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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Order: 08.02.2019

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Cont. Cas. (C) No.99/2019

ROSEY SAILO DAMODARAN

..... Petitioner

Through: Mr. Ujjwal Jha & Mr. Bonny
Laishram, Advocates with petitioner
in person.

Versus

NITIN DAMODARAN

....Respondent

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL (ORAL)

C.M. No.6067/2019 (for exemption)

Allowed, subject to all just exceptions.

The application is disposed of.

Cont. Cas. (C) No.99/2019

1. The petitioner seeks initiation of contempt proceedings against her husband/respondent for wilful breach and non-compliance of the undertaking/settlement arrived at between the parties before the Mediation Centre, Patiala House Courts, New Delhi, on 10.08.2018 and confirmed by the Family Court on 20.08.2018.

2. Learned counsel for the petitioner submits that the respondent herein filed a divorce petition being DA No.2/2017 against the petitioner herein before the Principal Judge, Family Court, Patiala House Courts, New Delhi titled as *Nitin Damodaran vs. Rosey Sailo*

Damodaran under the Indian Divorce Act, 1869 ('IDA'). The matter was referred to the Delhi Mediation Centre, Patiala House Courts, New Delhi, and parties settled their disputes amicably. The respondent agreed to withdraw the divorce petition and the parties agreed to obtain decree of divorce by mutual consent. At the time of the first motion, the respondent was to make the payment of Rs.17,50,000/- to the petitioner and at the time of the second motion, the remaining amount of Rs.32,50,000/- was to be paid by the respondent to the petitioner. He submits that despite the settlement, the respondent has not come forward to initiate, sign and file the divorce petition by mutual consent. He submits that the petitioner even contacted the learned counsel for the respondent but no response has been received. The petitioner has sent a letter dated 14.12.2018 followed by an e-mail of even date to the respondent but no response was given. He submits that the respondent has violated the undertaking given before the learned Principal Judge, Family court and for his wilful disobedience, contempt proceedings need to be initiated against him. In support of his contention, learned counsel for the petitioner relies upon the judgement of the Division Bench ('DB') of this court dated 15.05.2018 made in Reference in the Cont. Cas (C) No.772/2013 titled "*Rajat Gupta v. Rupali Gupta*" (2018) 249 DLT 289.

3. I have heard the learned counsel for the petitioner.
4. In the case of *Rajat Gupta (supra)*, the following four questions of law were referred to the DB to answer:-

“A) Whether a party, which has under a settlement agreement decreed by a Court undertaken to file a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both and has also undertaken to appear before the said Court for obtaining divorce can be held liable for contempt, if the said party fails to file or appear in the petition or motion or both to obtain divorce in view of the option to reconsider/renege the decision of taking divorce by mutual consent under Section 13B(2) of the Act?

B) Whether by undertaking before a Court to file a second motion under Section 13B(2) of the Act, 1955 at Section 13B(1) stage or by giving an undertaking to a Court to that effect in a separate court proceeding, a party waives its right to rethink/renege under 13B(2) of the Act, 1955? If yes, whether such right can be waived by a party under Section 13B(2) of the Act, 1955?

C) Whether any guidelines are required to be followed by the Court while recording the undertaking/agreement of the parties with respect to a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both for obtaining divorce?

D) Whether the judgment in Avneesh Sood (supra) and Shikha Bhatia Cont. Cas.(C) 772/2013 & Ors. Page 29 of 29 (supra) are good law in view of the doubts expressed by this Court in paras 19 to 28 and in view of the Division Bench judgment in Dinesh Gulati (supra).”

No plea to the effect of grave prejudice caused to the petitioner is set out

5. The Reference was answered by the DB on 15.05.2018 and the answer to questions (A) and (C) are relevant to decide the present

petition. Though the court in *Rajat Gupta (supra)* answered the reference in terms of Section 13B of the Hindu Marriage Act, 1955 ('HMA'), yet it is relevant to the present case despite the case between the parties being under Section 10A of IDA as Section 13B of the HMA is almost in *para-materia* with Section 10A of the IDA. This has been observed by the Division Bench of the Kerala High Court in the case of *Tomy Joseph v. Smitha Tomy*, 2018 (4) KLJ 668 as under:-

"11. A close scrutiny of the aforesaid two provisions would show that they are almost in pari materia except with regard to the period during which the spouses shall be living separately. Under Section 13B of the Hindu Marriage Act, 1955, a petition under that provision can be made only if the spouses have been living separately for a period of one year or more. Under Section 10A of the Divorce Act, 1869, a petition under that provision can be made only if the spouses have been living separately for a period of two years or more. In all other aspects, the aforesaid two provisions are almost identical. Therefore, we are of the considered opinion that the dictum laid down by the Hon'ble Supreme Court in Amardeep Singh (supra) would be applicable in case of a petition filed under Section 10A of the Divorce Act, 1869, also.

