

(2010) 02 KL CK 0025

In the High Court Of Kerala

Case No : Writ Petition (C) No. 20076 of 2009

Saumya Ann Thomas

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Constitution of India, 1950 — Article 13, 13(1), 14, 142, 21
Divorce Act, 1869 — Section 10A, 10A(1), 10A(2)
Hindu Marriage Act, 1955 — Section 13B, 13B(1)
Parsi Marriage and Divorce Act, 1936 — Section 32B, 32B(1)
Special Marriage Act, 1954 — Section 28, 28(1), 28(2)

Citation : (2010) 2 DMC 526 : (2010) 1 ILR (Ker) 805 : (2010) 1 KLT 869

Hon'ble Judges : R. Basant, J; M.C. Hari Rani, J

Bench : Division Bench

Advocate : G. Shrikumar, P.B. Sahasranaman, T.S. Harikumar, Liji J. Vadakkedom, H.B. Shenoy and K. Jagadeesh, for the Appellant; P. Pratheesh, S. Sudheeshkar, K. Siju, P.A. Jacob Vaidyan, P. Parameswaran Nair, Asst. Solicitor General and T.P.M. Ibrahim Khan, Assistant Solicitor General of India, for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—Is the stipulation of a period of two years as the minimum mandatory period of separate residence in Section 10A(1) of the Divorce Act right, just and fair? Is it arbitrary, fanciful and oppressive? Does that stipulation offend Article 14 and/or Article 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.

2. These questions arose for consideration before us in this Writ Petition as also in W.P.(C) No. 24219/08. Both were heard together. We have had the advantage of hearing Sri. G. Shrikumar, the learned Counsel who was requested to render assistance as amicus curiae to this Court. We have also heard the arguments of

Advocates M/s T.S. Harikumar, Liji J. Vadakkedom,. H.B. Shenoy and T.P.M. Ibrahim Khan, the learned Assistant Solicitor General of India. W.P.(C) No. 24219/08 is being disposed of by a separate judgment in view of certain vital difference in the facts scenario in that case. In fact we note that the bulk of arguments were advanced in W.P.(C) No. 24219/08. We must straightaway record our appreciation for the able and effective assistance rendered to us by Sri. G. Shrikumar who appeared as amicus curiae as also Advocate Sri. Ligi, J. Vadakkedom who appeared for one of the parties.

3. To the vital and crucial facts first. The petitioner and the 2nd respondent are spouses. They are Christians by faith. Their marriage was solemnized on 6.4.08 in accordance with Christian religious rites. Differences and disagreements arose instantly after marriage and the spouses started separate residence with effect from 21.9.08. The petitioner herein filed an application for divorce on 5.12.08. That petition was numbered as O.P. No. 1313/08. During the pendency of that petition, the parties appear to have settled all their outstanding disputes. They entered into Ext.P1 agreement. They consequently filed I.A. No. 536/09 with a prayer that the marital tie may be dissolved by a decree for divorce on mutual consent u/s 10A of the Divorce Act. They filed I.A. No. 537/09 to dispense with the waiting period of six months u/s 10A(2) of the Divorce Act. By the impugned order, the court below rejected both the applications holding that the period of two years having not elapsed admittedly from the date of commencement of separate residence, this joint petition u/s 10A of the Divorce Act is not maintainable.

4. The learned Counsel for the petitioner as also the learned Counsel for the 2nd respondent have been heard. The learned Counsel for the spouses assail the impugned order on the following grounds:

1. The period of two years stipulated u/s 10A(1) and the period of six months stipulated u/s 10A(2) of the Divorce Act must have been waived and dispensed with by the learned Judge of the Family Court.

2. The stipulation of a period of two years u/s 10A(1) is arbitrary, capricious and fanciful; is not fair, just, right and reasonable and consequently offends the right to equality of the petitioner under Article 14 of the Constitution and her right to life under Article 21 of the Constitution. The same is liable to be read down as one year and consequently divorce u/s 10A of the Divorce Act is liable to be granted.

5. To appreciate this contention raised, we deem it necessary to extract Section 10A of the Divorce Act. It reads thus:

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 solemnised 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 solemnised 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.

(emphasis supplied)

The provision is in substance a verbatim reproduction of the provision 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. The only difference is that instead of the period of two years mentioned in Section 10A(1) emphasised above, one year is the period of separate residence stipulated in those provisions.

