

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 3RD DAY OF FEBRUARY 2014

PRESENT

THE HON' BLE MR.D.H.WAGHELA, CHIEF JUSTICE

AND

THE HON' BLE MRS.JUSTICE B.V.NAGARATHNA

WRIT PETITON NO.13112/2012 (GM-RES-PIL)



BETWEEN

Mr.SHIV KUMAR
AGED 63 YEARS
S/o LATE SRITHANDAVESWARA
ADVOCATE, R/at B-901
MANTRI ELEGANCE APARTMENTS
BANNERGHATTA ROAD
BANGALORE - 560076.

... PETITIONER

(BY SMT.AARTI MUNDKUR, ADV.,)

AND

1. UNION OF INDIA
REPRESENTED BY SECRETARY
MINISTRY OF LAW AND JUSTICE
SHASTRI BHAWAN 'A' WING
NEW DELHI - 100001.
2. GOVERNMENT OF KARNATAKA
REPRESENTED BY CHIEF SECRETARY
VIDHANA SOUDHA
BANGALORE - 560001.
3. THE ARCHDIOCESE OF BANGALORE
REPRESENTED BY THE ARCHBISHOP
OF BANGALORE, ARCHBISHOP HOUSE
NO.75, MILLERS ROAD
BANGALORE - 560075.
4. THE CHURCH OF SOUTH INDIA
REPRESENTED BY THE BISHOP

NO.20, 3RD CROSS
CSI COMPOUND
BANGALORE - 560027.

5. VIMOCHANA
A SOCIETY REGISTERED UNDER THE
SOCIETIES REGISTRATION ACT, 1860
HAVING ITS OFFICE AT
33/1-9, THYAGRAJ LAYOUT
JAIBHARATH NAGAR
BANGALORE - 560033
KARNATAKA.
HEREIN REPTD. BY ITS SECRETARY
MS.DONNA FERNANDES.

... RESPONDENTS

(BY SMT.SINCHANA ADV. FOR
SRI S.KALYAN BASAVARAJ, ASG FOR R1
SMT.NILOUFER AKBAR, AGA FOR R2
SRI VASANTH V FERNANDES, ADV. FOR R3
SRI REUBEN JACOB, ADV. AS *AMICUS CURIAE* FOR R4
SMT.JAYANA KOTHARI, ADV. FOR R5)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT PORTION OF SECTION 10-A OF THE DIVORCE ACT, 1869, PRODUCED AS ANNEXURE-B THAT PRESCRIBES A PERIOD OF TWO YEARS AS THE SEPARATION PERIOD FOR FILING A PETITION FOR DIVORCE BY MUTUAL CONSENT AS BEING DISCRIMINATORY AND VIOLATIVE OF ARTICLES 14 AND 21 OF THE CONSTITUTION OF INDIA AND TO READ DOWN THE MINIMUM MANDATORY PERIOD OF SEPARATION CONTEMPLATED UNDER SECTION 10A OF THE DIVORCE ACT, 1869 FROM A PERIOD OF 'TWO YEARS' TO A PERIOD OF 'ONE YEAR'.

THIS WRIT PETITION COMING ON FOR PRELIMINARY HEARING THIS DAY, **NAGARATHNA .J**, MADE THE FOLLOWING:

ORDER

1. This Writ Petition has been filed in public interest to seek a declaration that Section 10-A of the Indian Divorce Act, 1869 (for short 'the Act') prescribing a period of 'two years' as the separation period before filing a petition for divorce by mutual consent is discriminatory and violative of Articles 14 and 21 of the Constitution. An alternative prayer is also sought by requesting the Court to read down the expression 'two years' in Section 10-A of the Act as 'one year'.

2. We have heard learned counsel for the petitioner and learned counsel for the respondents.

3. Learned counsel for the petitioner has brought to our notice a decision of a Division Bench of the Kerala High Court in ***Saumya Ann Thomas vs. The Union of India & others*** [2010 (1) KLT 869] ; ***ILR 2010 (1) Kerala 805***, to contend that Section 10A(1) of the Act has been read down and the expression 'two years' is to be read as 'one year'. She has taken the contention that the expression 'two years' was in violation of Articles 14 and 21 of the Constitution as with regard to other Acts namely, Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936, Special Marriage Act, 1954,

all of which have only 'one year' period of separation prior to filing of the petition for divorce by mutual consent. But under the Act in question, the period of two years is causing hardship and adverse consequences on persons to whom the said Act is applicable. She also brought to our notice the fact that the Kerala High Court having held that the period of 'two years' in Section 10A(1) being violative of Articles 14 and 21 of the Constitution and must be read down as a period of 'one year', is a judgment which is applicable throughout India. In support of this proposition, she placed reliance on the judgment of the Hon'ble Supreme Court in ***Kusum Ingots and Alloys Ltd., vs. Union of India and another (AIR 2004 SC 2321)***. It is an admitted fact that the Union of India has not filed any appeal against the order of the Division Bench of Kerala High Court.

4. Respondent No.3 who is represented by a learned counsel has, however, stated that the concept of divorce is alien to the Christian community but having regard to the codified law applicable throughout India, respondent No.3 would support two years of separation keeping in mind the *locus poenitentiae* of the parties, rather than making it one year.

5. Respondent No.4 is represented by *amicus curiae* who has stated that it represents the Protestant Church which follow the codified law in the matter of divorce.

6. Respondent No.5 which is a non-governmental organization working for the welfare of women has supported the petitioner.

7. Having heard learned counsel and on perusal of the judgment of the Kerala High Court in ***Soumya Ann Thomas***, as well as the judgment of the Apex Court in ***Kusum Ingots and Alloys Ltd.,*** what follows is that Section 10A(1) of the Act has been held to be unconstitutional being violative of Articles 14 and 21 of the Constitution. However, to save it from the vice of unconstitutionality, the expression of 'two years' has been read down to 'one year' in sub-section (1) of Section 10A of the Act. The Kerala High Court's pronouncement on the constitutionality of a provision of a Central Act would be applicable throughout India. This is made clear by Hon'ble Supreme Court in ***Kusum Ingots and Alloys Ltd.,*** wherein it has been stated that an order passed on a Writ Petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the

provisions contained in Clause (2) of Article 226 of the Constitution, would have effect throughout the territory of India subject of course to the applicability of the Act. In that view of the matter, this Writ Petition would not call for any specific orders with regard to holding constitutionality or otherwise of sub-section(1) of Section 10A of the Act. Keeping in mind the pronouncement of the Division Bench of the Kerala High Court and reading the same in the context of ***Kusum Ingots and Alloys Ltd***, the position of law with regard to sub-section (1) of Section 10A of the Act is now been made clear, particularly, insofar as State of Karnataka is concerned.

8. With the aforesaid observations, the Writ Petition is disposed of.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE