

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 160 of 2015**

(Arising out of judgment/order dated 29.9.2015 in civil Suit No.84/2015 of the learned Principal Judge, Family Court, Durg)

- Shitendra @ Ashish Sharma S/o Late Manharan Lal Sharma, Aged About 38 Years Caste Bramhan, Category General Class, R/o H. No.69/885, Shanti Vihar Colony, Near Sheetla Mandir Talab, Daganiya, Police Station D. D. Nagar, Raipur, Tahsil & District Raipur, Civil & Revenue District Raipur, Chhattisgarh

---- Appellant

Versus

- Smt. Sheetal Sharma, W/o Shitendra @ Ashish Sharma, Aged About 29 Years Caste Bramhan, R/o Namak Gali, Shikchak Nagar, Durg, Tahsil & District Durg, Civil & Revenue District Durg, Chhattisgarh

---- Respondent

For Appellant : Shri A.K. Prasad, Advocate.

For Respondent : Shri TK Jha & Shri Ganesh Ram Burman, Advocates.

Hon'ble Shri Justice Prashant Kumar Mishra

Hon'ble Shri Justice Arvind Singh Chandel

Judgment On Board By Prashant Kumar Mishra, J.

25/08/2017

1. The appellant would assail the impugned order passed by the family Court on 29.9.2015 dismissing the joint application moved by the parties for grant of mutual divorce under Section 13-B of the

Hindu Marriage Act, 1955 (for short 'the Act').

2. Learned counsel for the appellant would submit that even if the respondent wife was not present before the family Court on 29.9.2015 for according consent to the application for grant of divorce by mutual consent under Section 13-B of the Act, the trial Court should not have dismissed the matter at once but the matter should have been deferred awaiting appearance of the respondent. He would also submit that the wife's absence before the family Court should have been treated as her consent for mutual divorce and the application should have been allowed.
3. The ground urged by learned counsel for the appellant has no substance in view of the law laid down by the Supreme Court in the matters of **Smt. Sureshta Devi Vs. Om Prakash**¹ and **Smruti Pahariya Vs. Sanjay Pahariya**².
4. In **Smt. Sureshta Devi** (Supra), the Supreme Court had an occasion to dwell on the issue as to whether consent for divorce by mutual consent accorded by the parties at the time of filing of the petition would continue to operate and bind them and the parties are not permitted to withdraw the consent. The Supreme Court held that consent should continue from the date of petition till the

¹ (1991) 2 SCC 25

² (2009) 13 SCC 338

date of decree is passed and that is the reason for the cooling period of 6 months provided by the statute. Both the parties may consider the decision to affirm or to withdraw consent for divorce by mutual consent.

5. Affirming the above judgment in **Smt. Sureshta Devi** (Supra), the Supreme Court reiterated the view in the matter of **Smruti Pahariya** (Supra) to hold in para-36 of the judgment that there should be mutual consent when the Court is called upon to make an enquiry, if the petition is not withdrawn and then pass the final decree. It is thus settled that the mutual consent should continue till the date of enquiry and passing of final order. There is no indication under the legal provision contained in Section 13-B of the Act that absence of the parties at the time of final disposal of the petition under Section 13-B would be treated as consent to pass a decree. The Supreme Court thereafter observed thus in para-42 of the judgment:-

“42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three day, the court cannot presume his/her consent as has

been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.”

6. In view of the above, the Appeal deserves to be and is hereby dismissed reserving liberty in favour of the parties to proceed under any other provision of law or even under Section 13-B of the Act, if situation so warrants.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Arvind Singh Chandel)

Kvr

HEADLINES

Divorce by mutual consent under Section 13-B Hindu Marriage Act cannot be granted if one of the party is absent to accord consent on the date of order.