

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Civil Misc. Appeal No. 957/2021

1. Ajeesh Anand S/o G. Anandan Pillai, Aged About 37 Years, Plot No. 278, Hanwant Sector A, B.j.s. Colony, Jodhpur
2. Vandana W/o Ajeesh Anand, Aged About 32 Years, Quarter, A Back Portion Of Plot No. 278, Hanwant Sector A, B.j.s. Colony, Jodhpur Permanent Address- Vandana Telecom, Near Juni Janglat Choki, Gandhi Chowk, Near Bus Stand, Siwana, District Barmer

-----Appellants

Versus

Nil, Nil

-----Respondent

For Appellant(s) : Mr. Shailendra Kala
For Respondent(s) :

**HON'BLE MR. JUSTICE SANDEEP MEHTA
HON'BLE MR. JUSTICE SAMEER JAIN**

Judgment

01/12/2021

By the Court : PER HON'BLE JAIN, J.

The present appeal arises out of order dated 17.8.2021 passed by learned Judge, Family Court No.1, Jodhpur (presently Presiding office of learned Family Court No. 2, Jodhpur) (under additional charge of learned Family Court No. 1 & 3) in Civil Original Case No. 389 of 2021 whereby the application filed by the parties seeking exemption of 6 months time period as provided under Section 13B of the Hindu Marriage Act, 1955 (for short 'the HMA Act') was rejected.

On 02.8.2021, the appellants filed an application under Section 13B of the HMA Act stating that their marriage was solemnized on 11.11.2006 as per Hindu rites and customs at Udaipur and daughter namely Anvesha was born out of their wedlock, who resides with her mother. Ever since the marriage, on one count or the other, there was estrangement amongst them and due to ideological differences, the relationship reached to the point of no return. As a consequence, the appellant and respondent started living separately since April, 2011. It was finally decided by the spouses that they should part ways peacefully.

Litigation and cases under Sections 498 A IPC and 125 Cr.P.C. and divorce petition U/s 13 of Hindu Marriage Act, 1955 was also filed by Smt. Vandana "wife". One case under Domestic Violence Act, 2005 was also filed.

In between the litigation, the appellants attended many sessions of conciliation with family members but reconciliation efforts were in vain.

Ultimately both the appellants were ready for mutual divorce and they have decided to settle all their disputes amicably. Petitioner No. 2 has already received all her Stridhan and belongings from petitioner NO. 1 in the first-round of litigation itself. Further the appellant No. 2 agreed to accept Rs. 13,00,000/- (Rupees Thirteen Lacs) as one time settlement, as alimony towards herself and their daughter.

In this regard, an application under Section 13B of the HMA Act for divorce by mutual consent was filed by the spouses & came to be listed before the learned Judge, Family Court No.1, Jodhpur on 02.8.2021. The learned Family Court posted the matter in the

light of the fact that out of three Family Courts working at Jodhpur, two Family Court is lying vacant and on account of huge pendency and work, the disposal of application is not possible.

On 17.8.2021, inspite of Section 13B of the HMA Act application for exemption of 6 months' period in the light of Apex court judgment titled *Amardeep Singh v. Harveen Kaur* reported in 2017 (8) SCC 746, which was applicable in the facts and circumstances, the same was dismissed. Hence, the present appeal was filed under Section 19 of the Family Court Act seeking exemption of statutory period of 6 months when the dissolution of marriage has to take place with mutual acceptance.

During the course of hearing, both of appellants jointly requested for consideration of their prayers for exemption of statutory period under Section 13B of the HMA Act at the earliest and for dissolution of marriage. In this background and looking to the prayer made and facts and circumstances, we have expedited the proceedings and were inclined to pass orders in the present appeal.

In order to decide the present appeal, it is important to consider the provisions of Section 13B of the HMA Act, which are reproduced as under:

"13B. Divorce by mutual consent.-(1) Subject to the provisions of this Act a petition for dissolution 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 mean time, 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 w.e.f. from the date of the decree."

It is important to consider judgment of Hon'ble Apex Court in *Amardeep Singh v. Harveen Kaur (supra)*, relevant paragraphs whereof are reproduced here under:-

"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 13B(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 the 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 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 versus Nanhku and ors.15** as follows:

"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 oft-quoted 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.'

" '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 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.*

21. 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.

22. Needless to say that in conducting such proceedings the Court can also use the medium of

video conferencing 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."

