

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

WEDNESDAY, THE 23RD DAY OF JANUARY 2019 / 3RD MAGHA, 1940

WP(C).No. 1838 of 2019

PETITIONER/S:

- 1 DIONCEY AUGUSTINE,
AGED 53 YEARS,
D/O.AUGUSTINE, KULATHUMKAL HOUSE, KARIMPAN,
VATHIKUDY VILLAGE, IDUKKI DISTRICT.
- 2 GIANPAOLO BERTOLOTTI,
AGED 65 YEARS,
S/O.BERTOLOTTI, VENEGONO INFERIORE (VA), ITALY,
PRESENTLY RESIDING AT KULATHUMKAL HOUSE, KARIMPAN,
VATHIKUDY VILLAGE, IDUKKI DISTRICT.

BY ADVS.
SRI.N.G.VIKRAMAN NAIR
SRI.SANJAY THAMPI

RESPONDENT/S:

- 1 STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
DEPARTMENT OF REGISTRATION, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM 695 001.
- 2 THE REGISTRAR OF MARRIAGE,
OFFICE OF THE SUB REGISTRAR, THOPRAMKUDY,
IDUKKI DISTRICT 685 601.

OTHER PRESENT:

SRI.SAIGI JACOB PALATTY, SR.GOV'T.PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
23.01.2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'CR'**J U D G M E N T**

The prayer in the above writ petition is as follows:

“Issue a writ of Mandamus or any other appropriate writ, order or direction commanding the Sub Registrar/Marriage Officer to register their marriage on or before 23/01/2019 and to issue the marriage certificate.”

2. Heard Sri.Sanjay Thampi, learned counsel for the petitioners and Sri.Saigy Jacob Palatty, learned Government Pleader for the respondents.

3. It is stated that the 2nd petitioner is a citizen of Italy and is unmarried and is permanently settled in Italy. The 1st petitioner is a citizen of India and is employed in Italy as Nurse since 2012 and is now residing in Italy in connection with her employment. 1st petitioner was earlier married and such marital relationship with one Thomas George has been dissolved as per Ext.P3 order dated 22.06.2012 of Family Court, Thodupuzha in O.P(Div).No.617 of 2011 on mutual consent under Section 10A of the Indian Divorce Act with effect from the date of said decree. It is stated that after the divorce the 1st petitioner had gone to Italy and is now residing

there since then in connection with her professional duties and assignments. It is further stated that the petitioners had met at Italy and have been living as husband and wife for the last five years and they belong to Roman Catholic religion.

4. When the petitioners had come to India in the first week of January, 2019, they were advised by the parents of the 1st petitioner to solemnize and register their marriage. Since both the petitioners belong to Roman Catholic faith, they could have learn that unless they obtained a formal decree of nullity from the ecclesiastical Tribunal under the canonical laws of the Roman Catholic Church, their marriage may not be solemnized in a Roman Catholic Church, even though the petitioner has secured lawful divorce in respect of her previous marital relationship and even though the second petitioner is an unmarried person.

5. Further that since the petitioners, both belong to Roman Catholic faith, it was not feasible to think in terms of solemnizing the marriage in any other denominational Christian churches. Accordingly, the petitioners are constraint to ensure the solemnization registration of their marriage in terms of the provisions of Special Marriage Act, 1954 (hereinafter referred to as 'Act', for short).

6. It has been held by this Court in various decisions as in **Rajeev v. State of Kerala [2001 (1) KLT 578]**, **Vivan Varghese v. State of Kerala and others [2015(3) KLT 21]**, **Prasyanth Sreenivasan v. Sub Registrar Officer [2018(3)KLT 545]** that no prescriptions has been made in Section 4 or in any other provisions of the Act that the marriage between an Indian National and a foreign citizen is in any manner prohibited by the said Act and that the circular dated 08.08.2014 issued by the State Inspector General of Registration (Kerala) that marriage cannot be solemnized between an Indian citizen and foreign citizen under the provisions of the Act on the premise that both the parties should necessarily be Indian citizens for availing the benefit of the said Act, is clearly ultra-vires and illegal and that this Court had issued direction in that case to Marriage Registrar to accept the notice of intended marriage, if it is otherwise in order and to solemnize the marriage of those parties as per Act. In the light of these aspects the petitioners seek solemnization and registration of their marriage in terms of the provisions of the said Act. It appears that the petitioners have submitted Ext.P2 notice intended marriage under Section 5 of the said Act in the prescribed proforma as per the second schedule to the said Act before the 2nd respondent-Registrar of Marriage for ensuring solemnization and registration of the marriage as per Chapter II of the said Act on 11.01.2019.

