

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL No. 169 of 2015.
ALONG WITH
CIVIL APPLICATION No. 285 of 2015.
ALONG WITH
CIVIL APPLICATION No. 233 of 2016.

Dattatray Salvi
age 48 years, Occup.Business,
residing at 701, B Wing,
Phase II, Old Golden Nest,
Mira Road (East),
District Thane, Pin No. 401 107. **..Appellant.**
(Original Respondent-Husband).

Versus

Charu Dattatray Salvi
Age-46 years, Occup.Service,
Residing at 701, B Wing. Phase II,
Old Golden Nest, Mira Road (East),
District Thane, Pin No. 401 107. **..Respondent.**
(Original Petitioner-Wife).

Mr. Amol B. Kharat for the Appellant.

Ms. S. Mehra i/by Francisco X. D'souza for the Respondent.

**CORAM : R.M. BORDE &
A.S.GADKARI, JJ.**
DATE : 30th JANUARY, 2017.

ORAL JUDGMENT (PER : R.M. BORDE,J).

- 1) Heard.
- 2) Admit. By consent of parties, the appeal is taken up for final hearing at the admission stage.
- 3) The appellant-original respondent-husband before the Family Court is objecting to the Judgment and Decree passed in Petition No. A-869 of 2013 decided on 24th April, 2015. The Petition before the Family Court, Mumbai at Bandra was presented by the Respondent-wife praying for grant of decree of dissolution of marriage under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as the “Act” for short). The respondent herein has also prayed for grant of several other reliefs in the petition presented to the Family Court. It is recorded in the judgment that the Respondent did not press prayer clause (b) to (d) and (f) to (l) incorporated in the Hindu Marriage Petition. The Family Court as such considered the only prayer clause (e) in respect of issuance of direction to the appellant-husband herein to pay a sum of Rs. 2,21,400/- to the respondent-wife with interest at

12% per annum from the date of filing of the petition i.e. till 11th March, 2013. It is the case of the Respondent-wife that the marriage between the parties was solemnized on 21st January, 1992. There are two daughters born to the couple by name Rutuja and Namrata born on 26th July, 1995 and 22nd April, 1997 respectively. The respondent-wife alleges that the appellant-husband during the wedlock treated her badly and as such the respondent-wife prays for grant of decree of divorce under Section 13 (1) (ia) of the Hindu Marriage Act. So far as the refund of amount of Rs. 2,21,400/- is concerned, it would not be necessary to go into factual details recorded in the petition as well as the consideration thereof by the learned Judge of the Family Court since the decree passed by the Family Court is not sustainable in law and matter deserves to be remitted back. It is the contention of the appellant-husband that so far the decree passed by the Family Court relating to directions to the appellant herein to pay a sum of Rs.2,21,400/- is concerned, there is non-consideration of material evidence in the form of documents placed on record. It is also contended that no proper opportunity has been given to the appellant to oppose the claim of the respondent-wife.

4) It is surprising to note that though the petition is presented by the petitioner claiming grant of decree of divorce on the ground of cruelty at the instance of the appellant-husband, the learned Judge of the Family Court proceeded to grant decree of divorce in favour of the respondent-wife under Section 13B, although the prayer was for decree of divorce under Section 13 (1)(ia) of the Hindu Marriage Act. The Respondent-wife approached the Court with allegations that the appellant herein is guilty of treating her with cruelty after solemnization of marriage. The petition contains pleadings substantiating the claim of the respondent-wife in respect of alleged cruelty by the appellant. The respondent-wife did not pray for grant of decree of divorce by mutual consent. The learned Judge of the Family Court considering answer given to a question put to the appellant during his cross-examination, treating the answer given by the appellant to be a consent for divorce, proceeded to pass a decree under Section 13B of the Act, in our considered view, the learned Judge of the Family Court has committed material irregularity and error in law in granting decree of divorce under Section 13B of the Act.

Section 13B (1) of the Hindu Marriage Act reads thus :

Section 13B:- (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.*

There are three ingredients which are required to be satisfied, before a Court grants relief to the parties under Section 13B of the Act. They are :

- (i) They have been living separately for a period of one year,
- (ii) They have not been able to live together, and
- (iii) They have mutually agreed that marriage should be dissolved.

