

Sailesh Chandrakant and Another

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Court : Chennai

Decided On : Apr-05-1999

Reported in : 1999(1)CTC749; II(1999)DMC137

Judge : P. Shanmugam, J.

Acts : Code of Civil Procedure (CPC) Act, 1908 -- Order 19, Rule 1; [Hindu Marriage Act, 1955](#) -- Sections 13-B; [Special Marriage Act, 1954](#) -- Sections 28(2) and 40

Appeal No. : C.R.P. NO. 782 of 1999

Appellant : Sailesh Chandrakant and Another

Advocate for Pet/Ap. : Mr. M.A. Sadanand, Adv.

Judgement :

ORDER

1. Petitioners are husband and wife. They have filed this C.R.P.No. against the order passed by the Sub Judge, Poonamallee, dismissing their application I.A.S.R.No. 9671 of 1998 to receive the affidavit of the second petitioner in substitution of her oral evidence.

2. The facts necessary for the disposal of this C.R.P. are as followed.

The petitioners filed a joint petition H.M.O.P.No.21 of 1998 under Section 13-B of the Hindu Marriage Act, praying for the dissolution of their marriage by mutual consent. Thereafter, the first petitioner was ready to submit himself for an oral evidence on the expiry of the six months period prescribed under Section 13-B, whereas, the second petitioner was not available for giving evidence in the enquiry. Hence, both of them filed affidavits. The second petitioner prayed to receive the affidavit in substitution of her oral evidence. The learned Judge rejected that application. The C.R.P. is against this order.

3. According to the learned counsel for the petitioners, the courts have interpreted as to the 'hearing of the parties' under Sub-section 13 B(2) of the Act to the effect that personal hearing is not necessary. Order XIX, Rule (1) C.P.C. enables the parties to prove the particular facts by affidavits. Learned counsel for the petitioners referred to a decision of the Supreme Court in Sureshta Devi v. Om Prakash, holding that Section 13-B is in pari materia with Section 28 of the Special Marriage Act 1954. A Division Bench of the Calcutta High Court, in Annalie Prashad v. Romesh Proshad, : AIR1968 Cal48 , took the view that the expression 'after hearing the parties' occurring under Section 28(2) and 40 of the Special Marriage Act does not exclude either expressly or by necessary implication, affidavit evidence. They are permissible. As held by the Supreme Court that since the provisions of Section 13-B are in pari materia with Section 28 of the Special Marriage Act, the same reasoning shall apply to Section 13-B of the Hindu Marriage Act also. In Om Prakash v. K. Nalini, : AIR 1986 AP167 , a Division Bench of the Andhra Pradesh High Court held Section 13-B(2) does not fetter the court from passing instant decree of divorce. It was held therein that Section 13-B(2) of the Hindu Marriage Act should be read as directory only when the court is fully satisfied on the basis of proved facts that in the interests of justice of the society and individuals, marriage ties should be put asunder immediately. Since chances of reunion had completely faded away, the Division Bench thought, it just and proper to grant the decree of divorce straight away. Our High Court, in Santhana Krishnan v. Poongothai Ammal, 1989 (1) L.W. 561, held that the procedural provision is to be interpreted as the hand-maid of justice to advance and further the interests of justice, and not as a technical rule.

4. I have heard the counsel and considered the matter in reference to the decisions referred above. The order of the learned Judge distinguishing the judgment of the Calcutta High Court does not appear to be correct. The affidavit of the second petitioner has clearly stated that she had filed a joint petition, and the marriage has broken down irretrievably, and there is no chance of reconciliation. Both the petitioners are educated and intelligent, and they have taken the step after considerable deliberation. The second petitioner had also stated that she was planning to leave for the United States in August 1998 to continue her Doctoral Degree. She had reiterated her firm resolve that there was no chance of reconciliation between her and her husband, and the same may be recorded and the marriage be dissolved treating this affidavit as her evidence. I am unable to see how this affidavit cannot be treated as an evidence under Order XIX, Rule (1) establishing the facts in issue. In this case, both the parties have filed the affidavits, and there is no ground to suspect the facts set out in those affidavits. In my view, the lower court has tried to be hyper-technical.

5. In the above circumstances, the order of the Subordinate Judge cannot be sustained. It has been held by the decisions referred above that the parties should not be driven to go through the purposeless form, and the procedures should be hand- maid of justice to advance and further the interests of justice and not as a technical rule. I am in full agreement of the view that the requirement that the parties should be represented, but they need not be physically present, and that the facts can be established by an affidavit under Order XIX, Rule (1). In that view of the matter, the order of the Sub Judge is set aside and the matter is remanded back. The Subordinate Judge is directed to take the matter on file and dispose of the same on merits in the light of the observations contained in the above order, without any further delay. The C.R.P. is disposed of in the above terms. Consequently, C.M.P.No.4081 of1999 is closed, as no further order is necessary in the same.