* **HIGH COURT OF DELHI : NEW DELHI**

MAT App. No.72 of 2007

% Judgment reserved on: 17th July, 2008

Judgment delivered on: 8th Septbember, 2008

Shri Jiten Bhalla
Son of Shri R.K.Bhalla
Resident of D-128, East of Kailash
New Delhi-110065 ....Appellant

Through: Mr.Vijay Kishan with
Mr.Vikram Jetly, Adv.

Versus

Ms.Gaytri Bajaj
Daughter of Shri Anil Bajaj
Resident of N-30, Greater Kailash
Part-I, New Delhi-110048 ... Respondent

Through: Mr.P.N.Lekhi, Sr.Adv. with
Mr.Vijay Chaudhary, Adv.

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

V.B.Gupta, J.

The present appeal has been filed by the appellant under Section 28 of the Hindu Marriage Act, 1955 (for short as Act) read with Order 41 of CPC, against the order dated 25th September, 2007 passed by Sh.V.K.Khanna, Additional District Judge, Delhi.

2. The brief facts of the case are that the parties to the present appeal were married on 10th December, 1992 at Delhi according to Hindu Customs and rites. Two daughters, namely, Ms Kirti and Ms.Ridhi Bhalla were born from the said marriage on 20th August, 1995 and 19th April, 2000 respectively.

3. It is stated that the respondent, accompanied the appellant on 23rd May, 2003 to the District Court, Tis Hazari, Delhi, for signing the documents/petition. The First Motion under Section 13-B (2) of the Act along with an application under Section 151 CPC for waiving the statutory period of six months, was listed on 26th May, 2003. The Addl.District Judge allowed the waiving of statutory period of six months on the same date and also recorded joint statement of both the parties.

4. Vide judgment dated 3rd June, 2003, the Addl. District Judge dissolved the marriage between the parties and decree of divorce by mutual consent was granted.

5. In February, 2006 the respondent/wife herein filed a suit for declaration and perpetual injunction in the Court of Civil Judge seeking declaration to the effect that the judgment and decree dated 3rd June, 2003 passed by the Court of Sh.S.C.Mittal, ADJ, Delhi in HMA No.522/2003 in the matter of Sh.Jiten Bhalla vs. Ms.Gaytri Bajaj be set aside and declared as null and void.

6. While that suit was still pending, on 22nd December, 2006, the respondent/wife also filed an application under Section 151 CPC to recall/set aside the judgment and decree dated 3rd June, 2003 obtained by appellant alleging that a fraud has been played on the court and also filing false petition supported by false affidavits, in the court of Sh.V.K.Khanna, Addl.District Judge.

7. The Additional District Judge vide impugned order set aside the said decree.

8. Hence the present appeal.

9. It is contended by learned counsel for the appellant that the impugned order has been passed under O.12 R.6 CPC by misapplying the settled principles governing the said provision. Admission under Order 12 R.6 CPC on which Court wishes to pass a decree has to be unambiguous, clear and unconditional and written statement has to be read and construed as a composite document and the Court cannot pick up a single line and treat it as admission out of context.

10. In support of his contention, learned counsel for the appellant cited ***Express Towers P.TD & Anr. V. Mohan Singh & Ors. 2007 (97) DRJ 687 (DB)***, in which it has been held that;

> "Under order 12, Rule 6 of CPC, a decree can be passed or a suit can be dismissed when admissions are clear and unambiguous and no other interpretation is possible. The Court also is vested with a right to ask for independent corroboration of facts, even when denial in the pleadings is not specific. Right to pass a judgment or order under Order 12, Rule 6 of the Code is discretionary and not mandatory. It may not be safe and correct to pass a judgment under Order12, Rule 6 of the Code when a case involves disputed questions of

fact and law which require adjudication and decision."

11. The petition/application under Section 151 CPC filed by the wife was not maintainable because allegations in the application are that the fraud has been played on wife and not on Court by husband. It is the settled law that where fraud is alleged with the party and not with the court, the application under Section 151 CPC would not be maintainable but only a suit would lie. Even in the application filed u/s 151 CPC, the case relied on of Supreme Court on page 2 of the application takes the aforesaid view.

12. The Trial Court, even to make a case of fraud, has taken facts into consideration, which were even fully known to the wife, therefore, suppression of those facts, if any, on the part of the husband does not amount to suppression and does not constitute fraud on the part of the husband, as it is well settled principle of law that facts known to parties and omission by one to do what he might have done, would not render it 'suppression' and would not constitute 'fraud'.

13. The factum whether the parties were living separately or not or about the affidavit dated 15th June, 2002 etc. were fully within the knowledge of the wife and the wife, therefore cannot allege fraud on the basis of the alleged facts.

14. It is further contended that when both the parties practice fraud on a court and obtain a collusive decree, it is not open to either of them to impeach the judgment of the Court on the ground that it was collusively procured. The said principle of law has been completely ignored by the Trial Court.

15. Reliance by the Trial court in the impugned order on affidavit dated 15.6.2002 is totally misplaced and misdirected and not permissible because the said affidavit has not even been pleaded in application under section 151 CPC nor is on the record of the Trial court.

16. Moreover, the said affidavit is totally meaningless as it has been filed on a format given by passport office and that too 11½ months before the filing of the petition for divorce on 23.5.2003. The said affidavit merely states that

parties hereto got married in 1992 under the Act, and are living as married couple since 1992. The said averments in the said affidavit merely states the status of the appellant and the respondent to the effect that they were duly married and are still married. It does not indicate that they are not living separately as envisaged in Section 13B(1) of the Act.

17. It is further contended that what amounts to living separately is that the parties should have no desire to perform marital relationship and husband and wife would be said to be living separately for want of consummation of marital relationship.

