

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, 1944

OP (FC) NO. 398 OF 2022

AGAINST THE ORDER/JUDGMENTIA 3232/2022 OF FAMILY COURT, ERNAKULAM

PETITIONER/S:

1 ANUP DISALVA
AGED 30 YEARS

2 LIBNI MARY JACOB
AGED 28 YEARS

BY ADVS.
SMT.SIKHA G.NAIR
SMT.SANDHYA.K.NAIR
SMT.ANJANA SURESH.E
SMT.BEENA N.KARTHA

RESPONDENT/S:

UNION OF INDIA,
REPRESENTED BY SECRETARY TO GOVERNMENT OF INDIA,
MINISTRY OF LAW AND JUSTICE.

RESPONDENT IS SUO MOTU IMPEADED AS PER ORDER DATED
26/07/2022 IN OP(FC) 398/2022.

BY ADV MANU S., ASG OF INDIA
AMICI CURIAE ADV.SANDHYA RAJU AND ADV. R LEELA

THIS ORIGINAL PETITION (FC) **HAVING BEEN FINALLY HEARD ON
28/11/2022, ALONG WITH WP(C).28317/2022, THE COURT ON 9/12/2022**
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, 1944

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RESPONDENT/S:

- 1 UNION OF INDIA
REPRESENTED BY THE SECRETARY TO GOVT. OF INDIA
MINISTRY OF LAW AND JUSTICE, NEW DELHI., PIN - 110003

- 2 STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY
GOVT.SECRETARIAT , THIRUVANANTHAPUAM., PIN - 695001
BY ADV MANU S., DSG OF INDIA
ADV SUVIN R MENON, CGC
SENIOR GOVERNMENT PLEADER SHRI S.GOPINATHAN
AMICI CURIAE ADV.SANDHYA RAJU AND ADV. R LEELA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 28/11/2022, ALONG WITH OP (FC).398/2022, THE COURT ON 9/12/2022 DELIVERED THE FOLLOWING:

'C.R.'

A.MUHAMED MUSTAQUE

&

SHOBA ANNAMMA EAPEN, JJ.

O.P. (FC) .No.398/2022 & W.P. (C) .No.28317/2022

J U D G M E N T

Dated this the 9th day of November, 2022

A.Muhamed Mustaque, J.

"What God has joined together, let no one separate" is the sublime ideal read in the Bible (Matthew 19:6, Mark 10:9). Do spouses in that union have the right to separate their marriage, mutually, before the aura of the marriage period of one year vanishes, is the question presented in

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these matters. Two young Christians are before us. Their marriage was solemnized on 30.01.2022, in accordance with the Christian rites and ceremonies. They realised that their marriage was a mistake. The marriage was not consummated. On 31.5.2022, they moved a joint petition for divorce before the Family Court, Ernakulam, under Section 10A of the Divorce Act, 1869 (hereinafter referred to as the "Act"). The Family Court registry refused to number the same, apparently noting the bar in filing a joint petition within one year after the marriage, as referable under Section 10A of the Act. The petition was filed under Section 151 of the Code of Civil Procedure. This was taken up on the judicial side. The Family Court rejected the petition holding that one-year separation after the marriage is an essential condition to maintain a petition under Section 10A of the Act. Challenging this order, both parties

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approached this Court in O.P.No.398/2022. Thereafter, the matter was heard at length. In O.P.No.398/2022, this Court appointed Advocates Sandhya Raju and Leela R. as *amici curiae* to assist the Court. Realising that the bar is created by statute, the couple filed W.P. (C).No.28317/2022 to declare that the waiting period of one year fixed under Section 10A(1) of the Act is unconstitutional. Both matters were taken up together.

2. Heard the learned counsel Smt.Sikha G. Nair appearing for the petitioners, *Amici curiae* Adv.Sandhya Raju and Adv. R Leela and the learned Central Government Counsel, Sri.Suvin R.Menon.

