
(2012) 04 DEL CK 0460
In the Delhi High Court
Case No : Matrimonial APP. 19 of 2012

Pradeep Pant and Another

APPELLANT

Vs

Govt of NCT Delhi

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Hindu Marriage Act, 1955 — Section 13B(1)

Citation : (2012) 129 DRJ 674 : (2012) 5 ILR Delhi 485

Hon'ble Judges : Veena Birbal, J

Bench : Single Bench

Advocate : Vaibhav Vats, for the Appellant; H.S. Sachdeva, for the Respondent

Final Decision : Allowed

Judgement

Veena Birbal, J.—Admit. With the consent of parties the matter is taken up for final disposal.

2. The relevant facts for the disposal of present appeal are as under:-

A petition u/s 13-B(1) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") for a decree of divorce by mutual consent was filed by the appellants stating therein that their marriage was solemnized according to Hindu rites and ceremonies on 18.01.1993 at Anita Colony, Bajaj Nagar, Jaipur, Rajasthan. After marriage, they lived together as husband and wife at D2-2178, Vasant Kunj, New Delhi-110017. A daughter was born from their wedlock on 27.05.2000. Since 30.03.2010, they are living separately on account of temperamental differences. Despite their best efforts, they could not reconcile and there is no possibility of their living together as husband and wife in future. Accordingly, they have agreed to take divorce by way of mutual consent. They have arrived at an amicable settlement dated 13.12.2011. The terms of settlement are reproduced in the joint petition. A copy of the same is also annexed with the petition u/s 13-B(1). As per their settlement, appellant/husband has agreed to pay a sum of Rs. 30 lakhs to wife towards all her claims of maintenance, permanent alimony, etc.

They have also entered into a settlement in respect of their properties. Appellant/ husband has also agreed to bear the expenses of the child and has also agreed to take care of household expenses of his wife and daughter by paying 10% of his salary after tax deductions. It is also stated in the petition that respondent/ wife shall take care of the minor daughter and appellant/husband shall have visitation rights of the child as per the convenience of the child keeping in view her education schedule. It is also stated that the settlement has been arrived at with their free consent, without any pressure or undue influence and there is no collusion between them in filing the present appeal. Their consent has also not been obtained by fraud or undue influence. They have prayed that their marriage be dissolved by a decree of divorce by mutual consent. Along with the appeal there is an affidavit of non-collusion as well as an affidavit of non-cohabitation wherein it is categorically stated that they are living separately since 30.03.2010 and there has been no cohabitation between them since then.

3. Without recording the statement of the parties, the learned Principal Judge, Family Court, New Delhi had taken up the petition and had rejected the same on the ground that the parties have nowhere stated that there has been no cohabitation between them as husband and wife since 30.03.2010. They have not contended that they have not cohabited as husband and wife for last one year, as such, the court cannot presume that there has been cohabitation between them as husband and wife. Accordingly, the learned Principal Judge was of the view that parties have failed to show that there has been cessation of cohabitation between them since 30.03.2010. Further, the learned Principal Judge was of the view that husband is paying Rs. 30 lakhs to the wife as lumpsum payment for settlement of her claims of maintenance and permanent alimony and despite that he has also agreed to bear the household expenses of the respondent/wife and the child. Under these circumstances, they have not severed their relationship and it amounts to intention to perform marital obligations. Learned Principal Judge also observed that the parties are living under one roof as such it cannot be said that they are living separately and accordingly it is held that the parties have failed to prove that they are living separately since 30.03.2010 and as such vide impugned order the petition u/s 13-B(1) of the Act has been dismissed.

