Bombay High Court
Mrs. Pragati Varghese And Etc. vs Cyril George Varghese And Etc. on 6 May, 1997
Equivalent citations: AIR 1997 Bom 349, 1997 (4) BomCR 551, 1997 BomCR Cri, (1997) 3 BOMLR 333, II (1997) DMC 407, 1997 (3) MhLj 602
Author: Agarwal
Bench: A Agarwal, A Savant, P Patankar
ORDER Agarwal, J.

1. Present suits arc filed by Christian wives for dissolution of their marriages under Section 10 of the Indian Divorce Act, 1869 (hereinafter referred as 'the Act'). Each of them impugn the vires of the provisions of Section 10 of the Act which provides for the grounds on which a husband and wife can sue for dissolution of marriage. It is contended that the provisions are archaic and adversely discriminate wives as against husbands merely on ground of sex and are, therefore, violative of article 15 of the Constitution. It is further contended that the aforesaid provisions adversely discriminate them vis-a-vis wives belonging to other communities. They are, therefore, denied equality before law and hence the provisions are violative of Article 14 of the Constitution. It is also contended that the aforesaid provisions force them to continue to live with their husbands as wives even though they are subjected to cruelty or desertion. They are, therefore, deprived of their right to life and personal liberty thereby violating their dignity. The provisions, therefore, contravene Article 21 of the Constitution.

2. Plaintiffs have also impugned certain ancillary provisions of the Act namely Sections 17 and 20 of the Act which provide for a requirement of confirmation of decrees for dissolution of marriage or nullity of marriage, passed by District Judges, by the High Court and that too normally by a Bench of not less than three Judges.

3. Present suits were filed on the original side of this Court and came up for hearing before the learned single Judge Mrs K. K. Baam, J. When the aforesaid challenges was raised before her, by an order passed on 20th of December, 1996, she has referred the suits to a larger Bench under Rule 28 of the High Court. Original Side Rules, 1980. The learned Chief Justice has, thereafter, referred the suits to the present Full Bench for deciding the aforesaid issues raised in these suits.

4. Sections 10, 17 and 20 of the Act, insofar as they are relevant, provides as under:

"10. When husband may petition for dissolution. --Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution. --Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery, or of bigamy with adultery, or of marriage with another woman with adultery.

or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

17. Confirmation of decree for dissolution by District Judge. -- Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference the opinion of the Senior Judges shall prevail.

20. Confirmation of District Judge's decree. -- Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court and the provisions of Section seventeen, clauses one, two, three and four, shall, mutatis mutandis apply to such decrees."

5. Mrs. Desai, Mrs. Agnes and Mr. Bagaria appearing on behalf of the plaintiffs have contended that the grounds available to the husbands and wives under Section 10 of the Act are discriminatory. Whereas a husband can claim divorce merely by proving that his wife has been guilty of adultery, the wife is not given a similar right. She is required to prove that her husband is guilty of incestuous adultery or bigamy with adultery or marriage with another woman, with adultery or adultery coupled with cruelly or, adultery coupled with desertion. They have further contended that wives, who arc governed by the Act, arc also discriminated vis-a-vis wives governed by other statues such as (i) Hindi Marriage Act, 1955 (ii) Dissolution of Muslim Marriages Act, 1939, (iii) The Parsi Marriage and Divorce Act, 1936, (iv) The Special Marriage Act, 1954, and (v) The Foreign Marriage Act, 1959. Whereas the aforesaid enactments have provided larger rights to the wives to claim divorce, the same is denied to wives who are governed by the present Act. Aforesaid provisions of 'the Act' are, therefore, violative of Articles 14 and 15 of the Constitution. It is further contended that the legal effect Of Section 10 is to compel wives who are cruelly treated or arc deserted to continue to live as the wife of a man she hates. Such a life will be a sub-human life without dignity and personal liberty and is, therefore, violative of Article 21 Of the Constitution.

6. Under Section 22 of 'the Act', it is pointed out that Christian spouses are not entitled to dissolution of marriage on grounds of adultery, cruelly or desertion but are entitled Only to judicial separation which has the effect of a divorce a mensa et thoro i.e. separation only from bed and board whereunder matrimonial bonds remain undissolved. But spouses governed by other Acts such as Special Marriage Act, Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936, Dissolution of Muslim Marriages Act, 1939 are entitled to dissolution of marriage and not merely judicial separation on these grounds. Christian spouses are thus discriminated only on the ground of their being Christians by religion. This violates the mandate of Article 15 of the Constitution.

7. Article 21 guarantees protection of life and personal liberty. Right to life, includes the right to life with human dignity. A Christian wife, who is treated cruelly by her husband and is subjected to indignities is compelled to live with him without dignity. Personal liberty guaranteed to every person under Article 21 of the Constitution is denied to Christian women.

8. It is further contended that the ambit and scope of Article 21 has been expanded by Courts from time to time keeping pace with the changes in society and changing needs of the people. The Supreme Court has expanded the reach and ambit of the fundamental right of personal liberty enshrined in Article 21 being of widest amplitude. Reliance has been placed on the cases of (i) "Pathumma v. State of Kerala", ; (ii) Francis Colaria Mullin v. Administrator, Union Territory of Delhi AIR 1981 SC 746; (iii) "Smt. Triveniben v. State of Gujarat", AIR 1989 SC 1355; and (iv) "Unni Krishnan J.P. v. State of Andhra Pradesh", . In the case of "P.T. Parmanand Katara v. Union of India", , the Supreme Court has gone on lo hold that the right to dignity and fair treatment under Article 21 is not only avail a living man but also to his body after his Jail Authorities all over the country are directed not to keep the body of condemned prisoner suspended after the medical officer has declared him dead. Christian women have, however, been left far behind.

9. It is contended that Section 10 of the Act, to the extent that it requires adultery to be coupled with cruelty as a ground for divorce is viotative of Articles 14 and 21 of the Constitution. The right to life under Article 21 takes in its sweep a right to life with dignity, without cruelty, mental or physical, and without constant fear of torture and violence. The right to life guaranteed by the Constitution includes the right to seek dissolution of marriage if its existence is an unbearable suffering. Section 10 denies the Christian woman the right to get dissolution of marriage on the grounds of cruelty even when the marital relationship has been broken. Such a law that compels her to live with a person who is her tormentor till death is oppressive, arbitrary and violative of Articles 14 and 21 of the Constitution. It will be a sub-human life without dignity. It will be a life without freedom and personal liberty. To uphold the dignity of the individual in all respects as ensured by the preamble of the Constitution is the need of the hour. 'The Act' is a pre-constitutional legislation and in the present time is antiquated and contrary to the mandate underlying the Constitution. In the grounds allowed by the laws of dissolution of marriage, there is a discriminatory treatment meted out to Christian spouses. The discrimination is based solely on religion and hence is violative of Article 15.

10. In the context of the aforesaid submissions advanced before us, it would be useful to note the background under which 'the Act' was enacted.

11. Christiansin India belong to three different traditions i.e. (i) Roman Catholics, (ii) Protestants who are followers of Church of South India (CSI) and Church of North India (CNI), and (iii) Syrian Christians, who are followers of Greek Orthodox Churches. There is also a large population of Christians among various tribes particularly in the North-East region. These tribes are granted protection under the Constitution in respect of their culture, tradition, customs and laws.

12. Among the three traditions, only the Roman Catholic Church considers marriage to be a sacrament and subscribes to the doctrine of indissolubility of marriage. The other two Churches namely the Protestant Churches as well as Orthodox Churches do not have doctrinaire objection to

divorce. The early Christian Church (the Eastern Orthodox Church of Syria, Greece etc.) permitted divorce. The theory of indissolubility was evolved later. By 12th century, the Roman Church for mulated the Canon law regulating marriages and divorce among Christians in Europe. Under the Canon law, marriages were indissoluble. But during the industrial era, the Protestant reformists broke away from the Roman Catholic traditions. The French Revolutions led to the separation of State and Church in France. In the 1800 the French Civil Code (Napoleon Code) changed marriages from a sacramental status to dissoluble contract. The doctrine of separation of State and Church and marriages as dissoluble contracts spread all over Europe.

13. Following this tradition, in 1857 the matrimonial jurisdiction was transferred from the Ecclesiastical Courts (Canon Law Courts or Church Courts) to Civil Courts (High Courts), and marriages were construed as dissoluble contracts. Under the Matrimonial Causes Act, 1857 a limited ground of dissolving marriages was provided under the statute. Adultery, coupled with other offences like incest, bestiality, cruelty and desertion was made into grounds of divorce for the first time under English law of marriage. Prior to this, a divorce could only be obtained through an Act of Parliament, a procedure which was extremely expensive rendering divorces outside the reach of commoners. Provisions of the English statute i.e. Matrimonial Causes Act, 1857 were introduced in India through the Indian Divorce Act, 1869. The grounds of divorce under the 1857 Act were mechanically incorporated within the Indian Divorce Act. The Indian Divorce Act was mainly meant for the use of British subjects (mainly Protestants) and Europeans domiciled in India. The local Christians of Orthodox traditions were governed by customary laws regarding marriage, divorce and succession.

14. Under a subsequent English statute, the Matrimonial Causes Act of 1923, adultery was made an independent ground of divorce. The ground of adultery was not required to be coupled with any other ground. Under the Matrimonial Causes Act of 1937 three new grounds of divorce Were added i.e. desertion, cruelly and insanity. Each of these were independent grounds of divorce. Divorce Reform Act, 1969 was, thereafter, enacted which made irretrievable break down of marriage to be sole ground of divorce. The aforesaid Act is replaced by Matrimonial Causes Act, 1973. Section 1 of the Act has reiterated the ground of marriage having broken down irretrievably as a ground for divorce. Section 1 of the Matrimonial Causes Act, 1973, provides as under:

"1. Divorce on break down of marriage.(I) Subject to section 3 below, a petition for divorce may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably."

