

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SHEEL NAGU
&
HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL

FIRST APPEAL No.950 of 2021

Between:-

VISHAL KUSHWAHA S/O DILIP
KUSHWAHA AGED ABOUT 33 YEARS
OCCUPATION: GOVERNMENT
SERVANT R/O. SURATGANJ, ITARSI
(MADHYA PRADESH)

.....APPELLANT

(BY SHRI DEEPAK PANJWANI, ADVOCATE)

AND

MRS. RAGINI KUSHWAHA W/O MR.
VISHAL KUSHWAHA, AGED ABOUT
27 YEARS , R/O DEVAL MOHALLA,
TAHSIL SEONI, MALWA, DISTRICT
HOSHANGABAD (MADHYA
PRADESH).

...RESPONDENT

(BY SHRI ABHAY GUPTA, ADVOCATE)

Date of hearing : 26.02.2022.

Date of Judgment: 28.03.2022.

Per: Dinesh Kumar Paliwal, J.

JUDGMENT

This Appeal under section 28 of the Hindu Marriage Act, 1955 has been filed against the judgment and decree dated 23.07.2021 passed by First Additional District Judge, Itarsi, District Hoshangabad whereby the joint application filed by appellant-Vishal Kushwaha and her wife Ragini under Section 13(B) of the Hindu Marriage Act for mutual divorce has been rejected and the divorce petition has been dismissed on the ground that application has been filed before prerequisite period of one year under Section 14 of the Hindu Marriage Act.

2. A perusal of the application filed under Section 13B of the Hindu Marriage Act, 1955 (hereinafter referred to as “the Act”) shows that the marriage was solemnized on 21.02.2019 between the parties but after some time of marriage their marital relations got soured as a result whereof they started to live separately. On 15.10.2019 almost after 7 months and 24 days of marriage, they filed an application seeking mutual divorce under Section 13(B) of the Act before the Court of District Judge, Itarsi. Both the parties are living separately since 7 months prior to filing of the application under Section 13B of the Act. The said application under Section 13B of the Act was registered as RCS No.118/19. The divorce application filed under Section 13B of the Act was rejected by the learned District Judge by judgment dated 23.07.2021 as pre-mature

stating that under Section 14 of the Act, no application for divorce can be presented before expiry of the period of one year of marriage. Aggrieved with the said judgment, appellant husband has preferred the present appeal.

3. It is relevant to mention here that no application under Section 14 of the Act or an application to grant leave to present the divorce application with mutual consent before the expiration of the period of one year since the date of marriage, was filed.

4. Shri Deepak Panjwani, learned counsel for the appellant, has placed reliance on the judgment of *Priyanka Maity (Ghosh) vs. Shri Sabyasachi Maity, 2012 AIR (Cal) 243* and argued that under Section 14 of the Act a petition for mutual divorce could be entertained even before the expiry of one year from the date of marriage. It is not mandatory to require compliance with mathematical precision and to warrant rejection for non filing of application under Section 14 of the Act as provision of Section 14(1) of the Act is not mandatory. The provisions are directory in nature. As petition itself was pending before the Court for more than a year and that is substantial compliance of Section 14(1) of the Act, learned trial Court has committed an error in dismissing the mutual divorce application on the ground that the period of one year provided under Section 14 of the Act has not expired. He further submitted that the period of one year since the date of presentation of the application by the parties to the marriage can be waived by the Court itself under the proviso to Section 14 of the Act for the

purpose of filing of petition under Section 13B of the Act when it appears that there are no chances of living together as husband and wife and their differences cannot be resolved. He further submitted that both the parties are living separately for more than a year; therefore, it would be in the interest of justice, if the impugned judgment dated 23.07.2021 passed by learned District Judge is set aside and decree on the basis of mutual divorce under Section 13B of the Act is granted

5. On the other hand, learned counsel for the respondent wife Shri Abhay Gupta has opposed the arguments advanced by learned counsel for the appellant and has submitted that respondent wife does not want mutual divorce on the basis of consent. The learned District Judge has rightly dismissed the application as it was premature. Thus, he has prayed for dismissal of the appeal.

6. Perused the record as well as provisions of the Hindu Marriage Act particularly Sections 13, 13B and 14 of the Act, 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. 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. Before we dwell further in the matter, it would be apt to reproduce Sections 13B and 14 of the Act which read 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 13B and the Amendment in Section 14 of the Act were introduced w.e.f. 27.05.1976 by the Amending Act of 1976. Before the said amendment in Section 14 of the Act, the bar was for a period of three years in presentation of the petition under Section 13 of the Act and through the said amendment the period was reduced from three years to one year. Proviso to Section 14(1) of the 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

appellant or of exceptional depravity on the part of the respondent. Section 13(B)(1) of the 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 13B of the 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 Act, which clearly mandates separation of one year between the parties before presentation of their joint divorce petition.

