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IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.230 OF 2024

Mr. Vishwas Kawthankar Son of Ramesh
Kawthankar Age 41 years, service, Indian
National Resident of H.No.695 B.B.
Borkar Road Alto Porvorim Bardez-GoaPetitioner.

versus

Mrs. Sunita Vishwas Kawthankar alias
Sunita Gajanan Vazarkar Daughter of
Gajanan Vazarkar Indian National, Age
37 years, service, R/o H.No.324, nave
Bhat : Danda Siolim Bardez-GoaRespondent.

Mr Clayton Fonseca, Advocate for the petitioner.

Mr Kewal Sawant, Advocate for the respondent.

CORAM: BHARAT P. DESHPANDE, J.
DATE: 24th APRIL 2024

ORAL JUDGMENT.:

1. Rule
2. Rule is made returnable forthwith.
3. Heard finally with the consent.
4. In the present petition, very sensitive issue and that too with regard to grant of mutual consent divorce is raised. Petitioner and the respondent got married in the year 2016. However within a period of one year, differences arose, matter landed before the Magistrate by

filing Domestic Violence cases against the husband by the wife. Subsequently, and by interference of the Court, parties were referred to mediation. Learned Mediator submitted report as successful by drawing terms between the parties. Such consent terms were placed before the learned Magistrate at Mapusa in a Domestic Violence case. Consent terms were duly signed by both the parties along with their Advocates.

5. Petitioner as well as respondent agreed that they will separate by filing mutual divorce. Petitioner agreed to pay Rs.9,00,000/- as on the date when the mutual divorce is granted. Similarly, wife agreed that she will withdraw all the complaints filed against her husband only on the date when the mutual divorce is granted.

6. Accordingly, the petitioner and the respondent filed matrimonial petition before concerned Court for grant of divorce by mutual consent under Article 36 of the Law of Divorce. Along with such petition, parties jointly filed an application for waiver of the said period as found mentioned in Article 40 so as to give quietus to the dispute between the parties and to withdraw the proceeding as well as to pay amount agreed between the parties. Learned trial Court, however, refused to waive such period claiming that period of one year as provided under Article 40 is mandatorily to be gone into before confirming the divorce by the mutual consent. Petitioner as well as respondent are therefore, before this Court challenging such

decision.

7. Mr Fonseca appearing for the petitioner and Mr K. Sawant appearing for the respondent would submit that Civil Court is having inherent power to waive such period based on circumstances of each case. Reliance is placed in the case of *Amardeep Singh Vs Harveen Kaur*¹.

8. Mr Fonseca submits that principles laid down by the Apex Court though coming out of provisions of Section 13-B(2) of the Hindu Marriage Act, same would be applied with equal force to the matter in hand. He submits that provisions of Article 40 of the law of divorce applicable to State of Goa is only with an intention to give time to the spouses for the purpose of reconciliation or rethinking about the mutual divorce. He submits that matter in hand is quite distinct and different as all efforts for reconciliation or rethinking in living together were already exercised and finally parties decided to apply for mutual divorce. He submits that in such circumstances, and in order to comply with the consent terms, Court could have waived the period of one year so as to give quietus to the dispute and allow the parties to separate from each other. Mr Sawant appearing for the respondent also endorsed the same view and submitted that provisions cannot be stretched to mean that when a marriage is broken to the extent that it is not possible for the parties to live

¹ 2017(6) Bom. C.R. 773

together in future, Court should consider the option of waiving the period.

9. The scheme found in the Law of Divorce for applying for divorce by mutual consent, Article 36 provides as to how the application should be filed and what documents to be attached. Article 37 deals with the power of Judge to admit such petition and to issue summons to other side. It further shows that the Judge should consider reconciliation of the parties and only if it is not possible shall record it in writing about the agreement of the spouses for divorce, in presence of two respectable persons.

10. Article 39 would then provide that the Judge shall sanction by judgment agreement of spouses, recorded as per preceding Article, granting them provisional divorce for a period of one year. Intention of granting provisional divorce is found in paragraph 1 wherein it is provided that during such period spouses does not authorise themselves from obtaining any dissolution of marriage and that administration of all the properties of the couple should be continued to be vested in the husband.

