

Iresh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13721 OF 2024

1. Ayushi Doshi

Adult, Hindu; Age: 31 years

Occupation: Housewife

Currently residing at:

2-31, Varma Nagar, Old
Nagardas Road, Andheri, east,
Mumbai: 400069

2. Rahul Sheth

Adult, Hindu; Age: 32 years

Occupation: Service

Currently Residing at:

218, Al Bafta Grand, Behind
Centre Point, Next to Burjaman
Mall, Mankool Bur Dubai

.....Petitioners

Vs.

None

.....Respondent

Mr. Himanshu Nagarkar a/w Ms. Kajal, S, Mr. Kashish Bijlani for the
petitioners

CORAM : GAURI GODSE, J.

DATE : 17th OCTOBER 2024

ORAL JUDGMENT:

1. Heard. Rule. Rule made returnable forthwith. With the consent of

IRESH
MASHAL

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signed by
IRESH
MASHAL
Date:
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the parties, the petition is taken for final disposal.

2. This petition takes exception to the order passed by the Family Court No. 4, Mumbai, on 23rd August 2024 below Exhibit 10 for waiver of the cooling off period provided under sub-section (2) of Section 13B of The Hindu Marriage Act ('the said Act). The petitioners filed a petition under Section 13B for dissolution of their marriage by consent. The petition was filed on 19th June 2024. Thereafter, petitioners filed an application below exhibit 10, praying for waiver of the cooling off period of six months as provided under sub-section (2) of Section 13B of the said Act.

3. The learned Judge of the Family Court has partly allowed the application; however, referred the parties for counselling for the first motion and directed to list the matter for the second motion on 6th November 2024. The said order is impugned in this petition. Learned Judge in the operative order has recorded that the application is partly allowed; however, has not passed any order regarding waiving the cooling off period. A perusal of the impugned order indicates that all the decisions regarding the principles that are settled with reference to cooling off period were tendered before the learned Judge.

4. By referring to the decision of the Hon'ble Apex Court in the case of *Amardeep Singh Vs. Harveen Kaur*¹, learned Judge, held that the Court is required to consider whether the cooling off period has expired before submission of the first motion. The learned judge has referred to the date of filing the petition, the registration of the petition, and the consent terms tendered by the parties. Learned Judge further observed that in view of the Judgment of the Hon'ble Apex Court, 18 months period from the date of separation was not completed. Learned Judge has further observed that it was a fit case to invoke powers under Section 10 of the Family Courts Act and the ratio laid down by the Apex Court.

5. The learned Judge has further observed that by applying the ratio laid down by the Hon'ble Apex Court, a six-month waiting period is held directory and not mandatory. Thus, by invoking powers under the Family Courts Act, the learned Judge proceeded to pass the order. In spite of observing that it was a fit case to exercise jurisdiction, the learned Judge has not passed an order for waiving the cooling off period and instead has referred the parties for counselling for the first motion. The reasons recorded in the impugned order and the operative

¹ (2017) 8 Supreme Court Cases 746

order are inconsistent.

6. Learned counsel appearing for the petitioners submits that after registration of the petition for divorce by mutual consent, the parties were referred for counselling and that there was no reason for again referring the parties for counselling. He submits that even otherwise, once the parties are held to be entitled to waiver of the cooling off period, there was no occasion for referring the parties for counselling for the first motion.

7. Learned counsel for the petitioners further submits that the decision of the Hon'ble Supreme Court in the case of *Amardeep Singh* consistently followed in subsequent decisions of this Court in the case of *Sneha Akshay Garg and anr*², *Manjiri w/o Bhushan Raut and another*³ and *Pratik Rajendra Kutte and another Vs. State of Maharashtra through Law and Judiciary Dept*⁴ were placed before the learned Judge of the Family Court. Learned counsel for the petitioner further submits that in the decision of *Sneha Garg*, this Court has explained the legal principles settled by the Apex Court in the case of *Amardeep Singh*. He submits that the petitioners' case is clearly

² 2024 SCC Online Bom 2513

³ Writ Petition No. 3146 of 2022 dated 10th June 2022

⁴ Writ Petition No. 4747 of 2024 dated 19th June 2024

covered by the legal principles settled in the aforesaid decisions. He further submits that the parties are unnecessarily undergoing stress and agony due to the pendency of their petition. He submits that once the parties are held entitled to waiver of the cooling off period, there was no reason for the learned Judge of the Family Court to keep the petition pending.

