

Delhi High Court

Mohin Saili And Sonali Singh vs Nil on 26 November, 2010

Author: Kailash Gambhir

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 26.11.2010

MAT APP NO.126/2010

Mohin Saili

.....Appellant no.1

And

Sonali Singh

..... Appellant no.2.

Through: Ms. Bhakti Pasrija, Adv.

Vs.

NIL

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

- | | |
|---|-----|
| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

KAILASH GAMBHIR, J. Oral

*

1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955, the appellants seek to challenge the impugned order dated 11.11.2010, passed by the Family Court, whereby the application filed by the appellants under Section 14 of the Hindu Marriage Act to seek waiver of one year period for presenting the joint divorce petition under Section 13(B) of the Hindu Marriage Act was dismissed.

2. The grounds taken by both the appellants in the said application are that the appellant no.1 is working with the Bikanervala Food Pvt. Ltd as an Assistant Unit Manager in Delhi, while appellant no.2 is working with Qatar Airways, Doha, United Arab Emirates (UAE) as a Flight Attendant and both the parties could not live together for a day after solemnization of their marriage on 12.4.2010. It was also stated by them that their marriage was not consummated and both the parties realized

that they are totally incompatible, having different mind sets, ambitions and career orientations. It was also stated that the appellant no.2 since is working with an Airlines in Doha, therefore, it is not possible for her to join her husband appellant no.1.

3. The learned Family Court after placing reliance on the judgment of the Apex Court in Anil Kumar Jain Vs. Maya Jain (2009) 10 SCC 415, dismissed the said application moved by the appellants. The learned Family Court held that requirement of Section 13 B(1) of the Hindu Marriage Act is that before presentation of the divorce petition, the parties are required to live separately for a period of one year or more. The court further held that considering the fact that the marriage between the parties was solemnized on 12.4.2010, the statutory period of one year did not come to an end on the day of the presentation of the said petition, therefore, the parties were held not entitled for the grant of exemption of statutory requirement as envisaged under Section 13B(1) of the Hindu Marriage Act. Feeling aggrieved with the said order, both the parties have preferred the present appeal.

4. Ms. Pasrija, learned counsel for the appellants placed reliance on the judgment of this court in Pooja Gupta & Anr. Vs. Nil, 118 (2005) DLT 492, and unreported judgment in Sh. Tarun Kumar Vaish Vs. Ms. Meenakshi Vaish, decided by this court on 13.4.2005. Both the judgments are given by the Hon'ble Mr. Justice Mukul Mudgal, as he then was.

5. Taking into consideration the Statement of Objects and Reasons behind the 1996 amendment in the proviso to Section 14 of the Hindu Marriage Act, the Hon'ble Judge in Pooja Gupta's case (Supra) felt that the legislative intent behind the said amendment was expeditious disposal of divorce cases by way of mutual consent. Relevant para of the said judgment is reproduced as under:

"8. The above statement of objects and reasons though made in the context of parity with Section 28 of Special Marriage Act also clearly indicates that the legislative intent was expeditious disposal of divorces by mutual consent. In my view as long as the Court is satisfied as an essential reason for exemption for filing a divorce by mutual consent prior to expiry of one year after the marriage that the plea for mutual consent is not under coercion/intimidation or undue influence and there are no chances of reconciliation and the parties have fully understood the impact and effect of the divorce by mutual consent, the continuance of such a marriage is bound to cause undue hardship to the spouses. The other relevant considerations which may be considered for granting the exemption from passage of one year before filing a petition for divorce by mutual consent are:

- (a) the maturity and the comprehension of the spouses;
- (b) absence of coercion/intimidation/undue influence;
- (c) the duration of the marriage sought to be dissolved;
- (d) absence of any possibility of reconciliation;

(e) lack of frivolity;

(f) lack of misrepresentation or concealment;

(g) the age of the spouses and the deleterious effect of the continuance of a sterile marriage on the prospects of re- marriage of the parties."

