

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2016

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN
and
THE HON'BLE MR.JUSTICE S.BASKARAN

C.M.A.No.2177 of 2016

C.Srinivasan ... Appellant

Vs

T.Nageswari ... Respondent

Prayer: Civil Miscellaneous Appeal is filed against the judgment and decree dated 30.03.2016 made in H.M.O.P.No.4357 of 2013 on the file of the Principal Family Court at Chennai.

For Petitioner : Mr.R.Ramachandran

For Respondent : Mr.K.Natarajan

JUDGMENT

(Delivered by S.BASKARAN, J.)

This appeal filed by the husband, challenging the order dated, 30.03.2016 passed by the Principal Family Court, Chennai, in H.M.O.P.No.4357 of 2013 under Section 13-B of the Hindu Marriage Act, 1955 (hereinafter called as "Act") whereby, the petition for dissolution of marriage by decree of divorce by mutual consent filed by the appellant/husband along with the respondent/wife herein was dismissed.

2. The appellant claims that marriage between himself and respondent herein was solemnized on 20.02.2011 as per the Hindu rites and customs. No children were born out of the wedlock. The appellant/husband states that after the marriage, owing to differences in temperament, habits, tastes, thoughts and increasing incompatibility, the relationship between himself and the respondent/wife deteriorated. Due to repeated quarrels and disputes, they were living separately for more than two years and as they were not able to live together, they mutually agreed and decided to dissolve the marriage held on 20.02.2011. Accordingly, both filed a petition in H.M.O.P.No.4357 of 2013 under Section 13-B of the Act before the Trial Court.

3. The appellant/husband states that he agreed to pay a sum Rs.5,00,000/- as permanent alimony to the respondent/wife. It is stated that, out of the said sum Rs.1,50,000/- was paid to the respondent/wife. The appellant further stated that after the petition under Section 13-B of the Act was filed on 25.11.2013, the respondent dragged on the proceedings and subsequently on 03.09.2014 withdrew her consent in 13-B Petition, at the time of enquiry, and the trial court dismissed the petition on the ground that one of the parties has withdrawn the consent given already. This according to the appellant/husband is not correct and aggrieved over the same has come forward with this appeal, seeking to set aside the dismissal order passed by the trial court on 30.03.2016.

4. The learned counsel for the appellant contends that the trial court failed to notice that all the three ingredients necessary for filing joint petition was available and merely because of the withdrawal of the consent by the respondent/wife at a later stage, ought not to have dismissed the petition. The learned counsel appearing for the appellant further stated that both sides have acted upon the compromise arrived at, and appellant/husband has paid Rs.1,50,000/-, out of Rs.5,00,000/-, which was agreed to be paid as permanent alimony and the same has been received by the respondent/wife. In such circumstances, the withdrawal of the consent by the respondent/wife is malafide and the trial court should not have acted upon the withdrawal of the consent by the respondent.

5. The learned counsel appearing for the appellant further contended that consent was withdrawn after the period of six months and the same will go to prove the malafide intention of the respondent/wife and the same should not have been entertained by the Trial Court. It is also further stated that the possibility of both living together does not exist any longer and in such circumstances, dismissal of the petition by the trial court is erroneous and the same is liable to be set aside. Hence, the appellant/husband seeks to allow the appeal and grant divorce by mutual consent.

6. On the other hand, opposing the appeal, the learned counsel for the respondent contends that before any decree is passed in the petition under Section 13-B of the Act, any one of the parties is at liberty to withdraw their consent and in such event, the Court is bound to dismiss the petition and there is no other alternative to the same. It is also pointed out that the bonafide or malafide nature of such withdrawal of the consent cannot be considered and the plea of the appellant or that ground should not be entertained and seeks for dismissal of the appeal.

7. In such circumstances, the issues that arise for our consideration are:-

(a) As to whether any one of the parties to the proceedings in the petition filed for divorce by mutual consent can subsequently withdraw the consent already given by them for filing petition under Section 13-B of the Act, and

(b) In the event of such withdrawal of consent by one of the parties, whether the court can grant decree of divorce by mutual consent.

