

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.5481 of 2012

Date of decision: 02.03.2015

P.Sunder Raj

..... Appellant

Versus

P.Sarika Raj

..... Respondent

CORAM: HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MS. JUSTICE NAVITA SINGH

Present: Mr. J. D. Bhattacharaya, Advocate
for the appellant.

Mr. Sunder Singh, Advocate for the respondent.

S.S. SARON, J.

The appeal has been filed by the appellant P. Sunder Raj, husband of the respondent P. Sarika Raj, against the judgment and decree dated 07.06.2012 passed by the learned District Judge Family Court, Gurgaon whereby the petition of the respondent-wife seeking cancellation of the judgment and decree dated 05.01.2009 passed by the learned Family Court, Hyderabad in OP No.1083 of 2008 has been allowed.

The marriage between the parties was solemnized at Gurgaon on 30.10.2002. The marriage was an outcome of an affair that the parties had. From the marriage the parties had a son namely Vishwajit Raj, who was born on 21.08.2006 and a daughter namely Lakshita Raj, who was born on 22.11.2007. After marriage, the parties stayed at Hyderabad. On account of matrimonial dispute between them, the respondent-wife filed OP No.1083 of 2008 on 05.01.2009 in the Court of the learned Judge, Family Court at Hyderabad seeking dissolution of the marriage

between the parties on the grounds of cruelty. It was alleged that the dispute between the parties arose mainly from the rites, customs and habits that were followed. The appellant-husband and his parents, it was alleged, were treating the respondent-wife in a cruel manner for not following their customs. Therefore, it was prayed that a decree of divorce may be granted.

In the petition filed before the Family Court at Hyderabad, a memorandum of compromise stated to have been reached at on 04.01.2009 was filed. It was submitted that the said OP had been filed by the respondent-wife seeking a decree for dissolution of marriage between the parties. The relatives and elders of both the parties advised them to settle the matter amicably. As such both the parties decided to terminate the marital relationship between them. There was no chance of reconciliation between them; besides, there were serious differences between them which could not be compromised as both were not interested in marital life. Therefore, both of them realized that it was no longer possible for them to live together as husband and wife. In the said circumstances, the parties decided to move for consent divorce to avoid further legal proceedings. It was agreed that the custody of the two children shall be given to the appellant-husband. The respondent-wife was entitled to visitation rights at a convenient time and that the appellant would have no objection for the same. The respondent-wife it was recorded was doing a job and she had the capacity to maintain herself. Therefore, she was not claiming any permanent alimony or monthly maintenance from the appellant

or from the property or annual earnings or financial sources. The respondent-wife decided to leave her two children with the appellant-husband who was the natural guardian and decided not to claim her children in future. There was no collusion between the parties in filing the joint memo in the OP for consent decree for divorce. It was submitted that the above terms and conditions were accepted before elders and relatives of both the parties. Therefore, there was no collusion between them in entering into the memorandum of compromise, which was filed in the Court of the learned Judge, Family Court, Hyderabad.

The learned Judge, Family Court, Hyderabad changed the memo of parties from that of "P. Sunder Raj vs. P. Sarika Raj" to that of "P. Sarika Raj and P.Sunder Raj"; besides, in the head note of the petition, in the order that was passed as also in the decree-sheet it is mentioned; "Petition filed under Section 13-B of the Hindu Marriage Act, 1955 to dissolve the marriage between petitioner No.1 and petitioner No.2 performed on 14.08.2005 by mutual consent." In the order that was passed on 05.01.2009, it is mentioned that the petition was filed under Section 13 (1) (ia) of the Hindu Marriage Act by P. Sarika Raj against her husband P. Sunder Raj for divorce. It is further mentioned that both the petitioner and respondent were present and represented; that due to the intervention of their well-wishers and elders, they had settled their dispute amicably and requested to record the terms of compromise which was submitted to the Court along with the petition under Order 23 Rule 3 of the Code of Civil Procedure ('CPC'

- for short). Upon hearing the parties in person with their respective counsel, the petition under Order 23 Rule 3 CPC was allowed. The terms of the compromise and the passing of the order for dissolving the marriage are mentioned. A decree-sheet was also drawn up on 05.01.2009 on the basis that the petition had been filed under Section 13-B of the Hindu Marriage Act.

After the decree had been passed, OS No.468 of 2009 was filed by the respondent-wife in the Court of learned Family Judge, Hyderabad under Section 31 (1) and (2) of the Specific Relief Act, 1963 on 24.07.2009. Cancellation of the order and decree dated 05.01.2009 passed in OP No.1083 of 2008 was sought. It was alleged that the respondent-wife was made to sign the relevant papers by the appellant-husband under threat, coercion, fear of death, fraud and undue influence etc. and that the same were signed without even reading those papers and without her consent. The appellant-husband filed written statement to the plaint filed by the plaintiff (respondent-wife) seeking cancellation of the decree. The respondent-wife then filed Transfer Petition (C) Nos.908-911 of 2009 in the Hon'ble Supreme Court under Section 31 CPC seeking transfer of OS No.468 of 2009 filed by her under Section 31 (1) and (2) of the Specific Relief Act and other connected miscellaneous applications from the Family Court at Hyderabad to the Family Court at Gurgaon. The transfer application of the respondent-wife was allowed by the Hon'ble Supreme Court on 14.12.2009 and OS No.468 of 2009, OP No.103 of 2008 and connected miscellaneous applications were transferred from the

Family Court at Hyderabad to the District Judge, Gurgaon. The case was then transferred to the District Judge, Family Court at Gurgaon.

