

SYNOPSIS

The Petitioner is challenging the vires of sections 18, 19, 20, 21, 24, 30, 32(a), 46, 47(b) and 50 of the Parsi Marriage and Divorce Act, 1936 amended Act 1988 (herein after referred to as the 'said act'). Feeling aggrieved and dissatisfied by the continuance of the Jury system, even after the said system came to be abolished in the criminal jurisprudence of the country, the petitioner is approaching this Hon'ble Court. A challenge has been made out to certain provisions of the act which are in complete violation of Art. 14 and Art. 21 of the Constitution of India. The provisions which are under challenge are divided into three broad categories for the sake of convenience namely provisions relating to Jurisdiction of courts; provisions relating to appointment of delegates to participate and aid in adjudication of cases arising under the act and thirdly, the provision requiring the Defendant to seek leave of the Court

to bring a suit in the court at the place where the Plaintiff resides. It is submitted that no other codified statute has placed such restrictions and procedural embargoes on the parties to a matrimonial suit as have been placed in the PMDA, 1936. The provisions of the Hindu Marriage Act, 1955 as well as the Indian Divorce Act, 1869 have been appropriately amended to prevent prolonged agony to estranged spouses, which are in consonance with the constitutional scheme in force in India. It is submitted that the Act under challenge has been enacted in the pre-independence era which also pre-dates the abolishment of the jury system in the jurisprudence of the country. Notwithstanding this, the practice of appointing delegates to aid in adjudication of cases arising under the act, and giving the local Parsis an opportunity of expressing their opinion in a matter which is clearly in the realm of privacy between the parties to a lis continues to find favor in law.

The Family Courts Act of 1984 has mandated the establishment of Family Courts in the country, with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and matters connected therewith. Section 7 of the Family Courts Act relating to the jurisdiction of the Family Court inter alia provides that the Family Court shall have and exercise all the jurisdiction exercisable by any District Court or a subordinate Civil Court under any law for the time being in force in respect of matters relating to Family Law and connected therewith. Section 8 of the Act, specifically bars the jurisdiction of any District Court or subordinate Civil Court to have or exercise jurisdiction over matrimonial and connected matters. In view of the said provisions of the Family Courts Act, persons subject to their respective codified personal law, save and except, those subject to the PMDA, 1936 have the benefit of a secure, speedy

settlement mechanism in the Family Courts, offering its jurisdiction, to resolve their family disputes. However, in view of the provisions of Section 18 and 19 of the PMDA in pursuance of which Special Courts namely Parsi Chief Matrimonial Courts and the Parsi District Matrimonial Courts have been established, the parties subject to this Act are compelled to subject themselves to the jurisdiction of these Spl. Courts and are deprived of the advantages of the Family Courts, which are otherwise available to all other persons. It is submitted that even the territorial jurisdiction based upon the cause of action is discriminatory compared to the persons subject to other codified personal laws. Moreover, a Plaintiff-Wife under this act does not have the convenience of invoking the jurisdiction of the Court, within whose territorial jurisdiction she resides to seek matrimonial relief, without seeking prior leave of the Matrimonial Court.

The aforesaid provisions of law impinge upon the

fundamental rights of the Petitioner, which guarantees speedy disposal of proceedings as well as equal treatment with other similarly placed persons as far as procedural laws are concerned. The proceedings between the parties are pending in the Hon'ble High Court Bombay for the past almost two years and they are further likely to be delayed as the delegates also have to be appointed etc. The Petitioner is deprived of the benefits of the family Court mechanism as an alternative dispute Redressal forum, which is available to persons subject to other codified personal enactments. Thus the Petitioner urges this Hon'ble Court to consider the direct and inevitable effects of the aforesaid provisions on the Petitioner and other similarly placed. Hence, the Petitioner is approaching this Hon'ble Court for the reliefs as prayed.

IN THE SUPREME COURT OF INDIA

(Civil Original Jurisdiction)

Writ Petition (C) No. /2017

IN THE MATTER OF -

NAOMI SAM IRANI

AGED ABOUT 33 YEARS,

OCC- HOUSE HOLD

PRESENTLY RESIDING AT BUNGALOW NO. 4/5,

GOD'S VALLEY, KHINGAR ROAD,

PANCHGANI,

MAHARASHTRA.

