

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4528 OF 2015

1. Swati W/o Ramakant Patil,
Age- 21 years, Occ.: Household,
R/o: C/o Samadhan Onkar Patil,
at and post Anturli (khu) Tal. Pachora,
Dist: Jalgaon.
 2. Ramakant S/o Ratan Patil,
Age:- 28 years, Occ: Service,
R/o at post : Sangameshwar,
Tal. Pachora, Dist. Jalgaon
- ...PETITIONERS
- versus
- Nil
- ...RESPONDENT

.....
Mr. N.E. Deshmukh, Advocate for Petitioners
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CORAM : SUNIL P. DESHMUKH, J.

DATED : 7th MAY, 2015

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith and heard the learned counsel for petitioners.
2. The petitioners are before this court aggrieved by order dated 8th April, 2015 passed by learned Civil Judge, Senior Division, Jalgaon, in Hindu Marriage Petition No. 83 of 2015, rejecting their request to waive statutory period required under section 13-B (2) of the Hindu Marriage Act, 1955 for divorce by mutual consent.

3. The facts as emerging are that, petitioner No. 1 is wife whereas petitioner No. 2 is husband. Their marriage was solemnized on 15-04-2012 at Sangmeshwar, however, the couple could reside together hardly for four days and from 19-04-2012, petitioner No. 1 started residing with her parents, having moved out of matrimonial house, due to incompatibility and temperamental issues. Attempts to reconcile relations have failed and ultimately the petitioners purported to take divorce on 14-12-2014 under aegis of respected members of their community, by execution of an affidavit. The petitioners had decided not to claim any monetary benefits from each other and had also undertaken not to lodge any cases against each other and further agreed to file proceedings for divorce by mutual consent.

4. Accordingly, Hindu Marriage Petition No. 83 of 2015 seeking dissolution of marriage and divorce by mutual consent was filed on 18-02-2015 in the court of Civil Judge, Senior Division, Jalgaon. The learned Judge having regard to requirement of intervening statutory period of six months for divorce by mutual consent, has kept next date in the matter on 18-08-2015.

5. During pendency of said proceedings, the petitioners had filed an application Exhibit-10 on 08-04-2015 seeking waiver of

expiry of the statutory period. Petitioners had referred to that the marriage has been dissolved before the community and their relationship as husband and wife has come to an end. The petitioners are not at all interested to cohabit with each other. It is referred to in the application that they are young and their second marriage is also arranged. In view of aforesaid, they prayed for waiver of expiry of statutory period of six months prescribed under section 13-B (2) of the Hindu Marriage Act, 1955 and for passing decree of divorce by mutual consent.

6. Section 13-B (2) of the Hindu Marriage Act, 1955 reads thus-

“13-B Divorce by mutual consent -

(1)

(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”.

7. It appears that decision of this court in writ petition No. 1381 of 2010 (*Rakesh Parekh Vs. State of Maharashtra*) as well as decision of learned single judge in the case of *Sau Sonali W/o Manishkumar Chandak and another Vs. Nil* reported in 2008(1) All MR 227

were relied on. The court had considered that in the case of *Rakesh Parekh*, he had already filed a petition for divorce under section 13 of the Hindu Marriage Act, 1955, and as such, decision in said case would not be applicable to the request, for, facts would not be similar. It appears to have been considered by the court that the decision in the case of *Sau Sonali* referred to above had been in view of exceptional hardship being faced, the High Court under inherent powers was pleased to grant waiver of statutory period, and as such, said decision would not apply to present situation. The court, as such, went on to reject application under Exhibit-10.

8. The petitioners with a view to support their request for waiver of expiry of six month period pursuant to section 13-B(2) of the Hindu Marriage Act, 1955 for divorce by mutual consent have annexed to the memo of petition a photocopy of the decision dated 03-08-2007, in the case of *Sau Sonali W/o Manishkumar Chandak and another Vs. Nil* reported in 2008(1) All MR 227, wherein the court appears to have taken into account exceptional hardship being faced by the petitioners-therein as well as that they were living separately and all efforts for reconciliation had failed, and thus, claim for exemption (waiver) of statutory period of six month for divorce by mutual consent is allowed.

