

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12862 OF 2017

Vishal Nitinkumar Kondhia)
PO Box No.17354)
10E, Main Street , Alain,)
Abu Dhabi, United Arab Emirates.).. Petitioner

Vs.

Jahnvi Vishal Kondhia)
residing at 604/A)
Hulas Basti Gardens, Mahavir Nagar,)
Kandivali (W), Mumbai-400067.)...Respondents

AND

WRIT PETITION NO.12863 OF 2017

Vishal Nitinkumar Kondhia)
PO Box No.17354)
10E, Main Street , Alain,)
Abu Dhabi, United Arab Emirates.).. Petitioner

Vs.

Jahnvi Vishal Kondhia)
residing at 604/A)
Hulas Basti Gardens, Mahavir Nagar,)
Kandivali (W), Mumbai-400067.)...Respondents

Dr.Birendra Saraf with Mr.Rohan Kadam i/b. Mr.Prabhakar M.Jadhav, for
the Petitioner.

Mr.Vikram Deshmukh with Ms.Shrenai Shetty, for the Respdent.

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CORAM : G. S. KULKARNI, J.

RESERVED ON : 18 January 2018

PRONOUNCED ON : 22 January 2018

JUDGMENT:-

1. Rule on both these petitions returnable forthwith. By consent of the parties and at their request the petitions are taken up for final hearing.

2. The petitions arise between the same parties arising from the same proceedings before the family court at Mumbai, as also the issues are quite interconnected. The petitions were accordingly heard together and are being disposed of by this common judgment. Both the petitions are filed by the petitioner-husband and the common respondent is the wife.

3. The issue which arises for consideration in the first petition is as to whether the petitioner-husband in defending matrimonial proceedings instituted by the respondent- wife before the family court at Mumbai, can be permitted to raise a defense by amending written statement, on the basis of a divorce decree obtained by him from the Dubai Court and whether the Family Court was justified in rejecting such amendment to the written statement. In the second petition the issue which falls for consideration is whether it was permissible for the

petitioner to withdraw his consent to seek divorce by mutual consent as contained in a written pursis filed before the Family Court. The petitioner's application to withdraw the consent has been rejected by the Family Court.

WRIT PETITION No.12862 of 2017

4. This writ petition challenges the order dated 5 October 2017 passed by the learned Principal Judge, Family Court, Mumbai, whereby the application filed by the petitioner for amendment of the written statement under Order 6 Rule 17 of the Code of Civil Procedure to raise a plea and a defense on the basis of a divorce decree obtained by him from the Dubai Court has been rejected.

5. The petitioner in his application seeking amendment of the written statement had contended that the limited purpose to seek amendment of the written statement was to incorporate the facts relating to grant of a divorce decree by '*Dubai Court at First Instance*' dissolving the marriage between the petitioner and the respondent, being a decree dated 29 August 2013. The petitioner contended that by virtue of the decree of the Dubai Court, the rights between the parties were finally adjudicated by the Dubai Court which was a court of competent jurisdiction. It was petitioner's case that in view of said conclusive judgment of the foreign court, the Family Court at Bombay, would not have jurisdiction to

entertain the respondent's petition (M.J. Petition No.A-1927 of 2013) which interalia prayed for a decree of dissolution of marriage, permanent alimony, maintenance etc. The petitioner contends that the supporting facts were thus required to be incorporated in the written statement by the proposed amendment. In paragraph 4 of the amendment application, the petitioner contended that the applicant is layman, he was not aware of the applicable legal position and was not suitably advised that the respondent's petition was not maintainable and that it was liable to be dismissed on the ground of the petitioner possessing a decree of divorce passed by the Dubai Court. The amendment application was thus moved. The delay in making such application was bonafide. The petitioner also contended that the proposed amendments will not alter the character and frame of the proceedings as also the nature of the written statement. It was contended that the amendment was necessary for determining the real controversy that would arise in the proceedings and would avoid multiplicity of litigation.

