

WP(C).39357/15

1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 30TH DAY OF SEPTEMBER 2019 / 8TH ASWINA, 1941

WP(C).No.39357 OF 2015(T)

PETITIONER/S:

- 1 SANTHOSHKUMAR S.
AGED 32 YEARS
S/O.SREEDHARAN, CHETHIATHIRUVILA VEEDU,VADAKKEVILA,
BALARAMAPURAM, THIRUVANANTHAPURAM.
- 2 SHAINI
AGED 26 YEARS
D/O.STEEPHEN, SHAINY SADANAM,
THENGEVILAKUZHI,VADAKARA, MARAYAMUTTOM,
THIRUVANANTHAPURAM.

BY ADVS.
SRI.S.VINOD BHAT
SRI.LEGITH T.KOTTAKKAL

RESPONDENT/S:

- 1 CHURCH OF SOUTH INDIA
DISTRICT CHURCH (CSI DISTRICT CHURCH),BALARAMAPURAM
P.O. PIN 695 501. [ADDRESS OF R1 IS CORRECTED AS
'CHURCH OF SOUTH INDIA,SOUTH KERALA DIOCESE (SIUC),
L.M.S. COMPOUND, PALAYAM, THIRUVANANTHAPURAM - 695
034, REPRESENTED BY ITS SECRETARY.' AS PER ORDER
DATED 13.01.2016 IN IA 516/16.]
- 2 ALBERT JOHN
DISTRICT CHAIRMAN AND PRESBYTER,CSI DISTRICT
CHURCH,BALARAMAPURAM P.O., PIN - 695 501.
- 3 PRAVEEN R.P. STANLEY
DISTRICT SECRETARY, CSI DISTRICT
CHURCH,BALARAMAPURAM P.O. PIN 695 501.
- 4 MISS SHIJI G.K
AGED 25 YEARS
D/O.KANAKA BAI, REYA BHAVAN, MUDAVALLOORKONAM,
NARUVAMOODU, PALLICHAL VILLAGE, THIRUVANANTHAPURAM
DISTRICT.

ADDL.R4 IS IMPEADED AS PER ORDER DATED 5.1.2016 IN
I.A.NO.25 OF 2016.

R1, R4 BY ADV. SRI.T.N.MANOJ
R1, R3 BY ADV. SMT.K.R.RIJA
R1 BY ADV. SRI.SUMAN CHAKRAVARTHY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
20-03-2019, THE COURT ON 30-09-2019 DELIVERED THE FOLLOWING:

V.G.ARUN, J.

W.P(C).No.39357 of 2015

Dated this the 30th day of September, 2019

JUDGMENT

The petitioners had filed the writ petition when their marriage, which was proposed to be solemnized on 28.12.2015 at the 1st respondent Church, was refused to be solemnized pursuant to Exhibit P8 communication received from the South Kerala Diocese of the Church of South India. The petitioners therefore pray for the issue of a writ of certiorari to quash Exhibit P8 and for a writ of mandamus directing respondents 1 and 2 to solemnize the marriage of the petitioners on 28.12.2015 itself. The interim prayer to direct respondents 1 and 2 to solemnize the marriage on 28.12.2015 itself was declined and therefore the marriage did not take place as announced.

2. Sri.Vinod S.Bhat, the learned counsel for the petitioners submits that the marriage of the petitioners was subsequently registered under the Special Marriage Act but, the question as to whether the Church or the Diocese, of which the petitioners are members, can refuse to solemnize their marriage require consideration.

