

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

Wednesday, the 25th day of August 2021 / 3rd Bhadra, 1943
WP(C) NO. 15244 OF 2021(E)

PETITIONER:

DHANYA MARTIN, AGED 26 YEARS D/O. MARTIN, DHANYA BHAVAN, KOCHUVEEDU,
MANAKKATTU VILAKOM, 525(1), NEHRU JUNCTION, KAZHAKUTTOM P.O.,
THIRUVANANTHAPURAM DISTRICT-695022.

BY ADV. SRI.A.AHZAR

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY ITS CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM-695001.
2. MARRIAGE OFFICER, SUB REGISTRAR OFFICER, PUNALUR, KOLLAM
DISTRICT-691305.

BY R1 & R2 GOVERNMENT PLEADER

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 25.08.2021,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**



P.B.SURESH KUMAR, J.

W.P.(C) Nos.2072, 15244 & 16281 of 2021

Dated this the 25th day of August, 2021

REFERENCE ORDER

The common question that falls for consideration in these matters is whether the solemnization of a marriage in terms of the Special Marriage Act, 1954 (the Act) could be permitted through video conferencing.

2. Heard the learned counsel for the petitioners as also the learned Government Pleader.

3. The case of the petitioners is that once notice of the intended marriage is given as provided for in Section 5 of the Act to the Marriage Officer of the district in which at least one of the parties to the marriage has resided, there cannot be any impediment in solemnizing the marriage through video conferencing, if the notice is found to be one that could be acted upon. The petitioners rely on the decision of the Apex Court in **State of Maharashtra v. Praful B. Desai (Dr)**, (2003) 4 SCC 601, the decisions of this Court in

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Pardeep Kodiveedu Cletus v. Local Registrar of Marriages (Common), 2018 (1) KLT 292 and **Mathew T.K. v. Secretary and Registrar of Marriages, Alappuzha**, 2020 (4) KHC 456, the decision of the High Court of Jharkhand in **Upasana Bali v. State of Jharkhand**, 2012 SCC OnLine Jhar. 1505 and the decision of the High Court of Punjab and Haryana in **Ami Ranjan and Others v. State of Haryana and Others**, AIR 2021 Punjab and Haryana 78, in support of their case. The case of the State, on the other hand, is that physical presence of the parties to the intended marriage is necessary for solemnising the marriage under the Act. The State relies on the decisions of this Court in **Dioncey Augustine v. State of Kerala**, 2019 SCC OnLine Kerala 13112 and **Shitha V.K. v. The District Registrar (General)** [W.P.(C) No.3421 of 2021], in support of its case.

4. Section 11 of the Act deals with the declaration to be made by the parties to a marriage to be solemnized, Section 12 deals with the place and form of solemnisation and Section 13 deals with with Certificate of

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Marriage. Sections 11, 12 and 13 read thus :

“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)”.

13. Certificate of marriage.—(1) When the marriage has been solemnized, the Marriage Officer shall enter a certificate thereof in the form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

(2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the Certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with.”

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The form of certificate of marriage, as provided for in the Fourth Schedule to the Act is as follows:

“THE FOURTH SCHEDULE

(See section 13)

CERTIFICATE OF MARRIAGE

I, E.F., hereby certify that on the.....day of20.....,A.B. and C.D. appeared before me and that each of them, in my presence and in the presence of three witnesses who have signed hereunder, made the declarations required by section 11 and that a marriage under this Act was solemnized between them in my presence.

(Sd.) E.F.,

Marriage Officer for

(Sd.) A.B., Bridegroom

(Sd.) C.D.,
Bride

(Sd.) G.H. }
(Sd.) I.J. } Three witnesses

(Sd.) K.L. }

Dated theday of20.....”

5. The question has been answered in the negative by this court in **Dioncey Augustine**, holding that the provisions in Sections 11 and 12 are intended to upkeep the solemnity of the solemnization of the marriage and if the marriage is permitted to be solemnised through video

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conferencing, the same will trifle and dilute the provisions in Sections 11 and 12 of the Act. Paragraph 17 of the said judgment reads thus:

“**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.”