6. Similar controversy again cropped up before Hon'ble Ms. Justice Aruna Suresh when dealing with the Matrimonial Appeal bearing MAT APP NO. 134/2009 in the matter of Sh. Nand Kishore Vs. Smt. Suman, decided on 15.12.2009 and then in the case of Ms. Urvashi Sibal & Anr. Vs. Govt. of NCT of Delhi, decided on 7.1.2010. Hon'ble Ms. Justice Aruna Suresh referred to Pooja Gupta's case (Supra), and after placing reliance on the two judgments of the Apex Court in Smt. Sureshta Devi Vs. Om Prakash (1991) 2 SCC 25 and Anil Kumar Jain Vs. Maya Jain (2009) 10 SCC 415, took a view that under no circumstance, Section 14 of the Hindu Marriage Act can be invoked in the proceedings initiated under Section 13(B) of the Hindu Marriage Act. Hon'ble Ms. Justice Aruna Suresh also found that the Apex Court decision in the case of Smt. Sureshta Devi (Supra) was not brought to the notice of the learned Judge during the course of hearing in Pooja Gupta's case (Supra) and therefore, the said judgment ignoring the decision of the Apex Court would have no binding effect. It would be relevant to reproduce the observations of the learned judge in the case of Urvashi Sibal (supra) here:

"6. In Nand Kishore v. Suman Matrimonial Appeal No. 134/2009 decided by me on 15th December, 2009, while dealing with a similar question, reliance was placed on 'Smt. Sureshta Devi's case (supra)'. I further distinguished the provisions contained in Section 13B(1) and Section 14 of the Act for waiving the statutory period of one year before filing a petition under Section 13 or 13B of the Act, as the case may be. It was observed:

12. It is noted that requirement under Section 13B(1) of the Act is separation for a period of one year or more beside others to file a petition. Whereas under Section 14 of the Act, Court has the power to condone the statutory period of one year, required for filing a petition under Section 13 of the Act or any other provision contained in the said Act, from the date of the marriage. Therefore, under no circumstances, Section 14 of the Act can be invoked in the proceedings initiated under Section 13B of the Act.

7. Thus, it is clear that the statutory period of one year required to be maintained by the parties for filing a petition under Section 13B of the Act are independent of the provisions contained in Section 14 of the Act. Section 13B when read is a complete Code in itself and, therefore, for filing a petition under Section 13B of the Act, the parties cannot be allowed to invoke Section 14 seeking waiver of the statutory period of one year from separation for filing a petition under Section 13B of the Act."

7. I find myself in agreement with Hon'ble Ms. Justice Aruna Suresh. Before taking the discussion further it would be apt to reproduce Section 13(B) and Section 14 of the Hindu Marriage Act as under:

13B.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 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 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.

14. No petition for divorce to be presented within one year of marriage.

(1)Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties

before the expiration of the said one year.

8. Section 13 (B) and the amendment in Section 14 of the Hindu Marriage Act was brought through the same amendment by the legislature in the year 1976. Before the said amendment in Section 14 of the Hindu Marriage Act, the bar was for a period of three years in presentation of the petition under Section 13 of the Hindu Marriage Act and through the said amendment the period was reduced from three years to one year. Proviso to Section 14(1) of the Hindu Marriage Act provides an exception to the effect that the petition can be presented even before the expiry of said period of one year from the date of the marriage but the case should be of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. Section 13(B) (1) of the Hindu Marriage Act on the other hand specify the grounds under which the petition to seek dissolution of marriage by a mutual consent can be presented. The mandatory requirements envisaged under Section 13(B) of the Hindu Marriage Act are that (a) they have been living separately for a period of one year or more,

(b) that they have not been able to live together (c) that they have mutually agreed that the marriage should be dissolved. Once these three conditions are satisfied then only the court has the jurisdiction to entertain the petition for divorce by mutual consent. Under the proviso to Section 14 of the Hindu Marriage Act, the parties can seek waiver of one year period in presentation of the divorce petition on the ground of hardship or due to exceptional depravity but the same cannot have the effect of diluting the mandate of Section 13(B) (1) of the Hindu Marriage Act, which clearly mandates separation of one year between the parties before presentation of their joint divorce petition.

