

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4178 OF 2017

Mr.Ranjitkumar Ajaykumar ... **Petitioner.**

V/s.

Mrs.Kunti Vedprakash Gupta ... **Respondent.**

- Mr.Sarah Kapadia i/b. Kokila Kalra for the Petitioner.
- Mr.Pushkar M. Bopardikar for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATED : 9th OCTOBER, 2017.

P.C. :-

1] Heard learned counsel for the Petitioner and learned counsel for the Respondent.

2] This petition is preferred by the Petitioner No.2 in Marriage Petition No.27 of 2016 challenging the order dated 30/01/2017 passed by District Judge, Court No.8, Thane.

3] Brief facts of the petition are to the effect that, the Petitioner and the Respondent are husband and wife, *inter se*. Their

marriage had taken place on 29/04/2015. Thereafter, Petitioner No.1 Kunti has registered FIR against Petitioner No.2 for the offences under Section 376, 420, 323, 504 and 506(2) of Indian Penal Code at Naya Nagar Police Station being C.R. No.I-17 of 2016. In view thereof, as there was no possibility at all for both the parties to come together and dissolution of marriage was the only legal remedy, in the interest for both the parties, they filed this Marriage Petition bearing No.27 of 2016 before the trial Court for divorce by mutual consent under Section 28 of the Special Marriage Act, 1954.

4] The petition was filed on 30/04/2016 but thereafter, the present Petitioner No.2 husband did not remain present and hence *ex-parte* order came to be passed by the trial Court on 15/11/2016.

5] Subsequently, the Petitioner No.2 changed his Advocate and filed application below Exh.10 for setting aside the *ex-parte* order, so that he can withdraw his consent for divorce. The said application was opposed by Petitioner No.1 contending *inter-alia* that Petitioner No.2 is well educated and was fully aware of the terms of divorce. He has engaged the Advocate of his choice, therefore, now he cannot withdraw the consent given to the divorce by mutual consent.

6] The trial Court has, by its impugned order rejected the application to set-aside the order of *ex-parte*. Being aggrieved thereby this Writ Petition is preferred.

7] This Court wonders how the trial Court can reject the application filed by Petitioner No.2 for setting aside *ex-parte* order when admittedly the petition was for divorce by mutual consent and that petition is to remain pending minimum for 6 months for ascertaining the consent of both the parties and maximum for 18 months. In this respect it would be useful to reproduce Section 28 of the Special Marriage Act, 1954, which reads as follows :-

“28. Divorce by mutual consent –

(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together 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 district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.”

8] Thus, the perusal of Section 28 makes it clear that the petition for divorce for mutual consent is to remain pending at least for 6 months and upto 18 months during which period, which is called as “cooling off” period, both the parties are at liberty to withdraw the consent; thereby making it mandatory that both the parties must be present before the Court at the end of 6 months period or at any time thereafter before expiry of 18 months to give or withdraw their consent for divorce.

9] Thus, Section 28 requires that unless and until both the parties remain present on the subsequent date after 6 months of filing the petition, such petition for divorce cannot be decided. The law thus requires that when the petition is filed simpliciter for divorce on mutual consent, the Court must satisfy itself that the consent given by the parties is continued till the date of granting

decree of divorce. If one party remains absent, the Court does not get jurisdiction to grant decree of divorce by mutual consent, in view of the mandate of Section 28 of the Act. Such application for divorce by mutual consent cannot be decided exparte.

10] In this respect one may place reliance on the observations of the Hon'ble Supreme Court in the case of *Sanjay Pahariya vs. Ms.Smruti Pahariya*, 2008(4) ALL MR 513.

“19. We are not impressed by this submission. We have already quoted extensively from Sureshta Devi's case (supra). A reading of this judgment leaves no room for doubt that there should be mutual consent when parties move the court under Section 13B(2). No decree under Section 13B(2) can be passed on initial consent and the court must be satisfied about existence of mutual consent at the time it passes the decree. It is true that ordinarily, a motion can be made by one party to a proceeding. But, Section 13B(2) begins with words "on the motion of both the parties". Therefore, motion contemplated therein has to be made by both parties. In fact, in Sureshta Devi's case (supra), the Supreme Court has laid stress on these words and made the observations quoted above. It is not open for us to differently interpret Section 13B of the said Act.”

(Emphasis supplied)

11] Therefore, it follows that the trial Court should have allowed the application filed by Petitioner No.2 and set-aside the *ex-parte* order so that Petitioner No.2 could have appeared in the proceeding and either give the consent or withdraw the consent, as the case may be. Only after *ex-parte* order is set aside, in case Petitioner wants to withdraw the consent, the court may decide whether he should be permitted to do so.

12] In any case, without setting aside *ex-parte* order, the court cannot consider his request for withdrawal of the consent. Thus, to allow the *ex-parte* order to remain on record and not setting it aside is totally against the express provision of law. Hence, the impugned order passed by the trial Court rejecting the application filed by Petitioner No.2 for setting aside the *ex-parte* order needs to be quashed and set-aside.

13] The Writ Petition is allowed accordingly. The application at Exh.10 filed by Petitioner No.2 before the trial Court is allowed and the *ex-parte* order passed against him by the trial Court is set-aside.

14] The question whether the petitioner No.2 can be permitted to withdraw his consent or not is, then left open for the trial Court to decide.

15] Writ Petition is disposed of in above terms.

(DR. SHALINI PHANSALKAR-JOSHI, J.)