The District Judge, Family Court, Gurgaon vide impugned judgment and decree dated 07.06.2012 accepted the petition of the respondent-wife and cancelled the judgment and decree dated 05.01.2009 passed in OP No.1083 of 2008 by the learned Family Court at Hyderabad. The appellant aggrieved against the same has filed the present appeal.

Mr. J. D. Bhattacharaya, Advocate learned counsel appearing for the appellant has contended that the respondent-wife after having validly entered into a compromise and signed the memorandum of compromise, on the basis of which the judgment and decree dated 05.01.2009 was passed by the learned Family Court at Hyderabad in OP No.1083 of 2008, had no right to resile or back out from the same and seek its cancellation. In any case it is submitted that the petition for cancellation of the decree dated 05.01.2009 was not maintainable before the Family Court and only the appropriate Court which may be the Civil Court had the jurisdiction to entertain and try such a petition. It is submitted that the fact that the Family Court allowed the divorce petition vide impugned judgment and decree dated 05.01.2009 without waiting for the period of six months would not invalidate the said impugned judgment and decree dated 05.01.2009 and at the most it would be only an irregular decree, which can only be set aside in accordance with law i.e. by way of a civil suit in the Civil Court or an appeal and not by a suit or a petition under Section 31 (1) and (2) of the

Specific Relief Act, before the Family Court. Insofar as the waiting period of six months is concerned, learned counsel for the appellant has laid considerable emphasis on the fact that the Family Court can evolve its own procedure for deciding the disputes for settlement in terms of Section 10 (3) of the Family Courts Act, 1984 ('1984 Act' – for short). Therefore, it is submitted that the learned District Judge, Family Court gravely erred in law and facts in entertaining the suit and in fact it had no jurisdiction to do so as it does not have the trappings of a Court to invalidate a decree of the Family Court.

In response, Mr. Sunder Singh, Advocate learned counsel appearing for the respondent has contended that the judgment and decree dated 07.06.2012 passed by the learned Family Court at Gurgaon is perfectly valid and legal. It is submitted that in the heading and prayer of the petition that was filed under Section 25 CPC in the Supreme Court, it was mentioned for transfer of the case from Family Court, Hyderabad to the Family Court, Gurgaon. However, no objection was raised by the appellant regarding lack of jurisdiction of the Family Court either at Hyderabad or at Gurgaon before the Supreme Court nor was any such objection recorded by the Supreme Court in its order while transferring the petition. Even in the written statement filed by the appellant before the learned Family Court, Gurgaon, it is submitted that no objection regarding lack of jurisdiction was raised. It is only during the course of proceedings that the appellant filed an application raising objection of lack of jurisdiction of the learned Family Court, Gurgaon and that too without amending his written

statement. The learned Judge, Family Court, Gurgaon disposed of the objection regarding jurisdiction vide order dated 09.12.2011 by observing that issue No.2 regarding maintainability of the petition had already been framed and would be decided at the time of final decision after recording evidence. It is submitted that OP No.1083 of 2008 and OS No.468 of 2009 arise out of the same marital relationship. Therefore, in accordance with Section 7 (1) (a) and (b) read with the 'Explanation' of the 1984 Act, the Family Court has jurisdiction to entertain such a petition. It is submitted that the dispute being essentially a matrimonial one, it is the Family Court alone that has jurisdiction to entertain and try the petition.

We have given our thoughtful consideration to the contentions of the learned counsel appearing for the parties and with their assistance perused the record.

The primary question that requires consideration is whether a Family Court constituted under the 1984 Act, has the jurisdiction to set aside or nullify a decree passed by it or by a coordinate Court or whether a decree of a Family Court can only be set aside in a declaratory suit before a regular Civil Court. In order to consider the question, the provisions of Section 7 of the 1984 Act may be noticed which deals with the jurisdiction of the Family Court. Section 7 reads as follows:-

- 7. Jurisdiction.**— (1) Subject to the other provisions of this Act, a Family Court shall—
- (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate

civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the *Explanation*; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit of proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit of proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the Jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment. (Emphasis added).

