



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.09.2017

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A(MD)No.395 of 2017

P.Lydia Jenifar

... Appellant/Petitioner

Vs

S.Rajadurai

...Respondent / Respondent

PRAYER:- Civil Miscellaneous Appeal is filed under Section 19(1) of the Family Court Act, against the judgment and decree made in S.M.O.P.No.3 of 2016 by the I Additional District Judge, Madurai, dated 22.02.2017.

For Appellant : Mr.S.Poorna Chandran

For Respondent : No appearance

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellant/claimant against the judgment and decree made in S.M.O.P.No.3 of 2016 by the I Additional District Judge, Madurai, dated 22.02.2017.

2. The appellant would aver among other things that she is the wife of the respondent herein and the marriage between them, took place on 28.06.2013. However, after some time, due to the differences of opinion between them, the respondent got separated from this appellant. Therefore, she has filed the petition before the Court below seeking dissolution of her marriage. Though the respondent appeared before the Court below, he denied the allegations of cruelty levelled against him, however, he agreed for divorce and has given no objection to grant divorce to the petitioner herein. Both parties were duly examined and this petitioner marked five documents, namely, Ex.P.1 is the Marriage Registration Certificate; Ex.P.2 is the Marriage Photograph Certificate; Ex.P.3 is the copy of Ration Card of the petitioner; Ex.P.4 is the Rental Agreement and Ex.P.5 is the Agreement between the parties dated 08.02.2017. Among the



exhibits, as per Ex.P.5, it is stated that this petitioner would not seek maintenance from her husband in future and there is no children out of the wedlock between them. After appreciating oral and documentary evidence, the Court below dismissed the divorce petition filed by the appellant herein on the ground that the proper course for the parties concerned would be to file a fresh application for grant of divorce by mutual consent as per the statutory provisions. Aggrieved by the order of the Court below, the appellant/petitioner has filed this Civil Miscellaneous Appeal, seeking to set aside the order.

3. The learned Counsel for the appellant would submit that the Court below ought to have seen that the respondent had not denied the allegations specifically made in the petition and dismissed the same by directing the parties concerned to file fresh proceedings. The Court below has failed to see that from the date on which the respondent left her, he has not even visited her and prosecuted the matter and the respondent is not at all ready to reunite with the appellant herein. All the steps taken from her side for arriving at an amicable solution, ended in vain. Therefore, she prays for setting aside the order of the Court below.

4. This matter was admitted by this Court as early as 28.04.2017. When the matter came up before this Court on 07.09.2017, this Court permitted the petitioner to take substituted service for the respondent in a leading tamil newspaper, namely, in "Dhinanthanthi" at Madurai edition indicating the date of hearing of the Civil Miscellaneous Appeal on 20.09.2017. On the said date, there was no representation either in person or through his counsel. Therefore, this Court proceeded the matter with the available materials on record.

5. As earlier discussed, the Court below mainly dismissed the divorce petition on the ground that the appellant and the respondent have to institute fresh proceedings in accordance with the statutory provisions for obtaining divorce by mutual consent. No doubt, such statutory provisions are to ensure that the consent given by the parties is free of undue influence, coercion, fraud, etc., That apart, there is also a possibility to reunite the parties after the waiting period or withdraw their consent. However, in the case on hand, already the husband has given no objection for granting divorce to the petitioner in the year 2013 itself. Much water has flown in this case. Even assuming for a moment, that the parties have to wait for 'cooling off' period', that period has also gone. Though notice had been served on him, the respondent has not even represented before this Court either in person or through counsel and in support of which, a proof of service has also been filed by this appellant. More than four years have gone by and the respondent has not even come forward to take any steps to prosecute this matter. It also appears that

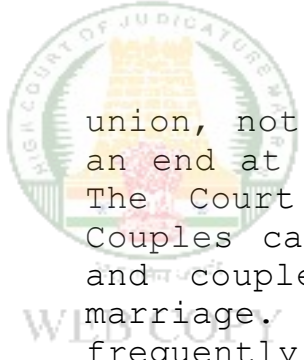


there is cruelty undergone by this appellant at the hands of the respondent herein and in any event, the marriage between this appellant and the respondent had virtually broken down and on the face of it, there was no possibility of reunion between them for the simple reason that he was not even bothered to appear before the Court below to rebut the allegations levelled against him. All this would go to show that he is not at all interested in living with the appellant since 2013 onwards. As far as womenfolk is concerned, time is the essence of the matter for them to go for a better marital life. Each and every day delay for them would affect their future marital life by which the problem would be more complicated for the womenfolk.

6. It may not be an exaggeration to say that neither the law nor its hidebound interpretation makes it easy for a couple to end an irretrievable marriage. The circuitous journey of the matrimonial case, takes years together before an order is passed by the Courts. Due to which, some times, the school going children and officer goers are very much affected. In such type of matters, it is high time that the Courts do some constructive measures to wipe out the pendency in the interest of both genders at the earliest possible time. Protracting case is costing the time and money of the couples. Long delay will ruin the life of both couples, especially, for the women-folk. I have come across that woman-folk particularly is battling for divorce and custody of their children years together. While doing so, this Court does not brush aside an important fact that every effort must be made to unite the couples in all possible ways. The concern of the Court is that high technicalities will pave the way for frustration in litigating the matter.

