

**Form No. J.(2)**  
**Item No.2**

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA**  
**CIVIL REVISIONAL JURISDICTION**  
**APPELLATE SIDE**

HEARD ON: 10.10.2023

DELIVERED ON: 10.10.2023

**CORAM:**  
**THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**C.O. 3138 of 2023**  
**Sri Sandip Manna**  
**Vs.**  
**Smt. Tritayee Manna**

**Appearance:-**

**Mr. Srinjay Das**  
**Ms. Chaitali Manna**  
**Ms. Kiron Roy**  
**Mr. Subrata Majumdar** .....**For the petitioner**

**Mr. Purbangshu Chandra Mitra**  
**Ms. Piyali Mitra** .....**For the opposite party**

**JUDGMENT**

***(Judgment of the Court was delivered by HIRANMAY BHATTACHARYYA.J.)***

1. An interesting point has cropped up in this application under Article 227 of the Constitution of India as to whether the cooling-off period provided under section 28 of the Special Marriage Act can be waived.

2. By an Order being No. 2 dated 21<sup>st</sup> August, 2023 in Mat. Suit No. 325 of 2023, the learned Additional District Judge, 1<sup>st</sup> Court Sealdah rejected the application dated 21<sup>st</sup> March, 2023 filed under section 151 of the Code of Civil Procedure praying for waiver of the cooling-off period of six months as stipulated in section 28 of the Special Marriage Act.
3. Before the learned trial Judge, the judgment of the Hon'ble Supreme Court in Transfer Petition (Civil) No. 1118 of 2014 was referred to in support of the contention that the cooling-off period under section 28 of the Special Marriage Act can be waived. The learned trial Judge observed that in the said decision, the Hon'ble Apex Court has been pleased to waive the statutory period of six months but the said order was passed under Article 142(1) of the Constitution of India and therefore, the learned trial Judge cannot exercise the power to waive the cooling-off period.
4. The husband and the wife are represented by their respective advocates and both of them submitted that the cooling-off period may be waived.
5. The Hon'ble Supreme Court in the case of **Amardeep Singh vs. Harveen Kaur** reported at **(2017) 8 SCC 746** while dealing with the issue as to whether the cooling off period can be waived, held that the period mentioned in section 13-B(2) of the Hindu Marriage Act is not mandatory but directory and 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. The Hon'ble Supreme Court held thus:

*“ 14. The learned Amicus Curiae submitted that waiting period enshrined under Section 13-B(2) of the Act is directory and can be waived by the court where proceedings are*

*pending, in exceptional situations. This view is supported by the judgments of the Andhra Pradesh High Court in K. Omprakash v. K. Nalini, Karnataka High Court in Roopa Reddy v. Prabhakar Reddy, Delhi High Court in Dhanjit Vadra v. Beena Vadra and Madhya Pradesh High Court in Dineshkumar Shukla v. Neeta. Contrary view has been taken by the Kerala High Court in M. Krishna Preetha v. Jayan Moorkkanatt. It was submitted that Section 13-B(1) relates to jurisdiction of the court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13-B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period than the period mentioned in Section 13-B(2). Thus, the court should consider the questions:*

- (i) How long parties have been married?*
- (ii) How long litigation is pending?*
- (iii) How long they have been staying apart?*
- (iv) Are there any other proceedings between the parties?*
- (v) Have the parties attended mediation/conciliation?*
- (vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?*

**15.** *The court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.*

**16.** *We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13-B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.*

**17.** *The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling-off period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong*

*the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.*

**18.** *In determining the question whether provision is mandatory or directory, language alone is not always decisive. The court has to have the regard to the context, the subject-matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's Principles of Statutory Interpretation (9<sup>th</sup> Edn. 2004), has been cited with approval in Kailash v. Nankhu as follows: (SCC pp. 496-97, para 34)*

*"34. The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oftquoted passage Lord Campbell said : "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered ."" (p.338)*