6. The family Court in dismissing the said application of the petitioner observed that the written statement was filed by the petitioner on 23 July 2014. It was observed that the proceedings before the Dubai Court ended in an exparte decree of divorce dated 29 August 2013, the petitioner was well aware of this decree when he filed the written

statement and could have added this fact in the written statement. It was also observed that it was not a case that the petitioner filed the written statement at his first appearance and had ample chance to include all the facts as the petitioner had appeared in the proceedings on 18 November 2013 and the petition had in-fact proceeded without written statement. Thereafter, the respondent had sought permission to file written statement which came to be filed on 23 July 2014. It was observed that there was sufficient time to draft and file a proper written statement and thus the proposed amendment which is not on subsequent events, cannot be allowed.

7. Learned Counsel for the petitioner in assailing the impugned order has made the following submissions:-

(I) The proposed amendments were necessary so as to incorporate a substantive defence of the petitioner to challenge the jurisdiction of the Family Court at Bombay, in view of the marriage between the petitioner and respondent being already annulled under a decree of Dubai Court on 29 August 2013.

(II) It is submitted that the facts supporting the above contention were being placed on record by the proposed amendment which pertains to the very jurisdiction of the Court to entertain the respondent's matrimonial petition, being an issue of jurisdiction the amendment was

required to be allowed.

(III) In paragraph 1H of the proposed amendment the petitioner had submitted that the decree dated 29 August 2013 passed by the Dubai Court is final, conclusive and binding and that the respondent's petition was barred by *res judicata* and was not maintainable. The Court lacking jurisdiction to entertain the petition, *res judicata* were all issues of law. The family Court could not have overlooked this aspect nor any opposition to raise such a claim as being made by the petitioner in the amendment application could have been entertained.

(IV) It is not a case that there was no foundation to such an application, as in the previous application, filed on behalf of the petitioner under Section 9A of the Code of Civil Procedure, raising a preliminary issue as to the maintainability of the petition on the ground of the decree passed by the Dubai Court, {Application No.A-1927 of 2013 (below Ex.41)}, the petitioner had raised these contentions and had applied before the family Court to frame a preliminary issue on maintainability of the respondent's divorce petition. The family Court in rejecting the said application had observed that as the objection was not raised by the petitioner at a preliminary stage the issue of maintainability of petition cannot be decided at a later stage. Liberty was granted to the petitioner to prove that the judgment was not an ex-parte judgment at the adjudication of the main proceedings. It is submitted that this aspect has been clearly

overlooked by the Family Court in passing the impugned order.

(V) The amendment was simplicitor formulation of the plea which was already incorporated in the written statement in its last part namely the 'counter claim'.

In support of the above submissions, learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case "*Haridas Das Vs. Usha Rani Bank (Smt)and Ors.*¹"; "*Foreshore Cooperative Housing Society Ltd. Vs. Praveen D.Desai (Dead) through Legal Representatives & Ors.*"²

8. On the other hand the learned Counsel for the respondent in supporting the impugned order would make the following submissions:-

(I) It was not permissible for the petitioner to move an application for amendment of the written statement at such a belated stage when the trial has already commenced and when the petitioner had clear knowledge of the said facts as sought to be incorporated by the amendment. Proviso to Order 6 Rule 17 of the C.P.C stipulates that no application for amendment be allowed after the trial has commenced and the petitioner had failed to satisfy on any reasonable basis as to why the petitioner had not raised such a plea before the commencement of the

1 (2006)4 SCC 78

2 (2015)6 SCC 412

trial.

(II) The amendment application of the petitioner was mischievous as the petitioner is well aware that the decree of Dubai Court is admittedly an ex-parte decree and not binding on the respondent as also is a nullity incapable of enforcement in India. It is submitted that the sole object of raising such a defense is not with an intention to remain in matrimony but to delay and defeat the claim of the respondent for maintenance, alimony and permanent residence as made in prayer clauses (b) and (c) of the petition.

(III) It is submitted that there is an absolute lack of due diligence on the part of the petitioner firstly when sufficient time was in hand in initially making out such a case in the written statement which itself was filed belatedly on 23 July 2014, and the present amendment application was made after three years of filing of the written statement. The Court therefore appropriately applying the stricter scrutiny as falling under the proviso to Order 6 Rule 17 of the CPC has rejected the application.

(IV) It is submitted that in any event considering the law laid down in the unreported judgment of the Division Bench of this Court in *“Shilpa Sachdev Vs. Anand Sachdev”*³, no defence on the basis the decree of Dubai Court could have been raised inasmuch as the Dubai Court has no jurisdiction to entertain the petition under the provisions of Hindu

3 Family Court Appeal No. 56 Of 2016 decided on 11/8/2017

Marriage Act and the Dubai Court was not a competent Court to decide the matrimonial dispute between the parties.

