

* **HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: February 28, 2012

+ MAT.APP.16/2012

Yagini Kapoor Petitioner
Through: Mr.H.R.Khan Suhel with Mr.Ankit
Upadhyay, Advocates with petitioner in person

-versus-

UOI & anr Respondents
Through:Mr.Nitya Sharma for respondent no.2
with respondent no.2 in person

CORAM:-
HON'BLE MS. JUSTICE VEENA BIRBAL

Veena Birbal, J (Oral)

C.M.3713/2012

Exemption allowed subject to all just exceptions.

Application stands disposed of.

C.M.3714/2012

This is an application for condonation of delay in filing the present appeal. Application is not opposed. In view of the reasoning given in the application, the delay in filing the appeal is condoned. Application stands disposed of.

Mat No.16/2012

1. Notice. Mr.Nitya Sharma accepts notice on behalf of respondent no.2.
2. With the consent of the parties, appeal is taken up for final disposal.
3. By way of this appeal, challenge has been made to the order dated 27th August, 2011 passed in HMA 421/11 and order dated 18th February, 2012 passed in review application.
4. The appellant and respondent no.2 had filed a joint petition i.e., HMA 421/2011 under section 13(B)(1) of the Hindu Marriage Act (hereinafter referred to as the Act) before the learned ADJ, Delhi praying for dissolution of marriage by a decree of divorce. A joint statement of parties was recorded on 1st August, 2011 before the court. Thereafter on 27th August, 2011 petition was disposed of.
5. On 1st February, 2012, a joint petition for second motion i.e., HMA 52/2012 under section 13(B)(2) of the Act was filed alleging therein that after the disposal of the earlier petition i.e. HMA 421/2011, they have not lived as husband and wife. There is no cohabitation between them since April, 2010 and since then they are living separately, as such, their marriage be dissolved by decree of divorce under section 13(B)(2) of the Act. After filing of the said petition, it was revealed to the parties that their first motion petition was dismissed by the learned ADJ on 27.08.2011, as such, second motion petition under Section 13-B(2) of the Act was not

maintainable. Thereupon, parties moved a review application seeking review of the order dated 27th August, 2011. On 13.02.2012, parties also filed a joint application for withdrawal of petition under Section 13-B(2) of the Act. Both the aforesaid applications were dismissed vide impugned orders dated 18th February, 2012 and vide same order petition u/s 13-B(2) of the Act was also held to be not maintainable. The aforesaid impugned orders as well as order dated 27.08.2011 passed on the joint petition under Section 13-B(1) have been challenged in the present appeal.

6. Learned counsel for the appellant has contended that at the time of recording of joint statements of parties in first motion u/s 13-B(1) of the Act, original documents pertaining to the identity proof of both the parties i.e. rent deed, copy of passport of petitioner and passport of respondent no.2 were produced. Thereupon, photocopies of aforesaid documents were exhibited in the evidence of both the parties and originals were returned to the parties. It is submitted that the same is also recorded in the statement of parties. It is further contended that after waiting for six months, parties had filed second motion petition under 13-B(2) of the Act on 1st February, 2012. However, after filing of second motion, it was revealed that first motion had not been allowed, as such second motion was not maintainable. It is contended that the counsel of parties was under the bonafide belief that since the necessary formalities had been done, the joint petition under Section 13-B(1) of the Act had been allowed. It is contended that parties should not be allowed to suffer due to lapse on the part of

their counsel. It is further contended that mistake is bonafide. There was no malafide on the part of the parties, as well as their counsel, as such, in the interest of justice, impugned orders be set aside.

7. Perusal of the record shows that joint statement u/s 13-B(1) of the Act was recorded on 1st August, 2011. The same is reproduced as under:-

“We the petitioners were married on 20.01.2007 at Amritsar in accordance with Hindu customary rites and ceremonies. Marriage was solemnized at Behl Ashiana, 3-A, Dasounda Singh Road, (Race Course Road Chowk) Lawrence Road, Amritsar. No child was born out of this wedlock.

Due to differences in our temperaments and attitudes, we started living separately w.e.f. 11.04.2010. We have not resumed co-habitation thereafter. Now there is no possibility of our living together as husband and wife and despite attempts being made for reconciliation by family and friends we have been unable to live together.

The parties have agreed to dissolve their marriage by mutual consent and have jointly filed the first motion u/s 13-B(1) of Hindu Marriage Act.

There are no claims/disputes left between us to be resolved/settled of any nature whatsoever qua this marriage.