4. Aggrieved with the same, the present petition is filed.

5. Learned counsel for the appellants has contended that it has been categorically stated in the joint petition u/s 13-B(1) of the Act that since 30.03.2010 they are living separately under the same roof and they are not able to live together as husband and wife on account of temperamental differences since then. It is further contended that along with the petition there is a separate affidavit of both the parties wherein they have specifically stated that they are living separately since 30.03.2010 and have not cohabited since then. Learned counsel has further contended that there is no requirement under the Delhi High Court Hindu Marriage Rules, 1979 to state about non-cohabitation specifically in

the petition u/s 13-B(1) of the Act. The only requirement under the aforesaid Rules is filing of an affidavit to this effect and the said affidavit was filed by the parties and learned ADJ has not considered the same. It is contended that there is no discussion in the impugned order about the affidavit of non-cohabitation filed by the parties. It is further stated that the husband has not agreed to give entire salary to the wife but has only agreed to give 10% of the same after tax deductions to the wife in the terms of settlement for running the household expenses to the wife and the child and the lumpsum amount has been given towards her claim for permanent alimony and maintenance. It is contended that by doing so no presumption can be drawn that they have not severed their relationship as husband and wife. It is further contended that even if the parties are living under the same roof but in these circumstances are not cohabiting and have no intention to live as husband and wife as such their being under one roof does not amount to living as husband and wife. In support of the contention, learned counsel has referred to the judgment of Smt. Sureshta Devi Vs. Om Prakash,

6. In the present case, the parties have categorically stated in the petition u/s 13-B(1) of the Act that they are living separately since 30.03.2010 and have not been able to live together since then. The efforts of reconciliation have also failed and there is no possibility of their living together as husband and wife. The petition is duly verified and is supported with their affidavits in this regard. The petition is also supported with separate affidavit of both the parties to the effect that they have not cohabited since 30.03.2010. Perusal of impugned order shows that the learned Principal Judge has ignored the said affidavit. It is also stated in the petition that they have been living separately since 30.03.2010 and thereafter have not been able to live together on account of temperamental differences. Despite best efforts of common friends and relatives, the petitioners cannot reconcile. There is no possibility of their living together as husband and wife now or in future. The petition fulfils all the requirements as are laid down under the Rules. It also fulfils the requirements of Section 13-B(1) of the Act which are as under:-

- (i) They have been living separately for a period of one year;
- (ii) They have not been able to live together, and
- (iii) They have mutually agreed that marriage should be dissolved.

7. As regards "living separately" stated in Section 13-B(1) of the Act, it has been explained by the Supreme Court in Smt. Sureshta Devi v. Om Prakash (supra) as under:-

9. The "living separately" for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression "living separately", connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may

live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they "have not been able to live Together" seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

8. The aforesaid observation leaves no manner of doubt that even if the parties are living separately under the same roof and are not cohabiting or are not living together as husband and wife, they can be stated to be living separately. The parties have also filed their separate specific affidavit explaining the reasons of their being under one roof.

9. The meaning of the expression "living separately" u/s 13-B(1) of the Act has also been discussed by this court in *Meghna Deva vs. Siddharth Suryanarayan*; 131 (2006) DLT 513 wherein after considering *Sureshta Devi's* case (supra) it has been held that the essence is the relationship of husband and wife and not the same roof. In the said case, it has been further observed as under:-

8. In my considered view in such a situation the Courts must encourage the amicable dissolution rather than compelling the parties to litigate or continue the relationship on paper which has actually broken down. The Trial Court fell into an error of law while solely relying on the presence of the wife and the husband under the same roof to reach a conclusion that they must be said to be not living separately.

10. As regards terms of settlement, learned counsel for the parties have submitted that the terms of settlement have been arrived at keeping in mind the welfare of the child as well as the monetary status of the husband.

11. Considering the material on record, no inference could have been drawn by the learned Principal Judge, Family Court that they have not severed their relationship of husband and wife as has been done in the present case. There is specific affidavit of non-cohabitation of the parties. There are averments in the petition that they are not living together as husband and wife which are duly verified. The petition fulfils all the requirements of Section 13-B(1) of the Act. They have also settled all their claims as is stated in the joint petition and as per terms of settlement annexed with the same. In view of the above discussion, the impugned order cannot be legally sustained and accordingly the same is set aside. The learned Principal Judge, Family Court shall take up the petition of the parties and record their statement on oath and thereafter shall pass appropriate order on it in accordance with law. The parties to appear before the concerned Family Court on 08.05.2012. The record of Family Court be sent back forthwith.

The appeal is allowed. There is no order as to costs.