

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9633 OF 2015

1. Sou. Amruta @ Aditi Amarsingh Barge		
2. Shri Amarsingh Chandrasen Barge	..	Petitioners
vs.		
State of Maharashtra	..	Respondent

Mr. Vilas B. Tapkir for Petitioners.
Mr. A. R. Metkari - AGP for Respondent.

CORAM : M. S. SONAK, J.
DATE: 20 OCTOBER 2015

P.C. :-

1] The challenge in this petition is to the order dated 17 July 2015, by which the Trial Court has declined to waive the statutory prescribed period of six months under Section 13B(2) of the Hindu Marriage Act, 1955 (said Act) and grant a divorce by mutual consent to the Petitioners.

2] Mr. V. B. Tapkir, placed reliance upon the decisions of this Court in the cases of *Rakesh Harsukhbhai Parekh vs. State of Maharashtra & Anr.*¹, *Sonali w/o Manishkumar Chandak & Anr. vs. Nil*², *Joydeep Tarunkumar Sarkar through Power of Attorney Mr. Tarunkumar Sarkar vs. Anita Joydeep Sarkar*³ and *Urmila Shankar Varma vs. Shankar Richhpal Varma*⁴, in order to submit that the

1 2010 (5) ALL MR 915

2 2007 (5) Mh.L.J. 615

3 Writ Petition No. 880 of 2014 decided on 14.07.2014

4 2008 (2) Bom. C.R. 482

Court can, with the consent of the parties, waive the period of six months prescribed under Section 13B(2) of the said Act and grant decree of divorce by mutual consent, particularly in a situation where such a plea is made jointly by the husband and the wife, who are firm upon obtaining divorce by mutual consent.

3] Section 13B of the said Act, reads thus :

“13-B(1) Subject to the provisions of the Act a petition for dissolution of marriage by a 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, 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petition referred to in Sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been,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.”

4] This issue arose directly before the Division Bench of this Court in the case of Principal Judge, Family Court, Nagpur vs. Nil⁵, which was a reference made by the Principal Judge, Family Court, Nagpur, upon being confronted with divergent views expressed by the learned Single Judges of this Court. The terms of reference, in

5 2008 (5) Mh.L.J. 222

the particular context of provisions contained in Section 13B(2) of the said Act read thus:

- i) *Whether the statutory waiting period of six months under section 13B(2) of the Hindu Marriage Act can be waived by the Trial Court or not may kindly be decided.*
- ii) *Necessary guidance or directions may kindly be issued as prayed.*

5] The Division Bench, after adverting to the facts giving rise to Reference, the law relating to divorce by mutual consent and its background, the view expressed by this Court upon a constitutional validity of Section 13B, the divergent views as to whether the six months waiting period is mandatory or directory, the ratio of the decision of the Hon'ble Apex Court in the case of *Sureshta Devi vs. Om Prakash*⁶, the meaning and interpretation of Section 13B, wisdom behind the waiting period of six months and other relevant parameters, has ultimately answered the Reference in the following terms:

"24. For the reasons afore-recorded, we have no hesitation in answering the question referred to this Court by the learned Principal Judge, Family Court, Nagpur as under:

- i) *The waiting period of six months (i.e. from the institution of the first motion to the moving of the second motion) is mandatory and cannot be waived by the Court of competent jurisdiction. It is a period during which the parties are expected to ponder and seriously consider their decision to sever the matrimonial ties. Thus, the second motion should be entertained and decided in accordance*

6 AIR 1992 SC 1904

with the provisions of section 13B(2) by the Court upon due application of mind and recording the satisfaction as contemplated under that provision.

ii) It is desirable that each case is decided by the Court of competent jurisdiction with reference to the facts and circumstances of such case and in accordance with law. No further guideline is called for.”

(emphasis supplied)

6] The Hon'ble Apex Court in the case *Sureshta Devi* (supra) has held that from the analysis of Section 13B, 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 second thoughts, change the mind and not proceed with the petition. The observations in paragraphs 13 and 14 bear reference :

“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 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 material 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 bonafides 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", "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.". [See (i) Halsbury Laws of England, Fourth Edition Vol. 13 para 645 : (ii) Rayden on Divorce, 12th Ed. Vol. 1 P. 291 and (iii) Beales v. Beales, 1972 (2) ALL E.R. 667 at 674.]*

(Emphasis supplied)

7] The Hon'ble Apex Court in the case of *Devinder Singh Narula vs. Meenakshi Nangia*⁷, has reiterated the position in law arising out of the interpretation of the provisions contained in

⁷ 2012 (6) Mh.L.J. 769

Section 13B (2) of the said Act. However, in the said case, the Hon'ble Apex Court in the exercise of powers under Article 142 of the Constitution of India and with a view to do complete justice to the parties did waive the statutory waiting period of six months. This Court however, will have to follow binding precedents and there is no question of exercise of powers under Article 142 of the Constitution of India, since such powers are not vested in this court.

8] Therefore, in the light of the law laid down by the Division Bench of this Court in the case of *Principal Judge, Family Court, Nagpur* (supra) and by the Hon'ble Apex Court in the case of *Sureshta Devi* (supra), there is no reason to interfere with the impugned order. The petition for divorce by mutual consent was filed on or about 22 June 2015 and that statutory waiting period will expire on or about 21 December 2015. It will therefore, be appropriate that the parties wait till then to obtain divorce by mutual consent.

9] Accordingly, this petition is dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)