15. While changes were effected in the aforesaid English statutes, no corresponding amendments were, brought about under the Indian Divorce Act, 1869. The grounds provided by the English statute i.e. the Matrimonial Causes Act, 1937 were incorporated into the Parsi Marriage and Divorce Act in 1937, the Special Marriage Act of 1954 and Hindu Marriage Act, 1955. The grounds contained in Section 10 of 'the Act', providing for dissolution of marriage, have remained unchanged. Section 7 of 'the Act', however, provides for automatic inclusion of all laws and procedures of English Matrimonial Courts into the Indian statute. Section 7 provides as under:

"7. Court to act on principles of English Divorce Court. -- Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England, for the time being acts and gives relief.

(Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.]: Even while the amendments to the aforesaid English enactments have been made from time to time, having regard to the change in circumstances, the Indian Divorce Act, 1869 has remained unchanged.

16. Section 7 of 'the Act' has come up for consideration in various decisions. The principle of incorporating the developments under English Matrimonial Statutes through the scope of Section 7 was upheld by the decision of the Full Bench of the Madras High Court in the case of, "Agnes Sumathi Ammal v. D. Paul", AIR 1936. Madras 324. the Full Bench" of the Madras High Court observed:

"The Indian Courts have to keep pace with the practices in England and to note changes that are made in the principles and rules of the English divorce law from time to time since the English statute is the parent law."

17. After independence, in 1955, the issue whether the statute of sovereign Republic could be made subordinate to the laws of a foreign power, was examined by the Madras High Court in the case of, "George Swamidoss Joseph v. Miss. Harriet Sundari Edward', (FB). The Court held to the following effect:

"Since Section 7 of IDA has been preserved by Adaptation of Laws Order, 1950, English law and practice could be applied to and should be applied. Courts must follow law and practice in England."

The above decision was, however, overruled in a later decision of the Madras High Court in, "T.M. Bashiam v. M. Victor", (FB). the Court ruled, as follows (Para 6):

"Section 7 does not incorporate statute of some other country as part of the law of the land. It merely makes a provision for conforming to the practice and principle of matrimonial Courts in England in the matter of divorce or dissolution of marriage subject to provisions and scheme of Indian Divorce Act."

Without actually slating so in so many words, the above decision, in effect, struck down Section 7. Any reform within Indian Divorce Act could be brought about either through Legislative reform or judicial directions. Developments in England cannot automatically be incorporated into 'the Act', Provisions of Section 7 it was found, could not incorporate the later amendments carried out from lime to time under English laws.

18. The Law Commission has from time to lime taken various steps to bring about changes in 'the Act'. In or around 1958-59 some private Bills were introduced in parliament to reform provisions of the Act.' Consequently, the Government referred the matter to the Law Commission and the Law Commission, in turn, submitted its fifteenth report. In the recommendations of the Law Commission, grounds for divorce were laid down, which include (i) adultery, (ii) conversion, (iii) insanity, (iv) virulent and incurable leprosy, (v) communicable venereal disease, (vi) not heard of for seven years, (vii) non-consummation of marriage, (viii) non-compliance with a decree of restitution of conjugal rights, (ix) desertion and (x) cruelty. Remedy of divorce by mutual consent was not introduced at this point of time. Desertion and cruelly were treated as independent grounds for claiming divorce.

19. Representatives of the Roman Catholic Church submitted before the Commission that the Roman Church is opposed to divorce and that Roman Catholics should be exempt from these provisions but the Law Commission pointed out that the provision for divorce exists since 1869 and the Church had not raised any protest. Further, the proposed amendments were only an enabling legislation and the same would not compel any Catholic to divorce. Law Commission further pointed out that the proposed, provisions on divorce did not introduce any remedy but merely widened the scope of the existing provisions. The Fifteenth report of the Law Commission was submitted to the Ministry of Law. The Ministry of law prepared a formal Bill for approval of the Government before introducing it in the parliament. But, at this stage, the Government concluded that public opinion should be again elicited and sent the Bill back to the Law Commission. Law Commission re-examined some of the clauses in the proposed Bill and submitted its twenty-second report to the Law Ministry. But there was no debate in Parliament and the Bill was allowed to lapse.

20. In 1983, the Law Commission, under the Chairmanship of Mr. Justice K. K. Mathew, again took up the limited question of amending Section 10 of 'the Act' based on letters sent by Christian women to the Commission detailing the cruelty experienced by Christian women al the hands of their husbands, The Law Commission, after considering various options, concluded that there is urgent heed for amending Section 10 of the Act, so as to remove the alleged discrimination from which Christian women suffered. The Law Commission regarded such an amendment as a constitutional imperative. The Law Commission observed "if the Parliament does not remove the discrimination, the Courts, in exercise of their jurisdiction to remedy violations of fundamental rights, are bound some day, to declare the section as void. "The Ninetieth Report of the Law Commission was submitted to the Law Ministry in May, 1983. Despite the recommendations, the Government did not introduce any legislation for amending Section 10 of the Act.

21. Discriminatory aspects of Indian Divorce Act have been a matter of consideration of several judicial pronouncements. Directions have been issued by Courts to the legislature to bring about suitable amendments to the discriminatory provisions. In "Solomon Devasahayam v. Chandirah Mary". (1968) 1 Mad LJ. 289, the Court held, as under:

"The Indian Divorce Act, 1869 is wholly out of date. Under this Act, it is enough if the husband proved adultery in order to enable him to get a divorce from his wife. On the other hand, that was not enough for a wife to get a divorce against her husband. Something more must be proved. .....It is

high lime that the Indian Divorce Act is brought in line with the Hindu Marriage Act, the Parsi Marriage Act and the Special Marriage Act 1954. Indeed, the Special Marriage Act even provides for divorce by consent of parlies"

22. In "Swapna Ghosh v. Sadananda Ghosh, (SB), the Calcutta High Court held, as under:

"3. To start with, under Section 10 of the Act, while the husband is entitled to a dissolution on the ground of the wife's adultery, the wife is not so entitled unless she proves that the husband's adultery is incestuous or is coupled with cruelty or bigamy or desertion. If the husband is entitled to dissolution on the ground of adultery simpliciter on the part of the wife, but the wife is not so entitled unless some other matrimonial fault is also found to be superadded, then it is difficult id understand as to why this provision shall not be held to be discriminatory on the ground of sex alone and thus to be ultra vires Article 15 of the Constitution countermanding any discrimination on such ground..... Then again, under the Divorce Act, Christian spouses are not entitled to dissolution of marriage on the ground of cruelty or desertion, but are only entitled to judicial separation under Section 22 which shall have the effect of a divorce a mensa et thoro, that is separation only from "bed and board", whereunder matrimonial bond remains undissolved. But spouses married under the Special Marriage Act, Hindu, Buddhist, Sikh and Jain spouses governed by the Hindu Marriage Act, 1955, Zoroastrian spouses governed by the Parsi Marriage and Divorce Act, 1936. Muslim wives under the Dissolution of Muslim Marriages Act, 1939 are entitled to dissolution of marriage, and not merely judicial separation, on those, grounds. Are we then discriminating against Christian spouses and that too, on the ground of their being Christian by Religion and thus violating the mandate of Article 15 interdicting discrimination on the ground of Religion only?"

4. ..... My only endeavour is to draw the attention of our concerned Legislature to this anachronistic incongruities and the provisions of Article 15 of the Constitution forbidding all discrimination on the ground of Religion or Sex and. also to Article 44 staring at our face four decades with its solemn directive to frame a Uniform Civil Code.

10. .. ... I have no hesitation also in expressing that I equally feel the need for an in-depth consideration by the Parliament or appropriate State Legislature of the procedural provisions, of the Indian Divorce Act for introduction of amending provisions..."

11. .. ... Time has also come for a reappraisal and reconsideration of the other anachronistic incongruities fundamental and discriminatory in nature manifest not only in procedure but in substantial core provisions of such Act. The fact whether wife should be discriminated against in the matter of getting relief, only on the ground of sex, has been seriously called into question not only in the arena of family laws but in other spheres as well concerning avocation of life. The highest Court of the land has already raised and considered such questions in the backdrop of protection of the rights enshrined in the Constitution. It is Undoubtedly interesting and imperative, therefore, to reconsider whether some of the salient features of the Indian Divorce Act, 1869 are violative of the equality clause prohibiting such discrimination on the ground of sex as in Art. 15 of our Constitution,

12. Apparently, some such questions, as it may appear to be unrelated to the material issues involved in this case, but I think lime has come to have an in-depth consideration of such associated questions by our legislatures to bring appropriate changes in the old and existing laws keeping pace with the changing needs of our society."

23. In the case of "Shri Meenakashi Mills Ltd. Madurai v. A. V. Visvanantha Sastri," , the Apex Court observed that --Article 14 guarantees to all persons the right of equality before the law and equal protection of the laws within the territory of India. This Article not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the Article is that alt litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination.

24. In the case of, "Ramish Francis Toppo v. Violet Francis Toppo", (SB), the Court again expressed its opinion that-- "desertion of one spouse by the other, is not, by itself, aground for dissolution of marriage under Section 10 of the Divorce Act, but is only a ground of divorce a mensa et thoro, i.e., judicial separation under Section 22. In fact, the Divorce Act in Section 10 provides for divorce on one ground only, the ground of adultery, which again, in the case of a wife seeking divorce, must be adultery coupled with some other lapses on the part of the husband. Desertion, cruelty and the like are grounds for divorce, and not merely judicial separation under all the matrimonial laws operating in this country and in, Swapna Ghosh, (SB) (supra), 1 have raised the question as to whether providing so many grounds of divorce to all the other communities while restricting Christian divorce only to the ground of adultery amounts to discriminating the Christian spouses on the ground of religion alone and I indicated an affirmative answer....."