9. Whether the period of six months to eighteen months as provided by section 13B(2) for the presentation of the petition can be waived off has been the subject of various judicial pronouncements and the Apex Court recently in the case of Neeti Malviya vs. Rakesh Malviya (2010) 6 SCC 413 has referred the said question to a larger Bench. But the question that this Court is confronted with in the present petition is different as it regards that whether the statutory period of one year of separation as provided in section 13B(1) can be waived off by the court in terms of undue hardship and depravity as provided by section 14 of the Act .

10. The Division Bench of the Bombay High Court has dealt with the same issue in detail in the matter of Principal Judge, Family Court, Vs. NIL AIR 2009 Bom 12 , decided on 12.6.2008. The relevant paras of the said judgment are reproduced as under:

"8. The learned Counsel appearing for the parties had also relied upon the judgment of the Supreme Court in the case of Smt. Sureshta Devi v. Om Prakash : [1991]1SCR274 , to buttress their submission. It may be noticed that this judgment hardly helps the cause of the petitioners. In this case, the Supreme Court had primarily interpreted the expression appearing in Section 13B of the Act and held that parties could be living under the same roof but still may be living separately in law as there is no cohabitation of matrimonial relationship between them. While deciding this as a principal controversy, the Supreme Court clearly observed that the

jurisdiction of the court to pass a decree by mutual consent is a limited jurisdiction, the court has to pass a decree upon satisfaction of the requirements of law and after expiry of the specified period. While referring to the judgments of the different courts in para 12 of the judgment and analysing the provisions of Section 13B of the Act, the Supreme Court held as under:

13. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under Sub- section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Subsection (2) of Section 13B is clear on this point. It provides that "on the motion of both the parties...if the petition is not withdrawn in the meantime, the Court shall...pass a decree of divorce. "What is significant in this provision is that there should also be mutual consent when they move the Court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

9. The above dictum of the Supreme Court clearly lays down the law that the period specified by Legislature as prerequisite to filing and grant of a decree for divorce on mutual consent is expected to be complied with and its observance is not discretionary at the whim of the court. The legislative scheme clearly shows that the specified periods are not optional for the parties to be complied with because the cause of action is completed only upon conclusion of the period and clearly mandates the court to satisfy the requirements of law before passing a decree.

10. As far as the judgment of the Delhi High Court in the case of Pooja Gupta v. Nil 2005(1) DMC 571, relied upon by the parties is concerned, it relates to the period of one year stated under Section 13B(1) of the Act and it is in apparent conflict with the Division Bench judgment of this Court in the case of Miten (supra) and for the reasons recorded in that judgment, we are unable to concur and accept the view of

Delhi High Court in the case of Pooja Gupta. In the cases of Anjana Kishor v. Puneet Kishor : (2002)10SCC194 and Sanghamitra Ghosh v. Kajal Kumar Ghosh : (2007)2SCC220 , the Supreme Court was primarily concerned with the transfer petitions filed before it and keeping in view the peculiar facts and circumstances of those cases and being satisfied that the marriages had broken down irretrievably, the Supreme Court in exercise of its special jurisdiction under Article 142 of the Constitution of India had allowed a decree of divorce by mutual consent. No question of law was discussed in these cases and thus, they cannot be treated as binding precedence especially when the Supreme Court itself noticed in the judgment that in the peculiar facts and circumstances of the case and particularly in exercise of its power under Article 142 to do complete justice between the parties, the court has passed those orders. No other court including the High Court is empowered to exercise jurisdiction under Article 142 of the Constitution of India and in fact, the courts do not have powers akin to such powers particularly in face of the provisions of the special Act viz. Hindu Marriage Act.