18. On this point, learned counsel for the appellant has cited the decision of ***Smt.Sureshta Devi v. Om Prakash AIR 1992 SC 1904*** in which it was held that;

> "Expression "living separately", connotes not living like husband and wife. It has no reference to the place of living. The parties may be living under the same roof by force by circumstances, and yet they may not be living as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations."

19. In ***Kirtibhai Girdharbhai Patel v. Prafulaben Kirtibhai Patel AIR 1993 Gujarat 111***, the meaning of expression "have been living separately" has been explained and according to it, it is not necessary that spouses should live in separate premises. Merely going abroad jointly and staying under one roof is not living as husband and wife and it cannot be ground to refuse divorce when marriage has not been consummated for more than one year.

20. In any case, the respondent/wife was fully aware of the said affidavit, so she would be equally guilty of the suppression of said fact and therefore, same cannot be termed as suppression from the Court and constituting a fraud.

21. Further, when a matter is settled by consent of the parties or by compromise, in that case, the parties can compromise not only in relation to the subject matter of the petition/ suit, but other matters also in the said petition/ suit and same is permissible under amended order 23 rule 3 CPC. Therefore, settlement between husband and wife in

the present case about the custody of the children or maintenance is perfectly lawful.

22. Admittedly the wife, in this case, is an educated lady, so it cannot be said that she did not voluntary agree in the matter of custody of children or maintenance particularly when according to the husband she was living in adultery.

23. Had the wife, in this case, not voluntarily and of her own will and consent agreed to the said divorce or for giving up the custody of the children or maintenance and since according to her, she came to know of the said divorce on 8.6.2003 and got all the papers of the said divorce case including the petition, orders etc and she filed the same before the passport officer on 14.7.2003, she would not have remained quite for two years and eight months in challenging the said divorce and would not have left for abroad firstly, to Switzerland and then to London although she visited India during this time on short trips. For at least three years, admittedly, wife did not meet her children nor tried to know about the welfare and only filed petition for custody only after three years that is, in July, 2006. The said fact and said conduct of the wife clearly

shows that divorce decree was passed with her full consent and will and voluntarily.

24. It is also contended that each of the pages of the petition filed U/s 13B(1) of the Act is signed with a firm hand by the wife as well as pages 2 to 4 of Petition U/s 13B(2) and also petition for exemption for six months and along with these applications/petitions, the respondent/wife in support thereof has filed affidavits duly attested by Oath Commissioner. The wife has also signed and put her thumb impression on joint statement made by her in the Trial Court made for the purpose of divorce. Even all these petitions were signed by the counsel for the wife.

25. On this point, learned counsel cited a case decided by Andhra Pradehs HIghCourt, in Re ***Gandhi Venkata Chitti Abbai and Anr. AIR 1999 Andhra Pradesh 91*** while interpreting Section 13B of the Act, the Andhra Pradesh High Court has held that;

> "Thus, Section 13-B(2) though it is mandatory in form is directory in substance. Hence, the argument that the period of six months for the second motion cannot at all be waived is not sustainable in law."

26. In a decision of this Court reported as ***Parshotam Lal v. Surjeet Kaur 2008 (103) DRJ 416,*** it has been held that;

> "Provisions of Section 13-B(2) is directory and not mandatory."

27. In another decision on the point cited by learned counsel for the appellant, ***Arvind Sharma v. Dhara Sharma 1997 VI AD (Delhi) 557*** , the same proposition of law has been laid down that;

> "Section 13-B(2) of the act though it is mandatory in form is directory in substance."

28. Similarly, the Trial Court while passing the divorce decree, has also observed in its order that, "this court has also made efforts for effecting reconciliation between the parties but with no success". The said recording in the order dated 3rd June, 2003, while passing the decree of divorce, has never been challenged by the wife and it is the settled law if the judges say in their judgments that something was said, done or admitted before them, that has to be the last word on the subject, unless immediately challenged by the aggrieved party.

29. Admittedly, the wife was represented by a counsel in the divorce proceedings and no complaint of any kind has been filed against the said Advocate till today by the wife that she never engaged him or gave him instructions for getting divorce. The aforesaid admitted facts have not been considered by the trial court, and it leaves no manner of doubt that her plea that fraud had been played by the husband on her is totally false, fabricated and afterthought.

30. In support of his contention, learned counsel for the appellant cited, ***Hamza Haji v. State of Kerala & Anr. JT 2006 (8) SC 215,*** in which it was held that;

> "In order to sustain an action to impeach a judgment, actual fraud must be shown, mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

31. In ***Mrs.Savitri Ahuja vs. Hari Mehta AIR 1964 Punjab 487 (V 51 C 160)*** it was held that;

> "It is a fundamental principle that an order or decree of a Court can be displaced on ground of fraud only when it is extrinsic or collateral to anything which has been adjudicated upon. A party in a legal proceedings is bound to examine the pleas

> raised against him and when he comes to accept these by a solemn statement made in Court, he cannot be heard later to say that it was induced by some misrepresentation."

32. In ***M/s Continental Foundation (Joint Venture) Sholding, Nathpa H.P. v. CCE Chandigarh JT 2007 (11) SC 286***, it has been laid down that;

> "When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression."

33. In the suit filed by the wife for cancellation of divorce/decree it has been alleged, "thereafter the defendant (husband) took the plaintiff (wife) to some office and the wife did not know that was a court or that was an office where few advocates were waiting for the husband."

34. It is not understandable that any educated lady, who can travel abroad all alone and spent two year in different countries and that too, all alone, could not make out, whether she is appearing in an office or a Court.

