

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.02.2021

C O R A M

THE HON'BLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

CIVIL REVISION PETITION No.93 of 2021

Mr. Sandesh

.. 1st Petitioner

Mrs. Anitha Sankaralingam

.. 2nd Petitioner

Prayer: This Civil Revision Petition filed under Article 227 of the Constitution of India praying to set aside the order of dismissal dated 22.12.2020 passed in I.A.No.4 of 2020 on the file of the Family Court at Namakkal.

For Petitioners Mr.M Ganesan
(For Nikitha R Vora)

O R D E R

The Civil Revision Petition has been filed by the two petitioners jointly namely V. Sandesh and Mrs. Anitha Sankaralingam praying to set aside the order of dismissal dated 22.12.2020 passed in I.A.No.4 of 2020 in O.P. No.223 of 2020 on the file of the Family Court at Namakkal.

2. The case of the petitioners is that the petitioners herein who are husband and wife respectively, got married on 29.08.2018 as per Hindu Rites and Customs at Vijaya Raja Marriage Hall, in Madavakkam Main Road at Chennai. Both parties could not have a comfortable cohabitation and they could not lead their matrimonial life in happy and harmonious manner within a short period of 30 days after the marriage, due to incompatibility in nature misunderstanding and difference of opinion have developed between the petitioners. Further, the 2nd petitioner/wife left the matrimonial home and started to live with her parents at Namakkal. Hence both parties have initiated legal proceedings against each other thereby HMOP. No.172 of 2019 has been filed by the 2nd petitioner/wife against the 1st petitioner/husband for restitution of conjugal rights on the file of the Family Court at Chennai and HMOP. No.4099 of 2019 has been filed by the 1st petitioner/husband against the 2nd petitioner/wife for divorce

on the file of Ist Additional Family Court, Chennai. Since the Ist petitioner/husband is living in Chennai and the 2nd petitioner/wife is living at Namakkal, the 2nd petitioner/wife has filed a Transfer CMP No.999 of 2019 before this Court praying to transfer the case in HMOP No.4099 of 2019 on the file of Ist Additional Family Court, Chennai to the Family Court, at Namakkal District. By order dated 06.02.2020 of this Court, it was ordered to transfer the case and renumbered as O.P. No.75 of 2020 on the file of the Family Court, at Namakkal. Pending these cases, the parties were directed to attend before the mediation for arriving at mutual settlement between the parties by the Court below. In addition to, many efforts and endeavour by way of negotiations and conciliations taken by the elders of their family and legal fraternity to ameliorate the relationship of the parties went failed. In the meanwhile, as the petitioners have taken their respective jewellery, ornaments, valuables, properties with their consent, there are no claims whatsoever between the parties in respect of their belongings against each other. Since their marriage has been broken down irretrievably and there is no chance and scope for reunion between the petitioners herein, they had come forward voluntarily to dissolve their marriage by mutual consent. Hence, the petitioners had jointly filed FCOP No.223 of 2020 under Section 13(B) of Hindu Marriage Act, 1955, on the file of Family Court, Namakkal praying for divorce by mutual consent of dissolving the marriage which was solemnized on 29.08.2018 at Vijaya Raja Marriage Hall in Madavakkam main road and subsequently, a Memorandum of Understanding has been executed between them whereby the 1st petitioner/husband agreed to pay a sum of Rs.5,00,000/- as permanent alimony to the 2nd petitioner/wife by way of Cheque bearing No.397778 dated 21.9.2019 for Rs.1,00,000/- drawn on State Bank of India, Ramanathapuram Branch and remaining amount of Rs.4,00,000/- by way of Cheque No.397777 drawn on State Bank of India, Ramanathapuram Branch. The same had been duly acknowledged by the 2nd petitioner/wife in which the 2nd petitioner/wife agreed to return the Cheque of Rs.4,00,000/- after receiving the said amount by cash from the 1st petitioner/husband. Moreover, the petitioners herein have agreed to withdraw the cases filed by them earlier before the Court below. Subsequent to the above, the petitioners have filed I.A. No.4 of 2020 under Section 13B(2) of the Hindu Marriage Act, 1955 before the Family Court, at Namakkal, praying for to dispense with the cooling off period of six months in FCOP No.223 of 2020 filed on its file and take up the matter immediately and pass appropriate orders accordingly based on the Memorandum of understanding entered into between the parties. Having considered the arguments advanced by their respective counsel and affidavits filed by the parties, the District Judge, Family Court, Namakkal has passed the following orders:

