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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

TUESDAY, THE 30TH DAY OF JUNE 2020 / 9TH ASHADHA, 1942

WA.No.53 OF 2020

[AGAINST THE JUDGMENT DATED 30-09-2019 IN WP(C) NO.39357/2015 OF HIGH COURT OF KERALA]

APPELLANTS/PETITIONER IN THE WRIT PETITION:

- 1 SANTHOSHKUMAR S., AGED 32 YEARS,
SON OF 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
KUM.ANAGHA LAKSHMY RAMAN

RESPONDENTS/RESPONDENTS IN THE WRIT PETITION:

- 1 CHURCH OF SOUTH INDIA
SOUTH KERALA DIOCESE (SIUC), L.M.S. COMPOUND, PALAYAM,
THIRUVANANTHAPURAM-695 034, REPRESENTED BY ITS SECRETARY.
- 2 ALBERT JOHN, DISTRICT CHAIRMAN AND PRESBYTER, CSI DISTRICT
CHURCH, BALARAMAPURAM P.O, PIN-695 501
- 3 PRAVEEN R.P. STANLY, DISTRICT SECRETARY, CSI DISTRICT CHURCH,
BALARAMAPURAM P.O, PIN-695 501
- 4 MISS SHIJI G.K, D/O. KANAKA BAI, REYA BHAVAN, MUDAVALLOORKONAM,
NARUVAMOODU, PALLICHAL VILLAGE, THIRUVANANTHAPURAM-695 020

R1 TO R3 BY ADV. SMT. K. R. RIJA
R4 BY ADV. SRI. T. N. MANOJ

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 17-01-2020, THE COURT ON 30-06-2020 DELIVERED THE FOLLOWING:

“C.R”

JUDGMENT

Dated this the 30th day of June, 2020

S.Manikumar, CJ.

Instant writ appeal is filed against judgment in W.P.(C) No.39357 of 2015 dated 30.09.2019 by which, the writ court, by holding that writ petition filed against a Church is not maintainable, dismissed the same.

2. Moot question raised in the writ petition is, whether 'Church' does a public duty or public function, within the definition of State or a instrumentality of State and, whether a writ petition is maintainable against a Church.

3. Short facts leading to the appeal are as under:

Appellants, who are the members of Church of South India, respondent No.1, submitted an application for solemnizing their marriage. Pre-marriage counseling of the appellants were conducted from 01.10.2015 to 03.10.2015 and a certificate to that effect was issued. Appellants remitted Rs.1,000/- each, at their pastorates for publishing/ announcing notice of their intended marriage during the prayer services on the three succeeding Sundays. Notice regarding the proposed marriage of the appellants was read out on 08.11.2015 and 15.11.2015. At that point of time, additional respondent No.4 raised objections against the proposed marriage alleging that appellant No.1 had promised to marry the

4th respondent, deceived her, and had sexual intercourse with her. When the 4th respondent realised the deception, she filed a complaint before Balaramapuram Police Station, which resulted in registration of Crime No.573 of 2015 under Section 376 of the IPC against appellant No.1. On receipt of the objection, appellant No.1 was directed to appear before the Ecclesiastical Court of the Diocese. He appeared and submitted his explanation stating that a false complaint had been filed by the 4th respondent out of personal animosity. The Church by Exhibit-P8 order dated 17.12.2015 upheld the objection submitted by the 4th respondent and decided not to solemnize the marriage between the appellants in the 1st respondent Church. Hence, the instant writ petition was filed for the following reliefs:

“i. To issue a writ of certiorari or such other writ quashing Exhibit-P8 order.

ii. To issue a writ of mandamus or such other writ directing respondents 1 and 2 to solemnize the marriage of petitioners to be held on 28.12.2015 and as in Exhibit-P1.”

4. Before the writ court, District Secretary, CSI District Church, Balaramapuram, respondent No.3, has filed a counter affidavit, wherein it was contended as follows:-

“(a) The Church while solemnizing a marriage is not performing any public duty, public function or statutory duty.

Merely because the Christian Marriage Act prescribes the procedure, that by itself would not bring 'Ecclesiastical Acts' within the sweep of public duty. According to the 3rd respondent, 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.

(b) It was further 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 a 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, further proceedings of the marriage was stopped. Merely because the petitioners attended the marriage counseling and had remitted the 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.