...PETITIONER

Versus

1. THE UNION OF INDIA

THROUGH ITS SECRETARY

MINISTRY OF LAW AND JUSTICE

NEW DELHI.

2.

SAM SHAPOOR IRANI

Aged about years,

presently residing at 3/39,

9th floor, Tata Mills Co-operative

Housing society Ltd.,

Elphinstone Road, Parel,

Mumbai - 400 012.

... RESPONDENT

**PETITION UNDER ARTICLE 32 OF THE
CONSTITUTION OF INDIA, 1950**

To,

The Hon'ble Chief Justice of India

And His Companion Judges of the

Hon'ble Supreme Court of India

New Delhi.

The humble Petition
of the Petitioner
abovementioned is
as follows –

1. The Petitioner is challenging the vires of sections 18, 19, 20, 21, 24, 30, 32(a), 46, 47(b) and 50 of the Parsi Marriage and Divorce Act, 1936 amended Act 1988 (herein after referred to as the 'said act'), as they are in contravention of Art. 14 and 21 of the Constitution and violate the fundamental rights of the Petitioner and others subject to the provisions of this Act. Feeling aggrieved and dissatisfied by the continuance of

the Jury system, even after the said system came to be abolished in the criminal jurisprudence of the country, the petitioner is approaching this Hon'ble Court. A challenge has been made out to certain provisions of the act which are in complete violation of Art. 14 and Art. 21 of the Constitution of India, thus the Petition under Article 32 of the Constitution is maintainable.

2. The provisions which are under challenge are divided into three broad categories for the sake of convenience namely provisions relating to Jurisdiction of courts; provisions relating to appointment of delegates to participate and aid in adjudication of cases arising under the act and thirdly, the provision requiring the Defendant to seek leave of the Court to bring a suit in the court at the place where the Plaintiff resides.
3. The Petitioner is a Zoroastrian Irani by religion. She was married to her husband Sam Irani on 13th November, 2005, at Saher Agyari, Breach Candy Mumbai, as per Zoroastrian Iranian Rites

and customs, under the Parsi Marriage and Divorce Act, 1936. The Plaintiff and the Defendant have two children namely Mehroy Irani – a son, born on 14th August, 2007 and Nysha Irani- a daughter, born on 22nd September, 2009, out of the said wedlock.

4. The Petitioner hereby submits that the Respondent herein has filed a Parsi Matrimonial Suit No. 14 of 2016, against the Petitioner in the High Court of Judicature at Bombay, inter alia seeking dissolution of marriage under Section 32 (dd) and (g) of the Parsi Marriage and Divorce Act, 1938. The said Suit is pending in the High Court of Judicature at Bombay. It is submitted that as on date there has been no appointment of delegates as contemplated under the said Act to participate in the matrimonial proceedings pending as aforesaid. It is submitted that for all the reasons which form the grounds of challenged to the impugned provisions, the

petitioner is deprived of speedy disposal of her case and she is also deprived of the specialized jurisdiction of the Family Court.

5. That feeling anguished and aggrieved by the provisions of Sections 18, 19, 20, 24, 29, 30, 46 and 50 of the said Act which provides for the jurisdiction, constitution and appointment of delegates etc. and the resultant delay caused by such delegation in deciding Parsi matrimonial matters, the Petitioner is filing the present proceedings in the interest of equality, fairness and right to speedy disposal of cases including matters pertaining to matrimonial disputes.

6. It is submitted that section 18 of the said Act provides for constitution of "special courts" to hear suits filed therein. In pursuance of the said provision, special courts shall be constituted in each of the presidency towns of Calcutta, Madras

and Bombay and entitled as 'Parsi Chief Matrimonial Courts'.

7. Section 19 of the said Act provides that:

“The Court so constituted in each of the Presidency towns shall be entitled the Parsi Chief Matrimonial Court of Calcutta, Madras or Bombay, as the case may be. The local limits of the jurisdiction of a Parsi Chief Matrimonial Court shall be conterminous with the local limits of the ordinary original civil jurisdiction of the High Court. The Chief Justice of the High Court, or such other Judge of the same Court as the Chief Justice shall from time to time appoint shall be the Judge of such Matrimonial Court, and, in the trial of cases under this Act, he shall be aided by five delegates, except in regard to-

a. Interlocutory applications and proceedings

b. alimony and maintenance both permanent as well as pendente lite;

c. custody maintenance and education of children;

d. all matters and proceedings other than the 'regular hearing' of cases."