25. In the case of " Mary Sonia Zachariah v. Union of India", (1990) 1 Ker LT 130, the Kerala High Court passed an interim order directing the Government of India to take a decision within six months from the date of receipt of a copy of its order on the recommendation of the 90th Report of Law Commission for making amendments to Section 10 of the Indian Divorce Act as the Law Commission's recommendations had been ignored.

26. In the case of Shri Srinivasa Theatre v. Government of Tamil Nadu," , the Supreme Court observed that, Article 14 of the Constitution enjoins upon the Stale not to deny to any person "Equality before law" or 'the equal protection of laws' within the territory of India. The two expressions do not mean the same thing even if there may be much in common. The meaning of these expressions have been found and determined having regard to the context and scheme of our Constitution. It appears that the word "law" in the former expression is used in a generic sense, a philosophical sense, whereas the word "laws" used in the latter expressions denotes specific laws in force. Equality before law is a dynamic concept having many facets. One facet, the most commonly acknowledged is that there shall be no privileged person or class and that none shall be above law. A facet which is of immediate relevance herein is the obligation upon the State to bring about, through the machinery of law, a more equal society envisaged by the preamble and Part IV of our Constitution. For equality before law can be predicated meaningfully only in an equal society i.e., in a society contemplated by Article 38 of the Constitution.

27. In the case of, "Abedabi d/o Doud Shaikh v. Sikandar Akabar Mujawar, 1980 Bom CR 240 this Court observed, as under:

"As the aforesaid provision (Section 125 Code of Criminal Procedure) granted maintenance to all women irrespective of castes, including woman belonging to the Christian faith, were given parity and same treatment. However, the same parity has been denied to Christian woman for obtaining divorce. Even though no reasonable grounds exists to deny the same or similar grounds available to Hindu, Muslim and Parsi women are not given to the Christian community."

28. Need to introduce 'mutual consent' as a ground for divorce has been a subject for consideration of various pronouncements. In the case of "Reynold Rajamani v. Union of India, ", the Supreme Court field, as follows:

"Per Pathak, J.

"... A man and woman married under the Christian Marriage Act arc not entitled to a decree of divorce by mutual consent..... history of all matrimonial legislation will show that at the outset conservative attitudes influenced the grounds on which separation or divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the adult parties directly involved.

Per Chinnappa Reddy, J.

"The history of matrimony in the past has been a movement from ritual and sacrament to reality and contract .... But the World is still a man's world and the laws arc man-made laws, very much so..... divorce by mutual consent should be available to every married couple, whatever religion they may profess and however, they were married. Let no law compel the union of man and woman who have agreed on separation.

If they desire to be two, why should the law insist that they be one?

.....But I have a qualification. The woman must be protected. Our society still looks askance at a divorced woman. A woman divorcee is yet a suspect. Her chances of survival arc diminished by the divorce. So, the law which grants the decree for divorce must secure for her some measure of economic independence..... If the divorce law is to be a real success, it should make provision for the economic independence of the female spouse..... It is necessary that the law should protect her interests even if she be an erring spouse, lest she becomes destitute and a dead loss to society.

29. In the case of "Jordan Deigdeh v. Chopra", , the Supreme Court suggested complete reform of law of marriage and introduction of mutual consent and irretrievable breakdown of marriage as grounds for divorce. The Court berated the legislature and the State for not introducing changes into the Indian Divorce Act, 1869 to bring it in tune with modern conditions. There is no point or purpose to be served by the continuance of a marriage which has so competely and signally broken down. We suggest that the lime has come for the intervention of the legislature in these matters.

30. Hence, it would appear that endeavour on the part of Courts, just as those of the Law Commission and the Society in general and the Christian Society in particular, have failed to stimulate the legislature in bringing about amendments in 'the Act' so as to uplift the plight of the Christian woman which is found demeaning in no small measure. Christian community has not logged behind in making efforts to suggest suitable amendments to 'the Act'. Recommendation made by the Law Commission in its 90th Report was initiated by a letter written to the Law Commission by a woman setting out in detail the various kinds of cruelly meted out to Christian women by their husbands. Various letters written to the press and articles published in the press by Christians regarding the need to bring about changes in the archaic taw during the years 1982-83 have been listed in the 90th Report of the Law Commission. This is an indication of the desire for change within the community. In 1983 Mrs. Jyotsna Chatterjee, Director of Joint Women's Programme (JWP), a Christian Women's intuited, mobilised community support and a memorandum signed by around ten thousand members was sent to the Law Ministry demanding changes in the personal law. In February, 1986, representatives of various Christian women's organisations presented a memorandum to the Prime Minister of India. There was a broad consensus among the various denominations of Protestant churches but the Roman Catholic Bishops objected to the grounds of divorce (including mutual consent divorce) and suggested that the Roman Catholic community be exempted from its application. Since this would result in a large segment of the Christian community being excluded from its application, several Catholic organisations expressed their support to the proposed amendment and campaigned for a change of approach within the church leadership. Finally Catholic Bishops Conference of India . (CBCI), the apex body of the Roman Catholic religious hierarchy gave its assent to the Bill. A Committee was formed to finalise the suggestions of various Christian organisations and churches under the broad banner Ecumenical Committee for Changes in Christian Personal Law. After arriving at a consensus draft Bill on Christian Personal Laws was submitted lo the Prime Minister and the President along with supportive letters from different churches and organisation. But despite this systematic and organised community initiative the government did not introduce the Bill in Parliament. The fact that government has not bothered to take any steps in the mailer clearly indicates the lack of concern on the part of the government to reform Christian Personal Law. The Christian Women, in the circumstances, are today in an ironical situation. For the Catholic women the religious laws are the Canon Laws which, on account of amendments carried out from time to time, offers more liberal grounds of dissolving the marriage while the scope under the secular or civil law is limited and has remained unchanged for well over a century. The Protestant women are under a further constrain. While Protestant religion universally supports the doctrine of divorce, the civil law constrains their scope into narrow and out-dated provisions under a premise that it is the tenet of their religion whether religion does not support such a tenet. The women who are subjected to cruelly or have been deserted are compelled to remain in marriage which is a marriage only in name on the ground that this is a tenet of their religion, when their own religious tenets do not subscribe to this doctrine. Such a provision of the civil law violates the Christian woman's 'right to life' a term which includes the 'right to life with dignity'. Though amendments have been carried out in the Indian Penal Code by introducing Section 498-A, which makes cruelty to wives an offence, ironically the same is not made a ground for divorce as far as Christian wives are concerned.

31. Denial of right of divorce, in our view, also constitutes violation of right to life under Article 21 of the Constitution. In recent years, various judgments of the Supreme Court as also the High Courts have expanded the scope of right to life under Article 21 and have held that violation of dignity and right to full human developments could constitute violation of Article 21 of the Constitution. In the case of, "Smt. Menka Gandhi v. Union of India, AIR-1973 SC 597, the Supreme Court held that the lest or yardstick to be applied for determining whether a statute infringes a particular fundamental right is to see what exactly is the direct and inevitable consequence or effect of the impugned provision of law on the fundamental right alleged to have been violated. The Supreme Court gave an expansive interpretation to the expressions life and personal liberty under Article 21, which has been described as the heart of fundamental rights in, "Unnikrishnan's case, . In the case of, "Pathuma v. State of Kerala , the Supreme Court interpreted the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom, through beneficial legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. In the case of, "Francis, Colaria Mullin v. Administrator, Union Territory of Delhi", AIR 1981 SC 746, the Supreme Court observed that" . . .right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. In the case of, "Board of Trustees v. Dilip", , the Supreme Court explained the meaning and contents of word 'life' by slating. "The expression life does not merely connote animal existence or a continued drudgery through life. The expression life has a much wider meaning.

32. In the case of, "State of Himachal Pradesh v. Umed Ram Sharma," , the Supreme Court observed" . . . Every person is entitled to life as enjoined in Art. 21 of the Constitution and in the facts of this case read in conjunction with Art. 19(1)(d) of the Constitution and in the background of Art. 38(2) of the Constitution every person has right under Art. 19(1)(d) to move freely throughout the territory of India and he has also the right under Art. 21 to his life and that right under Art. 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. These propositions are well settled. We accept the proposition that there should be road for communication in reasonable conditions in view of our constitutional imperatives and denial of that right would be denial of the life, as understood to its richness and fullness by the ambit of the constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication."

33. In the case of, "Consumer Education & Research Centre v. Union of India", the Supreme Court has observed, as under (at p. 938 of AIR):

"The preamble and Article 38 of the Constitution of India the Supreme law envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity. The constitution commands justice, liberty equality and fraternity as supreme values to usher in the egalitarian

social, economic and political democracy. Social justice, equality and dignity of person are corner stones of social democracy. The concept 'social justice' which the Constitution of India engrafed consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice is thus an integral part of "justice in generic sense. Justice is the genus, of which social justice is one of its species, Social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex of social change to relieve the poor etc. from handicaps, penury to ward off distress, and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectations. Social security just and humane conditions of work and leisure to workman are part of this meaningful right to life and to achieve, self expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilised living while sharing according to the capacity, social and cultural heritage.

(Para 20) The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc are languishing to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice imbeds equality to flavour and enliven practical content of 'life' Social justice and equality arc complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results."

34. Moreover, we find that Government of India is a party to the Vienna Declaration on the 'Elimination of All Forms of Discrimination against Women'. The declaration was ratified by the United Nations Organisation of 18th December, 1979 and by Government of India on 19th June, 1993 and acceded to on 8th August, 1993. Article 2 of the Declaration on the 'Elimination of All Forms of Discrimination against Women' is as follows:

"Article 2: Violence against women shall be understood to encompass, but not be limited to the following :

(a) Physical, sexual and psychological violence occurring the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women ..."

