HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

LPAOW no.64/2006 Date of decision: 30.03.2009
CMP no. 75/2006

Rajinder Kumar Sharma. v Jyoti Sharma.

Coram:

Hon'ble Mr. Justice Barin Ghosh, Chief Justice

Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge

Appearing counsel:

For the appellant(s : Mr. Z. A. Shah, Senior Advocate with
Mr. Vipan Gandotra, Advocate.

For the respondent(s): M/s. P. N. Raina, Rahul Bharti and Sindhu Sharma, Advocates.

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i) Whether approved for reporting in Law journals etc.: **Yes**

ii) Whether approved for publication in press: Optional

Per Barin Ghosh, CJ:

In the writ petition, which has been allowed by the judgment and order under appeal, the petitioner-

respondent sought a writ of certiorari quashing the reference made to Lok Adalat and also the order passed by Lok Adalat. It was contended that the reference to Lok Adalat was impermissible. The said contention has been accepted. It was also contended that Lok Adalat could not pass the order on the date the same was passed, as on that date, Lok Adalat had no authority to deal with the matter. The said contention too has been accepted.

The facts giving rise to filing of the writ petition are that the appellant filed a petition seeking dissolution of his marriage with the petitioner-respondent by decree of divorce on the grounds of cruelty and desertion, which are available grounds in terms of Section 13 of the Jammu and Kashmir Hindu Marriage Act, 1980. The petitioner-respondent not only contested the petition but also filed an application seeking dismissal thereof, since she returned

to her matrimonial home and started residing with the appellant. Upon dismissal of her application, the petitioner-respondent also filed a revision application. Soon after dismissal thereof, the appellant and the petitioner respondent, on January 21, 2004, filed a petition for dissolution of their marriage by a decree of divorce on mutual consent as may be had under Section 15 of the Act. In the said petition, amongst others, they stated that they are government employees and have not cohabited since April 20, 2002. In the application, it was also stated that the appellant will pay a sum of Rs. 4.00 lacs in cash or by way demand draft to the petitioner-respondent in lieu of full and final maintenance. It was also stated that the petitioner-respondent shall have one-third share in the house of which the appellant was the owner. The petition contained the plan of the house and demarcated one-third

portion thereof which would come to the share of the petitioner-respondent.

On January 21, 2004 itself, the appellant and the petitioner-respondent deposed before court stating that they have of their own volition, after understanding the true purport of the petition for divorce on mutual consent, have filed the same. After such deposition was recorded, both of them and their counsel requested the Court to put up the case before Lok Adalat. In the circumstances, the Court by an order dated 21st January, 2004 directed the case to be put up before Lok Adalat on January 27, 2004.

On January 27, 2004, the appellant as well as the petitioner-respondent deposed before Lok Adalat and, while doing so, not only stated that they want divorce on the terms and conditions contained in the said petition for

divorce on mutual consent, but also a decree to that effect be passed by Lok Adalat. Thereupon, before Lok Adalat, the appellant paid a sum of Rs. 1.00 lac in cash and another sum of Rs. 3.00 lacs by Demand Draft to the petitioner-respondent on January 27, 2004. Thereafter, Lok Adalat on January 27, 2004 passed the order dissolving the marriage of the appellant and the petitioner-respondent after recording that the appellant and the petitioner-respondent were told in Lok Adalat to reconsider the petition for mutual divorce and were advised to live together but they declined to do so.

Soon thereafter, the writ petition was filed. In the writ petition, it was contended that in relation to the petition for divorce by mutual consent, there was no dispute requiring compromise or settlement by Lok Adalat and, accordingly, the same could not be referred to Lok Adalat. It was also

stated that the reference was bad, inasmuch as the court failed to record its satisfaction before referring the petition for divorce by mutual consent to Lok Adalat. It was also contended that the petition for mutual consent could not be decided on the date the same was purported to be decided by Lok Adalat, for, on the date the same was considered and disposed of, Lok Adalat had no jurisdiction to decide the same. As aforesaid, the Writ Court accepted such contentions.

We have heard at length the counsel appearing on behalf of the parties and have considered the materials before us.

