NATALIE ABEYSUNDERE
v.
CHRISTOPHER ABEYSUNDERE AND ANOTHER

SUPREME COURT
G. P. S. DE SILVA, CJ.,
WADUGODAPITIYA, J.,
PERERA, J.,
WIJETUNGA, J. AND
SHIRANI BANDARANAYAKE, J.
S.C. APPEAL NO. 70/96
HIGH COURT GALLE NO. 5/94
M.C. GALLE NO. 6403
OCTOBER 13TH AND 14TH, 1997.

Penal Code, S. 362 B – Bigamy – Muslim Marriage contracted during the subsistence of a monogamous marriage – Validity of the second marriage – Marriage Registration Ordinance, Sections 18, 19 (1), 35 (1) , 35 (2) and section 64.

The accused-respondent and his first wife the appellant both Roman Catholics were married under the Marriage Registration Ordinance. During the subsistence of the first marriage, the accused registered a marriage with one Miss Edirisinghe under the Muslim Marriage and Divorce Act. The accused was convicted of the offence of bigamy. His defence was that prior to his second marriage, both he and Miss Edirisinghe had embraced Islam; and as such, the second marriage was valid.

Held:

(1) Section 18 of the Marriage Registration Ordinance prohibits polygamy and sections 18, 19 (1), 35 (1) and 35 (2) read together show beyond doubt that the Ordinance contemplates only a monogamous marriage; and the respondent could not, by a unilateral conversion to Islam, cast aside his antecedent statutory liabilities and obligations incurred by reason of the prior marriage. The rights of the respondent are qualified and restricted by the legal rights of his wife whom he married in terms of the Marriage Registration Ordinance.

(2) The second purported marriage of the respondent during the subsistence of the prior marriage contracted under the Marriage Registration Ordinance is void, notwithstanding the respondent's conversion to Islam.

Attorney-General v. Reid (1966) 67 NLR 25 P.C. and Reid v. Attorney-General (1964) 65 NLR 97 SC overruled.

Cases referred to:

1. *Attorney-General v. Reid* (1966) 67 NLR 25 P.C.
2. *Weatherley v. Weatherley* (1879) Kotze 71.
3. *Niboyet v. Niboyet* 4 PD 1 (Court of Appeal).
4. *King v. Perumal* (1912) 14 NLR 496 (Full Bench).
5. *Pasmore and others v. Oswaldwistle Urban District Council* (1898) A.C 387, 393.
6. *Reid v. Attorney-General* (1964) 65 NLR 97 S.C.
7. *Smt Sarla Mudgal, President, Kalyani and Others (Petitioners) v. Union of India and others (Respondents)* AIR 1995 S.C 1531.

APPEAL from the High Court, Galle.

Ranjit Abeysuriya, PC with *M. Markhani, Ms. Priyadharshani Dias* and *Ms. Mrinali Talgodapitiya* for the appellant.

D. S. Wijesinghe, PC with *Jayantha de Almeida Gunaratne, Ms. Dhammika Dharmadasa* and *Upul Ranjan Hewage* for the respondent.

B. P. Aluvihare, SSC for the Attorney-General.

R. K. W. Goonesekera as amicus curiae.

Cur. adv. vult.

December 16, 1997.

G. P. S. DE SILVA, CJ.

The accused-respondent (hereinafter referred to as respondent) was convicted of the offence of bigamy (s. 362 (B) of the Penal Code). The charge was that on 6.10.85 he contracted a second marriage with Kanthika Chitral Saranalatha Edirisinghe whilst his lawful wife Natalie Manel Antoinette Abeysundera was alive. These proceedings were instituted by the Police in the Magistrate's Court of Galle.

The offence of bigamy as set out in section 362 (B) of the Penal Code reads thus:

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment . . ."

The ingredients of the offence are (i) at the time of his second marriage the accused already has a spouse living, (ii) the accused purports to marry a second time during the subsistence of the prior marriage, (iii) the second marriage is void by reason of its taking place while the prior valid marriage remains undissolved.

In the present case there is no dispute that the ingredients (i) and (ii) above have been established by the prosecution. The matter in issue is the third ingredient of the offence enumerated above.

