IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. ____ OF 2013

IN

S.LP No. 18889 / 2012

IN THE MATTER OF:

Mrs.Goolrokh M. Gupta ….Petitioners

Versus

Mr.BurjorPardiwala and &Ors … Respondents

AND IN THE MATTER OF:

Mr. Feisal Alkazi and Anr. …Applicants

APPLICATION FOR IMPLEADMENT AND DIRECTIONS

To the Hon'ble Chief Justice of India
And his Companion Judges of the
Supreme Court of India

The Applicant above-named most respectfully showeth:

1. The above-stated Special Leave Petition has been filed in this Hon'ble Court challenging the final judgment and order dated 23.3.2012 in SCA No 449/2010 passed by the Hon'ble High Court of Gujarat. In the aforesaid impugned judgment, the majority by 2:1 held that (i) a Parsi woman by virtue of contracting a civil marriage with a non Parsi man under the Special Marriage Act ceases to be a Parsi; (ii) That it was not possible for the High Court to decide on the evidence available as to whether religious practices prohibiting non Parsi from entering Agiaris is an integral

part of Parsi Zoroastrian or not; and (iii) No writ deserves to be issued to respondents at this stage. According to the dissenting opinion, a woman who is born Parsi Zoroastrian does not cease to be a Parsi merely by virtue of solemnizing the marriage under the Act of 1954 with a man belonging to another religion concurred in part with regard to lack of maintainability.However, the dissenting opinion concurred with regard to lack of maintainability.

2. The Applicant No. 1 is an Indian Citizen. He is a qualified Master of Social Work. He is a noted Theatre Director and also works in the fields of education and social work. He has authored several books for children. He had been a Supervisor at the Sanjivini Society for Mental Health for over fourteen years. The Applicant No. 1 is Muslim by religion. The Applicant No. 2 is an Indian Citizen. She is She has a Masters degree in Sociology and is a trained counsellor. She is the Founder Director, Aarth-Astha which is an NGO working in the field of disability in Delhi.The Applicant No. 2 is Hindu by religion.

3. The Applicant No. 1 and Applicant No. 2 were married under the Special Marriage Act 1954 on January 29th,1988 in New Delhi. Neither of the Applicants changed their religion after marriage as the provisions of the Special Marriage Act, 1954 allows both partners to follow their respective religions.

4. The Applicants have two sons from the wedlock, Zain, aged 23 years and Armaan, aged 20 years. Both the children of the Applicants fill up ‘atheist’ in forms that ask which religion they follow.

5. The family of both the Applicant-Husband and the Applicant Wife have examples of individuals who have entered inter-religious marriages. There are practicing Buddhists, Catholics, Protestants, Jews and Hindus in the extended family of the Applicants, and the family is richer for it.

6. The Applicants are adversely affected by the impugned final order and judgment which holds that a Parsi Zoroastrian woman ceases to be a Parsi Zoroastrian by virtue of entering into a marriage with a Hindu man under the SMA, 1954. Though the judgment has been passed against an individual, it affects all women irrespective of their religion who are married or will get married under the Special Marriage Act, 1954. The Applicants are therefore aggrieved by the impugned order and judgment of the High Court of Gujarat. The Applicants submit that the impugned judgement suffers from following errors in law:

I. The Special Marriage Act, 1954 was enacted to facilitate inter-religious marriages in India

7. In 1868 the colonial state in India received a petition signed by a member of the BrahmoSamaj seeking legislation for marriages amongst their members such that they could freely marry as per their own rites. This petition initiated the introduction of a civil marriage law in India. The colonial State in India responded to this petition in the form of a Bill to regularise civil marriages. The Bill was revised three times and ultimately enacted as The Special Marriage Act (Special Marriage Act) III of 1872.

