

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

FAMILY COURT APPEAL NO.165 OF 2015

Mrs Bharti Bhausahab Aher	}	
Age 36 yrs, Occu: Service		
R/a C/o Prabhakar Nikam		
At Mungse Post Karangad	}	
Taluka Baglon Dist. Nasik		.. Appellant
vs		
Mr.Bhausahab Kautik Aher	}	
Age 44 yrs, Occu: Service		
R/a C/o G.N.Suryavanshi		
Plot no.169, D-3 Lata Kunj	}	
CHS Ltd,Sector II Nr Ajra Bank		
Gorai Khari Borivali (W)	}	
Mumbai-400 092		.. Respondent
Mr.Amey Deshpande for Appellant Mr.Rajesh Jadhav for Respondent		

CORAM: A.S.OKA & G.S.KULKARNI, JJ
JUDGMENT RESERVED ON : 20 DECEMBER 2016
JUDGMENT PRONOUNCED ON : 6th JANUARY 2017

JUDGMENT (Per G.S.Kulkarni, J)

1. The appellant-wife has preferred this appeal, against the judgment and order dated 20.6.2015 passed by the learned Principal Judge, Family Court at Mumbai.(for short the 'Family Court')

2. By the impugned judgment, the marriage petition of the respondent-husband for divorce is permitted to be converted as a Petition for divorce by mutual consent under section 13-B of Hindu Marriage Act, 1955 and has been allowed in terms of the consent terms dated 12.6.2015 (Exhibit 22) as stated to have been arrived between the parties. The operative part of the impugned judgment reads thus:

1. "The converted petition is allowed.
2. The marriage solemnized between the petitioner and the respondent on 21.2.1999 is dissolved by decree of divorce by mutual consent u/s 13-B of the Hindu Marriage Act, 1955.
3. Respondent shall comply with consent terms at Exh.22
4. Consent terms at Exh 22 shall form part of the decree.
5. No order as to costs.
6. Decree be drawn accordingly."

Dated: 20th June 2015

3. In nutshell the facts are :

On 21.2.1999 marriage between the appellant and the respondent was solemnized. On 18.5.2000 a son was born out of the wed-lock. After 11 years of marriage, the respondent-husband on 2.8.2011 filed a Hindu Marriage Petition for divorce praying for a decree of divorce under section 13 (1) (ia) & (ib) and section 26 of the Hindu Marriage Act, 1955 (for short the 'Act') read with section 7 of the Family Courts Act, 1984, as also praying for permanent

custody of the minor son.

4. Finally the case of the respondent before the Family Court was that during the pendency of the marriage petition, the respondent and the appellant have arrived at a settlement/consent terms and accordingly decided to dissolve their marriage by mutual consent.

5. The background being, on 12.06.2015 the Family Court passed an order referring the respondent and the appellant to a Marriage Counsellor. On the same day (12.06.2015) the Marriage Counsellor made an application (Exhibit 20) before the Family Court and placed on record the consent terms dated 12.06.2015 (Exhibit 22) stated to be duly signed by both parties. This application narrates that reconciliation was not possible between the parties and the parties were ready for divorce and have arrived at consent terms.

6. On the same day (12.06.2015) a joint application (Exhibit 23) was filed by the parties praying for converting the respondent's Petition into a Petition for divorce by mutual consent under section 13 (B) of the Act. The respondent also deposited with

the Family Court by a demand draft, an amount of Rs.3,00,000/- stated to be the amount of permanent alimony to be received by the appellant as per consent terms. On this antecedent, the marriage petition was adjourned however the roznama does not indicate the adjourned date.

7. The marriage petition was thereafter taken up by the Family Court on 20.6.2015, when the respondent remained present however the appellant-wife was absent. The respondent on that day filed an affidavit dated 20.6.2015, referred by the Family Court, as an affidavit of evidence, inter alia stating that the parties have agreed, that the respondent shall pay one-time-alimony of Rs.3,00,000/- to the appellant as already deposited in the Court. The affidavit further stated that the appellant-wife had agreed that she shall withdraw other proceedings between the parties on or before 20.6.2015. The affidavit also states that parties have agreed that the appellant shall hand over the custody of their son '(Nayan) Om' aged 14 years to the respondent "on the day of decree of divorce" before the Family Court and that both parties shall not interfere with each others' lives after a decree of divorce is passed.

8. The learned Principal Judge of the Family Court taking this affidavit of the respondent on record of the proceedings, passed the following order on the Roznama:

“Only petitioner is present and filed his affidavit of evidence. Respondent is absent. She has to comply with consent terms. Divorce is pronounced.