35. In cross objections filed by the wife in the appeal it is pleaded, "the appellant (husband) fraudulently told the respondent (wife) that she was to accompany the husband

to District Court to buy property in the name of the children as permission of the Court was necessary."

36. The above vital contradiction clearly demonstrate that she herself went to the Court and made a joint statement. It is admitted by the wife that all the petitions and affidavits are of her and are duly signed by her and she did appear in the Court. It is not the case of the wife that signatures on the petition under Section 13B(1) and (2) of the Act and for exemption and on affidavits, are not of her own, nor that she did not appear in court on 26.5.2003, when joint statement was recorded.

37. Another most relevant point, which has been overlooked by the Trial Court, is that in plaint filed by the respondent-wife in Feb.2006, which consists of 27 paras for setting aside of the said divorce decree, the allegations made therein were about dowry harassment against the father-in-law, sister-in-law, mother-in-law, husband etc. but there is no whisper of these allegations made in application under Section 151 CPC.

38. Another feature is that in the said plaint filed for declaring the divorce null and void, there is absolutely no allegation that she was drugged by the husband but for the first time wife made the said allegation more than three years after the alleged drugging that she was drugged by the husband. Even if it were so, she would not have remained silent till December, 2006 before filing of the application u/s 151 CPC, although the alleged drugging, accordingly to wife, took place in the last week of May 2003.

39. When civil suit has already been filed by the respondent, for declaring the divorce as null and void, then application under Section 151 CPC for recalling/setting aside the judgment and decree dated 3rd June, 2003 passed in the Mutual Consent Divorce case, does not lie.

40. Moreover, in ***Gurjant Singh v. Nachhattar Kaur 1981 HLR 246***, it has been laid down that;

> "Orders passed under the Hindu Marriage Act does not constitute a decree within the meaning of Section 2(2) of the CPC."

41. It is also contended that the Trial Court wrongly gave importance to the fact that the husband and wife stayed in hotel in the night of 25th May, 2003 even on 26th May, 2003, 4th June, 2003 and 7th June, 2003 went together to attend function that took place in connection with the relations of the wife.

42. The Trial Court completely ignored the fact that in the reply filed by the husband to application u/s 151 CPC, he has pleaded that wife was found by him to be living in adultery and in order to hide the said fact from public as wife even did not want her parents or parents-in-law to know about it, so they slept in a Hotel on the night of 26.5.2003 early in the morning without anybody coming to know of the same and similarly attended those functions on 26.5.2003, 4.6.2003, 7.6.2003, so that nobody should know about divorce otherwise it would come to the notice of the parents of the wife that she was living in adultery. If it were not so, the wife, instead of challenging the said divorce immediately on 8.6.2003 when she came to know about the same according to her, she would not have applied for passport and left for abroad.

43. It is further argued that the observation of the Trial Court about the health of the predecessor are wholly without jurisdiction and without any basis whatsoever. The successor of a Presiding Judge of a Court has no jurisdiction to comment upon about the competency or physical condition of the Presiding Judge. Whether a judge, subordinate to High Court, is competent to discharge his judicial function or not for any reason whatsoever, can only be decided by the High Court and by none else much less by the successor of the Presiding Judge and in fact there was nothing on the record to that effect much less any pleadings in the application u/s 151 CPC. Moreover, the successor of the Presiding officer of the Court has no business to compare the signatures of his predecessors particularly when there was no pleading whatsoever in respect thereof.

44. On this point learned counsel has cited ***Mukund Ltd. v. Mukand Staff & Officers Association JT 2004 (3) SC 474*** wherein it has been held that;

> "It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into."

45. There cannot be any question of collusion since both the parties in joint petition filed u/s 13B(1) of the Act have pleaded that there is no collusion in petition preferred by the parties. In joint statement recorded on 26.5.2003 it was expressly stated that there was no collusion between the parties in filing their petition. The Court has further observed in its judgement dated 3.6.2006, that – "the court also made efforts for effecting reconciliation between the parties but no success". The aforesaid pleadings and observations in order dated 3.6.2003 clearly show that there was no question of any collusion.

46. In ***Nagindas Ramdas v. Dalpatram Iccharam @ Brijram and Ors. AIR 1974 Supreme Court 471***, it has been laid down that;

> "Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions."

47. The Trial Court has fully complied with Section 23 of the Act by holding –"I am satisfied that the marriage

between the parties had broken down irretrievable and irremediably. There is not even a scintilla of hope of the petitioners joining together as husband and wife. Their consent for divorce appears to be voluntary and not induced by any force, fraud or undue influence from any quarter."

48. It is also contended that, non-signing of the joint statement is totally irrelevant as it is mentioned in the order dated 26.5.2003 that "I have considered the joint statement of the parties recorded on oath".

49. It is also contended that the present appeal can be treated as revision also and cited case law ***Col.Anil Kak (Retd.) v. Municipal Corporation, Indore and Ors. JT 2005 (8) SC 412*** where it has been held that ;

> "Where Revision is not maintainable, permission of High Court to convert and treat the petition as under Article 227, was held proper and justified."

50. To the similar effect in ***Bahori v. Vidya Ram AIR 1978 Aallahabad 299 and Jeewan Dass Rawal v. Narain Dass & Ors. AIR 1981 Delhi 291***, it was held that;

> "High Court has got the power to convert the appeal into revision provided conditions laid down in Section 115 CPC are satisfied."

51. Lastly, it is contended that mere non-singing of judgment will not invalidate the judgment in view of ***K.V.Rami Reddi v. Prema JT 2008(3) SC 115***, where it has been laid down that;

> "Mere non-signing of judgment, held, will not invalidate the judgment."

52. On the other hand, it is contended by learned counsel for the respondent that first and foremost question is as to whether appeal under Section 28 of the Act is maintainable or not.