(Emphasis Supplied)

8. It is submitted that thus the trial of cases under this Act has to take place in the presence of a Judge appointed under this Act is to be "aided" by five delegates. These 'delegates' are, for all practical purposes, a jury. Under Section 24 of the said Act, the delegates are appointed by the State Government by notification in the Official Gazette. All suits under the said Act and all questions of law and procedure shall be determined by the presiding Judge but the decision on the facts shall be the decision of the

majority of the delegates before whom the case is tried.

9. It is pertinent to note that the impugned provision of the said Act is archaic which pre-dates the country's Independence. More importantly, it pre-dates the abolition of the jury system in our criminal jurisprudence in the 1960's. Even after the amendment to the procedure codes, this system of delegates and a jury has been retained only for matters filed under the said Act. There can be no doubt at all that under the said Act it is the delegates' verdict on facts that is final. No appeal lies from that verdict.

10. It is a matter of fact that the Parsi Chief Matrimonial Court sits only once or twice a year and that too only short durations. In view of the drastically increased number of divorce petitions, jury as a fact finding body, acts as a practical impediment to the speedy delivery of justice which possibly could not have been foreseen during the

enactment of the statute. The parties to a divorce petition must continue to wait for the matrimonial court to come into session, one that requires at least eight weeks' advance notice to empanel a jury of delegates and for a court to set aside time from an already over-burdened docket. Whereas on the other hand, in the absence of a jury system, one could accelerate the time frame to disposal without in any way interfering with the integrity and the object of the said Act. It is the parties under that Act who would undoubtedly be the greatest beneficiaries through the speedy disposal of these marriage petitions. Therefore, in the light of such huge pendency of cases and delay in such adjudication, a reform has to be struck in order to protect the parties' right to speedy disposal of cases and the scarcest of a court's resources, judicial time. Law is dynamic and cannot remain stagnant when there is a need for evolution and hence, reforms shall be made

when the law which is made for the convenience of the public at large turns into an inconvenience.

11. It is submitted that the jury under the said Act were established for the purpose of speedy and effective fact finding and disposal of the cases while interpreting the substantive laws governing the community. The number of sessions was also decided in accordance with the need of the time in 1936. Similarly, various juries were established under the British rule in view of introducing English Justice System without meddling with the native laws and customs. But due to substantial drawbacks affiliated with the jury system, it was subsequently abolished. In the alternative, if an exception is provided in abolishment of the jury system in India, then it will be rendered meritless if it does not uniformly apply to all the jury systems. The abolishment of the jury system was deemed as a positive step in the history of Indian judiciary as the jury in most cases was not in a

position to weigh the facts in light of proper legal complications and is likely to be swayed by popular and painted notions and as a mature democracy we stand for free and fair judgement. It was seen that consensus of the jury are often biased and the jury consists of people who mostly are not related to the legal system. So it's not difficult for the jury to be influenced from popular notions/media portrayals *etal.* which could completely deter a fair trial. The jury judges a case based on societal norms, morality and ethics which may not be in consonance with the principles of natural justice and ethos of dynamic society and hence, it was deemed to be healthy to replace such a mechanism with a relatively fair and unbiased adjudication system.

12. It is pertinent to note that the abolition of the jury system neither resulted in violating the integrity of the other statutes nor did it affect the respective substantial provisions of law. Therefore, it is not wrong to infer that clinging to a

system that ill serves its purpose or the interests of the community itself, should definitely undergo a change. A procedural reform is not a matter of faith or religion nor should it be seen as irreligious or, in any sense, a 'tampering' with the religion. Achieving a fair and just result by and within law is no apostasy. No faith could possibly demand that its adherents be made to wait endlessly for their cases to be decided. Indeed, it would not be stretching it too far to suggest that the entire structure of delegates is now anachronistic, especially if it tends to delay the disposal of matters, and that there is a powerful case to be made here for doing away with the delegate system altogether, and to introduce greater conformity with other civil laws. Hence, what is needed is greater inclusiveness and not a persistence on exclusion.

