

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL
SEAT AT JABALPUR**

Case No.	Civil Revision No.31/2018
Parties Name	Rajkumar Sureen Vs. Smt. Manju Tirki
Date of Judgment	20/03/18
Bench Constituted	Single Bench.
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	No
Name of counsels for parties	For applicant: Shri T.S. Ruprah, Senior Advocate with Shri A.K. Pandey, Advocate. For Respondent: Shri S.K. Mishra, Advocate.
Law laid down	
Significant paragraph numbers	

ORDER
20/03/2018

This revision filed under Section 115 of the Code of Civil Procedure takes exception to the order dated 22.11.2017 whereby the Court below rejected the application preferred by the parties jointly under Section 28 of the Special Marriage Act.

2. The admitted facts between the parties are that the marriage between them was solemnized on 10.02.2014. Since the matrimonial life of the parties was not smooth, the applicant preferred an application under Section 27 of the Special Marriage Act, 1954 (hereinafter referred to as “the Act

of 1954”) on 12.04.2016.

3. During the course of hearing, learned counsel for the parties jointly submit that after receiving notices in aforesaid application preferred under Section 27 of the Act of 1954 by the applicant, the respondent appeared through their counsel. Various efforts were made by the counsel and the parties to settle their dispute amicably. Since all such efforts went in vain, the parties decided to prefer joint application seeking divorce by mutual consent under Section 28 of the Act of 1954. The said application was jointly filed on 22.09.2017.

4. Learned counsel for the parties jointly contended that the Court below has erred in disallowing the said application. It is urged that Section 28(2) of the Act of 1954 is similar to Section 13 (B) of the Hindu Marriage Act, 1955. In view of judgment of this Court reported in AIR 2005 MP 106 (*Dinesh Kumar Shukla Vs. Smt. Neeta*) and judgment of Supreme Court in the case of *Amardeep Singh Vs. Harveen Kaur*, 2017 SCC Online SC 1073, the Court below should have allowed the said application. It is jointly prayed that the impugned order may be set aside and the Court below may be directed to decide the application under Section 28 of the Act of 1954 and grant decree of divorce on mutual consent.

5. No other point is pressed by learned counsel for the parties.

6. As noticed, the parties are *ad idem* on the question of divorce by mutual consent and have jointly urged that the Court below has erred in disallowing the said application. In the impugned order, the Court below has assigned following

reasons for not entertaining the aforesaid application jointly preferred by the parties:

- (i) Parties can withdraw the present case and thereafter file a joint petition under Section 28 of the Act of 1954 for divorce by mutual consent.
- (ii) After filing such application under Section 28 of the Act of 1954, a waiver application can be filed one week after the first motion, giving reasons for the prayer for waiver of waiting period for the second motion as mentioned in Para 20 and 21 of the judgment of Supreme Court in the case of Amardeep Singh (supra).

7. Section 28(2) is *pari materia* to Section 13(B)(2). It is profitable to examine these provisions in juxtaposition.

Special Marriage Act, 1954	Hindu Marriage Act, 1955
<p>28. Divorce by mutual consent.— (1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together 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 district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a</p>	<p>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</p>

marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.	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.
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8. A Division Bench of this Court in *Dinesh Kumar Shukla* (supra) opined that divorce petition on the ground of cruelty and desertion was pending for more than six months. Joint application by the parties for divorce on mutual consent was filed after making all possible efforts for reconciliation. The Court need not wait for six months and can pass decree subject to fulfillment of requirement of Section 13(B)(1). Pertinently, in the case of *Amardeep Singh* (supra), the question arose for consideration was whether the minimum period of six months stipulated under Section 13-(B)(2) of the Hindu Marriage Act, 1955 for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations. After considering the legal journey on this aspect, the Apex Court in no uncertain terms opined that period mentioned in Section 13 (B)(2) is not mandatory but is 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.