A reading of the above provision shows that a Family Court subject to the provision of the 1984 Act has and exercises all jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature that are referred to in the 'Explanation'; besides, it is deemed for the purposes of exercising such jurisdiction under such law, to be a District Court, or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. In terms of the 'Explanation' to Section 7 of the 1984 Act various nature of proceedings are mentioned in respect of which the Family Court

exercises its jurisdiction which are primarily in relation to family disputes. The Family Court when it exercises its jurisdiction with respect to matters that are referred to in the 'Explanation' does exercise the powers of a Civil Court. Clause (b) of the 'Explanation' dealing with nature of the proceeding envisages a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person. Section 8 of the 1984 Act envisages that no District Court or any Subordinate Civil Court would have jurisdiction over matters which have been specifically spelled out under Section 7 (1) of the 1984 Act in relation to the area over which the Family Court exercises jurisdiction.

The petition/suit filed by the respondent-wife was for declaring the judgment and decree dated 05.01.2009 passed by the learned Family Court at Hyderabad to be a nullity and for cancellation of the same. The outcome of the suit filed by the respondent-wife relates to the determination of her matrimonial status, that is to say, as to whether she is or she is not the wife of the appellant. As is well known a judgment of a Matrimonial Court is a judgment *in rem* in terms of Section 41 of the Indian Evidence Act, 1872. The said provision envisages that a final judgment, order or decree of a competent Court, in exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal

character, or the title of any such person or to any such thing, is relevant. Such judgment, order or decree is conclusive proof that any legal character which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person; that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

The decree of the Family Court by which the matrimonial relationship between the parties stands terminated declares the legal character of the parties of cessation of their being husband and wife respectively of the other. By the subsequent suit that had been filed by the respondent is for determining her matrimonial status as wife of the appellant for which the Family Court would indeed have the jurisdiction in terms of Clause (b) of the 'Explanation' to Section 7 (1) of the 1984 Act. The mere fact that the marriage between the parties had been dissolved by a decree of the Family Court at Hyderabad passed on 05.01.2009 would not mean that the Family Court cannot exercise jurisdiction where question of matrimonial status of the parties is involved.

In **K. A. Abdul Jaleel v. T. A. Shahida**, AIR 2003 SC 2525, the question that was considered was whether the Family Court has jurisdiction to adjudicate upon any question relating to the properties of divorced parties. After referring to the Statement of Objects and Reasons, it was held that the same clearly go to show that the jurisdiction of the Family Court extends *inter alia*, in relation to properties of spouse or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of the other, irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise. The submission of the learned counsel to the effect that the Supreme Court should read the words "a suit or proceeding between the parties to a marriage" as mentioned in 'Explanation' (c) of Section 7 (1) of the 1984 Act as parties to a subsisting marriage, it was in the considered view of the Supreme Court lead to miscarriage of justice. It was held that it is now well-settled principle of law that the jurisdiction of Court created specially for resolution of disputes of certain kinds should be construed liberally and the restricted meaning if ascribed to the 'Explanation' (c) of Section 7 (1) of the 1984 Act would frustrate the object for which the Family Courts were set up.

Therefore, a restricted meaning on the question of determining the matrimonial status of a person by a Family Court set up for the purpose is not to be given and the dispute is not to be restricted to parties to a subsisting marriage.

Section 10 of the 1984 Act provides for procedure generally. It is provided that subject to other provisions of the said Act and the rules, the provisions of CPC and of any other law for the time being in force shall apply to suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) before a Family Court and for the purposes of the said provision of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court. In terms of Sub Section (3) of Section 10 nothing in Sub Section (1) prevents a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the fact alleged by one party and denied by the other.

The said provisions show that a Family Court when exercising powers and jurisdiction relating to matters referred to in the 'Explanation' to Section 7 (1) is a Civil Court and for nature of proceedings mentioned in the 'Explanation' it has all powers, jurisdiction and trappings of a Civil Courts.

Learned counsel for the appellant has, however, laid considerable emphasis on the fact that the Family Court has no jurisdiction to set aside a decree of a Family Court and it is only a regular Civil Court that can do so. In support of his contention, learned counsel has placed strong reliance on a judgment of the Supreme Court in **S.D. Joshi and others v. High Court of Judicature at Bombay and others**, (2011) 1 SCC 252. In the said case, the following questions were considered:

(a) What is the scope of the expression "judicial office" appearing in Article 217 (2) (a) of the Constitution?

(b) Whether a "Family Court" has the trappings of a court and the Family Court Judges, being the Presiding Officers of such courts, on the claimed parity of jurisdiction and functions, would be deemed to be the members of the Higher Judicial Services of the State?

(c) If answer to the above question is in the affirmative, then whether the Family Court Judges are eligible and entitled to be considered for elevation as Judge of the High Court in terms of Article 217 of the Constitution of India?

