

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-M-179 of 2009

Date of Decision: 19.1.2015

Gunjan

....Appellant.

Versus

Malvinder Singh

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE SNEH PRASHAR.**

PRESENT: Mr. Sunil Chadha, Senior Advocate with
Mr. Kirpal Singh Thakur, Advocate for the appellant.

None for the respondent.

AJAY KUMAR MITTAL, J.

1. Being aggrieved by the judgment and decree dated 6.6.2009 passed by the Additional District Judge, Chandigarh, whereby the petition filed by the parties under Section 13-B of the Hindu Marriage Act, 1955 (In short "the Act") for dissolution of marriage by a decree of divorce by mutual consent was allowed, the respondent-wife has approached this Court by way of instant appeal.

2. The facts, in brief, necessary for disposal of the present appeal as narrated therein may be noticed. Earlier the respondent filed a petition under Section 13 of the Act for dissolution of marriage by a decree of divorce pleading therein that after his marriage with the appellant on 29.10.2003, she committed different acts of omission and commission amounting to mental cruelty. Upon notice, the petition was contested by the appellant controverting the averments made therein.

Initially, the said petition was filed at Kurukshetra which was transferred

to Chandigarh under the orders of this Court. From the pleadings of the parties, the issues were framed and the respondent led evidence in support of his case. However, during the pendency of the said petition, a joint application was filed on 7.11.2008 by both the parties seeking amendment of their petition and for converting the same into a petition for divorce by mutual consent. The said application was allowed and both the parties filed amended petition under Section 13-B of the Act for dissolution of marriage by mutual consent. The joint statement of both the parties was also recorded on 8.11.2008 whereby, they stated that they were living separately since 7.5.2004 and had decided to divorce each other by mutual consent as it was not possible for them to live together as husband and wife on account of temperamental differences. As per compromise, it was agreed that the respondent-husband would pay ₹ 10 lacs to the appellant-wife on account of permanent alimony for herself and for her minor daughter who would remain with her. It was also agreed that the respondent would return gold necklace and other dowry articles and would pay a sum of ₹ 5 lacs on or before 14.11.2008 and the remaining amount of ₹ 5 lacs was to be paid on the next date of hearing. The case was adjourned to 6.12.2008 for compliance of terms and conditions of the settlement and to consider the application filed by the parties to waive off the statutory period of six months. However, on 6.12.2008, the presiding officer was on leave and the case was adjourned to 13.12.2008. On the said date, the appellant-wife had not appeared and then on 20.12.2008 and the case was adjourned to 9.1.2009. Thereafter, she did not appear on 11.5.2009 and 25.5.2009 and she appeared on 28.5.2009 on which date she was directed to appear on 3.6.2009. On 3.6.2009, the appellant appeared and made a

statement that she did not want to give divorce to the respondent by mutual consent. However, she admitted that she had received a sum of ₹ 5 lacs from the respondent-husband by way of demand draft. She also admitted to have received necklace as per the mutual settlement between the parties and executed an affidavit, Mark A and written writing, Mark B. The trial court after considering the contentions of both the parties, vide judgment and decree dated 6.6.2009 allowed the petition and passed a decree of divorce by mutual consent. Hence, the present appeal by the wife.

3. Learned counsel for the appellant submitted that it was mandatory that the statements of both the spouses were required to be recorded at the time of second motion. It was urged that the trial court invoking the provisions of Section 23(1)(bb) of the Act had erroneously passed a decree of divorce under Section 13-B of the Act especially when the appellant-wife had declined to make a statement at second motion. It was contended that the reliance of the trial court on the judgment of Bombay High Court in **Smt. Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe, AIR 1984 Bombay 302** was misplaced particularly when the said judgment stood overruled by the Apex Court in **Smt. Sureshta Devi v. Om Parkash, AIR 1992 SC 1904**. Support was also drawn from the judgment of the Apex Court in **Smruti Pahariya v. Sanjay Pahariya 2009(2) RCR (Civil) 943**.

4. As per office report, the respondent was served by affixation as he had refused to receive the summons. No one is present on behalf of the respondent.

5. After hearing learned counsel for the appellant and perusing the record, we find force in the submissions made by learned counsel for

the appellant. The issue that arises for consideration in this appeal is as under:-

Whether in the facts and circumstances of the case, the trial Court was in error in allowing the petition under Section 13-B of the Act filed by the parties?

6. Examining the issue arising in the appeal, inevitably reference has to be made to Section 13B of the Act. It reads thus:-

“13B. Divorce by mutual consent.-(1) Subject to the provisions of this 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, (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.”

7. A plain reading of sub-section (1) shows that the parties to the marriage wherever agree by mutual consent that the marriage should be dissolved by a decree of divorce on the ground that they have been living separately for a period of one year or more, both the parties may present a petition for divorce to the District Court. On presentation of such petition, statement by way of first motion would be recorded. Under sub-section (2), second motion would be required to be made which should be after six months from the date of presentation of the petition referred in sub-section (1) and not later than eighteen months from the date of first motion where the petition has not been withdrawn. The Court, on being satisfied after hearing the parties pass a decree of divorce to be effective from the date of the decree.

8. Considering the issue relating to divorce by mutual consent under Section 13-B of the Act, the Apex Court in **Sureshta Devi's case (supra)** had held as under:-

“8. 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, AIR 1984 Bom. 302**, 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 XXIII 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 **Smt. Chander Kanta v. Hans Kumar and Anr., AIR 1989 Delhi 73** and the Madhya Pradesh High Court in **Meena Dutta v. Anirudh Dutta, [1984] 11 DMC 388** also took a similar view.

9. But the Kerala High Court in **K.L Mohanan v. Jeejabai, AIR 1988 Kerala 28** and the Punjab and Haryana High Court in **Harcharan Kaur v. Nachhattar Singh, AIR 1988 Punjab & Haryana 27** and Rajasthan High Court in **Santosh Kumari v. Virendra Kumar, AIR 1986 Rajasthan 128** 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 XXIII Rule I of the Code of Civil Procedure since it is dissimilar to the situation arising under Section 13-B of the Act.

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12. 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 mutualitly 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.**

13. In our view, the interpretation given to the

section by the High Courts of Kerala, Punjab & Haryana and Rajasthan in the aforesaid decisions appears to be correct and we affirm that view. The decisions of the High Courts of Bombay, Delhi and Madhya Pradesh (supra) cannot be said to have laid down the law correctly and they stand overruled.”

9. Thus, it was essential for the trial court to have recorded the statement of the appellant-wife at the time of second motion before any decree of divorce under Section 13-B of the Act by mutual consent was passed. The requirement of Section 13-B(2) of the Act having not been complied with, the trial court was in error in passing the decree.

10. Accordingly, the appeal is allowed and the judgment and decree dated 6.6.2009 passed by the trial court is set aside and the petition filed under Section 13-B of the Act stands dismissed.

(AJAY KUMAR MITTAL)
JUDGE

January 19, 2015
gbs

(SNEH PRASHAR)
JUDGE