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

**WRIT PETITION NO.10282 OF 2016**

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| Smt.Lovely Abhishek Singh    | ...Petitioner |
| V/s.                         |               |
| Shri.Abhishek Rabindra Singh | ...Respondent |

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Mr.Rakesh Agrawal with Mr.Chetan Shah, Mr.Parmeshwar Bhise for  
Petitioner.

Mr.Swapnil R. Patil for Respondent.

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**CORAM : G.S. KULKARNI, J.**

**DATE : 25<sup>th</sup> JANUARY, 2018**

**P.C.:**

1. Rule. Respondent waives service. Heard finally by consent of the parties.
  
2. Challenge in this petition is to the judgment and order dated 19<sup>th</sup> August 2016 passed by the learned Civil Judge, Senior Division, Vasai, by which Miscellaneous Application No.24 of 2013 filed by the petitioner-wife for setting aside the decree of divorce by mutual consent dated 20<sup>th</sup> February 2013 has been rejected.
  
3. It appears that a joint petition for a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955 (for short 'the Act') being Marriage Petition No.130 of 2012 came to be filed by the parties. There were also affidavits in lieu of the examination-of-chief which were presented before the Court, *inter alia* stating about the

details of the marriage and other details in regard to the dispute and that there was no possibility of reconciliation. The learned trial Judge taking into consideration this material on record, allowed the petition of the parties under Section 13B of the Act. However, what is pertinent to be seen is the observation of the Court in paragraph 4 of the said order which reads thus:-

*“4. It seems to me that whatever evidence available on record is sufficient to prove the facts that the petitioners have married with each other on dated 28/06/2011, but unable to reside jointly as a husband and wife due to emperamental differences. Both of them are residing separately for 1 year i.e. more than one year preceding to this petition. Neither party have withdrawn their consent during the pendency of this petition. Both the parties have complied para no.3 of the petition. All the requirements of Section 13(B) of the Hindu Marriage Act, 1955 are being satisfied therefore, it is just and proper to grant a decree of divorce by mutual consent.”*

4. A plain reading of the above observations of the learned trial Judge clearly indicates that the fundamental requirement of Section 13-B of the Hindu Marriage Act which is mandatory to be taken into consideration before passing a decree of divorce by mutual consent, is not taken into consideration. This for the reason that Sub-Section (2) of Section 13B of the Act creates an obligation on the Court to hear the parties which is clear from the provision using the words *“after hearing the parties and after making such inquiry that the marriage was solemnized and the averments in the petition are true”*. Considering the above observations as made in paragraph 4 of the order, it is clear that the parties were not heard on the date the learned trial Judge pronounced a decree of divorce under Section 13B of the Act. The learned trial Judge ought to have inquired from the parties in regard to the continuation of mutual consent, as was reflected in the joint petition as also respective affidavits, and only on being satisfied that such mutual consent existed on the date the Court intended to award a decree of

divorce by mutual consent, could have proceeded to pass an order. Law in regard to the compliance of the said requirement is no more *res-integra*. In **Smt.Sureshta Devi vs. Om Prakash** <sup>1</sup>, the question which fell for determination of the Supreme Court was whether it was open for one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition. There was cleavage of opinion of the High Courts on this issue. The Supreme Court interpreting Section 13B of the Hindu Marriage Act held that mere filing of the petition with a mutual consent does not authorise the court to make a decree of divorce for more than one reason, namely that that there may be change of circumstances in the transitional period. The spouse may not be a party to the joint motion as provided by sub-section (2) of Section 13B and nothing in the section would prevent the party in taking such course. It is observed that sub-section (2) of Section 13B requires the Court to hear the parties which would mean both the parties and 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 intent of mutuality and consent for divorce, as mutual consent to the divorce is a *sine qua non* for passing a decree for divorce under Section 13-B and the mutual consent should continue till the divorce decree is passed. Paragraphs 13 and 14 read thus:-

“13. 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 party to the joint motion under sub-section (2). There is nothing in the Section which prevents such

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1 (1991)2 SCC 25

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-section (2) of Section 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 bonafides 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.