6. The first contention is that the period of two years u/s 10A(1) and the period of six months u/s 10A(2) of the Divorce Act must have been waived by the Family Court in its discretion. We find absolutely no merit in this contention at all. Under the body of Section 10A(1), four conditions must co-exist before an application can be made. They are:

- A. The marriage between the spouses must have been solemnized;
- B. They have mutually agreed that the marriage should be dissolved by mutual consent;
- C. That they have not been able to live together; and
- D. That they have been living separately for a period of two years or more.

7. We are satisfied that these are the essential requirements/ingredients/preconditions which must be established to justify an application for dissolution of marriage by mutual consent u/s 10A(1). These conditions must co-exist to justify an application for divorce. There is no provision-express or implied, which can enable the court to waive/reduce the mandatory minimum period of separate residence stipulated u/s 10A. That contention cannot hence be accepted at all.

8. There was a contention raised at the Bar initially that it is enough that conditions A and B specified above along with condition C and/or D alone need be satisfied. After detailed discussions at the Bar, that contention is not pressed. We are not hence delving deeper into that contention. Suffice it to say that such a contention is not justified by the language of Section 10A. All the above four pre conditions - A, B, C and D must co-exist to justify institution of proceedings for dissolution of marriage by mutual consent u/s 10A(1) of the Divorce Act.

9. We may also mention that we find no merit in the contention that the period of six months stipulated u/s 10A(2) can and must have been waived by the Family Court. We have already dealt with this question in detail in *M. Krishna Preetha v. Dr. Jayan Moorkkanatt and Anr.* in Mat. Appeal No. 633/08 dated 22/2/2010. Following the decision of the Supreme Court in *Anil Kumar Jain Vs. Maya Jain*, , we have held that no court other than the Supreme Court invoking its power under Article 142 of the Constitution can dispense with the mandatory period of six months specified u/s 10A(2) of the Divorce Act. In these circumstances, we find no merit in the challenge raised on ground No. 1 above.

10. We now come to the second ground raised above. Marriage in the Christian and Indian traditional thought has been accepted as an indissoluble sacrament. Divorce and re-marriage which are common concepts today were unknown to these systems of law. With passage of time marriage as a purely indissoluble sacrament has undergone changes conceptually. Marriage today is not looked upon in law as merely a divine institution made in heaven with the incident of indissolubility. Marriage and its dissolution, in modern judicial and legal thought, is reckoned as the incident of the human right of right to life. Marriage today is a social institution of partnership, friendship, mutual complementarity, love, affection, caring and sharing between two equal partners. Partners walk into the institution of marriage purely based on their consent and volition though after they enter such institution voluntarily, they are bound by the legal norms, ideas and procedure.

11. From a totally indissoluble institution, winds of change have swept the institution of marriage. Initially divorces on the ground of marital contumaciousness and non-existence of vitals necessary to make a marriage work were recognised by law. But later it was recognised that matrimony is after all a human institution - a bond created by exercise of the free act of will by the partners who are responsible; but fallible individuals who may err and blunder. With this emerged the concept of divorce by mutual consent. When the partners find it impossible to live out their lives with happiness and meaningfully, they were granted the option in law to walk out of such marriage subject to conditions by mutual consent. Today, most modern systems of jurisprudence recognise and accept the right of the spouses to get their marriage dissolved by mutual consent. This transformation in the concept of marriage and its dissolution and acceptance of those altered concepts by the legal systems did not take place one fine morning. Many a battle had to be fought socially and legally before the concept of divorce by mutual consent was accepted by the polity and approved by the Legislature. The Indian experiment shows that the Special Marriage Act, 1954 in Section 28 recognised the concept of dissolution of a secular marriage by mutual consent. Long later, in 1976 the concept of divorce by mutual consent was accepted and recognised under the Hindu Marriage Act. Still later in 1988 the Parsi Marriage and Divorce Act in Section 32B accepted and recognised the concept of divorce by mutual consent. To get the concept introduced into the Divorce Act, 1869 we had to wait for a lot more of time. In 2001, after the

Courts and the Law Commission incessantly demanded the incorporation of such a provision, Section 10A of the Divorce Act found its way into the Act. It is thus that the concept of divorce by mutual consent was accepted under the Divorce Act.