The moot point urged was whether the Court lacked inherent jurisdiction to refer the said petition for divorce on mutual consent to Lok Adalat and, if not, whether the

same was improper exercise of jurisdiction? The other point is whether Lok Adalat lacked inherent jurisdiction to pass a decree for divorce on mutual consent on the date the same was passed and, if not, whether the exercise of such jurisdiction was improper?

It was urged by the learned counsel for the petitioner-respondent that disputes *inter se* parties in connection with a litigation can be referred to Lok Adalat, but when a joint petition was filed by both the parties to the *lis*, seeking divorce on mutual consent, there was no dispute *inter se* them and, accordingly, the petition for divorce by mutual consent could not be referred to Lok Adalat. It was additionally contended that it was incumbent upon the Court before referring the petition for divorce by mutual consent to satisfy itself that the dispute is such that the same may be resolved through the intervention of Lok

Adalat, but in the instant case, the same was not done. It was contended that in any event, before expiry of six months from the date of presentation of a petition for divorce on mutual consent, neither the court nor Lok Adalat could deal with the same and, accordingly, Lok Adalat, as on the date of passing of the decree for divorce on mutual consent, lacked inherent jurisdiction to pass the decree. Additionally, it was stated that in any event, it was the bounded duty of Lok Adalat to wait for six months from the date of presentation of the petition for divorce on mutual consent in order to afford the parties to the petition an opportunity to reconsider their consent for divorce on mutual consent and that having not been done, the decree for divorce is improper.

The learned counsel for the appellant submitted that it is not the disputes but a *lis* that can be referred to Lok

Adalat and when both the parties are seeking such reference, it is not necessary for the court to satisfy that the *lis* may be referred to Lok Adalat, which satisfaction becomes necessary when the request for reference is made by one of the parties to the *lis*. By referring to various judgments, the learned counsel for the appellant submitted that the wait period of six months is not mandatory, the same is directory. He additionally submitted that since Lok Adalat did not lack inherent jurisdiction, the decree of divorce granted by Lok Adalat cannot be said to be illegal but may only be said to be an improper exercise of jurisdiction, and since such jurisdiction was exercised at the request of the petitioner-respondent also, the petitioner-respondent is estopped from contending that exercise of such jurisdiction by Lok Adalat was improper.

In reply, the learned counsel for the petitioner-respondent contended that parties to a *lis*, even by agreement, cannot vest jurisdiction in a court or an Authority which does not have jurisdiction, which can only be vested by a statute.

In order to appreciate respective contentions and submissions of the parties, it would be necessary for us to look into the laws governing the field. Before we take a closer look at Section 15 of the Act, it would be appropriate on our part to take note of certain salient features of said Section. A decree for divorce by mutual consent, if is to be had under Section 15 of the Act, both the parties to the marriage together are required to file a petition therefor. They can do so only when they have been living separately for a period of one year at least

before presentation of the petition. They must say in the petition that they have mutually agreed that the marriage should be dissolved. Once such a petition is filed, both the parties are required to move the court to seek divorce by mutual consent, but they can so move not before expiry of six months from the date of presentation of the petition and not later than eighteen months from the said date. It provides that the petition may be withdrawn in the meantime, i.e., within eighteen months after presentation thereof. When the Court is thus moved, it becomes obligatory for the Court to hear the parties and to make inquiries and to be satisfied that the marriage had been solemnized and that the averments made in the petition are true. Only then the court may pass a decree of divorce which shall be effective from the date of the decree.

When, therefore, a joint petition for dissolution of marriage by mutual consent is filed, apparently, there is no dispute *inter se* parties to the petition as regards the object thereof. Therefore, if a dispute between the parties to the *lis* can only be referred to Lok Adalat, then of course, a petition for divorce by mutual consent can not be referred to Lok Adalat. At the same time, it is settled law that if the forum, even if chosen or agreed to by the parties, lacks inherent jurisdiction, any thing done by the said forum is *per se* illegal.

We are, therefore, required to look at the appropriate provisions of law. Section 18 of the Jammu and Kashmir Legal Services Authorities Act, 1997, deals with Lok Adalats. Sub-section 4 thereof provides as follows:

> "(4) Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or

settlement between the parties to a dispute in respect of,--

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of and is not brought before, any court for which the Lok Adalat is organized:

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law."

