



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.02.2021

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P (MD) .No.122 of 2020

1.Jeff Beutson Jose

2.Hannah Nelson

... Petitioners/Petitioners

Vs.

Nil

... Respondents / Respondent

PRAYER:- This Civil Revision Petition has been filed under Article 227 of the Constitution of India, to call for the records relating to the order dated 14.11.2019 in I.D.O.P.No.(Not numbered. But filing No.OP/434/2019) of 2019 on the file of the Family Court, Kanyakumari District at Nagercoil, set aside the same and allow the IDOP as prayed for.

For petitioner : Mr.S.Xavier Rajini

ORDER

This Civil Revision Petition has been filed to call for the records relating to the order dated 14.11.2019 in I.D.O.P.No.(Not numbered. But filing No.OP/434/2019) of 2019 on the file of the Family Court, Kanyakumari District at Nagercoil, set aside the same and allow the IDOP as prayed for.

2.The learned counsel for the petitioner would state that the marriage between the petitioner and the respondent was solemnised on 04.09.2019 at C.S.I.Christ Church Nagercoil, as per Christian rites and customs and due to some matrimonial disputes, the petitioner and the respondent is living separately from 06.09.2019 and the efforts taken by the elders for reunion went in vain and thereafter, the parties decided to file a mutual consent divorce petition under Section 10(A) of the Indian Divorce Act on 07.11.2019. The said petition was returned as to the maintainability. Hence, this petition.

3.The learned counsel for the petitioner would contend that the Court below has erroneously returned the divorce petition on the ground that it is not maintainable as per Section 10A of the Indian Divorce Act, by which, it has to be filed only after two years from the date of separation. According to the learned counsel, the said prescription of two years has been held to be unconstitutional as it violates the fundamental rights to equality and the right to life under Articles 14 and 21 of the Constitution. In support of the said proposition, he would rely on a decision of this Court in P.Epsi vs J.Eugeen Durai Mahesh Kumar, CRP(NPD)No.1011 of 2016, dated 30.03.2016 and a decision of the Karnataka High Court in Mr.Shiv Kumar vs. Union of India, W.P.13112/2012 dated 03.02.2014.



4. Heard the learned counsel for the petitioner and perused the materials available on record.

5. In P.Epsi vs. J.Eugeen Durai Mahesh Kumar, CRP(NPD)No.1011 of 2016, dated 30.03.2016, relied on by the learned counsel for the petitioner, this Court has held as follows:-

'3. The first contention of the learned counsel for the revision petitioner is that in order to maintain the petition for divorce by mutual consent, period of one year separation is sufficient, as per the dictum laid down, as against the statutory requirement of two years. In order to support this preposition, (While representing the petition), the petitioner has relied upon the decision reported in II (2010) DMC 526 (DB) Kerala High Court in which it has been held that :

(a) The stipulation in Sec.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.

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

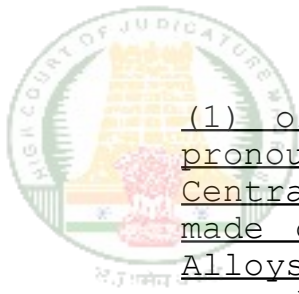
Thus it is clear that, the return regarding period of separation has been complied by the petitioner.

6. The Court also expects proof for separate living. There may be cases where the couples who are living together can make averments that they are separately living. Anticipating this, the Court expects proof. It is a matter for enquiry and it is not a matter for rejection at the threshold. It is an application jointly presented seeking divorce by mutual consent. Having regard to the relief asked for, the Court is expected to be pragmatic in their approach while taking the case on file. Therefore, the orders of the Court repeatedly returning the petition are unjustified.'

6. In yet another decision relied on by the learned counsel for the petitioner, the Karnataka High Court in Mr. Shiv Kumar vs. Union of India, W.P.13112/2012 dated 03.02.2014, has held as follows:-

'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

https://hcservices.ecourts.gov.in/hcservices/ 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.

7.Admittedly, the parties are living separately from 06.09.2019 and the petition for divorce by mutual consent has been filed on 07.11.2019. In my considered opinion, the above decisions are squarely applicable to the present facts and circumstances of the case and therefore, the learned Judge, Family Court, Kanyakumari District at Nagercoil, is directed to number the IDOP and dispose of the same in the manner known to law, within a period of four weeks from the date of receipt of copy of this order.

8.With the above directions, this Civil Revision Petition is disposed of. No costs.

Sd/-

Assistant Registrar

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

msa

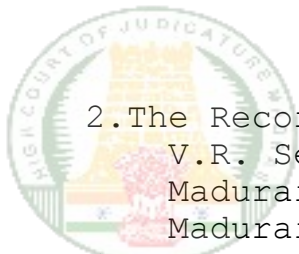
NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Judge,

Family Court, Kanyakumari District at Nagercoil

<https://hcservices.ecourts.gov.in/hcservices/>



2.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.(2C)

(To return the original document filed along with this revision to the learned counsel for the petitioner, after substituting its attesting copies.)

+1 CC to M/s.S.XAVIER RAJINI, Advocate (SR-4481[F] dated 11/02/2021)

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TP (CO)
KK (23.02.2021) 4P 5C