12. But when the said provision was incorporated in the Divorce Act, surprisingly instead of a period of one year as the mandatory minimum separate residence, a period of two years was stipulated u/s 10A(1) of the Divorce Act. It is that stipulation which is challenged before us.

13. It is contended that the incorporation and insistence of a longer period of mandatory minimum separate residence so far as the persons to whom the Indian Divorce Act applies is discriminatory. What is the justification for such a longer period mandatory minimum separate residence for those to whom the Indian Divorce Act applies; it is queried. It is argued that there is absolutely no principle or reason that justifies insistence on such longer period of separate residence so far as the Christians alone are concerned, to whom the Divorce Act applies. The constitutional mandate of equality is offended, it is urged. The core constitutional value of equality and equal protection of the law Article 14 of the Constitution is offended, contend the counsel. If the mandatory minimum period of separate residence of one year is sufficient for those to whom the secular law of divorce by mutual consent u/s 28 of the Special Marriage Act, and Hindus to whom Section 13B of the Hindu Marriage Act and Parsis to whom Section 32B of the Parsi Marriage and Divorce Act, there is no justification constitutionally acceptable for insisting on a different longer period of mandatory minimum separate residence so far as the Christians to whom Section 10A of the Divorce Act applies, contend counsel. The learned Counsel urge that the stipulation is unconstitutional as it offends the mandate of equality under Article 14 of the Constitution.

14. It is secondly contended that such stipulation of the longer period of minimum mandatory separate residence offends the right to life guaranteed under the Constitution. It is trite that the right to marry and right to obtain divorce by mutual consent must be reckoned as incidents of the right to life. Right to life can be curtailed or regulated only by procedure established by law. Such procedure, to pass the test of constitutionality must be fair, just, reasonable and right and should not be arbitrary, fanciful or oppressive. The stipulation of the longer period of two years is arbitrary, fanciful and oppressive. It is unreasonable. It offends the core constitutional value of respect to the dignity of life. Spouses during their active period of fertility and re-productivity will be unnecessarily and unreasonably obliged to conform to the oppressive stipulation of living in a dead marriage for one more year. This offends their right to life and the right to pursue happiness, it is urged. It is contended that the stipulation of the longer period of two years u/s 10A(2) to justify a claim for divorce by mutual consent for the Christians alone offends not only the right to equality under Article 14 of the Constitution; but it also offends the right to life under Article 21

of the Constitution, It places unreasonable, arbitrary and baseless fetter of the spouses to enjoy life and pursue happiness, contend counsel.

15. The learned Counsel, in these circumstances, contends that the stipulation of the period of two years in Section 10A(2) of the Divorce Act must be held to offend the fundamental rights guaranteed under Part III of the Constitution and consequently that stipulation must be held to be unconstitutional. Section 10A(2) as it now stands must be declared to be unconstitutional under Article 13 of the Constitution. The consequent prayer is that to avoid unconstitutionality the period of two years stipulated in Section 10A(2) may be read down to a period of one year, in tandem with the periods stipulated in Section 28(1) of the Special Marriage Act, Section 13B(1) of the Hindu Marriage Act and Section 32B(1) of the Parsi Marriage and Divorce Act.

16. This argument advanced by Sri. G. Shrikumar, amicus curiae, mainly is endorsed by the other counsel who appeared for the parties.

17. Sri. T.P.M. Ibrahim Khan, the learned Assistant Solicitor General of India, on the contrary, contends that the provision is absolutely valid, correct and constitutional. It is not vitiated by the vices against which Articles 14 and 21 of the Constitution are safeguards. The learned ASGI resists the contention on the following specific grounds:

18. First of all, the learned ASGI points out that the personal laws are not "laws" or "law in force" within the sweep of Article 13 of the Constitution. The learned ASGI places reliance on the decision of the Division Bench of the Bombay High Court in *The State of Bombay Vs. Narasu Appa Mali*, . The counsel contends that this view has been accepted by the Supreme Court in *Srikrishna Singh v. Mathura Aahir and Ors.* (1981) 3 SCC 639. In these circumstances, a piece of personal law cannot be assailed on the ground that it offends the fundamental rights guaranteed under Part-III of the Constitution. Article 13 has no application whatsoever in such a situation, contends the learned ASGI.