9. Learned counsel Mr. Deshmukh, refers to above decisions and relies on said judgments as well as judgment rendered by a division bench of this court in the case of *Satnosh Lalmani Tiwari Vs. Mrs. Aardhana Devi Santosh Tiwari* reported in *AIR 2013 Bombay, 12*. In that case, the petition had been filed by husband for divorce under section 13 (1) (i-a) of the Hindu Marriage Act, 1955 on the ground of cruelty, which was dismissed. Appeal was preferred and during pendency of appeal, proceedings were sought to be converted into a petition for divorce by mutual consent. The division bench after taking into account the decisions reported in *AIR 1986 Andhra Pradesh 167 (K. Omprakas Vs. Nalini)*, as well as *1989 Madras Law Journal Reports 319 (Santhana Krishnan Vs. Poongothari Ammal)* and *AIR 1998 Kerala, 97 (Sreelatha Vs. Deepthy Kumar)*, had considered that as parties were residing separately since 2006 and the petition for divorce was filed in 2010, which was dismissed in June-2012 and appeal was filed in July-2012 and as consent terms were also filed in said proceedings, there is no possibility of reconciliation between the parties and their decision to have divorce is not influenced by any external factors including coercion, intimidation or undue influence by any person including the parents. The proceedings appear to be given treatment as proceedings for divorce by mutual consent and, as such, in said case the division bench has considered that waiting period can be waived in a suitable case by the appellate court, when the court is fully

satisfied on the proved facts that marriage tie should be severed by mutual consent immediately as the parties have been living separately for more than the time prescribed under section 13-B (2) of the Hindu Marriage Act, 1955 and that they have been fighting for sufficiently long period. The High court had considered that the appellate court may not wait for further period of six months after filing of application seeking conversion of petition into a petition for divorce by mutual consent.

10. Learned counsel for the petitioners Mr. Deshmukh also relies on the decision in case of *Mittal Ramesh Panchal and Manoj Dayalal Panchal Vs. Nil* reported in 2014 AIR Bombay 80 : 2014 (3) All MR 60 : 2014 (3) Mh.L.J. 755 : 2014 (4) LJSoft 46, wherein customary divorce appears to have been taken by the parties. The parties had got remarried acting under the *bonafide* belief that their marriage has come to an end on execution of deed of divorce on 13-06-2011 before a notary. However, they subsequently realized this may not be valid in law and proceedings under Section 13-B of the Hindu Marriage Act, 1955 seeking divorce by mutual consent, were filed. A spouse had applied for visa, which was not issued, for, divorce under the deed is not a decree in the eye of law. In the circumstances, the court considered that no fruitful purpose could be achieved by forcing the parties to wait for six months. The division bench in the peculiar circumstances

of that case has considered invoking of inherent powers under Codes of Procedure. That was a matter being considered by the high court in the appeal, after the family court rejected request for waiver of statutory period.

11. Learned counsel further refers to a decision of the Supreme Court in the case of *Devinder Singh Narula Vs. Meenakshi Nangia* reported in 2012(5) ALL M R (S.C.) 895 : 2012(6) Mh.L.J.(S.C.) 769 : 2012(10) LJSoft (S.C.) 16. The Supreme Court in paragraphs No. 12 and 13 of the judgment has observed thus-

“12. It is quite clear from the materials on record that although the marriage between the parties was solemnized on 26.3.2011, within 3 months of the marriage the petitioner filed a petition under Section 12 of the Hindu Marriage Act, 1955, for a decree of nullity of the marriage. Thereafter, they have not been able to live together and lived separately for more than 1 year. In effect, there appears to be no marital ties between the parties at all. It is only the provisions of Section 13-B(2) of the aforesaid Act which is keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in Section 13-B for grant of a decree of dissolution of marriage by the mutual consent is present in the instant case. It is only on account of the statutory cooling period of six months that the parties have to wait for a decree of dissolution of marriage to be passed.

13. In the above circumstances, in our view, this is one of those cases where we may invoke and exercise the powers

vested in the Supreme Court under Article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months.”

