Supreme Court Of India

Before: Justice Adarsh Kumar Goel , Justice Uday Umesh Lalit, JJ.

Amardeep Singh

v.

Harveen Kaur

Civil Appeal No. 11158 Of 2017 (Special Leave Petition (Civil) No. 20184 Of 2017)

12.09.2017

(i) Hindu Marriage Act, 1955,Section 13B(2) – Statutory period – Waiver of – Where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court. [Para 18, 19, 20]

(ii) Hindu Marriage Act, 1955,Section 13B(2) – Period mentioned in Section 13B(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. [Para 21]

(iii) Hindu Marriage Act, 1955,Section 13B(2) – Object of .

Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony – 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 when 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. [Para 14, 15]

(iv) Interpretation of Statutes – In determining the question whether provision is mandatory or directory, language alone is not always decisive – The Court has to have the regard to the context, the subject matter and the object of the provision. [Para 17]

(v) Hindu Marriage Act, 1955,Section 13B(2) – Video conferencing – Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice. [Para 22]

Judgment

Adarsh Kumar Goel, J.

1. The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

2. Factual matrix giving rise to this appeal is that marriage between the parties took place on 16th January, 1994 at Delhi. Two children were born in 1995 and 2003 respectively. Since 2008 the parties are living separately. Disputes between the parties gave rise to civil and criminal proceedings. Finally, on 28th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The respondent wife is to be given permanent alimony of Rs. 2.75 crores. Accordingly, HMA No. 1059 of 2017 was filed before the Family Court (West), Tis Hazari Court, New Delhi and on 8th May, 2017 statements of the parties were recorded. The appellant husband has also handed over two cheques of Rs. 50,00,000/-, which have been duly honoured, towards part payment of permanent alimony. Custody of the children is to be with the appellant. They have sought waiver of the period of

six months for the second motion on the ground that they have been living separately for the last more than eight years and there is no possibility of their re union. Any delay will affect the chances of their resettlement. The parties have moved this Court on the ground that only this Court can relax the six months period as per decisions of this Court.

3. Reliance has been placed inter alia on decision of this Court in **Nikhil Kumar v. Rupali Kumar,** (2016) 13 SCC 383 wherein the statutory period of six months was waived by this Court under Article 142 of the Constitution and the marriage was dissolved.

The text of Section 13B is as follows:

"13-B. Divorce by mutual consent.- (1) Subject to the provisions of this 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, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

4. There is conflict of decisions of this Court on the question whether exercise of power under Article 142 to waive the statutory period under Section 13B of the Act was appropriate. In **Manish Goel v. Rohini Goel, (2010) 4 SCC 393** , a Bench of two-Judges of this Court held that jurisdiction of this Court under Article 142 could not be used to waive the statutory period of six months for filing the second motion under Section 13B, as doing so will be passing an order in contravention of a statutory provision. It was observed :

"14.Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide ***State of Punjab v. Renuka Singla [1994(1) S.C.T. 636 : (1994) 1 SCC 175], State of U.P. v. Harish Chandra [(1996) 9 SCC 309], Union of India v. Kirloskar Pneumatic Co. Ltd. [(1996) 4 SCC 453] , University of Allahabad v. Dr. Anand Prakash Mishra [(1997) 10 SCC 264] and Karnataka SRTC v. Ashrafulla Khan (2002) 2 SC 560****]*

15.A Constitution Bench of this Court in ***Prem Chand Garg v. Excise Commr. [AIR 1963 SCC 996]*** *held as under: (AIR p. 1002, para 12)*

"12. … An order which this Court can make in order to do complete justice between the

parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."

(emphasis supplied)

The Constitution Benches of this Court in ***Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] and E.S.P. Rajaram v. Union of India [2001(1) S.C.T 759 : (2001) 2 SCC 186]*** *held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure."*

5. This Court noted that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. This power was also exercised to put quietus to all litigations and to save the parties from further agony (Para 11 ibid, noting earlier decisions in **Romesh Chander v. Savitri, (1995) 2 SCC 7 ; Kanchan Devi v. Promod Kumar Mittal, (1996) 8 SCC 90 ; Anita Sabharwal v. Anil Sabharwal, (1997) 11 SCC 490 ; Ashok Hurra v. Rupa Bipin Zaveri, (1997) 4 SCC 226 ; Kiran v. Sharad Dutt (2000)10 SCC 243 ; Swati Verma v. Rajan Verma, 2004) 1 SCC 123 ; Harpit Singh Anand v. State of W.B., (2004) 10 SCC 505 ; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit, (2005) 13 SCC 410; Durga Prasanna Tripathy v. Arundhati Tripathy, (2005) 7 SCC 353 ; Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558 ; Sanghamitra Ghosh v. Kajal Kumar Ghosh : (2007) 2 SCC 220 ; Rishikesh Sharma v. Saroj Sharma : (2007) 2 SCC 263 ; Samar Ghosh v. Jaya Ghosh, 2007(2) R.C.R.(Criminal) 515 : 2007(2) Recent Apex Judgments (R.A.J.) 177 : (2007) 4 SCC 511 and Satish Sitole v. Ganga, (2008) 7 SCC 734])**. This view was reiterated in **Poonam v. Sumit Tanwar, 2010(2) Recent Apex Judgments (R.A.J.) 410 : (2010) 4 SCC 460.**

