
(2008) 01 CAL CK 0030
In the Calcutta High Court
Case No : C.O. No. 80 of 2008

Dr. Deepak Sharma

APPELLANT

Vs

Smt. Vineeta Sharma (nee Dubey)

RESPONDENT

Date of Decision : 24-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2, 151
Hindu Marriage Act, 1955 — Section 13B, 13B(2)
Special Marriage Act, 1954 — Section 28, 28(1), 28(2), 29, 40

Citation : AIR 2008 Cal 55 : (2008) 1 CALLT 324 : (2008) 3 CHN 440

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Mr. Probal Mukherjee, Dhanesh Relan and S. Chakraborty, for the Appellant; Debanjan Mukherjee, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—This revisional application under Article 227 of the Constitution of India is directed against an order being No. 4 dated 17th September, 2007 passed by the learned District Judge at Alipore in Mat. Suit No. 1420 of 2007, whereby an application filed jointly by the parties u/s 151 of the CPC for relaxing the six months restricted period as prescribed u/s 28(2) of the Special Marriage Act for moving the motion by the parties for the second time and thereby inviting the Court to pass a decree for divorce on mutual consent before expiry of six months restricted period, was rejected by the learned Trial Judge.

2. The propriety of such an order is under challenge in this revisional application at the instance of the petitioner No. I (husband).

3. Let me give the short background of this case under which such an application was filed jointly by the parties before the learned Trial Judge.

4. Admittedly the marriage between the parties was solemnized at Calcutta on 17th October, 2001. The said marriage was registered under the Special Marriage Act. The parties live together as husband and wife till 27th October, 2001.

Thereafter, the petitioner (husband) left for USA and the parties never cohabitated as husband and wife after 27th October, 2001.

5. Despite best efforts, the parties could not reconcile their differences. Since the marital ties between the parties has completely and irretrievably broken down between the parties, both the parties decided to dissolve their marriage by a decree of divorce by mutual consent.

6. Accordingly, an application for divorce was filed by the parties on 10th August, 2007.

7. In the said matrimonial suit, a joint petition u/s 151 of the CPC was filed by the parties, inter alia, praying for relaxation of the six months restricted period for enabling the parties to move the learned Trial Judge jointly for passing a decree for dissolution of marriage by mutual consent even without waiting till the expiry of the period of six months from the date of presentation of the joint petition for divorce on the ground that continuation of the marriage will simply increase the agony of the parties.

8. The said joint petition was supported by affidavit. So far as the husband is concerned, his affidavit was affirmed by power of attorney holder on his behalf. The wife, however, affirmed the said affidavit herself.

9. When the said application was taken up for hearing, a question cropped up before the learned Trial Judge as to whether the Court can proceed on the basis of the said application u/s 151 of the CPC as the same was not affirmed by the petitioner (husband) himself.

10. Considering the language of the provision contained in Section 28 of the Special Marriage Act and the intent of the said provision, the learned Trial Judge ultimately held that in order to get the relief by way of divorce by mutual consent, it is necessary that the joint petition for divorce must be moved by both the parties on second occasion, but since one of them being the husband is absent, the ingredients of Section 28(2) of the Special Marriage Act, was not fulfilled, particularly in view of the fact that in the absence of one of the parties to the marriage, Court cannot presume that the absentee party has not withheld his earlier consent.

11. Holding as such, the learned Trial Judge rejected the petitioners' prayer for allowing them to move the joint petition for divorce on the second occasion by relaxing the restriction regarding moving this application before expiry of six months from the date of presentation of the said petition.

12. Let me now consider as to how far the learned Trial Judge was justified in rejecting the petitioners' said application u/s 151 of the Code of Civil Procedure.

13. For considering the propriety of the impugned order, this Court is required to consider the following two questions:

1. Whether the personal presence of the parties before the Court on the second

occasion when the application is taken up for hearing for passing a decree for divorce on mutual consent, is mandatory?

2. Whether the restriction in moving the joint petition for divorce by the parties before the Court before expiry of six months after the date of presentation of the petition but not later than 18 months from the said date, can be relaxed by the Court?

14. Of course, the question as to whether the parties can be permitted to move jointly for the second time after the expiry of 18 months from the date of presentation of the joint petition for divorce, is not an issue before this Court in this application and as such, this Court does not think it necessary to consider the said aspect herein, but this much this Court can record that the joint petition for divorce automatically stands abated on the expiry of 18 months from the date of its presentation unless it is moved by the parties jointly for the second time as per the provision u/s 28(2) of the said Act.

15. Let me now consider the questions as formulated above in the facts of the instant case.

Re: Question No. 1.

16. It is rightly pointed out by Mr. Mukherjee, learned Advocate, appearing for the petitioner (husband) that all proceedings under the said Act shall be regulated, as far as may be, by the CPC subject to other provisions contained in the said Act and to such Rules as the High Court may make in this behalf.

17. In fact, a Division Bench of this Hon''ble Court after taking into consideration the provisions contained in Section 28(2) and Section 40 of the said Act, held in the case of Annalie Prashad Vs. Romesh Proshad, that the Special Marriage Act by Section 40 attracts the Code of Civil Procedure, subject of course, to the other provisions of the said statute and to such rules as the High Court may make in that behalf.

18. Their Lordships were further pleased to hold that "we are also unable to agree that, in a case of divorce by mutual consent, affidavit evidence should be excluded on the ground that in such a case it is desirable that the parties themselves should be present in Court. Such conclusion was arrived at by Their Lordships as Their Lordships were of the opinion that by virtue of Section 40 of the said Act, provision contained Order 19 of the CPC which provides for proof of fact on affidavit evidence, is attracted as the application of Order 19 of the CPC is not excluded either expressly or by necessary implication".

