

S/L 8
19.12.2022
Court No.652
SD

CO 2241 of 2019
With
CAN 3 of 2022

Smt. Swastika Sen (Nee Mukherjee)
Vs.
Sri Promit Sen

Mr. Jayanta Samanta
Ms. Paromita Malakar

...for the Petitioner.

Mr. Krishnendu Gooptu
Mr. Kanakendu Chatterjee

...for the Opposite Party

The present revisional application has been preferred against the orders dated April 6, 2019, May 28, 2019 and June 21, 2019 passed by the learned District Judge, Alipore in Matrimonial Suit No. 2643 of 2017. The brief background of the present application is that the marriage between the petitioner and the opposite party was registered under the special marriage act 1954 on 12.02.1999. Few months after marriage the husband /opposite party had temporarily moved to Bangalore with the knowledge of petitioner/wife and thereafter the petitioner herein started to reside with her parents in Kolkata due to irreconcilable differences in the temperament and their ways of life became completely disconnected and different. The parties are blessed with a girl child who is now staying with the mother/petitioner . On 07.06.2000 the petitioner initiated criminal proceedings under the various provisions of I.P.C. including 498A I.P.C. Subsequently the petitioner wife sworn an affidavit before the judicial magistrate stating that she had needlessly initiated criminal proceedings

against opposite party/husband and all his family members under wrongful advice. Thereafter the opposite party husband filed petition under section 482 of Cr.P.C. read with Article 227 of the Constitution of India, before this court for quashing the aforesaid criminal proceeding being BGR No. 2170 of 2000. This court was pleased to dismiss the said petition being no. CRR No. 2152 of 2015 for quashing by its order 27.11.2015.

Being aggrieved husband /opposite party preferred Special Leave petition(Cri) before the Hon'ble Supreme Court being SLP (Cri) No. 4306 of 2016. Hon'ble Supreme Court was pleased to allow the SLP and quashed the aforesaid criminal proceedings by its order dated 07.12.2016 with the following observation:-

“that the appellant will forthwith/without any delay co-operate with the respondent No.2 and file a joint application for mutual divorce before the competent Family Court under the provisions of Special Marriage Act, 1954.

No sooner such an application is filed the learned Family Court will proceed to pass necessary orders in accordance with law and the provisions of the Special Marriage Act, 1954.

The appeal is disposed of in the above terms.”

Petitioner submits that the brother of opposite party Priyam Sen filed writ petition before this court being WP No. 8451 (W) of 2011 for quashing of the seizure and for the recovery of the Jewellery and other items seized by the police from his bank locker pursuant to the criminal proceedings initiated by the petitioner/wife. Presently said Jewellery and other items are in the custody of this Hon'ble Court and kept in a designated bank locker after due inventory and valuation. Petitioner further submits that it was agreed between the parties that both the parties shall mutually prepare list of

Jewellery items so gifted to the petitioner /wife and thereafter will jointly file an affidavit before the Hon'ble High Court stating that they have no objection whatsoever in the said writ petition filed by the brother of the opposite party to be allowed in such a manner that the gifted items as aforesaid be given to the petitioner/ wife and the rest of the seized Jewellery and other items to be handed over to the writ petitioner i.e. brother of the opposite party and writ petition would be accordingly disposed of .

In view of the aforesaid order of the supreme Court passed in SLP (Cri) 4306/2016 the parties filed application for mutual divorce before the court below under section 28 of the Special Marriage Act 1954, on 02.12.2017.

In order to complete the divorce proceeding it was essential for both the parties to move the motion within the period of the 18 months from the date of filing the aforesaid application under section 28 of the Special Marriage Act in order to dissolve the matrimonial tie mutually.

Here it would be relevant to section 28 of the Special Marriage Act which runs as follows:-

28. Divorce by mutual consent.—

(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together 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.

(2) 1[On the motion of both the parties made not earlier than six months after the date of the 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 in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the

marriage to be dissolved with effect from the date of the decree.

Petitioner herein alleged that the pre condition of the mutual divorce application has not yet been fulfilled and for which petitioner prayed for adjournment on the grounds stated in the said petition in the said proceeding under section 28 of the Act of 1954 but the court below rejected the said application for adjournment on 06.04.2019. Again on 28.05.2019 petitioner wife prayed before the court below to keep the said proceedings under section 28 in abeyance in order to make fulfillment of the precondition of the said application for the mutual divorce but the court below again rejected the prayer of the petitioner by another impugned order dated 28.05.2019 and directed for filing affidavit in chief by the petitioner and for hearing on evidence.

Petitioner further alleged that no step has been taken by the opposite party or his brother in the aforesaid writ application filed by the brother of the opposite party for filing of affidavit of no objection concerning return of the Jewellery to the petitioner as admitted in the mutual divorce petition and for which the petitioner prayed for adjournment on the ground set forth therein again on 21.06.2019 before the court below, but without considering the intrinsic value of the observations made by the Apex Court and also precondition embodied in the application for mutual divorce the learned court below rejected prayer of the petitioner and directed the present petitioner to be present positively before court below with the affidavit in chief, otherwise non presence of the petitioner will be treated

as contemptuous act for issuance of civil warrant to compel the petitioner to remain present on the date fixed.

The husband/opposite party herein submits that he was ready to move the motion within the period of 18 months before the trial court but the petitioner before this Court did not move the motion within the statutory period of 18 months. The opposite party, therefore, submits that the said application under Section 28 of the Special Marriage Act has now become infructuous since it has not been moved by both the parties within the statutory period of 18 months from the date of filing of the motion.

At this juncture both the parties submits that they may be given liberty to file a fresh application under section 28 of Special Marriage Act, before the Trial Court and in the meantime, they will make every endeavour to settle their dispute for which earlier motion could not be moved within the statutory period and became infructuous.

In view of the aforesaid facts and circumstances, the revisional application being CO2241 of 2019 is disposed of giving liberty to the parties to file fresh application under Section 28 of the Special Marriage Act before the court below since the earlier application filed by both the parties for mutual divorce being Mat Suit No. 2643 of 2017 has become infructuous with the efflux of time.

In view of disposal of the revisional application, the connected application is also disposed of.

There will be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)