In the said case, the Bombay High Court issued an advertisement inviting applications for seven posts of Family Court Judges in the State of Maharashtra. The advertisement contained various conditions for eligibility for consideration for appointment as also certain service conditions. The selected candidates were appointed as Judges of the Family Court and some of them thereafter were appointed as Principal Judges of the Family Court. The petitioners in the said case contended that the Judges of Family Court hold a 'Judicial Office' and they discharge judicial functions and as such are entitled to be considered for elevation to the Bench of Bombay High Court. To elucidate the argument it was contended that the appointment to the post of Judge of the Family Court is

made under the statutory rules, their duties and responsibilities of a Judge of the Family Court were similar to that of the duties and responsibilities of a Judge of the City Civil Court and in short they performed similar duties as that of any other Court and appeal against the orders passed by a Judge of the Family Court lies to the High Court.

The Supreme Court held that a Family Court in a strict sense is a Tribunal, which is a part of the ordinary hierarchy of Courts of Civil Judicature maintained by the State under its Constitution to exercise the judicial power of the State. These Courts performed all the judicial functions of the State except those that are excluded by law from their jurisdiction.

Learned counsel for the appellant has laid emphasizes to the observations of the Hon'ble Supreme Court in the said case that where the jurisdiction of the Civil Courts and the Criminal Courts in relation to the matter specified in Section 7 (1) of the 1984 Act were specifically excluded, therefore, it also necessarily implies that the Family Courts have the jurisdiction only to deal with the matters specified in the 'Explanation' to Section 7 (1) and none other. In order to clearly understand the object of the legislature in establishing Family Courts, a reference was made to the 59th Report of the Law Commission recommending that the Court, in dealing with the disputes concerning family, ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts for an amicable settlement before the commencement of the trial. The

same view was reiterated in the 230th Report of the Law Commission. The primary purpose of the Family Court was to promote conciliation and amicably settle the matters relating to matrimonial and family disputes rather than adjudicate on the same. It was held that a Family Court is a court of limited jurisdiction.

This, however, in no manner means that a Family Court in respect of the nature of proceedings referred to in Section 7 (1) and the 'Explanation' thereto under the 1984 Act does not have the trappings of a Civil Court for adjudicating the nature of proceedings that are referred to therein and it would only be the domain of a regular Civil Court to set aside the decree. The said findings and observations in fact clearly envisage that the Family Court has the jurisdiction to deal only with the matters specified in the 'Explanation' to Section 7 (1) and none other.

The jurisdiction exercised by the Family Court in the present case falls within the ambit and scope of Clause (b) of the 'Explanation' to Section 7 (1) of the 1984 Act inasmuch as the question of matrimonial status of the respondent as the wife of the appellant was in issue. It also somewhat falls within the parameters of Clause (d) of the 'Explanation' to Section 7 (1) of the 1984 Act inasmuch as the same relates to a suit in circumstances arising out of a marital relationship. Even otherwise, the said case of S.D. Joshi and others v. High Court of Judicature at Bombay and others (supra), was in relation to the question as to whether a Judge of a Family Court is entitled to consideration for elevation as a Judge of

the High Court and not that a Family Court does not have the jurisdiction in relation to the nature of proceedings that are mentioned in 'Explanation' to Section 7 (1) of the 1984 Act. However, according to learned counsel for the appellant even an *obiter dictum* of the Supreme Court would be binding and it is to be treated as a law. A reference in this regard has been made to the case of **Oriental Insurance Company Ltd. v. Meena Variyal and others**, Appeal (Civil) No.5825 of 2006 decided on 02.04.2007, AIR 2007 SC 1609, wherein it has been inter alia held as follows:-

“An *obiter dictum* of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority.”

The said contention, however, is quite inconsequential in the facts of the present case as the petition/suit filed by the respondent falls within the 'Explanation' to Section 7 (1) of the 1984 Act. Besides, a restricted meaning on the question of determining the matrimonial status of a person by a Family Court set up for the purpose is not to be given and the dispute is not to be restricted to parties to a subsisting marriage.

Learned counsel for the appellant has contended that the nature of the suit before the learned Judge Family Court, Gurgaon was one seeking cancellation of an instrument, that is, the decree of the Family Court at Hyderabad dated 05.01.2009 which

does not fall in any of the clauses of Section 7 (1) of the 1984 Act. In support of his contention he has laid emphasis on the case of **Genu alias Ganu and others v. Jalabai and others**, ILR 2009 Karnataka 612.

In the said case, the averments as made in the plaint filed by the plaintiffs therein *inter alia* alleged that the plaintiffs were members of a Hindu Undivided Family of the first defendant and the suit properties were ancestral and joint family properties of the plaintiffs and the first defendant. Besides, the first defendant had no independent right. It was held that the property dispute was not between the parties to the marriage only. Rather it was a dispute between parties to the marriage as well as between their children. The subject matter of the suit was not a property exclusively belonging to the party or either of them. It belonged to the joint family in which the persons other than parties to the marriage had an interest. Therefore, it was held that the Family Court had no jurisdiction to adjudicate disputes between the parties other than parties to the marriage.