13. In the memorable words of Justice Bhagwati in *National Textile Workers' Union v P. R.*

Ramakrishnan (1983 AIR 750) it was observed that:

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. ... 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. Law must therefore constantly be on the more adapting itself to the fast changing society and not lag behind."

14. Secondly, it is submitted that the Family Courts Act of 1984 has mandated the establishment of Family Courts in the country, with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and matters connected therewith.

Section 7 of the Family Courts Act relating to the jurisdiction of the Family Court inter alia provides that the Family Court shall have and exercise all the jurisdiction exercisable by any District Court or a subordinate Civil Court under any law for the time being in force in respect of matters relating to Family Law and connected therewith. Section 8 of the Act, specifically bars the jurisdiction of any District Court or subordinate Civil Court to have or exercise jurisdiction over matrimonial and connected matters. In view of the said provisions of the Family Courts Act, persons subject to their respective codified personal law, save and except, those subject to the PMDA, 1936 have the benefit of a secure, speedy settlement mechanism in the Family Courts, offering its jurisdiction, to resolve their family disputes. However, in view of the provisions of Section 18 and 19 of the PMDA in pursuance of which Special Courts namely Parsi Chief Matrimonial Courts and the Parsi District Matrimonial Courts have been established, the

parties subject to this Act are compelled to subject themselves to the jurisdiction of these Spl. Courts and are deprived of the advantages of the Family Courts, which are otherwise available to all other persons.

15. It is submitted that Section 19 of Hindu Marriage Act (as amended) also provides for an additional jurisdiction of courts to the wife (if she is the Petitioner), where she is residing at the date of presentation of the petition. This Hon'ble Court on various instances has been pleased to appreciate and reiterate the importance of convenience of forum in matrimonial jurisdiction. The Family Courts are well equipped with Child Care Centres, Professional Counselors etc. The Presiding Officers of the Family Courts are also additional District Judges who are trained and experienced in dealing with such matters.

16. It is submitted that even the persons subject to the Indian Divorce Act have the benefit of invoking

jurisdiction of the family court. The persons subject to the Hindu Marriage Act, 1955, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of rights on divorce) Act, 1986, The Special Marriage Act, 1954 and The Divorce Act, 1869 respectively are entitled to invoke territorial jurisdiction of that Family Court where the parties were married; where the Defendant resides; and where the parties last resided together as husband and wife. On the contrary, Section 29 of the PMDA, 1936 makes it mandatory for all the suits under this Act to be brought in the court within the limits of whose jurisdiction the Defendant resides at the time of institution of the suit or where the marriage was solemnised. It is only in cases where the Defendant has left the territory to which this act extends, that such a suit can be brought in the court at a place where the parties last resided together. Section 29(3) of the act further places fetters on the right of a plaintiff to bring the suit

in the court at the place where she resides only if the court upon reasons to be recorded in writing grants leave to do so. No such fetters are placed upon the parties to choose the jurisdiction of a family court as per their convenience, in cases of persons other than those subjected to this act. Thus, this is a procedural irregularity and unconstitutionality rendering the said provisions ultra-vires the Constitution for discrimination on the ground of religion.

It is further submitted that Section 29 of this Act is contrary to the Section 45 of the same act, wherein it has been provided that the Code of Civil Procedure, 1908 shall apply to proceedings in suits instituted under this Act. The Civil Procedure Code, 1908 also provides for jurisdiction of courts where the cause of action, wholly or partly, arises. Hence, Section 29 and 45 are self-contradictory and unsustainable.

17. The Parsi Matrimonial Courts also contemplates the proceedings to be tried by a District Judge. Hence, there would be no disadvantage in hierarchy if the family courts are also vested with the jurisdiction of a Parsi Chief Matrimonial Court. Moreover, there is no *intelligible differentia* between the cause of action accruing within the territory of a presidency town and one accruing within the territory of a place other than a presidency town, to justify litigants of the same community to go to the Hon'ble High Court on the original side or the Ld. District Court respectively, depending upon the accrual of the cause of action within a particular territory.

