

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

W. P. No. 13112/ 2012 (GM – RES, PIL)

BETWEEN:

Mr. Shiv Kumar

PETITIONER

AND

Union of India & Others

RESPONDENTS

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Place: BANGALORE

Dated:

ADVOCATE FOR RESPONDENT NO. 5

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STATEMENT OF REPLY FILED BY THE RESPONDENT NO. 5

The Respondent No. 5 humbly submits as hereunder:

1. The present petition has been filed challenging the constitutionality of Section 10-A(1) of the Divorce Act, 1869 which mandates a two-year separation period for obtaining a divorce by mutual consent, whereas other matrimonial laws such as the Hindu Marriage Act, 1956, Special Marriage Act, 1954 and the Parsi Marriage and Divorce Act, 1936 all mandate only a one-year separation period. This petition has great importance for the rights of women from the Christian community and the Respondent No.5 herein is supporting the petition.
- I. **Background to the Amendment:** The Indian Divorce Act 1869 was amended in 2001. The Preamble of the Divorce Act, 1869 states that it amends the law relating to divorce of persons professing the Christian religion.
2. In the year 2001, the Indian Divorce (Amendment) Act, 2001 was introduced which substantially amended the India Divorce Act, 1869 and several grounds for divorce were inserted. In addition, Section 10-A was added that provided for 'Dissolution of marriage by mutual consent'. This provision entitled a Christian couple to file a petition seeking dissolution of their marriage by mutual consent on the condition that

they have been living separately for a period of two years or more, and that they have not been able to live together since then. In addition, they must mutually agree that their marriage must be dissolved.

(A copy of the Indian Divorce Amendment Act 2001 is annexed herein and is marked as **ANNEXURE – R/1**)

3. This amendment was largely similar to the provisions for ‘dissolution of marriage by mutual consent’ for Hindus under Section 13-B of the Hindu Marriage Act, 1956, Parsis under Section 32-B of the Parsi Marriage and Divorce Act, 1936 and persons marrying under the Special Marriage Act, 1954 under Section 28 of the said Act. However, all the above statutes mandate a period of separation of *one year or more* as opposed to the onerous two-year requirement of separation under the Divorce Act, 1869.

II. **Legislative Debates:**

4. When the above amendment was introduced in Parliament, it was debated at length during the session of the Lok Sabha. Members of the Parliament vehemently opposed the imposition of the two-year separation condition and argued that when a one-year requirement has been mandated in all the other matrimonial laws. Shrimati Renu Kumari, a Member of Parliament, raised the issue of financial status of a woman. She said in this regard, *“The Minister has suggested that husband and wife should remain separate for a period of two years but I would like to say that women are weaker from financial view point and how and from where they would be able to manage their living? The Minister should give an assurance that the matter in this regard would be disposed of within 60 days otherwise, the court would be held responsible. If such a provision cannot be made, then the husband and wife should be allowed to live in separation for a period of one year only.”* Other Members have raised similar issues. Shrimati Kanti Singh, another Member of the Parliament, during the debate suggested, *“Under Clause 4(a), it has been provided that with mutual*

consent a husband and wife can have divorce. I would like to suggest a period for divorce in the case of Christian women should be one year as it is in the case of for Hindu women under Hindu Marriage Act. I think two years is too much time.” Thus, it may be seen that Lok Sabha Members were also in support of a move to amend Section 10 making it a one-year separation period requirement.

(A copy of the Lok Sabha debates are annexed herein and are marked as **ANNEXURE - R/2**)

III. Rulings of other High Courts:

5. It is submitted that even other High Courts have also taken a view similar to that of the Lok Sabha Members. The matter was considered by a Division Bench of the Hon'ble High Court of Kerala in the case of ***Saumya Ann Thomas v. Union of India***, ILR 2010 (1) Ker 804. The Kerala High Court, in this case, held that Section 10-A was unconstitutional as it violated Articles 14 and 21 of the Constitution of India. The Court also held that the law relating to 'dissolution of marriage by mutual consent' is a secular law and in furtherance of Article 44 which provides for a uniform civil code in India. In essence, Section 10-A was held as *ultra vires* the Constitution of India as the classification based on religion led to discrimination of Christians and placed an even more harsh condition on dissolution of marriages by mutual consent and that such a condition was unreasonable, arbitrary, fanciful and oppressive as it deprived the Christians of their right to life and right to live with dignity.

6. It is submitted that several other High Courts have, prior to the Amendment incorporating divorce by mutual consent, advocated that the Divorce Act must be amended on the lines of the Hindu Marriage Act, 1956, Special Marriage Act, 1954 and the Parsi Marriage and Divorce Act, 1936 allowing for a divorce to be granted by mutual consent. In the case of ***S.D. Selvaraj v. Chandirah Mary***, 1968-1 Madras LJ 289, the Hon'ble Madras High Court stressed on the need for an immediate reform on the lines of the abovementioned Acts. In ***Mary Sonia***

Zachariah v. Union of India, ILR 1995 (2) Ker 431 and **Ms. Jordan Diengdoh v. S.S. Chopra**, II (1985) DMC 42 and **Reynold Rajamani & Anr. v. Union of India**, AIR 1982 SC 1261, the Courts, including the Supreme Court, have reiterated the need for divorce to be granted on mutual consent in line with the Acts mentioned above all of which mandate a one year mandatory separation period.

