

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10304 of 2021

With

R/SPECIAL CIVIL APPLICATION NO. 10305 of 2021

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JAMIAT ULAMA-E-HIND GUJARAT

Versus

STATE OF GUJARAT

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Appearance:

MR MIHIR JOSHI, SENIOR ADVOCATE WITH MR MUHAMMAD ISA M
HAKIM(10874) for the Petitioner(s) No. 1,2,3

MR KAMAL TRIVEDI, ADVOCATE GENERAL WITH MS MANISHA
LAVKUMAR, GOVERNMENT PLEADER WITH MS AISHVARYA GUPTA,
AGP for the Respondent(s) No. 1

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**CORAM: HONOURABLE THE CHIEF JUSTICE MR. JUSTICE
VIKRAM NATH**

and

HONOURABLE MR. JUSTICE BIREN VAISHNAV

Date : 19/08/2021

ORAL ORDER

**(PER : HONOURABLE THE CHIEF JUSTICE MR. JUSTICE VIKRAM
NATH)**

1. Both these Petitions, filed under Article 226 of the Constitution Of India challenge the vires of the Gujarat Freedom Of Religion Act, 2003 as amended by the Gujarat Freedom Of Religion (Amendment) Act, 2021 (hereinafter referred to as the “Freedom Of Religion Act,2021”) have prayed for the following reliefs :

“(A) THIS HON’BLE COURT MAY BE PLEASED TO hold and declare Sections 2(a), 2(d), 3, 3A, 4, 4A, 4B, 4C, 5, 6, 6A of the impugned Gujarat Freedom Of Religion Act,2003 as amended by the Gujarat Freedom Of Religion (Amendment) Act, 2021 to be ultravires the Constitution;

(B) Pending admission, hearing, and final disposal of the present application, this HON'BLE COURT MAY BE PLEASED TO stay the implementation of hold and declare Sections 2(a), 2(d), 3, 3A, 4, 4A, 4B, 4C, 5, 6, 6A of the impugned Gujarat Freedom Of Religion Act,2003 as amended by the Gujarat Freedom Of Religion (Amendment) Act, 2021 to be ultravires the Constitution; ...”

2. On 5.08.2021, this Court had, after hearing Mr Mihir Joshi, learned Senior Advocate assisted by Mr. Muhammad Isa. M Hakim for the petitioners and Ms Manisha Lavkumar, learned Government Pleader assisted by Ms. Aishvarya Gupta, Learned AGP, on a request made by the Learned Government Pleader granted ten days' time to obtain instructions. As there is a challenge to the State enactment, notices were issued to the learned Advocate General also.

3. Today, when the matter was taken up for hearing, Mr Kamal Trivedi, learned Advocate General along with Ms. Manisha Lavkumar, learned Government Pleader assisted by Ms. Aishvarya Gupta, learned AGP, has appeared and at the outset requested for time to put in a response by way of an affidavit-in-reply.

4. Admit. Issue Notice. No notice be sent to the respondents as Ms. Aishvarya Gupta, learned AGP waives service of notice. For the State to file its reply, we grant 4 weeks' time and a further 2 weeks' time to the

petitioners to put in their rejoinder. List on 30.09.2021.

5. Mr Mihir Joshi, learned Senior Advocate has pressed for interim relief inasmuch as the amended Section 3 of the Freedom Of Religion Act, 2003 (for short 'the 2003 Act'), per se, prohibits marriage on a presumption that such a marriage is for the purposes of conversion. The concept of marriage has no bearing on conversion. He would invite the attention of the Court to the penal provisions that can be triggered by lodging a complaint by any aggrieved person under Section 3A, 4A and 4B of the 2003 Act.

6. Mr.Kamal Trivedi learned Advocate General appearing for the State would submit that Section 3 of the 2003 Act cannot be read in abstract. According to him, marriage per se is not prohibited but a conversion actuated by fraud or allurement or a forcible marriage is prohibited. The focal point is conversion by force or a fraudulent marriage or a marriage by allurement. He would submit that once the scheme of the Act is seen the purpose is to prohibit unlawful conversion. The mechanism of investigation is well equipped by checks and balances as no prosecution is instituted except with the previous sanction of the District Magistrate. The offences under the Act shall not be investigated by an officer below the rank of a Deputy Superintendent Of Police. Mr.

Trivedi, learned Advocate General has drawn our attention to the Statement of Objects and Reasons and also to the various provisions which provide for the balances and checks in the 2003 Act and has strongly contended that the statement made by Mr. Joshi, learned Senior Advocate is not tenable. According to him, without an element of fraud, allurements or coercion, a marriage inter-faith followed by conversion would not amount to unlawful conversion and as such would not be hit by the penal provisions.

7. Having heard Mr Mihir Joshi, learned Senior Advocate for the petitioners and Mr Kamal Trivedi, learned Advocate General for the State, at this stage, being conscious of the fact that subject to the detailed examination of the Vires of the Act under challenge, certain prima facie observations based on a plain reading of Section 3 of the 2003 Act need to be made. They are as under:

(a) The Gujarat Freedom Of Religion Act, 2003 was initially an Act brought into force in April 2003. According to the then Section 3 of the 2003 Act, there was a prohibition of conversion of any person from one religion to another religion by use of force or allurements or by any fraudulent means.

(b) By the Amending Act of 2021, which was brought into force by way of a Notification dated 04.06.2021 a marriage itself is presumed to be a medium for the purposes of unlawful conversion if the marriage was by way of allurement, force or by fraudulent means. A plain reading of Section 3 would indicate that any conversion on account of marriage is also prohibited. The submission of Mr. Trivedi, learned Advocate General that the element of fraud, allurement or coercion which is sought to be brought in by reading the Statement of Objects and Reasons and the other provisions of the 2003 Act, may not be understood by a common man. The interpretation of Section 3 of the 2003 Act as Mr. Trivedi, learned Advocate General wants us to read would be a subject matter of adjudication but prima facie on a plain reading of Section 3 of the 2003 Act, we feel that marriage inter-faith followed by conversion would amount to an offence under the 2003 Act. Marriage itself and a consequential conversion is deemed as an unlawful conversion attracting penal provisions.

(c) In the case of **Shafin Jahan vs Ashokan reported in (2018) 16 SCC 368**, the Supreme Court observed as under:

“The right to marry a person of one’s choice is integral to [Article 21](#) of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except

through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.”

(d) From the perception of the common man, it appears that merely because a conversion occurs because of marriage, it per se cannot be held to be an unlawful conversion or a marriage done for the purpose of unlawful conversion.

(e) Section 6A of the 2003 Act places the burden of proof on the parties entering into an inter-faith marriage to prove that the marriage was not solemnized on account of any fraud, allurement or coercion. This again puts the parties validly entering into an inter-faith marriage in great jeopardy.

(f) Prima-facie inter-faith marriages between two consenting adults by operation of the provisions of Section 3 of the 2003 Act interferes with the intricacies of marriage including the right to the choice of an individual, thereby infringing Article 21 of the Constitution Of India.

8. We are therefore of the opinion that, pending further hearing the rigors of Sections 3, 4, 4A to 4C, 5, 6 and 6A shall not operate merely because a marriage is solemnised by a person of one religion with a person of another religion without force or by allurement or by fraudulent means and such marriages cannot be termed as marriages for the purposes of unlawful conversion.

9. The above interim order is provided only on the lines of the arguments advanced by Mr. Trivedi, learned Advocate General and to protect the parties solemnizing marriage inter-faith from being unnecessarily harassed.

(VIKRAM NATH, CJ)

(BIREN VAISHNAV, J)

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