3. The Indian Divorce Act was enacted during the British period in the year 1869 to confer on certain Courts the jurisdiction in matrimonial disputes of persons professing Christianity. By

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the Amendment Act 51/2001, the word "Indian" appearing in the name of the Act had been omitted. The 1869 law was based on the British enactment of 1858. The British scrapped the above law in 1923. The Law Commission of India in its 164th report recommended that the Parliament enact a comprehensive law governing marriage and divorce and other allied aspects of Christians in India. Based on the recommendation, the Central Government convened a meeting of prominent leaders of the Christian Communities in India and Members of Parliament belonging to the Christian community on 28.4.2001. Based on the understanding arrived at in the meeting, the divorce law was amended by removing the onerous conditions as contained in Section 10 of the Act and also doing away with the procedures causing delay in obtaining divorce due to the provisions contained in Sections 17 and 20 of the Act. One of the salient provisions was

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brought in by amendment in the year 2001, namely, the dissolution of marriage by mutual consent. Section 10A of the Act was inserted as a provision for dissolution of marriage by mutual consent in addition to Section 10 of the Act, the grounds for dissolution of marriage on fault basis.

Section 10A of the Act reads thus:

10-A. Dissolution of marriage by mutual consent.- (1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has

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been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

As seen from Section 10A of the Act, a petition for dissolution of marriage can be presented to the Court under Section 10A only on the ground that the parties to the marriage have been living separately for a period of two years or more and that they have not been able to live together.

4. A Division Bench of this Court in **Saumya Ann Thomas v. The Union of India and others [MANU/KE/0255/2010]** held that the stipulation of a period of two years as the minimum mandatory period under Section 10A is arbitrary and oppressive and the period of two years has to be read as one year. This was taking note of the one-year period stipulated in Section 28(1) of the Special Marriage Act, Section 13B(1) of the Hindu

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Marriage Act and Section 32B(1) of the Parsi Marriage and Divorce Act.

5. There are three types of theories that have been recognised for the separation of a legal marriage, (i) fault theory, (ii) irretrievable breakdown theory and (iii) no-fault basis (mutual consent).

6. Divorce by mutual consent reflects the will of the parties to separate and get rid of the marriage. The legislature has put safeguards against impulsive decisions that may permeate such a decision by stipulating a gestation period before presenting a petition for divorce on mutual consent. This period will insulate possible peril that may ensue for the parties as a follow-up of the decision for mutual separation. In the Indian social context, though marriages are solemnized by two individuals, it is seen more as a union for

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laying the foundation for a strong family and society. Many laws have been made and many rights have been created based on familial relationships. The legislature, therefore, decided that a minimum period of separation must precede before presentation of a petition for divorce on the ground of mutual consent.

7. The problem presented in this case is when the waiting period itself would cause hardship to the parties. Can the law command parties to sit at the fence and suffer the agony? The legislature in its wisdom contemplated possible repercussions of such fixation of minimum period that would result in hardships to spouses and accordingly allowed the Courts to entertain a petition within the minimum period in exceptional cases. This is how Section 29 of the Special Marriage Act and Section 14 of the Hindu Marriage Act, enabled the Courts to entertain the petition to be presented before one

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year had lapsed from the date of marriage. There is no corresponding provision in the Divorce Act for the Court to permit the dissolution of marriage by mutual consent until the mandatory period of one year has lapsed from the date of separation. The constitutional validity of the mandatory period is, therefore, questioned in the writ petition filed by the parties. This Court in **Saumya**'s case (*supra*) had no occasion to advert to the validity of the minimum mandatory period by which spouses are denied the remedy of approaching the Court before the lapse of one year from the date of marriage or from the date of separation. The reasoning of the Court found in paragraph 42 of the above judgment reads thus:

42. Having considered all the relevant circumstances, we are of the opinion that the stipulation of a higher period of two years of mandatory minimum separate residence for those to whom the Divorce Act applies, in contra-distinction to those similarly placed to whom Sec.13B of the Hindu Marriage Act, Sec.32B of the Parsi Marriage and

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Divorce Act and Sec.28 of the Special Marriage Act would apply, offends the mandate of equality and right to life under Arts.14 and 21 of the Constitution.

The above reasoning of the Court would clearly show that the decision rendered and the conclusion arrived at was on a premise that the mandatory minimum residence period of two years for Christians is discriminatory as there is no such prescription of two years under the Hindu Marriage Act and the Special Marriage Act etc. This Court, however, considers the question in these cases on a different ground; whether in the absence of any provisions allowing the parties to a marriage to move the Court before the lapse of one year from the date of marriage or the date of separation. Can the provisions stand the test of constitutional scrutiny? The plea of arbitrariness would arise in this context of denial of judicial remedy to approach the Court before the lapse of one year from the date of marriage or separation.