3. The essential facts involved in this writ petition are as follows:

The 1st petitioner is a member of the 1st respondent Church and had submitted an application for marriage. The 2nd petitioner, who is a member of the CSI Church, Thenguvilakuzhi, had also submitted an application for marriage. Thereafter, pre-marriage counselling of the petitioners was conducted from 1.10.2015 to 3.10.2015 and certificate was issued evidencing successful completion of the pre-marriage counselling. Thereafter, the petitioners remitted Rs.1,000/- each at their pastorates for the purpose of publishing/announcing notice of their intended marriage during the prayer services on the three succeeding Sundays. Accordingly, notice regarding the proposed marriage of the petitioners was read out on 8.11.2015 and 15.11.2015. At that point of time, the additional 4th respondent raised objections against the proposed marriage and filed a complaint before the ecclesiastical court alleging that the 1st petitioner had promised to marry the 4th respondent and had thereby deceived her into having sexual intercourse with the 1st petitioner and that when the 4th respondent realised the deception, she had filed a complaint before the Balaramapuram Police Station, which had resulted in Crime No.573 of 2015 being registered against the 1st petitioner for the offence under Section 376 IPC. On receipt of the objection, the 1st petitioner was directed to appear before the ecclesiastical court of the Diocese. The 1st petitioner appeared and submitted his explanation stating that

a patently false complaint had been filed by the 4th respondent out of personal animosity. By Exhibit P8, the ecclesiastical court upheld the 4th respondent's objection and decided that the marriage between the petitioners cannot be solemnized in the 1st respondent Church.

4. According to the petitioners, solemnization of marriages by the 1st respondent Church is subject to the provisions of the Indian Christian Marriage Act, 1872 and the Constitution of the CSI Churches. As such, the 1st respondent is exercising a public function and hence is amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. The petitioners allege that Exhibit P8 decision is actuated by *mala fides*, in as much as the members of the Committee which had taken Exhibit P8 decision had personal animosity against the petitioners. It is contended that neither under the provisions of Chapter XII of the Constitution of the CSI Churches dealing with marriage of the members of the CSI Church nor the provisions of the Indian Christian Marriage Act, 1872, the 1st respondent has the authority to refuse solemnization of marriage alleging moral turpitude on one of the parties to the marriage.

5. A counter affidavit has been filed by the 3rd respondent, in his capacity as District Secretary, CSI District Church, Balaramapuram. In the counter affidavit it is contended that the Church, while solemnizing a marriage, is not performing any public duty, public function or statutory duty. It is contended that merely because the

Christian Marriage Act prescribes the procedure, that by itself will not bring ecclesiastic acts within the sweep of public duty. That, the Church does not come within the purview of Article 12 of the Constitution of India and hence, the writ petition seeking to quash the decision by the Diocese Committee and a writ of mandamus directing the Church to solemnize the marriage is not maintainable. It is contended that the 4th respondent had filed an objection pointing out her relationship with the 1st petitioner and the registration of a crime against the 1st petitioner at her instance for the offence under Section 376 IPC. On receipt of the complaint, the Church Committee referred the matter to the Five Member District Court of the Church attached to the District Council. Thereupon, notice was served on the 1st petitioner to offer his explanation. The 1st petitioner engaged a lawyer and filed Exhibit P5 statement. Thereafter, the Bishop deputed by the Synod of the Church of South India, who is the supreme authority of the Diocese, sought legal opinion from the Advocate of the Diocese. Exhibit P8(a) is the legal opinion wherein it was opined that the Church should not proceed with steps for solemnization of the marriage. Hence, after getting permission from the Bishop, the further proceedings of marriage was stopped. It is contended that merely because the petitioners attended marriage counselling and had remitted fees for publication of notice regarding their proposed marriage, that does not confer any right on the petitioners to claim

that their marriage should be solemnized, irrespective of objections.

6. The 4th respondent has filed a counter affidavit contending that unless and until the petitioners are able to demonstrate that their fundamental right is violated or that the respondent Church falls within the definition of 'State' under Article 12 of the Constitution of India, no writ can be issued against the Church. It is submitted that the 1st petitioner and the 4th respondent were in love from 2005 onwards and that the 1st petitioner had sexually exploited the 4th respondent and later refused to marry her, which had compelled the 4th respondent to file a complaint before the Police leading to registration of the crime against the 1st petitioner. According to the 4th respondent, she was subjected to sexual intercourse from 2008 onwards on the false promise of marriage. It was in that background that she had raised an objection against the proposed marriage between the petitioners. Exhibit P8 was issued after providing an opportunity to the 1st petitioner to submit his explanation. Exhibit P8 is perfectly in order and warrants no interference by this Court, especially in exercise of the discretionary jurisdiction under Article 226 of the Constitution of India.