Similarly, the question has been answered in the negative by this court in **Shitha V.K.**, holding that without the physical presence of the parties to the marriage, the requirements in Sections 11 to 13 of the Act cannot be complied with. According to the petitioners, the view taken by this Court in the said decisions is incorrect and requires reconsideration.

6. The learned Government pleader supported

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the view in **Dioncey Augustine** and **Shitha V.K.**, pointing out that the requirements of Sections 11 to 13 which are mandatory in nature cannot be complied with, and Certificate of Marriage cannot be issued without the physical presence of the parties to the intended marriage before the Marriage Officer. In order to bring home the point that the requirements under Sections 11 to 13 of the Act are mandatory, and cannot be dispensed with, the learned Government Pleader has relied on the decision of the Division Bench of this Court in **Deepak Krishna v. District Registrar**, 2007 (3) KLT 570. The provision in Section 31 of the Act that proceedings provided for under Chapter V and Chapter VI of the Act are to be presented to the District Court within the local limits of whose original jurisdiction the marriage was solemnized was also relied on by the learned Government Pleader, in support of the stand that the marriage under the Act is one to be solemnised physically before the Marriage Officer. It was pointed out by the learned Government Pleader that the Act provides not only for solemnization of marriages but also registration of marriages

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celebrated in other forms, and the decisions relied on by the petitioners in **Pardeep Kodiveedu Cletus, Mathew T.K., Upasana Bali** and **Ami Ranjan** were rendered in the context of registering marriages celebrated in other forms under the Act as also other statutes and rules, and those decisions will not have any application in the context of resolving the question aforesaid.

7. I have examined the contentions advanced by the learned counsel for the parties.

8. No doubt, the Act provides that the parties to the marriage shall affix their signatures in the declaration form in the presence of the Marriage Officer before the solemnisation of the marriage. The fact that this Court and other High Courts have permitted parties to the marriages to appear before the authorities for registration of marriages under the Act and other statutes and rules through videoconferencing is not disputed by the State. As a matter of fact, in **Mathew T.K.**, in the context of identical provision in Section 11 of the Kerala Registration of Marriages (Common)

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Rules, 2008, this Court has directed that such requirements can be complied with by the parties through their power of attorney holders or authorised representatives. Identical is the view taken by other High Courts on this point. The learned Government pleader has not raised any arguments as to the impediments, if any, in permitting the parties to the marriage to affix their signatures in the declaration form through their power of attorney holders or authorised representatives. On the other hand, the contention raised by the learned Government pleader was that even if it is conceded that the parties can affix their signatures in the declaration form through their power of attorney holders or authorised representatives, the solemnization of the marriage is one to be performed physically, and therefore, the question of granting permission for the same through video conferencing does not arise.

9. To resolve this dispute, it is necessary to understand the contemplation of the Act as regards the solemnisation of the marriage. Black's Law dictionary defines

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the word 'solemnize' thus:

“To enter into (a marriage, contract, etc.) by a formal act, usually before witnesses.”

As noted, Section 12 of the Act deals with place and form of solemnisation of marriage. Sub-section (1) of Section 12 provides that the marriage may be solemnised either at the office of the Marriage Officer or at such other place within a reasonable distance therefrom as the parties may desire. Sub-section (2) of Section 12 however, clarifies that the marriage may be solemnised in any form which the parties may choose to adopt. In other words, while the statute contemplates that the marriage shall be solemnised, it does not prescribe the formal act to be performed by the parties for the said purpose, and the parties to the marriage are given the freedom to choose the act. In other words, the act to be performed for solemnizing the marriage need not be a physical act. The marriage can be solemnised by exchange of words as well. The said freedom, no doubt, includes the freedom to refrain from performing any act as well. But then, the question would be as to when the solemnisation can be said to be over. The

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proviso to sub-section (2) of Section 12 resolves the said question by clarifying that the solemnization would be complete and binding only when 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)." In other words, if the provisions in Section 12 the Act is understood conjunctively, it can be seen that the marriage can be solemnized by the parties even by complying with the requirement in the proviso to sub-section (2) of Section 12 alone. In other words, the marriage under the Act can be solemnized even by exchange of words.

