



2024:UHC:9471-DB

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

JUSTICE SHRI MANOJ KUMAR TIWARI

AND

JUSTICE SHRI VIVEK BHARTI SHARMA

First Appeal No.12 of 2021

5 December, 2024

Ashish Kumar Jain

...Appellant

Versus

Priya Jain

...Respondent

Present:-

Mr. Devesh Ghildiyal, Advocate for the appellant

Mr. Pradeep Kumar Chauhan, Advocate for the respondent

JUDGMENT: (per Shri Vivek Bharti Sharma, J.)

This appeal filed by the appellant, under Section 19 of The Family Courts Act (*hereinafter referred as Act*), is against the judgment and order dated 29.01.2021 passed by Additional Judge, Family Court, Rishikesh, Dehradun in O.S. No.05 of 2019, whereby the suit for divorce filed by the appellant/husband was dismissed.

2. Facts of the case, in brief, are that the appellant/plaintiff filed the O.S. No.05/2019 under Section 13 of The Hindu Marriage Act, 1955 seeking decree of divorce with the averments that the marriage between the appellant/plaintiff and the respondent/defendant was solemnized on 06.07.2014 as per the *Hindu* Rites at Dehradun;



that, out of the said wedlock a son was born, who at the time of filing of the divorce petition, was two years and ten months of age; that, for some time after marriage the behavior of respondent/defendant towards the appellant/plaintiff and his family members remained normal, but after sometime, the respondent/defendant began to talk with her mother over phone for hours; that, although, the behavior of respondent remained normal towards the appellant/plaintiff and his family members, but after her conversation with her mother, she used to quarrel with the appellant/plaintiff on petty issues; that, the respondent/defendant went to her paternal home on 28.11.2015.

3. It was also averred that the appellant/plaintiff continuously tried to contact the respondent/defendant but on 26.06.2016, the respondent/defendant sent a message to the appellant/plaintiff over the phone that now she would not return to her matrimonial home; that, the appellant/plaintiff kept on saving his married life due to which he also instituted a petition under Section 9 of the Hindu Marriage Act before the Family Court, Dehradun; that, this petition was decreed in favour of the appellant/plaintiff on 25.05.2017 but the respondent/defendant did not comply with the same.

4. On the aforesaid grounds, it was prayed by the appellant/plaintiff to grant a decree of divorce.

5. The respondent/defendant by filing her



written statement admitted the fact of marriage as well as the birth of a son, however, she denied rest of the averments made in the petition.

6. It was averred by the respondent/defendant that the respondent/defendant was subjected to taunts and abuses at the hands of appellant/plaintiff and his family; that, the ornaments which she had got from her paternal home after some days of marriage, were sold by the mother of appellant/plaintiff and even the car given from the paternal side of respondent/defendant was also sold; that, on 28.11.2015 the appellant/plaintiff and his family members exerted pressure on the respondent/defendant to bring Rs.5 lakh in cash and on being refused they all ousted the respondent/defendant from the house on 28.11.2015 itself; that, the application filed by the respondent/defendant before the Family Court under Section 125 Cr.P.C., which was decided by the Court on 17.01.2018, but the same was not deliberately complied with by the appellant/plaintiff.

7. On the basis of the pleadings of parties, three issues were framed by the court concerned as under:-

- i. Whether the respondent/defendant had deserted the appellant/plaintiff without any justified reason. If so, whether the same is sufficient enough to pass the decree of divorce?



ii. Even after passing of decree of restitution of conjugal rights, whether the respondent/defendant did not follow that order. If so, whether the same is sufficient to pass the decree of dissolution of marriage under Section 13 (1-A)(ii) of the Act.

iii. What relief the plaintiff is entitled to get?

8. In support of their case, the parties led their oral evidence and also filed various documentary evidence.

9. The Family Court, after hearing the parties and on perusal of the document available on record, decided all the three issues in favour of the respondent/defendant and against the appellant/plaintiff and accordingly the suit filed by the plaintiff under Sections 13(1)(ia) and 13(1)(ib) of the Act was dismissed with cost.

10. The husband has preferred this appeal for setting aside the impugned judgment dated 29.01.2021.

11. During the pendency of present appeal, an application being IA No.1 of 2014 has been filed by the parties on 14.07.2024 along with affidavits of both the respective parties. The application is signed by both the parties praying therein that this Court may dissolve the marriage of the parties by decree for divorce by mutual consent ignoring the



aforementioned allegations and counter allegations made by the parties.

12. Heard learned counsel for the parties and perused the entire material available on record.

13. Learned counsel for the parties would submit that the parties after understanding the terms and condition of the compromise, without any duress, undue influence, misrepresentation have agreed to close the dispute and have agreed to dissolve the marriage dated 06.07.2014 through decree of divorce by mutual consent.

14. Learned counsel for the parties would draw attention of this Court to the averment made in para 11 of the affidavit filed by the appellant as well as the affidavit filed by the respondent.

