SMT. POONAM

v.

SUMIT TANWAR

(Writ Petition (Civil) No. 86 of 2010)

MARCH 22, 2010

[AFTAB ALAM AND DR. B.S. CHAUHAN, JJ.]

CONSTITUTION OF INDIA, 1950:

Articles 32 and 142 – Writ petition against order of Family Court by which it asked the parties to abide by s.13-B(2) of Hindu Marriage Act – HELD: Is not maintainable – Judicial orders passed by courts are not amenable to be corrected by issuing a writ under Article 32 – Remedy of a person aggrieved by decision of a judicial tribunal is to approach the superior tribunal for redress and such decision cannot be circumvented by resorting to Article 32 – Family Court passed the order strictly in accordance with law and it cannot be said that the order has infringed any of the fundamental/legal rights of parties – Besides, it is not generally assumed that a judicial decision passed by a court would violate any fundamental right of a party – Hindu Marriage Act, 1955 – ss. 13-B(1) and (2) – Judgment.

Article 32 and 226 read with Article 12 – Writ jurisdiction of Supreme Court and High Courts – Scope of – Explained.

ADMINISTRATION OF JUSTICE:

Advocate – Responsibility of – Failure of counsel to render assistance to Court – HELD: In case counsel for the petitioner is not able to render any assistance, Court may decline to entertain the petition – If a factual/legal issue is not raised, court should not decide the same as its decision may be violative of principles of natural justice – In the instant

case, petition under Article 32 of the Constitution challenging order of Family Court in a petition u/s 13-B(1) of Hindu Marriage Act asking the parties to wait for six months was filed without any sense of responsibility either by the parties or their counsel – The proxy Advocates as well as the Advocate-on-Record, were unable to explain as to how the writ petition was maintainable – Such a practice is tantamount to not only disservice to the institution, but it also affects the administration of justice – Conduct of all of them has been reprehensible – Hindu Marriage Act, 1955 – ss.13-B(1) and (2) – Constitution of India, 1950 – Articles 32 and 142 – Supreme Court Rules, 1966 – Orders IV and XVIII – Advocate-on-Record – Practice and Procedure – Natural Justice.

The parties got married on 30.11.2008. On 9.9.2009 a petition u/s 13-B (1) of the Hindu Marriage Act, 1955 was filed. The Family Court by its order dated 25.11.2009 held that the marriage could not be dissolved straightaway and observed that the parties could file the petition of second motion u/s 13-B(2) of the Act. Aggrieved, the wife filed the writ petition under Article 32 of the Constitution of India.

Dismissing the petition, the Court

HELD: 1.1. It is settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial Tribunal is to approach for redress a superior Tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of the Constitution and only on the proof of infringement thereof. If by adjudication by a court of competent jurisdiction, the right claimed has been negatived, a petition under Article 32 of the Constitution is not

maintainable. It is not generally assumed that a judicial decision pronounced by a court may violate any of the fundamental rights of a party. Judicial orders passed by courts in or in relation to proceedings pending before them are not amenable to be corrected by issuing a writ under Article 32. [Para 9] [566-F-H]

Sahibzada Saiyed Muhammed Amirabbas Abbasi & Ors. vs. the State of Madhya Bharat (now Madhya Pradesh) & Ors. **1960 SCR 138 = AIR 1960 SC 768;** *Smt. Ujjam Bai vs. State of Uttar Pradesh & Anr.* **1963 SCR 778 = AIR 1962 SC 1621; and** *Naresh Shridhar Mirajkar vs. State of Maharashtra* **1966 SCR 744 = AIR 1967 SC 1, referred to.**

1.2. The citizens are entitled to appropriate relief under the provisions of Article 32 of the Constitution, provided it is shown to the satisfaction of the Court that a fundamental right of the petitioner had been violated. The distinction between a writ petition under Article 226 and the one under Article 32 of the Constitution is that the remedy under Article 32 is available only for enforcement of the fundamental rights, while under Article 226 of the Constitution, a writ court can grant relief for any other purpose also. Even if it is found that injury caused to the writ petitioner alleging violation of a fundamental right is too indirect or remote, the discretionary writ jurisdiction may not be exercised. More so, a writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or a "State" within the meaning of Article 12 of the Constitution. [Para 7 and 8] [565-G-H; 566-A-C-D]