53. The Act is a complete code in itself. The word "decree" is used in "the Act" in a special sense having different meaning and connotation than that in which it is defined in the Code of Civil Procedure. The word "decree", therefore, has to be interpreted in accordance with and in relation to the special language used in the Act.

54. Section 28 of the Act, confers right of appeal against "all decrees made by the court in any proceeding under

this Act, subject to the provisions of sub-section 3, be appealable as decrees of the court.…".

55. The words "all decrees" mean decree for restitution of conjugal rights u/s 9, decree for judicial separation u/s 10, decree of nullity u/s 11 and decree of divorce u/s 13 and 13-B. However, if a petition for restitution of conjugal rights fails, then no decree refusing conjugal rights can be passed. Similarly, if petition for judicial separation or petition for nullity or divorce fails, then there will be no decree denying judicial separation can be passed nor decree refusing nullity can be passed nor decree for refusing to grant divorce can be passed.

56. Thus, the words, "all decrees" as used in section 28 of the Act has limited meaning according to the language used in the Act.

57. It is settled principle of law of interpretation that the language used in the text has to be read to its context. In all these four cases, if the petitioner succeeds, a decree for restitution of conjugal rights, judicial separation, nullity or

divorce has to be passed. But if the petition fails, then no decree is passed i.e., the decree is denied to the petitioner.

58. In other words, when a decree for divorce is refused or denied to a petitioner, the marriage still subsists and as such it cannot be presumed that there exists a “decree” in the eyes of the law within the meaning of section 28 of the Act. It is only when a decree is passed that the rights of the matrimonial parties are altered u/s 41 of the Evidence Act, since it is a judgment in rem as distinguished from decrees in civil cases which operate as judgments in personam.

59. The meaning of word “decree” under the Act, cannot have one meaning when used in Sections 9, 10, 11, 13, 13-B and 23, 26 and 27 and another or different meaning under Section 28 of the same Act.

60. Secondly, even otherwise, an order passed u/s 151 CPC by the Addl. District Judge, setting aside a decree obtained by fraud under section 13-B of the Act, is not a “decree” within the meaning of section 28(1) of the Act nor

it is an “order” made by the Court under section 25 or section 26 of the Act which are only appealable.

61. Section 28(1) of the Act contemplates that only decree is appealable.

62. It is settled principle of law that appeal lies only against a decree and not from the judgment. In this case, the order passed by the Addl. District Judge does not mention that a decree be prepared on the basis of his order, and obviously could not have stated while exercising powers of inherent jurisdiction conferred u/s 151 CPC.

63. On this point, learned counsel for the respondent cited ***State of West Bengal v. Union of India 1 SCR 371***, in which it has been laid down that;

> “In considering the true meaning of words or expression used by the Legislature the Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire Statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs.”

64. Further, it is contended that the first and foremost statutory requirement of Section 13-B(1) of the Act is that

the parties to the First Motion have to truthfully state in the petition and solemnly affirm in the affidavit that “they have been living separately for a period of one year immediately preceding the presentation of the petition.”

65. The petitioner has fraudulently and falsely stated in paragraph 5 of the First Motion that “ever since December, 2001, due to irreconcilable differences having arisen between parties, they mutually have decided to live separately and have not cohabited together as husband and wife…”

66. However, on the other hand, the appellant has admitted in Joint Affidavit dated 15.6.2002 signed by the parties) with their joint photos affixed on it and dully notartised by the Notary Public, and filed before Passport Authority, a statutory authority created under the Passport Act, that “We are living together as married couple since 1992”.

67. This clearly expose the fraudulent scheme and intention of the appellant husband that he knew at the time of filing the First Motion that he had made false and

fraudulent representation in the First Motion in violation of the condition precedent of “living separately” for a period of one year immediately preceding the presentation of First Motion.

68. The appeal of the appellant should be rejected on this ground alone. This further proves that the appellant had fraudulently obtained the signature of the wife on the documents.

69. Further, the Additional District Judge, had no power and jurisdiction to pass a decree in violation of statutory provision of Section 13-B(2) of the Hindu Marriage Act, 1955 which is “mandatory”.

70. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorize the court to make a decree of divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from their relations and friends. In this transitional period, one of the parties may have a second thought and change the mind

not to proceed with the petition. The spouse may not be a party to joint motion under sub-sec. (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind, it should not be one party alone, but by both.

71. In the present case, the petition under Section 13-B(1) & (2) [First Motion & Second Motion] along with an application for waiving of minimum statutory period six months, was presented on 26.5.2003 and listed for hearing in the Court of Sh.S.C.Mittal, the then Addl. District Judge, Delhi, who allowed both the Motions on the same day along with the application for waiving of statutory period of six months. Finally, the Additional District Judge passed a Decree dissolving the marriage between the parties by mutual consent on 3.6.2003 i.e., just after 8 days of filing of the petition for divorce by mutual consent.

72. It is further contended that parties to the First Motion u/s 13-B(1) of the Act must be "living separately" for a period of one year immediately preceding the presentation of the First Motion but admittedly in the present case the parties were living together as husband and wife as per

Joint Affidavit dated 15.6.2002 filed before Passport Authority whereas the first Motion and Second Motion is dated 23.5.2003 and listed before the trial Court on 26.5.2003 falsely and fraudulently claiming to be living separately, expose the fraudulent intention of the appellant perpetrated on the Court. Fraud, collusion and undue influence are antithesis to the scheme of the Act and in particular Section 23 of the Act.