*Judgment: Petition is allowed.
Decree be drawn up accordingly.
Proceedings closed.”*

9. In the judgment, as impugned in this appeal, the Family Court proceeded on the basic premise, that the parties have arrived at a compromise to dissolve their marriage by mutual consent and accordingly the parties requested the Court to convert the respondent's Petition into a Petition for divorce by mutual consent by an application dated 12.6.2015 vide Exhibit 23. It is observed that this application was allowed and the marriage petition was permitted to be converted into a Petition under section 13-B of the Act. The Family Court observes that the Petition was kept for compliance of consent terms. It is further observed that the affidavit of the respondent dated 20.6.2015 is treated to be an affidavit of evidence. It is observed that the appellant has remained absent, as also she had not filed affidavit of evidence. It is further observed that there was no application for withdrawal of the consent terms dated 12.6.2015, which were signed by the appellant. It was therefore presumed, that

the appellant is ready for divorce. The learned Family Court thus, proceeded to pronounce Judgment and ordered a decree of divorce by mutual consent.

10. On this background, the appellant-wife is before us in this appeal. Learned counsel for the appellant in assailing the impugned Judgment submits that admittedly the appellant for some reason was prevented to appear before the Court on 20.6.2015 and in her absence, the Court proceeded to pronounce a decree of divorce by mutual consent. It is submitted that no opportunity was given to the appellant to place before the Court that the terms as agreed between the parties are not acceptable terms of settlement. It is submitted that the learned Judge of the family Court should have judicially examined the consent terms and ought to have heard the appellant's contention on the consent terms before proceeding to pronounce a judgment accepting the consent terms. It is submitted that the consent terms were not acceptable as the respondent-husband had played a fraud on the Court by stating that all the terms are fulfilled, which was not factually correct, as there was another notarized document dated 14.1.2015 executed by the relatives of the respondent, which was not disclosed before the Family Court. It is

submitted that under this document the relatives of the respondent had agreed to pay an amount of Rs.9,00,000/- as the compromise between the appellant and the respondent was on a payment of one-time permanent alimony of Rs.12,00,000/- and not on Rs.3,00,000/- as contained in the consent terms. This for the reason that the respondent being in government service serving as Commissioner of Sales Tax, Nasik, it was not feasible to show the entire amount of Rs.12,00,000/- in the consent terms, to be placed before the Court and accordingly consideration of Rs.3,00,000/- was shown in the consent terms. This document as relied upon by the appellant is executed before a Notary and is in the nature of a undertaking of the relatives of the respondent for payment of the balance amount of Rs.9,00,000/-. It records that a mutual divorce would be taken, only after complying of the conditions as mentioned in both the consent terms and the said undertaking. It is submitted that the respondent suppressed these facts including the said document before the Family Court, and obtained a decree behind the back of the appellant, as she could not remain present before the Court, on the day the Court proceeded to pronounce judgment. It is thus contended that the decree was obtained by playing a fraud on the Court and is accordingly null and void. It is submitted that the Family Court

ought to have examined whether the consent terms dated 12.6.2015 were at all the real terms of settlement between the parties. It is next submitted, that one of the significant aspects, completely overlooked by the Family Court is that as per the consent terms, the custody of the child was to be received by the respondent-husband on the date of decree and admittedly even today, the son is with the appellant. It is thus submitted that in any event the decree is not in accordance with consent terms and deserves to be set aside.

11. Learned counsel for the appellant has drawn our attention to the said undertaking dated 14.1.2015 which has been executed before a Notary, in favour of the appellant, by Shri Arjun Maloni Wagh Occupation: Service, Shri Kantilal Sitaram Pawar Occupation: Business and Shri Ashok Uttamrao Wagh Occupation: Agriculture, who state that the respondent is their relative. It is stated in the said undertaking that the respondent and appellant have decided to take divorce by mutual consent under which the appellant would accept Rs.12.00 lacs as a permanent alimony. It is stated that Rs.3.00 lacs are being shown on record and balance Rs.9.00 lacs would be required to be paid to the appellant outside the Court. It is further stated that as the respondent is a Sales Tax Commissioner in

the service of the State Government at Nasik, the amount of Rs.12.00 lacs on technical difficulties cannot be shown on record and therefore in the consent terms only Rs.3.00 lacs has been mentioned. The contents of paragraph 3 and 4 of the said undertaking would reads thus

3. “ Therefore, if Bhausahab Kautik Aher, husband of the party taking in writing fails to pay the amount of Rs.9,00,000/- to the party taking in writing towards her future food-clothing and maintenance then we undertake the guarantee/responsibility by virtue of this document to pay the said amount of Rs.9,00,000/- before filing the affidavit of final separation. If Shri Bhausahab Kautik Aher husband of party taking in writing fails to pay or evades to pay the said amount of Rs.9,00,000/- then we the party giving in writing all of us together collect our own amount of Rs.9,00,000/- and shall pay the same to the party taking in writing within a stipulated period. We undertake the entire guarantee and responsibility to pay such amount of Rs.9,00,000/- to the party taking in writing without any dispute.