18. At this juncture, the Petitioner also deems it appropriate to bring to the notice of this Hon'ble Court, the provisions of S. 30 and S. 50 of this Act. Undoubtedly, these two provisions are not completely procedural, however, the discrimination between these semi-substantive

provisions and corresponding provisions in other codified personal laws is writ large on the face of the provision itself and hence, the Petitioner finds it appropriate to draw the courts attention to the same. Non-consummation of a marriage on account of natural causes alone is a ground for nullity of marriage in PMDA, 1936. However, other codified enactments provide for declaration of voidable marriage on ground of non-consummation of marriage on account of impotency of the spouse, legal or medical. Thus, the status of a person in whose favour decree is passed is that of a divorcee in PMDA, 1936. However, the status of the person in whose favour the decree is passed in other codified enactments remains that of a spinster/bachelor in the eyes of law. It is further submitted that the provision of S. 50 of the Act is completely gender biased and hence unconstitutional.

19. Thus the fundamental right relating to life and liberty comprising of the right to speedy justice is being denied to a particular sect of citizens despite the fact that the age old mechanism jury system has been abolished effectively throughout the territory of India. The discrimination on ground of jurisdiction and cause of action etc. is also unconstitutional and hence ultra-vires the Constitution. Thus, the Petitioner is filing the present petition for the relief as prayed, on the grounds mentioned herein below.

GROUND

20. The grounds of objection enumerated herein below are independent of and without prejudice to each other:

A. Because the family courts have been established under the Family Courts Act, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and daily affairs and for matters connected therewith. Sec. 18, 19

and 20 of the PMDA has provided for the constitution of Parsi Matrimonial Courts. Because of the statutory constitution of these courts, the parties subject to this Act, are deprived of the facility and the speedy justice provided by the Family Courts. The persons subject to other codified personal laws including the Hindu Marriage Act, Divorce Act etc. have the opportunity of availing the specialised and speedy settlement of matrimonial disputes by the mechanism provided by the Family Courts which include the expertise of family counsellors, child welfare centres etc. and the Petitioner and others similarly placed are deprived from the privileges of submitting to the jurisdiction of the family courts.

B. Because there is no intelligible differentia in depriving the persons subject to this act of availing the speedy settlement mechanism

of the Family Courts as against the persons subject to other codified personal laws.

C. Because there is no rationale for continuing to discriminate between the persons subject to the territorial jurisdiction of Presidency Towns of Bombay, Madras and Calcutta and persons subject to the territorial jurisdictions of non-presidency towns. Under S. 19 and 20 of the Act, it has been provided that if the territorial jurisdiction as available to the persons subject to this Act falls within a presidency town, they are subject to the jurisdiction of the original side of the Hon'ble High Court and others within non-presidency towns are subjected to the jurisdiction of the District Courts. The District Courts are not equipped with the facilities that are required to deal with intricate and delicate issues relating to matrimonial matters and since the District Courts are vested with the jurisdiction to

entertain all civil matters including appeals etc., the speedy resolution of matrimonial matters is hampered and the parties are condemned to the prolonged agony of matrimonial litigation.

D. Because the impugned provision of the said Act is archaic which pre-dates the country's Independence. More importantly, it pre-dates the abolition of the jury system in our criminal jurisprudence in the 1960's. Even after the amendment to the procedure codes, this system of delegates and a jury has been retained only for matters filed under the said Act. It is pertinent to note that save and except the procedure of participation of delegates/jury members in matrimonial matters subject to the provisions of this Act, no other codified enactments relating to personal laws provides for adjudication of matrimonial matters on facts to be finally decided by jury

members, depriving the Petitioner and others similarly placed of judicial verdict on facts. It is also important to note that the verdict of the jury on facts is final and non-appealable. This is a clear procedural discrimination which has no nexus with the object to be achieved by the provision.

E. Because the abolishment of the jury system is a positive step in the history of Indian judiciary as the jury in most cases was not in a position to weigh the facts in light of proper legal complicacies. The jury is likely to be swayed by popular and painted notions. The consensus of the jury are likely to be biased and the jury consists of people who mostly are not related to the legal system. So it's not difficult for the jury to be influenced from popular notions/media portrayals *etal.* which could completely deter a fair trial. The jury judges a case based on societal norms, morality and

ethics which may not be in consonance with the principles of natural justice and ethos of dynamic society.