73. It is also contended that in the present case, the appellant has not only misled the then Additional District Judge, Delhi, but the Court has also committed a gross and manifest mistake and error of law by assuming that it has power to waive minimum statutory period of six months u/s 13-B (2) of the Hindu Marriage Act, 1955, contrary to the law laid down by the Supreme Court in ***Sureshta Devi v. Om prakash (supra)***, where held that;

> "A party to a petition for divorce by mutual consent under Section 13- of the Hindu Marriage Act, 1955 can unilaterally withdraw he consent and the consent once given is not irrevocable. Further the expression "living separately" occurring in Section 13-B connotes not living like husband and wife, it is immaterial

whether spouses live under same roof or in different house."

74. In ***Gurpinder Kaur Sahsi v. Ravinder Singh Sahsi AIR 2005 Punjab and Haryana 187***, cited by learned counsel for the respondent, it has been laid down that;

> "A decree for divorce under Section 13-B of the Act cannot be granted by the Court earlier than six months of presentation of petition. This statutory period of six months cannot be curtailed by Court on statement of parties. Waiting period of 6 to 18 months is intended to give time and opportunity to parties to reflect on their move and seek advice from their relations and friends and have second thoughts."

75. Another decision cited is ***Anita Sarwal v. Dr.Deepak Sarwal 46 (1992) DLT 502***, where it has been held that;

> "The Court gets no jurisdiction to make a decree for divorce by mutual consent, prior to the expiry of the mandatory period, as specified in the Section and the consent must continue when the second Motion is made."

76. Further, it is contended that an application u/s 151 CPC for setting aside a decree obtained by fraud is maintainable before the Court which passed the decree. The Court has inherent powers not only to set aside a

judgment, order or decree obtained by fraud but also where a Court is misled by a party or the Court itself commits a mistake, it can recall its order.

77. It is also the contention of learned counsel for the respondent that the principle of estoppel does not apply to a decree obtained by fraud particularly when the statutory requirement mandated by the legislature have not been strictly complied with like dispensing with the period of waiting of six months as required by law. Moreover, condition precedent of filing the First Motion that the parties are living separately for a period of one year immediately preceding the presentation of the petition. Appellant husband has admitted that the joint affidavit was duly signed by him on 15th June, 2002 also with photograph attached and notarized which was filed before the Passport Authority wherein he has solemnly declared that “we are married under Hindu Marriage Act/Rights/Customs and are living together as married couple since 1992”. This admission of facts and law on the face of record does not require any trial by evidence under law.

78. Further, the Limitation Act is not applicable in a case where decree and judgment has been obtained by fraud as it is settled principle of law that a decree or judgment obtained by fraud is nullity and non-est.

79. The learned counsel has also cited following judgments in support of his contention, namely, ***Smt.Puspalata Rout v. Damodar Rout AIR 1987 Orissa 1***, where a decree was obtained by exercise of fraud on wife under Section 13B of the Act, it was held that;

> "It is fraud practiced on court and a judgment is liable to be recalled by the court passing decree in exercise of its inherent powers."

80. In ***S.P.Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. And Ors. AIR 1994 SC 853***, it was held that;

> "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. If he withholds a vital documents in order to gain advantage on the other side then he

> would be guilty of playing fraud on the court as well as on the opposite party."

81. The next case cited as ***Tribeni Mishra and Ors. V.Rampujan Mishra and Ors. AIR 1970 Patna 13***, where while discussing the provisions of Section 44 of the Evidence Act, it was held that;

> "The right as given by Section 44 has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. A decree or order can be challenged on the ground of fraud in a collateral proceeding irrespective of the time when the judgment was delivered or decree or order was passed."

82. In ***Nazir Ahmad v. Emperor Privy Council 253 (1)***, it has been laid down that;

> "Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all."

83. Lastly, it is contended that the circumstances and evidence on record admitted by the appellant and not controverted, goes on to prove that fraud was practiced on the Court.

84. Petition under Section 13-B(1) of the Act for dissolution of marriage between the parties by a decree of divorce by mutual consent was filed in the court of Addl.District Judge on 26th May, 2003. This petition has been signed by the appellant as well as by respondent of this case and both the parties have filed their separate affidavits and appellant has placed on record photocopy of Election Identity Card whereas, the respondent has placed on record photocopies of extract of her passport. Further, appellant has also placed on record the vakalatnama of his counsel Sh.V.R.Dattar and Associates whereas, respondent has filed her vakalatnama in respect of Ms.Monika Malhotra, Advocate.

85. On 26th May, 2003 itself, the joint statement of the parties, that is, appellant as well as the respondent, were recorded by the Addl.District Judge. This joint statement has been signed by both the parties and it also bears the thumb impression of both the parties.

86. In the joint statement, it was stated by both the parties that due to divergence in their temperaments and idiosvncrasies, they have been living separately since

December, 2001. Efforts for their reconciliation made by their relatives could not bring about bonhomie between them. Now there is no possibility of their living together without causing mental pain and anguish. So they have decided to part away permanently in decent manner by taking divorce by mutual consent.

87. In joint statement, it was further stated that they have settled all their claims and disputes against each other amicably regarding dowry articles, stridhan, maintenance, past, present and future and also for permanent alimony outside the court. Now, there is no claim/dispute left between them to be solved/settled of any nature whatsoever qua this marriage. Their consent for divorce is voluntary and without any force, fraud and undue influence. There is no collusion between them in filing this petition.

88. After recording the statement of parties, the matter was adjourned for 3rd June, 2003 for orders.

89. Vide order dated 3rd June, 2003, petition under Section 13-B(1) of the Act was allowed by Sh.S.C.Mittal, Addl.District Judge, Delhi.

90. The petition under Section 13-B(2) of the Act was also filed on 26th May, 2003 by both the parties. This petition has been signed by both the parties as well as their respective counsel duly supported by respective affidavits of both the parties. Along with this petition, an application under Section 151CPC for waiving of six months period was also filed and this application has also been signed by both the parties and separate affidavit in respect of this application has also been filed by both the parties.