7. Section 5 of the said Act stipulates that when a marriage is intended to be solemnized under this Act, then the parties to the marriage shall give notice thereon in writing in the form prescribed in the Second Schedule to the Marriage Officer of the District.

8. Section 7(2) of the Act, further mandates that only after completion of 30 days from the date on which notice of intended marriage has been published under Section 6(2) that the marriage could be solemnized. According to the petitioners both of them fulfill all the eligibility conditions for solemnizing the marriage under the said Act and that they do not suffer any disqualification in that regard. Ext.P1 series are the copy of relevant pages of passports of both the petitioners and Ext.P4 is the copy of the identity card of the 2nd petitioner issued by the Governmental Authorities of the Republic of Italy and Ext.P5 is the letter dated 14.01.2019. According to the petitioners they had proceed from Italy to India on the specific assurance that both of them could remain in India for 45 days as the 1st petitioner has secured necessary leave in that regard from her employer. Later, by Ext.P5 letter dated 14.01.2019, the 1st petitioner was informed by the hospital authorities, where she is now employed that she has to report back to emergently to her professional duties well before 01.02.2019. Hence, it is stated that petitioners will not be able to remain in India till

05.02.2019, which is the expiration of 30 days from the issuance and publication of Ext.P2 notice of intended marriage under Section 5 of the Act. Therefore it is prayed before this Court that directions may be given to the 2nd respondent to solemnize and register the marriage by 23.01.2019 or immediately thereafter, so that the 1st petitioner could report back to Italy well before the deadline of 01.02.2019 as insisted in Ext.P5.

9. In other words, the prayer of the petitioner is that the waiting period of 30 days as prescribed in Section 7(2) of the Act should be treated as only directory and that this Court should direct the 2nd respondent to solemnize and register the marriage by deviating from the waiting period of 30 days prescribed under the said Act, taking into account the peculiar facts and circumstance of this case.

10. The matter in issue is no longer *res integra*. At the outset, it may be borne in mind that what is sought to be effectuated by Ext.P2 notice is solemnization of the marriage of the petitioner and its consequential registration as envisaged in Chapter II of the Act, 1954. This is specifically pointed out as Chapter III, which deals with certain provisions where marriages already solemnized and celebrated in other forms could also be registered in accordance with the provisions contained in Chapter III of the Said Act. Chapter III deals with cases where the marriage between the

spouses is already solemnized and celebrated in other forms and not under the provisions of the Act and the spouses choose that they want the benefit of registration of their already solemnized marriage as envisaged in Chapter III. This case is not dealing with such a scenario as as envisaged in Chapter III and it arises under the situation covered by Chapter II of the said Act, where both solemnization and its consequential registration are required by the parties.

11. Section 16 of the Act comes under Chapter III thereof, where it deals with the procedure for registration of an already solemnized marriage, which is celebrated in forms other than the one under the Act. Section 16 under Chapter II of the Act also stipulates a waiting period of 30 days after issuance of notice in that regard. A Division Bench of this Court in **Deepak Krishna and Another v. District Registrar, Ernakulam and others [2007(3) KLT 570]** has held that even the time frame of 30 days waiting period prescribed under Section 16 under Chapter III of the Act is a mandatory clause, which is not liable to be waived. However, another Division Bench of this Court in the judgment dated 27.09.2006 in **John Lukose v. District Registrar [2007(1) KLT 247]** has held that as per the provision in Section 16 under Chapter III of the Act, the marriage certificate consequent to the registration of marriage under

Section 16 appended under Chapter III of the Act can be issued in exceptional cases even before the expiry of 30 days stipulated in Section 16 of the Act. Their Lordships of the Division Bench in the case of **John Lukose's case (supra)** held in paragraphs 7 and 9 of the said judgment that in the matter of registration of marriage, refers to two situations, one is in respect of solemnization of the marriage coming under Chapter II of the Act and notice of intended marriage has to be there in the prescribed form and the publication is mandatory and thereby third parties get opportunity to raise objections for the proposed marriage. Chapter III of the Act, however, refers to the registration of marriage already celebrated in other forms and it could be seen from the Statement of Objects and Reasons that one of the intention in bringing the enactment is to give opportunity to register the marriage and thereby confer benefits under the Act to the needy. Of course, the procedure of registration, spoken to by Section 16, refers to the notice, but conspicuously the detailed formalities as prescribed for solemnization of a marriage are not there. This may lead to a presumption that the application and the registration is formal in nature and intended to ensure that there is no attempt to over reach the stringent stipulations, which are preconditions for a valid marriage, and there is no trifling with solemnity of material relations and the attempt should be to ensure that *bona fides* is spelt out. Therefore, it was ordered

by the Division Bench in John Lukose's case (supra) that if the appellants make available sufficient materials to show the parentage of the two children, referred to in the said petition, the respondent will have authority to proceed with the application forthwith, in spite of the the non fulfillment of the 30 days waiting period under Section 16. From a reading of the said judgment it can be seen that the spouses were already living as husband and wife and children were also born in that relationship. Therefore, it is only in the light of such exceptional circumstances, the Division Bench has spoken about the waiver of 30 days waiting period and that too only in the context of Section 16 under Chapter III of the Act. Whereas their Lordships in John Lukose's case (supra) has emphasized that the difference in scenario when the matter is one under Chapter II of the Act, which deals with both solemnization and registration and that therefore, unlike Chapter III, the detailed formalities are prescribed for ensuring the solemnity of the solemnization of the marriage. Therefore, in the light of these aspects the view taken by the Division Bench in John Lukose's case (supra), cannot come to the rescue of the petitioners as the petitioners seek the benefit of Chapter II of the Act.

12. It has to be borne in mind that what is involved in a case like present one is solemnization and consequential registration of the

marriage under Chapter II of the Act. The Parliament has envisaged that the minimal formalities for ensuring the solemnity for the solemnization of the marriage should be ensured. That apart, Section 46 of the Act deal with penalty for wrongful action of Marriage Officer, which reads as follows:

“46. Penalty for wrongful action of Marriage Officer.- Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act,-

(1) Without publishing a notice regarding such marriage required by Section 5, or

(2) Within thirty days of the publication of the notice of such marriage,

or

(3) in contravention of any other provision in this Act,

shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both.”

13. Therefore, it can thus be seen from mere reading of Section 46 of the Act that non compliance of the provisions regarding 30 days waiting period as conceived in Section 7(2) under Chapter II of the Act, would also invite not merely penal consequences of a non criminal nature but even that of a criminal offence. Hence, this Court is of the considered view that

the provision of 30 days waiting period as envisaged in Section 7(2) under Chapter II of the Act is indeed a mandatory provision and it will not be legal to waive any such requirement. Hence, the plea made by the petitioner that this Court should direct the 2nd respondent Registrar of Marriage to wait the minimum waiting period of 30 days as envisaged under Chapter II of the Act cannot be countenanced.

14. Faced with the situation, Sri.Sanjay Thampi, learned counsel appearing for the petitioners would submit that, if that be so, this Court may direct the 2nd respondent Registrar of Marriage to solemnize the marriage of the petitioners in terms of the Act through video conferencing facility as has been envisaged in **Pradeep Kodiveedu Cletus & another v. Local Registrar of Marriages (Common), Kollam and others [2018 (1) KLT 292]**, so that the petitioners can immediately now return back to Italy. That after the expiration of the 30 days period as per Section 7(2) of the Act and before the expiration of 90 days period as envisaged in Section 14 of the Act, they can seek solemnization and registration of their marriage through video conferencing of the petitioners who are based in Italy with the 2nd officer.

15. From a reading of the judgment of this Court in **Pradeep Kodiveedu Cletus's case (supra)**, it can be seen that the case involved

therein is one only for registration of an already solemnized marriage under the provisions of the Registration of Marriage (Common) Rules, 2008 (Kerala). The said common Rule conceive of situation where parties have already celebrated and solemnized the marriage in other forms and in terms of provisions of any other applicable law and marriage has not been formally registered and in such a scenario the said common Rules which has been framed to comply with the directions of the judgment of the Apex Court in **State of Maharashtra v. Prabhul B.Desai (Dr.) [2003 (2) KLT (SN) 35 (C.No.45, SC]**, is only for registration of already solemnized marriages. If the request of the petitioners had been under Chapter III of the Act, then their case would have been more or less similar to the one dealt with in **Pradeep Kodiveedu Cletus's case (supra)** and the said prayer of the petitioner could have been appropriately considered by this Court. But the fact of the matter is that the present case is one where the marriage has not been solemnized and it requires not merely consequential registration but the very solemnization of the marriage. After hearing the counsel for the petitioners and the learned senior Government Pleader, this Court is the considered view that the Parliament has ensured that the minimal norms for ensuring the solemnity of the solemnization of the marriage has to be maintained and strict provisions has been framed by the Parliament in that regard in Chapter II of the said Act. Therefore, in

the light of the minimum requirement for the solemnity of the solemnization of the marriage, it will not be right and proper for this Court to adopt the process of video conferencing in marriage of parties who are not present before the notified Marriage Registrar. Section 11 under Chapter II of the Act deals with declaration by parties and witnesses and it stipulates that before the marriage is solemnized the parties and three witness shall, in the presence of the Marriage Officer, sign a declaration in the forms prescribed in the Act and the declaration shall be counter signed by the Marriage Officer. Further Section 12 under Chapter II of the Act deals with place and form of solemnization of marriage and it stipulates that the marriage may be solemnized at the office of the Marriage Officer or such other place within a reasonable distance therefrom, as the parties may desire, and upon such conditions and payment of such additional fees as has been prescribed and subsequent to thereof prescribes that the marriage may be solemnized in any form the parties may choose to adopt and the proviso to Section 12(2) further mandates that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties the declaration envisaged therein.