Daryao & Ors. vs. State of U.P. & Ors. **1962 SCR 574 = AIR 1961 SC 1457;** *M.C. Mehta vs. Union of India* **2006 (2) SCR 264 =AIR 2006 SC 1325;** *A.K. Gopalan vs. State of Madras* **1950 SCR 88 =AIR 1950 SC 27;** *Bhagwandas Gangasahai vs. Union of India & Ors.* **AIR 1956 SC 175;**

A *Kalyan Singh vs. State of Uttar Pradesh & Ors.* **1962 Suppl. SCR 76 =AIR 1962 SC 1183;** *Fertilizer Corporation Kamagar Union, Sindri & Ors. vs. Union of India & Ors.* **1981 (2) SCR 52 = AIR 1981 SC 344;** *State of Rajasthan & Ors. vs. Union of India* **1978 (1) SCR 1 = AIR 1977 SC 1361;**
B ***Anandi Mukta Sadguru Trust vs. V.R. Rudani* 1989 (2) SCR 697 =AIR 1989 SC 1607;** *VST Industries Ltd. vs. VST Industries Workers' Union & Anr.* **2000 (5) Suppl. SCR 438 = (2001) 1 SCC 298; and** *State of Assam vs. Barak Upatyaka U.D. Karamchari Sanstha* **2009 SCR 467 =AIR 2009 SC**
C **2249, referred to.**

1.3. In the instant case, the Family Court, has passed an order strictly in accordance with law asking the parties to wait for statutory period of six months to file the second motion in the case. In such a fact-situation, it
D **is not permissible to suggest that the said order has violated or infringed any of the fundamental rights or any legal right of the parties. Therefore, the writ petition is maintainable. [Para 10] [567-C, D]**

E **2.1. In case the counsel for the party is not able to render any assistance, the court may decline to entertain the petition. Further, if petitioner's counsel is not able to raise a factual or legal issue, though such a point may have merit, the court should not decide the same as the**
F **opposite counsel does not "have a fair opportunity to answer the line of reasoning adopted" in this behalf. Such a judgment may be violative of principles of natural justice. In the instant case, the proxy Advocates as also the Advocate-on-Record have not been able to explain as to under what circumstances the writ petition under**
G **Article 32 of the Constitution was maintainable for such a relief claimed and as to whether the Court has the power to issue a writ to the court/tribunal to violate a mandatory statutory provision. However, the Advocate-on-Record tendered absolute and unconditional apology and**
H

assured that he will not lend his name merely for filing the petition by other counsel in future. [para 3,4,16 and 17] [564-D; 565-A; 569-E-F]

Thakur Sukhpal Singh vs. Thakur Kalyan Singh & Anr. **1963 SCR 733 =AIR 1963 SC 146;** *The Bar Council of Maharashtra vs. M. V. Dabholkar & Ors.* **1976 (2) SCR 48 = AIR 1976 SC 242;** *T.C. Mathai & Anr. vs. District & Sessions Judge, Thiruvananthapuram* **1999 (2) SCR 305 = AIR 1999 SC 1385;** *D.P. Chadha vs. Triyugi Narain Mishra & Ors.* **2000(5) Suppl. SCR 345 =AIR 2001 SC 457;** *New Delhi Municipal Committee vs. State of Punjab* **1996 (10) Suppl. SCR 472 = AIR 1997 SC 2847;** *Re: Sanjiv Datta* **1995 (3) SCR 450 = (1995) 3 SCC 619;** *Vijay Dhanji Chaudhary vs. Suhas Jayant Natawadkar* **2009 (16) SCR 518 = (2010) 1 SCC 166, relied on.**

Mst. Fakrunisa & Ors. vs. Moulvi Izarus Sadik & Ors., **AIR 1921 PC 55, relied on.**