4. If party giving in writing fails to pay the sum of Rs.9,00,000/- to the party taking in writing then the party taking in writing by virtue of this document may take necessary criminal or civil action against them (party giving in writing) for making recovery of the aforesaid amount of Rs.9,00,000/- from the party giving in writing and as such party giving in writing shall entirely be liable also for making payment of incidental expenditure to be incurred for making recovery of the said amount to the party taking in writing.”

Thus, we have this settlement deed in writing after having considered and understood the same and of our free will and pleasure and without falling prey to any body's pressure as well as without being under the influence of intoxicant and we have affixed our signatures there under in the presence of witnesses on this day.”

12. On the other hand, learned counsel for the respondent has supported the impugned judgment. Learned counsel for the respondent would submit that it is not in dispute that there was a

compromise between the appellant and the respondent in terms of the consent terms dated 12.6.2015. It is submitted that these consent terms were taken on record by the Family Court. The natural consequence therefore, was a consent decree of divorce to be passed by the Family Court. It is further submitted that the appellant ought to have appeared before the Family Court on the adjourned date of hearing and therefore, there was no embargo for the Family Court to proceed and pronounce a judgment in view of the consent terms even if the appellant was not to remain present. It is submitted that the contention as urged on behalf of the appellant that settlement as recorded in the consent terms was not a true settlement, also cannot be accepted as the respondent-husband is not a party to the document/undertaking dated 14.01.2015 which is sought to be relied on behalf of the appellant to claim an additional amount of Rs.9.00 lacs. It is then submitted that the appellant at no point of time had challenged the consent terms before the Family Court. It is therefore prayed that the appeal be dismissed.

13. We have heard learned counsel for the parties and with their assistance, we have gone through the impugned judgment and order and the documents as placed on record in the paper book. We

have also perused the record and proceedings before the trial Court.

14. This is a case where the Family Court has proceeded to award a decree of divorce by treating the Marriage Petition under section 13 (1) (i-a) and (i-b) of the Act to be a Petition under section 13 (B) of the Act and has decreed the Petition awarding a decree of divorce by mutual consent in terms of Consent terms stated to be arrived between the parties. We may observe that a joint application that the respondent's marriage petition be converted into a Petition for divorce by mutual consent under section 13-B of the Act was filed before the Family Court on 12.6.2015 at (Exhibit 23). The application came to be granted by the Family Court on the same day. The consequence of allowing the said application was that the parties were required to make consequential amendments in the marriage petition, in terms of what section 13-B of the Act would provide. On a perusal of the original record, we do not find that there are any amendments made, in consequence of the application dated 12.6.2015 being allowed, to treat the said marriage petition, as a Petition for divorce by mutual consent under section 13-B. There is no amendment even to the prayers.

15. It is also quite clear from the record that the Family Court at the instance of the respondent took up the petition on 20.6.2015. The Roznama does not show that 20.6.2015 was the adjourned date of hearing. The appellant did not remain present. The Family Court ought to have considered this aspect. However, it appears that respondent was prepared fully and adequately to pursue the proceedings in the absence of the appellant. The respondent filed his affidavit stated to be affidavit of evidence as noted above. The respondent in this affidavit stated that the parties have decided and agreed to dissolve their marriage by mutual consent on payment of one-time alimony of Rs.3.00 lacs by the respondent to the appellant as per the consent terms. The Family Court also accepted on record the said affidavit of the respondent and recorded that the respondent was required to comply with the consent terms and pronounced the impugned judgment and order granting a decree of divorce by mutual consent.

