

**(2015) 05 BOM CK 0002**

**In the Bombay High Court**

**Case No : Writ Petition No. 9985 of 2014**

Lancy Leo Mendonca and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

**Date of Decision : 08-05-2015**

**Acts Referred:**

Constitution of India, 1950 — Article 14, 21, 226  
Divorce Act, 1869 — Section 10A, 10-A, 10A(1), 10-A(1)  
Hindu Marriage Act, 1955 — Section 13B  
Parsi Marriage And Divorce Act, 1936 — Section 32B  
Special Marriage Act, 1954 — Section 28

**Citation : (2015) 05 BOM CK 0002**

**Hon'ble Judges : Abhay Shreeniwas Oka, J;C.V. Bhadang, J**

**Bench : Division Bench**

**Advocate : Prashant P. Chawan i/by Ravindra Rajaram Chile, for the Appellant;  
Rui A. Rodrigues and S.V. Bharucha, Advocates for the Respondent**

**Final Decision : Partly Allowed**

## **Judgement**

C.V. Bhadang, J.—Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. By this petition, the petitioners, who are husband and wife, are seeking dissolution of their marriage by consent under section 10-A(1) of Divorce Act 1869 (for short "The said Act").

3. The brief facts are that the marriage between the petitioners was solemnized on 12th June 2013 and the same was registered in accordance with the provisions of the said Act at Mumbai. Shortly after the marriage, i.e. on 23rd June 2013 irreconcilable differences arose between the petitioners and they decided to get their marriage dissolved by mutual consent. It is undisputed that petitioner No. 2/wife shifted out of the matrimonial home on 23rd June 2013 and since then there is no co-habitation as the petitioners have been staying separately. It appears that the petitioners approached the Family Court at Bandra

for divorce by mutual consent under section 10-A(1) of the said Act by filing a joint Petition on 05-07-2014. The Learned Judge of the Family Court dismissed the petition at the stage of admission on 8-7-2014 with liberty to file the same "at the appropriate time in accordance with the law". The order dated 8-7-2014 reads thus:

"Hd. Ld. Adv. for the Petitioners.

This is a petition for Divorce by mutual consent u/s. 10-A of the Divorce Act 1869.

Parties got married on 12th June '13 under Christian rites. They are living separately since 23rd June 2013.

S 10-A provides for presentation of the petition for divorce by mutual consent only after the parties have lived separately for two years or more.

In the present case, petn is filed soon after one year of marriage and separation.

Hence, this Court cannot admit this petition. Hence, dismissed at the stage of admission with liberty to file at the appropriate time in accordance with law."

4. Feeling aggrieved, the petitioners have approached this Court under Article 226 of the Constitution of India. It is their material contention that the provisions as contained in Section 10-A(1) of the said Act, which provides for the parties to stay separately for a period of 2 years as a condition precedent for filing the petition for divorce by mutual consent, is unconstitutional. Reliance in this regard is placed on the decision of the Kerala High Court in the case of Saumya Ann Thomas Vs. Union of India (UOI), (2010) 2 DMC 526 : (2010) 1 ILR (Ker) 805 : (2010) 1 KLT 869 in which a Division Bench of the Kerala High Court, faced with a similar challenge, has held that the provisions contained in Section 10-A(1) of the said Act to the extent they provide that the parties were to stay separately for a period of two years before filing a petition for dissolution of marriage by mutual consent, offends the mandate of right to equality and the right to life under Article 14 and Article 21 of the Constitution of India. However, in order to save the provisions from the vice of unconstitutionality, it was held that the period of two years stipulated in Section 10-A(1) of the said Act, has to be read down to a period of one year.

5. It appears that on 10th December 2014 this Court has noted a submission on behalf of the petitioners, that unless the petitioners challenge the validity of Section 10-A(1) of the said Act the petitioner may not succeed. In such circumstances the parties were seeking leave to amend the petition for incorporating a challenge to the validity of Section 10-A(1) of the said Act. That was precisely the reason why this Court entertained the petition despite remedy of appeal being available to the petitioners against the impugned order. Subsequently, this petition came to be amended on 20th December 2014, thereby incorporating a challenge to the Constitutional validity of Section 10-A(1) of the said Act to the extent of the requirement as to period of separation, for seeking divorce by mutual consent.

6. On 9th March 2015 this Court had found that in view of the decision of the Kerala High Court and a subsequent decision of the Karnataka High Court in Writ Petition No. 13112/2012 [Mr. Shiv Kumar v. Union of India and Others] dated 3rd February 2014, the petition deserves to be disposed of finally at the stage of admission.

7. On 15th April 2015 time was granted to the first respondent to make a statement as to whether the Union of India intends to challenge the decision of the Kerala High Court in the case of Shiv Kumar v. Union of India and others (supra).

8. We have heard the learned counsel for the parties. It is submitted by Shri Rodrigues, the learned counsel appearing for the first respondent that the Union of India has not challenged the decision of the Kerala High Court in the case of Shiv Kumar v. Union of India and others (Supra).

9. It is a matter of record that the petitioners were married on 12th June 2013 and on account of irreconcilable differences they are staying separately since 23rd June 2013. Indisputably, the petition before the Family Court was filed after a period of one year from 23rd June 2013. The Indian Divorce Act 1869 came into force on 1st April 1869. The said Act was amended by introduction of Section 10-A w.e.f. 3rd October 2001 which reads as under:--

"10A. 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 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."

10. The Constitutional validity of the Section 10A(1) to the extent of the period of separation before the parties can seek divorce by mutual consent was challenged before the Kerala High Court in the case of S.A. Thomas (supra). It was contended that Section 10-A(1) of the said Act, which provides for a minimum period of separation of two years, before the parties can seek divorce by mutual consent, offends Articles 14 and 21 of the Constitution of India, inasmuch as similar provisions contained in Section 13B of the Hindu Marriage Act, Section 32B of the Parsi Marriage and Divorce Act and Section 28 of the

Special Marriage Act provide for a minimum separation for one year. The Division Bench of the Kerala High Court, while upholding the challenge, allowed the petition, in the following terms:

"(a) This Writ Petition is allowed.

(b) The stipulation in Section 10A(1) of the Divorce Act that the spouses must "have been living separately for a period of two years or more" is declared to be unconstitutional as the stipulation of the period of "two years" therein violates the fundamental rights to equality and the right to life under Articles 14 and 21 of the Constitution.

(c) To save the provision and to avoid the vice of unconstitutionality the period of "two years" stipulated in Section 10A of the Divorce Act is read down to a period of "one year".

(d) The common impugned order passed by the court below is set aside. It is found that the petitioners are entitled to a decree for divorce under Section 10A of the Divorce Act.

(e) Invoking the powers of the Family Court under Section 10A of the Divorce Act as so read down, the marriage between the petitioner and the second respondent solemnized on 6/4/08 is hereby dissolved under Section 10A of the Divorce Act."

11. A similar question arose subsequently before a Division Bench of the Karnataka High Court in the case of Shiv Kumar (supra). Apart from placing reliance on the decision of the Kerala High Court, in the case of S.A. Thomas (Supra), the petitioners had also placed reliance on the decision of the Hon''ble Supreme Court in the case of Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, AIR 2004 SC 2321 : (2004) 3 BC 56 : (2004) 120 CompCas 672 : (2004) 3 ComplJ 1 : (2004) 3 CTC 365 : (2004) 186 ELT 3 : (2004) 1 JT 475 Supp : (2004) 138 PLR 626 : (2004) 5 SCALE 304 : (2004) 6 SCC 254 : (2004) 1 SCR 841 Supp : (2004) AIRSCW 7357 : (2004) AIRSCW 2766 : (2004) 3 Supreme 757 : (2004) 6 Supreme 376 in order to contend that keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution, the decision on the Constitutional validity of a Central Act, whether interim or final, will have effect throughout the territory of India subject of course to the applicability of the Act. Thus, it was contended that the decision of the Kerala High Court on the challenge to the Constitutional validity of Section 10A of the Act would have effect throughout the territory of India. Accepting the said contention, the Division Bench of the Karnataka High Court had allowed the petition, thereby dissolving the marriage under Section 10A of the said Act.

12. In Kusum Ingots and Alloys Limited (supra), the appellant, which was a company having its registered office at Mumbai, had obtained a loan from the Bhopal Branch of the State Bank of India. The second respondent therein had issued a notice for repayment of the said loan, from Bhopal, purportedly under

the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("Act of 2002" for short). The appellant-company had approached the Delhi High Court challenging the vires of the Act of 2002 which was dismissed on the ground of lack of territorial jurisdiction. The Hon"ble Apex Court, dealing with the question, observed thus in para 22 of the Judgment:

"22. The Court must have the requisite territorial jurisdiction. 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 of India, will have effect throughout the territory of India subject of course to the applicability of the Act."

13. On hearing the learned counsel for the parties and in view of the decision of the Hon"ble Supreme Court in the case of Kusum Ingots and Alloys Limited (Supra), we find that the decision of the Kerala High Court in the case of Shiv Kumar (Supra) would operate and govern the controversy in question. The learned Judge of the Family Court has dismissed the petition at the threshold, in view of the provisions of Section 10-A(1) of the said Act. We thus find that the impugned order cannot be sustained and will have to be set aside. We also find that it would neither be appropriate nor necessary to remand the matter to the Family Court, inasmuch as the petitioners have filed this petition jointly and the record shows that the petition before the Family Court was filed after one year of the parties staying separately. It would thus be superfluous to send the matter back to the Family Court. We also find that it would not be necessary for us to independently dwell on the issue of constitutional validity of Sub-Section 1 of Section 10A of the said Act, in view of the decision of the Division Bench of the Kerala High Court in the case of Shiv Kumar(Supra), which would apply throughout the territory of India in view of the law laid down by the Hon"ble Supreme Court, in the case of Kusum Ingots and Alloys Limited (Supra).

14. In the result we proceed to pass the following order:--

#### ORDER

- "1. The petition is partly allowed.
2. The impugned order dated 08-07-2014 passed by the learned Judge Family Court, Mumbai is hereby quashed and set aside.
3. The petition before the family court is allowed.
4. The marriage between the petitioners is dissolved by a decree of divorce by mutual consent under section 10A of the Divorce Act, 1869.
5. Rule is made absolute in the aforesaid terms with no order as to costs."