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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SHEEL NAGU
&
HON'BLE SHRI JUSTICE VINAY SARAF
ON THE 19th OF MARCH, 2024
FIRST APPEAL No. 1668 of 2023**

BETWEEN:-

**ARCHANA KANOJIYA W/O VIJAY KANOJIYA, AGED
ABOUT 44 YEARS, OCCUPATION: HOUSEWIFE R/O
GIRIRAJ KISHOR KAPOOR WARD NO. 11 GUPTESHWAR
JABALPUR (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI JITENDRA TIWARI-ADVOCATE)

AND

**VIJAY KANOJIYA S/O LATE SHRI HERALAL KANOJIYA,
AGED ABOUT 50 YEARS, OCCUPATION: BUSINESS R/O
DUBEY COLONY WARD NO. 17 (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI SIDDHARTH DATT-ADVOCATE)

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*This appeal coming on for admission this day, Justice Vinay Saraf
passed the following:*

JUDGMENT

The appellant/wife has assailed judgment and decree passed in RCSHM/372/2022 dated 13.1.2022 passed by Principal Judge, Family Court, Katni (MP), whereby joint petition filed by appellant/wife and respondent/husband under Section 13(B) of Hindu Marriage Act, 1955 (for short, 'the Act') for divorce by mutual consent was allowed and decree of divorce was passed.

2. Along with appeal, I.A.No.11571/2023 has been filed by

appellant/wife under Section 5 of Limitation Act for condonation of delay of 152 days occurred in preferring the present appeal. It is stated in application that appellant was suffering from various mental disorders like adjustment disorder with depressed mood, depression etc. and therefore, she was unaware of proceedings of Court and when she came to know about decree of divorce passed by family court, she filed instant appeal however, due to illness and being unaware of decree passed by family court, she could not file appeal earlier and, therefore, delay occurred in filing appeal be condoned. Learned counsel for the appellant prays for condonation of delay occurred in filing the appeal.

3. Learned counsel appearing on behalf of respondent/husband opposed the application on the ground that no cogent and sufficient reasons have been assigned by appellant/wife for condonation of delay. He further submits that appellant/wife herself was present before the family court on 13.1.2023, when judgment of divorce was passed and therefore, it cannot be accepted that she was not aware of passing of judgment and decree. He further submits that appellant/wife has not explained day to day delay and therefore, the application be rejected.

4. Reasons assigned for causing delay is bonafide and sufficient. Application is supported by affidavit of appellant and medical documents (prescriptions of various doctors) filed as Annexure A-2 along with appeal memo to demonstrate that wife was suffering from mental disease. It is certified by Dr. Sarang Pandit by certificate dated 26.4.2023 that appellant/wife was under his treatment for adjustment disorder with depressed mood from 22.4.2022 and will require regular treatment and psychotherapy to recover from

illness.

5. Medical treatment papers filed along with appeal reveals that appellant/wife was under treatment of Dr. Swapnil Agrawal on 7.3.2022 and thereafter, she consulted to Dr. Amitesh Dubey on 25.3.2022 and on subsequent dates also. She was under treatment of Dr. Sarang Pandit since 22.4.2022 and continuously remained under treatment till 3.7.2023 and on 21.7.2023, present appeal has been preferred by appellant/wife.

6. After perusal of prescriptions filed along with appeal as Annexure A-2 (collectively), it reveals that appellant/wife was under treatment with many doctors and therefore, reasons assigned by appellant/wife for not approaching to Court within prescribed limitation, appears to be reasonable, acceptable and sufficient. Accordingly, application filed for condonation of delay is allowed. Delay is condoned.

7. The appeal is considered on merits with the consent of counsel for parties and heard for final disposal.

8. Appellant/wife has challenged judgment and decree passed by learned Family Court under Section 13(B) of Hindu Marriage Act on the ground that appellant/wife was not in a mental fitness to understand nature of proceedings and respondent/husband by practicing fraud, pressurised appellant/wife to give consent and evidence for divorce by mutual consent and therefore, judgment and decree passed by Family Court are liable to be set aside as same was not passed on the basis of free consent of appellant/wife and her consent is vitiated because she was not in her sense and her husband has taken undue advantage of situation. Learned counsel for appellant/wife prays for setting aside judgment and decree dated 13.1.2023.

9. Learned counsel appearing on behalf of respondent/husband submits

that joint application under Section 13 (B) of Hindu Marriage Act was filed before Principal Judge, Family Court, Katni and after recording statements of both parties, the matter was referred for mediation, which was failed and thereafter on 13.1.2023 learned Family Court recorded statements of both the parties on second motion and passed the judgment and decree on 13.1.2023, which is in consonance with provisions of law, pleadings of parties, oral evidence adduced by parties, mediator's report and therefore, the appeal be dismissed.

10. Heard learned counsel for rival parties and perused the record.

11. It appears from record that a joint petition under Section 13 (B) of the Hindu Marriage Act was filed on 1.11.2022 and learned Family Court recorded statements of both parties on 1.11.2022 itself, wherein both of them stated that they are living separately since last two years and there is no likelihood for reconciliation between them and decree of divorce by mutual consent be passed. After recording evidence, matter was referred for mediation and case was fixed for mediation report on 30.11.2022. Report was submitted by mediator before learned Family Court, whereby it was reported that both of them are not ready to live together and mediation is unsuccessful. After considering mediation report, without assigning any reason and without waiting for statutory period of six months specified in Section 13 (B)(2), learned Principal Judge, Family Court, Katni fixed matter for second motion and recording statement of parties on 13.1.2023. In this way, matter was fixed by learned Family Judge for consideration according to Section 13(B)(2) within two and half months from the date of filing of case and no reasons were assigned in order dated 30.11.2022 waiving the statutory period. No application

was moved and/or no request was made by parties for waiving period of six months as stipulated in Section 13(B)(2) of the Act. The case was fixed for 13.1.2023, when parties appeared and after recording statements, judgment and decree was passed. It is pertinent to mention here that appellant and respondent both were represented by one and common lawyer before Family Court. Appellant herein contended that she was suffering from mental disease therefore, she was unable to understand nature of proceedings and by taking undue advantage of situation, husband had obtained consent of appellant/wife for decree by mutual consent, however, same is not acceptable in absence of any material except prescriptions of doctors.

12. At this stage, it is apt to reproduce sub section 2 of Section 13(B) of Hindu Marriage Act, which reads as under

"13B. Divorce by mutual consent .—

1. x x x x

(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."

13. Now the sole question before us is that whether the family court can *suo moto* without any application or oral request of parties may waive statutory waiting period of six months as specified in Section 13

(B)(2)?

14. It is not in dispute in the present case that divorce petition on mutual consent was filed on 1.11.2022 and statements at first motion were recorded on 1.11.2022 itself. The mediation between parties was held on 15.11.2022 and on 30.11.2022 next date for recording consent of parties after waiting cooling period was fixed for 13.1.2023. It is apparent that learned family court had not waited for statutory period of six months before passing judgment and decree of divorce.

15. The jurisdiction of court to pass a decree by mutual consent is limited jurisdiction, Court has to pass a decree upon satisfaction of requirement of law and after expiry of specified waiting period. From the analysis of Section 13 (B), it is apparent that filing of petition with mutual consent does not authorise court to pass a decree for divorce. Under sub-section 2, there is period of waiting to six to eighteen months. This interregnum was obviously intended to give time and opportunity to parties to reflect on their move and seek advise from relatives and friends. In this transitional period, one of the parties may have a second thought and may change the mind not to proceed with petition. Spouse may not be party to joint motion under sub-section (2) after waiting period and there is nothing in Section which prevents such courts. Section does not provide that if there is change of mind by one party, it should not be accepted. It is not the intention of Legislature that once the petition is filed under Section 13(B) for dissolution of marriage by decree of divorce by mutual consent, any party to motion may not withdraw consent. Meaning thereby, waiting period is prescribed by Legislature for benefit of litigants to take a second thought in respect of their consent and action of dissolution of marriage by mutual consent. If the court is permitted to waive cooling/waiting

statutory period without any application/request of parties, it will amount to deprive parties from exercising his/her option to withdraw consent, therefore, the same cannot be permitted, otherwise it will defeat very purpose of incorporating waiting period and provisions itself.