In the case of, "Valsamma Paul v. Cochin University", , the Supreme Court, in its recent decision, has held, as under (at p. 1020 of AIR):

"Human Rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter

dependent and have mutual reinforcement. The human rights for women including girl child are, therefore, inalienable, integral and individual part of the universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social and economic and cultural life are concomitants for national development, social and family stability and growth -- cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights."

35. Let us now examine the impugned provisions of Section 10 of the Indian Divorce Act in the light of the observations contained in the various Judgments cited above. We have already reproduced the relevant provisions of Section 10. The first part of the Section is in respect of a right of a husband to obtain divorce. All that is required of him is to prove that his wife has since the solemnisation of the marriage been guilty of adultery. Hence, adultery by itself is made a ground for divorce as far as husbands belonging to the Christian community are concerned. Now let us see how the wife is placed vis-a-vis the husband for claiming the very same relief, Provision, in this regard is made in the later part of the Section. As far as the ground of adultery is concerned, the same by itself is not sufficient to grant her a divorce. Adultery has to be incestuous adultery. Adultery has to be accompanied with bigamy. Adultery has to be accompanied by marriage with another woman. Adultery has to be coupled with cruelty or with desertion without reasonable excuse and that too for a period of two years or upwards. A question which arises for consideration is, whether there are just and sufficient grounds to make the above classification which places the Christian women to a disadvantageous position as compared to their husbands. Are there any grounds at all which can justify the discrimination. Can the discrimination be justified because the wives belong to the weaker sex. Can it be justified in order to establish the superiority of husbands over the wives. Is it merely in order to ensure that the wife is not treated equally with the husband. In our judgment, the aforesaid discrimination which is meted out to the wife, is wholly unreasonable. Article 14 of the Constitution ensures equality before law. The same mandates that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Is this the equality that the State has been able to offer to Christian wives as per the mandate contained in the above Article. Is this the equal protection of taw which the State has envisaged and has conferred on the Christian wives as compared to those conferred on Christian husbands. The answer to these questions can be only one, 'No'.

36. Article 15 of the Constitution mandates prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. The different treatment which is accorded to Christian woman under Section 10 of the Act, as we see it, is based merely on grounds of sex. Similarly, if one compares the provisions of the other enactments on the subject of divorce, which are enumerated in the foregoing paragraphs, it would be clear that Christian wives are discriminated and have been treated differently as compared to wives who are governed by the other enactments. The discrimination is, therefore, based merely on grounds of religion. The afore said discrimination, in the circumstances, is violative both, of Article 14 and of Article 15 of the Constitution. Similarly, if one has regard to the decisions referred above in regard to Article 21, dealing with protection of life and personal liberty, it would be clear that the position of Christian women, has been rendered most demeaning as compared 10 Christian husbands, as also wives governed by other enactments. The provisions contained in Section 10 in the circumstances, are violative of Article 21 also.

37. A question that now remains to be considered in the light of the contention advanced by Mr. Shah appearing for the Union of India is, whether it would be open to us to strike down the provision as being ultra vires Articles 14, 15 and 21 of the Constitution. It will further have to be considered, whether the entire provisions of Section 10 deserve to be struck down or only those portions of the provisions, which violate the aforesaid provisions of the Constitution can be stuck down and the remainder can be continued to remain on the statute, A reference to a recent decision of a Full Bench of the Kerala High Court can now usefully be made. In the case of, "Ammini E. J. v. Union of India," , a Full Bench of the Kerala High Court had an occasion to consider the vires of Section 10 of 'the Act'. The Court, in para 12 of its judgment, has set out the provisions of Section 10 of the Act and has, in para 13, noticed the difference in the grounds which are made available to the Christian husbands and wives to claim divorce. In para 14 it has noticed various other enactments regulating marriages and divorce among people belonging to Religions other than Christianity and also Christians outside India especially in England who were also governed by an Act more or less similar to 'the Act' when 'the Act' was passed or originally. In para 16 it has proceeded to observe, as under:

"16. In England also the law regarding marriage and divorce has undergone drastic changes. The Matrimonial Causes Act, 1973 which is now in force in England has introduced a fundamental change in the law by making irretrievable breakdown of marriage as the sole comprehensive ground for divorce and judicial separation."

In the succeeding paragraphs, the Court has proceeded to observe, as under :

"17. The analysis made above would clearly show that Parliament has brought out radical changes in the matrimonial legislations applicable to all other religions by incorporating progressive and realistic grounds for divorce taking into account the drastic changes in the nature of the family and the matrimonial relationship in the modern set up. It is specially relevant to note in this case that for Hindus who form the majority of the population in India also, marriage was and still is a sacrament and was believed to be a union between a man and a woman not only for their lifetime but also for life after death. But still, as far as Hindus are concerned progressively legislation from time to time has provided several grounds for divorce including cruelty and desertion. Even consensual divorce is permitted. It is important to note that there is no severe criticism that liberalisation shown in the matter of divorce has upset the Hindu family set up perilously or prejudicially. In fact even now the criticism and demand from the public is for more liberalisation by including irretrievable breakdown of marriage as a comprehensive ground for divorce. In fact Government of India has made a reference to the Law Commission of India seeking their recommendations on the question of acceptable of irretrievable breakdown of marriage as a ground for divorce among Hindus in response to demands and suggestions from the public. In answer to the reference the Law Commission has strongly recommended the acceptance of irretrievable breakdown of marriage as a ground for divorce among Hindus and has proposed necessary amendments to the Hindu Marriage Act in their 71st Report. In the 7lst Report, the Law Commission has pointed out that the majority of the replies received to their questionnaire have favoured the introduction of the new ground in the Hindu Marriage Act. Analysing the answers received, the Law Commission has pointed out the following aspects in support of their suggestion to accept the new ground.

"We need not stand on an old divorce law which demands that man and woman must be found innocent or guilty. It is desirable to get rid of the public washing of dirty linen which takes place in long drawn-out cruelty cases or in cases based on fault. If divorce is allowed to go through on the ground of marriage break-down, such an unhappy spectacle will be avoided.

One cannot say that it is an enhancement of the respect for marriage if there are tens of thousands of men and women desperately anxious to regularise their position in the community and they are unable to do so. People should be able to marry again where they can obtain a death certificate in respect of a marriage already long since dead."

(Law Commission, 71st Report page 15) The observations of the Full Bench of the Delhi High Court in Ram Kali v. Gogat Das, ILR 1 (1971) 1 Delhi 6 (FB), also was referred to as indicative of modern trend in judicial thinking which is as follows:

....."It would not be practical and realistic approach indeed it would be unreasonable and inhumane, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their even living together as husband and wife..."

18. It is also useful to note that Law Commission had suggested comprehensive amendment to the Act in the Bill titled "The Christian Marriage and Matrimonial Causes Bill 1960" submitted along with its 15th Report whereby both husband and wife were given the right to seek dissolution of marriagc on at most all grounds mentioned in the Special Marriage Act including the ground of adultery simpliciter, cruelty and desertion as per clause 30 of the Bill. As per Clause 31, the Law Commission also suggested to make a provision to grant divorce after a decree for judicial separation in case of non-resumption of co-habitation. On receipt of the 15th Report, the Government finalised a Bill on the lines suggested by the Law Commission and again referred the matter to the Law Commission for their views after inviting opinion from the public. Accordingly the Commission after ascertaining public opinion submitted the 22nd Report reiterating its earlier stand. Though on receipt of the 22nd report, the Christian Marriage and Matrimonial Causes Bill was introduced in the Parliament the same lapsed on the dissolution of the parliament.

19. It is relevant to note that the 15th and 22nd Reports were prepared after collecting evidence from the dignitaries of the Christian Church, representatives of the Christian Associations, Members of the Christian community, Bar Association sand Judicial Officers in the country. The Reports would reveal that there was a demand from the Christian community itself for inclusion of progressive grounds for divorce like cruelty and desertion which are available in almost all modern legislations on the subject. Since the law continued as such, in 1983, the Law Commission of India headed by none other than late Honourable Justice K. K. Mathewsuo motu took note of the urgent need to amend the provisions contained in S. 10 of the Act and submitted its 90th Report dated 17-5-1983 recommending urgent amendment of that Section. It is appropriate to quote the reason given in the Report which is thus:

"The reason why we attach the highest importance to amending Section 10 as above may be stated. We regard such an amendment as a constitutional imperative, In our view, if the section is to stand

the test of the constitutional mandate of equality before the law and equal protection of the laws, in the contest of avoiding discrimination between the sexes, then the amendment is necessary. If Parliament does not remove the discrimination, the Courts, in exercise of their jurisdiction to remedy violations of fundamental rights, are bound, some day, to declare the section as invalid. . ."

Though a decade and more have elapsed after the said Report, no effective action seems to have been taken by the Parliament on the basis of the same to amend S. 10 of the Act which is under challenge in these Original Petitions.

20. The Courts in India including the Supreme Court have noted the antiquated and anomalous nature of the Act and stressed the need for amendment of the law in various judgments. In S. D. Selvaraj v. Mary (1968) 1 Mad LJ 289 Alagiriswamy, L J. (as he then was) has stressed the need for an immediate amendment of the Act on the lines of the provisions contained in the Hindu Marriage Act, Parsi Marriage Act and the Special Marriage Act. In T.M. Bashiam v. M. Victor, a Special Bench of the same Court after referring to the obvervations of Alagiriswamy, J. in Selvaraj's case, (1968 (1) Mad LJ 289), has made the following observations:

. "It is only under this Act (4 of 1869) that the law remains where it was, when this enactment was born, so that parties governed by this law are under the grave disadvantage that, even if a husband deserts his wife for a considerable period, that will be no ground for divorce; in our view, it is a genuine hardship, and there is urgent need for re-examination of the provisions of Act 4 of (869, as the Act governs a large body of persons in this country to see that its provisions are tendered humane and up-to-date...."