We have to understand the meaning of the words "parties to a dispute in respect of any case pending before". Whereas, the learned counsel for the appellant submitted that the words "parties to a dispute" have been used to confine vesting of jurisdiction to arrive at a compromise or settlement between them and not to others or strangers; the learned counsel for the petitioner-respondent submitted that unless there is a dispute, there cannot be parties thereto.

A compromise or settlement, no doubt, can be arrived at between warring parties or between disputing parties. When an application is filed by both parties seeking same relief, it may be correctly contended that they are neither warring nor disputing parties. However, the object of vesting jurisdiction in Lok Adalat is to arrive at a compromise or settlement between the parties to a dispute in any case pending before any court for which Lok Adalat is organized. A dispute in respect of any case pending before any court for which Lok Adalat is organized means any dispute in relation thereto and not necessarily a dispute arising out of the disagreement between parties. There may not be any dispute in between the parties to a petition for divorce by mutual consent but since vesting of jurisdiction in Lok Adalat is to arrive at a compromise or settlement in between them, the

dispute may be in respect of the very case pending before the court for which Lok Adalat is organized, including those pertaining to the obligation of the court to resolve the *lis*. Therefore, it would not be appropriate to hold that unless there is a dispute between the parties in any case pending before any court; Lok Adalat shall have no jurisdiction to arrive at a compromise or settlement between such parties. It is true that ordinarily dispute means ‘disagreement’ and, accordingly, parties to a dispute would ordinarily mean ‘parties who disagree’ and vesting of jurisdiction in Lok Adalat is to arrive at a compromise or settlement in between them. Accordingly, ordinarily, when there is a disagreement between the parties in any case pending before a court for which Lok Adalat is organized, Lok Adalat shall have jurisdiction, but limiting thus and no further would be a too narrow

construction, for, as we have stated above, the parties to a dispute would not mean, only the parties who are in disagreement, but also those parties who seek redressal through the intervention of court, may be they are seeking same relief in agreement with each other. In ***Smt. Shilpa v. Abhinav***, reported in 2008 AIRSCW 8033, a petition for divorce by mutual consent has been entertained by Lok Adalat of the Hon'ble Supreme Court, which suggests that Lok Adalat organized for Hon'ble Supreme Court had authority to do what it did.

Learned counsel for the petitioner-respondent submitted that in the judgment referred to above, the question of jurisdiction of Lok Adalat was not addressed. He submitted that if the interpretation we have given is accepted, then the words 'to a dispute', as provided in Sub-section 4 of Section 18 of the Act, would become

otiose. He submitted that without reading the said words in the Statute, the same meaning, as we have given, can be had by reading 'between the parties in respect of any case pending before'. It is true that in the case referred to above, the question whether the Hon'ble Supreme Court Lok Adalat has jurisdiction over a petition for grant of divorce by mutual consent was not gone into. However, the interpretation given by us would not make the words 'to a dispute', used in Sub-section 4 of Section 18 of the Act, otiose, inasmuch as vesting of jurisdiction in Lok Adalat to arrive at a compromise or settlement is not only in between the parties in respect of any case pending before any court for which Lok Adalat is organized, but also in relation to a dispute, but such dispute need not be a dispute in between them, but may be also with regard to the case pending before the court, settlement whereof

does not depend only on agreement of the parties but also depends upon other factors, including satisfaction of the court as a pre-condition for obtaining what the parties desired to obtain by consent or agreement. In terms of Section 28 (1) (c) of the Jammu and Kashmir Hindu Marriage Act, 1980, when a divorce is sought on the ground of mutual consent, the court is required to be satisfied that the consent has not been obtained by force, fraud or undue influence and, therefore, an application for grant of divorce on the ground of mutual consent inherently raises a dispute as to whether the consent has been obtained by force, fraud or undue influence.

We, therefore, hold that Lok Adalat has jurisdiction in respect of a petition presented for obtaining divorce by mutual consent and it does not lack inherent jurisdiction in respect thereof.

In terms of Sub-section (1) of Section 19 of the Jammu and Kashmir Legal Services Authorities Act, if the parties agree, the court is bound to refer the case to Lok Adalat. Only when one of the parties makes an application for referring the case to Lok Adalat, the court is required to satisfy that there are chances of settlement and that the matter is an appropriate one to be taken cognizance of by Lok Adalat. In the instant case, the parties agreed and, accordingly, the court had no other option but to refer the case to Lok Adalat.

