

NEETI MALVIYA

A

v.

RAKESH MALVIYA

(Transfer Petition (C) No.899 of 2007)

MAY 12, 2010

B

[D.K. JAIN AND C.K. PRASAD, JJ.]

Hindu Marriage Act, 1955:

s.13-B(2) – Divorce by mutual consent – Settlement between the parties before Supreme Court Lok Adalat – Terms of settlement complied with – Waiving of the period of second motion in terms of sub-s.(2) of s.13-B – Held: The language of sub-s.(2) of s.13-B is clear and prima facie admits of no departure from the time frame laid down therein, i.e. the second motion under the said sub-section cannot be made earlier than six months after the date of presentation of the petition under sub-s.(1) of s.13-B – However, in view of more than one opinion expressed in the judgments of the Supreme Court on the issue, the matter referred to a three Judge Bench to consider the question: whether the period prescribed in sub-s.(2) of s.13-B can be waived or reduced by Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution – Constitution of India, 1950 – Article 142.

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Anjana Kishore vs. Puneet Kishore (2002) 10 SCC 194; *Anil Kumar Jain vs. Maya Jain* 2009 (14) SCR 90 = (2009) 10 SCC 415; *Manish Goel vs. Rohini Goel* (2010) 2 SCR 414; *Smt. Poonam vs. Sumit Tanwar* 2010 (3) SCR 557 = JT 2010 (3) SC 259 and *Prem Chand Garg vs. Excise Commissioner, U.P., Allahabad* 1963 Suppl. SCR 885 = AIR 1963 SC 996, referred to.

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Case Law Reference:

(2010) 2 SCR 414

referred to

para 3

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A	2010 (3) SCR 557	referred to	para 3
	(2002) 10 SCC 194	referred to	para 9
	2009 (14) SCR 90	referred to	para 10
D	1963 Suppl. SCR 885	referred to	para 11

CIVIL ORIGINAL JURISDICTION : Transfer Petition (Civil)
No. 899 of 2007.

Satya Mitra, D.N. Pandey, Sanjay Jain for the Petitioner.

C Jasmine Damkewala, Sourabh Seth (for Karanjawala & Co.) for the Respondent.

The following Order of the Court was delivered

D . ORDER

1. This transfer petition has been filed by the petitioner–wife, seeking transfer of the Divorce Petition M.C. No.2168 of 2006 titled as *Rakesh Malviya Vs. Neeti Malviya*, filed by the respondent–husband, from the court of Additional Principal Judge, Family Court, Bangalore (Karnataka) to the Family Court, Hoshangabad. (Madhya Pradesh).

2. After issuance of notice on 7th December 2007, efforts were made on various occasions to bring about a comprehensive settlement of the matrimonial discord between the parties. On 6th September 2008, the parties agreed for mediation. Accordingly, the parties were referred to the Delhi High Court Mediation Centre. Ultimately, in proceedings before the Supreme Court Lok Adalat held on 25th April 2009, it was reported that the parties had arrived at a settlement. The settlement agreement dated 24th April 2009 was taken on record. The relevant portion of the order passed on 25th April 2009 is extracted below:

H "...One of the terms so agreed upon is that the husband

is to pay to the wife an amount of Rupees sixty five lakhs on or before 28th February, 2010. It is now agreed before us that the said amount of Rupees sixty five lakhs shall be deposited in this Court as per the schedule of dates mentioned in the agreement. The amount, so deposited, shall be put in a Fixed Deposit Receipt for a period upto 1st May, 2010.

.....

It is also agreed that when full amount in terms of the agreement is deposited, the parties shall, immediately thereafter, move a joint application for grant of divorce by mutual consent. On the passing of the decree for divorce, the amount deposited in this Court shall be released to Neeti without any delay."

3. The matter remained pending for some time but the parties continued to discharge their obligations under the terms of settlement and when the case came up for hearing on 29th January 2010, it was stated that the respondent-husband shall deposit the last instalment of money, in terms of the settlement, by 28th February 2009, which was done. However, when the matter came up for final orders on 10th May 2010, learned counsel for the parties sought time to go through the two judgments of this Court in *Manish Goel Vs. Rohini Goel*¹ and *Smt. Poonam Vs. Sumit Tanwar*², and assist the Court on the question whether the period of second motion in terms of sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 (for short "the Act") can be waived or reduced by this Court.

4. We have heard learned counsel for both the parties.

5. Sub-section (1) of Section 13-B of the Act is the enabling Section for presenting a petition for dissolution of marriage by a decree of divorce by mutual consent, on the

1. 2010 (2) SCALE 332.

2. JT 2010 (3) SC 259.

- A ground that the parties 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. Sub-section (2) of Section 13-B of the Act provides the procedural steps that are required to be taken
- B once the petition for divorce by mutual consent has been filed and six months have expired from the date of presentation of the petition before the Court. The language of sub-section (2) is unambiguous and provides that on the motion of both the parties made not earlier than six months after the date of the
- C 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, pass a decree of divorce declaring the marriage
- D to be dissolved with effect from the date of the decree.

6. As already stated, the language of the said provision is clear and *prima facie* admits of no departure from the time frame laid down therein, i.e. the second motion under the said sub-section cannot be made earlier than six months after the
- E date of presentation of the petition under sub-section (1) of Section 13-B of the Act.