In the present case, we are concerned with the propositions of law simplicitor.

.....

18. Section 13B of the Act states the grounds on which and the period of limitations which shall constitute a complete cause of action for the parties to file a petition for divorce by mutual consent. Wherever any of the ingredients are missing or are not satisfied, the petition itself cannot be presented, as it would affect the very jurisdiction of the court to entertain such a petition. Legislature has not granted any power to waive or condone the periods of limitation specified under that provision. *Ex turpi causa non oritur actio*. Absence of complete cause of action would be a legal impediment in institution and continuation of such proceedings. Thus, the parties have to satisfy the court that ingredients of Section 13B(2) are satisfied and the averments made in the petition are correct to enable the court to pass a decree."

11. In the aforesaid judgment of Bombay High Court, reference has also been made to the decision in Pooja Gupta's case (Supra) and also the decision of the Apex Court in Smt. Sureshta Devi's case (Supra).

12. Here it would also be pertinent to mention the judgment of the Division Bench of the Bombay High Court in the case of Miten vs. Union Of India 2008(5) MhLj 27 where the constitutional validity of section 13B of the Act was challenged. Discussing the requirements of the section in detail the learned court observed that:

13. The Legislature, while introducing the Amending Act 1976, did take into consideration the following: (i) to liberalise the provisions relating to divorce (ii) to enable expeditious disposal of proceedings under the Act and (iii) to remove certain anomalies and handicaps in the existing law. These ingredients are evident from the

plain language of the section and do not leave any scope for ambiguity. Thus, it would not be necessary for the Court to expand its meaning and convert a mandatory provision into directory which may even result in defeating the object of the provision. In *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar*: AIR1963SC1207, the Supreme Court observed thus--

It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature.

13.1. Provisions of Section 13B of the Act are mandatory and the condition precedent to the presentation of the petition set out therein had to be satisfied strictly. Further, Section 14 of the Act prior to 1976 amendment had put a further bar stating that notwithstanding anything contained in the Act, the Courts shall not be competent to entertain any petition for dissolution of marriage by a decree of divorce unless the petition had been presented after a lapse of three years since the date of marriage. However, proviso to Section 14(1) provided an exception to the effect that a petition could be presented even before the expiry of the said period of three years if circumstances of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent existed and in such cases the Courts may, after hearing, pronounce a decree subject to the condition that the decree shall not have effect until after the expiry of three years. In this backdrop and while amending the Act in the year 1976, the Legislature while keeping the three of its aforementioned objects in mind, reduced the period from three years to one year and maintained the language of Section 14 as well as its proviso otherwise intact. In other words, the Legislature did not alter or change the contents of ingredients of Section 14 except to the extent of reducing the period from three years to one year. This is despite the fact that the Law Commission in its recommendations relating to Section 14 of the Act in its 59th Report in March, 1974 had asked for deletion of Section 14 of the Act.

14. As already noticed, by the same Act 68 of 1976, Section 14 was amended and Section 13B was introduced in the Act. The language of Section 13B is clear and unambiguous. The Legislature in its wisdom did not introduce any relaxation in Section 13B of the Act. There is nothing in the language of section which can suggest that the provisions of Section 13B are simpliciter procedurally directed and can be moulded by the Court in exercise of its judicial discretion depending on the facts and circumstances of the case. This provision is intended to liberalise the provisions relating to divorce. Being aware of the existing provisions, report of the Law Commission and the need of the society still the Legislature chose not to add any proviso granting relaxation to the conditions imposed under Section 13B(1) and/or 13B(2). It would not be permissible for the Court to read the expression 'living separately for a period of one year or more' as by adding the word 'may' or for such period as the Court in its discretion may consider appropriate.

.....