"5. In Para. 5, the second party assures the 1st party that the period of 2nd party assures return the cheque handed over for a sum of Rs.4,00,000/- Cheque

No.397777 drawn at State Bank of India, Ramanathapuram branch, after receiving the said amount of Rs.4,00,000/- by way of cash. The parties had exchanged their own articles. On perusal of the agreement, the future permanent alimony amount not settled between the parties and more over second petitioner Anitha Sankaralingam has not produced any document to show that she got appointment in Bangalore. As per argument, so for the second petitioner is residing only at N. Sosavampatti, Namakkal already the case is posted on 22.4.2021. As per act, the parties has to wait for six months, cooling period that, the petitioners not made out any urgency situation to dispense the cooling off period of six months. Hence this petition is liable to be dismissed without cost."

Being aggrieved over the aforesaid order, the petitioners have filed the present Civil Revision petition jointly to set aside the same and pass orders accordingly.

3. The learned counsel for the petitioners submitted that the Court below ought to have considered the decision taken by the parties concerned to dissolve the marriage by way of mutual consent since they have already settled their dispute amicably. Accordingly, the petitioners have entered into a memorandum of understating on 15.09.2020 for their amicable settlement in dissolving their conjugal relationship. Further, the petitioners herein have withdrawn the cases in O.P. Nos.172 of 2019 and O.P. No.75 of 2020 on the file of the Family Court. It has further been submitted that as their conjugal relationship has reached the stage of irretrievable broken down and they started living separately in different towns within a period of 30 days after marriage, both parties by their own consent agreed to dissolve their marriage by virtue of Memorandum of Understanding entering into between them with the full and final settlement of permanent alimony of Rs.5,00,000/- to the 2nd petitioner/wife along with other clauses entered therein and the same was accepted by both petitioners herein. As such, Both of them has jointly filed the FCOP No.223 of 2020 on the file of the Family Court, Namakkal, to dissolve their marriage. As the petitioners would not like to protract the matrimonial case for six months and they also like to move on into their professional as well as personal life, they have filed I.A. No.4 of 2021 to dispense with the cooling off period as contemplated under Section 13(B) of the Hindu Marriage Act, in disposing of FCOP No.223 of 2020 on the file of the Family Court, at Namakkal. Without considering the mutual consent of the parties to dissolve the marriage by entering into Memorandum of Understanding between them, the Court below dismissed the same and held as follows:

"On perusal of the agreement, the future permanent alimony amount was not settled between the

parties and more over second petitioner Anitha Sankaralingam has not produced any document to show that she got appointment in Bangalore. As per argument, so for the second petitioner is residing only at N.Kosvampatti, Namakkal, already the case is posted on 22.04.2021. As per Act, the parties has to wait for six months, cooling period that, the the petitioners not made out any urgency situation to dispense the cooling off period of six months. Hence, this petition is liable to be dismissed".

There is no meaning purpose left to keep the application for six months for cooling period, while there is no chance of reunion between the parties and they have agreed and requested jointly to dispense the cooling off period of six months so as to the petitioners have to take care of their carrier and both of them do not want to continue with their relationship in future. In support of his submission, the learned counsel appearing for the petitioners relying on the following Judgments and observations made therein, prays this Court for a direction to the Family Court, Namakkal, to dispose of the HMOP, proceedings before the cooling off period of six months since the waiting period will only prolong their agony.

