “bride” under S. 5 of the Hindu Marriage Act, 1955 should be read to mean not just a person assigned female at birth, but also a transgender or intersex person who identifies as female. It found that “Article 16 of the Universal Declaration of Human Rights”<sup>10</sup> (UDHR)

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<sup>10</sup> Article 16 of the Universal Declaration of Human Rights-

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.

grants men and women the right to marry, and in a recent Supreme Court case [Shafin Jahan, 2018], the Supreme Court had held the right to marry as a fundamental right protected under Article 21. The court also found support for this proposition in the NALSA judgment itself which had predicted that civil rights like marriage could be made available to the transgender population once their gender identity is given due recognition in law.

**2. The freedom of religion:** The court found that denying two practicing Hindus (the petitioners) to marry under Hindu law was a violation of their freedom of religion because it prohibited,

- **Guiding Principle of Interpretation:** The court also noted that the constitution is an enabling document and judged on its standards, it “would be absurd” to deny to the transgender population rights already available to the mainstream.

## VI. COMPARISON WITH DIFFERENT NATIONS

Gender discrimination cases in several other countries also offer ample evidence that litigants succeed in winning their status claims only when they engage in legal argumentation “that trades on heavily normalized conceptions of gender roles”. For example, in the United States, despite the progressive, non-dyadic belief of sex and gender among gender-diverse persons, litigants seeking compensation for sex discrimination in the workplace have paradoxically relied upon the immutability of both categories to win such cases. The “**Price Waterhouse v. Hopkins**”<sup>11</sup> case and ensuing progeny highlighted the pragmatic presentation of transgender litigants before the court. The Supreme Court in *Price Waterhouse* established the sex v. gender dichotomy and associated binaries. All sex discrimination cases have thusly, as a result of precedent, been seated within the gender binary paradigm. Instead of combatting the very categories of gender and sex that led to the discrimination against such gender-transgressing person ab initio, such litigants must rely on sex and gender stereotypes to state a legally justifiable claim. The Supreme Court referred to the US Supreme Court’s decision in “**Obergefell v Hodges**”<sup>12</sup> in which the Court had noted that it would be contradictory to recognize a right to privacy concerning other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in society.

In Australia, similarly, the High Court in “**NSW Registrar Marriages v. Norrie**”<sup>13</sup>

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3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

<sup>11</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>12</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>13</sup> *NSW Registrar Marriages v. Norrie*, (2014) HCA 11.

recognized that not all people identify as male or female but, in doing so, the Court still accepted male and female as stable categories; intersex and transgender persons could merely record their sex as “indeterminate or non-specific”. The Court cited the “**Bellinger v. Bellinger**”<sup>14</sup> case decided by the House of Lords and observed that in ordinary language, “to speak of the opposite sex is to speak of the contrasting categories of sex: male and female”.

## VII. DECISION OF THE COURT

### ISSUE 1.

The Honorable Justice G.R. Swaminathan stated that a marriage solemnized between a male and a transwoman, both professing Hindu religion, was a valid marriage. The Court stated that transgender persons had the right to decide their self-identified gender, as upheld by the Supreme Court in **NALSA v Union of India**<sup>15</sup>, which has been reiterated in **Justice K. Puttaswamy v Union of India**<sup>16</sup> and again in **Navtej Singh Johar v Union of India**<sup>17</sup>. The Court then stated that “sex and gender are not 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 affirms that the State shall not deny to any person equality before the law or equal protection of the laws within India would apply to transgender persons as well. The Supreme Court in the NALSA judgment had stated that transgender persons would fall within the expression “person” and would be entitled to legal protection of laws in all spheres of State activity as enjoyed by other citizens of the country, and therefore discrimination based on sexual orientation or gender identity would impair equality before the law and equal protection of laws and violates Article 14 of the Constitution of India.

The Court also relied on the findings of the Supreme Court in NALSA where it was held that gender identity lies at the core of one’s identity, gender expression, and presentation and has to be protected under Article 19(1)(a); and secondly, that recognition 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 stated that self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India. Accordingly, the Madras High Court observed that Sreeja’s choice to express her gender identity as that of a woman falls within

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<sup>14</sup> *Bellinger v. Bellinger*, (2003) UKHL 21.