7. The answer to the question of maintainability will depend on whether the 1st respondent was exercising any public duty or public function in terms of the Christian Marriage Act. The Christian Marriage Act was enacted for consolidating and amending the law relating to the solemnization in India of the marriages of persons professing the

Christian religion. The Act extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in the States of Travancore-Cochin, Manipur and Jammu and Kashmir. Therefore the Act was not made applicable to Travancore-Cochin, which position continues even today. In such event the Constitution of the CSI Churches, especially Chapter XII therein, dealing with the marriage law of the Church, assumes relevance. Clause 1 of Chapter XII authorises every Bishop of the Church of South India and every Presbyter and Deacon holding the authorisation of the Bishop of the Diocese to solemnize marriages in the Church, subject to the provisions of the Indian Christian Marriage Act or any other law. The procedure for solemnization provided in clause 7 of Chapter XII reads as under:

"7. Whenever a marriage is intended to be solemnized by any minister of the Church, the following procedure shall be followed;

(a) One or both of the persons intending marriage shall give notice thereof to the presbyters in charge of the pastorates in which the parties severally reside, and shall state therein:

(i) the full name, the father's name, the age, the profession, and the condition of each of the persons intending marriage,

(ii) the dwelling place of each of them,

(iii) the time during which each has dwelt there and

(iv) the place in which the marriage is to be solemnized.

(b) (i) The presbyters in charge, on receiving such notice shall cause it to be published, during Divine Service in the

places where the parties to be married severally reside (or, if there be no church in either of those places, in the nearest suitable place thereto) on three Sundays.

(ii) Any Diocesan Council may make rules providing for the relaxation in special cases of the period of publication of notice, and for permission to publish notices of marriages on other days than Sundays, provided that in all cases a period of at least 96 hours shall elapse between the first publication of the notice of marriage and the solemnization of the marriage.

(iii) Each presbyter in charge shall on the completion of such publication issue a certificate of publication having been made, and no lawful impediment having been shown, provided that no lawful impediment has been shown to his satisfaction why such certificate should not be issued.

(iv) After the issue of such certificates, the marriage may be solemnized at the place of which notice has been given, by the presbyter in charge of the pastorate in which that place is situated, or by any other minister of the Church authorized by him for that purpose. The marriage may be solemnized in any other place than that of which notice has been given only with the written permission of the bishop of the diocese or other diocesan official thereto authorized by the Diocesan Council;

Provided that whenever a marriage is not solemnized within three months after the date of the first publication of notice of the marriage, the certificates of publication shall be void, and no person shall proceed to solemnize the marriage until new notice has been given and certificates of the publication thereof issued as provided above.

(v) Any Diocesan Council may make provision for the issue of special marriage licences under which a marriage may be solemnized without the publication of notices required in this Rule. Any rules in this matter made by a Diocesan Council shall require the sanction of the Executive Committee of the Synod."

8. The above procedure reveals that the issuance of certificate of publication of notice is subject to the condition of the Minister of Religion being satisfied of there being no lawful impediment in issuing the certificate. According to the Church and members of the CSI District Church, the fact that the 1st petitioner had an illegitimate relationship with the 4th respondent and that he is an accused in a crime alleging commission of offence under Section 376 IPC was an impediment against solemnization of petitioners' marriage. The short question therefore, is as to whether this subjective finding of the members of the ecclesiastical court is justiciable in a proceeding under Article 226.