The first marriage was solemnized at the All Saints' Church, Borella, on 27th September, 1958, (vide marriage certificate P1). Admittedly, the respondent and his wife (who is the present appellant) were both Roman Catholics. The respondent was an Engineer serving at the Colombo Municipal Council. He worked at the Colombo Municipal Council until his retirement in 1975. Thereafter he worked abroad for 2 years and upon his return to Sri Lanka joined the "DFCC" in August, 1979. While working at the "DFCC", he developed a friendship with Miss K. C. S. Edirisinghe. In 1980 the respondent instituted divorce proceedings against the present appellant in the District Court of Colombo. The action, however, was dismissed on 4th September, 1985 (P2). The respondent did not prefer an appeal against the judgment dismissing his action. On 26th September, 1985, he gifted

his "matrimonial home" to Miss K. C. S. Edirisinghe (deed of gift P3). At the trial before the Magistrate's Court he made a statement from the dock and asserted that both he and Miss Edirisinghe were converted to Islam in March, 1985. On 6th October, 1985, for the second time the respondent got married and it was to Miss K. C. S. Edirisinghe, under the Muslim Marriage and Divorce Act (P4 the certificate of marriage dated 6.10. 85 and P5 the declaration dated 6. 10. 85 by the bridegroom in terms of section 18 (1) of the Muslim Marriage and Divorce Act).

As stated earlier, the Magistrate convicted the respondent on the charge of bigamy; he was sentenced to a term of 18 months rigorous imprisonment suspended for a period of 5 years and a fine of Rs. 2,000 was also imposed. The respondent preferred an appeal to the Provincial High Court of Galle. His appeal was successful, the conviction and sentence were set aside and he was acquitted. With the leave of this court, the aggrieved party N. Manel A. Abeysundera has preferred the present appeal.

When this appeal came up before a Bench of 3 Judges, Mr. Abeysuriya, counsel for the appellant, at first stated that he would accept the correctness of the decision of the Privy Council in *Attorney-General v. Reid* [(1)]. However, at a subsequent stage of the argument, counsel submitted that he would be challenging the correctness of the decision of the Privy Council in Reid's case (supra). It was in these circumstances that an order was made directing that this appeal be heard before a Bench comprising five Judges (Article 132 (3) of the Constitution). It is relevant to note that the principal reason for the acquittal of the respondent by the Judge of the High Court was the ruling given by the Privy Council in Reid's case (supra).

The material facts in the present case are almost the same as the facts in Reid's case. Reid married Edna Margaret de Witt at St. Mary's Church, Badulla, on 18th September, 1933. Both parties were Christians at the time of the marriage and they lived together until 1957. In 1957 Reid's wife left him and obtained an order for maintenance against him in the Magistrate's Court of Colombo. On 13th June 1959, Reid and a divorced lady named Fatima Pansy were converted to Islam. On 16th July 1959, they got married in Colombo and the marriage was solemnized by the Registrar of Muslim Marriages under the provisions of the Muslim Marriage and Divorce Act, notwith-

standing the fact that Reid's earlier marriage was subsisting. Reid was indicted before the District Court of Colombo and was convicted of the offence of bigamy under section 362 (B) of the Penal Code. He appealed against the conviction to the Supreme Court and his conviction was quashed. The Attorney-General appealed against the judgment of the Supreme Court to the Privy Council. The Attorney-General's appeal, however, was dismissed by the Privy Council. As in the instant case, the only question that arose for consideration is whether the third ingredient of the offence of bigamy was established. Their Lordships of the Privy Council concluded that "whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. They agree with the observations of Innes, J. almost 100 years ago. In their Lordships view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognized by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly, there is none . . . It follows that as the Attorney-General of Ceylon cannot establish that this second marriage was void by the law of Ceylon by reason of the earlier Christian monogamous marriage the appeal must fail."

In order to consider the crucial question that arises for decision in this appeal, namely, whether the second marriage was void, it is first necessary to consider the nature of a contract of marriage and in particular the precise character of the first marriage which the respondent contracted under the Marriage Registration Ordinance. It is not disputed that the first marriage was a valid marriage contracted in terms of the Marriage Registration Ordinance.

First, as to the general nature of the contract of marriage; Wille in Principles of South African Law, 5th edition states:

> "Marriage is an institution which is regulated by the law, and which confers a ***status*** on the parties to it. It is a juristic act *sui generis* . . . The legal consequences of a valid marriage are that a continuing collection of rights and duties, mostly reciprocal, are

conferred or imposed on the parties. This combination of rights and duties is usually termed a relationship" (p. 89).