In the present case, however, the case relates to a matrimonial dispute between parties to the marriage and the respondent-wife seeks determination of her status as the wife of the appellant, which would fall under Clause (b) of the 'Explanation' to Section 7 (1) of the 1984 Act. Besides, the suit filed by the respondent-wife arises out of marital relationship. The dispute in the present case is only between the parties to the marriage and none other.

Learned counsel for the appellant has drawn a distinction between an irregular decree and a void decree. It is submitted that the learned Judge Family Court, Gurgaon erred in holding that the judgment and decree dated 05.01.2009 was void and a nullity as the learned Judge, Family Court, Hyderabad did not have the jurisdiction to grant divorce by mutual consent by invoking the provisions of Order 23 Rule 3 CPC in a divorce petition pending before it. It is contended that the said finding is erroneous as a decree for divorce had been granted on a petition filed under Section 13-B of the Hindu Marriage Act; besides, in terms of Section 10 (3) of the 1984 Act, a Family Court can lay down its own procedure with a view to arrive at a settlement in respect of subject matter in a suit proceeding. A reference has been made to the case of **Rafique Bibi (D) through LRs v. Syed Walluidin (D) through LRs and others**, (2004) 1 SCC 287 to contend that a distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down by a law.

In the said case, a suit was filed by the landlord against their tenant in respect of the suit premises alleging that the tenants had defaulted in payment of rent for a period running over three years. A demand cum quit notice was served on the tenants which having not been complied with rendered the tenants liable for eviction in terms of Clause (a) of Sub Section (1) of Section 13 of the Delhi and Ajmer Rent Control Act, 1952. The suit was decreed

by the High Court holding that landlord-tenant relationship was proved and the tenant having incurred liability for eviction on the ground of default in payment of rent as had been alleged by the landlords. It was at the time of execution of the decree that an objection as to its execution was raised submitting that during pendency of the suit, by the effect of reorganization of States, Ajmer became part of Rajasthan with effect from 01.11.1956 and the suit premises came to be governed by the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and Section 13 (1) (a) of the Rajasthan Act conferred an additional privilege on the tenant that in a suit seeking eviction on the ground of default in payment of rent, the tenant may, during pendency of the suit deposit the amount of rent in arrears with interest and costs as directed by the Court and in that event a decree for eviction could not be passed. It is in the said context that the distinction between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down in the law was held to exist. In the said context it was held that a decree suffering from illegality or irregularity of procedure cannot be termed as not executable by the Executing Court and the remedy of a person aggrieved by such a decree was to have it set aside in a duly constituted legal proceedings or by a superior Court failing which he must obey the command of the decree. A decree passed by a Court of competent jurisdiction, it was held cannot be denuded of its

efficacy by any collateral attack or in incidental proceedings. The ratio of the said judgment is inapplicable to the present case in which the decree of a competent Court i.e. the Family Court at Hyderabad is sought to be got set aside so as to determine the matrimonial status of the respondent. Besides, the decree of the Family Court at Hyderabad has been passed in violation of the statutory provisions of Section 13-B of the Hindu Marriage Act inasmuch as the waiting period of six months between the filing of the petition and passing of the decree was not adhered to which is mandatory. Rather, a shortcut was made and the mandatory provisions circumvented by resorting to the provisions of Order 23 Rule 3 CPC. Such a decree though of a valid Court can be got set aside in accordance with the provisions of Chapter V of the Specific Relief Act, 1963 which relates to 'Cancellation of Instruments'. Section 31 of the Specific Relief Act envisages as to, 'When cancellation may be ordered'. It is provided that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

The respondent-wife filed a petition/suit seeking cancellation of the decree dated 05.10.2009 passed by the learned Family Court at Hyderabad as it affects her matrimonial status as wife of the appellant. Therefore, the Family Court at Gurgaon to which the petition of the respondent seeking setting aside of the

decree dated 05.01.2009 passed by the Family Court at Hyderabad had been transferred by the Hon'ble Supreme Court in Transfer Petition (C) Nos.908-911 of 2009 under Section 25 CPC, had the jurisdiction to entertain and try the petition and grant the relief prayed for. This is for the reasons that the suit/petition filed by the respondent-wife was/is for the determination of her status as wife of the appellant which falls under clause (b) of the 'Explanation' to Section 7 (1) of the 1984 Act. Besides, in terms of Section 7 (1) (a) of the 1984 Act the Family Court has and exercises all the jurisdiction exercisable by any District Court or any subordination Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the 'Explanation' thereto. In terms of Section 7 (1) (b) of the 1984 Act, a Family Court is deemed to be for the purposes of exercising such jurisdiction under such law, to be a District Court, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