8. Learned counsel for the petitioners submits that the petitioners got married on 14th June 2021, and their marriage was registered on the same day. He submits that there are no children born from the said wedlock. After the marriage, petitioners started residing together; however, since 5th May 2023, petitioners started living separately and never cohabited as husband and wife. He submits that since the parties were incompatible and it was impossible for them to live together, they filed an application for dissolution of their marriage by mutual consent. He submits that despite efforts made by the family members and friends, the petitioners were unable to reconcile. He submits that the petition was filed for divorce by mutual consent on 19th June 2024. He submits that thus, the petition was filed after more than a year from their separation.

9. By relying upon the well-settled legal principles, learned counsel

submits that the waiting period provided under sub-section (2) of Section 13B of the said Act is held to be directory and not mandatory. He submits that since the parties cannot live together, no purpose would be served by keeping the petition pending. Thus, by relying upon the well-settled legal principles laid down by the Hon'ble Apex Court in the case of *Amardeep Singh* and explained by this Court in the decision of *Prateek Kutte* and *Sneha Garg*, the petitioners' application be allowed, and necessary orders be passed for dissolution of their marriage.

10. Learned counsel for the petitioners submits that it is a common experience in the Family Courts that the applications for divorce by mutual consent and the applications for waiving off the waiting period are not decided by following the well-settled legal principles. He submits that it is a common experience that the applications are unnecessarily kept pending and are not given their due preference. He submits that as held by this Court in the case of *Sneha Garg*, it is necessary that the application filed for divorce by mutual consent be decided on a priority basis. He further submits that though this Court has exhaustively explained the guiding principles settled by the Hon'ble Apex Court in the case of *Amardeep Singh*, the guiding

principles are not correctly understood and followed by the Family Courts in most of the cases. Learned counsel for the petitioners has tendered a representation indicating the issues faced in the Family Courts in such matters and the possible solutions to the issues. The note dated 17th October 2024 prepared by the learned counsel for the petitioners is taken on record and marked as 'X' for identification.

11. Learned counsel for the petitioners has also tendered a draft of the petition for divorce by mutual consent. Learned counsel for the petitioners submits that it is necessary that the directions be issued for deciding the applications for divorce by mutual consent on a priority basis and by following the guiding principles settled by the Apex Court in the case of *Amardeep Singh* and consistently followed by this Court. The draft of the petition tendered by the learned counsel for the petitioners is taken on record and marked as 'X1' for identification.

12. Learned counsel for the petitioners also submitted that the applications for certified copies of the judgment and decree for divorce by mutual consent also remain pending for long time. He submits that parties face hardships due the delay in receiving certified copies of judgment and decree in such cases. He therefore submits that necessary directions may be issued for expediting the process of

drawing decree and issuance of certified copy of judgment and decree.

13. These issues raised by the learned counsel for the petitioners are not restricted to the present case. They are in the context of the common experience of various advocates and the respective parties. Hence, these issues cannot be dealt with in this petition. They can be addressed only on the administrative side of this court. However, it will be appropriate if the attention of the Principal Judge of the Family Courts at Mumbai and Pune is drawn to these issues so that, at their level, they can take necessary action.

14. It appears that despite the guiding principles in the case of *Amardeep Singh*, consistently followed by this Court in the case of *Prateek Kutte* and *Sneha Garg*, it appears that the same are not being followed in the Family Courts. A similar grievance was raised in the earlier petition in the case of *Sneha Garg* arising from the petition filed in the Family Court, Pune. Hence, to address the grievances raised by the learned counsel for the petitioners, I find it appropriate to call for reports from the learned Principal Judges of the Family Courts at Mumbai and Pune so that the reports can be placed before the Hon'ble the Chief Justice. The learned Principal Judges of the Family Courts at Mumbai and Pune shall submit their respective reports with

reference to the issues raised by the learned counsel for the petitioners in the note dated 17th October 2024.