It is also noteworthy to consider the dictum of Hon'ble Supreme Court in the case of *Devinder Singh Narula v. Meenakshi Nangia*, reported in 2012 (8) SCC 580, relevant paragraphs whereof are reproduced here under:-

"12. It is quite clear from the materials on record that although the marriage between the parties was solemnized on 26.3.2011, within 3 months of the marriage the petitioner filed a petition under Section 12 of the Hindu Marriage Act, 1955, for a decree of nullity of the marriage. Thereafter, they have not been able to live together and lived separately for more than 1 year. In effect, there appears to be no marital ties between the parties at all. It is only the provisions of Section 13-B(2) of the aforesaid Act which is keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in Section 13-B for grant of a decree of dissolution of marriage by the mutual consent is present in the instant case. It is only on account of the statutory cooling period of six months that the parties have to wait for a decree of dissolution of marriage to be passed.

13. In the above circumstances, in our view, this is one of those cases where we may invoke and exercise the powers vested in the Supreme Court under Article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than

one year, we see no reason to continue the agony of the parties for another two months.

14. We, accordingly, allow the appeal and also convert the pending proceedings under Section 12 of the Hindu Marriage Act, 1955, before the Additional District Judge-01, West Delhi, into one under Section 13-B of the aforesaid Act and by invoking our powers under Article 142 of the Constitution, we grant a decree of mutual divorce to the parties and direct that the marriage between the parties shall stand dissolved by mutual consent. The proceedings before the Additional District Judge-01, West Delhi, being HMA No.204 of 2012, is withdrawn to this Court on consent of the parties and disposed of by this order."

Reference may also be made to the recent judgment of this Court in SBCWP No. 15518/2021 decided on 09.11.2021.

"13. In light of the facts and circumstances of the case, particularly the fact that the parties are sufficiently educated and are aware of their rights - the petitioner (wife) is engaged in a private job and the respondent (husband) is running a business. As they have mutually decided to end their matrimony finding no hope/chance of reconciliation, I am of the opinion that their application for waiver of the statutory period of six months specified under Section 13-B(2) of the Act of 1955 deserves.

14. Hence, this writ petition is allowed. The impugned order dated 08.09.2021 passed by the court below is set aside and their application dated 08.09.2021 is, hereby allowed. The statutory period of six months specified under Section 13-B(2) of the Act of 1955 is hereby waived in exercise of extra ordinary powers available to this Court by virtue of Article 226 of the Constitution of India."

On perusal of statutory provisions contained under Section 13B of the HMA Act, relevant portions of the judgment cited

above, facts of the case and the request made by the concerned parties, we are of the view that it is an admitted position that since last 10 years April, 2011, the appellants to the case are living separately, they have filed an application under Section 13B of HMA Act on 02.8.2021, parties are in agreement and a consensus has been drawn on terms and conditions to dissolve their marriage mutually, the Family Court No.1 at Jodhpur is lying vacant due to absence of Presiding Officer therein and due to additional workload and long pendency, the application was dismissed.

It has been held by Hon'ble Apex Court time and again and in series of judgments that the provisions under Section 13B(2) of the HMA Act are not mandatory but directory. If all efforts of mediation, conciliation have been effected and there is no likelihood of success, point of no return has been arrived at between the parties and the marriage cannot be saved in this background and in present case the parties have genuinely made an attempt to settle their differences including alimony, pending issues etc. in such case, the waiting period will only prolong their agony, & thus, waiving the statutory period under Section 13B(2) of the HMA Act would be in interest of justice.

In light of the above and recent judgment on similar issue dated 16.11.2021 passed in DBCMA No. 1037/2021 titled as Kamal Vs. Smt. Varsha by this Court, the present appeal for setting aside and quashing of impugned order dated 17.8.2021 and for grant of date for considering the application for exemption of time under Section 13B of the HMA Act is allowed. In the facts and circumstances of the case, we direct that the statutory time period of 6 months stipulated under the provisions of Section 13B

of HMA Act, be waived and judgment and decree for divorce with mutual consent under Section 13B of the HMA Act, be passed in the light of consensus arrived at between the parties.

The parties are directed to appear before the learned Family Court on 09.12.2021, whereafter, the concerned Family Court will forthwith pass decree of divorce in accordance with law.

In terms of above, the appeal is allowed.

(SAMEER JAIN),J

(SANDEEP MEHTA),J

ns. 34-1/-



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