

(2014) 07 CAL CK 0043
In the Calcutta High Court
Case No : C.O. No. 997 of 2014

Kaizer Basu

APPELLANT

Vs

Mahua Basu

RESPONDENT

Date of Decision : 04-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 3, 151
Constitution of India, 1950 — Article 141, 142
Hindu Marriage Act, 1955 — Section 13, 13(1), 13B, 13B(2), 19

Citation : AIR 2014 Cal 180 : (2015) 1 CHN 81 : (2014) 3 DMC 776

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Advocate : Sebati Dutta, Advocate for the Appellant; Arijit Bardhan, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Debangsu Basak, J.—The revisional application was directed against Order No. 16 dated February 14, 2014 passed by the 7th Court of the Additional District Judge at Alipore, 24-Parganas (South) in Matrimonial Suit No. 17 of 2012.

2. By the impugned order, the learned Judge dismissed a petition u/s 13B of the Hindu Marriage Act, 1955 filed before it on the ground that such petition was maintainable before the District Judge only in view of the ratio of the judgment of the Special Bench reported at 2011 Volume 3 Calcutta Law Journal page 177 (Shrimati Rita Bhattacharjee v. Shri Santiranjana Bhattacharjee).

3. The parties to the proceedings jointly submitted that, the Court below being in seisin of the proceedings u/s 13(1) of the Hindu Marriage Act, 1955 had the jurisdiction to consider and dispose of a petition u/s 13B of the Hindu Marriage Act, 1955 when petition was presented before it jointly by parties to the proceedings. The Court below ought to have allowed the conversion of the proceeding u/s 13(1) of the Hindu Marriage Act, 1955 to one u/s 13B of the said Act and had acted with material irregularity in not doing so. In support of such

contention they relied on an unreported order dated June 25, 2012 passed in C.O. No. 33 of 2012 passed by the High Court where such conversion was allowed at the invitation of the parties thereto and Shrimati Rita Bhattacharjee (supra).

4. I have considered the contentions of the parties and the materials on record. The petitioner initiated a proceeding for divorce u/s 13(1) of the Hindu Marriage Act, 1955 against the opposite party in the Court of the learned District Judge at Alipore being Matrimonial Suit No. 7 of 2012. Such proceeding was subsequently transferred to the learned Additional District Judge, 7th Court at Alipore. The parties thereafter made an application under Order XIII Rule 3 read with Section 151 of the Code of Civil Procedure, 1908 and Section 13B of the Hindu Marriage Act, 1955 before the learned Additional District Judge 7th Court, Alipore. The learned Judge considered the application and was of the view that in terms of the ratio laid down in Shrimati Rita Bhattacharjee (supra) the petition u/s 13B of the Hindu Marriage Act, 1955 was not maintainable before it. The learned Judge noted that Shrimati Rita Bhattacharjee (supra) was not placed before the Court which passed the order dated June 25, 2012 in C.O. No. 33 of 2012.

5. Shrimati Rita Bhattacharjee (supra) was rendered by the Special Bench on a reference. The points of reference to the Special Bench were as follows:-

13. The points for reference are as under:-

1. Whether a Division Bench, vested with determination to take up appeals against the decree arising out of proceedings under Hindu Marriage Act and the applications in connection with such appeals, is entitled to take up an original application for divorce by mutual consent u/s 13B of the Act filed direct before such appellate forum?

2. Whether the directions given by the Supreme Court in the cases of Shashi Garg, Radha, Mrs. Payal Jindal and Sandhya Rani (supra), should be treated to be valid precedent in terms of Article 141 of the Constitution of India authorising any other Courts to adopt the said procedure?

3. Whether Section 13B of the Act authorises an appellate Court dealing with an appeal against a decree passed in the proceedings u/s 13 of the Act to grant relief in terms of Section 13B of the Act or such application should be filed only before the District Court specified in Section 19 of the Act?

4. Whether the waiting period mentioned in Section 13B(2) of the Act is mandatory or directory?

6. Their Lordships of the Special Bench were of the view that:-

23. Section 13B of the said Act gives a special power empowering the Court to pass a decree for divorce by mutual consent even in the absence of existence of any of the ground mentioned in Section 13 of the Act. Section 13 of the said Act empowers the Court to pass a decree for divorce on a petition presented by

either the husband or the wife for a decree of divorce on any of the ground mentioned in the said section. Section 13 does not specify any forum. On the contrary, Section 13B of the said Act provides that, subject to the provisions of the said Act, a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together. Section 13B is, therefore, to be read along with Section 3(b) and Section 19 of the said Act. Section 19 of the Act specifically contemplates that every petition under the said Act shall be presented to the District Court.