In support of the above submissions on the applicability of the provisions of Order 6 Rule 17 in the fact situation learned Counsel for the respondent has also placed reliance on the decisions of the Supreme Court in the case “*Ajendraprasadji N.Pandey & Anr. Vs. Swami Keshavprakashdasji N. and Ors.*”⁴; *J.Samuel & Ors. Vs. Gattu Mahesh & Ors.*”⁵

REASONS AND CONCLUSION

9. I have heard the learned Counsel for the parties. Some facts need to be noted. It is not in dispute that parties are Hindu by religion and are governed by the provisions of the Hindu Marriage Act, alibet the marriage is stated to have been solemnized and registered under the provisions of Special Marriage Act on 20 May 1999 at Bombay. There are two children born from the wedlock, daughter Yashasvi who was born on 26 March 2000 and is presently 17 years and 10 months and son Lakshya who was born on 22 July 2003 who is at present about 14 years of age. Disputes had arisen between the parties at Dubai, consequently the respondent ceased to cohabit with the petitioner from 15 October 2012 and returned to Mumbai. The respondent in the matrimonial petition has stated that the petitioner is a partner in his family business which is an affluent and well known family in UAE. The family businesses also include jewellery shops. There are various properties at different places in India as set out in paragraph 7 of her petition. The respondent at some

4 (2006)12 SCC 1

5 (2012)2 SCC 300

point of time was working in Dubai in an insurance company. She was compelled to leave her matrimonial house on 15 October 2012 and came back to her parent's house at Mumbai on account of mental and physical pain and agony caused to her due to extreme humiliation, distress as caused by the petitioner. She was constrained to file the matrimonial petition in question before the Family Court at Mumbai, on 11 June 2013 interalia seeking a decree of dissolution of marriage under Section 27(1) (d) and under Sections 36 and 37 of the Special Marriage Act, as also has made a claim of an amount of Rs.5 crores towards her claim for permanent maintenance and alimony and for a direction that the petitioner to transfer the residence located at J-126, Gujarati Society, Nehru Road, Vile Parle (East), Mumbai in her name so as to provide her with a permanent residence or direct the petitioner to alternatively provide her an accommodation admeasuring 1200 sq.ft. in and around Vile Parle, Mumbai. It is also the respondent's contention before the Family Court that when the respondent was away from Dubai, the petitioner filed the proceedings on 4 November 2012 before the Dubai Court praying for dissolution of the marriage and an ex-parte decree for divorce was granted on 29 August 2013.

10. On the other hand according to the petitioner the decree was granted validly inasmuch as Dubai Court was the court of competent jurisdiction in pronouncing the said decree, after due publication of notices to the respondent, in the local newspapers. The petitioner has appeared in the respondent's petition before the family Court at Bombay and initially filed written statement on 23 July 2014. In the written statement after dealing with the contentions and the grounds as raised by the respondent in the matrimonial petition, the petitioner has raised a '*counterclaim*' to contend that the respondent's petition had become

infructuous in view of the decree of divorce dated 29 August 2013 being granted by Dubai Court under the Hindu Marriage Act. The petitioner contended that in view of the divorce decree as granted by Dubai Court, apart from the marriage being annulled, the custody of the children was also granted to the petitioner by the said competent Court. Thereafter, the petitioner had also moved an application under Section 9A of the CPC on 20 February 2017 praying that the Family Court frame a preliminary issue as to the maintainability of the respondent's divorce petition under Section 9A of the CPC and prayed that the petition be disposed of as not maintainable. This application of the petitioner however came to be rejected by the family Court inter alia on two fold considerations, firstly in view of both the parties filing a joint pursis below 'Exhibit 28' wherein the parties agreed to take divorce by consent, and secondly the petitioner having submitted himself to the jurisdiction of this Court, by filing an application under section 9A of the CPC, was trying to delay the proceedings pending since 2013. As also that the Section 9A application was filed after a long delay and as the objection was not raised at a preliminary stage, the issue of maintainability cannot be decided at a later stage of the proceedings. It was observed that the respondent would be at liberty to prove that the judgment of the Dubai Court is not an ex-parte judgment. It would be appropriate to note the observations of the Family Court in paragraphs 8 and 9 of the said order of the Family Court which read thus:

“8. It is important to note that during pendency the parties agreed for mutual consent divorce and a joint pursis was filed by them vide Exh.28. Exh.28 reads, “Both parties have agreed to take divorce by consent. The question of maintenance be decided by this Hon'ble Court. Till date the children have been maintained by the respondent. The respondent undertakes not to part with or dispose of the properties standing in joint names or single names.