8. TheSpecial Marriage Act III of 1872 was an optional law initially made available to only those who did not profess any of the faith traditions of India. Hindus,Muslims, Christians, Sikhs, Buddhists and Parsis had to renounce whatever religion they were following in order to marry under this Act. This was a serious drawback in encouraging marriages under the Act. Therefore, in 1922 The Special Marriage Act was amended to make it available to Hindus, Sikhs, Buddhists and Jains to marry within these four communities without renouncing their religion. However, there was another drawback to this enactment, which was not addressed by the amendment. A marriage under the SMA resulted in a deemed severance whereby succession would be regulated by the Indian Succession Act of 1865.

9. In 1954, the Special Marriage Act of 1872 was repealed. The Special Marriage Act of 1954 was enacted. As per the Statement of Objects and Reasons it was enacted in order "*to provide a special form of marriage which can be taken advantage of by any person in India and all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess*." The parties may observe any ceremonies for the solemnization of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers.

10. Under the Special Marriage Act, 1954, Section 20 provides that persons opting for a civil marriage under the Act, would retain the same rights and disabilities with regard to the right of succession to any property as a person to whom the Caste Disabilities

Removal Act, 1850 applies. In other words, marriage under the Act would not affect the right of succession to any property, in the same way that it would not be affected by his or her renunciation of religion, or having been excommunicated from the communion of any religion or being deprived of caste.

11. However, the Special Marriage Act, 1954, in the form of Section 19, specifically retains the provision regarding severance of persons professing the Hindu, Buddhist, Sikh or Jain religion, married under the Act from the undivided family.

12. With respect to inheritance, the Special Marriage Act, under Section 21, provides that succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the Indian Succession Act, 1925. Further, Section 21 provides that for the purposes of the section, it Chapter III of Part V (Special Rules for Parsi Intestates) would be deemed to be omitted from the Indian Succession Act, 1925.

13. However, on the recommendation of the Law Commission of India (59th Report, 1974), Parliament enacted the Marriage Laws (Amendment) Act, 1976. A true copy of extracts of the act are annexed herewith and marked as**ANNEXURE A-1 (pages __ to __).** This Act added section 21-A to the Special Marriage Act. As per Section 21-A, where a marriage of any person professing the Hindu, Buddhist, Sikh or Jain religion with a person professing the Hindu, Buddhist, Sikh or Jain religion is solemnized under the

Special Marriage Act, Sections 19 (effect of marriage on member of undivided family) and 21 (Succession to property of parties married under the Act) shall not apply and Section 20 (rights and disabilities not affected by Act), in as much as it creates a disability shall also not apply.

14. Therefore, under section 21 A, section 19 will not apply in cases of marriage of a Hindu, Sikh, Buddhist or Jain to another Hindu, Sikh, Buddhist or Jain and the Hindu Succession Act would apply in such marriages as the law of succession.

15. The interpretation of a co-joint reading of sections 19, 20 and 21 A is that by virtue of two persons of different faiths marrying one another, a change of their religion does not result by law.

II. The Special Marriage Act, 1954 is a Progressive Legislation

16. The Special Marriage Act,1954 is a progressive legislation. It has been held that the Act applies to all Indian Citizens, irrespective of their caste, creed or religion. In *Dr. Abdul Rahim Undre vs. Padma Abdur Rahim Undre,*AIR (1982) Bom341, High Court of Bombay, held:

> *"23. It can safely be said that Special Marriage Act is in reality an Indian Marriage Act, which applies to all Indian Communities irrespective of caste, creed or religion.Even the religious marriages can be registered under the said Act. On such registration the religious marriage can be converted into secular marriage...However, a secular marriage cannot be converted into religious marriage...It cannot also be forgotten that the establishment of a secular society is the aim and goal of Indian Constitution. Therefore in the area and field which is secular or nonreligious laws will have to be common for all citizens of India, and that is what has been done, though to limited*

extent by enacting Special Marriage Act at least leaves a choice open which is available to all the citizens of India irrespective of their caste, creed or religion."