1. "In the Hon'ble Apex Court in "Amardeep Singh Vs. Harveen Kaur in Civil Appeal No.11158 of 2017 dated 12.09.2017 reported in [(2017) 8 SCC 746]

2. In Arulmozhi Vs. Nil in C.R.P. (MD) No.194 of 2018 dated 31.01.2018.

3. In Smt. Pooja Purohit Vs. Sumer Purohit in W.P. No. (227) 353 of 2018 dated 29.11.2018.

4. In Raji @ Jasmine Rani Vs. Nil in C.R.P. (PD) (MD) No.2655 of 2018 dated 29.11.2018.

5. In Smt. Prerna Nigotiya Vs. Pulkit Jain in (D.B) C.M.A. No.1597 of 2019.

4. Heard the learned counsel for the petitioners and perused the materials available on record.

5. On a perusal of the record it is seen that the 1st petitioner/husband is aged about 30 years and the 2nd petitioner/wife, 24 years, they lived together only one month with conjugal relationship after their marriage which was solemnized on 29.05.2018. So far, the period of separation is almost more than 2 years. They are living separately for the past two years in different towns and their own articles have been exchanged themselves. Further, In view of the Memorandum of understanding entered between both the parties, they do not have any dispute and difference of opinion in dissolving their

marriage. As both the parties seek dissolution of marriage by mutual consent and living more than two years, the relevant Section 10A(1) & 2 of the Divorce Act, 1869 reads as under:

10A Dissolution of marriage by mutual consent.

"(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage 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 Indian Divorce (Amendment) Act, 2001, 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 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 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 by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and 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 declaring the marriage to be dissolved with effect from the date of decree.]"

6. Further, the learned counsel for the petitioners has relied on the various citation as referred to the above wherein the Hon'ble Supreme Court by Judgment dated 12.09.2017 in Civil Appeal No.11158 of 2017 reported in [(2017) 8 SCC 746] in the case of in "Amardeep Singh Vs. Harveen Kaur, has made detailed observations as under:

"1."The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

2.

The parties have moved this Court on the ground that only this Court can relax the six months period as per decisions of this Court.

3. Reliance has been placed inter alia on decision of this Court in Nikhil Kumar vs. Rupali Kumar wherein the statutory period of six months

was waived by this Court under Article 142 of the Constitution and the marriage was dissolved.

The text of Section 13B is as follows:

"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.....

....
....

5. This Court noted that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. This power was also exercised to put quietus to all litigations and to save the parties from further agony. This view was reiterated in Poonam versus Sumit Tanwar.

10. However, we find that the question whether Section 13B(2) is to be read as mandatory or discretionary needs to be gone into. In Manish Goel (supra), this question was not gone into as it was not raised. This Court observed :

"23. The learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction."

11.....

12.....

13. Learned amicus submitted that waiting period enshrined 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, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy¹¹, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra¹² and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta¹³. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan¹⁰ AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13

AIR 2005 MP 106 (DB) Moorkkanatt. 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. He submitted that 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 Court should consider the 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?

14. 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.

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 the 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.* as follows:

15 (2005) 4 SCC 480 "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 object of 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."

7. Thereafter, it has been noted by the Hon'ble Supreme Court that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. The power was also exercised to put quietus to all litigations and to save the parties from further agony. It has been stated therein cooling off period of 6 months can be waived by exercising of power under Article 142 having considered the following grounds:

- 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?

8. Further, before arriving at the final decision, the Supreme Court has further laid down as follows:

"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.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

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."