9. The respondent submitted to the jurisdiction of this Court.

By filing this application he is trying to delay the proceedings which is pending since 2013. Bare perusal of the divorce decree of Dubai Court shows that it was an ex-parte decree. The instant application is filed after a long delay. The objection is not raised at the preliminary level and therefore the maintainability of this petition at this stage cannot be decided. The respondent is at liberty to prove that the judgment was not an ex-parte judgment.”

11. It is thus quite clear that though there were no averments in the written statement on the basis of the divorce decree of Dubai Court in the written statement, however the Family Court by the above order had granted liberty to the petitioner to prove that the judgment of the Dubai Court was not an ex-parte judgment. This order was accepted by the respondent, as it was not challenged. The plain consequence falling from the said order is that a window was kept open for the petitioner, on a plea to be urged, on the Dubai decree. Thus there was already a foundation available to the petitioner to defend the proceedings on the Dubai decree.

12. When the Family court had made it permissible for the petitioner to raise such a plea, the sequel would be that if such averments had remained to be incorporated in the written statement they ought to be permitted. Thus what was sought by the petitioner's application for amendment to the written statement was to provide supportive facts and/or the formulation of the said defense as available to him under the decree of Dubai Court. It is thus not a new case which in manner would cause any injustice or would result in causing a grave and irretrievable prejudice to the respondent so as to displace the respondent completely.

13. The principal objection of the respondent is to paragraph 1H of the schedule of amendments sought to be incorporated in the written statement, which reads thus:-

“1H. In these circumstances, the marriage between the Petitioner and the Respondent has already been dissolved by the Dubai Court after a proper adjudication on merits. The Judgment and Decree dated 29th August 2013 passed by the said Court is final, conclusive and binding as against the Petitioner. The Court of Dubai was competent to issue a divorce since both parties resided there. It is respectfully submitted that the rules of private international law and principles of comity require that this Hon'ble Court respect and enforce the decree passed by the Court of Dubai. The same is a conclusive and binding judgment. The Respondent thus respectfully submits that the present Petition is thus barred by res judicata and is not maintainable and this Hon'ble Court lacks jurisdiction to entertain, try and dispose of the same. A copy of the Dubai Court of First Instance's Judgment and Order dated 29th April 2013 is annexed hereto at Exhibit “B”.”

(emphasis supplied)

14. The contention of the respondent in opposing incorporation of the above averments is that a plea of *res judicata* and non maintainability of the respondent's petition on the ground of Dubai Court having pronounced decree of divorce cannot be accepted at a belated stage. It is next contended that the plea of *res judicata* cannot be applied when the Dubai Court was not a competent Court to exercise jurisdiction when the parties are Hindu and under the Hindu Marriage Act as also the decree passed by Dubai Court was an ex-parte decree. Thus when the decree for all these reasons is questionable and or illegal when tested on Indian law, any plea taken on such illegal decree itself is of no consequence. This contention is principally based on the decision of the Division Bench of this Court in ***Shilpa Sachdev Vs. Anand Sachdev*** (supra). In my opinion, for the respondent to make such a plea before this Court and call upon this Court to record any finding on the larger issues in regard to the decree of Dubai Court being invalid and/or of no consequence, may not be an appropriate course of action. This for the reason it is not a case that the respondent is precluded from urging all these pleas before the family court, as also on the basis of the said

decision of the Division Bench of this Court and contest all the pleas of the petitioner, being urged relying on the decree of divorce granted by the Dubai Court.