12. The provisions contained in Section 10A of the Divorce Act, 1869, are, in substance, a verbatim reproduction of the provisions contained in Section 13B of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954. The only substantial difference is that, instead of the period of one year mentioned in Section 13B(1) of the Hindu Marriage Act, 1955 and Section 28(1) of the Special Marriage Act, 1954, a period of two years of separate residence is provided under Section 10A(1) of the

Divorce Act, 1869. The beneficiaries under the abovementioned provisions of different statutes are persons who want divorce by mutual consent and who file joint petition for that relief. There can be no discrimination among them on the ground of religion. Divorce by mutual consent is a secular concept. When the Apex Court has declared the law that the "cooling off period" of six months provided under Section 13B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory and such period can be allowed to be waived by the court on satisfaction of certain conditions, denying that benefit to persons who are governed by the Divorce Act, 1869 would amount to unjust discrimination. Therefore, we are of the considered opinion that the dictum laid down by the Apex Court in Amardeep Singh (supra) is applicable to a petition for divorce filed under Section 10A of the Divorce Act, 1869 and on satisfaction of the conditions laid down in that decision, the Family Court can waive the period of six months stipulated under Section 10A(2) of that Act."

6. Question (A) has been answered in the following terms :-

"Answer: (a) The answer to Question (A) is yes. The distinguishing feature of Section 13B of the Act, 1955 is that it recognizes the unqualified and unfettered right of a party to unilaterally withdraw the consent or reconsider/renege from a decision to apply for divorce by mutual consent, notwithstanding any undertaking given in any legal proceeding or recorded in any settlement/joint statement, in or outside the court, resulting in a consent order/decreed, to cooperate with the other spouse to file a petition under Section 13B(1) or a second motion under Section 13B(2) of the Act, or both. Withdrawal of the consent even at the stage of the enquiry, as contemplated under Section 13B(2), is also in exercise of the right available to a party under the

very same provision. In other words, the mutuality of the consent to divorce should commence from the stage of filing the First motion under Section 13B(1) and it should continue at the time of moving the Second motion under Section 13B(2) of the Act, till such time that the court completes the enquiry and a decree of divorce is finally passed. The said element of mutual consent is a sine qua non for passing a decree of divorce. This being the legal position, the defaulting party cannot be compelled to file or appear in the petition or motion or both, to obtain divorce by mutual consent.

(b) Any other view will not only impinge on the jurisdiction of the court which has an obligation under the Statute to undertake an independent enquiry before passing a decree of divorce by mutual consent, it will also encroach upon a statutory right vested in a party under Section 13B(2) of the Act and go against the very spirit of the provision, at the heart of which lies the right of a party to reflect/revisit and retract from its decision of going ahead for grant of divorce by mutual consent, during the cooling off period.

(c) At the same time, a defaulting party can be held liable for civil contempt on the ground of breaching the terms and conditions incorporated in an undertaking given to the court or made a part of a consent order/decreed. In the event the aggrieved party approaches the court for initiation of contempt proceedings against the defaulting party for willful/deliberate breach of any of the terms and conditions of an undertaking/settlement agreement/consent order or a decree and takes a plea that as a consequence thereof, he/she has been placed in a disadvantageous position or has suffered an irreversible/grave prejudice, the court in exercise of its inherent powers of contempt, supplemented by the

1971 Act has the requisite jurisdiction to entertain the petition and direct restoration of status quo ante in every possible way. Besides directing the defaulting party to disgorge all the benefits/advantages/privileges that have/would have enured in its favour and restoring the parties to the position that was before they had arrived at such a settlement/agreement/undertaking and/or before the consent order/decreed was passed in terms of the settlement arrived at/undertakings recorded, the court has the discretion to punish the defaulting party for civil contempt, depending on the facts of a given case. Thus, contempt jurisdiction operates in a different field and is uninfluenced by the fetters imposed on a court under the Act of 1955. The only rider to the above is that no direction can be issued even in contempt proceedings to compel the defaulting party to give its consent for a decree of divorce by mutual consent, as it is opposed to the object, policy and intent of Section 13B of the Hindu Marriage Act.”