91. Vide order dated 26th May, 2003 itself application under Section 151 CPC for waiving of the statutory period of six months was allowed by the court and joint statement of the parties were recorded and the matter was adjourned to 3rd June, 2003 for judgment.

92. Thereafter, vide judgment dated 3rd June, 2003, petitions under Section 13-B(1) and 13-B(2) of the Act, filed by both the parties, were allowed.

93. In February, 2006, the respondent/wife has filed the suit for declaration and perpetual injunction in the court of Civil Judge, Delhi against the appellant/husband seeking declaration praying that judgment and decree dated 3rd June, 2003 passed by the Court by Sh.S.C.Mittal, ADJ, Delhi in HMA No.522/2003 in the matter of Jiten Bhalla and Gayatri Bhalla be set aside and declared as null and void.

94. This suit was filed inter alia on the following grounds:-

(a). That father-in-law, mother-in-law, sister-in-law of the plaintiff (respondent herein) had started harassing her right after her honeymoon in January, 1993 and they were tactfully laying demands for dowry on the pretext of social customs and festivals. The plaintiff continued to bear harassment from the defendant (appellant herein), his sister and his parents for the sake of her two daughters.

(b). On 23rd May, 2003, the sister-in-law of the plaintiff who was living in Gwalior invited the two daughters of the parties to stay at Gwalior for few days. Plaintiff allowed

her daughters to go to Gwalior for two days along with her mother-in-law on 24th May, 2003.

(c). On the next day, that is, on 25th May, 2003, the defendant booked a room in Hotel Surya, New Friends Colony, New Delhi and stayed with the plaintiff for a night. During the said night, defendant cohabited with the plaintiff and assured a vow from the plaintiff that on the next date, that is, 26th May, 2003, she would have to go with him at some place and without bothering the presence of the persons there, she should have signed on some papers as and when directed by the defendant.

(d). In the morning of 26th May, 2003, the defendant took the plaintiff to some offices, (the plaintiff did not know that the same was a court) and there was some Advocate who was waiting for the defendant. They took the plaintiff to a room and asked her to sign a paper which she did as directed by the defendant without reading the same and nobody uttered or asked anything from the plaintiff except the defendant.

(e). In the evening of 26th May, 2003 both the plaintiff and the defendant enjoyed on the occasion of Roka ceremony of a cousin of plaintiff at Punjabi Bagh and after the ceremony, both the parties slept and cohabited at the matrimonial home at night. The plaintiff continued to live in the matrimonial home as usual.

(f). On 4th June, 2003, the defendant along with the plaintiff and many other relatives of the defendant assembled for a party at Hotel Surya, New Friends Colony, New Delhi during lunch time on the occasion of the Mundan ceremony of a nephew of the plaintiff.

(g). In the evening of 7th June, 2003, the defendant along with the plaintiff and their two daughters and about 60-70 relatives of the defendant assembled at Hotel Maurya for a function. After the function was over, the plaintiff stayed with her parents.

(h). On 8th June, 2003, the plaintiff telephoned the defendant to come and pick her up from her parents home but the defendant rebuked the plaintiff saying that he had already divorced her and threatened the plaintiff that if her

parents would challenge the same, both the children would be done to death by his sister Namita Kapoor, who is in the matrimonial home at that time.

(i). The plaintiff realized that she was hoodwinked by the defendant on 22nd May, 2003 when she was made to sign some papers on the pretext of some scheme for the better future of their children and thereafter on 26th May, 2003 when she was made to sign on a statement without allowing her to read them.

(j). That the plaintiff has been living in matrimonial home, sharing the same bed and cohabited with the defendant upto 7th June, 2003 and both the parties were going in the family functions together. The plaintiff never engaged any counsel nor given any fee to him/her nor she knew any Advocate by the name of Monica Malhotra nor could recognize her face. In the court also, the Judge did not put any query nor anybody in the court asked her about the matter in question. The plaintiff was neither shown nor given opportunity to read the statement in question by the defendant and she did whatever was dictated by the defendant as settled between them on previous night, that

is, on 25th May, 2003. There was no question of waiving her right to the custody of children.

(k). Since the signature of the plaintiff on both the petition and affidavit and the joint statement were obtained from her by the defendant by fraud, misrepresentation and undue influence and thus, judgment and decree dated 3rd June, 2008 passed by the Court of Sh.S.C.Mittal, Additional District Judge is liable to be set aside as null and void.

95. While the civil suit was pending in the court, the respondent/wife moved an application under Section 151 CPC to recall/set aside the judgment and decree dated 3rd June, 2003 inter alia on the following grounds:-

(a). That none of the grounds for passing of the said decree ever existed and the Court would not have passed the same on 3rd June, 2003 but for the fraud committed and conspiracy hatched by the husband.

(b). On the night of 22nd May, 2003 when the wife was very much shocked and disturbed and was in a hurry to go to her parents house, as her grandmother has expired, the husband asked her to sign on some papers on a scheme for

better future of the children. The wife wanted to read them but the husband retorted that she would have faith in him. Believing his words, the wife had signed on all the papers without reading them.

(c). In the said petition, it was stated that stridhan was settled, which is also totally false. It is stated that the FIR has been registered regarding the same against the husband and other in-laws at P.S. Greater Kailash vide FIR No.393/2006 under Sections 120B/406/420/498A IPC dated 19th October, 2006.

(d). Remaining allegations mentioned in the application under Section 151 CPC are almost similar to those allegations which have been mentioned, in the civil suit filed by the respondent/wife.