15. The contention as urged on behalf of the respondent that the conduct of the petitioner in not initially raising such a plea in the written statement and at a belated stage after three years by filing of the written statement raising such plea when the petitioner was fully conscious and aware that the Dubai Court had granted a decree of divorce, itself would defeat the amendment application of the petitioner. This submission also cannot be accepted considering the nature of the proceedings before the family Court and the provisions of the Family Courts Act, in my opinion the rigorous and strict technicalities of law and the procedure cannot be strictly applied to the proceedings before the family Court. In any case technicalities should not defeat the cause of justice. The Family Court can device and lay down its own procedure to ascertain the issues before it and the application of the principles under the general law are subject to the provisions of the Family Courts Act as Section 10 of the Act would provide. Thus some allowance would be required to be made and discretion in that regard would be required to be judiciously applied, considering the facts and circumstances of the case. In the present facts, the respondent being based in Dubai and depending upon the legal advice available in Bombay, though has belatedly moved an application for amendment of written statement, the same was required to be allowed in view of the existing foundation that such plea was already raised by the petitioner in the application filed by him under Section 9A of the CPC as also by an order passed on the said application, a liberty was reserved to the petitioner to prove that the judgment of Dubai Court was not an ex-parte judgment. The consequence is that the plea under the decree of

Dubai Court was available to the petitioner to defend the respondents petition.

16. The contention as urged on behalf of the respondent referring to the proviso to Order 6 Rule 17 is that when an amendment application being made at a belated stage, a stricter scrutiny is called for, and unless the test of due diligence is satisfied amendment of the pleadings cannot be applied. There can be dispute on this requirement of law. To apply this test the question would be what is the nature of the plea being urged and is it such a plea which is a totally new plea changing the entire character and the nature of the defense which would cause an injustice to the defending party. Certainly the nature of the plea as raised by the petitioner is not such and more particularly considering the averments as being urged in paragraph 1H of the proposed amendment as being objected by the respondent. In my opinion the proposed amendment was necessary to bring to the fore the real question in controversy. The refusal to permit such amendment would create unwarranted complications on legal issues. It would always be appropriate that there are no loose ends left in deciding the rights of the parties and that the adjudication by the Family Court becomes effective on all issues. The complexion of the issue as raised on behalf of the petitioner was not such that the same could be glossed over by the Family Court and the Family Court could proceed to decide the matrimonial dispute discarding the said issue which is a issue both on law and facts. However it is now well settled that a prayer for amendment of a plaint and a prayer for amendment of a written statement stand on different footings. In case of amendment of a written statement the courts would be more liberal in allowing the application than that of a plaint as the question of prejudice would be far less than in the the latter. Technicality of law should not be permitted to hamper the

courts in administration of justice between the parties (**See Usha Balasheb Swami Versus Kiran Appaso Swami**⁶).

17. To support the contention that the amendment is raised on an issue of law qua the jurisdiction of the Family Court, learned Counsel for the petitioner would be correct in placing reliance on the decision of the Supreme Court in *Foreshore Cooperative Housing Society Ltd. Vs. Praveen D.Desai (Dead) through Legal Representatives & Ors.* Referring to the Constitution Bench judgment in “*Pandurang Dhondi Chougule V. Maruti Hari Jadhav*”⁷ the Court held that the plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. The Supreme Court in paragraph 49 held thus:-

“49. A Constitution Bench of five Judges of this Court in the case of Pandurang Dhondi Chougule vs. Maruti Hari Jadhav, 1966 SC 153, while dealing with the question of jurisdiction, observed that a plea of limitation or plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceeding. The Bench held: (AIR p.155, para 10)

"10. The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however, gross they may, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As clauses (a), (b) and (e) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising

6 (2007) 5 SCC 602)

7 AIR 1966 SC 153

them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115."

18. In view of the above clear position in law, it would be difficult to accept the contention as urged on behalf of the respondent that this Court considering the decision in *Shilpa Sachdev Vs. Anand Sachdev* (supra) ought to record a finding in this proceedings that the decree of divorce granted by Dubai Court itself is nullity as Dubai Court is not a court of competent jurisdiction applying the test as referred, following the decision of the Supreme Court in the case "*Y.Narashimha Rao & Ors. Vs. Y.Venkata Lakshmi & Anr.*"⁸. It would be premature to raise this contention before this court. This for the reason that at the first instance it would be appropriate for the family Court to consider such contentions of the respondent on facts and law and come to a considered conclusion in regard to the rival pleas as being made by the parties. I am also not persuaded to accept the submission as made on behalf of the respondent relying on the decision in *Ajendraprasadji N.Pandey & Anr. Vs. Swami Keshavprakashdasji N. and Ors.* (supra), wherein the Supreme Court considering the issue falling under an amendment application as made under Order 6 Rule 17 of the CPC in a civil suit, applying the proviso to Order 6 Rule 17 of the CPC, held that no application for amendment shall be allowed after the trial has commenced unless inspite of due diligence the matter could not be raised before the commencement of the trial. The Supreme Court considering the facts of the case in hand held that the appellant in the said case was lacking bonafides as also the amendment

