

(2019) 08 RAJ CK 0181

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 1603 Of 2019

Mridul Panwar

APPELLANT

Vs

Priyanka Fithani

RESPONDENT

Date of Decision : 27-08-2019

Acts Referred:

Hindu Marriage Act, 1955 — Section 8, 13, 13B, 13B(2)
Family Courts Act, 1984 — Section 19
Constitution Of India, 1950 — Article 142

Citation : (2019) 08 RAJ CK 0181

Hon'ble Judges : Sangeet Lodha, J;P.K. Lohra, J

Bench : Division Bench

Advocate : D.L.R. Vyas, Richin Surana

Final Decision : Allowed

Judgement

P.K. Lohra, J

1. Appellant's failure to seek nod of Family Court No.1, Jodhpur (for brevity 'learned trial Court') for waiver of six months' transitional period, envisaged under Section 13B(2) of the Hindu Marriage Act, 1955 (for short, 'Act'), has led to the instant appeal under Section 19 of the Family Courts Act, 1984.

2. Succinctly stated, the facts of the case are that appellant and respondent entered into matrimony at Jodhpur on 10th of September, 2017 as per Hindu rites & rituals. Since marriage, both the spouses realized incompatibility in their liaison and within no time acrimony between them reached to its pinnacle. This sort of situation resulted in separation of the spouses without consummation of marriage. The respondent wife, therefore, shifted to her parental house after few days of marriage. When the spouses pondered over their turbulent and unmatched martial life, both objectively decided to call it a day. Finally, at the behest of both the parties, a joint petition under Section 13B of the Act for seeking dissolution of marriage by mutual consent is filed before the learned trial Court on 10th of April, 2019. Alongwith the petition, an application is also filed to

dispense with transitional period of six months precisely by citing the reason that since marriage both are living separately and there was no cohabitation between them. The learned trial Court, by its order dated 26th of April, 2019, declined prayer of the spouses. Therefore, impugning the order aforesaid, appellant has laid this appeal.

3. It is contended by learned counsel for the appellant that a very significant fact of both the spouses not living together since marriage has completely escaped notice of the learned trial Court while declining waiver of six months cooling period under Section 13B(2) of the Act. Learned counsel would urge that in the peculiar facts and circumstances of the case, learned trial Court ought to have examined prayer for waiver of cooling period objectively by keeping interest of both the spouses paramount. Learned counsel further submits that non-consummation of marriage and other facts germane to the matter are completely eschewed by the learned trial Court while passing the impugned order, therefore, same is per se vulnerable.

4. In support of his arguments, learned counsel for the appellant has placed reliance on following precedents:

? Amardeep Singh V/s. Harveen Kaur [2017 (2) WLC (SC) Civil 639] : [(2017) 8 SCC 746]

? Siddarth Motwani V/s. Smt. Aastha Wadhwa [2019 (3) WLN 213 (Raj.)

? Ishan Khandelwal V/s. Smt. Nikita Khandelwal [2019 (2) WLC (Raj.) UC 27]

? Deepa Sahu (Smt.) Vs. Harshvardhan [2019 (1) CJ (Civ.)(Raj.) 316]

? Aditi Wadhera V/s. Vivek Kumar Wadhera [2016 (Suppl.) Civil Court Cases 606 (SC): [(2017) 11 SCC 241]

? Anju Garg Vs. Vikas Garg [2015 (2) Civil Court Cases 786 (SC)]

? Manish Goel V/s. Rohini Goel [2010 (1) WLC (SC) Civil 655]: [(2010) 4 SCC 393]

? Neeti Malviya V/s. Rakesh Malviya [2010 (2) WLC (SC) Civil 192: [(2010) 6 SCC 413].

Learned counsel for the respondent-wife has fully concurred with the arguments of the appellant.