24. The said Section 13B of the said Act was enacted on the basis of public policy. Law prescribes a forum and, therefore, the parties have no choice to select their forum of convenience.

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30. We are of the unanimous opinion that, having regard to the scheme of the said Act, an application for divorce by mutual consent u/s 13B of the said Act being an original application could only be filed before the District Court as referred to in Section 13B of the said Act.

31. Section 13B is a special provision deviating from the general provision for granting divorce on establishment of grounds mentioned in Section 13. Section 13B provides for the forum for filing such original application. It is settled law that, while hearing an appeal, the Court of appeal cannot enlarge its scope. If the trial Court was unable to grant a decree for divorce u/s 13B of the said Act, the appeal Court, also, cannot grant such decree in appeal arising out of such proceeding.

32. Law prescribes forum and prescribes the manner in which the provision of Section 13B of the said Act is to be exercised. The Court is required to exercise such power only in the manner prescribed or not at all.

7. Their Lordships answered the reference as follows:-

49. Thus, we sum up our findings as under:-

(i) The Division Bench, vested with the determination to take up appeal against the decree arising out of the proceedings under the Hindu Marriage Act, 1955, is not entitled to take up an application for divorce by mutual consent filed direct before such appellate forum nor the appeal Court while dealing with an appeal against a decree passed in the proceedings u/s 13 of the said Act could grant decree in terms of Section 13B of the said Act.

(ii) Neither Shashi Garg (supra), nor Radha (supra), nor Payal Jindal (supra), nor Sandhya Rani (supra), is binding precedents in terms of Article 141 of the Constitution of India. The Supreme Court of India passed directions in those cases in exercise of the power conferred Article 142 of the Constitution of India.

(iii) An application for divorce by mutual consent u/s 13B of the said Act being an original application could only be filed before the District Court as referred to in

Section 13B of the said Act.

(iv) The waiting period mentioned in Section 13B of the said Act is mandatory and not directory.

8. Shrimati Rita Bhattacharjee (*supra*) was not cited before the Hon'ble Judge deciding C.O. No. 33 of 2012. The order passed in such revisional application was by consent as would appear from the recording made therein. Both the parties to the said revisional application invited the Court to allow the parties to convert the original application into an application u/s 13B of the Hindu Marriage Act, 1955 so that the marriage could be dissolved. The Order dated June 25, 2012 passed in C.O. No. 33 of 2012 cannot be read in the manner as suggested by the parties herein.

9. Although the application under consideration giving rise to the order impugned was said to be made under Order XIII Rule 3 of the Code of Civil Procedure, 1908 as well as u/s 13B of the Hindu Marriage Act, 1955, the parties pressed Section 13B of the Hindu Marriage Act, 1955 at the time of hearing of the application. As would appear from the order impugned the learned judge considered the application before him as u/s 13B of the Hindu Marriage Act, 1955 only. Before me also the parties contended that, the learned judge acted with material irregularity in dismissing the petition u/s 13B of the Hindu Marriage Act, 1955 by holding that such petition was required to be filed before the District Judge.

10. In Shrimati Rita Bhattacharjee (*supra*) the Special Bench was of the unanimous opinion that, having regard to the scheme of the Hindu Marriage Act, 1955 an application for divorce by mutual consent u/s 13B of the said Act being an original application could only be filed before the District Court as referred to in Section 13B of the said Act.

11. In view of Shrimati Rita Bhattacharjee (*supra*) a proceeding u/s 13(1) of the Hindu Marriage Act, 1955 cannot be converted to be made u/s 13B of the Hindu Marriage Act, 1955. A new petition u/s 13B of the Hindu Marriage Act, 1955 was required to be filed before the District Court.

12. By the impugned order the learned Judge pointed out that it was not the Court authorized to accept filing of a petition u/s 13B of the Hindu Marriage Act, 1955.

13. I, therefore, find no material irregularity in the order impugned warranting interference. C.O. No. 997 of 2014 is dismissed without any order as to costs.