We both have identified our respective signatures at points X and Y on each page of the joint petition, affidavits and the compromise deed, which have been exhibited as P-1 to P-4 respectively. As identity proof, petitioner No.1 has filed attested photocopy of Rent Deed which is Ex.A.1, copy of her Passport Ex.A2(OSR) and petitioner no.2 has filed attested

photocopy of his Passport, same is Ex.A.3(OSR). Photograph pertaining to marriage is Ex.A4. The list of articles already admitted to have been returned to petitioner no.1 under her signatures is Ex.A5. We both identify our own photographs on the petition at points X and Y.

Our consent for divorce is voluntary and without any force, fraud and undue influence.

There is no collusion between us in filing this petition and its contents are correct.

We pray that our marriage be dissolved by decree of divorce by mutual consent.”

8. On the said date, the Ld. ADJ had passed the following order:-

“01.08.2011

Present: Parties alongwith respective counsels

Efforts for reconciliation were made on this petition under Section 13(B)(1) of HMA, 1995. However, reconciliation does not seem possible at such stage. Joint statement recorded. Original documents i.e. passport of petitioner no.2 along with original rent deed are produced the court on the date fixed.

To come up on 10.08.2011.”

9. Thereafter, neither the parties nor their counsel appeared in the matter. On 23rd August, 2011, the Ld. ADJ had passed the following order:-

“23.08.2011

Present: None.

None has appeared since morning to file requisite documents. In fact, vide order dated 01.08.2011 while recording of statement of parties, the original document of identity had been called for. They were not available and parties had undertaken to produce the said documents i.e. passport of petitioner no.2 & original rent deed. Neither has been produced till date inspite of repeated opportunities, this being the third date.

List for orders on 27.08.2011.”

10. Ultimately on 27th August, 2011, the petition under section 13-B(1) of the Act was dismissed on the ground that as the parties had failed to appear with original documents on the day, the matter was fixed, as such court has drawn the presumption that parties are deliberately not producing the same as the same would not be in their interest. The ld. trial court doubted the identity of the parties and dismissed the petition.

11. Perusal of record shows that original documents as are referred above, were already shown by the parties at the time when their joint statement was recorded on 1st August, 2011. Under these circumstances, Ld. ADJ was not justified in drawing the presumption as is recorded in the impugned order. The stand of the parties is that they did not appear on subsequent dates as their lawyer did not inform that matter had been adjourned for production of original documents. Had they been informed about appearing on 10th August, 2011, as

well as subsequent orders they would have definitely appeared with the original documents as per directions of the court.

12. The counsel for appellant has also given his own specific affidavit before this court wherein it is stated that after recording of the parties, he remained under the impression that order on first motion petition would be passed favorably and without going through the order on first motion petition, second motion petition u/s 13-B(2) was filed. It is further stated that after coming to know the mistake, immediately an application for withdrawal of petition u/s 13-B(2) of the Act. It is specifically stated in the affidavit that there was no malafide on the part of counsel.

Learned counsel appearing for the parties have also pointed out that the lawyer who was conducting the matter before the trial court was a new entrant to the bar having hardly any experience. It is submitted that mistake is bonafide on the part of counsel.

13. The material on record shows that there was a bonafide mistake on the part of advocates of the parties who were appearing before the learned trial court. One of the advocates is present before the court and has also given his specific affidavit in this regard. The bonafide of the parties as well as their counsel is not in doubt. Parties are also carrying original documents before this court which they were supposed to produce before the learned ADJ. From the material on record, it cannot be said that there was any malafide or foul play on the part of the parties. It was a mistake on the part of their counsel who did not convey the fixing up of date by Ld. trial court for showing

original documents to the court . Considering the specific affidavit of the counsel, it appears to be a case of bonafide mistake on the part of the counsel.

14. In view of the above discussion, the impugned orders dated 27th August, 2011 and 18th February, 2012 are set aside. The parties will appear before the concerned court on 15th March, 2012 with original documents as have been mentioned in the order dated 1st August, 2011. The learned ADJ will pass fresh orders on first motion petition u/s 13-B(1) of the Act i.e., HMA 421/11. The petition u/s 13-B(2) of the Act i.e., HMA 53/12 shall be deemed to be dismissed as withdrawn. After disposal of 1st motion petition, the parties will proceed further in the matter in accordance with law.

Appeal stands allowed.

VEENA BIRBAL, J.

February 28, 2012

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