Though as obiter A. M. Bhattacharjee, J. speaking for the special Bench in Swapna Ghosh v Sadananda Ghosh, had the fallowing observations to make in regard to the constitutionality of the provisions under consideration (at Pp. 3 and 4):

".....If the husband is entitled to dissolution on the ground of adultery simpliciter on the part of the wife, but the wife is not so entitled unless some other matrimonial fault is also found to be superadded, then it is difficult to understand as to why this provision shall not be held to be discriminatory on the ground of sex alone and thus to be ultra vires.

Art. 15 of the Constitution countermanding any discrimination as such ground.....

Then again, under the Divorce Act, Christian spouses are not entitled todissolution of marriage on the ground of cruelty or desertion, but are only entitled to judicial separation under S. 22 which shall have the effect of a divorce on a mensa et toro, that is separation only from "bed and board", whereunder matrimonial bond remains undissolved. But spouses married under the Special Marriage Act, Hindu, Buddhist, Sikh and Jain spouses governed by the Hindu Marriage Act, 1955, Zoroastrian spouses governed by the Parsi Marriage and Divorce Act, 1936, Muslim wives under the Muslim Marriages Act, 1939 are entitled to dissolution of marriage, and not merely judicial separation, on those grounds. Are we then discriminating against Christian spouses and that too, on the ground of their being Christian by Religion and thus violating the mandate of Art, 15 intradicting

discrimination on the ground of Religion only?"

In Raynold Rajamani v. Union of India, , the Supreme Court has observed that the history of matrimonial legislation has been towards liberalisation on the grounds for divorce. Chinnappa Reddy, J. in a separate judgment was forced to observe that "let no law compel the union of man and woman who have agreed on separation". Again in Jorden Diengdeh v. S. S.Chopra , the same learned Judge has made the following observations (at p. 940 of AIR):

". . . . Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There, is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down.

21. Lastly our learned brother K.T. Thomas, J. has also made the following observations and directions while passing an interim order in this case itself (O.P. No. 5805 of 1988 :

". . . . After independence, the Indian Parliament brought about radical changes in the marriage law applicable to Hindus, Parsis and even to foreigners living in India by incorporating progressive and realistic grounds for divorce in such enactments. But either for no reason or for reasons which are not easy to comprehend, the law of marriage applicable to Christians remains unrealistic and antiquated."

After observing so, the learned Judge has directed the Union of India to take a final decision regarding the recommendations of the Law Commission in its 90th Report already referred to within a period of 6 months from the date of receipt of a copy of the said order. In spite of such positive direction no final decision to amend the law except as already noted in para has been taken by the Government of India, though the direction was given on 1 3- 12- 1989.

21 A. Being a matter relating to dissolution of marriage among Christians in India, it may be useful to understand how marriage is generally understood in the Christian world. The classical definition of Christian marriage given by Lord Stewell, the most eminent ecclesiastical Judges in England is thus:

". . . . .It is a contract according to the law of nature, antecedent to civil institutions, which may take place to all intents and purposes wherever two persons of different sexes engage, by mutual contracts, to live together. . . A more casual commence, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commence for the procreation and bringing up of children, and for such lasting cohabitation, that in a State of nature would be a marriage . . . ."

Dindo v. Be Tisario (1795) 1 Hag con 216 (230).

The definition in fact brings out neatly the essential attributes of marriage relationship,

22. The following passage from Shefford on Marriage and Divorce (1841) page 3 is relevant.

"Besides the procreation and education of children, marriage has for its objects the mutual society, help and comforts, that one ought to have of the other both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view not only to the benefit of the parties themselves, but to the benefit of the third parties, to the benefit of the common off springs and to the moral order of civilised society."

23. Now we may consider the questions raised in the above background. It is evident from S. 10 of the Act that while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery simpliciter, the wife has to prove that the husband is guilty of adultery which is (1) incestuous, (2) coupled with cruelty which without adultery would have entitled her to divorce a mensaetloro,(3) coupled with desertion without reasonable excuse for 2 years or upwards, etc. Therefore, as far as the ground of adultery is concerned husband is in a much favourable position when compared to the wife since she has to prove adultery with one or other aggravating circumstances indicated in the Section itself. After adverting specifically to the above difference in the law P. B. Sawant, J. has held that "to that extent, undoubtedly, it is the wife who is discriminated against." Evidently the above discrimination is one purely based upon sex and nothing else. Such a discrimination based purely on sex will be against the mandatory provisions in Art. 18 of the Constitution of India and a denial of equality before law guaranteed under Art. 14 of the Constitution of India.

24. Learned counsel for the Central Government has however tried to support the constitutionality of the provision relying strongly upon the reasoning contained in Dwarke Das v. Nainan. . In that case Panchapakesa Iyyer, J. has held that "since the husband even by committing' adultery," does not bear a child as a result of such adultery and make it child of his wife to be maintained by the wife," the wife by committing adultery "may bear a child as a result of such adultery and 'the husband will have to treat it as his legitimate child and will be liable to maintain that child under S. 488 Criminal Procedure Code read with S. 112 of the Indian Evidence Act," and that "this very "difference in the result of the adultery may form some ground" of justification for this differentiation." We think that so long as the difference in the aftereffect of adultery committed by the husband and wife pointed out that the learned Judge as a justification for differential treatment is a difference solely resulting from sex, and that cannot be treated as a valid justification in the light of the provisions in Arts. 14 and 15 of the Constitution of India as explained by the Supreme Court in C. B. Muthamma v.

Union of India AIR 1979 SC 1868 and other cases.

25. The more important challenge levelled against S. 10 of the Act was that it is violative of the fundamental rights guaranteed under Arts. 14 and 21 of the Constitution of India. It was strenuously contended by Smt. Indira Jaising and Smt. Lekha Suresh, learned counsel for the petitioners, that Section 10 of the Act in so far as it obliges a Christian wife to prove adultery in addition to cruelty as

without adultery would have entitled her to a divorce mensa el toro or desertion without reasonable excuse for two years orupwards is totally arbitrary and violative of the right to equality under Art. 14 and right to live with human dignity and personal liberty under Art. 21 of the Constitution of India. There was also an alternative contention that in the matter of dissolution of marriage Christian spouses are discriminated against in as much as S. 10 of the Act does not provide for dissolution of marriage on the ground of cruelly and desertion which are independent grounds for dissolution of marriage for couples belonging to all other religions in India under the respective enactments governing them. The discrimination so made is solely based on religion and as such violative of Art. 15 of the Constitution of India.

26. Dealing with the main contention, detailed submissions have been made by the learned counsel justifying the same. The quintessence of such submissions is that when a marriage is irretrievably broken down as a result of desertion and/or cruelly meted out to a wife by her husband and the wife wants to get dissolution of her marriage, she must be able to get a dissolution on proof of desertion and/or cruelty under the relevant law relating to dissolution of marriage. There may not be any purpose of justification in keeping alive legally a marriage which is for all intents and purposes ceased to exist in reality. One must be able to put an end to the relationship entered into on the basis of mutual consent when such consent is withdrawn by both parties or at least one among them. dC jure continuance of such broken marriage may not be in the interest of either of the parties or to the society at large. It will only give rise to perpetual bickerings, quarrels and endless litigations ruinous to the parties and the society as a whole. There is no public purpose or individual benefit to be achieved by denying a right to dissolution of marriage in such cases and compelling the couples to live perpetually bound by a relationship which has ceased to exist de facto, If a right of dissolution of marriage is not available to a wife placed in such circumstances she will be compelled to live a subhuman life in perpetual bondage to a person who has wilfully deserted her and treated her cruelly making her married life miserable and unbearable. To be compelled to live at least in name as a wife of a person who has deserted her, cruelly treated her, who has no love and regard to her and whom she hates and considers as the wrecker of her married life will be to live as a slave without dignity and personal liberty guaranteed to every person under Art. 21 of the Constitution of India. It will be a life against her will imposed by an authoritarian law. It will be an oppressed life. She will not be able to choose another partner in fife and to enjoy the pleasures of the marital life once again like other women similarly situated and belonging to other religions who are entitled to get divorce on the ground of desertion and/or cruelty without proving adultery. In the absence of a provision in the Act recognising desertion and cruelty as independent grounds for dissolution of marriage a Christian wife who is deserted or cruelly treated by her husband is bound to continue that relationship till her death at least in name and will not be able to put an end to it. The legal effect of the provisions in S. 10 of the Act is to deny the Christian woman a right to gel dissolution of marriage on grounds of desertion and cruelly even when the marital relationship has broken irretrievably as a result of desertion and cruelty shown by her husband. Such a law which disentitles a married Christian woman to get divorce even when her marriage is irretrievably broken down as a result of desertion and cruelty and compels her to continue her life though in name alone as the wife of a person whom she hates and considers as the wrecker of her married life can only be treated as highly unjust, unfair and oppressive and as such arbitrary and violative of the rights guaranteed under Arts. 14 and 21 of the Constitution of India. Such a law is liable to be declared as void in the

light of Art. 13 of the Constitution of India. Being a provision granting divorce, a declaration that the entire provision is void under Art. 13 may go against the Christian woman themselves. Such a result is to be avoided by striking down the offending portions of the provision alone which makes it obligatory on the part of the Christian women to provide adultery along with desertion and cruelly, severing the same from the rest of the provisions which can stand by itself as valid provision providing 'desertion' and 'cruelty' as independent grounds for dissolution of marriage. When a provision of law is bad only in part and offending part can be separated from the rest of the provision, it will always be justifiable to strike down the offending portion of the provision alone leaving the remaining portion as valid to avoid unjust results which may follow from a striking down of the entire provision of law."

