

In Re Dr. Gopalan

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Court : Kerala

Decided On : Jan-06-2012

Judge : K.M. Joseph & M.L. Joseph Francis

Appeal No. : O.P.FC.No. 3473 of 2011 (R)

Judgement :

K.M. JOSEPH,J.

1. An interesting question has been raised by the petitioners, arising from the seemingly inflexible mandate contained in sub section (2) of Section 13B of the Hindu Marriage Act, 1955 (for short, 'the Act'), requiring a waiting period of six months after the filing of the joint petition seeking dissolution of marriage by consent.

2. The petitioners, husband and wife filed O.P.No.1611/11 before the Family Court, Thrissur on 19.8.2011 under Section 13B of the Act. They also filed Ext.P2 petition under Section 151 of the Code of Civil Procedure (for short, 'the Code'), praying that the court may dispense with the six months' time to dispose of the joint petition. The Family Court, Thrissur found that there is no provision to waive the statutory period of six months and dismissed the petition. Hence, this O.P.(F.C.) filed under Article 227 of the Constitution of India, wherein the prayer is to direct the Family Court, Thrissur to pass appropriate final orders on the joint petition filed under Section 13B of the Act immediately, at any rate, within two weeks from the date of the petition.

3. We heard Sri.P.B.Sahasranaman, learned counsel for the petitioners.

4. The contention of Sri.Sahasranaman runs as follows: Section 13B of the Act contains two parts; viz., Sub Section (1) and Sub Section (2). We extract Section 13 B:

“13B. Divorce by mutual consent.-(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised 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petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised 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.”

5. According to him, Section 13B contains substantial right of the parties to approach the court seeking dissolution of marriage by mutual consent. He would point out that Section 13B speaks about a petition being filed before the District Court. The argument is that while sub section (1) of Section 13B will apply even after the promulgation of the Family Courts Act, 1984, when the matter comes up before the Family Court in a petition under Section 13B, sub section (2) will not restrain the power of the Family Court otherwise available to it to pass appropriate orders in accordance with the powers available to it under the Family Courts Act. He would refer to the Preamble of the said Act, which reads as follows:

“An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and

family affairs and for matters connected therewith.”

He would emphasise that the legislature was concerned to bring about a speedy settlement of disputes, as is evident from the wording of the preamble. He points out Section 4 of the Family Court Act, which deals with the appointment of judges of the Family Court. Sub section (4) tends to indicate that there is a change brought about by the enactment of the Family Courts Act, he contends. Sub Section (4) of Section 4 of the Family Courts Act reads as follows:

“4. Appointment of Judges-

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(4) In selecting persons for appointment as Judges,--

(a) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; and

(b) preference shall be given to women.”

Then, he would invite our attention to Section 8 of the Family Courts Act. Section 8 of the Family Courts Act reads as follows:

8. Exclusion of jurisdiction and pending proceedings.-

Where a Family Court has been established for any area,--

(a) no District Court or any subordinate Civil Court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974).-

(i) which is pending immediately before the establishment of such Family Court before any District Court or subordinate Court referred to in that sub-section or, as the case may be, before any Magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.”

Therefore, according to him, in a case where the Family Court is established, sub section (2) of Section 13B of the Act would not apply and in such cases, it is to the other provisions of the Family Courts Act we must turn to, particularly, Section 9. Section 9, falling under Chapter IV of the Family Courts Act speaks about the procedure to be followed by the Family Court. Section 9 provides inter alia that an endeavour shall be made by the Family Court to persuade the parties to arrive at a settlement. Thus, the institution of counselling, with the aid of experts is countenanced. No doubt, Section 10 of the Family Courts Act deals with the procedure generally. Section 10 inter alia provides that the provisions of the Code and other provisions shall apply to the proceedings before the Family Court, subject to the other provisions in the Act and the Rules. Sub Section (3) of Section 10 of the Family Courts Act reads as follows:

“10. Procedure generally.-

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x x x x x x x x

(3) Nothing in sub-section(1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject- matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

Section 12 speaks about the assistance of medical and welfare experts. Section 20, the learned counsel would point out that, deals with the overriding effect of the Family Courts Act by providing that provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the said Act.

6. Learned counsel would contend that therefore, when the matter comes up before the Family Court under the Family Courts Act, there is a change from the position obtaining when the matter is dealt with by the District Court under the erstwhile regime. Right from the composition of the Family Courts Act to the procedure to be adopted by the Family Court, the Family Court is equipped to arrive at an appropriate conclusion, depending upon the facts of each case, as to the just relief to be granted. When once that is the position, the learned counsel would contend that it is not proper to apply the provisions contained in sub section (2) of Section 13B of the Act to restrain the wide amplitude of the power available to the Family Court to deal with the facts of an individual case by relaxing the six months period, which is in fact, not applicable to a case being dealt with by the Family Court.

7. We are not in a position to accept the contentions of the learned counsel for the petitioners. It is no doubt true that a central Act was enacted in the year 1984 with a view to create a separate forum to deal with family matters. After the promulgation of the Family Courts Act, in any area, where Family Court is established, it is the Family Court alone which would have jurisdiction to deal with the matters, as indicated in Section 7 of the Family Courts Act. At this juncture, it is necessary to refer to Section 7 of the Family Courts Act. Section 7(1) reads as follows:

“7. Jurisdiction - (1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

The Family Courts Act really does not deal with substantive matters in relation to various aspects of the personal laws applicable to parties. They are contained in various statutory provisions or customary laws as are applicable to the parties.