96. As stated above, the respondent has admittedly filed a civil suit for declaring the decree as null and void in February, 2006 and while that civil suit was pending, the respondent-wife moved an application under section 151 CPC for recalling/setting aside of the order dated 3rd June,

2003 passed by Addl.District Judge for setting aside the divorce decree.

97. The question which arises for consideration is when the civil suit was also pending on the same issue, can the Addl.District Judge had the jurisdiction to entertain application under Section 151 CPC on that point.

98. On this issue, Order 2 CPC may be referred to. The relevant provisions of the Order 2 CPC, read as follows:-

> "**R.1.Frame of suit**.-Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them
>
> **R.2.Suit to include the whole claim**.-
>
> (1)Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of this claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) **Relinquishment of part of claim**.-
>
> Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

> (3) **Omission to sue for one of several reliefs**.-
>
> A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such relief, he shall not afterwards sue for any relief so omitted.
>
> *Explanation*:- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

99. It is well settled that in order to attract the bar of Order 2 Rule 2, the earlier suit should be founded on the same cause of action on which the subsequent suit is based, and if in the earlier suit, the plaintiff has omitted to sue in respect of or intentionally relinquished any portion of his claim, he will not subsequently be entitled to sue in respect of portion of his claim so omitted or relinquished.

100. Order 2 Rule 2 CPC is directed to secure the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. The first part makes it incumbent on the

plaintiff to include the whole of the claim in his action. The later portion makes it incumbent on him to ask for the whole of the remedies. The cause of action in the two suits may be considered to be the same, if in substance they are identical.

101. In the civil suit, the relief claimed by the respondent-wife is that judgment and decree dated 3rd June, 2003 passed by the court of Sh.S.C.Mittal, Additional District Judge in HMA No.522/03 be set aside and declared as null and void.

102. In the civil suit filed by the respondent-wife, the allegations are that the appellant/husband has asked the respondent to sign on some papers on the pretext of some scheme for better future of their children.

103. On 26th May, 2003, she was made to sign on a statement without allowing her to read them since the appellant-husband has taken her to some office which the respondent did not know that the same was a court and there was some Advocate who was waiting and she was asked to sign all papers.

104. In the application under Section 151CPC filed by the respondent-wife for recalling/setting aside the judgment and decree dated 3rd June, 2003, the same allegation has been made that on 22nd May, 2003, the appellant-husband asked the respondent-wife to sign some papers on a scheme for better future of children. The respondent wanted to read the same but the husband retorted that she should have faith on him and believing his words, she has signed on all the papers without reading them.

105. Another allegation made in this application is that on 26th May, 2003, the appellant-husband asked her to be ready to go some place and to sign on some papers. Thereafter, the appellant drugged her and took her to some office which she did not know that the same was court and some Advocate was waiting for the appellant. There she was asked to sign on papers which she did as directed by the appellant without reading the same. In this application, the same relief has been sought that the judgment and decree dated 3rd June, 2003 be recalled/set aside.

106. Since the civil suit on the similar cause of action filed by the respondent-wife was pending and during the pendency of that suit, respondent-wife has filed application under Section 151 CPC for setting aside the decree, under these circumstances, the application under Section 151 CPC does not lie at all.

107. The next point which arises for consideration is about the inordinate delay in filing the application under Section 151 CPC for recalling/set aside of the judgment/decree.

108. The divorce was granted in this case on 3rd June, 2003 and the respondent had come to know about the divorce on 8th June, 2003 itself.

109. On 15th July, 2003, respondent has submitted an application in the passport office for passport in lieu of lost passport. In this application form, respondent has mentioned her name as Gayatri Bajaj. She has left the name of her spouse-as blank. The permanent as well as present address mentioned is N-30, Greater Kailash, Part-I, New Delhi, which is not address of her matrimonial home.

Along with this form, photocopy of court verdict (petition for divorce) has been enclosed as one of the enclosure.

110. There is also a deed of poll signed by respondent, dated 16th July, 2003 declaring that she has abandon the use of her former name/surname of Gayatri Bhalla and has assumed the name/surname Gayatri Bajaj.

111. All these facts goes on to show that at the time of submitting of an application for passport, she knew about the divorce proceedings and did not mention the name of her former husband, i.e., appellant in the relevant documents and had in her possession copy of divorce proceedings. If she had all the knowledge of divorce proceeding as early as July, 2003, then why she remained silent for more than two and half years and why she did not challenge the divorce proceedings, if obtained by fraud. There is no explanation whatsoever, for this inordinate delay.

112. For the first time, in February, 2006 the respondent filed civil suit challenging decree of divorce and in that suit

she has stated that cause of action arose on 22nd May, 2003.

113. Application under Section 151 CPC has been filed in December, 2006, that is, more than 3½ years after the divorce was granted and in this application also there is no explanation as to why it took her 3½ years to challenge the decree of divorce.

114. It is well settled that delay and latches cannot command premium and there is no explanation whatsoever about this inordinate delay in filing the civil suit as well as application under Section 151 CPC.

115. Now, coming to the fraud as alleged by the respondent in obtaining the divorce decree by the appellant, the respondent has taken contradictory stands in her civil suit and in application under Section 151 CPC.

116. In application under Section 151 CPC, it has been stated that on 26th May, 2003, the appellant asked the respondent to be ready to go some place and be ready for fulfilling the vow and sign on some papers at the destined place and warned her that said vow should not be broken

and papers should not be read at all before signing. Thereafter, the appellant drugged her and took her to some office.

117. So this story of drugging of the respondent by the appellant has been taken for the first time in application under Section 151 CPC and this is a new stand taken by the respondent, which was not her earlier stand, in the civil suit.

