

2

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 22.07.2011

MAT. APP. No. 48/2011

Ritu Preti Kapoor

.....Appellant No.1

Through: Mr. Rajeev Agarwal, Advocate
along with Appellant No.1 in
person.

AND

Vineet Perti

..... Appellant No.2

Through: Mr. Ashok Kumar Singh, Advocate
along with Appellant No.2 in
person.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may
be allowed to see the judgment?
 2. To be referred to Reporter or not?
 3. Whether the judgment should be reported
in the Digest?
- 1
yes

KAILASH GAMBHIR, J.Oral:

Mat App No.48/2011

Page 1 of 8

Signature Not Verified

Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

3

1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 read with Section 151 CPC, the appellants seek to challenge the order dated 2nd April, 2011 passed by the court of learned Addl.District Judge, Karkardooma Court, Delhi in HMA Case No.364/2009 thereby dismissing the second motion petition filed by the parties under section 13B(2) of the HM Act..

2. The background of facts briefly is that the appellants filed the petition for divorce by mutual consent under section 13B of the HM Act (first motion), on 11.07.2009 which was allowed vide judgment dated 3.09.2009 subject to the conditions mutually agreed between the parties. The second motion under section 13B(2) of the Hindu Marriage Act had already been filed jointly by the parties on 11.07.2009 and was granted petition no. 364/2009 which was listed on several dates but due to unavoidable circumstances both the parties could not appear together for the recording of the joint statement. However on 2.04.2011, when both the parties appeared together for recording their joint statement, vide

4

order dated 2.04.2011 the Ld. Court dismissed the second motion on the ground of limitation as being beyond the statutory period of 18 months. Feeling aggrieved with the same, the appellants have preferred the present appeal.

3. Learned counsel for the appellants submits that both the parties had filed the both motions under Section 13B(1) & (2) at the same time but the said motions were being taken up separately by the learned ADJ. Counsel also submits that in fact the first motion was granted by the court on 3rd September, 2009 and the second motion was kept pending so as to give finality to the terms and conditions agreed by the parties in their first motion petition. Counsel further submits that no upper limit under Section 13B(2) has been laid down for filing second motion petition as a period of 18 months mentioned in Section 13B(2) is an upper limit for the withdrawal of the first motion petition. In support of his arguments, appellants placed reliance of the judgment of this Court in *Pankaj Parmar v. Shikha Parmar* 119 (2005) DLT 278.

4. I have heard learned counsel for the parties.

5. Section 13B of The Hindu Marriage Act envisages divorce by mutual consent subject to the fulfillment of conditions as laid down under clause (1) of the said section. Section 13B(2) however states that the parties have to together make the first motion petition and after a gap of 6 months and not later than 18 months, have to make the second motion petition for the grant of decree of divorce. The period of 6 to 18 months being provided in section 13B(2) is a period of interregnum which is intended to give the parties time and opportunity to reflect on their move as the parties may have second thoughts about their decision during this period. The underlying principle behind this section is that both the parties should be fully willing and confident about their decision, both at the time of the first motion as well at the time of the second motion. The time of 6 to 18 months is essentially the time where one of the parties if has to if in doubt or has a change of heart withdraws its petition for divorce. Mutuality is the sine qua non for this section and the requirement is that

the consent to part from each other should be subsisting through out this period. In the case of *Pankaj Parmar v. Shikha Parmar (supra)*, this court has taken a view that the period of 18 months as contemplated in the section is the time limit for withdrawal of the first motion and not outer limit for filing of motion for grant of decree by mutual consent and this duration of 18 months therefore should not be taken to be a period of limitation fixed for filing of the second motion.

6. Adverting to the facts of the case at hand, both the parties moved the petition for divorce by mutual consent, that is, the first and second motion were preferred by the parties simultaneously and admittedly this was the practice in courts earlier when the courts were taking a liberal view and dispensing with the said statutory period of six months between the presentation of the first and the second motion in granting final divorce under Section 13B of the Hindu Marriage Act. The parties herein have filed the second motion petition alongwith the first motion on 11.7.2009 and the same was

7

pending consideration before the said court, therefore, it cannot be said that the motion was not made by both the parties within said period of 18 months. In fact the court was to record the statements of the parties and then was to pass a final order. It usually happens that that once the second motion petition is filed then the separate dates are given for recording statements and passing the order. Once the petition is filed by the parties, the date of the second motion under Section 13B(2) of the Hindu Marriage Act necessarily has to be reckoned from the date of the filing of the motion and not from the date of the recording of statements. Manifestly in the present case the second motion petition was already before the court and, therefore, it cannot be said that the said motion was made by the parties after the period of 18 months.

7. Hence, this court is totally in agreement with the law propounded by this court in the case of *Pankaj Parmar* not to treat the period of 18 months as the limitation period after which the petition for second motion cannot be preferred. The courts while dealing with the petition under section 13B cannot

8

forget that the courts are required to see the complete agreement of the parties for the dissolution of marriage and not that the consent of the both the parties , however being there, has been made at a date later than contemplated as such interpretation would render the expression "divorce by mutual consent" as otiose. The courts cannot frustrate the purpose and intent of the said section by bringing in the technicalities of limitation, hence making the real provision incapacitated. It would also be apt to mention that the Apex Court recently while dealing with the case of divorce by mutual consent in the case of *Hitesh Bhatnagar vs. Deepa Bhatnagar* decided on 18.4.2011 has held that the said period of 18 months has been specified only to ensure quick disposal of cases of divorce by mutual consent and not to specify the period for withdrawal of consent and thus can be withdrawn even after that. Thus it is manifest that the Apex Court is also inclined to give a liberal interpretation, even for withdrawal of consent after the period of 18 months and so it can be postulated that existence of concurrence to the decision of

divorce would precede the duration of presentation of petition.

8. Hence, in the light of the aforesaid position, the order passed by the trial court is illegal and the same is accordingly set aside.

9. The matter is accordingly remanded back to the learned trial court. Both the parties are directed to appear before said court on 10th August, 2011. The learned ADJ shall record their respective statements in the said second motion petition and pass a final order in terms of the Section 13B(2) after taking into consideration the averments made by the parties in the said second motion petition and the statements recorded therein.

10. With the above directions, the appeal stands disposed of.

22nd **JULY**, 2011
Bisht


KAILASH GAMBHIR, J