2.2. In the case of Manish Goel*, it has been held that this Court, in exercise of its powers under Article 142 of the constitution, generally should not issue any direction to waive the statutory requirement. The instant case is not the one where there had been any delay in disposal of the case by the Family Court. The petition has been filed without any sense of responsibility either by the parties or their counsel. Such a practice is tantamount to not only disservice to the institution but it also adversely affects the administration of justice. Conduct of all of them has been reprehensible. [Para 5 and 20] [565-B; 571-E, F]

Manish Goel vs. Rohini Goel* **[2010] 2 SCR 414; *Prem Chand Garg & Anr. vs. Excise Commissioner, UP & Anr.* **1963 Suppl. SCR 885 = AIR 1963 SC 996;** *Supreme Court Bar Association v. Union of India & Anr.* **1998 (2) SCR 795 = AIR 1998 SC 1895 and** *E.S.P. Rajaram & Ors. v. Union of*

A *India & Ors.* **2001 (1) SCR 203 = AIR 2001 SC 581, relied on.**

Case Law Reference:

[2010] 2 SCR 414	**relied on**	**para 5**
1963 Suppl. SCR 885	**relied on**	**para 5**
1998 (2) SCR 795	**relied on**	**para 5**
2001 (1) SCR 203	**relied on**	**para 5**
1962 SCR 574	**referred to**	**para 7**
2006 (2) SCR 264	**referred to**	**para 7**
1950 SCR 88	**referred to**	**para 7**
AIR 1956 SC 175	**referred to**	**para 7**
1962 Suppl. SCR 76	**referred to**	**para 7**
1981 (2) SCR 52	**referred to**	**para 7**
1978 (1) SCR 1	**referred to**	**para 7**
1989 (2) SCR 697	**referred to**	**para 8**
2000 (5) Suppl. SCR 438	**referred to**	**Para 8**
2009 SCR 467	**referred to**	**para 8**
1960 SCR 138	**referred to**	**para 9**
1963 SCR 778	**referred to**	**para 9**
1966 SCR 744	**referred to**	**para 9**
1963 SCR 733	**relied on**	**para 11**
AIR 1921 PC 55	**relied on**	**para 12**
1976 (2) SCR 48	**relied on**	**para 13**

1999 (2) SCR 305	**relied on**	**para 14**	A
2000 (5) Suppl. SCR 345	**relied on**	**para 15**	
1996 (10) Suppl. SCR 472	**relied on**	**para 17**	
1995 (3) SCR 450	**relied on**	**para 18**	B
2009 (16) SCR 518	**relied on**	**para 19**	

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 86 of 2010.

Under Article 32 of the Constitution of India. C

Rajiv Dutta, Dr. Ashwani Bhardwaj, Sandeep Tyagi for the Petitioner.

The Order of the Court was delivered by D

O R D E R

DR. B.S. CHAUHAN, J. 1. This Writ Petition has been filed under Article 32 of the Constitution of India for awarding the decree of divorce, annulling the marriage of the parties herein; and/or issue directions waiving the statutory period of six months provided under Section 13-B(2) of the Hindu Marriage Act, 1955 (hereinafter referred to as, "The Act, 1955"). E

2. The facts and circumstances giving rise to the present case are that the petitioner and the respondent got married on 30.11.2008 according to Hindu rites in Delhi. They separated just after two days of their marriage i.e. on 02.12.2008. A petition for dissolution of marriage by consent being HMA No. 197/09 dated 09.09.2009 was filed under Section 13-B(1) of The Act, 1955. The Family Court of Delhi, vide order dated 25.11.2009 accepted the said HMA No. 197/2009 (titled as *Poonam vs. Sumit Tanwar*) observing as under :- F G

"7. In view of Section 13(B)(2) of the Hindu Marriage Act, H

A the marriage between the parties cannot be dissolved straightaway in the present case. As per the statutory requirement, parties are advised to make further efforts for reconciliation in order to save their marriage. In case they are unable to do so, the parties may come up with the B petition of second motion under Section 13-B(2) of the Hindu Marriage Act as per law. The present petition under Section 13-B(1) of the Hindu Marriage Act is hereby allowed and stands disposed of.....".