5. Before the writ court, Miss. Shiji G.K., D/o. Kanaka Bai, Reya Bhavan, Mudavalloorkonam, Thiruvananthapuram, respondent No.4, has filed a counter affidavit, wherein it was contended that unless and until the petitioners therein 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 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, she had raised an objection against the proposed marriage between the petitioners. It was further contended that order dated 17.12.2015 (Exhibit-P8) issued by the Church to the Rev. Christine, Presbyter, CSI, Thenguvilakuzhi, Irumbil district (Exhibit-P8) was after providing the 1st petitioner an opportunity to submit his explanation. According to the 4th respondent, Exhibit-P8 is perfectly in order and warrants no interference by this Court, especially in exercise of discretionary jurisdiction under Article 226 of the Constitution of India.

6. Before the writ court, appellants have contended that Church of South India, District Church, Balaramapuram, respondent No.1, is exercising a public duty, in terms of the authority under the Christian Marriage Act and, therefore, there is no legal impediment in issuing a writ of mandamus directing the 1st respondent to solemnize the marriage between them. Reliance was placed on a few decisions in **VST Industries Ltd. v. VST Industries Workers' Union** [(2001) 1 SCC 298], **B.Bassi Reddy v. International Crops Research Institute** [(2003) 4 SCC 225], **Federal Bank Ltd. v. Sagar Thomas** [(2003) 10 SCC 733], and **Saksena K.K. v. International Commission on Irrigation and Drainage on Others** [(2015) 4 SCC 670].

7. After considering the rival submissions, writ court held that 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 learned counsel for the petitioners to bolster 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 carried on by the 1st respondent Church by solemnising the marriage between two members of the diocese. Accordingly, writ petition was held to be not maintainable and consequently, dismissed.

8. Being aggrieved, this appeal is filed on the grounds, inter alia, that, the finding of the writ court that solemnization of marriage is a private law right, is incorrect, in as much as the Indian Christian Marriage Act, 1872, gives legal sanctity when the marriage is solemnised by the District Chairman and Presbyter, CSI District Church, Balaramapuram, respondent No.2.

9. Appellants have further contended that solemnization of marriage by the 2nd respondent would result in change of status, in the eyes of public, as man and woman upon marriage, would become husband and wife. Such a change in the status has many implications in the society. It is also contended that the Christian Marriage Act, 1872 applies to the parties and the marriage solemnized by the District Chairman and Presbyter, CSI District Church, Balaramapuram, respondent No.2, accords legal sanctity. According to the appellants, there is no reasoning by the writ court to the finding in paragraph 14 of the impugned judgment, that no public duty or public function is being carried on by the Church, by solemnization of marriage between two members of the diocese.

10. Mr. S. Vinod Bhat, learned counsel for the appellants, relied on clause (vii) in paragraph 25 of the judgment in *Federal Bank's case (cited supra)* to contend that the Church though a private body, is discharging a public duty or positive obligation of public nature and, therefore, a writ

would lie against Church. He also relied on a decision of House of Lords in *Aston Cantlow and Wilmcote (supra)*, wherein at paragraph 170, it is held as hereunder:

“170. For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the Human Rights Act. In performing its duties in relation to the maintenance of the fabric of the church so that services may take place there, the PCC is doing its part to help the minister discharge his pastoral and evangelistic duties. The PCC may be acting in the public interest, in a general sense, but it is still carrying out a church rather than a governmental function. That remains the case even although, from time to time, when performing one of his pastoral duties - conducting a marriage service in the church - the minister himself may act as a public authority.”

11. Heard learned counsel for the parties and perused the material available on record.

12. The Indian Christian Marriage Act, 1872, is an Act to consolidate and amend the law relating to solemnization in India of the marriages of

persons professing the Christian religion. Sections 4, 10, 11, 12, 23, 25 and 27 of the Indian Christian Marriage Act, 1872, which are relevant for this case, are as under:

“4. Marriages to be solemnized according to Act – Every marriage between persons, one or both of whom is or are a Christian, or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

10. Time for solemnizing marriage – Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening:

Exceptions – Provided that nothing in this section shall apply to—

(1) a Clergyman of the Church of England solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese of his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special license in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorised to grant such license, or

(3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rule, rites, ceremonies and customs of the Church of Scotland.

11. Place for solemnizing marriage – No Clergyman of the Church of England shall solemnize a marriage in any place other than a Church where worship is generally held according to the norms of the Church of England,

unless there is no such church within five miles distance by the shortest road from such place, or

unless he has received a special license authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

Fee for special license.- For such special license, the Registrar of the Diocese may charge such additional fee as said Bishop from time authorizes.

