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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 16th April, 2021.
+ **W.P.(C) 3922/2021 & CM APPL. 11792/2021**
KAVITA MALIK Petitioner
Through: Ms. Juhi Arora, Advocate.

versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Sumit Jidani, Advocate for R-1
(M-9810664300)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through Video Conferencing.
2. The present petition has been filed by Ms. Kavita Malik, who was married to Mr. Amit Malik on 8th February, 1997. Due to various reasons, the parties did not wish to continue with the marriage and accordingly, they agreed for dissolution of their marriage by mutual consent.
3. A Memorandum of Understanding was arrived at between the parties on 30th November, 2019 by which various terms and conditions were agreed upon by the parties. The first motion petition for divorce by mutual consent was filed on 11th March, 2020. However, owing to the lockdown, physical hearing was not held in the first motion.
4. The Family Court thereafter listed the matter for 20th July, 2020 on which date, the statements of the parties in the first motion were recorded and the following order was passed:

“ Efforts for reconciliation have been made if the parties can reside together but both the petitioners have submitted that they cannot reside together and have mutually and amicably decided to part ways to take divorce. Considered.

Joint statement of both the petitioners have been recorded separately and both the petitioners have been identified by their counsel. Both the parties are directed to file their original documents and also to submit the signed copy of their statements recorded today, as per the directions of the Hon'ble High Court after the physical court functioning. Be put up for consideration of the statements and further proceedings for 01.09.2020.”

5. Ld. counsel for the Petitioner submits that on the said date, the Family Court had directed the Petitioner, after recordal of the statements, to file the physically signed copies of the statements. According to her, as per the usual practice in the family courts, the order on first motion was to be passed on the file upon filing of physical copies. Since the physical copies were filed within a period of two days duly verified by the respective counsels for the parties and no intimation was given by the Court that the first motion is not passed, all parties and counsels were under the impression that the order on first motion was passed.

6. On the basis of this understanding, the parties through their counsels filed On 17th November, 2020, the Petitioner moved an application seeking waiver of the cooling off period of six months in terms of the judgment of the Supreme Court in ***Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746***. In the application for second motion, an averment was made to the following effect:

*“12. That in terms of the settlement between the parties, the first motion divorce petition was filed in 17/03/2020 and the same allowed by the Hon’ble Court vide order dated 20/07/2020. A copy of Order Dated 20/07/2020 is annexed herewith and marked as **ANNEXURE P-5.**”*

The order on the first motion was to be Annexure P-5 in the second motion application. Instead of filing the order, the application for certified copy of the order on first motion was annexed. The parties however, never received the order on the first motion.

7. The second motion was listed on 21st November, 2020, however, the matter continued to be adjourned from time to time. Finally, on 10th March 2021, the second motion was taken up and objections were raised by the Court that the certified copy of the order on the first motion was not filed. The Petitioner applied for the verified copy of the order on the first motion but was not supplied the same. She, accordingly, re-applied for obtaining a copy of the said order. Finally, on 16th March, 2021, it was realised that a certified copy could not be issued as the order on the first motion itself was not passed.

8. The grievance of the Petitioner is that the Petitioner is a 45 year old lady who had entered into a Memorandum of Understanding with her husband and the various terms and conditions which were to be abided by the parties were given effect to. Both parties are living separately since 2nd June, 2018 but are being forced to continue their marriage. All future plans of the parties have been put on hold and these facts have not been appreciated by the Family Court which has acted with complete callousness in not recording the order on the first motion.

9. Vide order dated 24th March, 2021, this Court had called for the lower court record, including the physical record. The physical record has been sent to the Court. A perusal of the physical record shows that the matter was taken up by Ms. Barkha Gupta, Judge, Family Court (North), Rohini District, New Delhi since inception i.e., 18th March, 2020 as also on 20th July, 2020. The order of 20th July 2020 specifically records that the joint statement of the Petitioners have been recorded. The physical record also has signed copies of the statements by both parties, duly verified by both the counsels for the parties as well. It is completely inexplicable as to why the order on the first motion was not passed and whether there was any formality to be completed by the parties, considering the fact that the physical copy of their statement was already signed.

10. Since 20th July, 2020 till March, 2021, the parties have not been able to obtain a copy of the said order due to the fact that the said order has never been passed. Now, after almost 8 months, the precious time of the parties has been lost and the clock is sought to be set back as the matter has been listed for orders on the first motion tomorrow i.e., 17th April, 2021. The parties have in fact moved for waiver of the cooling-off period which shows that they had expressed urgency in the orders being passed expeditiously.