All that the provision requires is the petition for divorce on mutual consent should be filed at least not before the period of one year immediately preceding the presentation of the petition when the parties live separately. This period is intended to provide healing time to the parties to seriously ponder over their differences and settle their minds so as to know whether their disputes or differences are capable of resolution and whether they could restore their matrimonial home happily or the differences are of such kind or they belong to such class where continuation of matrimonial relationship is impossible as it has irretrievably broken down. If the continuation of the marriage results in continued mental torture, there is no compatibility and the parties would be free to ask for the relief of dissolution. Liberal construction, as suggested by the petitioner, in fact, would frustrate the very object of the Act and encourage complete disharmony in the continuance of institution of marriage and may even be without a rationale reason.

24.1. The legislature after considering various facets, in its wisdom, has provided the period of one year when parties would live separately and then alone approach the Court of law for a decree of divorce by mutual consent."

13. The legislature has thus no doubt liberalized the theory of divorce by the Amending Act 68 of 1976 as earlier the grant of divorce under Section 13 of the Act was based on the guilt theory which led to allegations by one party on the other for the grant of divorce. The Amendment was introduced to add a concept of mutuality to divorce thus recognizing the social reality that some marriages do not also fail because of the guilt of one of the parties but simply do not work out when the parties realize that they are not made for each other. But this cannot be interpreted to mean that liberalization is to the extent that the marriages can be dissolved at the drop of a hat. Trivial issues and day to day wear and tear of married life cannot be a ground for the parties to take recourse to section 13B for dissolution of marriage. The legislature in its wisdom has provided a safeguard in the form of statutory period of one year as living separately, as envisaged under section 13B(1), as the cooling off or the healing period for the parties to reconsider their differences and to aim at reconciliation. Any interpretation that circumvents this object of the Act is unconstitutional and not tenable in the eyes of law. Merely because the parties suffer inconvenience and they have to wait and live separately for a period of one year does not give the jurisdiction to the court to waive off the statutory limitations provided in the statute. The courts have not been vested with any specific or general powers to waive the period stipulated under section 13B(1).

14. The period of one year as living separately in section 13B(1) is a part of the substantive law for seeking divorce by mutual consent and not a procedural formality that can be done away with. The decree of divorce by mutual consent is a remedy that can be invoked under section 13B(2) only after fulfilling the conditions set forth in section 13B(1). Thus the condition of living separately for one year is not directory but mandatory and the plain meaning and requirement of law stated under these provisions should be satisfied before the court gives any relief. Hence it can not be permissible to mould the requirements of a provision and that too only on the ground of the convenience of the

parties.

15. Now coming to section 14 of the Act, it would suffice to say that it provides for the time frame for the presentation of petition and does not lay down an ingredient for granting the decree of divorce. The proviso of section 14 which provides for the presentation of petition even before the lapse of a period of one year cannot be read into the provision of section 13B(1) and both are independent of each other.

16. Therefore the period of one year of living in separation is a sine qua non to the filing of the petition under section 13B(1) and its waiver would be forbidden by any canons of law of interpretation. The court gets the jurisdiction to entertain and decide the petition for divorce by mutual consent only after these ingredients are satisfied. The object of liberalization has to be read only in the manner and framework as provided by the statute. Reason for enacting a law has to be the reason for sustaining the law and it should not destroy the letter and spirit of law.

17. Hence, in the light of the above discussion, this court is of the view that the legislative mandate envisaged under Section 13B(1) of the Hindu Marriage Act of providing a period of one year separation before the presentation of the petition to seek divorce by way of mutual consent cannot be waived under proviso of Section 14 of the Hindu Marriage Act as separation of one year is prerequisite for invoking Section 13B(1) of the Hindu Marriage Act and the said statutory period of one year cannot be given any different interpretation so as to dilute its true and correct meaning and any interpretation to the contrary would defeat the very intent of the legislation.

18. In the event of the foregoing, I find no merit in the present appeal and the same is hereby dismissed.

November 26, 2010
mg

KAILASH GAMBHIR, J