19. In fact, a single Bench of the Delhi High Court also followed the aforesaid Division Bench decision of this Hon''ble Court in the case of Mrs. Neelima Chopra v. Anil Chopra reported in 1986(2) DRJ 188 and held that if both the parties, by way of affidavits or through counsel, state that they are married and are able to produce proof of the marriage and that they have been living separately and have not been able to live together for the prescribed period, then there cannot

be any reason as to why the Court should not record its satisfaction as envisaged in Section 13B(2) of the Hindu Marriage Act and to pass a decree for divorce thereon. Incidentally it may be noted here that the provisions contained in Section 28 of the Special Marriage Act is *pari materia* with the provision contained in Section 13B of the Hindu Marriage Act.

20. Considering the aforesaid decisions of our High Court as well as of the Delhi High Court, this Court, thus, holds that the personal presence of the parties before the learned Court at the time of moving the joint petition for divorce for the second time u/s 28(2) of the Special Marriage Act, is not mandatory, as the parties can satisfy the Court even by affidavit that the ingredients contained in the said provision for passing a decree for divorce on mutual consent are fulfilled and thus the Court can be invited to pass a decree for divorce on mutual consent after being satisfied regarding the fulfilment of the ingredients contained in Section 28 of the said Act for passing a decree for divorce on mutual consent.

21. Though, this Court holds that appearance of the parties before this Court even at this stage is not mandatory but still then, since the Court cannot even pass a decree for divorce on mutual consent without satisfying itself as to whether the averments made in the petition are true and further as to whether consent of the parties was not obtained by force, fraud or undue influence, it is absolutely within the domain of the Court to make such enquiry as it thinks fit including hearing and or examination of the parties for recording its satisfaction in this regard.

22. This conclusion is arrived at by this Court by following the decision of the Hon"ble Supreme Court in the case of Smt. Sureshta Devi Vs. Om Prakash, , wherein it was held as follows:

10. Under Sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the Court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The Court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the Court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.

23. This Court, however, is not oblivious of the fact that in the instant case the petitioner (husband) himself has not affirmed any affidavit to prove the ingredients of passing a decree for divorce on mutual consent as per Section 28 of the Special Marriage Act.

24. The learned Trial Judge held that the Court cannot pass a decree on the basis of an affidavit filed by the power of attorney holder.

25. Let me now consider as to how far the learned Trial Judge was justified in coming to such a conclusion.

26. In fact, the Hon"ble Supreme Court, after considering the provisions contained in Order 3 Rules 1 and 2, held that power to depose on behalf of and/or in place of principal extends only to depositions in respect of "acts" done by power-of-attorney holder in exercise of power granted by the instrument. Their Lordships further held that the term "acts" would not include deposing in place of and instead of the principal for acts done by principal and not by power-of-attorney holder. It was further held therein that the power-of-attorney holder cannot depose for principal in respect of matters of which only principal can have personal knowledge and in respect of which principal is liable to be cross examined. It was further held therein that if the principal is unable to appear in Court, a commission for recording his evidence may be issued.

27. For obtaining a decree for divorce on mutual consent, the following requirements are to be satisfied:

- (i) The parties have been living separately for a period of one year or more,
- (ii) They have not been able to live together,
- (iii) They have mutually agreed that marriage should be dissolved,
- (iv) The parties are unable to reconcile themselves even during the interregnum period and reconciliation and/or adjustment is not at all possible between them and
- (v) Consent of the parties for such divorce was not obtained by force, fraud or undue influence.

28. In my view, the power-of-attorney holder cannot prove the aforesaid ingredients either by affirming an affidavit or by giving depositions on behalf of any of the parties, inasmuch as the acts forming such ingredients are not the acts of the power-of-attorney holder. Since such acts are exclusively within the personal knowledge of the parties, it is none but the parties who can prove those ingredients either by filing affidavit of evidence under Order 19 of the CPC or by giving evidence before the Court.

Re: Question No. 2.

29. On plain reading of the provision of Sub-section (2) of Section 28 of Special Marriage Act, this Court holds that motion cannot be moved the by the parties on the second occasion earlier than six months after the date of presentation of the petition u/s 28(1) thereof but not later than 18 months after the said date.

30. In fact, the said interregnum period was given to the parties to afford them an opportunity to reflect on their move and seek advice from relations and friends, so that during this transitional period the parties may have a second thought and change their mind not to proceed with the petition.

31. In my view, the intent of legislation for providing such interregnum period will be defeated if the parties are allowed to move the Court for obtaining a decree for divorce even before expiry of six months after the presentation of the joint petition by relaxing the minimum time limit as provided in the said provision. That apart, unlike Section 29 of the said Act which authorises the District Court, upon application being made to it, to allow a petition for divorce to be presented before one year has passed on certain grounds, as mentioned there, Section 28(2) of the said Act does not empower the Court to relax the minimum time limit for enabling the parties even to move on the second occasion for obtaining the decree for divorce on mutual consent within six months from the date of presentation of such petition u/s 28(1) of the said Act.

32. In the aforesaid circumstances, this Court is unable to allow the petitioners' prayer for relaxation of the restricted time limit for enabling them to move the application for divorce u/s 28(2) of the said Act for the second time within six months from the date of presentation of the joint petition for divorce u/s 28(1) of the said Act.

The petitioners' prayer for such relaxation, thus, stands rejected.

The revisional application, thus, stands disposed of accordingly.

Urgent xerox certified copy of this Judgment, if applied for, be given to the parties, as expeditiously as possible.