

* HIGH COURT OF DELHI

+ CM(M) 2631/2005

Date of Decision: February 2nd, 2009

Yash Mehra ...Petitioner
Through Mr. P.C.Chopra, Adv

Versus

Arundhati Mehra ...Respondent
Through Mr. M.Dutta, Adv.

Coram

***Hon'ble Ms.Justice Veena Birbal**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Veena Birbal, J.

1. Briefly the facts of the case are that marriage between the parties was solemnized on 12th July, 2001. After marriage, they lived together as a husband and wife for a short period. Since 3rd July, 2002 they are living separately. On 18th September, 2002, parties filed a joint petition being HMA No.604/2002 under section 13(B)(1) of Hindu Marriage Act, 1955 before the learned District Judge, Delhi which was assigned to the court of Shri S.C.Mittal, learned ADJ, Delhi for disposal. A joint statement of parties on oath was recorded on 20th September, 2002 and the petition was disposed of vide order dated 20th September, 2002 with advise to the parties to make efforts for reconciliation and in case they are unable to do so, they may file second petition under section 13B(2) of HMA within the statutory period. Thereafter, parties filed second joint petition before the learned ADJ under section 13(B)(2) of HMA on 21st March, 2003. Their joint statement on oath was recorded on 21st

March, 2003 and the case was fixed for pronouncement of judgment on 13th May, 2003.

Before the judgment could be pronounced, respondent/wife on 7.5.2003 moved an application under section 25 read with section 27 of the HMA claiming permanent alimony from petitioner @ Rs.1 lakh per month and for return of istridhan articles. On 13th May, 2003, respondent/wife moved another application under section 24 of HMA claiming interim maintenance @ Rs.1 lakh per month from petitioner/husband. During the pendency of these applications, respondent/wife moved another application under Order XXIII Rule 1 read with section 151 CPC on 15th September, 2003 seeking permission to withdraw all her statements/averments and affidavits made by her in the first and second joint motion Petitions under section 13(B) of HMA i.e. in petition seeking divorce by way of mutual consent. In the said application, respondent/wife had made allegations that petitioner/husband was to pay her Rs.70 lakhs towards permanent alimony and had to return istridhan articles after recording of statement in second motion Petition. However, it was alleged that husband had backed out from the understanding between the parties. Respondent/wife also made allegations against one Dr.Raj Kumar, a relative of petitioner of having given threats to her.

Petitioner/husband had filed reply to the said application and denied the allegations made by her. It was alleged that he had already paid Rs.3.50 lakhs in full and final settlement of all her claims and nothing was due from him.

2. Learned ADJ relying on the judgment of Smt.Shrestha Devi Vs. Om Parkash reported in AIR 1992 SC 1904, allowed the respondent/wife to withdraw her consent vide impugned order dated 22.12.2004. As regards, her applications under Sections 24, 25 and 27 of HMA are

concerned, same were permitted to be withdrawn by her with permission to file afresh as and when facts and circumstances of the case necessitated. Review application was also filed which was rejected vide order dated 10.9.2005.

3. Petitioner challenged the above orders by filing present petition under Article 227 of Constitution of India. The said petition was earlier disposed of vide order dated 28th August, 2006 of this court holding that once hearing of a case was concluded and the case was reserved for judgment, none of the parties had any right to move any such application and directed the Trial Court to proceed with the pronouncement of the judgment on the basis of arguments already concluded in the case prior to filing of three applications of respondent/wife. In pursuance to said directions, the learned Trial Court vide orders/judgment dated 25th September, 2006 passed decree of divorce on the ground of mutual consent.

4. Respondent/wife challenged order dated 28.8.2006 passed by this court by filing a Special Leave Petition. The leave was granted. The Supreme Court vide order dated 20th August, 2007 set aside the order passed by this court with a direction to dispose of the petition on merits after giving opportunity of hearing to the parties.