19. Sri. G. Shrikumar, the amicus curiae, questions the correctness of the dictum in *Narasu Appa* (supra). The learned Counsel contends that the view taken by the Bombay High Court in that decision has not been approved by jurists. The learned Counsel points out that Sri. H.M. Seervai in his work "Constitutional Law of India" has opined as follows:

There is no difference between the expression "existing law" and "law in force" and consequently personal law would be "existing law" and "law in force". This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them; it was, therefore, necessary to treat the whole of personal law as law in force under Article 372 and to continue it subject to the provisions of the Constitution and subject to the legislative power of the Legislature.

It is further pointed out that the learned author has finally opined as follows:

Finally Entry 5 List 3 Schedule VIII of the Constitution clearly recognizes personal law as a law which Parliament and State Legislature Can enact, alter or repeal. For these reasons it is submitted that the personal law of a community is law and is "law in force" or "existing law" within the meaning of the Constitution.

20. The learned Counsel further points out that many other authors, including Chitaley on the Commentaries on the Constitution of India have made critical reference to this aspect of the decision excluding personal laws from the sweep of Article 13 of the Constitution.

21. Sri. G. Shrikumar further points out that Justice V.R. Krishna Iyer as early as in *Assan Rawther v. Ammu Umma* 1971 KLT 684 has disagreed with the proposition enunciated in *Narasu Appa* (supra) by observing as follows in para 23:

In the Bombay case, the learned Judges went to the extent of laying down that personal law is not included in the expression "laws in force" used in Article 13(1). With great respect, I demur to the proposition and to the reasoning adopted in reaching this result. Personal law so-called is law by virtue of the sanction of the sovereign behind it and is, for that very reason, enforceable through court. Not Manu nor Muhammed but the monarch for the time makes "personal law" enforceable. Article 13(1) gives an inclusive and not exhaustive definition. And I respectfully venture the opinion that Hindu and Mohamedan laws are applied in courts because of old regulations and Acts charging the courts with the duty to administer the personal laws and not because the ancient law-givers obligate the courts to enforce the texts.

(emphasis supplied)

Sri. G. Shrikumar further points out that the Supreme Court in *Smt. Sarla Mudgal, President, Kalyani and others Vs. Union of India and others*, has also taken the view that the personal law owes its existence as law not to any religion; but to legislation and the willingness of the courts and the sovereign to enforce such personal law. The counsel relies on the following passage in para-35 of *Sarla Mudgal* (supra):

It would be necessary to emphasise that the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc., only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/ supplemented by introducing a uniform Civil Code.

(emphasis supplied)

22. It is also brought to our notice that a learned single Judge of Bombay High Court In re, *Smt. Amina*, has doubted the proposition enunciated in *Narasu Appa* (supra) and had referred the matter to a larger Bench. Our attempts to ascertain

the result of the said reference has not been successful. We note that the Delhi High Court had also made an effort to trace the answer on reference by the larger Bench; but as stated in *Kalawati v. Union of India* L.A.A. No. 650/08 and C.M. No. 9226/08 dated 27.1.09, that court was also not able to trace, the outcome of the reference. We are now given to understand that the Division Bench had declined to answer the reference by judgment dated 6.11.1993.

23. The learned ASGI submits that a Division Bench of this Court in *Mathew and Anr. v. Union of India* 1999 (2) KLT 248 : 1999 (2) Kar LJ 824 has also accepted the dictum in *Narasu Appa* (supra) and, in these circumstances, no doubts can be entertained now about the acceptability of that dictum. The learned ASGI further points out that in *Shri Krishna Singh Vs. Mathura Ahir and Others*, in para 17 the Supreme Court has virtually endorsed the dictum in *Narasu Appa* (supra) in the following words:

In our opinion, the learned Judge failed to appreciate that Part HI of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu Law, i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage of custom or is modified or abrogated by statute.

(emphasis supplied)

We have serious doubts about the proposition that a piece of personal law - whether statutory or precedent recognised or otherwise, will not be law or law in force within the meaning of Article 13 of the Constitution. This would go against the fundamental and core constitutional values as also the scheme of Article 13 of the Constitution.