17. The Hindu Marriage Act of 1956 was made applicable to Hindus, Buddhists, Sikhs and Jains. Consequently, marriage between a Hindu and a person outside these four religious communities is not permissible under the HMA. Such marriages will be valid only if performed under the Special Marriage Act 1954.The Law Commission in its Report Number 212, October 2008, observed, "*religion of the parties to an intended marriage is immaterial under this Act; one can marry under its provisions both within and outside one's community.*"A true copy of extracts of the Law Commission Report No. 212 of October 2008 is annexed herewith and marked as **ANNEXURE A-2 (pages __ to __).**

18. The Special Marriage Act, 1954 has facilitated inter religious marriages in India without requiring the parties to the marriage to renounce their religion.Marriage between persons of different religions have been recognised as valid under the Special Marriage Act 1954 by various High Courts across the country (*Late R. Sridharanby Legal Heirs vs The Commissioner of Wealth Tax Madras and Ors* AIR 1970 Mad 249, *SmtGitikaBagchivsSubhabrotaBagchi*AIR 1996 Cal 246, *Mohd. AjmalvsSivadasanand Ors*WP (Crl) 107/2010 High Court of Kerala). This Hon'ble Court in *Mrs.Valsamma Paul vs Cochin University and Ors,*AIR 1996 SC 1011 acknowledged that '*The Hindu Marriage Act 1956 and Special Marriage Act 1954 made*

the marriage between persons belonging to different castes and religions as valid marriage' (at para 30).

19. The SMA 1954 is specific to India and is in consonance with the Indian State's commitment to secularism and equal respect for all religions. It is a progressive legislation enabling couples to solemnise their marriage while retaining their respective religious identities. It is interesting to note that The Special Marriage Act of 1872 continues to be in force in Pakistan and Bangladesh.

20. The effect of the impugned judgment is essentially a prohibition on inter-religious marriages. Countries which prohibit inter religious marriage specify this prohibition in legislation. For example, section 10 of the Islamic Family Laws Act 1984 of Malaysia prohibits the marriage of a Muslim man to a non *Kitabiya* woman, and the marriage of a Muslim woman to a non Muslim. Civil marriages are an option only for non Muslims.

III. The Scope of Section 19 of the SMA is Restricted

21. Section 19 of the Special Marriage Act 1954 provides that where a person professing the Hindu, Buddhist, Sikh or Jaina religion under the Special Marriage Act, 1954, it shall be deemed to effect his severance from such family. It is pertinent to note that the Section is limited in its scope.

22. First, Section 19 specifically applies to those persons professing Hindu, Buddhist, Sikh or Jaina religions. There is no like provision applicable to persons professing other religions. A person professing Christianity, Islam or Zoroastrian who chooses to get

married under the Special Marriage Act, 1954 is not deemed to effect severance from his or her family.

23. Further, where applicable, Section 19 only deems severance from a person's family and not from the religion itself. The Special Marriage Act, 1954 does not envisage a situation where a person is severed from their religion as a result of marriage under the Act. On the other hand, the impugned judgment has held that the Petitioner ceased to be a Parsi Zoroastrian as a result of her marriage to a Hindu. Such a finding is contrary to the provisions of the Special Marriage Act, 1954.

24. It is further submitted that the deemed severance effected by Section 19 is only for the limited purposes of succession. It does not hinder a person's personal relations with their family. Section 19 corresponds to Section 22 of the old Special Marriage Act 1872, and according to the 59th Report of the Law Commission of India,'*its principle object is to replace co-parcenary rights and other rights concerning the HUF by a position under which the person marrying will become a divided co-parcener.* The Report further refers to the debates in the Joint Committee and notes that section 19 was retained in order to simplify the law of succession as follows:

> *"The Joint Committee gave anxious consideration to this clause as that had been made the subject of attack in many of the opinions received on the ground that it penalises marriages under this law. After careful consideration the Joint Committee have decided to retain this clause in its original form particularly because it has the desirable effect of simplifying the law of succession."*

25. Consequently, Section 19 is concerned with succession alone and has no connection with the religious identity of the marrying person. It does not imply that the person marrying under Special Marriage Act is obliged to severe his or her personal relations with the natal family.