8. Admittedly, the marriage between the appellant and respondent took place on 20.02.2011. It is also not disputed that due to misunderstanding, both of them are living separately for about two years before filing of the petition under Section 13-B of the Act, on the file of the trial court. The fact that consent was given by the respondent/wife initially for filing of the said petition is also admitted.

9. It is evident from the records that the petition in H.M.O.P.No.4357 of 2013, under Section 13-B of the Act was filed on 25.11.2013 and subsequently, when the same was pending, the respondent/wife herein filed an affidavit on 03.09.2014 withdrawing the consent given by her already for filing 13-B petition.

10. It is crystal clear that before passing of any order by the trial court, and at the time of enquiry itself, the respondent/wife has withdrawn her consent as stated above. Pointing it out, the learned counsel appearing for the respondent contended that such withdrawal by the respondent/wife is just and proper and in such circumstances, the order of dismissal passed by the Trial Court is correct and needs no interference.

11. The learned counsel appearing for the respondent relying upon the judgment of the Hon'ble Apex Court reported in Smt.Sureshta Devi Vs.Omprakash reported in 1991-1-L.W.page 623 (Judgement dated 7th February, 1991 in Civil Appeal No.633 of 1991), contended that if anyone of the parties withdraws their consent, then decree of the divorce by mutual consent cannot be passed. In the said ruling, in paragraph Nos.7 and 8, it is held as under:-

" 7. 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-S.(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-S.(2) of S.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. सत्यमेव जयते

8. Sub-S(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 S.13B. 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".

Likewise, the learned counsel also relied upon the ruling reported in Hitish Bhatnagar Vs. Deepa Bhatnagar, reported in (2011) 5 SCC 234, wherein, in paragraph Nos.14, it is held as follows:-

" 14.In other words, if the second motion is not made within the period of 18 months, then the Court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression "divorce by mutual consent" would be otiose."

The learned counsel appearing for the respondent also relied upon the ruling of Punjab and Haryana High Court in the case of Somesh Kumar Gupta Vs. Sapna Gupta reported in 2014 (3) CCC 387 (P&H) wherein, in paragraph Nos.14, 15 and 16, it is held as follows:-

"

14. A plain reading of sub-section (1) shows that the parties to the marriage wherever agreed 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 effected from the date of the decree".

15. In the present case, the wife at the second instance made the following statements:

"I do not want divorce by way of mutual consent under Section 13B of HMA. The present petition may be dismissed".

16. Thus, the second statement is not in consonance and conformity with the requirement of Section 13B of the Act and, therefore, no decree for divorce by mutual consent can be passed. In the absence of the fulfilment of requirement of statement at the second motion of the wife, the Court below was justified in dismissing the petition under Section 13B of the Act."

It is thus clear from the above said precedents that if one of the parties in the petition filed under Section 13-B of the Act, withdraws the consent at any stage, before passing of decree, the Court has no other option except to dismiss the petition for want of consent.

12. As stated above, in the case on hand, the appellant as well as respondent, mutually agreed to file the petition for divorce and accordingly, filed a petition in H.M.O.P.No.4357 of 2013 on 25.11.2013. But subsequently, when the same was pending for enquiry, the respondent/wife herein unilaterally withdrew her consent given already by filing affidavit before the trial court on 03.09.2014 and according to the respondent, the same is well within the time and before passing of any order by the trial court. In such circumstances, the learned counsel for the respondent contends that the order passed by the trial court is in accordance with the law and needs no interference.