15. In para 11 of both the affidavits, following averment has been made:-

“11. That as one time settlement, the plaintiff/appellant/husband has agreed to pay a lump sum amount of Rs.30 lacs (Rupees Thirty Lacs Only) as present and future maintenance of Smt. Priya Jain and Master Mihir Jain. The amount is being paid vide demand drafts, details of which are as under:-

- (a) Demand draft of Rs.29,00,000/- (Rupees Twenty Nine Lacs) dated 6.7.2024 drawn by State Bank of India, Rishikesh.*
- (b) Demand draft of Rs.1,00,000.00 (Rupees One Lac Only) dated 8.7.2024 drawn by Indian Overseas Bank, Dehradun.”*



16. At the very outset, it would be apt to refer some statutory provisions and case-laws for passing a decree of divorce by mutual consent arrived at between the parties.

17. The text of Section 13-B of Hindu Marriage Act, 1955 is as under:-

“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 (68 of 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.”*

As evident, Sub-Section 2 of Section 13-B of the “Act” says that second motion cannot be made before expiry of six months after date of presentation



of petition in Sub-Section 1 of Section 13-B of the Act.

18. The counsel for the parties would submit that the marriage of parties was solemnized on 06.07.2014 and petition for dissolution of marriage by decree of divorce was filed by appellant/husband, on the ground of cruelty, in year 2019; that, the parties have entered into a compromise, hence, this appeal be disposed of by allowing I.A. No.1 of 2024 thereby dissolving the marriage of parties by decree of divorce with mutual consent under Section 13-B (2) of the Hindu Marriage Act, 1955, by waiving of period of six months in view of law laid down in re **‘Amardeep Singh vs. Harveen Kaur (2017) 8 Supreme Court Cases 746.’**

19. This Court considered the submissions of learned counsel for the parties and perused the complete record.

20. Now, this Court has to see whether IA No. 01 of 2024 filed by the parties in this appeal should be allowed.

21. The Application (IA No. 01 of 2024) is mainly with averments that *in the facts and the circumstances stated in the accompanying affidavits made part of this compromise application, it is expedient in the interest of justice to accept the same and to pass a decree of divorce in favour of the plaintiff/appellant in FA No. 12 of 2021 arising out of*



O.S. No. 05/2019, titled as Shri Ashish Kumar Jain Vs. Smt. Priya Jain, as parties have compromised the dispute, out of free will without any duress, misrepresentation, otherwise both the parties would suffer irreparable loss and injury.

The language of the accompanying affidavits of the respective parties is almost verbatim with facts that due to the sagacious intervention of the acquaintances, the parties have arrived at compromise, without any duress, undue influence or misrepresentation, to take the divorce with mutual consent; that, an amount of ₹30 lakhs is paid by the appellant/husband to the respondent/wife out of which ₹15 lakhs of the said amount would be deposited in an interest earning scheme in the joint account of respondent/wife and Master Mihir Jain for securing his interest till he attains the age of majority; that, the custody of Master Mihir Jain shall remain with the respondent/wife and the appellant/husband would be entitled to meet the son on prior information; that, respondent/wife and Master Mihir Jain would have no right left in the property of the father of appellant/husband and of the appellant/husband also; that, the appellant/husband and respondent/wife after understanding the contents of compromise having read over in vernacular language have accepted the same and have consented to dissolve the marriage.

However, the application along with the



affidavit nowhere states whether any mediation/conciliation efforts as per the mandate of Order 32-A Rule 3 CPC, Sub-section 2 of Section 23 of the Hindu Marriage Act and Section 9 of the Family Courts Act to re-unite the parties were made and failed; that, there is no likelihood of success in that direction by any further efforts; that, if the statutory period of six months after presentation of the first motion under Section 13-B (1) of the Hindu Marriage Act is not waived off then it will only prolong the agony of the parties. Moreover, it is also pertinent to note that the appellant/husband and the respondent/wife have not filed any application either to amend the original petition or memo of appeal in order to incorporate all these facts in terms of the requirement of Section 13-B(1) & (2) of the Hindu Marriage Act.

22. As apparent, this application IA No. 01 of 2024 is made at the stage of Appeal before the High Court. It is trite that an appeal is continuation of the suit or the proceedings of the original court and while disposing of the appeal, the jurisdiction of the appellate court involves re-hearing not only on the point of law but also on the facts and evidences adduced before the original court.

23. The Hon'ble Supreme Court in the case of **'Malluru Mallappa (DEAD) through legal representatives vs. Kuruvathappa & others, 2020 (4) SCC 313'** has also observed as under:-



“13. It is a settled position of law that an appeal is continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for reconsideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons.”

24. The High Court of Andhra Pradesh in its judgment **‘K. Omprakash vs. K. Nalini, 1985 SCC Online AP 98’** dissolved the marriage of the parties by decree of divorce with mutual consent in appeal on the basis of compromise filed by the parties with mutual consent.

25. The High Court of Karnataka in its judgment **‘Roopa Reddy vs. Prabhakar Reddy, 1993 SCC Online Kar 111’** granted the relief of dissolving the marriage by decree of divorce with mutual consent at the appellate stage on the applications of the parties for amendment of the main petition.

