

(2023) 06 TEL CK 2793
In the Telangana High Court
Case No : Family Court Appeal No. 83 Of 2023

Robert Raj

APPELLANT

Vs

All Concerned

RESPONDENT

Date of Decision : 30-06-2023

Acts Referred:

Evidence Act, 1872 — Section 45, 73
Registration Act, 1908 — Section 17, 49
Indian Stamp Act, 1899 — Section 33, 35, 44

Citation : (2023) 06 TEL CK 2793

Hon'ble Judges : B.R.Madhusudhan Rao, J

Bench : Division Bench

Advocate : J.Ashvini Kumar, Vedula Srinivas, Seeta Ramaiah Tenneti

Final Decision : Dismissed

Judgement

K. Lakshman, J

1. Heard Mr. B. Srikanth, learned counsel for the appellants.
2. The present Family Court Appeal is filed challenging the order dated 31.01.2023 in F.C.O.P. (SR) No.13491 of 2022 passed by the learned Judge, Principal Family Court, City Civil Court at Secunderabad.
3. Appellant No.1 is the husband and Appellant No. 2 is the wife. Their marriage was solemnized on 02.06.2021. However, due to differences and disputes, they have been living separately since 30.08.2021.
4. On 12.12.2022, both the Appellants filed a petition vide S.R. No.864 of 2022 seeking divorce by mutual consent under Section - 10A of the Divorce Act, 1869 (hereinafter referred to as 'the Act, 1869') before the Principal Family Court, City Civil Court at Secunderabad (hereinafter referred to as 'Family Court'). The said petition was however rejected vide the impugned order dated 31.01.2023 on the ground that the mandatory two-year separation period under Section 10A (1) of the Act, 1869 before presenting the petition was not completed.

5. The Appellants challenged the order passed by the Family Court mainly on the ground that it failed to consider the decisions in *Saumya Ann Thomas v. Union of India* 2010 SCC OnLine Ker 5197, *Shiv Kumar v. Union of India* 2014 SCC OnLine Kar 10121 and *Lancy Leo Mendonca v. Union of India* 2015 SCC OnLine Bom 5743.

6. It is relevant to note that constitutionality of Section 10A of the Act, 1869 was challenged before a Division Bench of the Kerala High Court in *Saumya Ann Thomas* (supra) on the ground that the two-year separation period in Section 10 (A) (1) is discriminatory and is without rationale. The Petitioner therein contended that other legislations like the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 provide only one-year separation period as a pre-requisite for filing a petition for divorce by mutual consent. Therefore, the two-year period when compared to other similar legislations is arbitrary and discriminatory. The Kerala High Court accepted the said contention and held that two-year separation period under Section 10A is unconstitutional. However, to save the entire provision from unconstitutionality, the two-year period was read down to a one-year waiting period. The relevant paragraphs of the said judgment are extracted below:

"Is the stipulation of a period of two years as the minimum mandatory period of separate residence in S. 10A(1) of the Divorce Act right, just and fair? Is it arbitrary, fanciful and oppressive? Does that stipulation offend Art. 14 and/or Art. 21 of the Constitution? Does that stipulation deserve to be read down to "one year" to save the provision from the vice of unconstitutionality ? These interesting contentions are raised for our consideration in this Writ Petition.

43. 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 S. 13B of the Hindu Marriage Act, S. 32B of the Parsi Marriage and Divorce Act and S. 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.

44. What is to be the consequent order is the next question. Applying the doctrine of severability as has been held in *D.S. Nakara v. Union of India*, ((1983) 1 SCC 305 : AIR 1983 SC 130) we are satisfied that we will be well within the power of this Court to read down such an unconstitutional provision which is unrelated to the object sought to be achieved the stipulation of two years can be severed and can be read down to one year to bring it to be in conformity with the provisions of other laws to avoid the vice of unconstitutionality.

45. We comeback to the facts of the case. The marriage was solemnized on 6.4.08. Separate residence commenced on 21/9/08. Separate residence has

been there for a period exceeding one year on the date of application. A period of six months has already elapsed from the date of filing of the petition. We are satisfied, in these circumstances, that a decree for divorce can be granted as prayed for by the Appellants under S. 10A of the Divorce Act.

46. In the result:

(a) This Writ Petition is allowed.

(b) The stipulation in S. 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 Arts. 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 S. 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 Appellants are entitled to a decree for divorce under S. 10A of the Divorce Act.

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

7. It is relevant to note that a declaration by a High Court regarding the unconstitutionality of a law passed by the Parliament will be binding on all the other High Courts in the country. In this context, it is apt to refer to the decision of the Supreme Court in *Kusum Ingots & Alloys Ltd. v. Union of India* (2004) 6 SCC 254 wherein the following was held:

"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."

Therefore, the decision regarding the unconstitutionality of Section 10A of the Act, 1869 is binding on this Court. Same view was expressed by the Courts in *Shiv Kumar* (supra) and *Lancy Leo Mendoca* (supra).