13. On the other hand, disputing the same, the learned counsel appearing for the appellant contends that earlier O.P.No.3100 of 2013 was filed by the appellant on the file of Family Court, Chennai, which was under Section 13-B of the Act, seeking divorce and the same was subsequently dismissed as not pressed on 24.01.2014 and thereafter, petition for divorce on mutual consent was filed. He further contended that now after availing a part of the permanent alimony amount also, the respondent has withdrawn her consent and this according to the appellant amounts to malafide act and the respondent should not be permitted to get away by withdrawing her consent unilaterally. Further, the learned counsel for the appellant contends that both parties were involved in trial before the Family Court for length of time in the earlier proceedings in O.P.No.3100 of 2013 and also subsequently in the proceedings for divorce by mutual consent and in the circumstances, withdrawal of consent at the letter stage by the respondent will cause untold harm and misery to the appellant. Thus, the learned counsel for the appellant, refuting the contentions of the respondent seeks to set aside the order of the trial court

dismissing the petition for divorce on mutual consent. Further, the learned counsel for the appellant also pointed out that no proposal was taken by the respondent for reuniting with the appellant as they are living separately for a long period and the marriage is irretrievably broken down and there is no possibility of them living together again. In such circumstances, it is contended by the appellant that the ruling relied upon by the respondent is not applicable to the present case on hand and on the other hand pleads to allow the appeal relying upon the decision of the Honourable Apex Court, in the case of Ashok Hurra Vs. Rupa Bipin Zaveri reported in AIR 1997 SC 1266. Likewise, the learned counsel for the appellant also relied upon the following rulings:-

- (1) K.Omprakash Vs. K.Nalini reported in 1987(2) HLR 230.
- (2) Rajesh Vs. Bhavna reported in Indian Kanoon.org/doc/1039203/ decided by the Bombay High Court, in W.P.No.3556 of 2008.
- (3) (1) Mittal Ramesh Panchal and (2) Manoj Dayalal Panchal Vs. Nil reported in 1(2014) DMC 20 (DB) (Bom.)
- (4) Smt Laxmi Singh Vs. Pradeep Singh, decided by Madhya Pradesh High Court by judgment dated 20 April, 2016 in F.A.No.177 of 2011.

However, it is clear that the reliance placed upon by the appellant herein in the ruling of the Apex Court (AIR 1997 Supreme Court 1266) (cited supra) delivered in exercise of the powers under Article 142 of the Constitution of India, the Apex Court granted divorce, in order to give complete justice between the parties. Further, in the subsequent ruling relied upon by the respondent as stated above in the case of Hitesh Bhatnagar Vs. Deepa Bhatnagar, reported in (2011) 5 SCC -234, the Apex court has categorically held that the parties are at liberty to withdraw consent at any stage of the proceedings and also observed as follows:-

“ These observations of this Court in Ashok Hurra cannot be considered to be ratio decidendi for all purposes, and is limited to the facts of that case. In other words, the ratio laid down by this Court in Sureshta Devi still holds the field.
”

14. It is therefore clear that ruling relied upon by the counsel for the appellant cannot be of any help to the cause advanced by him in this appeal in view of the earlier rulings relied upon by the respondent, wherein, it is stated that any one of the parties is entitled to withdraw the consent already given for filing petition under Section 13-B of the Act at any stage of the proceedings and decree of divorce can be granted only if the consent subsists till passing of decree. In the case on hand, as stated earlier, one of the parties to the proceedings viz., the respondent/wife herein has clearly

withdrawn her consent as stated above. In such circumstances, it is apparent that consent of both parties does not exist when the matter was taken up by the trial court for passing of orders and in such circumstances, the conclusion arrived at by the trial court has to be upheld as just and proper.

15. The contention of the learned counsel for the appellant is that only on arriving at a compromise and agreeing to receive Rs.5,00,000/- as permanent alimony and receiving Rs.1,50,000/- as part payment of the same, the respondent gave consent in filing petition under Section 13-B of the Act and subsequently without any valid reason, she has withdrawn her consent and the same amounts to malafide act and the same cannot be permitted. However, the same is refuted by the learned counsel for the respondent contending that even during the proceedings before the District Social Welfare Officer, she expressed her desire to live with the appellant and also categorically stated at different points of time that she is prepared to refund the sum of Rs.1,50,000/- to the appellant or to adjust the same towards maintenance amount due to her and there is no malafide intention on her part in withdrawing her consent. It is also pointed out by the learned counsel for the respondent that in the affidavit filed to withdraw her consent, it is stated that during the cooling-off period, after the petition under Section 13-B of the Act, was filed before the trial court, she realised that she is not having any other relative to live with, except the appellant/husband and hence wanted to live with him. This according to the respondent, would go to show the valid nature of withdrawal of consent by her. Further, the learned counsel for the respondent relying upon the judgment of Kerala High Court in the case of Rajesh R.Nair Vs. Meera Babu, reported in 2014(2) CCC 208 (Ker.), contended that even in the case of withdrawal of consent by any one of the parties to the proceedings, the court is not bound to probe the bonafide or otherwise of such withdrawal. It is therefore clear that from the above said precedents relied upon by the respondent that the nature of withdrawal of consent whether bonafide act or otherwise of the other party need not be looked into. In such circumstances, the contentions raised by the appellant has to fail for the reasons stated above.