7. These Acts provide for a minimum period of separation of one year and since the Courts are clearly in favour of a provision in line with the aforementioned Acts, the Divorce Act must, therefore, be constructed accordingly providing for a separation period of only one year as opposed to the current onerous condition of two years.

IV. Discrimination against women under other parts of Section 10:

8. Additionally, it has been observed that other provisions of the Divorce Act have also been regarded discriminatory against women prior to the Indian Divorce (Amendment) Act, 2001. At least two other provisions of the Divorce Act, 1869 have been quashed by the High Courts as being discriminatory against women. In the cases of **Ammini E.J. and Anr. v. Union of India & Others**, 1995 (1) KLJ 624 and **Youth Welfare Federation rep. by its Chairman, K.J. Prasad v. Union of India (UOI) rep. by its Secretary, Law Dept. and Anr.**, 1997 (1) APLJ 159, the Hon'ble Kerala High Court and the Hon'ble Andhra Pradesh High Court, respectively, have quashed parts of Section 10 that denied the right to dissolution of marriage on the grounds of cruelty and desertion by having to prove adultery along with it, as being discriminatory against women. It is submitted, thus, that the Divorce Act, 1869 has had a history of discrimination against women and while the abovementioned Sections have been amended, Section 10-A awaits an amendment or atleast an interpretation.

V. Violation of Article 14 and Article 21 of the Constitution:

9. It is submitted that Section 10-A is discriminatory on the basis of religion as it provides for a mandatory two-year period of separation for Christian couples while the matrimonial laws of other religions have only a one-year requirement for the same. Further, there are many instances where women facing domestic violence, neglect or harassment at the hands of their husbands opt for a quick and amicable separation and dissolution of such violent marriages in the interest of their children or family members. In such cases waiting for a period of two years can be extremely onerous and dangerous in many cases. Even when marriages are not violent but the women are completely incompatible with their partners, the requirement of waiting for two years is completely irrational. Thus, the impugned Section is violative of Article 14 as well as Article 21 of the Constitution.

10. **No Alimony during separation:** Further, it is submitted that the two year requirement under the Divorce Act, 1869 creates an unreasonable classification based on religion and is arbitrary and oppressive in nature. In having such a provision, an unreasonable burden is created on women as they tend to be weaker from the financial point of view. In this period of two years of separation, the woman receives neither any alimony amount nor maintenance amount to depend on and is consequently put through a lot of hardships. This point has been put forth by the Members of Parliament as well during the Lok Sabha debate on the Indian Divorce (Amendment) Bill, 2001. Various Members of the Parliament, including Christian women Members of Parliament, have supported the reduction of the separation period to one year challenging the validity of a provision that mandates a two year separation period before the divorce may be granted while other personal laws require only one year of separation.

11. Additionally, the 2nd Law Commission had in the 15th Report opposed the incorporation of the ground of divorce on mutual consent citing the Hindu

Marriage Act and the Special Marriage Act that had not provided for such a ground at that point, showing the intention to make a similar provision as and when the same is made in other personal laws. Now that such provisions have been made, there is no reason for the Legislature not to have such a provision on the lines of the aforementioned Acts.

12. Lastly, the Divorce Act was formulated on the basis of the Matrimonial Causes Act, 1857 of England. The Matrimonial Causes Act, 1857 itself has been amended several times in keeping with the changing social conditions. Necessary amendments must be made to the Divorce Act as well, in keeping with the times and a period of one year of separation must, therefore, suffice in light of the weak financial status and vulnerability of women. In this manner, not only is Section 10-A(1) discriminatory under Article 14 and Article 21 of the Constitution, but it also creates an unreasonable burden on women who remain helpless throughout this period of two years. In light of the above, Section 10-A(1) must be read down to reduce the condition to a one year separation period.

13. The Applicant submits that Section 10-A is arbitrary, discriminatory and in violation of Articles 14 and 21 of the Constitution of India. It puts women through undue hardships by making them helpless in a situation of no alimony and in case of violent marriages, it places them in a dangerous situation. Further, Courts and Members of the Parliament have also questioned the constitutionality of such a provision stating that merely because a person professes a certain religion, he must not be subject to undue hardships. Thus, the Applicant prays that on all these above grounds, the impugned Section may be held to be unconstitutional, bringing relief to the members of the Christian community and the Writ Petition may be allowed, in the interest of justice and equity.

Place: BANGALORE

Dated:

ADVOCATE FOR RESPONDENT NO. 5