It would, thus, appear that the Full Bench of the Kerala High Court, on a consideration of several decisions of the Supreme Court and High Courts, has found that the provisions of Section 10 of 'the Act' arc ultra vires. In our judgment, the reasons advanced for holding the provisions ultra vires is fully justified and we have no hesitation in adopting the same.

38. Mr. Shah, the learned counsel for the Union of India has, however, strenuously urged that it would he impermissible for us to do what has been done by the Kerala High Court as the same will have effect of recodifying the provision which is the exclusive domain of the Parliament. Contention of Mr. Shah is similar to the contention raised before the Full Bench of the Kerala High Court to be found in para 39 of the judgment, which reads:

"39. Another contention of the learned Central Govt. Pleader was that the impugned provisions in Section 10 are codified form of personal laws of Christians in India founded on the teachings of Christ and his disciples. Such personal laws may not come within the purivew of Art. 13 of the Constitution of India and such cannot be declared as ultra vires the Constitution. Learned Counsel has in this connection relied upon the decision in the State of Bombay v. Nrasu Appa Mali, , where it has been held that personal laws are not covered by Art. 13 of the Constitution of India. We do not find any merit in the above contention as we are in this case directly concerned with a particular provision in an enactment passed by the legislature unlike in the case which came up for consideration in Narasu Appa Mali's case. So long as the infringed provisions arc part of an Act, it must pass the best of constitutionality even if the provision is based upon religious principles. We would accordingly repel the said contention also."

"40. Having thus found that the impugned provisions are violative of the provisions contained in Arts. 14, 15, and 21 of the Constitution of India, the next question to be considered is about the sustainability of the prayers made in the Original Petitions.

41. In the light of our findings that the impugned provisions are violative of the provisions in Arts. 14, 15 and 21 of the Constitution of India, normally the above provisions as a whole are liable to be declared as null and void in terms of Art. 13 of the Constitution of India. However, as contended by the petitioners, a declaration to that effect and striking down of the entire provisions will really go against the interest of the petitioners and other similarly situated Christian wives inasmuch as they are provisions providing grounds for dissolution however harsh and unreasonable they may be. To

avoid such a result, the learned counsel for the petitioner as already indicated has prayed that the offending portions of the impugned provisions alone be declared severable and liable to be struck down as ultra vires leaving, the remaining portion as a valid provision allowing dissolution of marriage on grounds of adultery, desertion and cruelty. In this connection, strong reliance was placed on the decision in D. S. Nakara v. Union of India to contend that such a course is liable to be adopted in this case having due regard to ultra vires nature of the impugned provisions which works out great hardship on Christian wives.

42. Elucidating the point further, the learned counsel has submitted that the words and phrases 'incestuous' and 'adultery coupled with' used in the impugned provisions in Section 10 are severable and liable to be struck down as ultra vires Arts. 14, 15 and 21 of the Constitution of India. We may once again quote the relevant provision underlying the impugned portions:

"10. When husband may petition for dissolution -

.....

When wife may petition for dissolution --Any wife may present a petition to the District Court, or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband, has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery....

or of adultery coupled with such cruelty as without adultery would have entitled to her to a divorce a mensa et toro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

It was submitted that if the underlined words are excluded, the remaining portions of the Section would in terms provide adultery, desertion and cruelty as indicated therein as independent grounds for dissolution of marriage for Christian wives whose marriage has irreversibly broken down as a result of desertion, cruelty and adultery committed by the husband. By striking down the underlined portions as ultra vires, the remaining portion can by itself remain as constitutionally valid provision along with 'the rest of the provisions in Section 10 of the Act. The offending portion can easily be severed and cannot be treated as inextricably connected with the remaining portion.

43. Section 10 being the only provision allowing dissolution of marriage among Christians governed by the Act, striking down of the provisions as a whole should be avoided as far as possible. As such, we should see whether the offending portion to the impugned provisions are severable and if so whether the (remaining provisions) can be allowed to remain as provisions valid in law. Having thus considered the rival contentions, we find that the underlined portions are the offending portions which makes the impugned provisions ultra vires and if such portions are severed and quashed as ultra vires, the remaining portions of the provisions can validly stand along with the other provisions in Section 10. So modified Section 10 would permit Christian wives to seek dissolution of

their marriages on the grounds of adultery, desertion and cruelty also without the necessity of proving adultery. In that event, the remaining provisions will be more or less similar to the provisions contained in all other enactments in force regulating dissolution of marriages among people belonging to other religions and also the Special Marriage Act. If such a course is adopted, the provisions can be made constitutionally valid and retainable in the modified form to serve the purpose for which it was enacted in a better way avoiding the striking down of the entire provision which would have created a hiatus as feared by the Law Commission of India in its 90th report.

44. The question then to be considered is whether the offending portions are severable or not. The learned Central Govt. Pleader has strongly contended that it is not a fit case where the principle of severability can be applied justifiably. Learned Counsel has in this connection strongly relied upon the tests laid down by the Supreme Court in (R.M.D.C. v. Union of India, , as the tests to be applied while deciding the question. In support of his contention, the learned Govt. Pleader has made various submissions to which we have already made a brief reference in paragraph 9 of this judgment. In fact, such submissions were made mainly relying upon the tests indicated in R.M.D.C.'s ease. Having bestowed our anxious consideration on the question in all relevant aspects, bearing in mind the tests indicated in R.M.D.C.'s case, we are of the firm view that none of the objections raised by the learned Central Govt. Pleader can be accepted as valid and sustainable in law. In our view, severance of the offending portions would neither make the remaining provisions unworkable nor will it upset the scheme of the provisions in Section 10 to such an extent as to make the modified provisions totally unjust of unreasonable as contended by the learned Central Govt. Counsel. We cannot also accept the contention that the only approach available for us in the matter is "either make it or leave it." That is a contention which was specifically repelled by the Supreme Court in Nakara's case, . Supreme Court has held in Nakara's case that the correct approach is not neither take it or leave it." but try to remove the arbitrariness or unconstitutionality of a provision of law if it can be done by severing the offending portion and saving the beneficial, portion. Going by the above principle we arc of the view that It is a fit case where we would be justified in severing and quashing the offending portion which makes the provision contained in Section to of the Act arbitrary and violative of the fundamental rights, to save the beneficial portion of it. Though such a course of action will certainly result in modification of the provisions to some extent or removing the limitations and expanding the scope of the provision as it was enacted, we find that we are justified in doing so in an attempt to avoid the striking down of the entire provisions of Section 10. The contention such a course if adopted would amount to introduction of new grounds substantially different from the existing grounds cannot also be treated as a reason sufficient to dissuade us from adopting such a course for the purpose of giving necessary reliefs to the petitioner and other similarly situated Christian wives who seek dissolution of their marriage on grounds of adultery, desertion and cruelly. We may in this connections pertinently point out that such consequences are bound to happen and cannot be avoided when an offending portion is severed and quashed for making the remaining portion constitutionally valid and operative. In fact, such was the consequence in Nakara's case, , where the principle was applied. By severing the eligibility qualification contained in the concerned Rules, the benefit of enhanced pension was made available even to persons to whom the legislature never wanted to confer such benefits. In R.M.D.C.'s case, , also the scheme intended was to apply the provisions of the Act and the relevant Rules to all competitions without any exception. However, the Supreme Court has upheld the provisions of the

Act only in regard to competition depending upon mere chance applying the principle of severability. It cannot be said that the Supreme Court has not interfered with the scheme of the provisions or its contents at all in Nakara and R.M.D.C. cases. The fact that the impugned provisions after modification would enable the wives to gel dissolution of their marriage on grounds of cruelty and desertion also whereas the husband can get dissolution only on ground of adultery cannot be a ground for holding that the provisions should not be interfered with. Such a provision which confers on the wife certain additional grounds for dissolution of marriage not available to husband can very well be justified in the light of the provisions contained in Art 15(3) of the Constitution even if the constitutionality of the same is challenged by the husband. Such a provision can legitimately be considered even as a provision made specially for the benefit of women.

45. Applying the tests indicated in R.M.D.C.'s case, , if we are now, to ask ourselves the question as Venkataramd Iyyer, J. has done in that case, would Parliament have enacted the law in question if it had known that it would fail as, regards the offending portions, there can be no doubt, as to what our answer would be. We do not also think that expunging of the offending portions would affect either the texture or colour of the Act in any substantial manner inasmuch as Section 10 is a provision which provides grounds for dissolution of marriages among Christians and it will continue to be so even after expunging of the offending portions. There may not also be any propriety of touching up or re-writing the law before the remaining portion could be applied as valid law The remaining portion can form a code complete in themselves alongwith the other provisions in S. 10, as a provision providing grounds for dissolution of marriages among Christians. Thus the conclusion is inescapable that the offending portions are severable.

46. For all the above reasons we would hold that the offending portions of the provisions as already indicated are severable and they are liable to be quashed as ultra vires. We would further hold that the remaining portions of the provisions can remain as valid provisions allowing dissolution of marriage on grounds of adultery simpliciters and desertion and/or cruelty independent of adultery. Adoption of such a course, in our view, would help to avoid striking down of the entire provisions in Section 10 of the Act and to grant necessary reliefs to the petitioners and similarly situated Christian wives seeking dissolution of their marriage which has for all intents and purposes ceased to exist in reality."