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8. Men have free choice to enter into marriage. However, the same freedom is not accorded to the men to separate the marriage. The State's interference in marriage through legislation is on the assumption that men are ill-equipped to take a decision for themselves and the State is competent to take decisions by taking note of the welfare, needs, interests etc. of men. Legal paternalism is often justified with beneficial intent which is sought to be secured through legislation, regulation etc. From a liberal perspective, any encroachment on an individual's right to take a decision would be viewed as an encroachment on personal liberty. But in our constitutional scheme, the competency of a legislature to make laws for the common good, keeping in mind the social context and the larger community interest cannot be termed as an encroachment on personal liberty. The ideal of the constitution itself is

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to create a society of values. These values represent the ethos of society, invalidation of liberty affecting the lives of others, to promote the welfare and common good of the persons involved in relationships. *John Stuart Mill* in his book '*On Liberty*', Chapter IV - '*Of The Limits To The Authority Of Society Over The Individual*' discussed the problem relating to controlling the behaviour of individuals. The author says, "The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near

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connections, and often far beyond them. If he injures his property, he does harm to those who directly or indirectly derived support from it, and usually diminishes..”

9. The harm likely to cause others is something that bothered the legislature to fix a mandatory minimum period to present a petition for mutual divorce. We would not have thought of interfering with a minimum period as it carries a laudable object behind it. But we are constrained to note that no remedy is provided by statute in exceptional and depraved conditions for a spouse to approach the Courts to get rid of the minimum period. The legislature in their wisdom felt that some provisions are to be made to relax the rigour of the minimum period to entertain a petition within the waiting period of separation in other statutes. This essentially ensures that efficacious judicial remedy is provided in cases

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of exceptional hardships to the parties. The denial of such a remedy to Christians bothers us. The Court must circumvent from entering into the domain of legislature by providing measures of relaxation. Individual liberty when curtailed, the Court has to examine whether the law was passed to further any common good or to protect the larger interest of the parties. We have already found that there is a rationale behind fixing the one-year waiting period. We also note that the very idea of fixing the waiting period before the presentation is also intended to be secured after the presentation of such a divorce petition. The Court after presentation under Section 10A(2) of the Act is bound to allow the parties to think on their decision of mutual separation. The provision states that the parties shall be given an opportunity to withdraw the petition not earlier than six months after the date of presentation of

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the petition. However, we find that the mandate of Section 10A(1) will become oppressive if the parties are not given the option to highlight hardships and exceptional hardships they may experience during the waiting period. The right to a judicial remedy if curtailed by statutory provisions, the Court will have to strike it down as it is violative of a fundamental right. The right to life encompasses judicial remedy as well. Article 8 of the Universal Declaration of Human Rights declares that everyone has the right to an effective remedy by the competent national Tribunals for acts violating fundamental rights granted by the constitution or by law. The legislature in other statutes, having felt the need for relaxation, to redress exceptional circumstances through judicial remedy, cannot remain in oblivion when concerning the Christian community. *Ronald Dworkin*, in his famous book

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'Taking Rights Seriously' argues that, "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." [Introduction Pg.(xi)]. The collective good we find as rationale cannot trample on the rights of individuals to depart if his or her need to depart is not relatable to the collective good. We are not holding that the law is discriminatory because of the reason that different communities in equal circumstances are given different treatment. Law intends to apply to a particular class or group and that group is not homogeneous with certain classes or groups being excluded, compelling the legislature to make different laws for each group. We are of the firm view that when

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liberty is taken away to act according to one's will, without any procedure to safeguard the fallout of such restrictions, the law will become oppressive. But for the legislation, parties would be able to separate themselves. The legislature cannot take away liberty without adequately safeguarding the interest of the individuals whose interests to seek remedy are affected even if such legislation intends to achieve laudable objects.

10. Section 10 of the Divorce Act permits divorce on fault grounds. It is possible for a spouse to file a petition for divorce without any waiting period. The Court may be able to grant a divorce even before the period of one year, on being satisfied with the ground for divorce. One of the grounds to obtain a divorce is willful non-consummation of marriage. On recognizing the existence of this ground on the basis of fault, one may be able to obtain a divorce from the Court

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by not contesting the same. However, if they have shown wisdom, to avoid stigma, the Court cannot permit to move the petition without the lapse of a period of one year after separation. This exactly is the dilemma and hardship for the parties in these cases.

11. We hold that the fixation of the minimum period of separation of one year as stipulated under Section 10A is violative of the fundamental right and accordingly, strike it down.

12. We have interacted with the parties who came online before us on the last hearing date. They also had appeared before the earlier Bench which heard the matter. On both occasions, they were firm in their decision to separate. In view of the fact that more than six months have lapsed since the presentation of the petition for divorce

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before the Court, we find no further reason for their appearance before the Family Court again.

13. Before parting with the judgment, we hasten to observe that the Legislature's competence to enact laws to regulate divorce cannot be doubted as it has an avowed intention to uphold the common good and welfare of the people and society. The State knows what is best for the couple and the community. The grounds of divorce on a fault basis have regulated divorce but in a practical sense, it has resulted in hardships rather than in promoting welfare. The impact of welfare objectives must reflect on the parties. Today, the Family Court has become another battleground, adding to the agonies of parties seeking a divorce. This is obvious for the reason that the substantial legislation enacted prior to Family Courts Act was fashioned on a platform to adjudicate upon adversarial interests rather than

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to promote the common interest or good. The time has come for a change in the law applicable to the parties on a common uniform platform. The law differentiates parties based on religion in regard to welfare qua matrimonial relationship. In a secular country, the legal paternalistic approach should be on the common good of the citizens rather than based on religion. The State's concern must be to promote the welfare and good of its citizens, and religion has no place in identifying the common good. The Union Government should seriously consider having a uniform marriage code in India to promote the common welfare and good of spouses in matrimonial disputes. The legislation on divorce must focus on the parties rather than the dispute itself. In matrimonial disputes, the law must aid parties to resolve the differences with the assistance of the Court. If a solution is not possible, the law must allow the Court to

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decide what is best for the parties. The procedure for seeking divorce shall not be to aggravate the bitterness by asking them to fight on preordained imaginary grounds.

14. In the result, these cases are disposed of with the following:

i. W.P.(C).No.28317/2022 is allowed declaring that the stipulation of the one-year period or more for the purpose of filing a divorce petition by mutual consent under Section 10A is violative of fundamental right and is declared unconstitutional.

ii. O.P.(FC).No.398/2022 is allowed. The Family Court is directed to number the petition presented by the petitioners seeking divorce on mutual consent and dispose of the same within two weeks in the light of interaction we had with the

O.P.(FC).No.398/2022 & W.P.(C).No.28317/2022

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parties before us and to grant a decree of divorce without insisting further presence of parties.

We record our appreciation to *Amici curiae* Adv.Sandhya Raju and Adv. R Leela.

Sd/

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

SHOBA ANNAMMA EAPEN, JUDGE

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APPENDIX OF WP(C) 28317/2022

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF I.A.3232/2022 IN UNNUMBERED O.P. /2022 ON THE FILE OF FAMILY COURT, ERNAKULAM.
- Exhibit P2 TRUE COPY OF UNNUMBERED O.P. /2022 ON THE FILE OF FAMILY COURT ,ERNAKULAM.
- Exhibit P3 TRUE COPY OF ORDER DATED 07.06.2022 IN UNNUMBERED O.P OF 2022 OF THE FAMILY COURT, ERNAKULAM.

APPENDIX OF OP (FC) 398/2022

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF I.A.3232/2022 IN UNNUMBERED
O.P. /2022 ON THE FILE OF FAMILY
COURT ,ERNAKULAM.
- Exhibit P2 COPY OF UNNUMBERED O.P. /2022 ON THE
FILE OF FAMILY COURT ,ERNAKULAM.
- Exhibit P3 TRUE COPY OF ORDER DATED 07.06.2022 IN
I.A 3232/2022 IN O.P NO.(UNNUMBERED)
OF 2022 OF THE FAMILY COURT, ERNAKULAM.