5. Learned counsel for appellant has contended that since the statement of respondent/wife was already been recorded in court in both the petitions i.e under Section 13 (B)(1) of HMA on 20th September, 2002 and 13 (B)(2) of HMA on 21st April, 2002 wherein she has stated that her consent has not been obtained by force, fraud or undue influence, its unilateral withdrawal was not permissible. In support of his contention, Ld. counsel has relied upon Ashok Hurra Vs. Rupa Bipin Zaveri AIR 1997 SC 1266. Chandra Kanta Vs. Hans Kumar & anr AIR

1989 Delhi 73 (I (1988) DMC 509 and Raj Rani Vs. Roop Kumar 41 (1990) DLT 266.

It is contended that application of respondent-wife u/o XXIII Rule 1 of CPC is not maintainable as the said provision envisages two parties, one making a claim against the other and it is during the pendency of proceedings that the claimant may abandon his entire claim or any part thereof against the other party. It is contended that in the proceedings under section 13B of Hindu Marriage Act, the parties are joint petitioners making a joint request for identical relief and as such, the case is not covered within the purview of Order XXIII Rule 1 CPC. It is further contended that if the case is to be treated within the purview of Order XXIII Rule 1 of CPC then under sub rule (5) of Order XXIII Rule 1, court can't be permit one of the parties to abandon his/her claim or part thereof without the consent of other party. It is also contended that application u/o XXIII Rule 1 of CPC is an afterthought as the same is filed after four months of recording statement under Section 13 (B) (2) of HMA.

6. On the other hand, learned counsel for the respondent has argued that respondent was entitled to withdraw her consent unilaterally before passing of decree/judgment under the provisions of 13(B)(2) of the Hindu Marriage Act. In support of his contention, learned counsel for the respondent has relied upon decision of Hon'ble Supreme Court in Om Prakash vs Sureshtha Devi's case (supra). It is submitted that ratio of the said judgment has been followed by Division Bench of Calcutta High Court in II (1998) DMC 19 (DB). It is contended that perusal of the aforesaid judgments clearly shows that respondent is entitled to withdraw her consent any time before passing of decree. It is further contended that mutual consent as stated under Section 13 (B) has nothing to do with settlement of claims. Both are different issues.

7. For deciding rival contentions of the parties, it is relevant to reproduce Section 13B of the Act which is as under:-

1. Subject to the provisions of this Act a petition for dissolution of marriage by decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the marriage Laws (Amendment) Act 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
2. On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the 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 a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

8. The question as to whether it is open to one of the parties at any time till divorce decree is passed to withdraw consent given to the petition has been discussed at length by Hon'ble Supreme Court in Smt.Sureshta Devi Vs. Om Prakash (1991) 2 SCC 25. Relevant paras of the judgment are as under:-

"11. The question with which we are concerned is whether it is open to one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition. The need for a detailed study on the question has arisen because of the fact that the High Courts do not speak with one voice on this aspect. The Bombay High Court in Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe, has expressed the view that the crucial time for the consent for divorce under Section 13-B was the time when the petition was filed. If the consent was voluntarily given it would not be possible for any party to nullify the petition by withdrawing the consent. The court has drawn support to this conclusion from the principle underlying Order 23 Rule 1 of the Code of Civil Procedure which provides that if a suit is filed jointly by one or more plaintiffs, such a suit or a part of a claim cannot be abandoned or withdrawn by one of the plaintiffs or one of the parties to the suit. The High Court of Delhi adopted similar line of reasoning in Chander Kanta v.

Hans Kumar and the Madhya Pradesh High Court in Meena Dutta v. Anirudh Dutta also took a similar view.