F. Because no specific qualification has been provided for a person to be a delegate save and except that the delegates have to be senior members of the community. Thus, the jury are bound to prejudicially affect the administration of justice as such delegates are vested with adjudicatory powers as it may not be feasible for persons of ordinary experience to deal with such subjects with legal accuracy. Thus, this leads to arbitrariness and the system is open to abuse.

G. Because keeping in view the basic structures of the constitution and the independence of the judiciary, it is a mandatory requirement that judicial and quasi-judicial powers ought to be exercised by persons having judicial knowledge and

expertise. It is the fundamental right of the Petitioner and others similarly placed to be adjudged by a forum which exercises judicial power in an impartial and independent manner consistent with their recognised principles of adjudication.

H. Because the Family Court Act provides for recording the evidence of parties and the proceedings generally to be held in camera. This is in keeping with the principles of right of privacy of parties to matrimonial litigation. The parties may not be comfortable in allowing persons of their community who are appointed as delegates to hear the factual matrix in the proceedings which may involve personal and sensitive information about the parties. Thus, the court has to thus consider the direct and inevitable effect of such a law.

I. Because this Hon'ble Court, in various precedents, while referring to the

adjudicatory process, has said “We must strive to give such an interpretation as well promote the march and progress towards the socialist, secular and democratic state. For ex. When we consider the question whether a statute offends Art. 14 of the Constitution, we must also consider whether a classification that the legislature may have made is consistent with the socialist and secular goals set out in the preamble and directive principles in Part-IV of the Constitution.”

J. Because other similarly placed Petitioner wives are entitled to file proceedings of matrimonial nature at the place where they reside at the time of presenting the Petition. It is only persons subject to this Act, who are deprived of *forum convenia* and are compelled to submit to the jurisdiction of the courts within whose jurisdiction the marriage took place or where the Defendant

resides. The Petitioner can file in the court within which jurisdiction the parties last resided together and/or where she resides only if the court grants leave for the same. Even then the said order is appealable extending the scope of delay being caused by the other party.

K. Because the provisions challenged herein are procedural and are not an integral part of the religion of the parties. The question is not whether a particular religious belief or practice appeals to reason or sentiment, but whether the belief is genuinely and conscientiously held as part of the profession or practice or religion. The provisions challenged in the present petition are not integral to the substantive religious sentiment but are procedurally unconstitutional and hence declaring them as such will not offend Art. 25 of the Constitution.

L. Because the provisions of S. 18, 19 and 20 of the Act, need to be read down to include the jurisdiction of Family Courts, to be treated as Parsi Chief Matrimonial Courts and Parsi District Matrimonial Courts.

M. Because the provisions sought to be declared ultra-vires the Constitution as mentioned herein above are in contravention of Art. 14 and 21 of the Constitution and hence, violate the fundamental right.

21. The Petitioner submits that no other writ petition or any other proceeding has been filed by the Petitioner in this Hon'ble Court or any other court claiming similar relief.

PRAYER

22. It is, therefore, most respectfully prayed that the Hon'ble Court may kindly be pleased to-

- a) Issue an appropriate writ, direction or order directing the Respondents to declare Section 24, r/w S. 25, 26, 27, 29 and 46 of the said Act ultra-vires of the Constitution as violative of the fundamental rights of the Petitioner and persons subject to the provisions of this Act;
- b) Declare the provisions of S. 18, 19 and 20 of the said Act to be read down to include the jurisdiction of the Family Courts in place of the Parsi Chief Matrimonial Court and the Parsi District Matrimonial Court;
- c) Direct that the Matrimonial Suit No...../2016 pending in the Bombay High Court, Original Side, may be transferred to the Hon'ble Family Court, Bandra, Mumbai;
- d) Pass any other just and reasonable orders to meet the ends of justice

AND FOR THIS ACT OF KINDNESS, THE
PETITIONER ABOVE NAMED, AS IN DUTY
BOUND, SHALL EVER PRAY.

New Delhi

Dated:

Petitioner