11. Article 40 would then provide that only after lapse of one year spouse shall appear before the Judge who on an application made by either of them declare whether they still maintain their decision and record it for the purpose of drawing up of the decree. At this stage

also paragraph 1 of Article 40 further provides that notice has to be served on the parties and spouses shall remain present in person. Only thereafter order of provisional divorce could be made final.

12. The Apex Court in the case of *Amardeep Singh* (supra) was dealing with the application for Divorce by mutual consent, under Section 13-B(2) of the Hindu Marriage Act wherein cooling period is of six months. The question was raised as to whether such cooling period as provided under the said provision is mandatory and whether the Court in its inherent power is entitled to waives such period on case to case basis.

13. While dealing with such aspects, certain observations are relevant which are found in paragraph nos. 15,16, 17 and 18 as quoted below:-

"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 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.

- 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 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 v. Nanhu* [*Kailash v. Nanhu*, (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.”

- 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 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”

14. Principles emerging from above decision could be made applicable to the matter in hand. There is no dispute that the marriage between the petitioner and the respondent though performed in the year 2016, parties separated immediately within a period of one year which resulted in filing Domestic Violence case as against the husband in the year 2017. It is also not disputed that during the pendency of the Domestic Violence case, learned Magistrate referred the spouses for mediation. Learned mediator after successful proceedings, was able to draw consent terms agreeable to both the parties. Accordingly, on 28.8.2023 such consent terms were drawn and placed before the learned Magistrate at Mapusa in Domestic Vilence Act, proceedings no. 40/2017.

15. Terms drawn between the parties reads as follows:-

“1. The parties have decided to file mutual divorce before the court of law.

2.The respondent has agreed to pay Rs.9,00,000/to the complainant by way of

demand draft on the date when the mutual divorce is granted.

3. This DV proceedings shall be withdrawn by the complainant on the date when the mutual divorce is granted.

4. Upon mutual divorce both have agreed that they shall not claim any right, interest in each others property.

5. The complainant has agreed to withdraw all the complaints filed by her before various authorities on the date when the mutual divorce is granted.”

16. Thus it shows that the efforts by the mediator would show that parties instead of coming together, mutually decided to separate and depart by obtaining mutual divorce. It further shows that relationship between the petitioner and the respondent including the marriage is irretrievably broken beyond reunion. Parties are unable to stay together and accordingly decided to separate by filing mutual divorce.

17. Condition nos. 2 and 3 in the consent terms would further show that same cannot be finally performed unless mutual divorce is granted.

18. Respondent/wife will not be able to receive amount of Rs.9,00,000/- which is agreeable to be paid to her. Similarly wife will not be able to withdraw the Domestic Violence Act proceedings till the mutual divorce is granted.

19. The language used in Article 40 of the Law of Divorces though

provides that period of one year has to pass when applied for mutual divorce. Intention behind it is to give time to the parties to rethink and to find out whether settlement is possible including reunion. However, when such procedure is already followed by the parties during other proceedings and it is found that there is no possibility of reunion, very object of keeping the parties tied with such relationship for a period of one year without waiving the period would be too harsh. In such circumstances, when the Court is entitled to grant decree by consent, such Court is also entitled to consider waiver of such period, however based on circumstances of each case. It is necessary to note here that such waiver cannot be granted in each and every matter. However, when the circumstances are such that all efforts are already made between the parties and that it is not possible to reunite, question of keeping them tied with said relationship for a further period of one year would be adding to further agony and bitterness. Accordingly, principles laid down by the Apex Court in the case of *Amardeep Singh* (supra) could be taken into account for the purpose of waiving the period and granting divorce by consent in the matter in hand.

20. Accordingly, impugned order dated 5.2.2024 is hereby quashed and set aside. Application filed by the petitioner and the respondent for waiver of the waiting period stands allowed.

21. Rule is made absolute in the above terms.

22. Petition stands disposed of.

BHARAT P. DESHPANDE, J.

VINITA VIKAS
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