7. The scope of contempt proceedings in cases where the defaulting party has retracted or failed to co-operate to give its consent at the point of first motion or second motion or at any stage before the divorce decree is passed, despite having an undertaking to that effect, in cases of divorce petition by mutual consent is limited. The Courts, acting in their contempt jurisdiction, do not have the power to compel the defaulting party to give his/her consent despite having an explicit agreement to that effect. However, the court can still hold the defaulting party liable for contempt for retracting from such an undertaking only if, a plea that as a consequence of default by the defaulting party, he/she has been placed in a disadvantageous position

or has suffered an irreversible/grave prejudice is set out. The court in such a case, in exercise of its inherent powers of contempt, has the requisite jurisdiction to entertain the petition and direct restoration of status quo ante in every possible way and direct the defaulting party to disgorge all the benefits/advantages that would have ensued in its favour and restore the parties to the same position which was there before giving consent. Apart from it, the court has the discretion to punish the defaulting party for civil contempt depending on the facts of a given case.

8. In the case at hand, the petitioner has failed to set out a plea that would point towards the grave prejudice suffered by her or the disadvantageous position she was placed in as a result of the respondent's defiance to honor the terms and conditions of the mediation agreement.

Mediation agreement does not qualify as an 'undertaking' for obtaining divorce by mutual consent or 'payment of compensation'

9. The Mediation Agreement is also not in the nature of an undertaking in its entirety. It is also not in accordance with the guidelines set out in the case of *Rajat Gupta (supra)*. It would, therefore, be relevant to refer to the mediation settlement as recorded by the learned Mediator on 10.08.2018. The same is reproduced as under :-

"1. That due to temperamental and other issues, it will not be possible for the parties to live together. They have, therefore, agreed to separate their ways and be peaceful in their respective lives.

2. That the petitioner shall be paying a total sum of Rs.50,00,000/- (Rupees Fifty Lakh only) in the manner hereafter provided, in full and final settlement of all issues viz. dowry, past, present and future maintenance for self and the minor child Master Jonathan, alimony etc.

3. That the petitioner will be withdrawing the pending divorce petition from Family Court with permission to file fresh joint petition for divorce on the ground of mutual consent. The parties propose to move the petition for first motion on or about 15th October, 2018. The petition for second motion shall be moved within three months of the grant of first motion with an application for waiver of statutory period. Obviously, they will cooperate with each other by swearing affidavits, signing the petition, making statements before the Family Court etc., in this behalf.

4. That the petitioner shall be paying a sum of Rs.17,50,000/- to the respondent by way of demand draft drawn in her favour at the time of recording of their statements of first motion on or before 15.10.2018. Further the petitioner shall pay a remaining settlement amount of Rs.32,50,000/- to the respondent by the same mode at the time of recording of their statement of second motion.

5. That the parties undertake that they shall not file any case against each other except the petition for divorce (mutual consent) as per settlement, in future and any other cases (civil or criminal) or otherwise, if found between the parties, would deem to be withdrawn.”

10. On 20.08.2018, neither of the parties were present in person before the learned Principal Judge, Family Court, Patiala House

Courts, New Delhi. However, only the learned counsel for the respondent herein, Mr. P. Banerjee was present and made the following statement :-

“Statement of Sh. P. Banerjee, Counsel for the petitioner office at A-80, Defence Colony, Delhi. Enrolment No.D/1083/95.

Without Oath

I am counsel for petitioner in present case, my Vakalatnama is Ex.-P-1. I have got the instructions from my client/petitioner Mr. Nitin Damodran to withdraw the present petition since the parties have settled their dispute as per settlement dt. 10.08.2018 held before Delhi Mediation Centre, PHC, Delhi, which is Ex.P-2. As per mediation settlement Ex.P-2, both the parties shall file the divorce petition by way of mutual consent U/s.13 (B) (1) of HMA on or before 15.10.2018. I may be permitted to withdraw the present petition on behalf of petitioner as settled with liberty to revive the same if the respondent fails to abide by the terms and conditions of mediation settlement Ex.P-2.

RO & AC

Sd/-”

11. After recording the statement of the learned counsel for the respondent herein, learned Principal Judge, Family Court, passed the following order on 20.08.2018 :-

*“Present: Sh. P. Banerjee, Ld. Counsel for petitioner.
Petitioner not present.
None for respondent.*

Ld. Counsel for petitioner wants to withdraw the present petition as matter has been settled between the parties as per mediation settlement dt.10/8/18 held before Delhi mediation Centre, PHC, which is Ex.-P-/2. Ld. Counsel for the petitioner has also given his separate statement in this regard.

In view of separate statement given by Ld. Counsel for petitioner, the present petition is disposed of as settled with liberty to revive the same if respondent fails to abide by the terms and conditions of mediation settlement Ex.P2. Copy of this order be given dasti to the Ld. Counsel for petitioner.”