IV. The interpretation of the judgment and the reading of section 19, 20 and 21 A in the manner the impugned judgmentdoes is in violation of Article 14 of the Constitution

26. The Respondent–Trust permits a male Parsimarried to a non-Parsi to enjoy all the rights and privileges of the Parsi Zoroastrian religion while denying such rights to Parsi Zoroastrian women married to non Parsi men.

27. With regard to the above, the majority judgment of the Hon'ble High Court of Gujarat observed that:

> "*In all religion, be it Christian, be it Parsi, be it Jews, the religious identity of a woman unless specifically law is made by the Parliament or the legislature, as the case may be, as per the religions, shall merge into as that of the husband. Such rights would be the rights other than those as may be available to a woman given by the nature and the rights as otherwise specifically protected by express provisions of statute. It is hardly required to be stated that such principle is generally accepted throughout the world and therefore, until the marriage, after the name of the woman, the name of the father is being mentioned and after marriage, name of husband is being mentioned for the purpose of further describing her identity*" (at Para 26).

28. Such a finding is erroneous and contrary to the provisions of the Special Marriage Act, 1954. As submitted above, it is clear that

the Special Marriage Act, 1954 does not require a woman to adopt her husband's religion or name upon marriage. An increasing number of women in India retain their own surnames upon marriage and do not adopt the surname of their husbands. To assume that it is mandatory for all wivesto merge their identity with that of the husband, while the husband is free to maintain the identity of his choice is in violation of the right to equality guaranteed Article 14.

29. The impugned judgment suffers from a misreading of the law and has serious implications for women who enter inter-religious marriages and who do not wilfully choose to change their religions. To make it mandatory for all women to accept the faith of their husbands, while the husband is free to choose his religious faith is, in effect, tocreate a separate law for women and a separate law for men, which is in violation of Article 14. Making it obligatory for women to change their religions after marriage to the religion followed by their husband, while the husband has liberty to retain or change his religious faith - is not based on any intelligible differentia and only serves to perpetuate inequality between men and women.

V. Reading SMA in the manner the Impugned Judgment does is in violation of Article 21 of the Constitution of India

30. It is an established position of law that the fundamental rights under the Constitution are to be interpreted in an expansive and purposive manner and not in a narrow and pedantic fashion. Such liberal interpretation would invest fundamental rights with

significance and vitality and enhance the dignity of the individual and the worth of the human person. This was held by this Hon'ble Court in the case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.

31. Article 21 of the Constitution guarantees the right to life and personal liberty to all persons. It is based on the premise that all human beings are born with certain inalienable rights like life, liberty and happiness, which are fundamental for the realization of their full personality. Article 21 has been interpreted to include rights to privacy, substantive due process, dignity and health, amongst others that have been deemed central to the concept of civilized existence in a democratic society.

32. This Hon'ble Court has heldin*Noise Pollution (V), In re,* (2005) 5 SCC 733 a life with human dignity includes all those aspects of life which go to make a person‘s life meaningful, complete and worth living. It is submitted that faith forms the core of a person's being and is intrinsic to individual identity. The respect of a person's faith is therefore a part of the respect of the right to dignity, protected under Article 21.

33. The term 'religion' has been judicially considered in *Commissioner, Hindu Religious Endowments, Madras v. LakshmindraThirthaSwamiar of Sri Shirur Mutt*1954 Indlaw SC 33 wherein the following proposition of law have been laid down:

> *"(1) Religion means 'a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being';*
> *(2) A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well;*
> *(3) Religion need not be theistic."*

34. It is thus, Constitutionally impermissible to force a person to cease to follow a particular religion and second, to foist the religion of another person onto that individual. Forcing a wife to merge her religious identity with that of her husband, impairs her dignity and violated Article 21.

