

A woman doesn't mortgage herself to a man with marriage, asserts CJI

A file photo of a Parsi woman praying at the Fire Temple in Mumbai.AP

A woman does not mortgage herself to a man by marrying him, and she retains her identity, including her religious identity, even after she exercises her right to marry outside her community under the Special Marriage Act, Chief Justice of India Dipak Misra has observed.

The 1954 Act is seen as a statutory alternative for couples who choose to retain their identity in an inter-religious marriage.

“The Special Marriage Act confers on her the right of choice. Her choice is sacred. I ask myself a question: Who can take away the religious identity of a woman? The answer is only a woman can choose to curtail her own identity,” said Chief Justice Misra, heading a five-judge Constitution Bench. Nobody could presume that a woman had changed her faith or religion just because she chose to change her name after marrying outside her community, he observed on Thursday.

The comments came on the first day of hearing by the Constitution Bench on a petition from a Parsi woman, Goolrokh M. Gupta, who was barred by her community from offering prayers for her dead parents in the Tower of Silence for the sole reason that she married a Hindu under the Special Marriage Act.

The Bench, comprising Justices A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud and Ashok Bhushan, is deciding on the question whether the woman can keep her religious identity intact after choosing to marry someone from another faith under the Act.

Paradigm shift

A decision in favour of the woman would uphold the fundamental right to religion, dignity and life and create a paradigm shift for women of the minority community.

The Supreme Court had recently ruled in favour of Muslim women, declaring instant triple talaq unconstitutional, and has paved the way for a proposed legislation.

The Bench *prima facie* disagreed with the widespread notion in common law that a woman's religious identity merged with that of her husband after marriage.

Indicating that this amounted to discrimination on the ground of gender, Chief Justice Misra asked: “How can you [Parsi elders] distinguish between a man and woman singularly by a biological phenomenon... If a woman says she has not changed her religion, by what philosophy do you say she cannot go to the Tower of Silence? No law debars a woman from retaining her religious identity.”

“If a woman's identity is merged, then the Special Marriage Act is not required, is it not?” Justice Sikri said.

“The Tower of Silence is not a mutt or a citadel of a cult. It is a place to offer prayers to the dead. Can such a right of a woman be guillotined? It is part of her constitutional identity,” Chief Justice Misra said.

The court said it had to decide whether a religious principle had dominance over the constitutional identity of the Parsi woman.

Arguing for the petitioner, senior advocate Indira Jaising said that every custom, usage, customary and statutory laws must stand the test of the principle of fundamental rights. Article 372 (continuance of the existing laws) of the Constitution was subject to Article 13, which mandated that laws should not violate the fundamental rights of an individual.

The petition is against the Gujarat High Court's March 23, 2012 judgment which held that Goolrokh Adi Contractor ceased to be a Parsi as she had married Mahipal Gupta, a Hindu, under the Special Marriage Act.

The Valsad Parsi Anjuman Trust, which opposed Ms. Goolrokh's plea, said the High Court decided the case after going through the affidavits of at least seven Parsi priests, saying the religious tenets hold that she ceased to be a Zoroastrian upon her marriage to a Hindu and could not be allowed to offer prayers at a Zoroastrian place of worship.

The court asked the Valsad Parsi Trust to inform by December 14 whether it would allow Ms. Goolrokh to attend the last rites of her parents.

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