12. As per the terms and conditions of the mediation settlement dated 10.08.2018, the respondent has agreed to withdraw the divorce petition from the learned Principal Judge, Family Court and both the parties have decided to part company of each other by obtaining a decree of divorce by mutual consent and the respondent has agreed to pay Rs.17,50,000/- to the petitioner at the time of recording their statements of first motion on or before 15.10.2018 and the remaining settlement amount of Rs.32,50,000/- to the petitioner at the time of recording of their statements of second motion. However, interestingly, the parties have given their explicit undertaking only to the effect that they shall not file any case (civil or criminal or otherwise) against each other, in future and if found, the same would be deemed to have been withdrawn. Neither of the parties has given an explicit undertaking to the rest of the terms and conditions, that is, conditions no. 1, 2, 3 and 4 of the mediation agreement (reproduced above).

13. While answering Question (C) in *Rajat Gupta (supra)*, this court laid down general guidelines to be followed by the court while recording the undertaking/agreement of the parties, which read as under :-

“Answer: The general guidelines suggested to be followed by the Court while recording undertaking/agreement of the parties are as below:-

(1) If the parties amicably settle their inter se disputes and differences, and arrive at a settlement, whether of their own accord, or with the aid and assistance of the court or on exercising the ADR processes (mediation/conciliation/Lok Adalat), or otherwise, the settlement agreement that may be drawn up, must incorporate the following:-

i) Record in clear, specific and unambiguous language, the terms/stipulations agreed upon between the parties;

ii) Record in clear, specific, simple and unambiguous language, the mode, manner, mechanism and/or method for the implementation or compliances of the terms/stipulations agreed upon between the parties;

iii) Record an undertaking of the parties that they will abide by and be bound by the agreed terms /stipulations of the settlement agreement;

iv) Stipulate a fine or penalty as may be agreed upon, in the event of a default of the agreed terms/stipulations of the settlement agreement by either side;

v) Provide for the consequences of the breach of the terms/stipulations of the settlement agreement;

vi) Record a declaration of both the parties in unequivocal and unambiguous terms that they have agreed on each and every term recorded in the settlement agreement, after carefully reading over and fully understanding and appreciating the contents, scope and effect thereof, as also the consequences of the breach thereof, including payment of the fine/penalty, if so agreed;

vii) The settlement agreement must state that the terms have been settled between the parties of their own free will, violation and consent and without there being any undue pressure, coercion, influence, misrepresentation or mistake (both of law and fact), in any form whatsoever. It should also be stated that the settlement agreement has correctly recorded the said agreed terms.”

“(4) On the said settlement agreement being presented, along with a report (in the event the settlement is arrived at through mediation or conciliation or Lok Adalat) to the court where the proceedings between the parties are sub judice, the said court should apply the procedure and principles to be followed by a civil court under and/or analogous to the provisions of Order XXIII Rule 3 of the Code of Civil Procedure.

(5) To avoid any ambiguity or misunderstanding on the part of either of the parties, at a later stage, a clear and unambiguous undertaking to the court must be recorded.

(6) The statements of the parties may be recorded by the court after putting them on oath in the following manner:- a) the parties should affirm the terms of the settlement; b) the fact that they have executed the settlement agreement after fully understanding the

terms, consents, effect and consequences thereof; c) that the same has been arrived at of their own free will and volition; d) that they would be liable for penal consequences in case of breach.

(7) In the alternative, the court may direct the parties to file their respective affidavits affirming the terms and conditions of the settlement. If considered necessary, the court may ask the parties to formally prove not only the said affidavits, but also the settlement agreement executed by them.

(8) The Court must apply its judicial mind to satisfy itself that the settlement arrived at between the parties is not only bonafide, equitable and voluntary in nature, but is enforceable in law and is not opposed to public policy. The court must also satisfy itself that there is no impediment of any nature in accepting the said settlement and the undertakings of the parties and binding them down thereto.

(9) After perusing the settlement agreement, recording the statements of the parties and/or examining the affidavits filed by them, as the case may be, the Court must specifically accept the statements of the parties and/or the undertakings given by them as also the terms/stipulations of the settlement agreement and direct that they shall remain bound by the same.

(10) Depending upon the jurisdiction of the Court, appropriate orders/decrees be passed. The said order/decrees, as the case may be, should clearly spell out the consequences of breach, violation of any of the terms of the settlement agreement. In the event any fine/penalty has been agreed to be paid under the terms of the settlement agreement or in case of breach of the same, the order shall state that the said amount will be recovered from the defaulting party. The parties

must be informed that they will be liable to be punished for contempt of court in the event of any breach/violation/willful/deliberate disobedience of the terms of the settlement agreement.