5) In the instant matter, on perusal of the petition presented by the respondent-wife to the Family Court, it does appear that the appellant-husband on the date of the presentation of the petition to the Family Court was residing with the respondent-wife. One of the instance quoted in the petition by the respondent-wife alleging bad treatment meted out to his daughters by the appellant-husband is an instance which took place just few months prior to the presentation of the petition. The address of the parties recorded in the divorce petition is one and the same. Thus, the learned Judge of the Family Court prima facie does not appear to have applied her mind in respect

of the satisfaction of the first condition that “the parties have been living separately for a period more than one year”. There is absolutely no material on record to indicate that the parties i.e. the husband and wife were residing separate for a period of one year prior to the date of presentation of the petition. The another aspect that has been overlooked is that the petition is required to be presented jointly by the parties and the condition laid down under sub-section (2) of Section 13B also is required to be satisfied. Sub-section (2) of Section 13B provides that 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 may proceed to pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. In the instant matter, the Court has not

considered the aspect of passage of six months minimum cooling period before grant of decree of divorce. The satisfaction of the Court has also not been recorded in the judgment. The first material irregularity is that in fact, there are no averments made in the petition presented by the respondent to the Family Court satisfying ingredients of Section 13B of the Act. Since the petition presented by the respondent-wife itself was not for grant of decree of divorce under Section 13B, but was presented seeking grant of decree of divorce under Section 13 (1)(ia) of the Act, it was impermissible for the Family Court to exercise the jurisdiction and pass a decree of divorce under Section 13B of the Act. The Division Bench of this Court in the matter of *Miten Shyamsunder Mohta & Anr v. Union of India*¹ has observed in Paragraph 20 of the judgment as quoted below :

“Purposive approach is not unknown to Indian laws. In modern jurisprudence, we have taken flair to discard liberal approach in favour of purposive approach. Dharmashastra advocates purposive approach since ancient times even though

¹ 2008 (5) Mh.L.J.27

their reverence for the letters of the sacred law was almost devotional. It was considered that decision was never to be made solely by having recourse to the letters of the law, for a decision not according to the reason of law would occasion miscarriage of justice. Letters of law and reason of law are not synonymous terms but they both help in proper interpretation of law. Reason for enacting the law could be the reason for sustaining the law and it need in no way destroy the letters of law. The Legislature in its wisdom and being aware of other existing provisions of the Act, other laws and the opinion of the society, opted for insertion of section 13B in its present form without any intent to convert divorce from statutory satisfaction to whim of the parties. The period of one year 'living separately' is *sine qua non* to the filing of the petition under section 13B and as such, its waiver would be impermissible as per any settled canons of interpretation. The Court gets jurisdiction to entertain and decide the petition only after these ingredients are satisfied. Non-compliance of these provisions may even affect the jurisdiction of the Court as the petition would lie beyond the statutorily specified essentials and, thus, in

law, be a defective or an incomplete petition.”

The observations of the Supreme Court in the matter of Anil Kumar Jain v. Maya Jain² in Paragraphs 29 to 31 are relevant. Those read as below :

“29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable breakdown of marriage is not one of the grounds indicated whether under Section 13 or 13-B of the Hindu Marriage Act, 1955 for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable breakdown of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High

2 2009 10 SCC 415

Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on the grounds not provided for in Sections 13 and 13-B of the Hindu Marriage Act, 1955.

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other courts can exercise such powers. The other courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the

parties.

31. The various decisions referred to above merely indicate that the Supreme Court can in special circumstances pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. The law as explained in *Sureshta Devi* case still holds good, though with certain variations as far as the Supreme Court is concerned and that too in the light of Article 142 of the Constitution.”

6) Considering the law laid down by the Supreme Court as recorded above as well as considering that the Trial Court has not ensured satisfaction of three conditions mentioned in Section 13B referred to above before proceeding to pass a decree of divorce, we are of the view that the Judgment and Decree passed by the Family Court deserves to be quashed and set aside.

7) The learned Counsel appearing for the Respondent wife prays that in the event of remand of the

matter, the respondent be permitted to press all reliefs claimed in the Hindu Marriage Petition presented to the Family Court. It would be open for the respondent-wife to make a suitable request to the Family Court on remand of the matter and the Family Court may consider the same in accordance with law. So far as the decree passed by the Family Court in respect of payment of sum of Rs.2,21,400/- by the appellant herein to the respondent-wife (original petitioner) before the Family Court is concerned, we find that the consideration by the Trial Court in respect of the issue dealt with is also quite casual. The Trial Court has not considered the documentary evidence placed on record by the parties. It was also necessary for the Trial Court to scrutinize the oral evidence placed before the Court before passing a decree in respect of recovery of money. Since the appeal is being remitted back noticing that the decree passed by the learned Family Court dissolving the marriage of the parties by taking recourse to Section 13B of the Act is unsustainable, we deem it appropriate to direct the Family Court to consider the other claim raised by the original

petitioner- i.e. the present respondent-wife herein in respect of recovery of amount of Rs. 2,21,400/- from the appellant-husband afresh.

8) The appeal is, thus, allowed;

9) The decree passed by the Family Court on 24th April, 2015 in Petition No.A-869 of 2013 is quashed and set aside and the matter stands remitted back to the Family Court for reconsideration. The Family Court after extending opportunity to parties to lead evidence shall decide the petition and pass appropriate orders in accordance with the provisions of law.

10) In the facts of the case, there shall be no order as to costs.

11) In view of disposal of the Family Court Appeal, Civil Applications do not survive and the same are disposed of.

(A.S. GADKARI,J)

(R.M. BORDE, J.)