24. All laws whether pre constitutional or post constitutional will have to pass the test of constitutionality. We find no reason, in a secular republic, to cull out "personal law" alone and exempt the same from the sweep of Article 13 and Part III of the Constitution. With great respect to the eminent Judges who decided *Narasu Appa* (supra), we feel that the decision requires reconsideration. A piece of personal law also binds citizens. It is as much a piece of enforceable law notwithstanding the fact that such principles of personal law may not be statutory law and may only have been accepted and enforced by the sovereign and acted upon by the courts for a long period of time. Article 13 assures the citizen that pre-constitutional or post-constitutional laws shall not be permitted to eat into space of fundamental rights reserved by "we the people of India" in favour of themselves while giving unto themselves the Constitution. In that view of the matter, we are certainly of the opinion that the decision in *Narasu Appa* (supra) which appears to have been endorsed in *Mathew* (supra) deserves reconsideration. *Mathew* (supra) does not appear to have delved deeper into question before endorsing *Narasu Appa* (supra). We are tempted to agree with

the learned single Judge who opined In re, Smt. Amina, that the observations of the Supreme Court in Shri Krishna Singh (supra) extracted above cannot be reckoned as ratio. In an appropriate case, we shall certainly want the matter to be decided by a larger Bench.

25. Be that as it may, we are of the opinion that this question need not be referred to a larger Bench in this case. We are not dealing with a piece of traditional personal law pure and simple. We are dealing with a piece of statutory law enacted by the Parliament. Section 10A has been introduced into the Divorce Act by the legislative act of Parliament. Notwithstanding the fact that such statutory law amends the personal law, it will certainly have to satisfy Part III of the Constitution and will hence be open to challenge under Article 13. On this question, we find absolutely no doubt. If there be any doubt, the decision of the Full Bench of this Court in Mary Sonia Zachariah v. Union of India 1995(1) KLT 644 (F.B.) lays to rest all such doubts. After adverting to Narasu Appa (supra), the Full Bench has observed thus in para. 39:

39. Another contention of the learned Central Government Pleader was that the impugned provisions in Section 10 are codified forms of personal laws of Christians in India founded on the teachings of Christ and his disciples. Such personal laws may not come within the purview of Article 13 of the Constitution of India and as such cannot be declared as ultra vires the Constitution. Learned Counsel has in this connection relied upon the decision in The State of Bombay Vs. Narasu Appa Mali, where it has been held that personal laws are not covered by Article 13 of the Constitution of India. We do not find any merit in the above contention as we are in this case directly concerned with a particular provision in an enactment passed by the Legislature unlike in the case which came up for consideration in Narasu Appa Mali's case. So long as the infringed provisions are part of an Act, it must pass the test of constitutionality even if the provision is based upon religious principles. We would accordingly repel the said contention also.

(emphasis supplied)

26. We do further note that the Supreme Court in Shri Krishna Singh (supra) which decision, according to the learned ASGI, endorses and approves the dictum in Narasu Appa (supra) has also observed that when personal law is altered, "modified or abrogated by statute", the same will have to satisfy the test of Article 13. (See para 17 of Shri Krishna Singh already extracted above).

27. We do, in these circumstances, hold that even if the dictum in Narasu Appa (supra) is valid and binding and has been approved by a co-equal Bench of this Court as well as the Supreme Court, the same cannot in any way justify the contention that Section 10A of the Divorce Act is not amenable to challenge under Article 13 of the Constitution. The said contention must, in these circumstances, fail. We hold that Section 10A of the Divorce Act shall have to stand the test of Article 13 of the Constitution.

28. The learned ASGI next contends that classification is inherent in legislation and the mere fact that there has been classification of Christians as a separate group in the matter of divorce by mutual consent to stipulate a different period of minimum mandatory separate residence cannot be said to offend Article 14. Relying on precedents which we find unnecessary to specifically refer, the learned ASGI contends that the classical test as judicially enunciated demands that two conditions must be fulfilled. They are:

(1) The classification must be founded on an intelligible differential which distinguishes those that are grouped together from others.

(2) The differential must have a rational relation to the object sought to be achieved by the law under challenge.

There can be no dispute on this proposition of law. Classification is permissible and differential in classification can be justified only if the above two tests are simultaneously satisfied by the piece of law under challenge. It is also well settled that classification on the basis of religion in the matter of personal laws is justified. These general principles are not disputed. But the learned Counsel argue that these tests are not satisfied in the instant case.