VI. Reading SMA in the manner the impugned judgment does is in violation of Article 25 of the Constitution

35. Article 25 of the Indian Constitution affirms freedom of conscience, and free profession, practice and propagation of religion. In *Faheem Ahmed v. Maviys @ Luxmi*2011 IndLaw Del 1218, it was held that:

> *"India is a secular country and under Article 25 of the Indian Constitution, right has been given to every citizen to profess, practice or propagate any religion. The cherished ideal of secularism which is the hallmark of our Constitution has been expressly recognized under the said Article 25 of the Indian Constitution. The Constitution does not put any kind of embargo on the right of any person to freely choose any religion he or she so likes or the religion which one is to adopt and practice in his or her life. It is well-settled that freedom of conscience and right to profess a religion implies freedom to change his or her religion as well. The Constitution of India does not define the word 'religion' and rightly so, as the framers of the Constitution could not have perceived to give any exhaustive definition of 'religion'."*

36. In this regard, the right to practice and profess religion has been interpreted differently from the right to propagate religion.

37. In essence, the right to propagate ones religion cannot infringe upon another person's right to freedom of religion. This was laid

down by this Hon'ble Court in *Lily Thomas vs Union of India (JT2000(5)SC617 at Para 62:*

> *"Under the constitutional scheme every person has a fundamental right not merely to entertain the* religious *belief of his choice but also to exhibit his belief and ideas in a manner which does not infringe the* religious *right and personal freedom of others"].*

38. The limitation on the right to propagate religion was affirmed in *Rev Stainislaus vs. State of Madhya Pradesh* [AIR 1977 SC 908], and in *SatyaRanjanMajhivs State of Orissa and Ors*. (2003)7SCC439, wherein this Hon'ble Court held there is no fundamental right to convert another person to one's own religion; however the right to propagate one's religion is protected by Article 25.

39. The Law Commission of India, in Report No. 235/2010has noted that the freedom of conscience and the right to profess, practice and propagate religion as enshrined in Article 25 of the Constitution connotes the right to communicate the religious belief to others by expounding the tenets of that religion. The Report makes it clear that conversions are separate from marriage and notes that conversion is a solemn act, and cannot be treated as an event which can be achieved through a mere declaration - oral or writing. Importantly it notes that '*Conversion which is bereft of any particular formalities or religious rites cannot be placed on the same pedestal on marriage which can be recognized in law only if customary rites and ceremonies are gone through*'. A true copy of the Law Commission Report No. 235/2010 is annexed herewith and marked as **Annexure A-3 (pages __ to __)**.

40. It is also pertinent to note that some State governments have even enacted laws to prevent forcible conversions,however there is no prohibition on voluntary conversions. To make it compulsory for a wife in an inter-religious marriage to convert to the religion of her husband is essentially a forcible conversion, which is in violation of Article 25.

VII. Reading SMA in the manner the impugned judgment does is in violation ofInternational law

41. It is an established position of law that international law can be used to expand and give effect to the fundamental rights guaranteed by our Constitution. [*V/0 Tractor Export v. Tarapore& Co.*1969 (3) SCC 562 at para 15; *Jolly George v. Bank of Cochin* (1980) 2 SCC 360 at para 10; *Gramaphone Company of Indian Ltd v. BirendraBahadurPandey,* (1984) 2 SCC 534 at para 5; *Vellore Citizens Welfare Forum v. Union of India,* (1996) 5 SCC 647 at para 15; *Vishakha&Ors. v. State of Rajasthan &Ors.*(1997) 6 SCC 241 at paras 7 and 10; *People's Union for Civil Liberties v. Union of India &Anr.* (1997) 1 SCC 301 at paras 20-26; *People's Union for Civil Liberties v. Union of India &Anr.*(1997) 3 SCC 433 at para 13; *Apparel Export Promotion Council v. A.K. Chopra*(1999) 1 SCC 759, at para 26-27; *Pratap Singh v. State of Jharkhand* (2005) 3 SCC 551 at para 63-64; *People's Union For Civil Liberties v. Union of India &Anr.* [(2005) 2 SCC 436); *Entertainment Network (India) Ltd. v. Super Cassette Industries*, (2008) 13 SCC 10 at para 70-76, *Smt. Selvi v. State of Karnataka* (2010) 7 SCC 263 at para 236]