Kotze, J. in *Weatherley v. Weatherley*[2] stated :

"Marriage is not a mere ordinary private contract between the parties, it is a contract creating a ***status*** and gives right to important consequences directly affecting society at large. It lies indeed at the root of civilized society."

Brett, LJ. in *Niboyet v. Niboyet*[3] (Court of Appeal)

expressed himself in the following terms:

"Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by a law a relation between the parties and what is called a ***status of each.*** The status of an individual, used as a legal term, means a legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law."

What then are the provisions of the law in terms of which the respondent chose to enter into a contract of marriage on 27th September 1958? (i.e. the first marriage). The material provisions of the Marriage Registration Ordinance are sections 18,19 (1), 35 (1) & (2) and the definition of "marriage" contained in the interpretation section, namely, section 64.

Section 18 : "No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."

Section 19 (1) "No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a *vinculo matrimonil* pronounced in some competent court."

Section 35 (1): "A marriage in the presence of the registrar shall, except as hereinafter provided, be solemnized between the parties at his office or station with open doors, and between the hours of six O'clock in the morning and six O'clock in the afternoon, and in the presence of two or more respectable witnesses, and in the following manner:

(2) The registrar shall address the parties to the following effect:

"Be it known unto you, A, B and C, D., that by the public reception of each other as man and wife in my presence, and the subsequent attestation thereof by signing your name to that effect in the registry book, you become legally married to each other, although no other rite of a civil or religious nature shall take place; and know ye further that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you before the death of the other shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy and be liable to the penalties attached to that offence."

Section 64: "In this Ordinance, ***unless the context otherwise requires*** –

"marriage" means any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam."

There is little doubt that section 18 ***expressly prohibits*** polygamy and sections 18, 19 (1) and 35 (1) & (2) read together show beyond doubt that the Marriage Regisration Ordinance contemplates ***only a monogamous marriage.*** As stated by Dr. H. W. Tambiah in his work Laws and Customs of the Tamils of Jaffna, "by the General Marriage Ordinance only monogamy is recognised . . ." (page 106). The

respondent having solemnized his first marriage under the Marriage Registration Ordinance ***is bound to monogamy*** and, what is more, ***the only mode*** by which such marriage could be dissolved is by a "judgment of divorce a *vinculo matrimonil* pronounced in some competent court". The obligation of monogamy and the mode of dissolution of the marriage are the ***statutory incidents*** of the first marriage which the respondent entered into with the appellant.

As rightly pointed out by Mr. R. K. W. Goonesekera, the judgment of the Privy Council in Reid's case makes no reference at all to the enactments which preceded the present Marriage Registration Ordinance. Mr. Goonesekera drew our attention to section 28 of Ordinance No. 6 of 1847.

The section reads thus:

> "28. And it is further enacted, that no marriage solemnized in any part of this Island, after the notification in the Gazette of the confirmation of this Ordinance by Her Majesty, shall be valid (except among Muhammedans) where either of the parties thereto shall have contracted a prior marriage, which shall not have been legally dissolved or declared void by decree of some competent court. And every person, except a Muhammedan, who shall, after such period as aforesaid contract a subsequent marriage, before his or her prior marriage shall have been so dissolved or declared void and every person except a Muhammedan, who shall marry another whom he or she shall know to be bound by a previous marriage not so dissolved or declared void, shall be guilty of bigamy, and liable to imprisonment with or without hard labour for any period not exceeding three years. Provided always, that no person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, shall be deemed to be guilty of bigamy."

It is thus clear that as far back as 1847, our law made express provision prohibiting polygamy (except in the case of Muslims) and defining the offence of bigamy. A provision to the same effect was found in section 19 of Ordinance No. 2 of 1895. Thus in 1911 Lascelles, CJ. in *King v. Perumal* [(4)] (Full Bench) stated:

"That polygamy has been prohibited and has been an offence under the Municipal law of Ceylon for more than half a century, except in the case of Muhammadans, is beyond all question" (at page 505).