5. As per basic tenets of Hindu Mythology & Culture, marriage is a sacred ceremony. It is a bond of companionship for life between spouses. Yudhishtira, while answering to a question of Yaksha, said "Bhaaryaa Mitram Grihesatah", i.e., the friend of householder is his spouse. According to Hindus, this friendship is the understanding, the promise and the commitment that unites a man and a woman. Under the Hindu scriptures, aim of a marriage is not merely physical pleasure but also spiritual advancement and fulfilment of duties. If we examine Hindu philosophy of marriage, Vedas & Puranas, then, it would reveal that

concept of divorce is absolutely alien. With the advent of time, Hindu philosophy and culture transformed to match the pace of modern day life by shunning the age old Mythological and Cultural injunctions.

6. Then came a comprehensive codified law governing the province of marriage among Hindus, i.e., Hindu Marriage Act, 1955. The Act covered all the matters relating to condition of marriage, prohibitions and other allied issues including dissolution of marriage. Initially, Section 13 of the Act incorporated stringent conditions for divorce with the solemn object to save matrimony. In the original Act, there was no provision for mutual divorce and the same came into offing by Act 68 of 1976, Section 8 (w.e.f. 27.05.1976) as Section 13B of the Act. Yet again legislature made sincere endeavour to save the institution of marriage by engrafting sub-section (2) for giving opportunity to the spouses to reconcile. Therefore, under sub-section (2) of Section 13B of the Act, a cooling period of 6 to 18 months was prescribed for the spouses to rethink or reflect on their move and also seek advice from relations and friends.

7. Thus, we are of the view that by prescribing the transitional period of 6 to 18 months before second motion of hearing, the legislature intended to secure desired results in only those cases where matrimony between spouses remained streamline for some time and if they are unencumbered, i.e., no birth of a child out of wedlock. However, when the marital life of spouses diminished at the threshold and there was no cohabitation between them, its sacrosanctity is indisputably under jeopardy. Nurturing such dead relations between spouses under the guise of statutory cooling period would be too harsh for the parties and in such situations any affirmative expectation of reflecting their move is nothing but day dreaming and euphoric.

8. Well law envisages minimum cooling period of six months but in the peculiar facts and circumstances of the present case, we are firmly of the opinion that postponing second motion of hearing for that duration would be futile and unproductive. Moreover, further delaying second motion of hearing will prolong the agony of both the spouses. It is also unthinkable that an irretrievably broken down marriage since date of nuptial between spouses can blossom to love with the passage of time. In the backdrop of undisputed facts surfaced before us, allowing transitional minimum period, from the institution of the petition under Section 13-B of the Act upto second motion of hearing, may simply reduce the same to observance of statutory ritual without foreseeing any meaningful outcome.

9. The Apex Court, in the matter of Smt. Sureshta Devi Vs. Om Prakash [(1991) 2 SCC 25], had the occasion to examine object of sub-section (2) of Section 13B of the Act, which prescribes the parties to make a joint motion not earlier than six months after the date of presentation of the petition and not later than eighteen months after the said date. Spelling out the true object of transitional period of six to eighteen months required for the parties to make a joint motion, the Court observed:

"...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."

10. In a subsequent judgment of three Judge Bench of Supreme Court, in the matter of Anjana Kishore Vs. Puneet Kishore [(2002) 10 SCC 194], while hearing a transfer petition, the Court invoked its jurisdiction under Article 142 of the Constitution and directed the parties to file a joint petition before Family Court under Section 13B of the Act for granting decree of divorce by mutual consent along with terms of compromise arrived at between the parties. The Court further permitted the Family Court to consider dispensing with the need of waiting for expiry of period of six months, as required by sub-section (2) of Section 13B of the Act, and pass final orders on petition, within such time as it deems fit.

11. In a later judgment, Supreme Court, in case of Manish Goel (supra), declined to waive six months' waiting period by observing that no ground is made out to exercise extraordinary jurisdiction. However, in the same year, Supreme Court in the matter of Poonam Vs. Sumit Tanwar [2010 (4) SCC 460] permitted waiver of six months waiting period required by sub-section (2) of Section 13B of the Act.

As there were two conflicting judgments of two Judge Benches of Supreme Court, the later Bench of equal strength in the matter of Neeti Malviya (supra), referred the question to three Judge Bench as to whether waiting period can be waived or reduced in exercise of powers under Article 142 of the Constitution.