8. According to this Court, the Family Court committed an error in rejecting the petition filed seeking divorce by mutual consent on the ground that two-year separation period was not completed.

9. Further, the finding of the Family Court that the decisions in *Saumya Ann Thomas* (supra) and *Shiv Kumar* (supra) and *Lancy Leo Mendoca* (supra) reducing the separation period was done in exercise of extraordinary jurisdiction

under Article 226 of the Constitution of India and Section 10A is still not amended in accordance with the said decisions is wholly untenable.

10. When a provision is read down to save it from unconstitutionality, it has to be applied by the Courts throughout the country. The Courts cannot continue to apply a provision which has been held unconstitutional till the legislature brings an amendment. Therefore, Section 10A of the Act, 1869 as interpreted in *Saumya Ann Thomas* (supra) is applicable throughout the country and is binding on all the Courts, except the Supreme Court.

11. At this stage, it is relevant to discuss another recent judgment of the Kerala High Court in *Anup Disalva v. Union of India* 2022 SCC OnLine Ker 6415 wherein the separation period of one-year under Section 10A(1) of the Act, 1869 was declared unconstitutional. The Court noted that Section 14 of the Hindu Marriage Act, 1955 and Section 29 of the Special Marriage Act, 1954 empower the Courts to entertain a petition seeking divorce even before the lapse of one-year from the date of marriage. No such provision exists in the Act, 1869 to seek permission of the Court to file a petition before the lapse of one-year thereby making it mandatory for the people of Christian community to wait for one-year before a divorce petition can be filed. According to the Kerala High Court, absence of such provision in Act, 1869 results in discrimination. Therefore, the minimum waiting period of one-year under Section 10A(1) is unconstitutional. The relevant paragraphs are extracted below:

"9. 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 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 contradistinction to those similarly placed to whom Sec. 13B of the Hindu Marriage Act, Sec. 32B of the Parsi Marriage and 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.

10. 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.

12. 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 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 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 '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 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.

13. 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 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.

14. 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."

Therefore, by virtue of *Kusum Ingots* (supra), this Court is bound by the decision of the Kerala High Court in *Anup Disalva* (supra) declaring Section 10A (1) of the Act, 1869 as unconstitutional.

12. This Court would also like to refer to a recent decision of the Supreme Court in *State of Manipur v. Surjakumar Okram* 2022 SCC OnLine SC 130 wherein it was held that a statute declared unconstitutional will be treated as void ab initio. The relevant paragraphs are extracted below:

"22. Where a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their

consideration are void; it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. Field, J. in *Norton v. Shelby County*, observed that “an unconstitutional act is not law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed”.

23. An unconstitutional law, be it either due to lack of legislative competence or in violation of fundamental rights guaranteed under Part III of the Constitution of India, is void ab initio. In *Behram Khurshid Pesikaka v. State of Bombay*, it was held by a constitution bench of this Court that the law-making power of the State is restricted by a written fundamental law and any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus, a nullity. A declaration of unconstitutionality brought about by lack of legislative power as well as a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights goes to the root of the power itself, making the law void in its inception. This Court in *Deep Chand v. State of Uttar Pradesh* summarised the following propositions:

“(a) Whether the Constitution affirmatively confers power on the legislature to make laws subject-wise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power;

(b) The Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution;

(c) It follows from the premises that a law made in derogation or in excess of that power would be ab initio void...”

Therefore, on account of Section 10A (1) of the Act, 1869 being declared as unconstitutional, there is no need for the parties to whom the Act, 1869 applies to file a petition seeking divorce after a lapse of one-year.

13. In the present case, the marriage between the Appellants was solemnized on 02.06.2021 and the petition for divorce by mutual consent was filed on 12.12.2022 i.e., after a lapse of one year from the date of marriage. In any case, on account of the decision in *Anup Disalva* (supra) there is no waiting/separation period of one-year.

14. Therefore, in result, this Court decides the present appeal as follows:

i. The petition filed by the Appellants before learned Judge, Principal Family Court, City Civil Court at Secunderabad is maintainable;

ii. The impugned order dated 31.01.2023 in F.C.O.P.(SR) No. 13491 of 2022 on the file of learned Judge, Principal Family Court, City Civil Court at Secunderabad is set aside;

iii. The learned Judge, Principal Family Court, City Civil Court at Secunderabad is directed to number the petition filed before it by the Appellants herein, if the same is otherwise in order; and

iv. As six months have already been lapsed since 12.12.2022 (from the date of filing the petition), the learned Judge, Principal Family Court, City Civil Court at Secunderabad is directed to dispose of the petition within two (02) weeks from the date of this order.

15. With the aforesaid directions, this Appeal is disposed of. However, there shall be no order as to costs.

As a sequel, the miscellaneous applications, if any, pending in the appeal shall stand closed.