

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2299 of 2016

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Smt. Anupama Devi @ Anupama

.... Petitioner/s

Versus

Shailendra Kumar Dubey

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Parijat Saurav

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

3 16-12-2016 **1.** Heard the learned counsel for the petitioner and the learned counsel for the respondent.

2. Perused the impugned order dated 21.12.2015 passed by learned Principal Judge, Family Court, Buxar in Divorce Case No.83 of 2013 whereby the learned Court below rejected the application filed by the petitioner praying for withdrawal of the consent for the grant of consent decree of divorce.

3. It appears that divorce case was filed by the husband-respondent against the wife-petitioner on the ground of cruelty and adultery. After appearance of the wife-petitioner, a joint compromise application was filed on 04.02.2015 with affidavit praying for conversion of the divorce proceeding filed under Section 13 of the Hindu Marriage Act to a proceeding under Section 13B of the Hindu Marriage Act. In the compromise



application, some terms and conditions were recited. On 14.08.2015, the wife petitioner filed application praying for withdrawal of her consent for passing a consent decree under Section 13B of the Hindu Marriage Act. The Court below by the impugned order although referred the decision of the Supreme Court in the case of *Hitesh Bhtnagar Vs. Deepa Bhagnagar 2011 (3) PLJR 7 SC* has held that this decision of the Supreme Court is not applicable in the present case as the wife failed to prove that the husband agreed to pay Rs.6 lakhs as permanent alimony.

4. In view of the above fact, it becomes clear that the divorce case was filed originally under Section 13 of the Hindu Marriage Act. On the basis of joint compromise application, the case was converted on 4.2.2015 to a proceeding under Section 13B of the Hindu Marriage Act.

5. Section 13B of the Hindu Marriage Act reads as follows :-

‘13-B. 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.'

6. In view of the provision, the second motion if not made after six months and not later on 18 months, i.e, if the consent is not withdrawn during this period, the Court can pass decree of divorce declaring the marriage to be dissolve with effect from the date of decree. The question is whether the consent once given in a petition for divorce by mutual consent can be subsequently withdrawn by one of the parties after the expiry of 18 months from the date of filing of the petition in accordance with Section 13B(1) of the Hindu Marriage Act. So far this question is concerned, it is not applicable in the present case because admittedly the wife has filed the application for withdrawing her consent between six months and eighteen months, i.e, prior to expiry of eighteen months.

7. The next question will be whether the Court can grant a decree of divorce by mutual consent when the consent has been



withdrawn by one of the parties and also under what circumstances. This question have been considered by the Supreme Court in the case of *Hitesh Bhatnagar (Supra)* wherein the Supreme Court considering the earlier decisions has held that 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 then eighteen months after the said date. This motion implies the Court to proceed with the case in order to satisfy itself to 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 enquiry as it thinks fit including the hearing or examining all the parties for the purpose of satisfying itself whether the averments in the petition are true and if the Court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have agreed that the marriage should be dissolved, it must pass a decree of divorce. At paragraph 13, the Supreme Court has held that in this transactional 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. What is significant in this provision is that there should also be mutual



consent when they moved 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 the instance of one of the parties and against the consent of the other, such decree cannot be regarded as decree as mutual consent.

8. Admittedly, in the present case prior to expiry of eighteen months, the wife has withdrawn her consent. Therefore, now the Court could not have rejected the application filed by the wife withdrawing her consent and the Court below should not have proceed to pass a decree under Section 13B of the Hindu Marriage Act. From perusal of the impugned order, it appears that the Court below only referred the case of the Hon'ble Supreme Court ***Hitesh Bhatnagar (Supra)*** and without discussing as to why it is not applicable only mentioned that the Supreme Court decision is not applicable in the present case.

9. In view of the above facts and circumstances of the case, in my opinion, the present case is fully covered by the decision of the Hon'ble Supreme Court in ***Hitesh Bhatnagar***



(*Supra*) and the Court below ignoring the decision of the Supreme Court has passed the impugned order, therefore, the order passed by the Court below is contrary to law and is not sustainable.

10. Thus, this Civil writ application is allowed. The impugned order dated 21.12.2015 passed by Principal Judge, Family Court, Buxar in Divorce Case No.83 of 2013 is hereby set aside. The application of the wife-petitioner is allowed. Her consent is withdrawn. The Court now, therefore, cannot pass a consent decree under 13B of the Hindu Marriage Act. However, the main divorce case be decided on merit.

(Mungeshwar Sahoo, J)

Sanjeev/-A.F.R.

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