"47. We would accordingly severe and quash the words "incestuous" and "adultery coupled with" from the provisions in Section 10 of the Act and would declare that Section 10 will remain hereafter operative without the above words;"

39. Having considered all the pros and cons, we are inclined to fully endorse the view expressed by the Kerala High Court and hold that only those portions of Section 10 that offend Articles 14, 15 and 21 of the Constitution are liable to be severed and quashed and the remainder of the provisions are liable to be retained on the statute. So done, Section 10 would now read as follows:-

"10. When husband may petition for dissolution. --Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution.--Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of sonic other religion, and gone through a form of marriage with another woman;

or has been guilty of adultery, or of bigamy or of marriage with another woman or of rape or sodomy or bestiality.

or of cruelty or of desertion, without reasonable excuse, for two years or upwards."

40. It is, however, contended by Mr. Shah that the above provision would grant to the wife grounds to claim divorce which are not available to the husband. Whereas the wife would been entitled to claim divorce on the ground of change of religion, bigamy, rape, sodomy, bestiality, cruelty or desertion, the very same grounds are not available to the husband. The provisions would, therefore, have the same vice as the vice we have found for striking down the provision. In this connection a reference, can usefully be made to a decision of the Supreme Court in the case of, Anil Kumar Mahsi v. Union of India,". In that case, a Christian husband had impugned the very same provision of Section 10 as being discriminatory against the husband and, therefore, violative of Article 14 of the Constitution. The Supreme Court after setting out two provisions of Section 10 observed, as under:

". . .It will be apparent from the aforesaid provisions that while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery simpliciter, the wife has to prove that the husband has been guilty of adultery which is (i) incestuous, (ii) coupled with bigamy, (iii) coupled with marriage with another woman, (iv) coupled with cruelty which without adultery would have entitled her to divorce a mensa et toro,(v) coupled with desertion without reasonable excuse for two years or upwards. It is, therefore, clear that as far as the ground of adultery is concerned, it is the husband who is in a favourable position as against the wife, since it is not enough for the wife to prove adultery simpliciter on the part of her husband. To that extent, undoubtedly, it is the wife who is discriminated. As regards the other grounds which are available to the wife to claim dissolution of the marriage, which grounds are impliedly not available to the husband, the same areas follows: --

(a) that the husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman, and (b) that the husband is guilty of rape, sodomy or bestiality. It will be evident from these two grounds that a mere exchange of the profession of Christianity for the profession of another religion on the part of the husband is not enough. The wife has also to prove that the husband has married another woman. Since, however the husband can seek dissolution of the marriage only on the ground of adultery, the husband is not at a disadvantage as against his wife because a mere marriage with another man whether after exchanging the profession of religion or not, would give a ground to the husband to seek dissolution of marriage. It would thus be seen that even as far as this ground is concerned, it is the wife who is at a disadvantage.

5. As regards the only other grounds unavailable to the husband, they arc of rape, sodomy or bestiality. Although the modern usage of the word 'rape' extends also to the forcible sexual

intercourse by a woman with a man, the dictionary meaning of the said word as well as the offence of rape as defined in the Indian Penal Code speak only of forcible sexual intercourse by a man with a woman. We have, therefore, to accept the latter meaning of the said word while construing the provisions of the Act which is one of the vintage enactments on our statute book. Hence, it cannot be said that there is any discrimination between husband and wife because the ground of rape is not available to the husband for dissolving the marriage.

6. As regards sodomy. the word is defined in Black's Law Dictionary (5th Edn.) to mean:

"A carnal copulation by human beings with each other against nature, or with a beast, State v. Young, 140 Or 228, 13 P 2d 604, 607. Sodomyis oral or anal copulation between persons who are not husband and wife or between consenting adult members of the opposite sex, or between a person and an animal, or coitus with an animal Kansas Criminal Code."

Shorter Oxford English Dictionary defines the word 'sodomy' to mean "An unnatural form of sexual intercourse, esp. that of one male with another." Section 377, I.P.C. defines "unnatural offences", as follows:

"377. Unnatural offences. -- Whoever voluntrily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of cither description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.

Penetration is sufficient to constitute the carnal intercourse necessary to the of fence described in this section."

7. It can, therefore, be said that a woman can also be guilty of sodomy. So will be the position in the case of the offence of bestiality. The discrimination, therefore, can be alleged by the husband only on the basis that these two grounds, viz. sodomy and bestiality, are not available to him for claiming dissolution of his marriage whereas the same arc available to the wife for the purpose.

8. Taking into consideration the muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two "rounds are made available to the wife and not to the husband for seeking dissolution of the marriage. For the same reasons, it can hardly be said that on that account the provisions of .Section 10 of the Act arc discriminatory as against the husband,

9. We, therefore, find that there is no substance in the challenge by the petitioner-husband to the vires of the provisions of Section 10 as being discriminatory against the husband and, therefore, violative of Article 14 of the Cosntitution.

10. What is further, the individuals not willing 10 submit to the Indian Divorce Act or any other personal law are not obliged to marry exclusively under that law. They have the freedom to marry under the Special Marriage Act. 1954. Having however, married under the Act and accepted its discipline, they cannot be heard to complain of its rigours, if any,"

(Underlining ours) It would, thus, appear that the Supreme Court has taken into consideration the mascularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, and has found that the legislature can hardly be faulted for affording additional grounds to the wife for claiming divorce that are not made available to the husband. In any event, we are in the present proceedings concerned with a challenge raised by the wives. Incase a challenge is, at a later stage raised by husbands, the same will be considered and dealt with separately.

41. Mr. Shah has next contended that enactments pertaining to personal law involve issues of Slate policies and Courts should not dabble with them. In this context Mr. Shah has placed reliance on a decision of the Supreme Court in the case of "Ahmedabad Women Action Group (AWAG) v. Union of India". . In this case, challenge was raised to various enactments relating to personal law of Hindus, Muslims and Christians as being ultra vires the Constitution. Supreme Court did not entertain the challenge as the issues raised involved issues of State policies with which the Court will not ordinarily have any concern. It was observed that, when similar attempts were made on earlier occasions the Supreme Court had held that the remedy lies somewhere else and not by knocking at the doors of the Courts. Placing reliance on the above decision. Mr. Shah contended that laws enacted by the Parliament, which related to personal laws of the parties, lie in the exclusive domain of the Parliament. It will not he open to Courts, by a comparison of the provisions to be found in different enactments, to hold one enactment to be just or unjust as compared to other enactments and thereby proceed to strike clown a less favourable enactment.

42. Mr. Shah next contended that, once the vires of a particular provision of law is upheld the same cannot be once again challenged by setting up fresh grounds. In this context, he has placed reliance on a decision of the Supreme Court in the case of "Delh Clothi, and General Mills Co. Ltd. v. Shambhu Nath Mukherji, , where, it is observed, as under (Para 11) :

"..... If this Court held S. 10 (of the Industrial Disputes Act) as intra vires and repelled the objection under An. 14 of the Constitution it would not be permissible to raise the question again by submitting that a new ground could he raised to sustain the objection. It is certainly easy to discover fresh grounds of attack to sustain the same objection, but that cannot be permitted once the law has been laid down by this Court holding that S. 10 of the Act does not violate Art. 14 of the Constitution."

43. Mr. Shah then placed reliance on a case of T. M. Bashiam v. M. Victor. . where a Full Bench of the Madras High Court has summarised a contention raised before it, in the following terms :

"7. In this context, learned Counsel for the petitioner (the wife) has raised an argument that Section 17 itself may be taken as violating An. 14 of the Constitution, because it provides for the reference 10

this Court to be heard by a Bench of three Judges of this Court, for confirmation of a decree nisi for dissolution of marriage grunted by any District Court whereas, with regard to such cases arising under the original civil jurisdiction of this Court, this Court itself exercises that jurisdiction as the High Court, and the proceeding is a petition before a learned single Judge of this Court on the Original Side. The argument appears to be wholly lacking in validity, F'irstly. It is not an unreasonable differentiation: nor one unrelated to a very clear principle of distinction, that the jurisdiction of a superior tribunal attracts cases arising within its territory, while inferior tribunals have to deal with cases in their similar jurisdiction. If such a principle or scheme were to be held as offending Art. 14, the entire hierarchy of Courts, and the different provisions for the institution and disposal of civil matters in these Courts will have to be abolished."

In the aforesaid case, the Full Bench has proceeded to hold that Section 17 of the Indian Divorce Act is not discriminatory".

44. Mr. Shah next relied on a decision of this Court in the case of "Slate of Bombay v. Narasu Appa Mali, . This Court in para 12 of the Judgment, has reproduced the contentions in regard to validity of Bombay Prevention of Hindu Bigamous Marriages Act, 1946 raised before it, as follows :

"(12) It has then been argued with great ingenuity by Mr. Shah that by reason of the Constitution the Muslim personal law which permits polygamy has become void and, therefore, the Act has discriminated in applying to Hindus. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void: and what is contended is that the institution of polygamy offends under Art. 15(1) inasmuch as a Muslim male is permitted to have more than one wife whereas a Muslim woman is restricted to one husband. It is, therefore, submitted that the very institution of polygamy discriminates against women only on the ground of sex."

In para 30 of Die Judgment, this Court has proceeded to hold, as under :

"(30) But it is argued that even as to this social reform, the Stale Legislature should have made it all pervasive and should not have left the Mahomedans outside its ambit. That, as I have already said, is partly a political, and partly a legal argument. Whether it was expedient to make this Act applicable to the Mahomedans as well as to the Hindus would he a matter for the Legislature to consider. It is now well settled that the equality before the law which is guaranteed by Art. 14 is not offended by the impugned Act is the classification which the Act makes is based on reasonable and rational considerations. It is not obligatory for the Slate Legislature always and in every case to provide for social welfare and reform by one step. So long as the Stale Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended. The State Legislature may have thought that the Hindu community was more ripe for the reform in question. Social reformers amongst the Hindus have agitated for this reform vehemently for many years past and the social conscience of the Hindus, according to the Legislature, may have been more in tune with the spirit of the proposed reform. Besides, amongst the Mahomedans divorce has always been

permissible and marriage amongst them is a matter of contract. If the Slate Legislature acting on such considerations decided to enforce this reform in the first instance amongst the Hindus, it would be impossible in my opinion to hold that in confining the impugned Act to Hindus as defined by the Act it has violated the equality before law as guaranteed by Art. 14. In my opinion, therefore, the argument that Art. 14 is violated by the impugned Act must fail."