7. The question with which we are concerned in the present petition is whether in view of the settlement arrived at between the parties, a decree of divorce by mutual consent can be
- F granted by this Court without waiting for the statutory period of six months in terms of Section 13-B(2) of the Act. In other words, the question for consideration is whether or not this Court can reduce or waive of the statutory period of six months, as stipulated in the said provision?
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8. At the outset, we may note that in several cases this Court has been invoking its extraordinary powers under Article 142 of the Constitution of India and passing a decree of divorce by mutual consent without waiting for the statutory period of six
- H months to expire. As a matter of fact, even the family courts in

some States, following the ratio of the decisions or the directions by their respective High Courts, have been reducing the period of second motion when they were convinced that there was no possibility whatsoever of the spouses coming back together again and granting decree of divorce by mutual consent in terms of the settlement arrived at between the parties in order to give quietus to all the litigations pending between them. A B

9. In fact, in *Anjana Kishore Vs. Puneet Kishore*³, a Bench of three Judges of this Court, while hearing a transfer petition, invoked its jurisdiction under Article 142 of the Constitution and directed the parties to file a joint petition before the family court under Section 13-B of the Act, for grant of decree of divorce by mutual consent, along with a copy of the terms of compromise arrived at between the parties. The Court further permitted the family court to consider dispensing with the need of waiting for expiry of a period of six months as required by sub-section (2) of Section 13-B of the Act and pass final orders on the petition within such time as it deems fit. C D

10. The issue with regard to the jurisdiction of the High Court and the matrimonial court to reduce or waive of the period of second motion in terms of sub-section (2) of Section 13-B of the Act fell for consideration of this Court in *Anil Kumar Jain Vs. Maya Jain*⁴, though in a different context. Taking note of a number of earlier cases where decree of divorce by mutual consent had been granted by this Court without waiting for the expiry of statutory period of six months, it was held that neither the civil courts nor even the High Courts can pass orders before the period prescribed in Section 13-B(2) of the Act has expired. The Court opined that it is only this Court, in exercise of its extraordinary powers under Article 142 of the Constitution, that can grant relief to the parties without even waiting for statutory period of six months stipulated in Section 13-B of the Act. E F G

3. (2002) 10 SCC 194.

4. (2009) 10 SCC 415.

A 11. However, recently in *Manish Goel* (supra) and *Smt. Poonam* (supra), this Court while taking note of the decisions in *Anjana Kishore* (supra) and *Anil Kumar Jain* (supra) has also referred to various other judgments of this Court taking a contrary view and has observed that under Article 142 of the

B Constitution, this Court cannot altogether ignore the substantive provisions of the statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in a statute. The Court has also observed that power under Article

C 142 of the Constitution is not to be exercised in a case where there is no basis in law which can form an edifice for building up a structure. Reference has also been made to the decision of the Constitution Bench in *Prem Chand Garg Vs. Excise Commissioner, U.P., Allahabad*⁵, wherein it was held that an order which this Court can make in order to do complete justice

D between the parties, cannot be inconsistent with the substantive provisions of the relevant statutory laws. *Inter alia*, observing that no court has competence either to issue a direction contrary to law or to direct an authority to act in contravention of the statutory provisions, the Court finally summarised the law on the issue before us to the effect that in exercise of power under

E Article 142 of the Constitution, this Court 'generally' does not pass an order either in contravention of or ignoring the statutory provisions or exercise power merely on sympathetic grounds.

F 12. Although it can be gathered from the use of the word 'generally' in para 15 and the last paragraph of the judgment where the Court did not find the case before it to be a fit case for exercise of its extra-ordinary jurisdiction under Article 142 of the Constitution, that both the said decisions do not altogether rule out the exercise of extraordinary jurisdiction by

G this Court under Article 142 of the Constitution, yet we feel that in the light of certain observations in the said decisions, particularly in *Manish Goel* (supra), coupled with the fact that the decision in *Anjana Kishore* (supra) was rendered by a Bench of three learned Judges of this Court, it would be

H ⁵. AIR 1963 SC 996.

appropriate to refer the matter to a Bench of three Judges in order to have a clear ruling on the issue for future guidance. A

13. Accordingly, we refer the following question for the consideration of a Bench of three Hon'ble Judges:-

- (I) Whether the period prescribed in sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 can be waived or reduced by this Court in exercise of its jurisdiction under Article 142 of the Constitution? B

14. We direct the Registry to place the papers of this case before the Hon'ble Chief Justice of India for appropriate orders. C

15. It is agreed between the parties that in the meanwhile, they will file a joint petition under Section 13-B of the Act for grant of divorce by mutual consent in terms of the settlement within two weeks from today. We are informed that the fixed deposit for the amount deposited by the respondent in terms of the settlement will be maturing for payment in the first week of August, 2010. As and when the said fixed deposit matures, a sum of Rupees two lacs and fifty thousand shall be paid to the petitioner by means of a bank draft payable at Itarsi (Madhya Pradesh). The balance amount along with interest accrued thereon shall be put in a fresh fixed deposit for a period of six months. D E

16. List in the month of November, 2010. F

R.P.

Matter Adjourned.