6. In **Neeti Malviya v. Rakesh Malviya, (2010) 6 SCC 413** , this Court observed that there was conflict of decisions in **Manish Goel** (supra) and **Anjana Kishore v. Puneet Kishore, (2002) 10 SCC 194**. The matter was referred to bench of three-Judges. However, since the matter became infructuous on account of grant of divorce in the meanwhile (Order dated 23rd August, 2011 in Transfer Petition (Civil) No. 899 of 2007).

7. Without any reference to the judgment in **Manish Goel** (supra), power under Article 142 of the Constitution has been exercised by this Court in number of cases **(Priyanka Singh v. Jayant Singh (2010) 15 SCC 390 ; Sarita Singh v. Rajeshwar Singh (2010) 15 SCC 374 ; Harpreet Singh Popli v. Manmeet Kaur Pople, (2010) 15 SCC 316 ; Hitesh Bhatnagar v. Deepa Bhatnagar (2011) 5 SCC 234 ; Veena v. State (Govt of NCT of Delhi), 2012(1) Recent Apex Judgments (R.A.J.) 137 : (2011) 14 SCC 614 ; Priyanka Khanna v. Amit Khanna 2012(1) Recent Apex Judgments (R.A.J.) 251 : (2011) 15 SCC 612 ; Devinder Singh Narula v. Meenakshi Nangia (2012) 8 SCC 580 ; Vimi Vinod Chopra v. Vinod Gulshan Chopra, (2013) 15 SCC 547 ; Priyanka**

Chawla v. Amit Chawla, (2016) 3 SCC 126 ; Nikhil Kumar v. Rupali Kumar, (2016) 13 SCC 383) even after the said judgment.

8. We find that in **Anjana Kishore** (supra), this Court was dealing with a transfer petition and the parties reached a settlement. This Court waived the six months period under Article 142 in the facts and circumstances of the case. In **Anil Kumar Jain v. Maya Jain, (2009) 10 SCC 415** , one of the parties withdrew the consent. This Court held that marriage had irretrievably broken down and though the civil courts and the High Court could not exercise power contrary to the statutory provisions, this Court under Article 142 could exercise such power in the interests of justice. Accordingly the decree for divorce was granted.

9. After considering the above decisions, we are of the view that since **Manish Goel** (supra) holds the field, in absence of contrary decisions by a larger Bench, power under Article 142 of the Constitution cannot be exercised contrary to the statutory provisions, especially when no proceedings are pending before this Court and this Court is approached only for the purpose of waiver of the statute.

10. However, we find that the question whether Section 13B(2) is to be read as mandatory or discretionary needs to be gone into. In **Manish Goel** (supra), this question was not gone into as it was not raised. This Court observed :

“23.The learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction.”

11. Accordingly, vide order dated 18th August, 2017, we passed the following order :

“List the matter on 23rd August, 2017 to consider the question whether provision of Section 13B of the Hindu Marriage, Act, 1955 laying down cooling off period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case.

Mr. K.V. Vishwanathan, senior counsel is appointed as Amicus to assist the Court. Registry to furnish copy of necessary papers to learned Amicus”.

12. Accordingly, learned amicus curiae has assisted the Court. We record our gratitude for the valuable assistance rendered by learned amicus who has been ably assisted by S/Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao Angara, Advocates.

13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in **K. Omprakash v. K. Nalini, AIR 1986 AP 167 (DB)**, Karnataka High Court in **Roopa Reddy v. Prabhakar Reddy, AIR 1994 Kar 12 (DB)**, Delhi High Court in **Dhanjit Vadra v. Smt. Beena Vadra, AIR 1990 Del 146** and Madhya Pradesh High Court in **Dinesh Kumar Shukla v. Smt. Neeta, AIR 2005 MP 106 (DB)**. Contrary view has been

taken by Kerala High Court in **M. Krishna Preetha v. Dr. Jayan Moorkkanatt, AIR 2010 Ker 157** . It was su*b*mitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?

ii) How long litigation is pending?

iii) How long they have been staying apart?

iv) Are there any other proceedings between the parties?

v) Have the parties attended mediation/conciliation?

vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. 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 when 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.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in **Justice G.P. Singhs "Principles of Statutory Interpretation"** (9th Edn., 2004), has been cited with approval in **Kailash v. Nanhku and ors.**, (2005) 4 SCC 480 as follows:

"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.

"`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."

18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(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.

22. Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

23. The parties are now at liberty to move the concerned court for fresh consideration in the light of this order.

24. The appeal is disposed of accordingly.