10. Having found that a marriage under the Act can be solemnized by the parties even by exchange of words, the next question is as to whether the same could be performed through video conferencing. In **Praful B. Desai (Dr)**, the question considered was whether evidence can be recorded through video conferencing in a criminal trial. The question was considered in the context of Section 273 of the

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Code of Criminal Procedure which provides that except as otherwise expressly provided, all evidence taken in the course of a trial or other proceedings shall be taken in the presence of the accused, or his pleader. It was held in the said case that recording of evidence by video conferencing would satisfy the requirement of Section 273 that evidence shall be recorded in the presence of the accused. The relevant paragraphs of the said judgment read thus:

“ **13.** One needs to set out the approach which a court must adopt in deciding such questions. It must be remembered that the first duty of the court is to do justice. As has been held by this Court in the case of *Nageshwar Shri Krishna Ghobe v. State of Maharashtra* [(1973) 4 SCC 23 : 1973 SCC (Cri) 664] courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence. Of course the rights of the accused have to be kept in mind and safeguarded, but they should not be overemphasized to the extent of forgetting that the victims also have rights.

14. It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled *Statutory Interpretation*, 2nd Edn., p. 617:

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“It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

* * *

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

* * *

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year

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out. It also comprises processing by executive officials.”

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17. These principles have also been applied by this Court whilst considering an analogous provision of the Criminal Procedure Code. In the case of *Basavaraj R. Patil v. State of Karnataka* [(2000) 8 SCC 740 : 2001 SCC (Cri) 87] the question was whether an accused needs to be physically present in court to answer the questions put to him by court whilst recording his statement under Section 313. To be remembered that under Section 313 the words are “for the purpose of enabling the accused *personally* to explain”. (emphasis supplied) The term “personally”, if given a strict and restrictive interpretation would mean that the accused had to be physically present in court. In fact the minority judgment in this case so holds. It has, however, been held by the majority that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in facilities for legal aid in the country. It was held, by the majority, that it was not necessary that in all cases the accused must answer by personally remaining present in court.

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19. At this stage we must deal with a submission made by Mr Sundaram. It was submitted that video-conferencing could not be allowed as the rights of an accused, under Article 21 of the Constitution of India, cannot be subjected to a procedure involving “virtual reality”. Such an argument displays

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ignorance of the concept of virtual reality and also of video-conferencing. Virtual reality is a state where one is made to feel, hear or imagine what does not really exist. In virtual reality, one can be made to feel cold when one is sitting in a hot room, one can be made to hear the sound of the ocean when one is sitting in the mountains, one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one's sofa etc. Video-conferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example, today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players. When a person is sitting in his drawing room and watching the match on TV, it cannot be said that he is in the presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both, the person sitting in the stadium and the person in the drawing room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other. The submissions of the respondents' counsel are akin to an argument that a person seeing through

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binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video-conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273 of the Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

As seen from the extracted paragraphs of the judgment, the Apex Court has come to the aforesaid conclusion interpreting the relevant provision in the Code of Criminal Procedure applying the doctrine "updating construction", which enables courts to interpret provisions of an ongoing statute in a manner suiting to the changes that have occurred since the passing of the statute in social conditions, technology, meaning of words and other matters, on a presumption that the legislature intends the Court to apply to an ongoing statute a construction that continuously updates its wordings to allow for changes since the statute was initially framed. If a witness in a criminal case can be permitted to depose before the court under oath through video conferencing, according to me, the

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Act being an ongoing statute, the parties to an intended marriage can certainly be permitted to solemnize the marriage by exchange of words through video conferencing.