Sub-section (2) of Section 15 of the Jammu and Kashmir Hindu Marriage Act, 1980 is as follows:-

> "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 solemnized and that the averments in the petition are true, pass decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

It is, therefore, clear that the court can be activated to consider a petition for divorce by mutual consent on the motion of both the parties. The embargo is on the parties. They can move the court not earlier than six months after the date of the presentation of the petition. It does not say that before expiry of six months after the date of the presentation of the petition, the court shall have no power to consider the petition. Therefore, if the court considers the petition on the motion of both the parties made earlier than six months after the date of presentation of the petition, it would not be appropriate to hold that the

court lacked inherent jurisdiction to consider the petition when the same was considered. It is true that the object of the sub-section is to grant the parties to reconsider the consent given by them within a period of at least six months after the date of presentation of the petition and, accordingly, it would be appropriate on the part of the court not to permit the parties to move the court for consideration of the petition before expiry of at least six months after the date of presentation of the petition, but if the court does not do so, it cannot be said because the court did not do so, it lacked jurisdiction to consider the petition, for, despite the embargo, the parties moved earlier.

It is one thing that the court had no jurisdiction at all, i.e., it lacked inherent jurisdiction, the other is that the court had jurisdiction but it exercised such

jurisdiction improperly. The consequence of the first episode would be total nullity; whereas exercise of improper jurisdiction would result in a wrong order. In order to understand the outcome of exercise of jurisdiction by the court which lacked inherent jurisdiction and the outcome of exercise of jurisdiction by the court when it did not lack inherent jurisdiction but decided the same illegally or incorrectly, we have taken note of the judgment of the Hon'ble Supreme Court rendered in the case of ***Official Trustee, West Bengal v. Suchindra Nath Chatterjee***, reported in AIR 1969 SC 823, where the Hon'ble Supreme Court held that what is relevant is whether the court had the power to grant the relief asked for in the application made to it and that if the court had competence to pronounce on the issue presented for its decision then the fact that it

decided that issue illegally or incorrectly, is wholly besides the point. Since we have held that neither the court lacked inherent jurisdiction to refer the case to Lok Adalat, nor Lok Adalat lacked inherent jurisdiction to pass the decree for divorce by mutual consent as on the date it passed the same, it cannot be said that the reference to Lok Adalat and the decree for divorce passed by Lok Adalat are nullity.

It is true that a writ of certiorari can be sought to correct an illegal order passed by an inferior authority. We are ad idem with the learned counsel for the petitioner-respondent that Lok Adalat should not have permitted the parties to move it to have the petition for divorce considered by them before expiry of six months from the date of presentation thereof, but not having done so at the instance of the petitioner-respondent

too, it would be inappropriate on our part to permit the petitioner-respondent to question such inaction on the part of Lok Adalat. It is true that the parties, by consent, cannot vest jurisdiction to a court which does not have jurisdiction to entertain the litigation, but as aforesaid, the bar in Section 15 (2) of the Jammu and Kashmir Hindu Marriage Act, 1980, is not on the court but is on the parties, and if the parties have breached the bar consciously, they cannot be permitted to take advantage thereof.

It was contended that the public policy of giving an opportunity to rethink, as contained in sub-section 2 of Section 15 of the Jammu and Kashmir Hindu Marriage Act, 1980, would be defeated if the decree passed by Lok Adalat is not interfered with. It is true that sub-

section 2 of Section 15 of the Act contains a public policy whereby and under it grants time of at least six months to the parties to rethink the consent given by them for dissolution of their marriage, but a person, who did not wait for the time given for such rethinking, cannot be permitted to turn around and contend that he should be permitted to rethink after having had concluded the matter at his/her own volition.

It was contended that the said decree was obtained by fraud, coercion and intimidation. There was no scope to prove the same in a writ petition. For that, it was obligatory on the part of the petitioner-respondent to approach Lok Adalat.

For the reasons as above, we set aside the judgment and order under appeal and dismiss the writ petition.

(Mansoor Ahmed Mir) **(Barin Ghosh)**
Judge **Chief Justice.**

Jammu,
30.03.2009
Tilak, Secy.