15. For the reasons recorded above, the petition was taken up for final disposal. The parties joined through video conferencing. I have interacted with the parties. Both the petitioners submitted that they are well settled in their independent professions and have no claim against each other. They confirm the contents of their application for divorce by mutual consent and the application filed for waiver of the cooling off period. The parties further informed that petitioner no. 1 is residing in Mumbai, and petitioner no. 2 is residing in Dubai for his work purpose. Thus, the petitioners informed that they are well settled in their independent professions, and no reconciliation is possible. On interacting with the petitioners and considering the reasons stated by them in the application for waiver of the cooling off period, I am satisfied that the parties are unable to reconcile, and they, therefore, decided to separate. Petitioner no. 1 is 31 years old, and petitioner no. 2 is 32 years old. Thus, I am satisfied that the pendency of the petition is causing mental agony and that there is no point in keeping the marriage petition pending.

16. By following the guiding principles in the Supreme Court's

decision in the case of ***Amardeep Singh***, this Court, in the case of ***Sneha Garg***, has explained in detail the reasons for correctly understanding and applying the guiding principles for deciding the applications filed for waiver of the cooling off period. A perusal of the impugned order indicates that the learned Judge of the Family Court has completely ignored the guiding principles in the decision of the Hon'ble Apex Court in the case of ***Amardeep Singh***, followed in various decisions and exhaustively explained by this court in the case of ***Sneha Garg***.

17. Since this Court has come across various orders passed by the Family Court and found that the legal principles settled in the case of ***Amardeep Singh*** are not correctly understood and not followed by the Family Courts, I find it necessary to summarise the guiding principles settled by the Apex Court in the decision of ***Amardeep Singh***. Thus, the guiding principles must be followed by correctly understanding the object of the provision of Section 13B of the said Act. The Hon'ble Supreme Court has observed that the object of the waiting period is to provide a safeguard against a hurried decision if there is otherwise a possibility of reconciliation. Thus, the waiting period is a precautionary provision to avoid any injustice to any party and to rule out any

possibility of reconciliation. The Hon'ble Apex Court, in paragraphs 19 and 20, has observed as under:

“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 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 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.”

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.”

18. Thus, the Hon’ble Apex Court held that the period mentioned in sub-section (2) of Section 13B is not mandatory but directory. The Hon’ble Apex Court further observed that it would be open to the Court to exercise its discretion in the facts and circumstances of each case when there is no possibility of parties resuming cohabitation, and there are chances of alternate rehabilitation. Hon’ble Supreme Court held that the waiver application could be filed after the first motion giving reasons for the prayer for waiver. Thus, once the conditions, as explained in paragraph 19 of the decision of *Amardeep Singh*, are satisfied, there would not be any reason to keep the waiver application pending. In view of the observations in paragraph 20 that the period mentioned in sub-section (2) of Section 13B is not mandatory, then the application for cooling off period is to be considered. What is necessary is that the learned concerned Judge is satisfied with the conditions as referred to in paragraph 19 are complied with.

19. In view of the impugned order referring to the filing of the first motion and second motion and thereafter keeping the application pending by referring the parties to counselling for the first motion, it is

necessary to correctly understand the purpose and object of Section

13B. Section 13B of the said Act reads as under:

“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 (68 of 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.

(2) On the motion of both the parties made 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 Court shall, on being satisfied, after hearing the parties and after 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 of divorce declaring the marriage to be dissolved with effect from the date of the decree.”

20. Sub-section (1) of section 13B provides for filing an application

for dissolution of marriage by consent on the ground that the parties have been living separately for a period of one year or more. Sub-Section (2) of Section 13B provides for a period of six months to enable the parties to withdraw from the petition. Sub-Section (2) further clarifies that if the petition is not withdrawn within six months and in the meantime, the Court shall on being satisfied after hearing the parties and after making such enquiry that the marriage has been solemnized and the averments in the petition are true, shall pass a decree of divorce declaring the marriage to be dissolved. Thus, the words “first motion” which is used in common parlance, means filing an application for applying for divorce by mutual consent on the ground that the parties have been living separately for more than one year. The commonly used words “second motion” is nothing but a stage for actually passing the order as contemplated under sub-section (2) of Section 13B of the said Act. The period of 18 months mentioned in sub-section (2) is an outer limit provided to withdraw from the consent.