12. But the Kerala High Court in K.I.Mohanan v. Jeejabai and the Punjab and Haryana High Court in Harcharan Kaur v. Nachhattar Singh and Rajasthan High Court in Santosh Kumari v. Virendra Kumar have taken a contrary view. It has been inter alia, held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the court passes a decree for divorce. The satisfaction of the court after holding an inquiry about the genuineness of the consent, necessarily contemplates an opportunity for either of the spouses to withdraw the consent. The Kerala High Court in particular has ruled out the application of analogy under Order 23 Rule 1 of the Code of Civil Procedure since it is dissimilar to the situation arising under Section 13-B of the Act.

13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for 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 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 the joint motion under sub-section (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 by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties. ... if the petition is not withdrawn in the meantime, the court shall ... pass a decree of divorce ...". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.(emphasis added)

14. Sub-section (2) requires the court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the court cannot pass a decree of divorce by mutual consent. If the court is held to have the power to make a decree solely based on the initial

petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce.....”

Following the above judgment, the Division Bench of Calcutta High Court in Pralay Kumar Bose Vs. Smt.Shyama Bose II(1998) DMC 19, has held that “either of the spouses had an option to retract from the consent given in the joint petition and to express his unwillingness to consent for mutual divorce, of course, it could be done only before a decree of divorce is actually passed.

This court also in Ashok Kohli Vs. Neelam Kohli 53(1994) DLT 290 relying on the above judgment of Smt.Sureshta Devi (supra) dismissed the petition of husband wherein he had challenged the order of learned ADJ allowing the application of wife withdrawing her consent before petition under section 13(B) of HMA could be disposed of.

The judgment of this court in Chandra Kanta vs. Hans Kumar AIR 1989 Delhi 73 relied upon by counsel for petitioner holding that if consent was voluntarily given, it would not be possible for any party to withdraw the same has not been approved by the Supreme Court in Shreshta Devi vs. Om Prakash referred to above. The conclusion drawn in the said case was based on principle underlying Order 23 Rule 1 of Code of Civil Procedure. The decision of this court in Rajrani Roop (41) 1990 DLT 266 is also of no help to petitioner as same is on the lines of Chandra Kanta’s case referred above. Further the judgment of Ashok Hurra vs. Rupa Bipin Zaveri AIR 1997 SC 1266 is also of no help to the petitioner. In the said case Supreme Court noted that its observation in Shresha Devi’s case that mutual consent should continue till divorce decree is passed even if petition is not withdrawn by any one of the parties within the period of 18 months appears to be too wide and also

observed that decision of said case may require reconsideration in an appropriate case but did not deal it further.

Considering the above, Ld. ADJ was justified in allowing the respondent/wife to withdraw her consent as the decree of divorce under Section 13 B (2) of HMA was not yet passed in the present case.

Thus, the contentions raised by petitioner have no force and the same are rejected.

9. About settlement of claims it may be mentioned that in petitions i.e. under Section 13 B (1) and 13 B (2) of HMA as well as in statement before court it is stated that claims of maintenance, dowry are settled but necessary details of settlement have not been given. In application under Order 23 Rule 1 of CPC, respondent/wife has alleged that all her claims were settled for Rs.70 lakhs but petitioner-husband backed out later and nothing was paid to her. Petitioner-husband in reply to the said application has alleged that entire claims were settled for Rs.3,50,000/-. In the present petition, petitioner has alleged having paid Rs.50,000 pm in cash from July, 2002 till February, 2003 whereas first motion petition was filed in September, 2002.

10. In view of above discussion, I do not find any illegality in both the impugned orders i.e. order dated 22.12.2004 and 10.9.2005 passed by Ld. ADJ, Delhi which calls for interference by this court under Article 227 of the Constitution of India. Accordingly, the petition stands dismissed.

11. No order as to costs.

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No such application was filed before the learned ADJ or during the pendency of present proceedings before this court when the matter was earlier disposed of vide orders dated 28th August, 2006 or before the Supreme Court when the SLP was filed challenging the above order.

Present application is filed after a lapse of about five and half years. Same is an afterthought and is rejected.

Application stands disposed of accordingly.

Veena Birbal, J

February 2nd, 2009
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