Having considered the statute law and rules of Private International Law the learned Chief Justice went on to state –

"It is thus clear that, except in the case of Muhammadans, ***polygamy is as obnoxious to the public policy of Ceylon as to that of European States. . .*** In view of the circumstance that polygamy is ***expressly prohibited*** by the Municipal law of the Colony (except in the case of Muhammadans) I am clearly of opinion that a polygamous marriage between persons who are not Muhammadans is void in Ceylon . . ."

It is also relevant to note that Wood Renton, J. who was the trial Judge in Perumal's case while "stating the case" in terms of section 355 (1) of the then Criminal Procedure Code expressed the view that the Marriage Registration Ordinance, No. 19 of 1907 "not only contemplates monogamous marriage alone but expressly prohibits polygamy. . .".

It is therefore abundantly clear that the concept of monogamy and the prohibition on polygamy was a part of our law relating to marriage as long ago as 1847. Unfortunately, neither the relevant statutes nor the Full Bench decision in Perumal's case were cited before the Privy Council in Reid's case.

Perumal's case is important for another reason. Dealing with the concept of a "Christian marriage" in relation to the rule of Private international Law "under which the capacity to marry depends upon the domicil of the parties" and the "well-recognized exceptions to the rule," Lascelles, C.J observed:

"But the use of these expressions ('the general consent of all Christendom', 'the law of God' and 'the law of Christendom') does not imply that it is only in countries where Christianity is the prevailing religion that polygamous and incentuous marriages are beyond the pale of private international law. If a non-Christian country has followed the rule of Christendom as to polygamy and by its Municipal law has prohibited such marriages it surely stands

on the same footing as Christendom as regards the non-recognition of polygamous marriages. The only distinction is that in the ***former case the prohibition rests on grounds of public policy,*** whilst in the latter case it is associated with the teaching of Christianity" (at page 505).

Thus the submission of Mr. Goonesekera that prohibition against polygamy (except in the case of Muslims) under our statute law rests on grounds of public policy is well-founded. As stressed by Mr. Goonasekera, the integrity of the institution of marriage is the most important consideration. None of these matters were considered by the Privy Council. The Privy Council was content to observe, "whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there" *Attorney-General v. Reid* (supra) at 32.

There is no question that Reid was free to change his faith, but the true question which arose for decision was whether Reid could cast off the statutory obligations which ***directly arose*** from his previous marriage in terms of the Marriage Registration Ordinance by the simple expedient of ***unilateral conversion to Islam.*** Could he ***by his own act*** overcome the incidents of the marriage he chose to contract in terms of the Marriage Registration Ordinance? In my view, the answer is emphatically in the negative. The statute expressly provides for the mode of dissolution of the marriage, and that is the only mode provided for by law. "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and runs through the law". *Pasmore and others v. The Oswaldtwistle Urban District Council*[5]. The Privy Council in Reid's case did not focus on the crucial question whether by a unilateral conversion to Islam subsequent to a lawful marriage in terms of the Marriage Registration Ordinance, Reid could absolve himself of the statutory liabilities incurred and the statutory obligations undertaken by him. The Privy Council overlooked the fact that the "rights" of Reid were qualified and restricted by the legal rights of his wife whom he married in terms of the Marriage Registration Ordinance.

Savitri Goonesekera in her work on the Sri Lanka Law on Parent and Child relevantly states (commenting on Reid's case):

> "In emphasizing the right of a person to change his personal law by a unilateral act, the Privy Council seems to have been influenced by the theory that the inhabitants of Sri Lanka have an inherent right to change their religion and personal law. This view, we have observed, is not correct with regard to other personal laws (i.e. other than Muslim law) that apply in Sri Lanka. Besides, the concept of the monogamous marriage, in the non-Muslim law on family relations in this country, indicates that there is no absolute right to convert to Islam and change one's personal law. . . In Reid's case the Attorney-General argued that a marriage under the General Marriages Ordinance created a status of monogamy which could not be changed legally unless the marriage was dissolved or annulled. The Privy Council rejected this argument stating that whatever may be the situation in a purely Christian country . . . in a country like Ceylon . . . a monogamous marriage (does not) prohibit for all time during the subsistence of that marriage, a change of faith and personal law. The Privy Council, we have observed, was unaware of the fact that there are strict limitations on the application of the other personal laws. In rejecting the Attorney-General's argument, the Court refused to appreciate that even the right of conversion to Islam and of becoming subject to Muslim law ***could be qualified in a non Muslim state, where the monogamous marriage was the norm in the law on family relations."*** (at pages 56 and 57).