21. Thus, the situation contemplated under sub-section (2) is for the satisfaction of the Court that the parties are living separately, either of the parties has not withdrawn from the consent, that the marriage has been solemnized, and the averments in the petition are true.

Therefore, the parties are not required to file any second motion to pass the decree of dissolution of marriage. Thus, in a given case, if parties do not apply for waiving off the waiting period of six months, the Court, after the expiry of the period of six months, is required to make necessary enquiry and record satisfaction after hearing the parties and pass a decree for dissolution of marriage.

22. Thus, the second motion is only a stage after a period of six months for making necessary enquiry as contemplated under sub-section (2) of Section 13B of the said Act and passing necessary orders for dissolution of marriage.

23. Thus, I summarise the legal principles for deciding the applications filed under Section 13B of the said Act as follows:

A. The parties must file an application under sub-section (1) of Section 13B for dissolution of their marriage by mutual consent by stating in the petition that they have been residing separately for more than one year.

B. In view of sub-section (2) of Section 13B, the application must be listed on expiry of six months for passing the necessary order. Then, on the date fixed after a period of six months, the concerned Judge is

required to make necessary enquiry after hearing the parties and record satisfaction that the marriage has been solemnized, the averments made in the petition are true, i.e., the date of marriage, date of separation, date of filing the petition for divorce by mutual consent, no claim of the parties against each other, there is no possibility of any reconciliation, either of the parties have not withdrawn from the consent, and then pass a decree for divorce declaring that the marriage is dissolved with effect from the date of decree.

C. If the parties make an application for waiver of the waiting period as contemplated under sub-section (2) of Section 13B, the principles set out by the Hon'ble Apex Court in the case of ***Amardeep Singh*** are required to be followed. The principles set out in the decision of ***Amardeep Singh*** provides for:

- i) Verifying the period of separation as contemplated in sub-section (1) of Section 13B.
- ii) all efforts for mediation and conciliation including efforts to reunite the parties have failed and there is no likelihood of reconciliation 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 contemplated under sub-section (2) of Section 13B of the said Act is directory and not mandatory.

v) and that the waiting period will only prolong the agony of the parties.

D. Once the concerned Judge is satisfied with regard to the aforesaid aspects, the learned Judge must exercise discretion to waive the waiting period.

E. Thus, the purpose of waiting period needs to be correctly understood while deciding the application for waiver and exercise the discretion after ruling out the possibility of any reconciliation. The concerned Judge is required to verify whether the parties have taken a conscious decision to move ahead and that they intend to put an end to the litigation as there is no possibility of any reconciliation.

F. Once the concerned Judge is satisfied that reconciliation is impossible and that the parties have no claims against each other, the Judge should adopt a realistic approach and exercise the discretion to waive the waiting period.

G. Once the concerned Judge is satisfied that the parties are

entitled to waiver of the waiting period of six months, there is no requirement to refer the parties for counselling.

H. Once the satisfaction is recorded for waiving off the waiting period of six months, the petition for divorce by mutual consent filed under sub-section (1) of Section 13B should not be kept pending, and immediate orders should be passed for dissolution of marriage and drawing the decree.

24. The reasons for not keeping the application pending for dissolution of marriage by mutual consent are explained by this Court in the case of *Sneha Garg* in paragraphs 8 and 9 which reads as under:

“8. The guiding principles in the Supreme Court’s decision in the case of *Amardeep Singh* need to be correctly understood and applied to achieve the object of the provision of Section 13-B of the said Act. The Hon’ble Supreme Court has observed that the object of the waiting period was to provide a safeguard against a hurried decision, if there was otherwise a possibility of reconciliation. **Thus, the waiting period is a precautionary provision to avoid any injustice to any party and rule out the possibility of reconciliation. Thus, the purpose of the waiting period needs to be correctly understood while**

deciding the application for a waiver. Seeing the rapid changes in an evolving society, the judiciary would play a vital role in assisting the parties seeking the dissolution of their marriage by mutual consent. Thus, keeping in mind the changing social conditions, a realistic approach needs to be adopted.”