29. They argue that concept of divorce by mutual consent is unknown to the Christian personal law. It is not modification or amendment of an existing stipulation regarding divorce applicable to Christians. Section 10A attempts to introduce the secular concept of divorce by mutual consent into the personal law. Christian, Hindu or Parsi religions had not permitted divorce by mutual consent under their traditional personal law. The concept is alien to all these religions identically. The secular concept of divorce by mutual consent had gained currency and acceptance in the system. There was demand from members of these communities that such concept must be made applicable to them and they should not be denied the benefit of such divorce by mutual consent merely because they had chosen to get their marriages solemnised by following the traditional rites available in their community. It is this demand - by people of all religions that the secular concept of divorce by mutual consent must be made applicable to them also that prompted the Legislature to bring in amendments to the personal laws by Acts of Parliament. The classification is not on the basis of religion. The classification is on the basis that the beneficiaries are spouses who want the benefit of divorce by mutual consent, notwithstanding the fact that they belong to a religion which does not recognize divorce by mutual consent and have got their marriages solemnised by observing religious rituals and rites. Those who belong to such a group cannot be discriminated on the basis of their religion. The community may initially have been unwilling to accept such an altered progressive concept regarding divorce. The provision may have been introduced into the Divorce Act belatedly on account of such assumption of Parliament about reluctance of the community to accept change. But having chosen to introduce the provisions relating to divorce by mutual consent into the Christian law of divorce and having decided to make the said benefit available to

them, the Legislature is not justified in discriminating against Christians who belong to that larger group of spouses wanting the benefit of the secular concept of divorce by mutual consent solely on the basis of their religion.

30. The argument in short is this. We belong to a larger group of Indians who do not want religion to interfere with our right to claim divorce by mutual consent. It is for the benefit such larger group of Indians that the Legislature has chosen to introduce the concept of divorce by mutual consent. To those who had married under the secular Special Marriage Act the benefit was made available in 1954 when Section 28 of the Special Marriage Act was enacted. In 1956 it was made applicable to the Hindus in the group. In 1988 it was made applicable to Parsis in the group. In 2001 it was made applicable to Christians in that group. For Muslim this is not necessary as they can get their marriage dissolved by mutual consent already under their personal laws without the intervention of the court. Now the concept of divorce by mutual consent is applicable to all Indians. Having made it applicable to all Indians belonging to that group, it is not constitutionally right, just or fair to discriminate among the Christian members of the group/classification on the ground of their religion and to insist on a longer period of mandatory minimum separate residence so far as they are concerned.

31. We have first of all got to see what is the basis of the classification? The dominant rationale for classification, we must note is the anxiety and the yearning of the Legislature, in response to popular demands, that the secular concept of divorce by mutual consent must be made available and applicable to the followers of all religions who want to take advantage of the same. They are people who may have got their marriages solemnized in accordance with their respective personal laws; but want such marriages to be dissolved on the ground of mutual consent. That is the dominant principle of classification. To such class of persons benefits have been extended by amendment and incorporation of identical provisions in the statutory law relating to marriage. The beneficiaries do not primarily and dominantly belong to the class of Christians, Hindus or Parsis. They are not classified for the purpose of the amendment on the basis of their religion at all. They belong to the class of persons who notwithstanding the solemnization of their marriage under the personal law and notwithstanding the absence of such provisions in their personal law, want to claim the benefit of such dissolution of marriage by mutual consent as is available to those who have got their marriage solemnized under the secular law i.e., the Special Marriage Act. After having identified such a class of persons and after having chosen to extend the benefit of divorce by mutual consent which is totally alien to their personal law to them, though at different points of time there is, according to us, absolutely no justification in again classifying them on the basis of their religious and applying the law unequally to such a homogeneous group of persons on the basis of their religious identity. Religious identity is irrelevant to such a group of persons who want to transcend their religious identity and claim the benefit of the secular concept of divorce by mutual consent. The sub-classification in such a broad group on the basis of their religion and differentiation against them must

obviously be held to be unconstitutional as the discrimination and differentiation is unrelated to the purpose and object of classification.