118. So, it is a matter of evidence as to whether the appellant drugged respondent or not and whether her signatures were obtained on the documents for better future of the children or to buy some property. There are all triable issues.

119. In application under Section 151 CPC for recall, it has been alleged by the respondent that she never engaged any counsel nor given any fees to him/her nor she knew any Advocate by the name of Ms.Monica Malhotra, nor could recognize her face.

120. As per documents placed on record, petitions under Sections 13(B)(1) and 13(B)(2) of the Act have also been

signed by Ms.Monica Malhotra, Advocate for respondent and signatures of respondent on affidavits have been identified by Ms.Monica Malhotra, Advocate.

121. There is nothing on record to show that if, Ms.Monica Malhotra was not the Advocate of respondent, had respondent taken any action against her Advocate for appearing in the court, unauthorisedly. Moreover, it a matter of evidence as to whether this Ms.Monica Malhotra was the Advocate of respondent or not.

122. Now coming to the fraud, the respondent in her application under Section 151 has referred to a decision of Apex Court reported as ***Indian Bank v. M/s Satyam Fibres (India) Pvt. Ltd. 1996(7) SC 135.*** In this case the Apex Court has held that;

> "The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by Fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent power are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not

> from legislation but from the nature and the constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behavior. This power is necessary for the orderly administration of the Court's business."

Further, the Court observed;

> "Since the evidence of the parties is already on record and all vital facts either stand admitted or proved, we proceed now to consider whether forgery and fraud was established."

123. In that case, the evidence was already before the Apex Court and on basis of that evidence, the Court proceeded.

124. Here in the present case, the Addl.District Judge without recording the evidence and without going into the allegations and counter allegations made by both the parties, has disposed of this application, which is unwarranted, since all the allegations and counter allegations made in the present proceedings require evidence.

125. Now, the question which arises for consideration as to whether present appeal under Section 28 of Act is maintainable or not. Even assuming for arguments sake that appeal is not maintainable, but revision does lie and this appeal can be treated as revision.

126. When admittedly, civil suit was pending, then there was no occasion for Addl.District Judge to have admitted application under Section 151CPC for consideration and as such, the order of Addl.District Judge in entertaining application under Section 151 CPC, was patently without jurisdiction.

127. Lastly, the Addl. District Judge has made certain observations about the health of the his predecessor.

128. There was no occasion for Sh.V.K.Khanna, Addl.District Judge, to make such observations.

129. It has nowhere been pleaded by the respondent/applicant in application under Section 151 CPC, that predecessor of Sh.V.K.Khanna, Additional District Judge was not keeping good health or the judgment has not been signed by him.

130. Sh.V.K.Khanna, Additional District Judge on its own has made certain remarks/observations, which are reproduced hereunder:-

> "Most importantly, the signature's of Sh.S.C.Mittal ld. Predecessor of this court in the order passed in the first motion petition and in the second motion petition do not tally and are apparently different. Two orders are passed on 3.6.03. First motion petition is disposed of with the observation that "it can be revived if and when the second motion petition is preferred by the parties." Whereas second motion petition which was already there and statement in the second motion petition had also been recorded on the same date i.e. 26.5.03. In the second motion petition the marriage between the parties has been dissolved with immediate effect on 3.6.03. It is not that two motions cannot be allowed on the same date. The legal position is well settled now that court can waive time period of six months between two motions. These two contradictory orders are not usually passed at the same point of time. The petitions could be disposed of vide a common order. In both the petitions bearing No.521/03 and 522/03, the joint statement of the parties dated 26.5.03, are not signed by the ld. Predecessor and as observed above, the signatures of learned Predecessor on two judgments passed on same day i.e. 3.6.03 in first motion petition and second motion petition are apparently different."

Further, he observed that;

> "This court cannot comment too much upon the condition of Sh.S.C.Mittal ld.Presiding Officer at the relevant time but it is a open secret that Sh.S.C.Mittal ld. ADJ was not keeping well during those days."

131. A judicial officer has no authority or jurisdiction to comment upon the functioning and working of judicial officer of same rank, about the competency or physical condition of his successor.

132. Whether an Additional District Judge, who is subordinate to this Court, is competent to discharge his judicial functions or not, that is, for this Court to decide. Sh.V.K.Khanna, Additional District Judge has assumed powers of this Court and has made sarcastic remarks on the functioning, competency and physical condition of his predecessor, Sh.S.C.Mittal, Additional District Judge (since deceased) who was much senior in hierarchy to Sh.V.K.Khanna, Additional District Judge.

133. A judicial officer, has no business or right to compare the signatures of his predecessor on the judicial proceedings which have been made by him in discharge of his judicial functions. More so, when no pleadings

whatsoever in respect thereof, have been made by any of the parties. The conduct of Sh.V.K.Khanna, Additional Districut Judge in making the above remarks about the physical conditions and functioning of Sh.S.C.Mittal, Additional District Judge, are highly improper and uncalled for.

134. In view of above discussion, the present appeal is, hereby, allowed and the impugned order passed by Sh.V.K.Khanna, Additional District Judge is, hereby, set aside.

135. However, it is made clear that respondent can agitate all those pleas as available to her under the law, in the civil suit filed earlier and any observations made hereinabove, shall have no bearing on the merit of the civil suit filed by respondent earlier.

136. With these observations, the present appeal stands disposed of.

137. A copy of this judgment be placed before the Inspecting Judges of Sh.V.K.Khanna, Additional District Judge, for taking appropriate action, against

Sh.V.K.Khanna, Additional District Judge for his improper conduct, in making comments against his successor, which are against the judicial ethics and discipline.

138. Parties shall bear their own costs.

139. Trial court record be sent back.

September 08, 2008 **V.B.GUPTA, J.**
Bisht