*"For ascertaining the real intention of the legislature', points out Subbarao, J. ' the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom, and above all, whether the object of the legislation will be defeated or furthered.' If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." (pp.339-40).*

**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 13-B(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 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.”*

6. The Transfer Petition (Civil) No. 1118 of 2014 was disposed of by the Hon’ble Supreme Court vide its order dated 6<sup>th</sup> May, 2015 dissolving the marriage by grant of divorce by mutual consent by two Hon’ble Judges of the Supreme Court exercising jurisdiction under Article 142 of the Constitution of India. However, in view of the conflicting ratio of the judgments of the Hon’ble Supreme Court on the applicability of the power and jurisdiction under Article 142 of the Hon’ble Supreme Court, the transfer petition was directed to remain pending for statistical purposes upon following the substantial questions of law to be decided by a three Judge’s bench.

**“5. \*\*\*\*\***

*“4. Notwithstanding the above order passed by us, for the purposes of statistics the present transfer petitions shall remain pending as we are of the view that an issue of some importance needs to be addressed by the Court in view of the huge number of requests for exercise of power under Article 142 of the Constitution that has confronted this Court consequent to settlement arrived at by and between the husband and the wife to seek divorce by mutual consent.*

*5. The questions are formulated herein below:*

*1. “What could be the broad parameters for exercise of powers under Article 142 of the Constitution to dissolve a marriage between the consenting parties without referring the*

*parties to the Family Court to wait for the mandatory period prescribed under Section 13-B of the Hindu Marriage Act.*

*2. Whether the exercise of such jurisdiction under Article 142 should not be made at all or whether such exercise should be left to be determined in the facts of every case.”*

7. Five Hon’ble Judges of the Supreme Court in the case of **Shilpa Sailesh vs. Varun Sreenivasan reported at 2023 SCC OnLine SC 544** while dealing with the said issue, took note of the decision in the case of *Amardeep Singh (supra)* and observed that the waiver is not to be given on mere asking but on the Court being satisfied beyond doubt that the marriage has shattered beyond repair. The Hon’ble Supreme Court held thus:

*“22.The time gap is meant to enable the parties to cogitate, analyse and take a deliberated decision. The object of the cooling off period is not to stretch the already disintegrated marriage, or to prolong the agony and misery of the parties when there are no chances of the marriage working out. Therefore, once every effort has been made to salvage the marriage and there remains no possibility of reunion and cohabitation, the court is not powerless in enabling the parties to avail a better option, which is to grant divorce. The waiver is not to be given on mere asking but on the court being satisfied beyond doubt that the marriage has shattered beyond repair.”*

8. The Hon’ble Supreme Court however, concluded that the question as to the power and jurisdiction under Article 142(1) of the Constitution has been answered in terms of paragraphs 8 to 13 of the said reports inter alia, holding that the Supreme Court can depart from the procedure as well as the substantive laws so long as the decision is exercised based on considerations of fundamental general and specific public policy.
9. In view thereof, this Court is of the view that the application under Article 151 of the Code praying for waiver of the cooling-off period is required to be

decided afresh in the light of the observations of the Hon'ble Supreme Court in the case of *Amardeep Singh (supra)* and *Shilpa Sailesh (supra)*.

10. In view thereof, the order impugned being Order No. 2 dated 21<sup>st</sup> August, 2023 in Mat. Suit No. 325 of 2023 stands set aside.
11. The learned Additional District Judge, 1<sup>st</sup> Court at Sealdah is directed to reconsider the application filed by the parties under section 151 of the Code in the light of the observations made by the Hon'ble Supreme Court in *Amardeep Singh (supra)* and *Shilpa Sailesh (supra)*.
12. The parties shall, however, be at liberty to approach the learned Court below for preponing the date already fixed.
13. There shall be no order as to costs.
14. Urgent Photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

**(HIRANMAY BHATTACHARYYA, J.)**

PG/ AR(Ct.)