(11) A decree/order shall be passed by the Court in respect of the subject matter of the suit/proceedings. For those matters/disputes that are not the subject matter of the suit/proceedings, where a settlement has been reached before a non-adjudicatory ADR fora, the Court shall direct that the settlement agreement shall be governed by Section 74 of the Arbitration and Conciliation Act (in case of a settlement through conciliation) and/or Section 21 of The Legal Services Authorities Act, 1987. (in respect of a settlement by a Mediator or a Lok Adalat) [Refer: Afcons Infrastructure Ltd. (supra)]

(12) If the obligations under the settlement agreement/undertaking/consent order/decreed are breached by one party, then, at the instance of the aggrieved party, appropriate orders shall be passed in accordance with law.

(13) For breach of the undertaking given to the concerned court or willful/deliberate violation of a consent order/decreed, if so approached or otherwise, the court would take appropriate action as permissible in law to enforce compliance by the defaulting party by exercising contempt jurisdiction as contemplated under Section 2(b) of the Contempt of Court Act, 1971. This will however exclude any coercive orders compelling the defaulting party to give its consent for grant of a decree of divorce by mutual consent, notwithstanding any settlement/undertaking given by the parties before any fora.”

14. Further, the guidelines set forth in *Rajat Gupta (supra)* are mandatory inasmuch as it says that settlement agreement "must" incorporate guidelines (i) to (vii) as reproduced above. The mediator failed to draw the mediation agreement in accordance with the said guidelines by not recording :-

- (i) a declaration of both the parties in unequivocal and unambiguous terms that they have agreed on each and every term recorded in the settlement agreement;
- (ii) the terms that have been settled between the parties of their own free will, volition and consent and without their being any undue pressure, coercion, influence, misrepresentation or mistake; and
- (iii) an undertaking of the parties that they will abide by and be bound by the agreed terms/stipulations of the settlement agreement etc.

15. Further, Rule 25 (a) of the Mediation and Conciliation Rules, 2004 sets out the procedure for the court to ratify the settlement reached between the parties. The Rule reads as under :-

“Rule 25: Court to fix a date for recording settlement and passing decree.

(a) On receipt of any settlement, the court shall fix a date of hearing normally within seven days but in any case not beyond a period of fourteen days. On such date of hearing, if the court is satisfied that the parties have settled their dispute(s), it shall pass a decree in accordance with terms thereof.”

16. The petitioner herein never personally appeared before the learned Principal Judge, Family Court. Even the respondent did not

personally appear. Only the learned counsel for the respondent made a statement that the matter stands settled between the parties as per the mediation settlement Ex. P-2 and he sought permission to withdraw the petition. The petition was allowed to be withdrawn with liberty to the respondent herein to revive the proceedings in case the petitioner herein does not abide by the terms and conditions of the mediation settlement. The satisfaction stipulated in Rule 25 is a judicial satisfaction and could be reached at only after verifying from both the parties, their objective, willingness and satisfaction towards the terms of the settlement. The said Rule escaped the attention of the learned Principal Judge, Family Court.

17. The mediation settlement dated 10.08.2018 does not record any undertaking of the parties inasmuch as that they shall file the petition for divorce by mutual consent on or before 15.10.2018 or that the respondent shall pay a sum of Rs.17,50,000/- to the petitioner on or before 15.10.2018 at the time of recording the statements of parties in the first motion or Rs.32,50,000/- to the petitioner at the time of recording of their statements of the second motion. The mediation settlement also does not record any term or condition or consequence in case of default or breach of the terms and conditions of the mediation settlement on the part of the respondent. The order dated 20.08.2018 does not record that the parties have settled the terms and conditions out of their free will, volition and consent and without their being any undue pressure, coercion, influence, misrepresentation or miscommunication in any form whatsoever. It also does not record

the statement on oath of either of the parties that they have executed the settlement agreement after fully understanding its terms and conditions, consents, effect and consequence thereof or they have arrived at the settlement of their own free will or volition or in the alternative to file their respective affidavits affirming the terms and conditions of the settlement. The learned Principal Judge, Family Court has given liberty only to the respondent herein to revive divorce proceedings if the petitioner herein does not abide by the terms of the mediation settlement in terms of the statement of the counsel for the respondent herein.

18. In view of the above discussion, I do not find any merit in the petition. The petition is dismissed with no orders as to costs.

FEBRUARY 08, 2019
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(VINOD GOEL)
JUDGE