45. Mr. Shah next placed reliance on the case of "Reynold Rajamanj v. Union of India, . where the Supreme Court, in para (i has observed, as under ;

"6. ..... However, whethera provision for divorce by mutual consent should be included in the Indian Divorce Act is a matter of legislative policy. The Courts cannot extend or enlarge legislative policy by adding a provision to the statute which was never enacted there."

The Court, thereafter, in para 10 of the Judgment, has proceeded to observe, as under :

"10. Learned Counsel for the appellants then points out that a Christian marriage can be registered under the Special Marriage Act. 1954 and that there is no reason why a marriage registered under the Indian Christian Marriage Act should not enjoy an advantage which is available to a marriage registered under the Special Marriage Act. Reliance is placed on the constitutional prohibit ion against discrimination embodied in Article 14 of the Constitution. Assuming that the marriage in this case could have been registered under the Special Marriage Act. 1954, inasmuch as it was solemnised in 1967 it was open to the parties to avail of that Act instead of having resort to the Indian Christian Marriage Act, 1872. In the circumstances, it is not open to the appellants to complain of the disadvantage now suffered by them."

Placing reliance on the above observations. Mr. Shah has contended that provisions to be found in Section 10 of 'the Act' are a result of a legislation enacted by the Parliament. Whether they are onerous otherwise is for the Parliament and the Courts cannot extend or enlarge on the enactment passed by the Parliament by adding to or subtracting from the provisions of the statute. He has further contended that the plaintiffs, if they desired to take advantage of the provisions contained in the Special Marriage Act, it was open to them to have got their marriages registered under the Act. They would have, in that case, been entitled to take advantage of that Act. Not having done so, they cannot be heard to complain as they have chosen to be governed by the Indian Divorce Act.

46. Mr. Shah next placed reliance on the case of "Ms. Jorden Doemgde v. S. S. Chopra", . where the Supreme Court has observed, at page 938, as under :

"3. ..... If the provisions of the Hindu Marriage Act are compared with the provisions of the Indian Divorce Act. it will be seen that apart from the total lack of uniformity of grounds on which decrees of nullity of marriage, divorce or judicial separation may be obtained under the two Acts, the Hindu Marriage Act contains a special provision for a joint application by the husband and wife for the grant of a decree of divorce by mutual consent whereas the Indian Divorce Act contains no similar provision. Another very important difference between the two is that under the Hindu Marriage Act, a decree for judicial separation may be followed by a decree for the dissolution of marriage on the

lapse of one year or upwards from the date of the passing of a decree for judicial separation, if meanwhile there has been no resumption of cohabitation. There is no corresponding provision under the Indian Divorce Act and a person obtaining a decree for judicial separation will have to remain content with that decree and cannot seek to follow it up with a decree of divorce, after the lapse of any period of lime. We may also notice that irretrievable break-down of marriage is yet no ground for dissolution of marriage under the Hindu Marriage Act also though the principle appears to have been recognised in Sec. 13(1 A) and Sec. I3(B)."

In para 7 of its Judgment the Supreme Court has further observed, as under :

"7. It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely, the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to he necessary to introduce irretrievable break-down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a ease where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the lime has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take...."

47. Mr. Shall next relied on the case of Union, of India v. Deoki Nandan Aggarwal, AIR 1992 SC 96, where the Supreme Court has observed, as under :

" 14. ..... It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. ....

48. Mr. Shah lastly placed reliance on the case of State of Kerela v. Mathai Verghese, , where the Supreme Court has held, to the following effect :

"The Court can merely interpret a provision so as to make explicit the intention of the legislature. It cannot rewrite, recast or redesign the provision since the power to legislate has not been conferred on the Court."

49. We have considered the aforesaid submissions advanced by Mr. Shah, in the light of the decisions relied upon by him and we find that what we are doing in the present case is not reenacting the provisions of Section 10 by adding or subtracting words from the Section. We are also not embarking on the sphere of legislation. All that we are doing is the striking down of portions of the section which are ultra vires the provisions of the Constitution. If only such provisions, which are ultra vires Constitution, can be struck down, without striking down the entire section, it is always open to a Court to retain the rest of the Section which does not suiter from a similar vice. In the instant case, we find that by striking down the offending portions the rest of the section, which does not offend the provisions of the Constitution, can legitimately be maintained. In the circumstances, we proceed to strike down the offending portions of Section 10 of 'the Act'.

50. The Supreme Court in the case of Anil Kumar Mahsi. (supra), was concerned with an altogether different and distinct challenge to Section 10 of the Act and that too on the part of a husband. There, the challenge was based on the ground that rape, sodomy and bestiality are made grounds for divorce to a wile and against a husband whereas the same was not available to a husband. The Supreme Court has held that the above provision is not discriminatory against the husband. The Court was not at all concerned with a challenge raised before us and that too on the part of wives. Aforesaid decision, in the circumstances, will not be a bar against considering the challenge raised before us.

51. We have not, in the instant case, sought to redraft Section 10 by comparison of provisions of similar statutes as suggested by Mr. Shah. We have merely struck down portions of Section 10 which we have found to be offending Articles 14, 115 and 21 of the Constitution.

52. As far as the provisions of Section 16 are concerned, the same provide that decree of a dissolution of marriage made by a High Court shall, in the first instance, he a decree nisi and the same can he made absolute only after a period of not less than six months from the pronouncement thereof.

53. As far as the provisions of Sections 17 and 20 are concerned, they provide for confirmation by High Court of decrees for dissolution of marriages and decrees for nullity of marriages passed by District Judges. Such confirmation is required to be made by a Bench of the High Court consisting of not less than three Judges. Aforesaid provisions, we find, smack of procedural unreasonableness. There are several judicial pronouncements which have held that Section 17 of 'the Act" amounts to a procedural unreasonableness. In the case of Mrs. Neena v. John Pormer, (SB), it has been observed, as under :

"9. Before purling with the case we would like to observe that in genuine cases, the procedure prescribed by S. 17 of Indian Divorce Act. 1869 requiring confirmation by High Court of a decree of dissolution of a marriage made by District Court pranks the agony of the affected parties even though none of the affected parties desirous of preferring an appeal. We see no valid justification for continuation of this procedure. specially when no such procedure is prescribed by other Acts. That is why in U. P. by an amending Act (Act No. 30 of 1957) paras one to five of S. 17 have been omitted. In our opinion there is an urgent need for making suitable amendments in the Indian Divorce Act as

made in U.P."

In the case of Swapna Ghosh v. Sadananda Ghosh, (SB), it has been observed' - under the Special Marriage Act. providing the general matrimonial law of the land and the various special matrimonial laws governing all the communities in India, a decree of dissolution by a District Court is final, conclusive and binding, unless the party aggrieved chooses to prefer appeal while because of Section 17 of Indian Divorce Act, a similar decree between the Christian spouses would not acquire legal efficacy unless proceedings are dragged to the High Court before a 3-Judge Bench and confirmed by it.

Necessity of confirmation by High Court, under Section 17 of the Indian Divorce Act amounts to procedural unreasonableness,

54. In the case of Ramesh Toppo v. Violet Toppo.(SB), the Calcutta High Court has observed that -- Section 17 of the Indian Divorce Act requires confirmation of a divorce decree passed by a District Judge by a Bench of High Court of not less than three Judges. This needs to be amended as it is violative of Article 15 and of procedural due process for denying procedural reasonableness to Christians.

55. Section 17, we further find, provides that in case a High Court comprises of only two Judges and decree passed by a District Court conies up for confirmation before !he said two Judges and in case of a difference of opinion, the provision contemplates that the decision of the Senior Judge would prevail. In our Judgment, the aforesaid procedure contemplated by Sections 16. 17 and 20 arc unreasonable and arc arbitrary in nature. The same achieves no useful object or purpose. The procedure provided tends to perpetuate the agonies of the affected parties for no useful purpose. If such a procedure is absent in other similar enactments, we do not find any propriety why this procedure should be applied to Christian spouses. The said procedure, in the circumstances, is liable to be struck down by suitable amendments, which we suggest should be brought about by suitable amendments in 'the Act' .

56. In the result, we hold that the indicaled portions of Section 10 of the Act are ultra vires Articles 14, 15 and 21 of the Constitution and the same are accordingly struck down. We further find the provisions of Sections 16, 17 and 20 of the Act are also arbitrary and unreasonable. We suggest that the legislature should intervene and carry out suitable amendments to 'the Act' at the earliest. We direct that a copy of this order may be forwarded forthwith to the Ministry of law and Justice for such action as they may deem fit to take.

57. The present suits will now go back to the learned single Judge for decision in accordance with law.

58. At this stage, the counsel appearing for the Union of India, applies for slay of this order in order to enable the Union of India to carry the matter to the Supreme Court. We find that the Full Bench of the Kerala High Court had similarly struck down the provisions of Section 10 of the Act. The said matter was not carried to the Supreme Court. Even in the present suits, even though notices were

served upon the learned Attorney General, no affidavit-in-reply has been filed in any of the mailers. Mr. Shah, at the commencement of the arguments, had frankly staled that, despite several letters and reminders, he has received no instructions whatsoever in the matter. In the circumstances, we find that no useful purpose will be served in granting stay. In any event. Union of India will have sufficient time at its disposal to impugn our order, if so advised, as all that has been done in the instant case is to remit the present suits for trial to the learned single Judge. Prayer, in this behalf, is accordingly rejected.

59. Order accordingly.