9. Learned counsel for the petitioners would contend that the 1st respondent is exercising a public duty in terms of the authority under the Christian Marriage Act and hence there is no legal impediment in issuing a writ of mandamus, directing the 1st respondent to solemnize the petitioners' marriage. Following are some of the decisions which are relevant for considering the contention put forward by learned counsel for the petitioners: The Honourable Supreme Court in **VST Industries Ltd. v. VST Industries Workers' Union** [(2001) 1 SCC 298] dealt with the question as to what amounts to performance of a public duty by private body and held as follows:

"7. In de Smith, Woolf and Jowell's Judicial Review of Administrative Action, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law e.g the

activities by private bodies may be governed by the standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to act in the public interest... After detailed discussion, the learned authors have summarised the position with the following propositions:

(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a 'public' or a 'private' body.

(2) The principles of judicial review prima facie govern the activities of bodies performing public functions."

10. The question as to what actions would constitute public function or public duty was considered by the Apex Court in **G.Bassi Reddy v. International Crops Research Institute** [(2003) 4 SCC 225] and held as follows:

"28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty.... ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities

of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities.”

11. The question arose for consideration yet again in **Federal Bank Ltd. v. Sagar Thomas** [(2013) 10 SCC 733]. The Apex Court, after a detailed survey of precedents, classified the entities against whom a writ petition will be maintainable in the following words:

“18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.”

12. Later, in **K.K.Saksena v. International Commission on Irrigation and Drainage** [(2015) 4 SCC 670], the legal position was succinctly laid down by the Honourable Supreme Court in the following words:

“43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is “State” within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is

obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law."

13. Thus, even in cases where a person, body of persons or an institution is found to be performing a public duty, a writ would not lie to enforce purely private law rights, which in the case of the petitioners is solemnization of their marriage.

14. The decision of the House of Lords in ***Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank and Another*** [(2003) UKHL 37] relied on by the learned counsel for the petitioner in support of his contention that persons or bodies whose functions are of public nature are amenable to writ jurisdiction, is not applicable since no public duty or public function is being carried out by the Church by solemnization of marriage between two members of the diocese.

For the aforementioned reasons, the writ petition is found to be not maintainable and is consequently dismissed. No order as to costs.

Sd/-

V.G.ARUN, JUDGE

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1** EXT.P-1: COPY OF THE INVITATION OF THE MARRIAGE BETWEEN THE PETITIONERS
- EXHIBIT P2** EXT.P-2: COPY OF EXTRACT FROM THE CONSTITUTION OF THE CHURCH OF SOUTH INDIA, 2003 (CHAPTER XII)
- EXHIBIT P3** EXT.P-3: COPY OF THE CERTIFICATE ISSUED BY WOMEN'S COUNSELLING CENTRE, WOMEN'S FELLOWSHIP TO THE 2ND PETITIONER
- EXHIBIT P4** EXT.P-4: COPY OF THE NOTICE DATED 2.12.2015 ISSUED BY CHURCH OF SOUTH INDIA, BALARAMAPURAM
- EXHIBIT P5** EXT.P-5: COPY OF OBJECTION DATED 6.12.2015 SUBMITTED BY THE 1ST PETITIONER BEFORE THE CSI COURT
- EXHIBIT P6** EXT.P-6: COPY OF THE ORDER DATED 23.6.2015 IN B.A.3489/2015 OF THE HIGH COURT OF KERALA
- EXHIBIT P7** EXT.P-7: COPY OF THE COMPLAINT MADE BY THE PETITIONER BEFORE THE JUDICIAL 1ST CLASS MAGISTRATE COURT-III, NEYYATTINKARA
- EXHIBIT P8** EXT.P-8: COPY OF THE ORDER DATED 17.12.2015 ISSUED BY 1ST RESPONDENT WITH A LEGAL OPINION OF AN ADVOCATE

RESPONDENTS' EXHIBITS:

EXHIBIT R4(a): COPY OF COMPLAINT FILED BEFORE THE BALARAMAPURAM POLICE STATION.

EXHIBIT R4(b): COPY OF FIR REGISTERED BY BALARAMAPURAM POLICE STATION IN CRIME NO.573/2015.