7. Granting divorce to a couple, after considerable period of time, is nothing but operation success but patient died. Three decades ago, matrimonial cases were taken out of the adversarial setting of civil courts to family courts. This came with an inbuilt counselling and mediation mechanism. But the dynamics of family courts also came inbuilt with huge systemic delays. This leads to a massive pendency of cases. Regular Adjournments in the case of matrimonial matters would devastate the spirit of the act. Family Courts clearly need reforms in procedural practices to make sure cases don't drag on interminably. Especially, so far as maintenance and child custody, where couples end up spending years in Court. Matrimonial cases are concerned, both the couples have to move on with their further life, not have it swallowed up by the Court.

8. This Court wants to remind once again that it would save ~~the lives of matrimonial cases~~ life rather than break matrimony, wherever, it is possible. The judicary is after all nothing more than a reflection of our Society, where marriage is seen as a sacred



union, not a legal contract. Irretrievable marriage should come to an end at the earliest possible of time, like, the case on hand. The Court has a duty to persuade the parties to reconcile. Couples cannot wait a lifetime for a divorce. Times are changing and couple now know that life does not begin and end with marriage. Women especially those with children do not remarry as frequently as men.

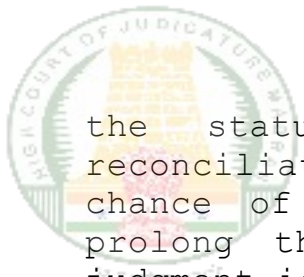
9. Apart from the factual position, the Supreme Court has considered the question as to whether the provision of Section 13B of the Hindu Marriage Act, 1955 laying down that "cooling off" period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case. Under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in **K.Omprakash vs. K. Nalini**, AIR 1986 AP 167 (DB) Karnataka High Court in **Roopa Reddy vs. Prabhakar Reddy**, AIR 1994 Kar 12 (DB) Delhi High Court in **Dhanjit Vadra vs. Smt. Beena Vadra** AIR 1990 Del 146 and Madhya Pradesh High Court in **Dinesh Comber, Shukla vs. Smt. Neeta**3. AIR 2005 MP 106 (Division Bench).

10. Contrary view has been taken by Kerala High Court in **M. Krishna Preetha vs. Dr. Jayan Moorkkanatt**. AIR 2010 Ker 157 It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural.

11. Further, the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Supreme Court considered the following questions:

- i) How long parties have been married?
- ii) How long litigation is pending?
- iii) How long they have been staying apart?
- iv) Are there any other proceedings between the parties?
- v) Have the parties attended mediation/conciliation?
- vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

12. Further, the Supreme Court has held that the Court must be satisfied that the parties were living separately for more than



the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony. The relevant portion found in the said judgment is usefully extracted below:-

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"15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "*Principles of Statutory Interpretation*" (9th Edn., 2004), has been cited with approval in **Kailash versus Nanhku and ors.**¹⁵ as follows:
15 (2005) 4 SCC 480

11 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No



universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'

" 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

18. 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 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(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 XXXIIA 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.

<https://hcservices.ecourts.gov.in/hcservices/> The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. 13



20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(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.

22. Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

23. The parties are now at liberty to move the concerned court for fresh consideration in the light of this order. The appeal is disposed of accordingly."

To sum up, in the judgment of **Anil Comber Jain Vs. Maya Jain**, reported in **2009 (10) SCC 415**, wherein the Supreme Court has held that marriage had irretrievably broken down and though the Civil Courts and the High Court could not exercise power contrary to the statutory provisions, the Supreme Court under Article 142 exercised such power in the interests of justice.

13. In the recent verdict, the Apex Court, has held in the case of **Amardeep Singh Versus Harveen Kaur (Civil Appeal No.11158 of 2017)**, the Supreme Court waived the six-month 'waiting period' once compulsory for mutual consent divorce. This was definitely give a solace for mutual divorce couple, because, some times, the matrimonial case consumes minimum two to twelve years.

14. Under the afore-said circumstances, this Court has no other option except to grant the relief sought by the appellant/petitioner and accordingly, the marriage of the appellant and the respondent herein which took place 28.06.2013 stand dissolved and divorce is granted to the appellant herein by setting the order of the Court below.

15. In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Miscellaneous Appeal is closed.

Sd/-

Assistant Registrar(AD-II)

/True Copy/



To,

1.The I Additional District Judge,
Madurai.

2.The Record Keeper,
VR Section,
Madurai Bench of Madras High Court, Madurai.

+ 1 cc TO Mr.S.Poorna Chandran , Advocate in SR No. 80088

ssm/baba

AE/KKR/SAR4/24.01.2018/8P/5C

C.M.A (MD) No.395 of 2017
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