On the facts of the case it is contended by learned counsel for the appellant that the impugned judgment and decree dated 07.06.2012 passed by the learned Judge, Family Court, Gurgaon is not sustainable as he failed to consider glaring discrepancies in the testimony of the respondent-wife. It is submitted that in Para 13 of the examination in chief of the respondent-wife, it is stated that the respondent (now appellant) filed a petition for divorce through his own counsel before the learned Family Judge, City Civil Court, Hyderabad on her behalf and

he got her signatures on several papers under threat and coercion; besides, got the said divorce petition filed. It is also further stated that divorce petition bearing OP No.1083 of 2008 was got filed by her on her behalf from his own advocate i.e. the appellant's advocate at Hyderabad. It is further stated that in the month of September, 2008 the respondent (now appellant) approached her with some documents and forced her to sign the said documents without reading them. When she refused, the respondent (now appellant) came with a pistol and threatened to kill her. She under the fear of her life and that of her children had signed the documents without reading the contents and consequences of the same. However, in cross examination it is stated that she had seen the original divorce paper in the summoned file which bears her signatures and then it is voluntarily stated that the signatures were taken from her by the respondent by force. She had signed below the verification of plaint, that is, OP No.1083 of 2008. She was taken to the Court premises and she signed outside the courtroom; besides, on that day i.e. 18.09.2008 she had gone to the Court premises. However, she remained outside the court premises. It is stated as incorrect to suggest that OP No.1083 of 2008 was got signed from her at her residence and then she voluntarily stated that some documents were got signed from her by the respondent (now appellant) at home.

On the strength of the said examination in chief and the cross examination of the respondent-wife, it is sought to be contended by the learned counsel for the appellant that the

documents with respect to the divorce petition and the memorandum of compromise on the basis of which divorce was granted by the learned Judge, Family Court, Hyderabad were got executed by the appellant by putting the respondent-wife under fear of death. However, during cross-examination she easily identified the documents signed by her and pinpoint the exact position where she had signed. Therefore, according to learned counsel for the appellant, this clearly implied that the divorce petition had been signed by the respondent-wife after reading them.

As regards the compromise also it is contended that in examination in chief, the respondent-wife states that the respondent (now appellant) forced her to sign some legal papers and she had to sign without reading them. It is further stated that the respondent (now appellant) forced her to sign by pointing a pistol. However, in cross examination she identifies her signatures on the memorandum of compromise which were obtained by the respondent (now appellant) outside the courtroom without allowing her to go through the contents. Therefore, it is contended that the documents were signed outside the court premises and the question of getting them signed under threat or coercion much less by pointing a pistol does not arise. A further reference has been made regarding the respondent wife being aware of the settlement entered into by her with the appellant. A reference has been made to her amended plaint in which it is admitted by the respondent-wife that she was willing for the divorce, give up custody of the

children, was content with visiting rights and was not to claim future maintenance or share in the property. She was then asked to leave the Court without knowing further proceedings. It is further stated that she was forced to tell the Hon'ble Judge at Hyderabad that she was willing to give up a custody of the children; besides, she did not know Telgu language. It is submitted that the respondent-wife stated that the presiding officer asked her something in Telgu language and she nodded her head because she had been sent in the Court room. She did not make any complaint before the Presiding Officer that she was sent in the Court after threatening her. She did not raise any noise that she was brought to the Court by her husband after holding out threats. It is submitted that the bald averments made by the respondent that she did not understand Telgu language loses steam in view of her categorical admission. Even otherwise the judgment and order dated 05.01.2009 being a public document, the onus to prove as to its validity lies on the respondent. Certain other intervening factors have been referred to, that is, the respondent-wife had remarried on 11.04.2012 when the decree was valid. She had cited difficulty in travelling from Gurgaon to Hyderabad for transfer of the case from the Supreme Court; besides, filed other cases against him, which are illustrative of the fact that the respondent is harassing the appellant.

In response learned counsel for the respondent-wife has submitted that the decree dated 05.01.2009 passed by the learned Judge, Family Court, Hyderabad is per se illegal inasmuch as

divorce by way of compromise could not have been granted without the waiting period of six months to lapse after the recording of initial statement at the first motion. Besides, the waiting period of six months after recording statement at first motion could not be waived by recording a compromise in terms of Order 23 Rule 3 CPC. It is submitted that the contention that the respondent-wife has solemnized a second marriage, is clearly erroneous as no such second marriage has been performed by her. The same is clearly a baseless and wild allegation, which is not substantiated by any material on record. As regards the other cases filed by the respondent wife, it is submitted that the respondent is pursuing her bona fide legal rights by filing the suits and the same are not for harassing the appellant as alleged.

It may be noticed that a decree for divorce had been passed by the learned Judge, Family Court at Hyderabad on 05.01.2009. A reading of the order dated 05.01.2009 passed by the learned Judge, Family Court at Hyderabad shows that in the head note of the order it is mentioned as; "Petition filed under Section 13-B of the Hindu Marriage Act to dissolve the marriage between petitioner No.1 and petitioner No.2 performed on 14.08.2005 by mutual consent." However, while passing the order it is mentioned that the petition is filed under Section 13 (1) (ia) of the Hindu Marriage Act by Smt. Sarika Raj against her husband P Sunder Raj, for divorce. Thereafter, it is mentioned that both the parties were present and represented that due to the intervention of their well wishers and elders, they had settled their dispute amicably and

requested to record the terms of the compromise which were submitted to the Court along with a petition under Order 23 Rule 3 CPC. Upon hearing the parties in person and their respective counsel, the petition under Order 23 Rule 3 CPC was allowed.