14. 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 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 Section 13-B. 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". [See (i) Halsbury Laws of England, Fourth Edition Vol. 13 para 645; (ii) Rayden on Divorce, 12th Ed. Vol. 1 p. 291 and (iii) Beales v. Beales, [ 1972] 2 All E.R. 667 at 674]."

5. In *Hitesh Bhatnagar vs. Deepa Bhatnagar*<sup>1</sup>, the Supreme Court has held that the most important requirement for a grant of a divorce by mutual consent is free consent of both the parties and 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. The law as laid down in paragraph 14 of the decision read thus:-

"The language employed in Section 13B(2) of the Act is clear.

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1 (2011)5 SCC 234

The Court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met:

- a. A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub- section (1) and not later than 18 months;
- b. After hearing the parties and making such inquiry as it thinks fit, the Court is satisfied that the averments in the petition are true; and c. The petition is not withdrawn by either party at any time before passing the decree;

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.”

6. The Division Bench of this Court in **Bharti Bhausaheb Aher vs. Bhausaheb Kautik Aher**<sup>1</sup>, considering the challenge to an order of the Family Court where the Family Court pronounced a decree of divorce merely on the consent terms, without a petition being filed by the parties in compliance of Section 13B of the Hindu Marriage Act, in the absence of a petition under Section 13B of the Hindu Marriage Act and in the absence of compliance of the mandatory stipulations of the said provision and only accepting the version of the respondent-husband on an affidavit that the parties had decided and had agreed to dissolve their marriage by mutual consent in terms of the consent terms between the parties, it was held that the approach of the family Court was illegal and in violation of Section 13B of the Hindu Marriage Act. It was held that mere allowing husband's application to convert the marriage petition in a petition by mutual consent under Section 13B is not sufficient as it is necessary that requirements prescribed by Section 13B are present in

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1 2017(3) Mh.L.J. 264

the averments/statements in the petition. The Division Bench in paragraphs 18, 19 and 23 has held as under:-

“18. A plain reading of section 13B 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 13B of the Act. Further subsection (2) of section 13B 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 13B of the Act. Subsection (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 13B of the Act and secondly without making any inquiry as subsection (2) of section 13B 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.

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23. In considering a petition for divorce by mutual consent under section 13B 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 13B read with section 23 (1) (bb) of the Act. Only after such a procedure is followed there would be complete compliance of section 13B and section 23 (i) (bb) of the Act.”

7. Thus, the consent of the parties for a petition under Section 13B of the Act to succeed, ought to be a consent till a decree of divorce is passed. In the event the parties are not heard before an order under Section 13B could be passed, for the Court to be satisfied that the consent continued, in my opinion, this would be fatal and the Court cannot pass decree of divorce by mutual consent. These requirements are not satisfied when the learned trial Court proceeded to pass an order granting a decree of divorce. Once the entire foundation to the very order passed under Section 13B of the Act was illegal and not in compliance of Section 13B of the Act, it is difficult to conceive as to how further proceeding even the application as moved by the petitioner for setting aside the decree could not be allowed.

8. In view of the above observations, the Court cannot overlook that the decree of divorce dated 20<sup>th</sup> February 2013 passed by the learned trial Judge in Marriage Petition No.130 of 2012 cannot be sustained and it would be required to be quashed and set aside. Accordingly, the judgment and order dated 20<sup>th</sup> February 2013 passed by the learned trial Judge allowing Section 13B petition is quashed and set aside. Consequently, the impugned order dated 19<sup>th</sup> August 2016 passed by the learned trial Judge cannot be sustained. It is, accordingly, quashed and set aside.

9. Resultantly Marriage Petition No.130 of 2012 would be required to be re-considered afresh by the learned trial Judge. The same be considered and decided within a period of two months from today. Ordered accordingly. All contentions of the parties on merits of the matter are expressly kept open.

10. The Petition is disposed of in the above terms. No costs.

**[G.S. KULKARNI, J.]**