<sup>15</sup> *Nalsa v. Union of India*, (2014) 5 SCC 438

<sup>16</sup> *Justice K. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

<sup>17</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1



the domain of her autonomy and cannot be questioned by the State authorities.

The Court stated that the expression bride in the HMA, 1955 cannot have a static meaning and must be interpreted in light of the legal system as it exists today. The Court then cited Article 16 of the Universal Declaration of Human Rights, which includes the right to marry as a human right as well as **Shafin Jahan v. Asokan K.M. and Ors.**<sup>18</sup> where the right to marry a person of one's choice was held to be integral to Article 21 of the Constitution of India. The Court also went on to cite Justice K. Puttaswamy, where the Supreme Court referred to the US Supreme Court decision in **Obergefell v. Hodges** in which the Court had noted that it would be contradictory to recognize a right to privacy concerning other matters of family life and not concerning the decision to enter the relationship that is the foundation of the family in society.

Further, the Court again referred to **NALSA v. Union of India**, in which the Supreme Court recognized a transgender person's right to marry as a fundamental right under the constitution. Thereafter, the Court stated that since the Constitution of India is an enabling document that is inviting transgender persons to join the mainstream and they cannot be denied the benefits of social institutions that are already in place in the mainstream.

The Court noted that both petitioners profess the Hindu religion and their right to practice Hindu religion is recognized under Article 25 of the Constitution of India. Given that the right of transgender persons to marry has been upheld by the Supreme Court, they cannot be kept out of the purview of the Hindu Marriage Act. The Court accordingly stated that denying the petitioners Hindu marriage infringes their fundamental right to practice their religion under Article 25 of the Constitution of India. The Court held that the expression bride would include transwomen and intersex persons/transgender persons who identify themselves as women, with the only consideration being how they perceive themselves.

The Court held that refusal to register the marriage of Ms. Sreeja would amount to a violation of her fundamental rights under Articles 14, 19(1)(a), 21, and 25 of the Constitution of India and quashed the orders of the Joint Registrar No.II and the District Registrar of Tuticorin and directed the Joint Registrar No.II to register the marriage of the Petitioners.

## **ISSUE 2.**

After deciding this issue, the Court decided to address a second issue on sex reassignment surgery (SRS) or Intersex Genital Mutilation (IGM) of intersex children. The Court pointed

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<sup>18</sup> *Shafin Jahan v. Asokan K.M. and Ors.*, (2018) 16 SCC 368.

out that according to the judgment in **S. Amutha v C. Manivanna Bhupathy**<sup>19</sup> consent of a parent cannot be considered as the consent of the child and as held in NALSA and no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity. The Court directed the Government of Tamil Nadu to issue a Government Order to ban SRS on intersex infants and children. The Court made an additional observation that parents must be encouraged to feel that the birth of an intersex child is not a matter of embarrassment or shame and left it to the Government to launch awareness programs.

The Court also noted that since Arun Kumar, the first petitioner was from an SC community, they were entitled to obtain financial incentives under the Dr. Ambedkar Scheme for Social Integration through Inter-Caste Marriages.

### **VIII. HERMENEUTICAL INJUSTICE IN THE INDIAN CONTEXT**

The Indian Constitution lists “sex” as a prohibited ground of discrimination under “Article 15”<sup>20</sup> but does not provide a definition; as such, sex is not explicitly restricted to the immutable categories of male and female. However, this silence in the Constitutional framework has not necessarily meant a positive recognition of other (non-binary) sex or gender identities. India is a particularly rich excavation site for these inquiries, as gender diverse persons are numerous, heterogeneous, and have been active in seeking a legal remedy for historical wrongs committed. However, as described previously, Indian jurisprudence continues to rely on fixed categories of sex and gender to decide the claims that gender-diverse litigants bring to court.