16. As stated above, it is crystal clear that any one of the parties to the proceedings under Section 13-B of the Act is entitled to withdraw the proceedings at any such stage of the proceedings and in the case on hand, the respondent has withdrawn her consent before passing of the decree and hence, the trial court is bound to accept the same and has no other option except to dismiss the petition for mutual consent.

17. Thus, the conclusion arrived at by the trial court and the impugned order passed is proper and in accordance with law. We find no ground to interfere with the order of the trial court and accordingly, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

To

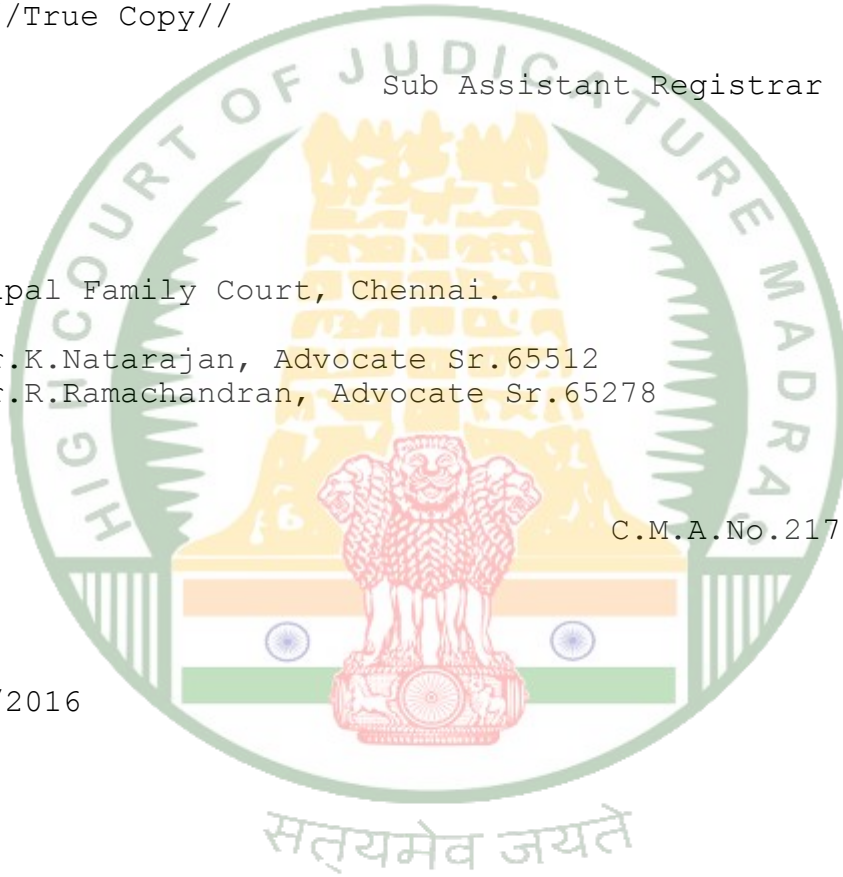
The Judge,
The Principal Family Court, Chennai.

+1cc to Mr.K.Natarajan, Advocate Sr.65512

+1cc to Mr.R.Ramachandran, Advocate Sr.65278

C.M.A.No.2177 of 2016

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