

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 6 OF 2013**

Smt. Kay Kanizbanu Ryalls, Nee Kay
Kanizbanu Rajpar, married, aged 56 years,
daughter of Shri Mohamedali Rajpar,
residing at H. No. 485, Caraim, Chorao. Appellant

Versus

Shri Robert John Ryalls, aged 59 years, son
of Shri Ronald Ryalls, residing at H. No.
521, Caraim, Chorao. Respondent

Mr. Anthony Joe D'Silva, Advocate for the Appellant.

Mr. Jitendra P. Supekar, Advocate for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 24th January, 2019

PRONOUNCED ON: 2nd February, 2019

JUDGMENT:

By this appeal, the appellant (original petitioner no. 1) is challenging the judgment and order dated 04.10.2012, passed by the learned District Judge at Panaji in Matrimonial Petition No. 1/2009.

2. By the impugned order, the learned District Judge has allowed application (Exhibit-23), filed by the respondent (original petitioner no. 2), thereby recalling the earlier order dated 13.01.2010, granting divorce by mutual consent. The net result is that the application for dissolution of marriage by mutual consent jointly filed by the parties stands dismissed.

3. The appellant is an African National, while the respondent is a Britisher. They were married on 29.12.1993 at Sheffield (UK) and the marriage was registered under No. 150 in the office of the Marriage Registrar at Sheffield (UK).

4. The petitioner and the respondent filed joint application dated 15.05.2009, before the learned District Judge at Panaji under Section 28 of the Special Marriage Act, 1982 (Act, for short), for dissolution of marriage by mutual consent. It was contended that the parties have been living separately since the year 2005 and that do not wish to continue with the marital relationship.

It was claimed that as the parties were residing at Chorao, the Court of the District Judge at Panaji, was having jurisdiction to decide the said petition.

5. It appears that the learned District Judge recorded the statement of the parties and allowed the petition vide order dated 13.01.2010, on the ground that the parties have been residing separately and there was no possibility of any reconciliation between them.

6. Normally, this would have given a quietus to the matter. However, the appellant filed an application (Exhibit-14) dated 23.02.2011, before the learned District Judge praying for confirmation of the “provisional divorce” granted by the order dated 13.01.2010, being made absolute under Article 40 of the Law of Divorce and the final decree of divorce being published in terms of Article 19 of the Law of Divorce.

7. The respondent appeared in the said application and filed his reply (Exhibit-20), objecting to the said application on the ground that Special Marriage Act was not extended to the State of Goa and that the learned District Judge had no jurisdiction to pass the order dated 13.01.2010. The respondent also sought to withdraw his consent and claimed that as such, the decree of divorce cannot be confirmed or made absolute.

8. On such a reply being filed, the appellant on 24.08.2011 sought to withdraw the application, on the ground that the divorce granted on 13.01.2010 was final under Section 28 of the Act. The respondent filed application (Exhibit-22), objecting to the withdrawal of the application (Exhibit-14), on the ground that the decree dated 13.01.2010 was a nullity and

non-est, in view of the non compliance with Section 28(2) of the Act. It was also contended that the consent of the respondent was obtained by undue influence and coercion. The respondent filed yet another application (Exhibit-23), claiming that the provisions of the Act are not extended to the State of Goa and the District Judge had no jurisdiction to entertain the application for dissolution of marriage and the order dated 13.01.2010 was without jurisdiction and a nullity. It was contended that even otherwise, the respondent having withdrawn the consent, the decree would be ineffective in view of Section 28(2) of the Act. He, therefore, sought to recall the earlier order.

9. The learned District Judge after noticing the decision of the Division Bench of this Court in the case of **Monica Variato Vs. Thomas Variato 2000 (2) Goa L.T. 149**, found that the District Court had no jurisdiction to grant the decree under Section 28 of the Act. After holding this, the learned District Judge proceeded and went on to examine the question whether, consent of both parties should continue for the entire period till the decree is passed and the question whether, the Court is entitled to waive the statutory period of six months, in which, the parties are expected to reflect on their decision on

dissolution of their marriage and then revert back. The learned District Judge noticed the decision of the Hon'ble Supreme Court in the case of **Sureshta Devi Vs. Om Prakash (1991) 2 SCC 25**, to hold that mere filing of an application for divorce by mutual consent does not authorize the Court to pass a decree for divorce and the decree of divorce can only be granted, subject to the parties making a second motion within the stipulated period.

10. The learned District Judge found that the decree of dissolution of marriage was passed without the mandatory, cooling off period, of six months. Thus, the learned District Judge recalled the earlier order of dissolution of marriage on twin grounds of lack of jurisdiction of the District Court and the decree having been passed without waiting for the mandatory period of six months and without being satisfied that the consent of the parties continued for a period of six months. Feeling aggrieved, the appellant is before this Court.

11. I have heard Mr. D'Silva, the learned Counsel for the appellant and Mr. Supekar, the learned Counsel for the respondent.