emphasis applied

25. So far as the present case is concerned, as recorded in above paragraphs, I am satisfied that the pendency of the petition is causing mental agony and that there is no point in keeping the marriage petition pending. From the interaction with the petitioners, I have already recorded my satisfaction that the parties cannot reconcile, and they, therefore, decided to separate. In view of the aforesaid, I am also satisfied that there is no possibility of any reconciliation. Thus, to avoid any further loss of time, I am not inclined to relegate the parties to the Family Court for passing the order on the main application under sub-section (1) of Section 13B of the said Act. Considering the facts of the present case, the view taken by this Court in the decision of ***Prateek Kutte*** and ***Sneha Garg*** would squarely apply to the facts of the present case. The relevant observations of this Court in the case of ***Prateek Kutte*** in paragraphs 9, 10 and 11 read as under:

“9. On interaction with the petitioners and considering their reasons stated in the application before the Family Court as well as in the present petition, I am satisfied that the parties are unable to reconcile and have, therefore, decided to separate. In view of the order rejecting the application for waiver, the petitioners’ application under section 13-B(1) for dissolution of their marriage has remained pending before the Family Court. Considering the aforesaid, I am satisfied that the petitioners are entitled to waiver of the waiting period of six months provided under section 13-B(2) of the said Act.

10. To avoid further loss of time, I am not inclined to relegate the parties again to the Family Court for passing the order on the main application under section 13-B (1). Petitioner no. 1 is 33 years old, and petitioner no. 2 is 28 years old. The petitioners have informed me that they both are well-settled in their independent professions. I am satisfied that there is no possibility of any reconciliation. **Hence, considering the facts of the case, I find it appropriate to take a pragmatic view and not send the parties to the Family Court only for the purpose of passing a final order. If only for a technical purpose, the parties are relegated to the Family Court, the very object of making an application for dissolution of marriage under section 13-B(1) and the application for a waiver**

under section 13-B(2) would be frustrated.

11. Hence, I find it fit to exercise the jurisdiction under Article 227 of the Constitution of India to correct the impugned order by waiving the waiting period and also pass further orders for the dissolution of the marriage.....”

emphasis applied

26. Therefore, in view of the aforesaid facts and circumstances, I find that this is a fit case to exercise jurisdiction under Article 227 of the Constitution of India to correct the impugned order by waiving off the waiting period and also pass further orders for dissolution of marriage.

27. For the reasons stated above, the following order is passed.

ORDER

I. The impugned order dated 23rd August 2024 passed by the Family Court no. 4, Mumbai, below exhibit 10 in Petition F/2713/2024, is quashed and set aside.

II. Application at exhibit 10 in Petition F/2713/2024 filed before Family Court No. 4, Mumbai, for waiving off the waiting period of six months under sub-section (2) of Section 13B of the said Act is allowed, and six months

waiting period is waived.

III. Application for dissolution of marriage under sub-section (1) of Section 13B of the said Act in Petition F/2713/2024 filed before the Family Court No. 4, Mumbai is allowed.

IV. The marriage solemnized between the parties on 14th June 2021 is dissolved.

V. The Family Court No. 4, Mumbai shall draw a decree of divorce in terms of the dissolution of marriage granted by this Court.

VI. The concerned Judge of the Family Court No. 4, Mumbai shall issue necessary directions for drawing up the decree in terms of this order, upon production of a certified copy of this order, without insisting on the parties' presence.

VII. The concerned Judge of the Family Court No. 4, Mumbai shall issue necessary directions for drawing up the decree and issuing certified copies expeditiously.

VIII. The writ petition is allowed in the above terms.

IX. Rule is made absolute in the above terms.

X. The registry of this court is directed to forward the copy of this order along with the note dated 17th October 2024 and the draft petition tendered by the learned counsel for the petitioners to enable the learned Principal Judges of the Family Courts at Mumbai and Pune to prepare a report and submit in this Court.

XI. Necessary reports to be submitted on or before 6th December 2024. Thereafter, the learned Registrar (Judicial-I) shall place the reports before the Hon'ble the Chief Justice along with a copy of this order.

[GAURI GODSE, J.]