42. Reading SMA the way the impugned judgment does is in violation of the following internationals laws India is a signatory to:

a. Article 16 (1) of the Universal Declaration of Human Rights 1948 states:

> ‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.’

b. Article 23 (4) of the International Covenant on Civil and Political Rights 1966 declares:

> ‘States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.’

c. Article 2 (e) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, and Article 2 (f) of CEDAW are germane:

> ‘States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> > (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;'

d. Paragraph 21 of General Comment 28 to the International Covenant on Civil and Political Rights states as follows:
'States parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice - including the freedom to change religion or belief and to express one's religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination. These freedoms, protected by article 18, must not be subject to restrictions other than those authorized by the Covenant and must not be constrained by, *inter alia*, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others. Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion; States parties should therefore provide information on the status of women as regards their freedom of thought, conscience and religion, and indicate what steps they have taken or intend to take both to eliminate and prevent infringements of these freedoms in respect of women and to protect their right not to be discriminated against.' [Paragraph 21 of CCPR/C/21/Rev.1/Add.10, 29 March 2000]

43. While there is no one international law specifically dealing with forcible conversion of wives to the religion of their husbands, there are reports on the status of women in the light of religion and traditions.The report of the Special Rapporteur on Freedom of Religion or Belief notes in report dated24 April 2009, [E/CN.4/2002/73/Add.2]that :

> *'At the dawn of this third millennium, many women across the world suffer discrimination in their private and family lives and in relation to their status in society. Such discrimination, which is deeply rooted in the dominant culture of some countries, is largely based on or imputed to religion. It is often trivialized and tolerated by the State or society and sometimes sanctioned by law.'*

The report calls upon States to undertake domestic measures such as education and training, legislative measures, generating public awareness, religious instruction and dialogue with religious leaders, gender parity and combating extremism as strategies to improve women's status in light of religion and traditions.

VIII. Civil Unions in other countries that do not call upon either party to give up their religion

44. It may be noted that laws in countries where people following diverse religions and multiple ethnic groups co-exist–civil union / marriage lawsdo not call upon either party to give up their respective religions. For example:

45. Under section 1 of The Civil Union Act 2006 of South Africa, two individuals over 18 years of age may enter into a civil union irrespective of religion, or even gender.

46. In the United States, any couple can get married following the acquisition of a marriage license. The couple do not have to be of the same religion under any of the State requirements in order to obtain a marriage license.

47. The Marriage Act 1949 regulates marriages in the United Kingdom. While marriage when either person is under the age of sixteen is void, and there are prohibited degrees of relationships stipulated under the law, there is no prohibition on persons of different religions marrying each other.

48. There is no law in India which prohibits inter-religious marriages. The impugned judgement of the Gujarat High Court, by deeming a conversion of the wife even in the case of a marriage performed under secular law, is not in consonance with the law of the land.

PRAYER

In the premises, it is most respectfully prayed that

a) This Hon'ble Court may be pleased to allow the Applicants to be impleaded as a party respondent in the subject Special Leave Petition,

b) Without prejudice to the prayer above, this Hon'ble Court may be please to permit the Applicants to intervene in the subject Special Leave Petition;

c) Pass such other and further order/s as may be deemed fit and proper in the circumstances.

AND FOR THIS ACT OF KINDNESS THE APPLICANT AS IN DUTY BOUND SHALL FOREVER PRAY

FILED BY:

New Delhi

Filed on: