

Tomy Joseph vs Smitha Tomy on 30 October, 2018

Equivalent citations: AIRONLINE 2018 KER 1105

Author: C.K.Abdul Rehim

Bench: C.K.Abdul Rehim

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

TUESDAY ,THE 30TH DAY OF OCTOBER 2018 / 1ST KARTHIKA, 1940

OP (FC).No. 577 of 2018

AGAINST THE ORDER IN I.A.NO.4728 IN OP 1636/2018 of FAMILY
COURT,THRISSUR DATED 10-10-2018

PETITIONER/PETITIONER NO.1:

TOMY JOSEPH
AGED 50 YEARS
S/O.JOSEPH, NJALIYAN HOUSE, NEELESWARAM DESOM,
NEELESWARAM PO, KALADY VILLAGE, ALUVA TALUK,
ERNAKULAM DISTRICT, NOW RESIDING AT FLAT NO. 16
B, SKYLANE, AXIS, PARAVATTANI DESOM, OLLUKKARA
PO, THRISSUR 680655.

BY ADV. SRI.P.B.KRISHNAN

RESPONDENT/PETITIONER NO.2:

SMITHA TOMY
D/O.XAVIOR M SEBASTIAN, NJALIYAN HOUSE,
NEELESWARAM DESOM, NEELESWARAM PO, KALADY
VILLAGE, ALUVA TALUK, ERNAKULAM DISTRICT NOW
RESIDING AT NO. 74, UMA NAGAR, KALATHODE DESOM,
OLLUKKARA PO, THRISSUR 680655.

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
23.10.2018, THE COURT ON 30.10.2018 PASSED THE FOLLOWING:
O.P. (FC) No.577/2018

2

"CR"

C.K.ABDUL REHIM
&
R.NARAYANA PISHARADI, JJ.

O.P. (FC) No.577 of 2018

Dated this the 30th day of October, 2018

JUDGMENT

R.Narayana Pisharadi, J The petitioner is the husband and the respondent is the wife.

2. The petitioner and the respondent jointly filed O.P.No.1636/2018 in the Family Court, Thrissur under Section 10A of the Divorce Act, 1869 for granting a decree of divorce on the basis of mutual consent. The petitioner filed an application as I.A.No.4728/2018 for waiving the 'cooling period' of six months. As per Ext.P4 order, the Family Court dismissed the aforesaid application. Ext.P4 order is under challenge in this Original Petition filed under Article 227 of the Constitution of India.

3. We have heard learned counsel for the petitioner and also the respondent.

4. The petitioner and the respondent are Christians. Their marriage was solemnised on 29.12.1999 in a church as per religious ceremonies. They are living separately from 09.01.2016 onwards. On 10.09.2018, they jointly filed O.P.No.1636/2018 in the Family Court under Section 10A of the Divorce Act, 1869. The application I.A.No.4728/2018 was filed by the petitioner on 27.09.2018 for waiving the cooling period of six months.

5. Ext.P4 order passed by the Family Court, dismissing the application I.A.No.4728/2018 filed by the petitioner, reads as follows:

"The petition is to waive 6 months period for making second move for divorce under Section 10A of Divorce Act. As per Section 10A(2), the second motion cannot be made before 6 months of the first motion. There is no provision in the Divorce Act to waive 6 months period also. No decision under Section 10A of the Divorce Act brought to my notice permitting waiver of 6 months period. Hence, the petition cannot be allowed.

In the result, the petition is dismissed."

6. In *Amardeep Singh v. Harveen Kaur* : AIR 2017 SC 4417, the Hon'ble Supreme Court considered the question whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 for a motion for passing decree of divorce on the basis of mutual consent is mandatory or directory and whether such period can be relaxed in exceptional situations. The object of the provision contained in Section 13B of the Hindu Marriage Act, 1955 was considered by the Apex Court and it was held as follows:

"The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option."

7. In *Amardeep Singh* (supra), after analysing the provision contained in Section 13B(2) of the Hindu Marriage Act, 1955, the Hon'ble Supreme Court further held as follows:

"18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following:

i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA, Rule 3, CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to re-unite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13-B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

8. We do not think that the learned Judge of the Family Court was not aware of the decision of the Apex Court in Amardeep Singh (supra). It appears from the impugned order that the learned Judge of the Family Court was under the impression that the decision in Amardeep Singh (supra) is applicable only to a petition for divorce filed under Section 13B of the Hindu Marriage Act, 1955 and that it is not applicable to a petition for divorce filed under Section 10A of the Divorce Act, 1869.

9. At this juncture, we find it advantageous to extract here the provisions contained in Section 13B of the Hindu Marriage Act, 1955 and Section 10A of the Divorce Act, 1869. Section 13B(2) of the Hindu Marriage Act, 1955 reads as follows:

"13B Divorce by mutual consent.- (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce 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 Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that 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 the 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 in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

10. Section 10A of the Divorce Act, 1869 reads as follows:

"10A. Dissolution of marriage by mutual consent.-

(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not

been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree."

11. A close scrutiny of the aforesaid two provisions would show that they are almost in pari materia except with regard to the period during which the spouses shall be living separately. Under Section 13B of the Hindu Marriage Act, 1955, a petition under that provision can be made only if the spouses have been living separately for a period of one year or more. Under Section 10A of the Divorce Act, 1869, a petition under that provision can be made only if the spouses have been living separately for a period of two years or more. In all other aspects, the aforesaid two provisions are almost identical. Therefore, we are of the considered opinion that the dictum laid down by the Hon'ble Supreme Court in Amardeep Singh (supra) would be applicable in case of a petition filed under Section 10A of the Divorce Act, 1869, also.

12. The provisions contained in Section 10A of the Divorce Act, 1869, are, in substance, a verbatim reproduction of the provisions contained in Section 13B of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954. The only substantial difference is that, instead of the period of one year mentioned in Section 13B(1) of the Hindu Marriage Act, 1955 and Section 28(1) of the Special Marriage Act, 1954, a period of two years of separate residence is provided under Section 10A(1) of the Divorce Act, 1869. The beneficiaries under the abovementioned provisions of different statutes are persons who want divorce by mutual consent and who file joint petition for that relief. There can be no discrimination among them on the ground of religion. Divorce by mutual consent is a secular concept. When the Apex Court has declared the law that the "cooling off period" of six months provided under Section 13B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory and such period can be allowed to be waived by the court on satisfaction of certain conditions, denying that benefit to persons who are governed by the Divorce Act, 1869 would amount to unjust discrimination. Therefore, we are of the considered opinion that the dictum laid down by the Apex Court in Amardeep Singh (supra) is applicable to a petition for divorce filed under Section 10A of the Divorce Act, 1869 and on satisfaction of the conditions laid down in that decision, the Family Court can waive the period of six months stipulated under Section 10A(2) of that Act.

13. The view taken by us that, divorce by mutual consent is a secular concept and there can be no discrimination on the ground of religion against persons who want divorce by mutual consent, is fortified by the decision of a Division Bench of this Court in Saumya Ann Thomas v. The Union of India: 2010 (1) KLT 869 wherein it has been held that the period of 'two years' stipulated in Section 10A(1) of the Divorce Act, 1869, being violative of Articles 14 and 21 of the Constitution of India, must be read down as a period of 'one year'.

14. In the instant case, the marriage between the parties was on 29.12.1999. It is stated that they have been living separately from 09.01.2016 onwards. The petition for divorce under Section 10A of the Divorce Act was filed on 27.09.2018. More than a period of two years and six months from the date 09.01.2016 was over at that time.

15. In the aforesaid circumstances, Ext.P4 order passed by the Family Court cannot be sustained in law and it is liable to be set aside. It necessarily follows that the Family Court has to consider afresh the application I.A.No.4728/2018 filed by the petitioner and pass appropriate orders thereon.

16. Consequently, we allow the Original Petition and set aside Ext.P4 order passed by the Family Court, Thrissur in I.A.No.4728/2018 in O.P.No.1636/2018 and remand the aforesaid application for fresh disposal in accordance with law, in the light of the observations made in this judgment. The Family Court shall dispose of the aforesaid application within a period of two weeks from the date of production of a certified copy of this judgment before that court by either party.

(sd/-) C.K.ABDUL REHIM, JUDGE (sd/-) R.NARAYANA PISHARADI, JUDGE jsr/26/10/2018
APPENDIX PETITIONER'S EXHIBITS:

EXHIBIT P1 TRUE COPY OF O.P.NO.1636 OF 2018 ON THE FILE OF THE FAMILY COURT, THRISSUR, DATED 10.9.2018.

EXHIBIT P2 TRUE COPY OF I.A.NO.4728 OF 2018 IN O.P.NO.1636 OF 2018 ON THE FILE OF THE FAMILY COURT, THRISSUR, DATED 27.9.2018.

EXHIBIT P3 TRUE COPY OF THE LIST OF DOCUMENTS DATED 27.9.2018 AND THE DOCUMENTS PRODUCED BY THE PETITIONER EXHIBIT P4 TRUE COPY OF THE ORDER DATED 10.10.2018 IN IA NO.4728 OF 2018 IN O.P.NO.1636 OF 2018 ON THE FILE OF THE FAMILY COURT, THRISSUR.

RESPONDENT'S EXHIBITS :

NIL TRUE COPY PS TO JUDGE