

IN THE HIGH COURT OF DELHI AT NEW DELHI

MAT APP. No.20/2011 & CM No. 5645/2011

Judgment delivered on: 02 November, 2011

Satinder Singh Petitioner
Through: Mr. Hari Shankar, Adv.

Vs.

Bhupinder Kaur Respondent
Through: Mr.Shailender Dahiya, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 read with section 151 CPC, the Appellant seeks to challenge the Order dated 16.8.2010 passed by the learned trial court whereby a decree of divorce under Section 13(2)(iii) of the Hindu Marriage Act was passed in favour of the respondent.

2. Brief sequence of events that has led to the filing of the present appeal is that the respondent filed a petition for divorce under section 13(2)(iii) of the Hindu Marriage Act and

the appellant filed an application under Order VII rule 11 for rejection of the plaint which was dismissed vide order dated 13.11.2009. A revision was filed against the said order which was dismissed by this court vide order dated 17.12.2010. Thereafter the petition for divorce was decided and the respondent was granted divorce vide order dated 16.8.2010 and feeling aggrieved by the same, the appellant has preferred the present appeal.

3. Assailing the said judgment and decree, learned counsel representing the appellant submits that the order passed under Section 125 Cr.PC was an interim order and based on the interim order the learned matrimonial court could not have exercised jurisdiction to grant a decree of divorce in terms of section 13(2) (iii) of the Hindu Marriage Act. Counsel also submits that any interim order passed in any proceedings will always remain an interim order which would ultimately be subject to passing of a final order and the final order can always vary and in a given case may be against the party in whose favour an interim order has been passed. Counsel thus submits that jurisdiction under Section 13(2) (iii) of the Hindu Marriage Act may be exercised by the matrimonial court only when a final order was passed under Section 125 Cr.PC and, therefore, the

expression 'order' referred to under section 13(2) (iii) of the Hindu Marriage Act must be read as a final order and not as an interim order. Counsel also submits that the respondent has also misled the matrimonial Court by not disclosing the fact that she got remarried and due to such suppression of a material fact on the part of the respondent she was not entitled to the grant of decree under section 13(2) (iii) of the Hindu Marriage Act. Counsel also submits that the learned matrimonial court has also not appreciated that the earlier divorce petition filed by the respondent under section 13(1) (ia) of the HM Act was dismissed and the said finding being against the respondent and in favour of the appellant, the learned trial court ought not to have passed a decree in favour of the respondent under section 13(2) (iii) of the Hindu Marriage Act. In support of his arguments, counsel for the appellant has placed reliance on the following judgments :-

1. Gita Massant vs. Narain Dass, 27 (1985) DLT 374
2. Snehlata Seth vs. V. Kewal Krishan Seth, 27(1985) DLT 449.
3. Prem Chandra Agarwal vs. U.P. , JT 2009(8) SC 118
4. Amarjeet Singh vs. Devi Ratan, AIR 2010 SC 3676
5. Kalabharati Advertising vs. Hemant Vimalnath, AIR 2010 SC 3745

4. Opposing the present appeal, counsel for the respondent submits that the appeal filed by the appellant is a

gross abuse of process of law and the appellant has suppressed from this court that he had filed an application under Order VII Rule 11 CPC before the matrimonial Court to seek rejection of the said petition filed by the respondent under section 13(2) (iii) of the HM Act and that the said application of the appellant was dismissed by the trial court. Counsel further submits that against the said order the appellant had also filed a revision petition before this Court which was also dismissed vide order dated 17.12.2010. Counsel thus submits that because of suppression of these vital facts, the appellant is not entitled to the grant of any relief by this Court in the present appeal. Counsel further submits that in the order passed by the Hon'ble High Court in the said revision petition, the finding has already been given by this Court that the interim order passed under section 125 Cr.PC would give jurisdiction to the matrimonial court to pass a decree under section 13(2) (iii) of the HM Act and the said finding not being challenged by the appellant, the same attained finality and in view of this also the appellant now cannot agitate the same grievance again before this Court. Counsel also submits that so far as the remarriage of the respondent is concerned, same has taken place after the passing of the decree of divorce in favour of the respondent.

5. I have heard counsel for the parties at considerable length and gone through the records.

6. The Law Commission in its 59th report recommended adding section 13(2)(iii) to the Act wherein it provided an additional ground of divorce to the wife. The intent of introducing the said section was to give the wife the right to seek divorce if she has been neglected or not maintained by her husband after an order of maintenance has been passed in her favour. There was discussion with regard to the said provision being made available to the husband equally but it was concluded that such right would ultimately lead to the husband misusing the provision, who in the bid to get rid of his wife would abandon her and compel the wife to move the court for the grant of maintenance and thereafter himself fully submit to the order of payment of maintenance knowing that he would be entitled to get a decree of divorce after the said period of one year has elapsed. Therefore the said provision was brought on the statute book to enable only the wife to seek a decree of divorce if after passing of the order of maintenance there has been no cohabitation for one year which would mean that the husband has ceased to value the society of the wife and their need for each others company has

prima facie come to an end. Earlier it was suggested that the period under the section be of three years but later on it was reduced to one year as being appropriate. Thereafter Section 13(2)(iii) of the Hindu Marriage Act in its present form was introduced in the Act through the Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976). Hence by virtue of the said provision, an additional ground of divorce has been made available to the wife to seek dissolution of her marriage by a decree of divorce on the ground that a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife either in a suit filed by the wife under Section 18 of the Hindu Adoptions and Maintenance Act or in the proceedings under Section 125 of the Code of Criminal Procedure and since the date of passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards. For better appreciation, Section 13(2) (iii) is reproduced as under:

"Section 13(2): A wife may also present a petition for dissolution of her marriage by a decree of divorce on the ground,-

(iii) that in suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 , (78 of 1956 .) or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974 .) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898), (5 of 1898 .) a decree or order, as the case may be, has been passed against the husband awarding maintenance to the

wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;"

7. It would be evident from a plain reading of the above provision that for a wife to claim divorce under the said provision she is required to satisfy the following conditions:

(a) A decree or order has been passed in her favour and against the husband awarding maintenance to her either in a suit filed by her under Section 18 of the Hindu Adoptions and Maintenance Act or in the proceedings under Section 125 of the Code of Criminal Procedure; and

(b) That the wife has been living apart since passing of such a decree or order; and

(c) There has been no resumption of cohabitation between the parties for a period of one year or upwards.

Hence, in a petition filed by the wife under the said section if she is able to satisfy the aforesaid three conditions, then she would be entitled to a decree of divorce. In the facts of the case at hand, the contention raised by the counsel for the appellant is that the order which gives a right to the wife to seek divorce under the said section is a final order and not an interim order. The appellant had urged this ground for filing an application

under order 7 rule 11 for rejection of the petition for divorce filed by the wife on the basis of the interim order dated 2.3.2005 under section 125 CrPC where the court while dismissing the said application vide order dated 13.11.2009 held that the word 'order' would include an interim order as well and the appellant herein had then challenged the order before this court in the revision petition which was also dismissed by this court vide order dated 17.12.2010 with the following observations:

“As per this Section, wife is entitled to file a petition for dissolution of marriage by a decree of divorce on the basis of proceedings under Section 125 Cr.P.C. wherein a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife. The word “order” appearing in this Section includes the interim order as well as the final order and does not speak only of the final order passed on a petition under Section 125 Cr.P.C. for seeking dissolution of marriage by a decree of divorce under the above provisions of law”

Admittedly, the above said order of this court was not challenged by the appellant and thus attained finality laying the controversy to rest to whether the order under the said section would mean an interim order as well and the ground cannot be allowed to be reagitated by the appellant herein.

8. Even otherwise, a bare look at the section 13(2)(iii) would manifest the intention of the legislature as two separate expressions have been used in the said Section i.e. 'decree' or

‘order’, which would necessarily mean either an interim or a final order. The intention of the legislature is to give a right to the wife to invoke the said provision in a case where even an interim order has been passed in either of the said proceedings, which is also clear from the language used in the said section beginning with the words *“in a suit under Section 18 of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure,* wherein the words *‘in a suit or in a proceeding’* would clearly mean that the order passed during the pendency of the proceedings either under Section 18 or under Section 125 of the Code of Criminal Procedure. There is thus no room to interpret the said provision in a manner suggested by the counsel for the petitioner which otherwise would defeat the very purpose and object of the said section.

9. The essence of the said provision is that there should be no resumption of cohabitation between the parties for a period of one year or upwards from the date of the passing of such an order, so this one year gap has to be reckoned from the date of the passing of an order under Section 125 of the Code of Criminal Procedure or under Section 18 of the Hindu Adoptions

and Maintenance Act and not necessarily a final order or decree. The section does not talk about the payment or non payment of the maintenance amount but of the non resumption of cohabitation of the parties. Clearly, in the facts of the present case the appellant had admitted that there was no resumption of cohabitation for a period of more than one year after the order dated 02.03.2005 under Section 125 Cr.P.C. was passed by the court of the learned Metropolitan Magistrate.

10. It is quite pertinent to note that section 13(2)(iii) talks about section 18 under the HAMA and section 125 Cr.PC, which are both the provisions for grant of maintenance available to the wife only unlike section 24 or 25 of the HMA wherein any party can approach the court for the grant of maintenance. It is thus manifest that the order of maintenance passed in the favour of the wife in her petition under section 18 HAMA or section 125 Cr.PC would make her available the right to file for divorce under section 13(2)(iii). If the contention of the counsel for the appellant is accepted and the order in the section is meant to be only a final order then the purpose of the said provision would be negated as the wife who seeks a decree of divorce under the said section would have to wait till a final order under section 18 or

section 125, as the case may be, which would certainly mean insisting on an invariably long waiting period, which is certainly not the object of the said section. The only desideratum is that the parties have ceased to live together for one year or more and to save the wife from vagrancy she has a order or decree of maintenance in her favour. The judgments relied upon the counsel for the appellant would not be applicable to the facts of the case at hand as they sought to carve a different legal proposition altogether.

11. In the light of the above discussion, this court does not find any merit in the present appeal and the same is hereby dismissed.

November 02, 2011

KAILASH GAMBHIR,J