C 3. Being aggrieved by the order of the Family Court, the present Writ Petition has been filed. The matter came up for preliminary hearing on 19.03.2010. Mr. A., an proxy counsel, was not able to explain as under what circumstances, a Writ Petition under Article 32 of the Constitution is maintainable for such a relief and as to whether the Court has the power to issue D a writ to the Court/Tribunal to violate a mandatory statutory provision. The learned counsel was also not able to explain under what circumstances a writ petition lies; who is amenable to writ jurisdiction; and which are the necessary parties in a writ petition? The matter was passed over and the proxy counsel E was asked to come along with Mr. B., Advocate-on-Record, who had signed and filed the petition. In the second round when the matter was taken up, another proxy counsel appeared and introduced himself as brother of Mr. B., Advocate-on-Record. The second proxy counsel also expressed his inability to render F any assistance to the Court on any legal issue. Being faced with an inordinate and unfortunate situation that the matter had been filed in the Apex Court of the Country and the appearing counsel was not able to render any assistance, the matter was adjourned for Monday i.e. for 22.03.2010 and the learned G Advocate-on-Record Mr. B. was requested to appear in the Court.

4. Mr. B. learned Advocate-on-Record appeared in Court today and could not furnish any explanation whatsoever to defend the petition, nor he could explain how this petition is H

maintainable. However, he tendered absolute and unconditional apology and assured that he will not lend his name merely for filing the petition by other counsel in future. A

5. This very Bench decided a Special Leave Petition (Civil) No. 2954/2010 (Manish Goel vs. Rohini Goel) vide Judgment and Order dated 05.02.2010 observing that this Court, in exercise of its powers under Article 142 of the Constitution, generally should not issue any direction to waive the statutory requirement. The Courts are meant to enforce the law and therefore, are not expected to issue a direction in contravention of law or to direct the statutory authority to act in contravention of law. While deciding the said case, reliance has been placed upon a large number of Judgments of this Court including Constitution Bench Judgments of this Court viz. *Prem Chand Garg & Anr. vs. Excise Commissioner, UP & Anr.* AIR 1963 SC 996; *Supreme Court Bar Association v. Union of India & Anr.* AIR 1998 SC 1895 and *E.S.P. Rajaram & Ors. v. Union of India & Ors.* AIR 2001 SC 581. B C D

6. In the said case, a similar relief was claimed, however, it was rejected observing that statutory period of six months for filing a second petition under Section 13-B(2) of The Act, 1955 has been prescribed for providing an opportunity to the parties to reconcile and withdraw the petition for dissolution and as it was not a case where there has been any obstruction to the stream of justice nor there had been injustice to the parties, which was required to be undone, this Court refused to grant the relief under Article 136 of the Constitution of India. E F

7. The citizens are entitled to appropriate relief under the provisions of Article 32 of the Constitution, provided it is shown to the satisfaction of the Court that the Fundamental Right of the petitioner had been violated. (Vide *Daryao & Ors. vs. State of U.P. & Ors.* AIR 1961 SC 1457). This Court has a constitutional duty to protect the Fundamental Rights of Indian citizens. (Vide *M.C. Mehta vs. Union of India* AIR 2006 SC 1325). G H

A The distinction in a Writ Petition under Article 226 and Article 32 of the Constitution is that the remedy under Article 32 is available only for enforcement of the Fundamental Rights, while under Article 226 of the Constitution, a Writ Court can grant relief for any other purpose also. (Vide *A.K. Gopalan vs.* B *State of Madras* AIR 1950 SC 27; *Bhagwandas Gangasahai vs. Union of India & Ors.* AIR 1956 SC 175; *Kalyan Singh vs. State of Uttar Pradesh & Ors.* AIR 1962 SC 1183; *Fertilizer Corporation Kamagar Union, Sindri & Ors. vs. Union of India & Ors.* AIR 1981 SC 344).