26. The Division Bench of this High Court in its judgment **‘Megha Nautiyal vs. Deepak Barthwal, 2024 SCC Online Utt 2341’** had *suo motu* converted the application of the parties in appeal against the dismissal of the petition for dissolution of marriage



by decree of divorce into petition under Section 13-B(2) of the Hindu Marriage Act and dissolved the marriage on the conditions agreed upon by the parties.

27. The Division Bench of this Court in its judgment dated 02.05.2024 in ***Habeas Corpus Petition No. 07 of 2024, 'Arun Vs. State of Uttarakhand & others'*** suo motu converted the habeas corpus petition into petition under Section 13-B of the Hindu Marriage Act and dissolved the marriage of parties by decree of divorce in writ petition on the basis of mutual consent of the parties by waiving off the period of six months in between the two motions.

However, it would be pertinent to note that the Hon'ble Supreme Court in its judgment in re ***'Amardeep Singh'*** case (*supra*) has specifically stated that before granting the relief of waiving off the period of six months in order to dissolve the marriage by a decree of divorce with mutual consent, the Court has to satisfy itself on the four points as quoted in paragraph no. 19 above of this judgment. It seems that this judgment of Hon'ble Supreme Court was not brought in the notice of the Division Bench of this Court in re ***'Arun Vs. State of Uttarakhand'*** (*supra*) and re ***'Megha Nautiyal vs. Deepak Barthwal'*** (*supra*).

28. The Hon'ble Supreme Court in re ***Amardeep Singh vs. Harveen Kaur (2017) 8***



Supreme Court Cases 746 has held that the six-month cooling-off period mandated by the Hindu Marriage Act is directory and not mandatory. Relevant paragraphs of this judgment are as under:-

“19. 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 13-B(2), it can do so after considering the following:

- (i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(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 32-A 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 court concerned.*

20. Since we are of the view that the period mentioned in Section 13-B(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.”

29. In the considered view of this Court in absence of the satisfaction of the Court on four points stated above, the period of six months after presentation of the first motion under Section 13-B(1) of the Hindu Marriage Act cannot be waived off.

30. In this case also, the parties have not made any averment, neither in the application nor in the affidavit, on which this Court could satisfy itself about the four points that the Hon’ble Supreme Court has referred to in paragraph no. 19 of its judgment in re **‘Amardeep Singh’** case (*supra*). However, this Court is of the view that when there is no possibility of cohabitation and marriage of parties has irretrievably broken, when the parties have entered a compromise then there is no point for keeping the parties entangled with each other in cobweb of matrimony, therefore, the Court directs the parties to file fresh petition in the Family Court under Section 13-B(1) and the petition under Section 13-B(2) of the Hindu Marriage Act simultaneously with an application for waiving off the statutory period of six months under Section 13-B(2) of the Hindu Marriage Act in the light of the judgment of Hon’ble Supreme Court in re **‘Amardeep Singh’** case (*supra*).

31. At the same time, it would not be out of



place to note that in the appeals before this Court under Section 19 of the Family Courts Act, the parties to the appeal at times make the application for grant of relief of dissolution of marriage by decree of divorce on the ground of mutual consent at the appellate stage itself without making an application for amendment to the main petition to convert the same in petition under Section 13-B (1) of the Hindu Marriage Act. The applications moved by the parties for this relief do not spell out the facts and circumstances of the case on the basis of which Court could satisfy itself about presence of grounds to waive off the period of six months in the light of the judgment of Hon'ble Supreme Court in re **'Amardeep Singh'** case (supra).

32. This Court, therefore, is of the view that if such an application is made at the appellate stage then it should be with an amendment to the original petition for grant of the dissolution of marriage by amending the original petition before the Family Court in consonance with the requirement of Section 13-B(1) and petition under Section 13-B(2) of the Hindu Marriage Act accompanied with an application for waiving off the statutory period of six months after presentation of the petition under Section 13-B(1) of the Hindu Marriage Act for the purpose of acceptance of petition under Section 13-B(2) of the Hindu Marriage Act.

33. If such applications are moved by the



parties in appeal by making all the necessary averments on the basis of which this Court could satisfy itself on the points elaborated in paragraph no. 19 of the judgment of Hon'ble Supreme Court in re '**Amardeep Singh**' case (supra) then the marriage of the parties can be dissolved by decree of divorce with mutual consent at the appellate stage also.

34. In view of the above observations, this appeal is disposed of with liberty to the parties to file the petition for dissolution of marriage by decree of divorce with mutual consent under Section 13-B(1) & (2) of the Hindu Marriage Act with an application for waiving off the statutory period of six months in the Family Court.

35. A copy of this order be sent to all the Courts of the State for compliance as well as to the Director, Uttarakhand Judicial and Legal Academy, Bhowali Nainital to see that these observations with directions should be brought in the knowledge of the judges who come there for refresher courses and induction training.

(Vivek Bharti Sharma, J.)
05.12.2024

(Manoj Kumar Tiwari, A.C.J.)
05.12.2024

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