It is then mentioned that as per the terms of the compromise, the custody of the minor children of the parties namely Gopi Hotri Vishwajeet Madanraj aged about 2½ years and daughter Lakshita Raj aged 1½ years shall continue with the respondent/father (now appellant). The petitioner/mother (now respondent) it was held shall have visitation rights over their minor children on week ends from 10.00 am on Saturday till 5.00 pm on Sunday and even during holidays. It is further mentioned that the petitioner wife (now respondent) has given up all her rights with regard to maintenance or permanent alimony. In view of the settlement arrived at between the parties, the OP was allowed and marriage between the parties dated 14.08.2005 was dissolved by granting divorce.

In the decree-sheet that was drawn up in consequence of the order that was passed, it is mentioned that the petition was presented on 05.01.2009, it was numbered on 03.11.2009 and cause of action arose on 14.08.2009. Therefore, it is quite evident that the decree for divorce by mutual consent was passed on the same day, the petition was filed.

The said order dated 05.01.2009 apparently does not make any mention of the waiting period of six months between the statements recorded at the first motion and the second motion had

lapsed. The ingredients of Section 13-B of the Hindu Marriage Act are not shown to have been complied with. Section 13-B of the Hindu Marriage Act reads 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, 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.”

The requirements of Section 13-B of the Hindu Marriage Act for grant of divorce are that the parties had been living separately for a period of one year or more at the time of filing the petition and that they had not been able to live together, besides, they had mutually agreed that the marriage should be dissolved. On a motion of both the parties made not earlier than six months after the date of the presentation of the petition and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage had been solemnized and that the averments in the petition were true, is to pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. The said ingredients are not shown to have been followed and complied with in the order and consequent decree dated 05.01.2009 passed by the learned Judge, Family Court, Hyderabad.

The waiting period of six months from the presentation of the petition for divorce by mutual consent is mandatory and is not to be dispensed with. The Supreme Court in **Smt. Sureshta Devi v. Om Parkash**, AIR 1992 SC 1904 has observed as follows:-

“From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum is

obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both."

Their Lordships further observed:

"... What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

Sub-section (2) requires the Court to hear the

parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the Court cannot pass a decree of divorce by mutual consent. If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a *sine qua non* for passing a decree for divorce under Section 13-B. Mutual Consent should continue till the divorce decree is passed. It is a positive requirement for the Court to pass a decree of divorce."

A Division Bench of this Court in **Charanjit Singh Mann v. Neelam Mann**, 2006 (2) RCR (Civil) 497 held that the waiting period of six months for grant of divorce by mutual consent is mandatory from the date of presentation of the petition and it cannot be waived.

In **Devinder Singh Narula v. Meenakshi Nangia**, (2012) 8 SCC 580, at page 583 it was observed by the Supreme Court that Section 13-B of the Hindu Marriage Act itself provides for a cooling off period of six months on the first motion being moved, in the event the parties change their minds during the said period. Accordingly, after the initial motion and the presentation of the petition for mutual divorce, the parties are required to wait for a period of six months before the second motion can be moved, and

at that point of time, if the parties have made up their minds that they would be unable to live together, the court, after making such inquiry as it may consider fit, grant a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. It was further observed that it is no doubt true that the legislature had in its wisdom stipulated a cooling off period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. It was observed to be true that the intention of the legislature could not be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for the Supreme Court to invoke its powers under Article 142 of the Constitution in an irreconcilable situation. In different cases, in different situations, it was observed that the Supreme Court had invoked its powers under Article 142 of the Constitution in order to do complete justice between the parties. Though their Lordships were not inclined to accept the proposition that in every case of dissolution of marriage under Section 13-B of the Hindu Marriage Act, the Supreme Court has to exercise its powers under Article 142 of the Constitution. The Supreme Court was of the opinion that in appropriate cases invocation of such power would not be unjustified and may even prove to be necessary.

Therefore, the waiting period of six months is mandatory. The Supreme Court, however, in exercise of its plenary jurisdiction can dispense with the same. The learned Judge, Family

Court at Hyderabad, however, was not liable to and in fact could not have dispensed with the waiting period of six months between the first motion of filing the petition and the second motion, and pass the impugned judgment and decree dated 05.01.2009. In fact it has not even been mentioned in the said impugned decree that the waiting period is being dispensed with. Rather an application/petition under Order 23 Rule 3 CPC was entertained and a decree of divorce passed on the said basis.