12. Mr. D'Silva, the learned Counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of **Amardeep Singh Vs. Harveen Kaur (2017) 8 SCC 746**, in order to submit that the Supreme Court has now held that the period as mentioned in Section 13B(2) of the Hindu Marriage Act, 1955 (which is *pari materia* with Section 28 of the Special Marriage Act) is not mandatory, but directory. It is submitted that it is open to the Court to exercise its discretion, in the facts and circumstances of each case, where there is no possibility of the parties resuming cohabitation and where there are chances of alternative rehabilitation. It is submitted that thus, the ground about the District Court not having waited for the statutory period of six months would no longer survive.

13. Reliance is then placed on the decision of the Supreme Court in the case of **Vinisha Jitesh Tolani Vs. Jitesh Kishore Tolani, AIR 2010 SC 1915**, in order to submit that the provisions of the Special Marriage Act would apply in the present case. It is submitted that in any event, it was not open to the learned District Judge to recall the earlier order dated 13.01.2010, by which, the marriage was dissolved by consent of parties. It is submitted that the application (Exhibit-14) was

filed under a misconception. It is submitted that the appellant also sought to withdraw the said application. However, the learned District Judge without permitting the same, has proceeded to recall the earlier order of dissolution, which is not proper.

14. Mr. Supekar, the learned Counsel for the respondent has supported the impugned judgment. It is submitted that the earlier order having been passed by the Court, without jurisdiction, is ab initio void and non-est in the eyes of law and therefore, once this aspect was brought to the notice of the District Court, it was always open to formally recall the earlier order.

15. I have carefully considered the circumstances and the submissions made and I do not find that any case for interference is made out.

16. The following points fall for my determination in this appeal:

- (I) Whether, it was open for the learned District Judge to have considered the issue of recall of earlier order dated 13.01.2010 ?
- (II) If yes, whether, on facts the learned District

Judge was justified in recalling the earlier order ?

Point No. (I):

17. The learned District Judge has considered this aspect in para 23 onwards of the impugned judgment. The learned District Judge after noticing the decision of this Court in the case of **Gangabai & Others Vs. Ratankumar & Others AIR 1983 BOM 291** and the decision of the Supreme Court in the case of **Dadu Dayal Mahasabha Vs. Sukhdev Arya, (1990) 1 SCC 189** has held that where the Court finds that the earlier order was passed, contrary to the law and without jurisdiction, the Court has jurisdiction to recall the same. It has been noticed that there was an application (Exhibit-23) filed by the respondent for recall of the order. I do not find that any exception can be taken to the said finding. It is now well settled that an order, which is passed by the Court, without jurisdiction is non-est and ab initio void and can be challenged at any stage and in an appropriate case, even in collateral proceedings. If the Court comes to the conclusion that there was inherent lack of jurisdiction in passing the earlier order, the Court would be clothed with jurisdiction to declare it so and correct the same. The Hon'ble Supreme Court in the case of **Dadu Dayal Mahasabha** (supra) has held that the Court has inherent power to correct its own order. Thus, it is not possible

to accept that the learned District Judge was in error in considering the issue of recall of the earlier order dated 13.01.2010.

Point No. (II):

18. This takes me to the merits of the order of recall. The Division Bench of this Court in the case of **Monica Variato** (supra) has held thus:

“The Special Marriage Act has, however, not been extended to the State of Goa. What then would be the forum to decide the issue in the State of Goa. There can be no vested right in a forum. Private International Law accepts that the forum and procedure as to the extent applicable will be the law of domicile. In that view of the matter, it will be the civil Court exercising jurisdiction in divorce matters in the State of Goa that will hear and decide the petition. If the Special Marriage Act applies, it is the competent Court of civil jurisdiction deciding matrimonial matters which is the Court in which the petition would be filed.”

19. Admittedly, the appellant is an African National and the respondent is a Britisher and their marriage was solemnized at Sheffield (UK), where it was registered. In the case of **Monica Variato** (supra), the Division Bench has

considered the question of what then would be the forum in such case to decide the dispute in the State of Goa and it has been held that it will be the Civil Court, exercising jurisdiction in divorce matters in the State of Goa that will hear and decide the petition. Looked from any angle, the District Court was clearly not clothed to entertain the petition.

20. Coming to the aspect of Section 28(2) of the Act, even assuming for a moment that the District Court had jurisdiction, the order was clearly vitiated for non-compliance of Section 28(2) of the Act. It is true that in the case of **Amardeep Singh** (supra), similar provisions as contained in the Hindu Marriage Act, is held to be not mandatory, but directory. However, in such a case, it is for the Court to exercise its discretion in facts and circumstances of each case and in a given case, the Court would be entitled to waive or curtail the statutory period, if the Court finds that there is no possibility of the parties resuming cohabitation and where there are chances of alternative rehabilitation.

21. The decision in the case of **Vinisha Jitesh Tolani** (supra) turned on its own facts. The question in the said case was whether, the petition for annulment of marriage filed by

the wife before the Senior Civil Judge at Vasco could be transferred under Section 25 of the Code of Civil Procedure to the Court of competent jurisdiction in Delhi, where the parties were governed by the Hindu Marriage Act. The decision in my considered view cannot come to the aid of the petitioner.

22. In the present case, it is not shown that the District Court had considered the question of waiver, much less a finding being recorded that in the facts and circumstances of the case, the statutory period was liable to be waived or curtailed.

23. I have carefully gone through the impugned order passed by the learned District Judge and I do not find that it suffers from any infirmity, so as to require interference. The appeal is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.