9. Sub-section (1) of Section 13B is an enabling Section for presenting a petition for dissolution of marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties have been living separately for a period of one year or more and have not been able to live together. Sub-section (2) of Section

13B of the Act, however, provides for the procedural steps that are required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the Court. The language is very specific and it intends that on a motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in Sub-section (1) and not later than 18 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, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. When all the ingredients are proved a decree of divorce cannot be refused.

10. In the case of *Amardeep Singh vs. Harveen Kaur, 2017 (8) SCC 746*, Hon'ble Apex Court held:

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 XXXIIA 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 concerned Court.

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

11. From the above, it is clear that the statutory waiting period of at least 6 months mentioned in Section 13B(2) of the Act is not mandatory but directory and that it would be open to the Court to exercise its discretion to waive the requirement of Section 13B(2) of the Act having regard to the facts and circumstances of the case, if there was no possibility of reconciliation between the spouses and the waiting period would serve no purpose except to prolong their agony.

12. In the case in hand, the question is different i.e. whether the statutory period of one year of separation as provided in Section 13B(1) can be *suo motu* waived off by the Court in terms of undue hardship and depravity as provided by Section 14 of the Act. In the

present case, the marriage was solemnized on 21.02.2019. Since the petition for mutual divorce was filed within 8 months of marriage, that is less than a year of separation of parties to the marriage, the petition for divorce on the basis of mutual consent as provided under Section 13B was not maintainable. But learned Judge came to the conclusion that under Section 14 of the Act, application for divorce cannot be filed before expiration of the period of one year from the date of marriage and rejected the divorce petition filed on the ground of mutual consent.

13. The question arise for consideration is whether provisions of Section 14 of the Act are applicable in an application filed under Section 13B of the Act. The Division Bench of the Bombay High Court has dealt with the said issue in detail in the case of *Principal Judge, Family Court vs. NIL AIR 2009 Bom 12*. The relevant paragraphs 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 analyzing 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 Subsection (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."

14. As far as the judgment of *Priyanka Maity (supra)* is concerned, we have carefully perused the judgment rendered by the Calcutta High Court in that case. The case of *Priyanka Maity (supra)* is not applicable in the present case as in that case, petition for divorce was filed under Section 13 of the Act and not under Section 13B of the Act; therefore, we are of the view that the facts of that case have no application in the present case and we are of the view that proviso to Section 14 of the Act is not applicable for the

purpose of waiving the period of one year as provided under Section 13B of the Act as Section 13B is an independent section by itself.

15. The argument of learned counsel for the appellant is also that the proviso to Section 14 would be read along with Section 13B of the Act whereunder the divorce has been sought by mutual consent. The question that arises for determination by this Court is that whether Section 14 of the Act qualifies Section 13 alone or does it also qualify Section 13B of the Act. The period of one year has been prescribed in Section 14 and the same can be relaxed only by means of its proviso. No such proviso finds place in Section 13B. The contention of the counsel for the appellant that the proviso of Section 14 should have been applied to Section 13B is liable to be rejected because as per the scheme of the Act, Section 13B cannot be read along with Section 14 of the Act and the proviso to Section 14 by no stretch of imagination will be applicable in the matters of mutual divorce by consent.

16. Even in the case of *Amardeep Singh (supra)*, Hon'ble Apex Court has not permitted either to the Court or the parties to waive the statutory period of one year as provided under Section 13B(1) of the Act, as Apex Court observed that Court dealing with the matter should be satisfied that a case is made out to waive the statutory period under Section 13B(2) of the Act and should also be satisfied that the statutory period of one year as provided under Section 13B(1) of the separation of the parties is already over before the first motion itself. Thus, the Supreme Court was of the view that the

period of one year as provided under Section 13B(1) should be over before the presentation of the divorce petition on mutual consent before the Court below and has not held that the period of one year as provided under Section 13B(1) is directory in nature and not mandatory.

17. After considering the overall scheme of the Act envisaged under Section 13B and 13B(1) of the Act, it is apparent that period of one year as living separately in Section 13B(1) of the Act 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 condition of living separately for one year is not directory but mandatory and the requirement of law stated under Section 13B(1) should be satisfied before the Court gives any relief. As per Section 14 of the Act is concerned, it provides for the time frame for the presentation of divorce petition and does not lay down an ingredient for granting the decree of divorce. The proviso of Section 14 of the Act 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), as both are independent of each other. Therefore, having considered the facts of the case and law as referred above, we are of the view that the period of one year of living in separation is a must to the filing of the petition under Section 13B(1) and waiver of this period is not permissible under Section 14 of the Act.

18. The Court gets the jurisdiction to entertain and decide the petition for divorce by mutual consent only after the ingredients

under Section 13B(1) of the Act are satisfied. Therefore, we are of the view that the mandate envisaged under Section 13B(1) of the Act 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 Act either on the application of the parties or *suo motu* by the Court, as separation of one year is prerequisite for invoking Section 13B(1) of the Act.

19. In view of the above discussion, we find no merit in the present appeal and the same is hereby dismissed.

(SHEEL NAGU)
JUDGE

(DINESH KUMAR PALIWAL)
JUDGE