### **IX. CRITICAL OVERVIEW OF THE JUDGEMENT**

In a major move for the Indian transgender community, the Madras High Court ordered authorities to register a marriage between a man and a trans woman.

The Madras High Court held that the term “bride” in the Hindu Marriage Act, 1955 which codifies the laws related to marriage in the Hindu community in India, can also refer to a trans woman and does not need to be restricted to someone born a woman.

This move comes after marriage registration authorities in Tamil Nadu in south India refused to register the marriage of Arun Kumar and Sreeja, a man and a trans woman who approached the authorities for formal recognition after tying the knot in a temple ceremony. Justice G.R Swaminathan, one of the judges on the bench, stated that authorities who had

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<sup>19</sup> S. Amutha v C. Manivanna Bhupathy, (2007) SCC Online Mad 141.

<sup>20</sup> Article 15 of the Constitution of India- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

refused to recognize the marriage because a trans woman can't be treated as a bride as per Section 5 of the Hindu Marriage Act were wrong in doing so.

He referred to past judgments of the Supreme Court in NALSA, Puttuswamy (privacy case), and the Section 377 repeal, and even quoted Hindu epics like the Mahabharata, declaring that the "personhood" of transgender persons has been recognized under the Indian Constitution. "Gender identity falls within the domain of her autonomy and involves her right to privacy and dignity. It is not for the State authorities to question this self-determination of the second petitioner herein," he went on to say. "For too long, the transgender persons have been languishing in the margins. The Constitution of India is an enabling document. It is inviting them to join the mainstream. It is absurd to deny the transgenders the benefit of the social institutions already in place in the mainstream."

While this isn't the first time a transgender marriage has been registered in India, this judgment means that the Madras HC has set a precedent that will now make it easier for transgender persons to get married without being discriminated against, or at least enable them to build a strong case against anyone who refuses to let them register for marriage. "This Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart," the court said rather eloquently and melting our heart in the process. The transgender community has been fighting for their basic human rights for a while and this kind of backing may also help make such marriages more socially acceptable in the long run.

The court also asked the Tamil Nadu government to issue an order against sex-reassignment surgeries on intersex infants and children, saying that children must be given time and space to discover their true gender identity and that parental consent differed from that of the child.

## **X. JUDGMENT IN A GLANCE**

1. The expression "bride" occurring in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or immutable meaning. As noted in Justice G.P.Singh's Principles of Statutory Interpretation, the court is free to apply the current meaning of a statute to present-day conditions.
2. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

3. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before the law and equal protection of the law and violates Article 14 of the Constitution of India. Article 19(1)(a) and Article 21 were expansively interpreted to encompass one's gender identity also.
4. A statute must be interpreted in the light of the legal system as it exists today. Article 16 of the Universal Declaration of Human Rights reads as under: "Article 16(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."

## **XI. CONCLUSION**

As such, the current litigation strategy for gender diverse litigants is to continue perpetuating the myth that sex is fixed and inevitable, and, therefore, rightly and morally justifiable when persons of one sex or the other are discriminated against based on this unalterably fixed identity. Thus, the transgender litigant is (fixedly) transgender and not conducting a series of actions and behaviors of being transgender. Not merely a linguistic difference, but an entire paradigmatic shift exists between these two conceptions of gender: doing and being. If a person is unalterably transgender, rather than behaving through a series of performative acts (i.e., doing gender) transgender, their identity becomes unchosen, birth-given, in other words, much akin to the sex dyad. This litigation strategy, of course, makes sense: for a claim to succeed, the litigant must show that they belong to either one of the sexes and are being harmed based on not "fitting" into the sex stereotype. Thus, in a nearly Lovecraftian sense of horror, transgender litigants are forced to see and package themselves as their adversary: the gender binary. The famous Lovecraft short story, *Beast in the Cave*, concludes with the protagonist's horrible realization that the presumed animal-beast he had encountered (and then, killed) within a cave was, in fact, also a man (and not an animal); so too are transgender litigants forced to view themselves and present themselves in the eyes of their antagonist within the courtroom.

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