16. In our opinion, there is a serious error on the part of the Family Court in passing a decree of divorce under section 13-B of the Act by the impugned judgment and order. There are several reasons for us to say so. The learned Judge has

completely overlooked the fundamental aspect that it was just on an earlier occasion i.e on 12.6.2015, that an application was made by the parties to convert the Petition into a Petition for divorce by mutual consent under section 13-B of the Act, as also on the same day consent terms were placed on record. Consequently, the adjourned date i.e. 20.6.2015 was the first date, albeit not the adjourned date as per roznama. The Court was considering the marriage petition on this background. Although the application of the parties to convert the petition into petition under section 13-B was allowed, the Petition was not converted into a Petition under section 13-B as can be clearly seen from the original record. Mere allowing the application to convert the marriage petition into a petition for divorce by mutual consent under section 13-B of the Act was not sufficient, as it was necessary that the requirements of section 13-B are present in the averments/statements as made in the petition.

17. The appellant was not present on the said adjourned date 20.6.2015, so as to enable the Court to seek concurrence of the appellant on the consent terms as normally a Court would require, so as to proceed and pronounce a decree of divorce by mutual consent in terms of the consent terms. As in doing so, obviously the Court

would be required to verify and re-verify from the appellant about the acceptability of the consent terms and/or any other contention which any party may have to submit, before the decree of divorce is pronounced. However, in absence of the appellant, the learned Judge proceeded to accept whatever was recorded in the consent terms as confirmed in the affidavit of the respondent as taken on record, on the same day, and pronounce the impugned judgment and order of dissolving the marriage under section 13-B. In our clear opinion, the entire approach of the learned Judge was defective and incorrect, oblivious to the provisions of section 13-B read with section 23 (1) (bb) of the Act. We extract these provisions below for convenience and the discussion ahead:

“13-B Divorce by mutual consent : (1) Subject to the provisions of the 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 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”

23” **Decree in proceedings:** (1) In any proceeding under this Act whether defended or not if the Court is satisfied that :.....

(bb) When a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence and)

(Emphasis supplied)

18. A plain reading of section 13-B of the Act, makes it clear that it is a provision for divorce by mutual consent. Parties can pray for a decree of divorce by mutual consent on a joint petition by the husband and wife and subject to the terms and conditions as stipulated in the said provision. The principal requirement therefore, is that the Court would consider whether the petition, including a converted petition, satisfies the primary requirement of section 13-B of the Act. Further sub-section (2) of section 13-B makes it clear that on such a Petition, the Court is required to satisfy itself, after hearing the parties and only after making an inquiry as it thinks fit, 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 decree. Further section 23 (1) (bb) of the Act is an additional safeguard as provided by the legislature in decreeing petitions under section 13-B of the Act. Sub-section (1) (bb) of section 23 provides that when parties are seeking a decree of divorce by mutual consent, the Court is under an obligation to to be satisfied that such consent has not

been obtained by force, fraud or undue influence.

19. In the facts of the present case, the learned Judge of the Family Court has completely overlooked the mandate of the above provisions. We say so for the reason that the learned Judge proceeded to pronounce a decree without the Petition being converted into a Petition, for decree of divorce by mutual consent under section 13-B of the Act and secondly without making any inquiry as sub-section (2) of section 13-B read with section 23 (1) (b) would provide, when admittedly the appellant was not present before the Court on the date of the judgment. The scope of the inquiry which was expected in law is that when the parties are seeking divorce by mutual consent, whether such a consent was a free consent or was obtained by fraud, or undue influence. In other words, whether the consent was a real consent is required to be examined and tested by the learned Judge. The non-adherence to these basic mandate of law in our opinion is sufficient, to set aside the impugned judgment and order.

20. However, we do not stop at this, as what is more telling is that such approach as adopted by the Family Court has caused a

serious prejudice to the appellant in as much as firstly on a bare reading of the consent terms, the amount of one-time-alimony of Rs.3,00,000/- prima facie appear to be unconscionable. The respondent admittedly is in the service of the State Government as Commissioner of Sales Tax. What would then logically follow is that whether the respondent had a capacity to pay a better amount. Thus, to a judicial mind an inquiry on this issue had become necessary. If the learned Judge was to follow a reasonable and appropriate procedure, as very well contained in section 13-B read with section 23 (1) (bb) of the Act and was to adjourn the proceedings for the appellant to be heard, then surely the consequence would not have been as reflected in the impugned judgment. If the appellant was to be heard, the appellant could have possibly placed for consideration of the Family Court her case on the basis of the document/Undertaking dated 14.1.2015, under which she was still to be paid Rs.9.00 lacs and a total one-time alimony of Rs.12,00,000/-. The appellant thus would not have agreed for a decree of divorce by mutual consent, also the appellant could have placed on record the said Undertaking that she has to receive Rs.9.00 lacs which is part of the one-time permanent alimony amount. All this could not happen as the appellant was not granted any

opportunity of being heard and the learned Judge straight away proceeded to pronounce a decree of divorce by mutual consent.