32. We do first of all look at Article 44 of the Constitution which enjoins that the State must endeavour to secure for all its citizens a uniform Civil Code throughout the territory of India. The preamble of the Constitution declares and stipulates that the Union of India shall be a sovereign, secular, socialist, democratic republic. The core values of the Constitution are declared. Secularism without any dispute is one of the basic features of the Indian Constitution. The State cannot be secular until the polity also becomes secular. Constitutional secularism is not denying religion as such. The core of Constitutional secularism is the realistic understanding and acceptance that the religions shall not transgress into domains and areas where religion is and ought to be irrelevant.

33. Article 44 of the Constitution mandates that there must be a uniform Civil Code in India. All Indians ideally will have to come under the umbrella of a uniform Civil Code which will contribute to the creation of national identity and character. Persons who have imbibed the core constitutional value of secularism and the constitutional dream of the polity having a uniform Indian civil laws are members of the classified group to whom this law is expected to cater. Section 28 of the Special Marriage Act, Section 13B of the Hindu Marriage Act, Section 32B of the Parsi Marriage and Divorce Act and Section 10A of the Divorce Act are all attempts of the Legislature to make the law of divorce by mutual consent applicable to this broad classification/group of individuals. The law classifies them into one group and makes the benefit of the concept of divorce by mutual consent, unknown to their respective traditional personal law, available to them. Due to pressure of obscurantist religious groups this could not evidently be introduced simultaneously by Parliament by enacting a law applicable to all in the group. Progressively one by one the benefit has been extended to the followers of all religions. When the Legislature has perceived that the time is ripe to extend the benefit of the concept to a particular community, to further discriminate them on the basis of their religion is certainly anathema to law. It offends the principle of equality. The stipulation of the longer period of mandatory separate residence, the differential, has no rational relationship to the object sought to be achieved. In short, we agree that classifying persons into one group to extend the benefit of the secular concept of divorce by mutual consent to them by progressive amendment of the personal law though in stages and later discriminating among them on the basis of religion by prescription of a longer period of mandatory minimum separate residence clearly offends the mandate of equality under Article 14 of the Constitution. We take the view that such prescription offends Article 14 and must hence be held to be unconstitutional.

34. The learned Counsel alternatively argue that the discriminating stipulation offends the right to life guaranteed under Article 21 of the Constitution. The stipulation obliges those to whom Section 10A will be applicable to continue in dead matrimony for a period of one year more. This obligation is not there for

persons belonging to other religions. Willing couple who want to avail the benefit of the concept of divorce by mutual consent will have to waste one extra year during the prime period of life only to satisfy the unreasonable statutory stipulation of a longer period. This would offend their right to life and their right to pursue happiness. The imposition of such an onerous condition on one section of the populace alone is arbitrary, fanciful and oppressive. It is not fair, just and right, contend the learned Counsel.

35. It is now well settled that right to marry and the right to secure divorce must be reckoned as basic and essential incidents of the right to life. Right to life cannot be controlled, regulated or denied except by procedure established by law. This procedure cannot be arbitrary, fanciful or oppressive and must necessarily answer the test of fairness, propriety and reasonableness. Para.56 of the decision in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, appears to be relevant and crucial. It reads as follows:

56. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive: otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

(emphasis supplied)

36. In this context it will be apposite to look at the rationale behind the stipulation of a period of mandatory minimum separate residence. The law and the system values and cherishes the institution of matrimony. The concept of marriage being sublime is accepted by the refined polity. Though the polity and State does not look at marriage as purely a divine sacrament it accepts marriage to be the most fundamental and sublime of all human institutions. Marriage is an arrangement/institution between the adult partners which has social and societal implications. Even when the concept of divorce by mutual consent is accepted, the system wants to ensure that a decision to dissolve marriage by mutual consent is taken by the partners only after sufficient forethought, The spouses must decide mutually that the marriage can be dissolved by their mutual consent. They must be satisfied that they are not able to live together. They must actually have been unable to live together and such period of separate residence must be a prescribed mandatory minimum. AH this is made only to ensure that a decision to dissolve marriage is not taken hastily and without sufficient forethought or contemplation. This anxiety of law is reflected in Section

28(2) of the Special Marriage Act, Section 13B(2) of the Hindu Marriage Act and Section 10A(2) of the Divorce Act. Even after the parties take a decision to dissolve marriage by mutual consent and file an application, they have to live with the decision, contemplate the same, sleep over the decision and wait for a period of six months before a court can pass any order on the basis of such a joint application. Only if the request is repeated after the said period of six months, can the court grant a decree for divorce by mutual consent.

