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% 15.09.2010

Present:- Mr. Pushpender Singh, Advocate for the appellant.

+ MAT. APP. No. 99/2010
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By this appeal filed under Section 28 of the Hindu Marriage Act, the appellant seeks to challenge the order passed by the Ld. Trial Court dated 26.04.2010 in H.M.A. case No. 115/2010 thereby dismissing the petition filed by the appellant under Section 13 B(2) of the Hindu Marriage Act. Counsel for the appellant submits that the Id. trial court should have at least directed notice upon the respondent so as to exactly know whether the respondent has withdrawn her consent from the second motion or not.

I have heard learned counsel for the appellant.

It is not in dispute that the petition under Section 13B(2) of the Hindu Marriage Act, 1955 was preferred by the husband alone while the respondent wife did not come forward to join the husband in presenting the second motion. It is also not in dispute that the first motion was allowed by the Ld. Trial Court vide order dated 28.01.2009. The Id. Trial court has placed reliance on the

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judgment of the Apex Court in the case of **Sureshta Devi Vs. Om Prakash (1991)2 SCC 25** wherein the Apex Court took a view that the consent given by the parties for the filing of the petition for divorce by mutual consent had to subsist till the final decree is passed and in case either of the parties withdraw such a consent before passing of the final decree, the petition under Section 13 B(2) would not survive. It would be pertinent to reproduce the relevant para of the said judgment here:

"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 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".

In a recent decision in **Anil Kumar Jain Vs. Maya Jain (2009 (10) SCC 415)** also the Apex Court has reiterated the abovesaid legal position.

It is also quite explicit in Section 13B (1) of the Hindu Marriage Act, that divorce petition under the said Section 13 (B) may be presented to the District Court by both the parties to a marriage together. In Section 13B(2) the second motion can be moved by both the parties 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 and the court shall, on being satisfied,

after hearing the parties and after making such inquiry as it thinks fit, that the 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. The intendment of the legislature is quite manifest in the said provision which mandates the presentation of the petition by both the parties and not by one of the parties unilaterally. In the present case it is only the husband appellant who had filed the second motion while the respondent wife did not come forward to join the appellant to file the second motion. It is thus quite clear that the respondent has withdrawn her consent by not coming forward to file the second motion along with her husband.

Hence, this court cannot enjoin upon itself the duty to ask the party not consenting as to what led her to withdraw her consent and therefore the question of serving notice upon the respondent to ask for any explanation does not arise. If the petition under section 13B which reads as "Divorce by mutual consent" has no mutuality left in it, the court has recourse to only dismiss such a petition. Mutual consent is the essence of this section and hence if only unilateral consent survives, then there is no substance in the petition.

In the light of the above facts, I do not find any illegality or infirmity in the impugned order passed by the Ld. Trial Court. There is no merit in the present appeal. The same is hereby dismissed.

September 15, 2010
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KAILASH GAMBHIR, J