Again, the Privy Council in Reid's case failed altogether to appreciate the significance of section 35 of the Marriage Registration Ordinance in the context of a statute which recognizes only a monogamous marriage. The comment of the Privy Council on section 35 reads thus :

> "Their Lordships have not overlooked section 35 of the Marriage Registration Ordinance which tends to support Mr. Littman's argument, but the exhortation contained in the registrar's address is no more than a warning and though it may be apt to mislead the ordinary man or woman ignorant of the definition of marriage contained in section 64, it cannot successfully be prayed in aid

when considering whether the offence of bigamy has been committed in terms of section 362 (B) of the Penal Code" *Attorney-General v. Reid* (supra) at 32.

It is to be noted that section 35 contemplates the situation where the Registrar addresses the parties to the marriage ***just before*** they place their signature on "the registry book". They are unambiguously told in simple language that the marriage intended to be contracted cannot be dissolved except by a valid judgment of divorce and if either of the parties contracts another marriage before the former marriage is legally dissolved he or she will be guilty of bigamy. It is difficult to understand what the Privy Council meant by saying that the "exhortation" is apt "to mislead the ordinary man or woman". The true meaning of section 35 is lucidly expressed by Savitri Goonesekera in the following terms :

"He (the Registrar) is required to tell them that the marriage can only be dissolved by a valid judgment of divorce, or death, and that a marriage prior to dissolution amounts to bigamy. This provision on the Registrar's directive is therefore not based on a misconception of the law, as the Privy Council suggested. It is an articulation of the concept that status of marriage acquired under the General Marriages Ordinance prevents a spouse from contracting a valid second marriage. Inasmuch as a subsequent marriage under the Ordinance is declared void when a prior marriage has not been legally dissolved, the ***statute contemplates the creation of a monogamous marital status."*** (Sri Lanka Law on Parent and Child, p. 58).

It is thus clear that the approach of the Privy Council to a pivotal provision in the Marriage Registration Ordinance is fundamentally flawed.

Mr. D. S. Wijesinghe for the respondent adopted the reasoning of His Lordship Chief Justice *Basnayake in Reid's case*[6] and strenuously contended that the entirety of the Marriage Registration Ordinance has no application whatever to persons professing Islam. The respondent's second marriage was under the Muslim Marriage and Divorce Act and *ex facie* it is a valid and lawful marriage. In short, counsel's submission was that the prohibition contained in section 18 of the Marriage Registration Ordinance will not and cannot apply to persons professing Islam. Reliance was placed on the definition

of "marriage" in section 64 of the Ordinance. Counsel for the Attorney General agreed with the submissions of Mr. Wijesinghe.

Having cited section 18, His Lordship Chief Justice Basnayake reasoned thus: "The section declares that no marriage" shall be vaild when there is a prior 'subsisting marriage'. Now what is a marriage for the purpose of section 18? That expression is defined in section 64 and it means 'any marriage save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance 1870 or the Kandyan Marriage and Divorce Act and except marriages contracted between persons professing Islam. There is nothing in the context of section 18 which renders the definition inapplicable". Mr. Abeysuriya for the appellant submitted that the approach of His Lordship the Chief Justice was "simplistic". Section 18 is an all-important provision of the Ordinance. The section enshrines the concept of a monogamous marriage and expressly prohibits polygamy. I therefore cannot agree that "there is nothing in the context of section 18 which renders the definition inapplicable". The definition of "marriage" applies "unless the context otherwise, requires" (section 64). The Marriage Registration Ordinance is founded on the concept of a monogamous marriage and this is the relevant context. To have recourse to the definition of the term "marriage", in the way suggested, would render a basic and essential provision of the Ordinance largely nugatory. This is not a permissible mode of interpretation. By reason of the definition of "marriage", persons professing Islam cannot marry under the Marriage Registration Ordinance. The true issue is not whether the respondent's second marriage under the Muslim Marriage and Divorce Act is valid or not, but whether by a *unilateral conversion to Islam* he could cast aside his antecedent statutory liabilities and obligations incurred by reason of the prior marriage. As stated earlier, the answer is clearly in the negative.

