

**\* IN THE HIGH COURT OF DELHI AT NEW DELHI**

**+ MAT APPEAL NO. 61/2010**

Date of Decision: May 03, 2010

SH. SURENDER KUMAR KASHYAP .....Appellant  
Through: Mr. Amar Nath Saini, Advocate.  
With Appellant in person.

versus

SMT. RAJNI ..... Respondent  
Through: Mr. K.K. Arora, Adv. with  
Respondent in person.

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**CORAM:**

**HON'BLE MS. JUSTICE ARUNA SURESH**

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| (1) | Whether reporters of local paper may be allowed to see the judgment? |     |
| (2) | To be referred to the reporter or not?                               | Yes |
| (3) | Whether the judgment should be reported in the Digest ?              | Yes |

**J U D G M E N T**

**ARUNA SURESH, J. (Oral)**

**MAT APPEAL NO. 61/2010 and CM APPL.8153/2010**

1. Parties to the petition were married on 25.11.2003. Due to disputes and temperamental differences their marriage irretrievably broke down. Parties decided to divorce each

other by mutual consent. Petition under Section 13 (B) (1) of Hindu Marriage Act (hereinafter referred to as 'H.M. Act') was filed on 27.01.2010 and the same was allowed by the Trial Court vide order dated 28.01.2010.

2. Parties also filed a petition under Section 13 (B) (2) of H.M. Act along with an application under Section 151 CPC seeking waiver of six months period for filing the petition. The petition as well as the application was dismissed by the Trial Court vide impugned order dated 18.02.2010 in view of '*Anil Kumar Jain Vs. Maya Jain, Manu/SC/1593/2009.*' Hence, the present petition.
3. The impugned order in no manner determines the rights of the parties on merits and therefore, in my view, matrimonial appeal does not lie against the said order. The appellant could have challenged the said order in CM (Main). Since this appeal can be decided without any notice to the other party, I need not go into the maintainability of the appeal.
4. In '*Anil Kumar Jain's case (supra)*', it was observed that only the Supreme Court has the power under Article 142 of

the Constitution of India to grant relief to the parties without waiting for statutory period of six months stipulated under Section 13 (b) of H.M. Act. In other words, the power vests only with the Supreme Court under Article 142 of the Constitution of India to waive the six months statutory period required to be maintained by the parties after filing of the first petition and before filing of the second petition.

5. In '*Sureshta Devi vs. Om Prakash*' MANU/DE/0749/2008, it was observed:-

“10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.

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.”

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 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. “The consent must continue to decree nisi and must be valid subsisting consent when the case is heard.” [See (i) *Halsbury's Laws of England*, 4<sup>th</sup> Edn., Vol. 13 para 645; (ii) *Rayden on Divorce*, 12<sup>th</sup> Edn., Vol. 1, p. 291; and (iii) *Beales v. Beales* 7). ...”

6. In '*Asmita Roy Choudhary v. Ram Babu CM (M) No. 1299 of 2009*', decided by me on 13<sup>th</sup> November, 2009, similar question was agitated and waiver of six months period was sought for filing a petition under Section 13(B) (2) of the H.M. Act. While dismissing the petition, it was observed:

“.....Thus, it is clear that petition for divorce by mutual consent has to be considered and treated on a different footing and the conditions precedent prescribed under these Sections must be satisfied before presentation of

a petition seeking divorce under the said Section. No undue hardship or inconvenience or prejudice is caused to the parties by complying of the provisions contained in Section 13(B)(2) of the Act. The validity and constitutionality of the provisions contained in this Section has been repeatedly upheld by the Supreme Court in various cases.

The Court while interpreting the statutory provisions cannot add or subtract the words in the Section nor would it give meaning to the language of the Section, other, than what is intended on the plain reading of the provisions. Plain reading of Sub-section (2) of Section 13(B) of the Act makes it clear that parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than eighteen months after the said date. This provision has been incorporated with a view to provide time to the Court to satisfy the genuineness of the claims in the petition, find out whether the consent was not obtained by force, fraud or undue influence. For that purpose, the Court is at liberty to make enquiry and may record the statements of the parties or hear them. If the Court is satisfied that the consent is voluntary, without any force, fraud or undue influence and that the parties have mutually agreed that the marriage should be dissolved, it must pass a decree for divorce under Section 13(B) (2) of the Act.”

7. In view of the settled principle of law, the Trial Court rightly dismissed the application filed under Section 151 CPC seeking waiver of six months period to entertain the petition under Section 13 (B) (2) of the H.M. Act. Consequently,

petition under Section 13 (B) (2) of the H.M. Act also deserves dismissal being premature.

8. Hence, I find no merits in the appeal, the same is accordingly dismissed.

**(ARUNA SURESH)**  
**JUDGE**

**MAY 03, 2010**  
**vk**