12. Learned counsel further refers to a decision dated 17th November, 2014 of the Supreme Court in *Civil Appeal No. 10561 of 2014 (Arising out of SLP(C) No. 13941 of 2013) Prachi Singh Patil Vs. Shri Rahul G. Patil*, wherein with reference to facts that for last more than six years efforts made for settlement had failed and ultimately the parties decided to reside separately by virtue of consent terms arrived at between them on 26th September, 2014. In the circumstances, the Supreme Court in exercise of power under Article 142 of the Constitution of India, declared the marriage to have been dissolved.

13. Thus, it is clear that, the Supreme Court had exercised the powers under Article 142 of the Constitution of India, when it had been not possible for the parties to live together.

14. Learned counsel for petitioners relying on aforesaid judgments urges to this court to pass order of waiver of expiry of statutory period of six months after institution of the proceedings

for divorce by mutual consent pursuant to section 13-B(2) of the Hindu Marriage Act, 1955.

15. However, I am required to take into account a decision by a learned single judge of this court in writ petition No. 9131 of 2011 (*Rachna Shailendrakumar Kasliwal Vs. The State of Maharashtra and another*) decided on 15-12-2011, wherein learned single judge declined the request of petitioners. It was urged before learned single judge that there is no embargo on the exercise of powers of court from considering the waiver of the period, and as such, there is no impediment. In that case, the parties were litigating for a year before the family court and during pendency of the proceedings parties had arrived at a consensus and filed the proceedings under section 13-B and considering all the aspects, it was urged that application for waiver of six months ought to have been allowed and a decree of divorce ought to have been passed. However, learned single judge considered that said issue is no longer *res-interga* referring to two decisions, one by the Supreme Court of India reported in 2009 (10) SCC 415 and another by a division bench of this high court reported in AIR 2009 Bombay 12 and considered that court has no jurisdiction to waive period of six months as required under section 13-B (2) of the Hindu Marriage Act, 1955. It was further considered that application for waiver does not spell out any undue hardship.

16. In present case, it appears that parties have been residing separately immediately after solemnization of their marriage i.e. after about a period of four days. The marriage had taken place in April-2012 and was dissolved by customary divorce in December-2014. The proceedings for divorce under Hindu Marriage Act, 1955 have been lodged in February-2015 and application Exhibit-10 for waiver of period has been moved in April-2015.

17. In the decisions which are sought to be relied on by the learned counsel for the petitioners, the facts are quite different from the facts in the present case. In one of the cases, the divorce proceedings were filed way back in 2006 and subsequently the parties decided to have divorce by mutual consent, as the proceedings which were already pending, the court decided to give proper treatment to period consumed by the same and decided granting of waiver after the parties went for divorce by mutual consent. In other case of the division bench, factual situation was different and customary divorce had been obtained and that *bonafide* belief led the parties to contract second marriage. In that case the court deemed it appropriate to invoke inherent powers.

18. So far as the case of Supreme Court is concerned, the Supreme Court invoked article 142 of the Constitution of India

and allowed the application for divorce by mutual consent by waiving the statutory period.

19. It would be useful to consider observations by the Supreme Court in paragraphs No. 27 to 31 in the case of *Anil Kumar Jain Vs. Maya Jain* reported in (2009)10 Supreme Court Cases 415, which read thus:

“27. In all the subsequent cases, the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution of India in order to do complete justice to the parties when faced with a situation where the marriage ties had completely broken and there was no possibility whatsoever of the spouses coming together again. In such a situation, this Court felt that it would be travesty of justice to continue with the marriage ties.

28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme court under Article 142 of the constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up to propositions. The first proposition is that although irretrievable breakdown of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955 for grant of divorce, the said doctrine can be applied to proceeding under either of the said two provisions only where the proceedings are

before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable breakdown of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on the grounds not provided for in Sections 13 and 13-B of the Hindu Marriage Act, 1955.

30. *The Second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other courts can exercise such powers. The other courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which in exercise of its extraordinary powers under Article 142 of the Constitution can pass orders to do complete justice to the parties.*

31. *The various decisions referred to above merely indicate that the Supreme Court can in special*

circumstances pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. The law is explained in Sureshta Devi Case still holds good, though with certain variations as far as the Supreme Court is concerned and that too in the light of Article 142 of the Constitution.”