8. Section 13B of the Act was incorporated by amendment, in the year 1976. The Family Courts Act is made in the year 1984. Section 13B created a new right in favour of the parties to seek dissolution of marriage by filing a petition based on consent of the parties. Section 13B insists that the parties must have been living separately for a period of one year prior to the date of presentation of the petition. As to what is to be done in a petition under Section 13B, there is no indication in Section 13B(1). That is why Section 13B(1) itself is incomplete. Life is given to Section 13B only when we read Section 13B(1) along with Section 13B(2). Section 13B(1), on the one hand creates the right to seek dissolution, as provided therein and it will not be appropriate to say that the right is contained only in Section 13B. When it comes to Section 13B (2), it part takes both of the substantive right as also the procedure. Section 13B(2) indicates that the parties may move not earlier than six months and not more than 18 months. Actually, the decision of the court dissolving the marriage is to take place on the basis of the provisions contained in Section 13B(2). Therefore, it encompasses both the substantive right as also the procedure for the accomplishment of the said right of the parties. In other words, Section 13B(1) and (2) is a complete Code as to what is to be done with a case brought under Section 13B(1).

9. The salutary purpose that is sought to be achieved in Section 13B(2) is to see that the institution of marriage may be preserved, if possible. It is deliberate choice of the legislature reflecting its value judgment. Courts are expected to implement the laws made by Parliament. While it may indulge in interpretation with reference to the various rules available to it, if the language of the law admits of no other interpretation, it is no part of the court's jurisdiction to tinker with the legislative mandate as in such circumstances, the court will be doing violence to the

separation of powers which is envisaged in the Constitution.

10. We have no doubt in our mind, that the mandate of Section 13B(2) admits of no exception, that is to say, there is no power to waive the waiting period of six months contained in sub section (2) of Section 13B. We are of the view that the provision contained in Section 13B is clearly applicable also to a case where the Family Court deals with the matter. As is evident from Section 9 of the Family Courts Act, it is true that in a case where the Family Court is not established, the District Court, as contemplated under the Hindu Marriage Act will continue to have jurisdiction. It is also true that where the Family Court is not established and a petition is filed under Section 13B, Section 13B(2) will apply to a proceeding under Section 13B. Learned counsel for the petitioners also has no complaint about Section 13B(2) being made applicable before the District Court. If that is so, we are unable to understand how the mandate contained in Section 13B(2) will not apply when the forum of the District Court is supplanted by the establishment of the Family Courts in an area. Essentially what happens under the Family Courts Act is the creation of a new forum to deal with a wide spectrum of cases exclusively on the basis of the provisions of Section 7 of the said Act. The mere fact that there is a change in forum will not have the effect of the said forum being free to disregard the substantive provisions of the personal laws applicable to the parties. In other words, when a petition is filed under Section 13B of the Act, be it before the District Court or before the Family Court, both Section 13B(1) and (2) will apply. The resultant position would be that when a petition is filed under Section 13B of the Act before the Family Court, necessarily, the Family Court is enjoined upon to await for a period of six months as directed in Section 13B(2) and then alone it can take up the matter and deal with it, as provided in Section 13B(2). Neither the qualifications of the judges who are appointed as Family Court judges nor the presence of experts to aid such judges nor the declaration in the preamble about the need for the speed dilute the unambiguously clear mandate in the law contained in sub section (2) of Section 13B of the Act that the married parties cannot move for dissolution of marriage except after the expiry of the period of six months. While in individual cases it may work hardship, the merit of a law cannot be decided with reference to its operation on the rights of parties in individual cases. Law by its very essence is of general application. It is meant to apply to all

situations unless legislature indicates otherwise. Therefore, the complaint of the learned counsel for the petitioners that in this case, parties have been living separately for seven years, that they had three children of which two died and any further waiting will visit them with unnecessary misery, cannot be a sound argument for us to act contrary to Section 13B(2). That there is no power to waive the waiting period is covered by case law, of which we need only refer to the one pronounced by the Apex Court in Poonam v. Sumit Tanwar [2010 AIR SCW 2084]. In fact, the rationale behind the waiting period appears to be that the parties are given an opportunity to reconsider their original decision and to save the institution of marriage which the legislature holds sufficiently dear to insist on such waiting period. The wording in Section 7(1)(a) of the Family Courts Act makes it clear that the Family Court shall have and exercise all the jurisdiction exercisable by any District Court under any law for the time being in force and it is further stated by deeming provisions contained in Section 7(b) of the Act that the Family Court is to be deemed to be the District Court. Therefore, Family Court is deemed to be the District Court and the jurisdiction under the Hindu Marriage Act contained in Section 13B is to be exercised in accordance with the jurisdiction conferred under Section 13B (2) also. Section 8 of the Family Courts Act indicates that all matters which are inter alia pending before the District Court before the establishment of such court which are to be required to be dealt with by the Family Court and of the nature contained in the explanation are all to be transferred to the Family Court. In fact, if the argument of the petitioners is accepted, the anomalous position of a vacuum will be created. What is to be done with a petition under Section 13B(1) is contained in Section 13B(2). We may also indicate that by the amendment in 1976 even before the Family Court Act was enacted by virtue of the provisions contained in Order 32A of the Code of Civil Procedure, there is a duty with the court to make efforts for settlement (Rule 3). There are provisions for securing assistance of welfare experts (Rule 4). Upshot of the above discussion is that there is no merit in the petition and it is only to be dismissed. Ordered accordingly.