11. This Court has perused the judgments of the Supreme Court in *Amardeep Singh (supra)* as also *Devinder Singh Narula v. Meenakshi Nangia, (2012) 8 SCC 580*. The legal position on the waiver of the cooling-off period of six months as also the purpose of filing of the first motion and the second motion, has been settled by the Supreme Court in these two judgements. The relevant paragraphs of the said judgments are set out herein-below:

***Amardeep Singh v. Harveen Kaur,
(2017) 8 SCC 746***

“16. 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 13-B(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.

17. 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 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.

18. 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 v. Nanhku* [*Kailash v. Nanhku*, (2005) 4 SCC 480] as follows: (SCC pp. 496-97, para 34)

“34. ... ‘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 oftquoted 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.”’” (p. 338)

“‘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." (pp. 339-40)

19. 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 13-B(2), it can do so after considering the following:

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(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 32-A 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.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the

waiver of the waiting period for the second motion will be in the discretion of the court concerned.

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

21. Needless to say that in conducting such proceedings the court can also use the medium of videoconferencing 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.”

***Devinder Singh Narula v. Meenakshi Nangia,
(2012) 8 SCC 580***

“2. Section 13-B itself provides for a cooling off period of six months on the first motion being moved, in the event the parties change their minds during the said period. Accordingly, after the initial motion and the presentation of the petition for mutual divorce, the parties are required to wait for a period of six months before the second motion can be moved, and at that point of time, if the parties have made up their minds that they would be unable to live together, the court, after making such inquiry as it may consider fit, grant a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

...

12. It is quite clear from the materials on record that although the marriage between the parties was solemnised on 26-3-2011, within 3 months of

the marriage the petitioner filed a petition under Section 12 of the Hindu Marriage Act, 1955, for a decree of nullity of the marriage. Thereafter, they have not been able to live together and lived separately for more than 1 year. In effect, there appear to be no marital ties between the parties at all. It is only the provisions of Section 13-B(2) of the aforesaid Act which are keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in Section 13-B for grant of a decree of dissolution of marriage by mutual consent is present in the instant case. It is only on account of the statutory cooling off period of six months that the parties have to wait for a decree of dissolution of marriage to be passed.”

Both judgments make it clear that the time-period of six months for cooling off can be waived by the Court under special circumstances. Moreover, in the present case, the parties are living apart from 2018 and have also finally settled their disputes. There is thus no reason as to why the Family Court did not pass orders on the first motion after recording the statements of the parties and after the physically signed copy was placed on record. Simply adjourning the matter on the said date i.e., 20th July, 2020, without passing orders on the first motion has resulted in turning the clock back for the Petitioner.

12. The divorce, being one of mutual consent, the parties cannot be put to such grave inconvenience due to the action of the Family Court which has failed to pass orders on the first motion.

13. Ms. Juhi Arora, Id. Counsel appears for the Petitioner and submits that as per her information, in the Family Court, there are several cases where orders on the first motion have not been passed.

14. Under these circumstances and owing to the settled legal position as laid down by the Supreme Court in the aforementioned two judgments, the following directions are issued:

- i) the present Presiding Officer in the Family Court shall record his satisfaction in respect of the statement recorded by the parties, which are already on record.
- ii) upon the present Presiding Officer recording his satisfaction, orders on the first motion shall be passed by the Family Court. Since passing of orders on the first motion is a consequence of the statement recorded, upon recordal of the satisfaction, in order to ensure that the parties are not put to any further inconvenience, the order on the first motion would date back to 20th July, 2020.
- iii) Insofar as the second motion is concerned, once the order on the first motion, which shall date back to 20th July, 2020, is passed by the present Presiding Officer, the Court would proceed to pass orders on the second motion in accordance with law.

15. The Id. Registrar General shall look into the issue in respect of other similar cases which may be pending before the Family Courts which are awaiting orders on first motion, after statements of parties have been recorded and file a report in this regard for appropriate orders.

16. The petition is disposed of in the above terms. All pending applications are also disposed of.

17. List for receiving of the report on 1st July, 2021. Let the physical copy of the lower court record be sent back.

PRATHIBA M. SINGH, J.

APRIL 16, 2021

Rahul/C