20. Observations of the division bench of this court in the case of *Principal Judge, Family Court Nagpur Vs. Nil* reported in AIR 2009 Bombay, 12 are,

“The period specified by Legislature as prerequisite to filing and grant of a decree for divorce on mutual consent is expected to be complied with and its observance is not discretionary at the whim of the Court. The legislature scheme clearly shows that the specified periods are not optional for the parties to be complied with because the cause of action is completed only upon conclusion of the period and clearly mandates the Court to satisfy the requirements of law before passing a decree. The provisions of Section 13B(2) of the Act provide that parties should be given six months period to ponder and reconsider their decision which is obviously after filing of the first motion in terms of Section 13B(1) of the Act. This is a kind of benefit founded on social outlook and undisputed legislative intent. The parties are expected to consider whether their mutually taken decision to file a petition under Section 13B(1) was correct one and it should be affirmed by filing a second motion and praying for a decree of divorce on mutual consent or they should withdraw the first motion or render it

ineffective and live together if their marriage can be saved. The mutual consent ought to continue from the date of institution of first motion till passing of the decree. This is the significance of the provisions of Section 13B(2) of the Act. It will not only be unjust but would be impermissible on accepted norms of statutory interpretation that this period of six months is treated as optional, condonable or could be waived at the request of the parties. The law must be given a meaning that would be applicable and acceptable generally and not to a particular case. Firstly, the legislature has not provided any power of relaxation to the Court in regard to the stated period of six months under section 13-B(2). Secondly, if this procedure is adopted at the behest of the parties by the Court, it will amount to denial of a statutory benefit of rethinking. The period of six months is the product of the legislature and the Courts have always upheld its validity. To waive or abolish by judicial dictum a specific provision of the legislature would amount to negating a statutory provision which is otherwise constitutional and cannot easily be dropped in reality. No prejudice is caused to the parties by merely waiting for a short period of six months before they take a vital and pertinent decision in regard to their marriage which is a social sacrament coupled with civil rights and obligations and which they had entered upon voluntarily and happily. Impulsive and impatient decisions rarely guide the parties to the logical and correct decision. They must have time to ponder over their decision and reassure themselves that the decision of dissolving their marriage is correct and needs to be implemented. For arriving at such a vital decision the period of six months is to be held as mandatory and in conformity with the legislative intent it expressed in no uncertain terms in the relevant provisions.”

21. As such, the decisions which have been rendered in the cases relied on by the learned counsel, would not be able to assist petitioners in the present case, particularly when, in majority of cases the litigation went on for more than the period as required by statute, and in very peculiar and unusual facts courts have in some cases waived the period. Decisions relied upon on behalf of the petitioners may not assist the petitioners for waiver statutory period.

22. The division bench of this court in the decision reported in *AIR 2009 Bombay 12* has referred to rationale and reasons underlying the provisions of section 13-B of the Hindu Marriage Act, 1955 and the Supreme Court in the decision reported in *(2009)10 Supreme Court Cases 415*, has ruled that the Supreme Court can in exercise of extraordinary powers under Article 142 of the Constitution of India convert a proceeding under section 13 of Hindu Marriage Act, 1955 into one under section 13-B of Hindu Marriage Act, 1955 and pass decree of divorce by mutual consent without waiting for the statutory period of six months. The Supreme Court has also observed that neither civil courts nor even high courts can pass orders before the period prescribed under relevant provisions of the Act or on the grounds not provided for under sections 13 and 13-B of the Hindu Marriage Act, 1955.

23. In the present case, though the parties appear to have agreed for divorce, and contend to have arranged for their respective second marriages, no particulars have been given and though it is being urged that passage of six months would cause undue hardship to the petitioners, those have not been spelt out in the application. In such a case, the order impugned can hardly be faulted with.

24. Taking into account aforesaid and in the circumstances, I do not deem it appropriate to accede to earnest request being made by the petitioners under present writ petition.

25. Writ Petition, as such, stands dismissed. Rule stands discharged.

Sd/-

(SUNIL P. DESHMUKH, J.)

mtk