12. Be that as it may, the fact remains that no adjudication could be made by the three Judge Bench for the reason that by efflux of time the petition for mutual divorce became infructuous. Yet again, issue came up before the Supreme Court for consideration in Anju Garg (supra) and the Court was pleased to invoke Article 142 of the Constitution in the peculiar facts and circumstances of the case for waiver of six months cooling period. Likewise, in the matter of Aditi Wadhwa (supra), Supreme Court invoked jurisdiction under Article 142 of the Constitution for granting decree of divorce by mutual consent after waiving statutory period of waiting. The endeavour of the Court was to honor conscious decision taken with free-will by the spouses to part and put an end to litigation.

13. In a recent judgment, Supreme Court, in Amardeep Singh (supra), discussed the entire law threadbare and examined the question as to whether waiting period enshrined under Section 13B(2) of the Act can be waived by the Court where proceedings are pending in exceptional situations. Upon examining the provision, the Court observed that a significant fact that parties are living

separately for more than the statutory period and all efforts for reconciliation have proved abortive leaving no chance of reconciliation, then, in such a situation further waiting period would be futile and unnecessarily prolong the agony of spouses. Thus, in general, the Court has simply insisted for recording satisfaction by the concerned Family Court about the aforementioned conditions. Dilating on the object of provision, the Court observed:

"The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties where there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option."

14. The Supreme Court, in *Amardeep Singh* (supra), further made endeavour to examine the question as to whether provision is mandatory or directory. For ascertaining the true character of statute, the Court has opined that language alone is not always decisive, and therefore, the Court has to have regard to the context, the subject-matter and the object of the provision. Relying on its earlier three Judge Bench decision in *Kailash Vs. Nanhku & Ors.* [(2005) 4 SCC 480], wherein the principles enunciated by Justice G.P. Singh in his celebrated work 'Principles of Statutory Interpretation' were noted while dealing with the mandatory and directory provisions, the Court has quoted:

"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered'. (p. 338)

'For ascertaining the real intention of the Legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all,

whether the object of the legislation will be defeated or furthered". If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." (pp. 339-340)

Finally, while answering the question, Court concluded as follows:-

"Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

Following the verdict of Amardeep Singh (supra), Coordinate Bench at Jaipur in Siddarth Motwani (supra), reiterated the same principle. The Bench further emphasized that waiver of cooling off period mentioned in Section 13B(2) of the Act is within the discretion of the Court depending on attending facts and circumstances of each case.

Similarly, in Ishan Khandelwal (supra), Coordinate Bench at Jaipur, while relying on earlier decision of Supreme Court in Amardeep Singh (supra), concluded that Section 13B(2) of the Act is not mandatory but directory. The Court held:

"The Family Court has dismissed the application under Section 13B of the Act being not maintainable as the requisite period of one year was still not completed. Even otherwise, this Court has the power to waive the cooling period of one year in view of judgments of the Supreme Court in Veena Vs. State Govt. of NCT, Delhi & Anr., 2011 (14) SCC 614, Devinder Singh Narula Vs. Meenakshi Nangia - 2012 (8) SCC 580, and Amardeep Singh Vs. Harveen Kaur - 2017 (8) SCC 746. In Amardeep Singh, supra, the Supreme Court laid down that since the cooling off period mentioned in Section 13-B(2) is not mandatory but directory, it will be open to the court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

15. In overall scenario, as observed supra, both the spouses are living separately for last almost two years with no formal ties of marriage between them and subsistence of marriage is due to attenuated thread on account of statutory cooling off period, of which more than four months have already passed, we feel persuaded to waive the remaining period of nearly two months in the peculiar facts and circumstances of the instant case. Therefore, we are convinced that the impugned order passed by the learned trial Court cannot be sustained.

Accordingly, the instant appeal is allowed. The impugned order passed by learned trial Court is set aside and the application filed on behalf of spouses for waiver of statutory cooling off period of six months is allowed. The parties are directed to appear before the learned trial Court and the learned trial Court is expected to pass final orders on the petition for divorce by mutual consent as early as

possible.

Costs are made easy.