C Even if it is found that injury caused to the writ petitioner alleging violation of Fundamental Right is too indirect or remote, the discretionary writ jurisdiction may not be exercised as held by this Court in *State of Rajasthan & Ors. vs. Union of India* AIR 1977 SC 1361.

D

8. More so, a writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or a "State" within the meaning of Article 12 of the Constitution. (Vide *Anandi Mukta Sadguru* E *Trust vs. V.R. Rudani* AIR 1989 SC 1607; *VST Industries Ltd. vs. VST Industries Workers' Union & Anr.* (2001) 1 SCC 298; and *State of Assam vs. Barak Upatyaka U.D. Karamchari Sanstha* AIR 2009 SC 2249).

F 9. It is settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial Tribunal is to approach for redress a superior Tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of G the Constitution and only on the proof of infringement thereof. If by adjudication by a Court of competent jurisdiction, the right claimed has been negatived, a petition under Article 32 of the Constitution is not maintainable. It is not generally assumed that a judicial decision pronounced by a Court may violate the H Fundamental Right of a party. Judicial orders passed by the

Court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution. (Vide *Sahibzada Saiyed Muhammed Amirabbas Abbasi & Ors. vs. the State of Madhya Bharat (now Madhya Pradesh) & Ors.* AIR 1960 SC 768; *Smt. Ujjam Bai vs. State of Uttar Pradesh & Anr.* AIR 1962 SC 1621; and *Naresh Shridhar Mirajkar vs. State of Maharashtra* AIR 1967 SC 1)

10. In the instant case, the Family Court, Delhi has passed an order strictly in accordance with law asking the parties to wait for statutory period of six months to file the second motion in the case. In such a fact-situation, it is not permissible to suggest that the aforesaid order has violated or infringed any of the fundamental rights or any legal right of the parties. Therefore, we are not able to understand as under what circumstances, the writ is maintainable. The learned counsel appearing for the petitioner is not able to explain under what circumstances, the petition has been filed and as to whether such a petition is maintainable or whether relief of dissolution of marriage could be sought by the parties directly from this Court in a case, wherein the marriage had taken place only a year and three months ago. The counsel was not able even to explain that even if the Court considers to issue the writ, to whom it would be issued as the only parties in the case are wife and husband, who are seeking the divorce by consent. The learned counsel is not able to enlighten the Court as to whether the Family Court could be impleaded in this petition. He expressed his inability to answer any question.

11. In T*hakur Sukhpal Singh vs. Thakur Kalyan Singh & Anr.,* AIR 1963 SC 146, this Court has held that in absence of proper assistance to the Court by the lawyer, there is no obligation on the part of the Court to decide the case, for the simple reason that unless the lawyer renders the proper assistance to the Court, the Court is not able to decide the case. It is not for the Court itself to decide the controversy. The

A counsel cannot just raise the issues in his petition and leave it to the Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the Court itself to find out what the points for determination can be and then proceed to give a decision on
B those points.

12. While deciding the said case, this Court placed reliance upon the judgment of *Privy Council in Mst. Fakrunisa & Ors. vs. Moulvi Izarus Sadik & Ors.*, AIR 1921 PC 55 wherein it had been observed as under:–
C

> "In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered to justify
D the alteration of the judgment that stands. Their Lordships are unable to find that this duty has been discharged."

13. In *The Bar Council of Maharashtra vs. M. V. Dabholkar & Ors.* AIR 1976 SC 242, this Court had observed as under :-
E

> "Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the
F nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice – social justice.....Law is no trade, briefs no merchandise."