A decree for divorce by mutual consent can be passed and is liable to be passed where the parties seek divorce by mutual consent only by resort to the specific provisions of Section 13-B of the Hindu Marriage Act and not otherwise. It is well settled that where a power is given to do certain thing in a certain way, that must be done in that way alone or not at all and all other methods of performance are necessarily forbidden. Therefore, the statutory provisions which have been enacted for grant of divorce by mutual consent are to be adhered to and these cannot be circumvented or short circuited by resort to other procedure like Order 23 Rule 3 CPC and grant a divorce by dispensing with the requirements contained in Section 13-B of the Hindu Marriage Act.

Insofar as the other contentions of the learned counsel for the appellant are concerned that the impugned judgment and decree dated 07.06.2012 passed by the learned Judge, Family Court, Gurgaon is not sustainable as the Court failed to consider glaring discrepancies in the testimony of the respondent-wife inasmuch as in Para 13 of her examination in chief, she stated that

the appellant filed a petition for divorce through his own counsel before the learned Family Judge, City Civil Court, Hyderabad on her behalf and he got her signatures on several papers under threat and coercion, besides, got filed the divorce petition bearing OP No.1083 of 2008 on her behalf from his own advocate at Hyderabad and that in the month of September, 2008 the appellant approached her with some documents and forced her to sign the said documents without reading them and when she refused, the appellant came with a pistol and threatened to kill her and she under the fear of her life and that of her children had signed the documents without reading the contents and consequences of the same; however, in cross examination it is stated by the respondent-wife that she had seen the original divorce paper in the summoned file which bears her signatures and then it is voluntarily stated that the signatures were taken from her by the respondent by force and she had signed below the verification of plaint, that is, OP No.1083 of 2008 and she was taken to the Court premises and she signed outside the courtroom; besides, on that day i.e. 18.09.2008 she had gone to the Court premises, however, she remained outside the court premises and it is stated as incorrect to suggest that OP No.1083 of 2008 was got signed from her at her residence and then she voluntarily stated that some documents were got signed from her by the respondent (now appellant) at home, are of no consequence as the decree dated 05.01.2009 passed by the learned Family Court at Hyderabad are in any case in gross violation of the provisions of Section 13-B of the Hindu Marriage Act.

The further contention of the learned counsel for the appellant on the strength of the examination in chief and the cross examination of the respondent-wife, that the documents with respect to the divorce petition and the memorandum of compromise on the basis of which divorce was granted by the learned Judge, Family Court, Hyderabad were got executed by the appellant by putting the respondent-wife under fear of death, however, during cross-examination she easily identified the documents signed by her and pinpoint the exact position where she had signed and this according to the learned counsel for the appellant, clearly implied that the divorce petition had been signed by the respondent-wife after reading all the necessary documents and pleadings, are also not of much consequence or significance for the same reason that the statutory requirement of passing the decree in accordance with the provisions of Section 13-B of the Hindu Marriage Act were not followed or adhered to, which vitiates the impugned decree.

The fact that the impugned decree dated 05.01.2009 was passed by the learned Family Court at Hyderabad on the date it was filed and that also by way of a compromise in terms of Order 23 Rule 3 CPC is not understandable. The discrepancies as have been stated by the learned counsel for the appellant in fact do not in any manner show that the judgment and decree dated 05.01.2009 was validly passed by the learned Family Court at Hyderabad and in fact the same being passed on the date the petition was filed gives the impression that it was a hasty decision.

A further reference has been made regarding the respondent-wife being aware of the settlement entered into by her with the appellant. A reference has also been made to the amended plaint of the respondent-wife in which it is admitted by her that she was willing to the divorce, give up custody of the children, be content with visiting rights and not claim future maintenance or share in the property. She was then asked to leave the Court without knowing further proceedings. It is further stated by her that she was forced to tell the Hon'ble Judge at Hyderabad that she was willing to give up a custody of the children; besides, she did not know Telgu language. It is submitted by the respondent-wife that the presiding officer asked her something in Telgu language and she nodded her head because she had been sent in the Court room. She did not make any complaint before the Presiding Officer that she was sent in the Court after threatening her. She did not raise any noise that she was brought to the Court by her husband after holding out threats. It is submitted that the bald averments made by the respondent that she did not understand Telgu language loses steam in view of her categorical admission. Even otherwise the judgment and order dated 05.01.2009 being a public document, the onus to prove as to its validity lies on the respondent. Certain other intervening factors have been referred to that is she had remarried on 11.04.2012 when the decree was valid. She had cited difficulty in travelling from Gurgaon to Hyderabad for transfer of the case from the Supreme Court; besides, filed other cases against him, which are

illustrative of the fact that the respondent is harassing the appellant.

The said contentions of the learned counsel for the appellant also are not of much consequence or significance as the decree dated 05.01.2009 passed by the learned Judge Family Court at Hyderabad was otherwise not validly passed.

For the foregoing reasons there is no merit in the appeal and the same is accordingly dismissed.

(S.S. SARON)
JUDGE

(NAVITA SINGH)
JUDGE

02.03.2015
A.Kaundal/amit

Note: Whether to be referred to the Reporter: Yes/No