37. We intend to note that the prescription of the period of mandatory minimum separate residence has an objective to serve, that is to ensure the interests of sufficient forethought and contemplation before an application is filed. Even thereafter, the contemplation must continue. The stipulation of the period of minimum mandatory separate residence thus serves this purpose. Considering the purpose and the group of people to which such purpose is to apply and operate, we find the stipulation of different periods for different religions totally unjustified. That renders the stipulation not fair, just and right. It renders the stipulation unreasonable, arbitrary, fanciful and oppressive. In that view of the matter, we are satisfied that Article 21 of the Constitution is also offended by the prescription of a separate, different and longer period of mandatory minimum separate residence for those to whom the Divorce Act applies. Having brought all persons belonging to all religions within a group/classification for the purpose of extending the benefit of the concept of divorce by mutual consent and having chosen to make that benefit available to members of all the communities within the group, later stipulation of a different more onerous period to one sub group alone on the basis of the unreasonable and irrelevant basis of religion does certainly, according to us, offend the mandate of right to life under Article 21 of the Constitution. That the discrimination manifests itself not in one common statute but in a separate statute applicable to the victims of discrimination is not relevant while considering the challenge against the unconstitutional discrimination.

38. It is argued by the learned ASGI with the help of the discussions in Parliament that the community had demanded the stipulation of different period considering the difference in the Christian approach to indissolubility of marriage. The learned Counsel, on the contrary, argues that having decided to extend the concept of divorce by mutual consent to the members of the Christian community by introduction of Section 10A of the Divorce Act, there is no basis whatsoever for the contention that they must alone wait for a longer period of minimum mandatory separate residence. The concept of indissolubility of marriage was available in the Indian and Christian thought and the attempt to justify prescription of a discriminatory provision on the mere basis of "demands from the community" is not justified, it is urged.

39. The learned Counsel further contend that even parliamentary discussions show that this prescription was questioned and the right of the clergy who are not married men to give authentic opinion regarding marriage on behalf of the

laity was questioned even in Parliament. We need not enter into that domain at all. We need only note that having chosen to introduce the concept of dissolution of marriage by mutual consent, prescription of a longer period does appear to offend the mandate of equality undoubtedly. The attempt to justify the same on the vague and assumed basis of demands from the community cannot be held to be sufficient to avoid the vice of arbitrariness.

40. With the help of the decision in *Karnataka Bank Ltd. Vs. State of A.P. and Others*, it is argued by the learned ASGI that in pronouncing the constitutional validity of a statute the court is not concerned with the wisdom or unwisdom, the justice or injustice of law. If that which is passed into the law is within the scope of power conferred on a Legislature and violates no restriction of that power the law must be upheld whatever a court may think of it. It is further argued that the presumption of constitutionality must apply to Section 10A of the Divorce Act. The court cannot lightly assume the same to be not fair, just and right or arbitrary, fanciful and oppressive. It must be remembered that the wisdom of the legislative policy is not to be questioned at all before the courts.

41. We have no quarrel with this proposition. We are reminded by learned Counsel with the help of the decision in *A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.*, that the wisdom of legislative policy is not open to judicial review but when the wisdom takes the concrete form of law, the same must stand the test of being in tune with the fundamental rights and if it trenches upon any of the fundamental rights it is void as ordained by Article 13 of the Constitution.

42. In the domain of policy, it is the legislative decision which will prevail. The wisdom or un-wisdom, justice or injustice of the policy cannot be called in question in judicial review. But when the wisdom takes the concrete form of law the legislative provision will have to stand the test of Article 13 and if the legislative stipulation offends any fundamental right under Part- III of the Constitution Article 13 will come into operation and the offending provision will have to be declared to be void.

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 Section 13B of the Hindu Marriage Act, Section 32B of the Parsi Marriage and Divorce Act and Section 28 of the Special Marriage Act would apply, offends the mandate of equality and right to life under Articles 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 and Others Vs. Union of India (UOI)*, 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 come back 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 petitioners u/s 10A of the Divorce Act.

46. In the result:

(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 u/s 10A of the Divorce Act.

(e) Invoking the powers of the Family Court u/s 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 u/s 10A of the Divorce Act.