9. The following principles are culled out for examining whether a case is made out to waive the statutory period under Section 13-(B)(2):

- “(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(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 32-A 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.”

10. The reason assigned by the Court below appears to be based on the last portion of aforesaid quoted passage. However, a careful reading of the judgment shows that it is nowhere laid down that in order to prefer an application under Section 28(2), the applicant was required to withdraw his earlier application and thereafter file a joint petition under Section 28 of the Act of 1954. No such statutory provision could be brought to the notice of this Court which makes it obligatory for the parties to withdraw the pending application in order to file a fresh application under Section 28 of the Act of 1954.

11. Putting it differently, it cannot be said that a joint application under Section 28(2) of the Act of 1954 is not maintainable if the same is filed in a pending proceeding. The intention of Legislature in bringing sub-section (2) of Section 28 in the statute book is to facilitate the parties to cut short the litigation and get divorce with mutual consent when other

essential conditions are satisfied. This will provide them chance to settle in life. Thus question of filing such application in the pending proceeding is a procedural aspect. There is no substantive statutory prohibition in filing application under Section 28(2) in the same proceeding.

12. This is settled in law that all the rules of procedure are the handmaid of justice. The Apex Court in AIR 1955 SC 425, *Sangram Singh v. Election Tribunal, Kotah* opined that A code of procedure must be regarded as such. It is “procedure”, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against. The Apex Court in (1975) 1 SCC 774, *Sushil Kumar Sen v. State of Bihar* opined that the mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence-processual, as much as substantive. In (1976) 1 SCC 719, *State of Punjab v. Shamlal Murari*, the Apex Court held that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are

the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In (1984) 3 SCC 46, ***Ghanshyam Dass v. Dominion of India***, the Apex Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle. In (2005) 4 SCC 480, ***Kailash v. Nanhku***, the Apex Court held that the provisions of Civil Procedure Code or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice.

13. The procedural aspect and technical approach cannot be permitted to strangle the basic purpose of an enactment and such technical approach must be eschewed. The Bombay High Court in ***Rakesh Harsukhbhai Parekh vs. State of Maharashtra***, AIR 2010 (Bom) 34 held that where original petition for divorce had been filed under Section 13 and had remained pending for more than six months, divorce sought by the parties by consent could be granted without waiting for statutory period of six months. In AIR 2003 P&H 255 (***Chander Kanta vs. Mohinder Pratap Dogra***), the High Court permitted the parties to file a joint application and to convert a petition filed under Section 13 of Hindu Marriage Act, 1955 as a petition for divorce by mutual consent. Similar view is taken by Division Bench of Bombay High Court in 2016 SCC Online Bom 10705 (***Nikhlesh Anil Rodrigues vs. Rachelle Anne Ornillo Montero***). On the basis of these judgments, the view taken by court below that first petition must be

withdrawn for filing application for divorce with mutual consent is erroneous.

14. In the light of aforesaid analysis, the impugned order cannot be countenanced. The Court below is, therefore, obliged to decide the pending application under Section 28(2) of the Act of 1954 in accordance with law. It is noteworthy that if there exists a requirement of initiating first motion with reasons, followed by another motion, the Court below may permit the parties to undertake the said exercise. Thereafter, the Court below shall decide the application filed under sub-section (2) of Section 28 in accordance with law expeditiously.

15. The impugned order is set aside. The Court below shall decide the said application in accordance with law by taking into account the observations made hereinabove.

16. The application is allowed to the extent indicated above.

(Sujoy Paul)
Judge

HIGH COURT OF MADHYA PRADESH JABALPUR**Civil Revision No.31/2018****Rajkumar Sureen****Vs.****Smt. Manju Tirki**

For applicant : Shri T.S. Ruprah, senior counsel with
Shri A.K. Pandey, Advocate.

For Respondent : Shri S.K. Mishra, Advocate.

Judgment post for : **20/03/2018**

(Sujoy Paul)
Judge
/03/2018