



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE V.G. ARUN

FRIDAY, THE 15TH DAY OF JULY 2022 / 24TH ASHADHA, 1944

WP(C) NO. 17818 OF 2022

PETITIONER/S:

- 1 SHAN S
AGED 34 YEARS
49 A, BHARAT NAGAR, PAPAD LANE
NETTAYAM, THIRUVANANTHAPURAM, PIN - 695013

- 2 NITHYA. V
AGED 38 YEARS
D/O. VALSAKUMARI
NOW TEMPORARY RESIDING AT A9, 14/525(A),
KACHANI, NETTAYAM P.O.,
THIRUVANANTHAPURAM, RESIDING AT BUILDING NO. 8228,
BIRCHMOUNT ROAD
MARKHAM, ONTARIO, L3R1A6, CANADA TORONTO, PIN -
695013

BY ADV R.V.SREEJITH

RESPONDENT/S:

THE MARRIAGE OFFICER
SUB REGISTRAR OFFICE
JAWAHAR NAGAR, SASTHAMANGALAM,
THIRUVANANTHAPURAM, PIN - 695010

BY ADV ADVOCATE GENERAL OFFICE KERALA

OTHER PRESENT:

SRI. P. S. APPU - GP, ADV. SHYAM PADMAN, ADV LAYA
MARY JOSEPH

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 15.07.2022, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



V.G.ARUN, J.

W.P(C).No.17818 of 2022

Dated this the 15th day of July, 2022

JUDGMENT

The first petitioner is an Indian citizen and the second petitioner, a Canadian citizen with an Overseas Citizen of India card. Being desirous of entering into matrimony, the petitioners gave Exhibit P1 notice of intended marriage. Based on Exhibit P1 an intimation was sent to the petitioners, requiring them to appear on 22.5.2022 for solemnisation of the marriage. In the meanwhile, the second petitioner had to rush back to Canada at her employer's behest. The second petitioner therefore requested the respondent to permit her to appear through online mode. The respondent having refused to accede to the request, this writ petition is filed seeking the following reliefs;

“I. to issue a writ of mandamus or any other appropriate writ, order or direction, commanding the respondent to permit the second petitioner to appear online before him, for solemnization of marriage, as sought in Exhibit P1.

ii. to issue a writ of mandamus or any other appropriate writ, order or direction, commanding the respondent to



pass orders on Exhibit P4 as expeditiously as possible and at any rate within a time frame to be fixed by this Hon'ble Court."

2. Adv.R.V.Sreejith appearing for the petitioner submitted that, right of an intending spouse working/residing abroad, to get his/her marriage solemnized by appearing through virtual mode, is no longer *res integra* in view of the directions in Exhibit P7 order of the Division Bench. It is submitted that ,after Exhibit P7 order, a series of judgments have been rendered, granting permission for solemnization of marriage, by one spouse appearing virtually. It is pointed out that the only distinctive feature of the case at hand is that the second petitioner is a Canadian citizen. Therefore, 'a non-objection and bachelorhood certificate' to prove her single status has to be obtained from the Canadian Embassy in India. The request in that regard submitted by the second petitioner was answered by the Canadian Embassy expressing its inability, since Canadian law neither requires nor provides from issuance of non-objection and bachelorhood certificate. It is contended that the second petitioner cannot be compelled to perform the impossible task of producing bachelorhood certificate and should, in the alternative, be permitted to produce an affidavit as to her single status, notarised by an Attorney in Canada.



3. Learned Government Pleader pointed out that, Exhibit R1(a) order mandates the production of non-objection and bachelorhood certificate from the Embassy, if one of the applicants is a foreign national. On being informed about this requirement, the second petitioner produced Exhibit R1(b) certificate, the relevant portion of which reads as under;

“Canadian law neither requires nor provides for the issuance of such certificates. Therefore, the High Commission of Canada in New Delhi, is not in a position to issue the certificate required.”

In view of the mandatory stipulation in Exhibit R1(a), it is impossible to solemnize the marriage, without the certificate. It is contended that, affidavits apostilled in a foreign country will be acceptable only if the foreign country is a member of the Hague Apostille Convention, 1961. Canada not being a member of the Hague Convention, the 2nd petitioner's affidavit, even if apostilled by a Notary in Canada, cannot be accepted.

4. On being requested to assist the Court in resolving the question as to the acceptability or otherwise of affidavits apostilled by Attorneys in foreign countries, Adv. Shyam Padman responded with alacrity and made the following submissions;

In view of the Canadian High Commission's stand that it does



not issue certificates of non-impediment to marriages abroad, the option available to the petitioner is to file a properly authenticated and attested single status affidavit. Many countries are accepting such affidavits in lieu of bachelorhood certificates. The Hague Apostille Convention of 1961 is an international treaty creating a unified process for confirming the authenticity of documents and for recognising the documents of other participating countries. Every participating country issues and recognises apostilles on documents, which is a standard certification provided under the Hague Convention for authenticating documents used in foreign countries. Apostille is done for personal documents like birth/death/marriage certificates, affidavits, power of attorney etc. and educational documents like degree, diploma, matriculation and secondary level certificates etc. As India is a member of the Hague Apostille Convention, 1961, no further attestation or legalization of a document apostilled by a member country is required for using the document in India. An apostilled document should be treated as legalized document for all purposes in India. At the same time, Canada not being a participant to the Hague Convention, the apostille on documents executed in Canada or its Embassy in India will not be acceptable. In such a situation, the Notaries Act, 1952 could have been pressed into service if Canada



was one among the countries notified under Section 14 of the Notaries Act. Inasmuch as Canada is not a notified country, petitioners will have to depend upon Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948. The above provision enables administration of oaths by diplomatic and consular officers for a prescribed fee. The legal validity of such documents has been dealt with in In re; KK Ray [AIR 1967 Cal.636].

5. As rightly contended by the petitioners' Counsel, it is impossible for the second petitioner to produce the non-impediment to marriage certificate mandated under Ext. R1(a). In such circumstances, the authority will have to either exempt the person from performing the impossible act or provide a viable alternative. To drive home the contention based on the doctrine of impossibility, Adv. Sreejith relied on the decision in State of M.P. v. Narmada Bachao Andolan [(2011) 7 SCC 639]. Therein the Apex Court expounded on the scope of the doctrine of impossibility in the following words;

“Doctrine of impossibility

39. The court has to consider and understand the scope of application of the doctrines of lex non cogit ad impossibilia (the law does not compel a man to do what he



cannot possibly perform); impossibilium nulla obligatio est (the law does not expect a party to do the impossible); and impotentia excusat legem in the qualified sense that there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman law nemo tenetur ad impossibilia (no one is bound to do an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. (Vide Chandra Kishore Jha v. Mahavir Prasad [(1999) 8 SCC 266 : AIR 1999 SC 3558] , Hira Tikkoo v. UT, Chandigarh [(2004) 6 SCC 765 : AIR 2004 SC 3649] and HUDA v. Dr. Babeswar Kanhar [(2005) 1 SCC 191 : AIR 2005 SC 1491] .)

40. Thus, where the law creates a duty or charge, and the party is disabled to perform it, without any fault on his part, and has no control over it, the law will in general excuse him. Even in such a circumstance, the statutory provision is not denuded of its mandatory character because of the supervening impossibility caused therein.”

6. Marriage being a contract, one contracting party cannot be completely exempted from the obligation/requirements, since that may adversely affect the rights of the other party.

7. The purpose of the Hague Apostille Convention of 1961



was to abolish the traditional requirement of legalisation, replacing the often long and costly legalisation process with the issuance of a single Apostille certificate by a Competent Authority in the place where the document originates. The electronic Apostille Programme (e-APP) was launched in 2006 to support the electronic issuance and verification of Apostilles around the world.

8. In this context, the following portion of the treaty assumes relevance;

“The States signatory to the present Convention,

Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");



b) administrative documents;

c) notarial acts;

d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

a) to documents executed by diplomatic or consular agents;

b) to administrative documents dealing directly with commercial or customs operations.”

From the above extracted portion it is clear that the decisions of the Convention will apply only to member States. As Canada is not a signatory to the treatise, a document apostilled/notarised in Canada cannot be accepted.

9. The other alternative is under Section 14 of the Notaries Act, 1952, providing for acceptance of notarial acts done by notaries within the countries that recognise notarial acts done by the notaries within India. Such reciprocating countries are to be notified.

10. That takes us to Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948. Being contextually relevant,



Section 3 is extracted hereunder for easy reference;

"3. Powers as to oaths and notarial acts abroad

(1) Every diplomatic or consular officer may, in any foreign country or place where he is exercising his functions, administer any oath and take any affidavit and also do any notarial act which any notary public may do within [a State]; and every oath, affidavit and notarial act administered, sworn or done by or before any such person shall be as effectual as if duly administered, sworn or done by or before any lawful authority in [a State].

(2) Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any person authorised by this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person."

The above provision empowers diplomatic or consular officers, exercising functions in any foreign country to administer oath, take affidavits and do notarial acts which any notary public may do within that State. Such oath, affidavit and notarial act administered, sworn or done by or before any such diplomatic officer shall be effectual as if duly administered, sworn or done by or before any lawful authority in the State. The scope of Section 3



came up for consideration in *In re: K.K.Ray (supra)*. Therein, the learned Single Judge held as follows;

"32. Now that being the express statute in India, there is no difficulty here. The Notarial Act of Elizabeth Levy has not only been certified under the seal of the County Clerk and Clerk of Supreme Court, New York, but has also been forwarded under the certificate of the Consulate General of India in New York for legalisation of the seal of the Clerk of the County of New York. In that context of law and facts I see no difficulty whatever, legal or otherwise, in admitting this affidavit on the records of this Court I need hardly quote R. 6 of the Company Rules, 1959 of this Court which says:

"Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any of the documents which is presented otherwise than in accordance with these rules or the practice and procedure of the Court."

11. The legal position has been reiterated by the High Court of Madras in *Elizabeth Rajan v. Inspector General of Registration and others* [(2022) 2 MLJ 321]. What emerges from the scrutiny of Section 3, and the well considered decisions above, is that the diplomatic officers of the Indian Embassy in Canada are empowered to apostille affidavits and do notarial acts, which shall have the same effect as done by an authorised officer/attorney in India. Therefore, the petitioner can be permitted to produce an



affidavit duly attested/notarised in the manner provided in Section 3, in lieu of the 'non-objection and bachelorhood certificate'.

The writ petition is disposed of under:-

I. The respondent shall accept the affidavit produced by the second petitioner, attested/notarised in the manner provided in Section 3 of the Diplomatic and Consular Officers (Fees and Oaths) Act, 1948.

II. Thereafter, marriage of the petitioners shall be solemnised, by permitting the second petitioner to appear through online, subject to the following conditions;

- (i) The witnesses required for solemnization of marriage shall be present before the Marriage Officer.
- (ii) The witnesses shall identify the parties who are online.
- (iii) The copies of passport or any other public document, in respect of the party who is appearing online, shall be provided to the Marriage Officer for the purpose of identification.
- (iv) Wherever signature of parties are required, that shall be affixed by the authorised Power of



Attorney of the party appearing online.

III. All other necessary formalities as required by law shall be complied with before solemnization of marriage.

IV. The Marriage Officer shall fix the date and time and convey the same to the parties in advance.

V. The Marriage Officer is free to fix the mode of online platform.

VI. The Marriage Officer is directed to comply with the directions expeditiously, subject to the parties complying with the statutory formalities.

VII. On solemnization of marriage, the certificate of marriage shall be issued in the manner referred to in Section 13 of the Special Marriages Act.

As the period for solemnisation stipulated in the Special Marriage Act is getting over by 18.7.2022, the time limit shall stand extended by a period of one month from receipt of a copy of this judgment.

Sd/-

V.G.ARUN, JUDGE

vgs



APPENDIX OF WP (C) 17818/2022

PETITIONER EXHIBITS

- Exhibit1 THE TRUE COPY OF THE NOTICE OF INTEND TO MARRIAGE ALONG WITH THE RECEIPT
- Exhibit2 THE TRUE COPY OF THE EMAIL COMMUNICATIONS FROM THE EMPLOYER OF CANADA TO THE 2ND PETITIONER
- Exhibit3 THE TRUE COPY OF THE RETURN TICKET OF THE PETITIONER DATED 15.05.2022
- Exhibit4 THE TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE 2ND PETITIONER BEFORE THE RESPONDENT
- Exhibit5 THE POSTAL RECEIPT EVIDENCING THE SUBMISSION OF EXHIBIT P4
- Exhibit6 THE TRUE COPY OF THE JUDGMENT IN W.P.(C) NO. 29743 OF 2021
- Exhibit7 THE TRUE COPY OF THAT INTERIM ORDER IN WP(C) NO. 15244 OF 2021 DATED 09.09.2021

RESPONDENT ANNEXURES

- annexure R1(a) true copy of the order no J3-80/2021 dt. 26/07/2021 of Taxes (J) department
- annexure R1(b) true copy of the certificate dt.05/04/2022 issued by the High Commission of Canada