Mr. R. K. W. Goonesekera cited before us a recent judgment of the Supreme Court of India which seems to me of decisive importance – *Smt Sarla Mudgal, President, Kalyani and others (petitioners) v. Union of India and others (respondents)*[7] . The question that arose for decision was "whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnize a second marriage. Whether such a marriage without having the first marriage dissolved under law would be a valid marriage, qua the first wife who continues to be Hindu? Whether the apostate husband would be guilty of the offence under

section 494 of the Indian Penal Code"? After a careful and a comprehensive consideration of the position under Hindu law, and the Hindu Marriage Act 1955 as well as several decisions of the Indian courts, Justice Kuldip Singh concluded that the "second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of section 494 of the Indian Penal Code". Justice Kuldip Singh reasoned as follows :

"It is, thus, obvious from a catena of case law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage . . . The position has not changed after coming into force of the Hindu Marriage Act, 1955 (the Act) rather it has become worse for the apostate . . . A marriage solemnized, whether before or after the commencement of the Act, can only be dissolved by a decree of divorce on any of the grounds enumerated in section 13 of the Act . . . It is obvious from the various provisions of the Act that the modern Hindu law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under section 13, of the Act. In that situation parties who have solemnized the marriage under the Act remain married even when the husband embraces Islam in pursuit of other (*sic*) wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless by (*sic*) a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore be (*sic*) illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the

provisions of the Act and as such would be non est. Section 494 Indian Penal Code is as under :

Marrying again during lifetime of husband or wife' – Whoever, having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The necessary ingredients of the section are : (1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void; (4) by reason of its taking place during the life of such husband or wife . . .

It is no doubt correct that the marriage solemnized by a Hindu husband after embracing Islam may not be strictly a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy . . .

The expression "void" under section 494 I. P. C. has been used in the wider sense. ***A marriage which is in violation of any provisions of law would be void in terms of the expression used under section 494 I. P. C.***

"A Hindu marriage solemnized under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. ***The second marriage by a convert would therefore be in violation of the Act and as such void in terms of section 494 I. P. C. Any Act which is in violation of mandatory provisions of law is per se void.***

The real reason for the voidness of the second marriage is the subsisting (*sic*) of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-bye to the substance of the matter and acting against the spirit of the statute if the second marriage of the convert is held to be legal". (pages 1536 to 1537).

In my view, the reasoning of Justice Kuldip Singh set out in extenso above is cogent and valid, and is clearly applicable to the facts of the fact before us, and to Reid's case.

In the early part of his judgment Justice Kuldip Singh made a very relevant observation which Mr. R. K. W. Goonesekera rightly emphasized in the course of his submissions. The issues that arise are concerned with an institution of the utmost importance, namely marriage and the family. Said the learned Judge, "Marriage is the very foundation of the civilized society. ***The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder.*** Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilization can exist." (page 1533). These wider considerations, so relevant and important for a correct appreciation of the issues involved, I say with the utmost respect, were completely lost sight of by the Privy Council and His Lordship the Chief Justice. To attempt to literally transpose the definition of the expression "marriage" to the core provision in the Ordinance (section 18) has the effect of emasculating the section. This approach is wrong for it takes no account of the basic principle enshrined in the Ordinance, the recognition of monogamy alone and the explicit prohibition on polygamy.

For the reasons I have endeavored to set out above, I hold that Reid's case [supra] was wrongly decided and must be overruled. As stated earlier, the material facts in Reid's case and in the present appeal before us are almost identical and the legal issues are the same. I accordingly hold that the second purported marriage of the respondent to Miss Edirisinghe during the subsistence of the prior valid marriage contracted under the Marriage Registration Ordinance is void, notwithstanding the respondent's conversion to Islam. It follows that the charge of bigamy (section 362 (B) of the Penal Code) preferred against the respondent is proved.

The appeal against the acquittal of the respondent by the Judge of the High Court is accordingly allowed and the judgment of the High Court is set aside. I affirm the conviction and the sentence imposed by the learned Magistrate.

Whilst thanking Mr. Abeysuriya, Mr. Wijesinghe and Mr. Aluvihare for their assistance in this not altogether easy case, I wish to place on record my deep appreciation of the assistance given by Mr. R. K. W. Goonesekera who appeared as *amicus* on the invitation of the court.

WADUGODAPITIYA, J. – I agree.

PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal allowed.