**Part III - MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION
LICENSED UNDER THIS ACT**

12. Notice of intended marriage.— Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act—

one of the persons intending marriage shall give notice in writing, according to the form contained in the First Schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—

- (a) the name and surname, and the profession or condition, of each of the persons intending marriage;
- (b) the dwelling-place of each of them;
- (c) the time during which each has dwelt there; and
- (d) the church or private dwelling in which the marriage is to be solemnized:

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it

may be stated therein that he or she has dwelt there one month and upwards.

23. Issue of certificate to Indian Christians – When any Indian Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Indian Christian is cognizant of the purport and effect of the said notice or certificate, as the may be, and such if not, shall translate or cause to be, translated the notice or certificate to such Indian Christian into some language which he understands.

25. Solemnization of marriage – After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt: Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister.

27. Marriage when to be registered.– All marriages hereafter solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered³ in manner hereinafter prescribed.”

13. Core question, which arises for consideration in this appeal, is as to whether the subjective finding of the members of ecclesiastical court can be questioned in a proceeding under Article 226 of the Constitution of India. We deem it fit to reproduce the judgments considered by the writ court. The Hon'ble Supreme Court in **VST**

Industries (cited supra) dealt with a question as to what amounts to performance of a public duty by a private body and held as under:

“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 WP(C).39357/15 11 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.”

14. What actions would constitute public function or public duty have been considered by the Hon'ble Apex Court in *G.Bassi Reddy* (cited supra) and held as under:

“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... ICRIAT 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.”

15. In *Federal Bank Ltd.* (cited supra), after a detailed survey of precedents, the Hon'ble Apex Court 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.”

16. Later, in *K.K.Saksena* (cited supra), the legal position was succinctly laid down by the Hon'ble 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.”

17. The procedure for solemnisation of marriage provided in clause (7) of Chapter XII of the Marriage Law of the Church 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) (l) 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.”

18. Public duty generally said as a duty owed to the people, a duty attached to an office under a Statute. As per P. Ramanatha Aiyer's Dictionary III Edition, the phrase “public duty or public function” can readily be defined to mean, the functions which are similar to or closely related to those performable by the State in its sovereign capacity. In Blacks Law dictionary, 9th Edition, public function is considered thus;

“In a suit under 42 USCA Section 1983, the doctrine that a private person's action constitute State action if the private person performs functions that are traditionally reserved to the State.”

19. Applying the abovesaid principles to the case on hand, it cannot be said that solemnization of marriage is the duty of the State or an authority, and thus, Church can be said to be performing a public duty or public function of the State.

20. Though the Priest of a Church is solemnising a marriage in a Church, he cannot be said to be a public servant, discharging public duty or public function. Functions which are similar or closely related to those performable by the State in its sovereign capacity alone can be said to be a public duty or public function. Solemnization of a marriage by a Minister of District Chairman and Presbyter, CSI, District Church, Balaramapuram (respondent No.2), cannot be said to be an act performable by the State in its sovereign capacity.

21. Solemnizing a marriage involves relationship between the parties, which clearly falls within the ambit of private law and no public function is involved in it. As rightly contended by the District Secretary, CSI District Church, Balaramapuram, Church, while solemnizing a marriage, is not performing any public duty or public function or a statutory duty, merely because the Christian Marriage Act, 1872 prescribes a procedure, and that by itself would not bring the Church within the ambit of a State or instrumentality of State, within the purview of Article 12 of the Constitution of India. Church cannot be declared as a State or as an authority or instrumentality of the State.

22. Thus, even in cases where a person, body of persons or an institution performs an act to any particular section of the society, in the case on hand, those belonging to Christianity, that alone would not give a

cause of action to file a writ against a Church to enforce private law rights, which in the case of the appellants, solemnization of marriage.

In the light of the discussion and decisions, we are not inclined to accept the submission of the learned counsel for the appellants based on the reliance placed to clause (vii) in paragraph 25 of the decision in *Federal Bank Ltd. case* (cited supra). For the abovesaid reasons, reliance placed on *Aston Cantlow and Wilcote with Billesley Parochial Church Council's case* (cited supra) is rejected. Writ petition is not maintainable against a Church and, therefore, dismissed. No costs.

Sd/-

**S .MANIKUMAR
CHIEF JUSTICE**

Sd/-

**SHAJI P .CHALY
JUDGE**

Krj

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P.A. TO C.J.