

Neutral Citation No. - 2023:AHC:180510-DB

Court No. - 39

Case :- FIRST APPEAL No. - 1033 of 2023

Appellant :- Amit Jaiswal

Respondent :- Dr. Pankhuri Agarwal @ Dr. Pankhuri Jaiswal

Counsel for Appellant :- Dharm Vir Jaiswal, Harsh Vikram

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Arun Kumar Singh Deshwal, J.

1. Heard learned counsel for the appellant and perused the record.
2. Present appeal has been filed under Section 19 of the Family Courts Act, 1984, arising from the order dated 25.07.2023 passed by Principal Judge, Family Court, Bareilly, by which the learned court below has rejected the joint application filed by the present appellant and his estranged wife referable to Section 13B(2) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act'). Thus, the prayer made by the parties before the learned court below to waive off cooling period of six months to file the second motion petition, has been rejected.
3. Having heard learned counsel for the appellant and perused the record, we find, the learned court below has rejected the joint application made by the parties, in a mechanical manner. No application of mind has been made to the facts pleaded by the parties. Only a superficial observation has been made that the parties have been living apart for more than one year. Other than a bald observation that the parties should have taken more time to reconsider their position and their stand qua their marriage, no fact discussion has emerged in the order as may allow this Court to reach a conclusion that the learned court below had found a firm opinion that it was not in the interest of the parties and in the

interest of the justice to waive off the requirement of six months. Recently, in **Vijay Agarwal Vs. Smt. Suchita Bansal, 2023 (8) ADJ 484**, this Court had occasioned to consider the same provision and the approach of the Family Court in dealing with such application. In paragraph-4 to 8 of that report, it was observed as under :

*"4. The issue involved is no longer res integra. In **Amardeep Singh Vs. Harveen Kaur (2017) 8 SCC 746**, it was held as below :*

"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 13 B(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 32A 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 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."

5. That principle of law laid down by the Supreme Court has not been departed from, in any subsequent or other decision of that Court.

6. After considering the provisions of law, the Supreme Court had thus clarified that though the provision of Section 13B(2) postulates a cooling period of six months, that stipulation of time was not mandatory. Not only the provision stipulating six months' time period was held to be directory, further, the Supreme Court held that the discretion to waive that stipulation

of time would vest in the Court dealing with the second motion petition. The intent of the decision of the Supreme Court and the interpretation of the law made by it are clear as daylight. Once the Supreme Court observed that the stipulation of time was directory and that the discretion to waive it may be exercised in the individual facts and circumstances of each case, by the Court, clearly, it had left no manner of doubt to arise with any party, less so the Court itself, as to who may exercise the discretion.

7. Insofar as the Supreme Court interpreted the statutory provision and laid down the law, that decision of the Supreme Court may never have been described as an exercise referable to Article 142 of the Constitution of India.

8. Article 142 of the Constitution of India enables the Supreme Court to do complete justice in the facts of any case. However, by very nature of that power, whenever exercised, that Court never seeks to lay down any proposition or principle of law. Here, to the contrary, the Supreme Court laid down the law in no uncertain terms. It took note of the statutory provision contained under Section 13B of the Act, 1955 and interpreted it to reach the conclusion that the same was was directory and that the discretion to waive the stipulation of time would vest with the Court dealing with the second joint motion petition, seeking to dissolve the marriage between those parties."

4. In the present case since the respondent is not represented, we set aside the order dated 25.07.2023 and require the learned court below to pass fresh order keeping in mind the observation made above.

5. Before parting we may observe, merely because the parties before the Court may not have produced a copy of the report or precedent on which they may have relied, though they had clearly referred to the same, the learned court below erred in failing to apply that principle of law contained in that precedent.

6. With the aforesaid observations/directions, the appeal stands **disposed of.**

Order Date :- 19.9.2023

SA

(Arun Kumar Singh Deshwal, J.) (S.D. Singh, J.)