

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ MAT.APP. 79/2011 & CM Nos.22660-61/2011

Judgment delivered on : 16th December, 2011

HARVINDER MAINI Appellant
Through: Mr. O.P. Gogna & Mr. Vikas
Gogna, Advs.

versus

NEERAJ MAINI Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J. (Oral)

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955, the appellant seeks to challenge the judgment dated 2.9.2011 passed by the learned Trial Court, whereby the marriage between the parties was dissolved by decree of divorce in terms of Section 13(1A) (i) of the Hindu Marriage Act, 1955 (HM Act).

2. Assailing the judgment passed by the learned Trial Court, Mr. O.P. Gogna, learned counsel representing the appellant, submits that the learned Trial Court has committed an illegality in passing a decree of divorce based on the judgment and decree of judicial separation dated 30.5.2009 passed by the Court of Shri Virender Bhatt, Additional District Judge. The contention raised by learned counsel for the appellant is that while deciding issue no.1, the Court in the said judgment dated 30.5.2009 had clearly observed that the

petitioner/respondent herein had failed to discharge the onus of proving the issue no.1 and similarly on issue no.3, which pertained to the grant of final relief, the observation of the Court was that the petitioner had failed to prove that the respondent had treated her with cruelty. The contention raised by learned counsel the appellant is that once the respondent had failed to prove the ground of cruelty in the previous petition filed by her under Section 13(1)(ia) of the HM Act, therefore, the act of the previous Court to grant the relief of judicial separation in favour of respondent/wife was itself without jurisdiction and, therefore, no relief could be granted by the learned Trial Court to grant a decree of divorce, based on the judgment and decree dated 30.5.2009 which was illegal and without jurisdiction. In support of his argument, learned counsel has placed reliance on the judgment of the Bombay High Court in the case of *Prabhakar S. Nikam -vs- Satyabhama P. Nikam*, AIR 2008 Bombay 129 and *Harish Chandra Drall -vs- Suresh Wati*, 142(2007) DLT 198. Learned counsel also referred to the judgment of the Apex Court in the case of *Ms. Ahlawat -vs- State of Haryana & Anr.*, 2000 Cr. L.J. 388 to support his argument that to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience.

3. I have heard learned counsel for the appellant at considerable length and given my thoughtful consideration to the pleas advanced by him.

4. The appellant herein is aggrieved by the judgment and decree dated 2.9.2011 whereby the learned Trial Court has granted a decree of divorce in favour of wife/respondent and against the husband/appellant in terms of Section 13(1A) of the HM Act. Under Section 13(1A) of the HM Act, petition for divorce can be filed on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation and proceedings to which they were parties. For better appreciation, the said provision is reproduced as under:-

13(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
- (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

5. Indisputably, decree for judicial separation under Section 13A was passed by the learned Additional District Judge vide order dated 30.5.2009 when the petition for divorce was filed by the respondent wife to seek decree of divorce on the ground of cruelty envisaged in Section 13(1)(ia) of the HM Act. It is also not in dispute that the said judgment and decree dated 30.5.2009 was not challenged by the appellant in appeal, thus allowing the said judgment and decree dated 30.5.2009 to attain finality. It is also not in dispute that both the

parties did not stay together after the passing of the said judgment and decree dated 30.5.2009 and, therefore, clearly there was cessation of cohabitation between the parties. Based on the said decree of judicial separation and the fact that there was cessation of cohabitation between the parties which fulfilled the requirement for the grant of divorce under section 13(1A)(i) , the respondent wife filed a petition for divorce which was decreed vide impugned judgment and decree dated 2.9.2011.

6. The prime argument canvassed by learned counsel for the appellant in the present appeal is that the judgment and decree dated 30.5.2009 passed by the learned Additional District Judge was illegal and without jurisdiction because of the fact that the learned Trial Court itself returned a finding on issue no.1 that the respondent/petitioner had failed to discharge the onus of proving the ground of cruelty against her husband, that is, appellant herein. The contention raised by learned counsel for the appellant is that once having failed to prove the ground of cruelty, the respondent was not entitled to the grant of decree for judicial separation and this Court, in the exercise of appellate powers, can correct the said jurisdictional error committed by the learned Additional District Judge in passing the judgment and decree dated 30.5.2009. In my considered view, the argument taken by learned counsel for the appellant is fallacious and merits outright rejection. The remedy to challenge any decree and

order passed by the Court is provided under Section 28 of the HM Act whereby decree or orders passed by the learned Trial Court can be set aside in appeal or the same can be modified by the same court in the exercise of review jurisdiction. The decree and orders passed under the HM Act are enforceable as orders passed by the Court are in exercise of its original civil jurisdiction in terms of Section 28(4) of the HM Act. Limitation period of ninety days has been provided under Section 28(4) to the aggrieved party to challenge any judgment and decree. The respondent had approached the Trial Court to seek a decree of divorce on the ground of cruelty as envisaged in Section 13(1)(ia) of the HM Act but looking into the totality of the facts and circumstances and considering the fact that the marriage between the parties practically reached a dead end and there being acrimony and differences between the parties to a large extent, the learned Trial Court passed a decree for judicial separation under Section 13A instead of granting a decree of divorce under Section 13(1)(ia) of the HM Act. The remedy of the appellant to assail the said judgment and decree dated 30.5.2009 was available to him only by way of filing an appeal under Section 28 of the HM Act and having not availed the said remedy, the appellant cannot now turn round to attack the said judgment and decree dated 30.5.2009 on the ground of illegality and jurisdictional error on the part of the learned Trial Court. Based on the judgment dated 30.5.2009 the court on the presentation of the

petition by the respondent wife under section 13(1A), the court dissolved the marriage of the parties vide the impugned judgment and decree. In the present appeal, challenge is the judgment dated 2.9.2011 and not the judgment dated 30.5.2009 and the appellant now cannot find faults with the judgment dated 30.5.2009 which is not the subject matter of the present appeal. The learned Trial Court in the present impugned order has rightly observed that having regard to the provisions of Section 41 of the Indian Evidence Act, the judgment and decree dated 30.5.2009 is a relevant fact determining the legal rights of the parties after the passing of the said judgment and decree dated 30.5.2009. The judgments cited by learned counsel for the appellant are not be applicable to the facts involved in the present case as they canvass the legal proposition applicable if the judgment under challenge was a decree of judicial separation, which is not the situation in the case at hand.

7. In the light of the aforesaid discussion, this Court does not find any illegality or perversity in the impugned judgment and decree dated 2.9.2011 passed by the learned Additional District Judge, thereby granting decree of divorce in favour of the respondent wife and against the appellant husband under Section 13(1A) (i) of the HM Act.

KAILASH GAMBHIR,J

DECEMBER 16, 2011
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