G

14. In *T.C. Mathai & Anr. vs. District & Sessions Judge, Thiruvananthapuram* AIR 1999 SC 1385, this Court observed:

> "The work in a Court of law is a serious and responsible function. The primary duty of a.....court is to
H administer.....justice. Any lax or wayward approach, if

adopted; towards the issues involved in the case, can cause serious consequences for the parties concerned.....In the adversary system which is now being followed in India, both in civil and criminal litigation, it is very necessary that the Court gets proper assistance from both sides.....Efficacies discharge of judicial process very often depends upon the valuable services rendered by the legal profession" A B

15. In *D.P. Chadha vs. Triyugi Narain Mishra & Ors.*, AIR 2001 SC 457, this Court has observed as under:– C

".....Mutual confidence in the discharge of duties and cordial relations between Bench and Bar smoothen the movement of the chariot. As responsible officers of the Court, as they are called ---- and rightly, the counsel have an overall obligation of assisting the Courts in a just and proper manner in the just and proper administration of justice." D

16. Thus, in view of the above, law can be summarised to the effect that, in case, the counsel for the party is not able to render any assistance, the Court may decline to entertain the petition. E

17. There is another aspect of the matter. In case, petitioner's counsel is not able to raise a factual or legal issue, though such a point may have a good merit, the Court should not decide the same as the opposite counsel does not "have a fair opportunity to answer the line of reasoning adopted" in this behalf. Such a judgment may be violative of principles of natural justice. (vide *New Delhi Municipal Committee vs. State of Punjab* AIR 1997 SC 2847). F G

18. While dealing with a similar issue, this Court in *Re: Sanjiv Datta* (1995) 3 SCC 619 observed as under:-

"Of late, we have been coming across several instances which can only be *described as unfortunate both for the* H

A *legal profession and the administration of justice.* It becomes, therefore, our duty to bring it to the notice of the members of the profession that it is in their hands to improve the quality of the service they render both to the litigant-public and to the courts, and to brighten their image B in the society. *Some members of the profession have been adopting perceptibly casual approach to the practice of the profession* as is evident from their absence when the matters are called out, the filing of incomplete and inaccurate pleadings — many times even illegible and C without personal check and verification, the non-payment of court fees and process fees, the failure to remove office objections, the failure to take steps to serve the parties, et al. *They do not realise the seriousness of these acts and omissions. They not only amount to the contempt* D *of the court but do positive disservice to the litigants and create embarrassing situation in the court leading to avoidable unpleasantness and delay in the disposal of matters.* This augurs ill for the health of our judicial system..... The legal profession is different from other professions in that what the lawyers do, affects not only an E individual but the administration of justice which is the foundation of the civilised society." (emphasis added)

19. In *Vijay Dhanji Chaudhary vs. Suhas Jayant Natawadkar* (2010) 1 SCC 166, this Court has taken note of F the ongoing rampant unethical practice by some of the Advocates-on-Record, duly enrolled under the provisions of the Supreme Court Rules, 1966, as many special leave petitions are being filed by them being merely as name-lenders, without having, or taking any responsibility for the case. As a result of G prevalence of such a practice, in such cases, the Advocates-on-Record do not appear when matters are listed before the Court, nor do they take any interest or responsibility for processing or conducting the case. They also play no role in preparation of the petitions, nor ensure that requirements of H Rules are fulfilled and defects are cured. If role of an Advocate-

on-Record is merely to lend his name for filing cases without being responsible for conduct of a case, the very purpose of having the system of Advocates-on-Record would get defected. A

In the said case, this Court did not merely dismiss the petition for not rendering any assistance by the appearing counsel in absence of the Advocate-on-Record, rather issued notice to the Supreme Court Bar Association and the Advocates-on-Record's Association asking for suggestions for improving the system and to compel such mere name-lending Advocates-on-Record to serve the purpose for which they have been enrolled. The matter is to come for further consideration after those Associations submit their suggestions for observance and strict adherence to the Rules, as is evident from the proceedings in that case dated 30.11.2009, 08.03.2010, 15.03.2010 and 18.03.2010. B C D

20. The aforesaid facts reveal that application for dissolution of marriage was filed only on 9.9.2009 before the Family Court and the said application was disposed of vide order dated 25.11.2009 asking the parties to wait for six months. Thus, it is not a case that there had been any delay in disposal of the case by the Family Court. The petition has been filed without any sense of responsibility either by the parties or their counsel. Such a practice is tantamount to not only disservice to the institution but it also adversely affects the administration of justice. Conduct of all of them has been reprehensible. E F

For the reasons aforesaid, this petition is dismissed.

R.P. Writ Petition dismissed.