21. There is one more aspect which needs to be noted and that is on 12.6.2015 itself when the parties were before the Court, the parties were referred to the Mr.Kamble Marriage Counsellor for an amicable settlement. It appears that this was at the request of the parties and on the same day, the Marriage Counsellor under his application dated 12.6.2015 placed on record the consent terms between the respondent husband and appellant-wife. The conciliation happening on the same day coupled with the Marriage Counsellor, on the same day, placing the consent terms on record of the Court, appears to be an eye wash, to accept that the consent terms is a real settlement between the parties. This is for the simple reason, that in the event if the appellant's case was to be accepted that she was to be paid additional Rs.9.00 lacs as per the said document/undertaking as executed by the said three persons-relatives of the respondent on 14.1.2016, the consent terms would fall to the ground. This document was executed almost six months prior to the consent terms signed by the parties i.e.12.6.2015. It is significant that the case of the respondent is that he is not a party to

the said document/undertaking. He does not deny that the signatories are not his relatives or that the said document is a fabricated or bogus document. All these issues which could have been the subject matter of inquiry and consideration of the learned Judge, provided the learned Judge was not to exercise an undue haste and was to exercise caution before pronouncing the judgment.

22. Considering these glaring facts and the dispensation of justice by the Family Courts, we would sound a note of caution to the learned Presiding Officers of the Family Court, that in matters where parties have sought a decree of divorce by mutual consent, a complete compliance of section 13-B read with section 23 (bb) in its letter and spirit is required to be followed, as also the compliance of the requirements thereof be noted in the final orders which would be pronounced.

23. In considering a petition for divorce by mutual consent under section 13-B of the Act, learned Judges of the Family Court shall hear the parties before a judgment is to be pronounced and also on consent terms/compromise, the parties may enter into, so as to

examine all the parameters of law touching the consent terms including reasonableness of the consent terms. Further it shall also be examined whether the consent is a free consent and the same is not in any manner influenced by fraud, coercion, undue influence as section 23 (i) (bb) would provide and accordingly observations be made and recorded in the judgment. Section 23 (1) (bb) contemplates a free consent. It is well settled that fraud is an act of deliberate deception with a design of securing something by taking advantage of another. It would be a deception to gain from another's loss and it would be cheating if intended to get an advantage. These are very crucial parameters which are required to be very meticulously considered by the Court before pronouncing the decree of divorce by mutual consent exercising jurisdiction under section 13-B read with section 23 (1) (bb) of the Act. Only after such a procedure is followed there would be complete compliance of section 13-B and section 23 (i) (bb) of the Act.

24. We may also note that even if a petition under section 13-B of the Act is filed, sub section (1) thereof, contemplates a solemn statement that the parties were living separately for one year or more and they have not been able to live together and they have

mutually agreed that their marriage be dissolved with further requirement that after six months of the said Petition being presented, the Court is required to be satisfied after hearing the parties and after making an inquiry, as it thinks fit, to verify the correctness of the averments, only then the Court would proceed to pass a decree. Thus, it is clear, that mere filing of the Petition under section 13-B is no good. All requirements of sub-section (2) of section 13-B are required to be considered before a decree is pronounced on such a petition. The Court is required to be satisfied of the bonafides of the consent of the parties and if during the course of inquiry, the Court is of the opinion that there is real and mutual consent, the Court does not get the jurisdiction to pronounce a decree of divorce by mutual consent as held by the Supreme Court in *Smt Sureshta Devi vs Om Prakash AIR 1992 Supreme Court 1904*). Their Lordships in para 14 have observed thus:

“ Sub-section (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 any 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 Section 13-B. Mutual consent should continue on the divorce decree is passed it is a positive requirement of 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. (See (I) Halsbury Laws of England Fourth edition Vol 13 para 645 (ii) Rayden on Divorce 12 th Ed Vol 1 pg 29 and (iii) Beales vs Beales (1972) 2 All ER 667 at pg 674 (1972) 2 WLR 972.)”

25. In view of above deliberation the Appeal succeeds. The impugned judgment and order passed by the Family Court, Mumbai is quashed and set aside. Marriage Petition No.A 1933 of 2011 is restored to the file of the Family Court at Mumbai to be heard and decided by the Family Court afresh and after hearing the parties and in the light of observations as made by us in this Judgment.

(G.S.KULKARNI, J)

(A.S.OKA, J)