16. There is no provisions in Section 13(B)(2) of the Act for waiving of statutory period of six months and earlier Apex Court by exercising power under Article 142 of Constitution of India waived statutory period in appropriate cases. However, in the matter of *Amardeep Singh Vs. Harveen Kaur (2017) 8 SCC 746*, it was held by Apex Court that in appropriate case after considering and satisfying the requirement of waiving the cooling period, court dealing with matter may accept prayer of parties to waive statutory period under Section 13(B)(2). The relevant paragraphs of the judgment are infra:

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"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 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.

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 court concerned.

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.*

21. *Needless to say that in conducting such proceedings the court can also use the medium of videoconferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the court, to advance the interest of justice.*

17. Apex Court in the case of Amit Kumar Vs. Suman Beniwal, 2021 SCC Online SC 1270 held thus:

"17. Legislature has, in its wisdom, enacted Section 13B(2) of the Hindu Marriage Act to provide for a cooling period of six months from the date of filing of the divorce petition under Section 13B(1), in case the parties should change their mind and resolve their differences. After six months if the parties still wish to go ahead with the divorce, and make a motion, the Court has to grant a decree of divorce declaring the marriage dissolved with effect from the date of the decree, after making such enquiries as it considers fit.

18. The object of Section 13B(2) read with Section 14 is to save the institution of marriage, by preventing hasty dissolution of marriage. It is often said that "time is the best healer". With passage of time, tempers cool down and anger dissipates. The waiting period gives the spouses time to forgive and forget. If the spouses have children, they may, after some time, think of the consequences of divorce on their children, and reconsider their decision to separate. Even otherwise, the cooling period gives the couple time to ponder and reflect and take a considered decision as to whether they should really put an end to the marriage for all time to come"

18. The Apex Court in the matter of *Amardeep (supra)* has not authorised courts to waive statutory period *suo moto* and permitted to consider request of parties after considering facts and circumstances of each case. The Courts are empowered to exercise its discretion when application is moved for waiving period. Second motion of recording consent of parties for decree of divorce by mutual consent is important and cannot be waived in routine manner. It is essential for parties to petition for divorce on mutual consent to apply before court, stating reasons for waiving statutory period under Section 13(B) (2) and satisfying court that they are living separately since more than statutory period of one year before first motion itself and all efforts for mediation/conciliation were failed and there is no likelihood of success in that direction by any further efforts, waiting period will only prolong their agony and other conditions required for waiving statutory period of six months. Until and unless it is applied, court cannot itself fix case before six months by waiving statutory period impliedly without recording its satisfaction.

19. After examining proceedings dated 30.11.2022, it appears that before fixing case for recording of statements of parties for second motion within a period of two and half months from the date of presentation of petition, learned Family Court has not recorded satisfaction or any reason for waiving statutory period and straightway fixed the case for 13.1.2023 and passed judgment and decree on same day without completing statutory period as stipulated in Section 13(B)(2) of the Act.

20. The family court was not empowered to curtail period of reconsideration of consent by parties because the period has been provided by statute to parties for the purpose of reconsideration of their consent and though period mentioned in Section 13 (B)(2) is not mandatory, but it is right of parties

to wait for period provided under the Act before giving final consent and if a party is desirous to withdraw the consent, the same may be withdrawn, therefore, fixing of case at an early date without any application/request of parties by Family Court amounts to violation of provisions of law. The question is answered accordingly.

21. Consequently, the appeal is allowed. Judgment and decree dated 13.1.2023 are hereby set aside and matter is remanded back to Family Court as period of 18 months from the date of filing petition has not been completed till now and family court may proceed further and pass appropriate order/judgment after recording fresh consent by way of statements of parties for divorce by mutual consent. The parties are directed to remain present before learned Family Court on 8.4.2024.

22. Let a decree be drawn up by Registry accordingly. Record of Family Court be returned with copy of this judgment and decree.

(SHEEL NAGU)
JUDGE

P/-

(VINAY SARAF)
JUDGE