9. Taking into consideration the parameters stated in the above Judgment of the Apex Court, this Court is of the view that in the present case on hand, both parties have jointly filed HMOP seeking divorce on mutual consent by entering into Memorandum of Understanding, wherein the 2nd petitioner has agreed to receive a sum of Rs.5,00,000/- by way of two cheques as permanent alimony with the condition to return the Cheque of Rs.4,00,000/- after receiving the amount of Rs.4,00,000/- by cash. It shows that there is no possibility of parties to continue their conjugal relationship and they are living separately for more than 2 years after the marriage. Further, it has been stated by 2nd petitioner/wife that as she has got a job opportunity in Bangalore, she wants to settle down there. Having considered all the above said aspects, it shows that there is no chance to resume their cohabitation and conjugal relationship. In view of the above, as already two months have gone from the order dated 22.12.2020 passed by the Court below in I.A. No.4 of 2020 in FCOP No.223 of 2020 and the matter is to be listed on 22.04.2021, the Court below is directed to take up the matter by directing the petitioners herein to file an advance hearing petition within a week and on the day of hearing, the petitioners can be directed to go for a final mediation and after receipt of the report of final mediation, the Court below shall pass orders in 13 B petition accordingly as expeditiously as possible within two weeks.

10. In the result, the order dated 22.12.2020 passed by the Court below in I.A.No.4 of 2020 is set aside and this Civil Revision Petition is allowed. Consequently, connected miscellaneous petition is closed if any. No Costs.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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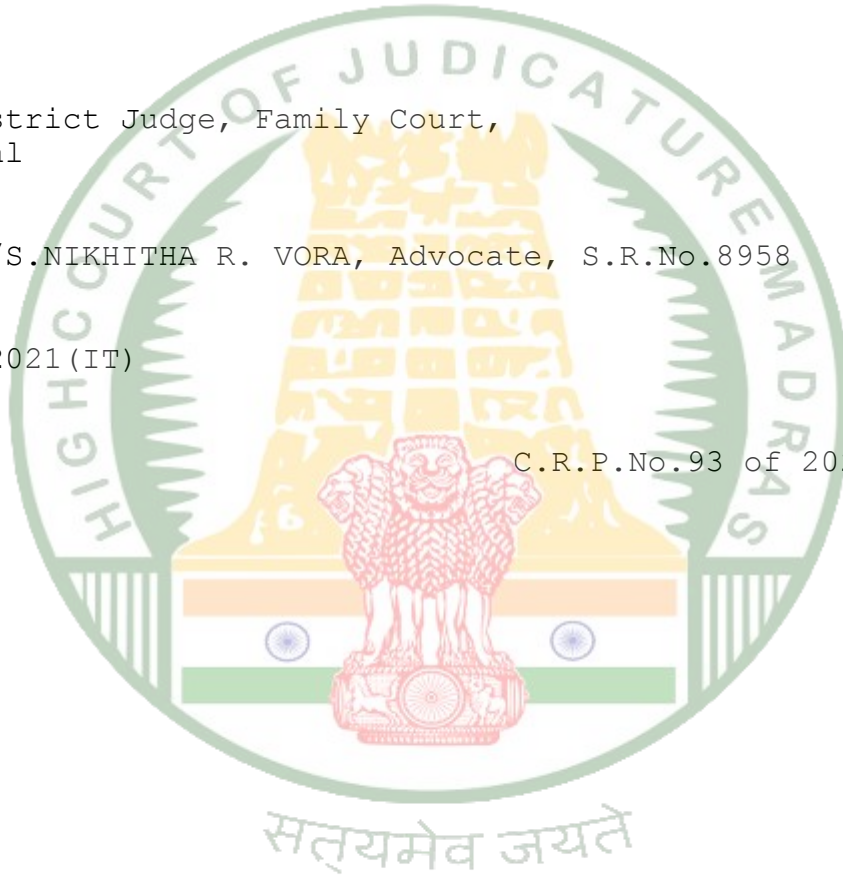
1. The District Judge, Family Court,
Namakkal

+1cc to M/S.NIKHITHA R. VORA, Advocate, S.R.No.8958

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