16. Section 11 and 12 reads as follows:

*“11. **Declaration by parties and witnesses.**- Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.*

*12. **Place and form of solemnization.**-(1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed.*

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three Witnesses and in any language understood by the parties,-”I (A), take the (B), to be my lawful wife (or husband).”

17. A bare reading of Section 11 and 12 make it clear that the parties to the proposed marriage and three witnesses will have to sign the declaration in the presence of the Marriage Officer as per Section 11. So also proviso to Section 12(2) of the Act would also clearly indicate that the solemnization of the marriage of the parties in the designated place should be in the presence of the Marriage Officer. In order to ensure the minimum upkeep of the solemnity for the solemnization of the marriage, the said norms prescribed by the Parliament cannot be diluted and so it will not be right

and proper for this Court exercising powers of judicial review to issue any directions which have the effect of diluting and trifling such norms for the minimum upkeep of solemnity for the solemnization of the marriage.

18. This Court has all the sympathies with the petitioners as they are placed in a peculiar situation and they had pre-planned their marriage as per the wishes of the parents of the 1st petitioner under the belief that they could be in India at least for a period of 45 days. Now due to circumstances beyond their control the 1st petitioner has been directed to report back to duty by her employer by 01.02.2019. However, these circumstances cannot be the basis for deviating from the minimum norms prescribed by the Parliament in the provisions of Chapter II of the Act. Therefore, with a heavy heart this Court has no option but to refuse the aforesaid request of the petitioners.

19. However, this need not necessarily be the end of the road for the petitioners. Section 14 under Chapter II of the Act provides as follows:

“14.New notice when marriage not solemnized within three months:- Whenever a marriage is not solemnized within three calender months from the date on which notice thereof has been given to the Marriage Officer as required by Section 5, or where an appeal has been filed under sub-section (2) of section 8, within three months from the date of decision of the district court on

such appeal or, where the record of a case has been transmitted to the Central Government under Section 10, within three months from the date of decision of the Central Government, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no Marriage Officer shall solemnize the marriage until a new notice has been given in the manner laid down in this Act.”

20. A combined reading of Section 5, 7 and Section 14 would lead to the situation that the marriage could be solemnized only after the expiry of the minimum waiting period of 30 days from the date of publication of notice under Section 5 of intended marriage. But that the marriage could be solemnized thereafter, but within three calendar months from the date on which Section 5 notice has been given. Therefore, it will be certainly be open to the petitioners to come back to India any time before the expiry of the 90 days period as envisaged under Section 14 so as to avail the benefit of solemnization and registration of the marriage under Chapter II of the Act. Before leaving to Italy now or immediately after their arrival well before the expiry of the time limit as prescribed under Section 14 or the petitioners may give any other additional materials before the 2nd respondent like the sworn affidavits regarding their eligibility for contracting marriage and that they have not incurred any disqualification and that the 1st petitioner has obtained lawful divorce and that the 2nd petitioner is unmarried and remained single, so that, in case the petitioners

wants to avail the benefit of solemnization of marriage within the time limit pursuant to Ext.P2 notice dated 11.01.2019 but before the expiry of the 90 days period in terms of Section 14, then they can ensure that further steps could be effectuated with the 2nd respondent as expeditiously as possible, keeping in mind the time frame in Section 14. In this regard it is also declared and ordered that the mere fact that the 2nd petitioner is a citizen of Italy will not be any bar for the petitioners to seek solemnization and registration of the marriage under the provisions of the Act in view of the dictum laid by this Court in the afore-stated judgments dealt with herein above.

With these observations and directions, this writ petition is disposed of.

Sd/-

ALEXANDER THOMAS

JUDGE

DG

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 TRUE COPIES OF THE RELEVANT PAGES OF
PASSPORT ISSUED TO THE 1ST AND 2ND
PETITIONERS.
- EXHIBIT P2 TRUE COPY OF THE NOTICE OF INTENDED
MARRIAGE
- EXHIBIT P3 THE TRUE COPY OF THE JUDGMENT AND DECREE
DATED 22/06/2012 OF DIVORCE PASSED BY
FAMILY COURT, THODUPUZHA
- EXHIBIT P4 TRUE COPY OF CIVIL STATUS ID OF 2ND
PETITIONER.
- EXHIBIT P5 TRUE COPY OF LETTER OF COMMUNICATION WITH
ENGLISH TRANSLATION.