11. That apart, marriage, as per common law, constitute a contract between a man and a woman in which the parties undertake to live together and support each other. In India, marriages take place either in terms of the personal law of the religion to which the parties belong or in terms of the Act. The Act is one introduced to provide for a special form of marriage for those who are unable to marry in terms of the personal law on account of the difference in faith or other similar reasons. Although the Act provides for a procedure for solemnization of marriage, the basic character of the marriage remains to be a contract [See **Raghunath Gopal Daftardar v. Vijaya Raghunath Daftardar**, AIR 1972 Bombay 132]. If the basic character of the marriage under the Act is a contract, the provisions of the Information Technology Act, 2000 would also assume relevance in the context of resolving the question formulated for decision. Section 10A of the Information

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Technology Act reads thus:

10A. Validity of contracts formed through electronic means.—Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

As evident from the extracted provision, if the communication of proposal and the acceptance thereof in a contract are expressed in electronic form, the same will not be unenforceable on that ground, if it is otherwise in order. Sections 2(1)(ha), 2(1)(i), 2(1)(j), 2(1)(o), 2(1)(r) and 2(1)(v) of the Information Technology Act, which define “communication device”, "computer", “computer network”, “data”, “electronic form” and “information” respectively read thus:

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 x x x x x x x x

(ha) — “communication device” means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image;

(i)- "computer" means any electronic, magnetic,

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optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;

(j) —“computer network” means the inter-connection of one or more computers or computer systems or communication device through—

(i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers or communication device whether or not the inter-connection is continuously maintained;

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(o) “data” means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

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(r) "electronic form", with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

x x x x x

(v) "information" includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche;

As seen from the extracted definitions, information in terms of the Information Technology Act would include images, sound, voice etc. A representation of images, sound, voice etc. which is being processed in any form in a computer system or computer network would amount to data. Images, sound, voice etc. sent and received in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device as data would amount to transmission in electronic form. Video conferencing being a live video based meeting between two or more persons in different physical locations by simultaneously transmitting and receiving images, sound,

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voice etc. in real-time, in terms of the provisions of the Information Technology Act , it is nothing but transmission of images, sound, voice etc. in electronic form, making use of a communicative device, by processing the same through a computer network. If that be so, in the light of Section 10A of the Information Technology Act, it cannot be said that proposal and acceptance made by the parties to a marriage through videoconferencing is invalid. If it is valid and permissible, there is absolutely no reason why the parties to a marriage under the Act shall not be permitted to solemnize the marriage by exchange of words through video conferencing.

12. In the light of the discussion aforesaid, the view in **Shitha V.K.** that without the physical presence of the parties to the marriage, the requirements in Sections 11 to 13 of the Act cannot be complied with, and the view in **Dioncey Augustine** that if the marriage is permitted to be solemnised through video conferencing, the same will trifle and dilute the provisions in Sections 11 and 12 of the Act, do not appear to be correct. Needless to say, the view in the said cases needs

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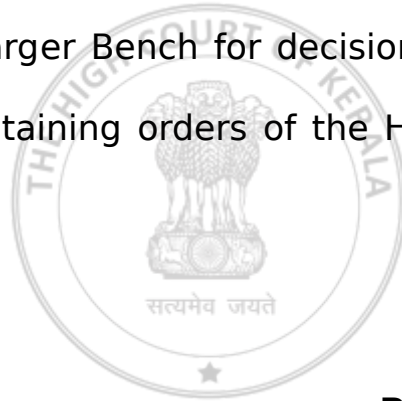
to be re-considered, or else, according to me, as observed by the Apex Court in **National Textile Workers' Union v. P.R. Ramakrishnan**, (1983) 1 SCC 228, we will be allowing the dead hand of the past to stifle the growth of the living present. The law must not only change with the changing social needs, it must also acknowledge and recognise the technological advancements. As observed by the Apex Court in the said case, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress, or if the society is vigorous enough, it will cast away the law, which stands in the way of its growth. I am constrained to quote the above observation of the Apex Court, as I find that larger number of cases are coming up before this Court involving situations where one or both the parties to the intended marriage had to leave the country, after giving notice of the intended marriage, on account of the inevitable social requirements and could not, consequently, solemnise the marriage. Cases involving situations where parties to the marriage who have left India after giving notice of the

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intended marriage, could not come back to India due to reasons beyond their control and could not consequently solemnise the marriage, have also come to the notice of this Court. A pragmatic interpretation of the provisions of the Act, according to me, would redress the grievances of many such people.

The Registry is, therefore, directed to place these matters before a larger Bench for decision on the question, if necessary, after obtaining orders of the Honourable the Chief Justice.



Sd/-
P.B.SURESH KUMAR
JUDGE

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