

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1280 OF 2016

Melvin Pascoal Fernandes and anr. .. Petitioners
vs.
State of Maharashtra .. Respondent

Ms Shabnam Latiwala for the Petitioners.
Mr. A.R. Metkari, AGP for State- Respondent.

CORAM : M. S. SONAK, J.
DATE : 25 FEBRUARY 2016.

P.C. :-

1] In this petition, the challenge is primarily to the order dated 4 January 2016 made by the Family Court at Bandra, adjourning the hearing of Petition No.F-2263 of 2014 by six months, i.e., upto 6 July 2016. The Roznama, in which, the order is transcribed was made available to the Petitioners just yesterday. Accordingly, leave is granted to the Petitioners to formally annex the impugned order dated 4 January 2016 to this petition, so that the challenge to the same can be appropriately considered. Amendment to be carried out forthwith.

2] The Petitioners Melvin Fernandes and Charmaine M. Fernandes, both are catholics by religion, were married on 20 January 2002 under the provisions of Special Marriage Act, 1954. They have one daughter viz. Minovshka. Mr. Melvin is gainfully

employed in Australia. Ms Charmaine is employed on Cruise Liner. They state that since 2009 they have been living apart on account of irreconcilable differences between them. Despite efforts, they have not been in a position to resolve their differences.

3] Accordingly, both Melvin and Charmaine applied to the Family Court under the provision of 10-A of the Divorce Act, 1869 (said Act) for dissolution of their marriage by mutual consent. The petition in this regard, which is now numbered as Petition No. F-2263 of 2014 was presented 7 November 2014 registered on 18 November 2014. The aforesaid petition was duly signed and verified by Melvin before the High Commission at Australia. Ms Charmaine has also signed the petition in Mumbai itself. As Melvin was unable to come to India, at the time of presentation of the petition, the same was presented through his duly constituted power of attorney. The petition was duly received by the Family Court and ordered to be registered without any objection.

4] Section 10-A of the said Act, *inter alia*, provides that a petition for dissolution of marriage may be presented to the District Court by both the parties together, on the ground that they have been living

separately for a period of two years or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. On the motion of both parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months from the date of presentation of the petition, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such enquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

5] Accordingly, after the period of six months from the date of presentation of the petition, but before expiry of eighteen months from such date, both Melvin and Charmaine appeared before the Family Court on 4 January 2016 and are reported to have stated that they stand by the decision which is expressed by them in their petition seeking dissolution of the marriage by mutual consent. They also placed on record consent terms, in which, necessary provisions have been made with regard to custody of Minovshka, distribution of immovable properties etc.. On the said date, the parties requested

the Family Court to make necessary orders in terms of Section 10-A of the said Act.

6] However, on the said date, the Family Court made order dated 4 January 2016, which reads thus:

04/1/16

Resumed

Both parties are present. Both referred to Shri. Shivde, MC

5 *RMC*

Adj. for RMC/HRG 6/7/16

sd/-

Judge

7] The aforesaid means that on the same date, the parties were referred to Marriage Councilor Shri. Shivde. This is confirmed by the learned counsel for the Petitioners. The parties conferred with Mr. Shivde, Mr. Shivde, MC has also submitted Report on the same date. The learned counsel for the parties states that the parties have no access to such report, but they submitted that in all probabilities the Report is to the effect that conciliation is not possible between the parties and therefore, the proposal for dissolution of marriage by mutual consent may be accepted.

8] Melvin is present in the Court today. However, Ms Charmaine is unable to remain present in the Court, as she is on duty as a

Cruise Liner. However, she is represented by Ms Philomena Fernandes, who is her close relative. Both Melvin and Ms Philomena Fernandes state that it would appropriate if divorce by mutual consent is granted, particularly since Melvin and Ms Charmaine cannot continue in matrimony and wish to dissolve the marriage by mutual consent. They submit that the provision have been made for the welfare of Minovshka and both parties have agreed to divide the immovable properties as well. Melvin points out that it will be extremely difficult for him to keep on returning to India and there is likelihood that he might lose his employment in Australia. Ms Charmaine has no fixed schedule, considering that she serves on a Cruise Liner.

9] Considering the totality of the circumstances, there was no reason for the Family Court to adjourn the matter to 6 July 2016. The facts and circumstances on record at least, *prima-facie*, establish that the predicates of Section 10-A of the said Act stand complied with. At the highest, the Family Court, can always make further enquiries from Melvin and the Ms Philomena, Power of Attorney of Ms Charmaine and thereafter issue necessary decree/order under Section 10-A of the said Act. From the date of presentation of the

petition, period of six months have already expired. The Marriage Councilor 's report is also on record. The consent terms are also on record. The parties appear to have genuine difficulties on account of their employment. In such circumstances, there is no necessity to require the parties to await further six months.

10] For the aforesaid reasons, the impugned order dated 4 January 2016 is hereby set aside. The Family Court is directed to take up this matter on some suitable date between either on 29 February 2016 and 3 March 2016 and dispose of the same during the said period. This is because, Mr. Melvin is required to leave for Australia by 5 March 2016, failing which there is danger of his loosing employment.

11] Mr. Melvin and Ms Philomena, Power of Attorney holder of Ms Charmaine, alongwith their counsel Ms Shabnam Latiwala to appear before the Family Court on 29 February 2016 and produce an authenticated copy of this order. All concerned to act on the basis of authenticated copy of this order.

12] Rule is accordingly, made absolute in the aforesaid terms. There shall however, be no order as to costs.

(M. S. SONAK, J.)