8 (1991)3 SCC 451

had sought to introduce a totally new and inconsistent case and thus had refused to permit amendment at a belated stage when deposition of three witnesses was already over as well as documentary evidence was already tendered. This is not the situation in the present case. This decision was also not in the context of a dispute before the family Court. The decision in *J.Samuel & Ors. Vs. Gattu Mahesh & Ors.* (supra) would also not assist the respondent inasmuch as the observations in regard to due diligence as made in paragraph 19 of the decision, cannot be made applicable in the present case, as the petitioner prior to moving the amendment application, had raised such a plea in the Section 9A application and the Family Court as noted above, had reserved a liberty to the petitioner in the order dated 5 May 2017.

19. As a corollary to the above discussion it needs to be observed with certitude that the issue as raised by the petitioner in the amendment application was in regard to the jurisdiction of the Family Court when issues of *res judicata* and conclusiveness of the decree of the Dubai Court are being asserted. This is an issue of law. In any case the plea as being urged in the amendment to the written statement is a plea of jurisdiction which can be permitted to be raised at any stage of the proceedings .

20. In the light of the above discussion, the impugned order dated 5 October 2017 passed by the Family Court rejecting the petitioner's application for amendment of the written statement, cannot be sustained and is required to be quashed and set aside. The application of the petitioner seeking amendment of the written statement (below Exhibit 46) stands allowed. However, there are some lapses on the part of the petitioner in not being prompt in moving such an application, the application cannot be allowed unconditionally. The same is thus allowed

on the condition of the petitioner making payment of cost of Rs.50,000/- to the respondent to be paid within a period of two weeks from today.

21. Needless to observe that all contentions of the respondent on facts and law in regard to the legality and validity of the decree of divorce dated 29 August 2013 of the Dubai Court and to defend all the issues as being urged by the petitioner on the said basis are expressly kept open to be urged before the family Court.

22. The petition is allowed in the aforesaid terms. No costs.

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23. This petition challenges the order dated 5 October 2017 passed by the learned Principal Judge, Family Court, Mumbai, whereby the application filed by the petitioner for withdrawing a joint pursis filed by the petitioner alongwith the respondent on 25 June 2015, stands rejected.

24. On the initial background as noted in the above judgment, it so happened that the petitioner and the respondent had earlier placed on record of the Family Court a joint pursis, which reads as under:-

“ In the Family Court at Mumbai
Pet No.A 19279 of 2013

Janhvi Kondia ...Petitioner

vs.

Vishal Kondia ...Respondent

May it please your Honour.

Both parties have agreed to take divorce by consent. ~~(Decree for Divorce has been passed by the UAE Court)~~

The questions of maintenance be decided by the Hon'ble Court, alimony and access to the children. Till date the children have been maintained by the Respondent. The Respondent undertake not to part with or dispose of the properties standing in joint names or single names.

Dated this 25th June 2015.

Some contents of the first paragraph of the said pursis were scored off as indicated above. It is thought appropriate to refer to the said joint pursis as it stood, also indicating the scored off sentence in the first paragraph.

25. It has so transpired that after the petitioner's application under Section 9A of the CPC was rejected by the Family Court by an order dated 5 May 2017 by the Family Court, the petitioner moved an application below Exhibit 45 dated 20 January 2017 praying that the petitioner be allowed to withdraw the joint pursis dated 25 June 2015. In this application, the petitioner interalia contended that the said joint pursis dated 25 June 2015 was filed by the petitioner alongwith the petitioner, for divorce by mutual consent, on an erroneous legal advice given to him by his former lawyer. The petitioner stated that he was not made to understand the full implications of signing of the said pursis and the petitioner had signed the same without complete and clear knowledge of its legal implications. The petitioner stated that therefore, his consent was obtained under lack of complete information and having not been made aware of the consequences, and therefore he desired to withdraw the said pursis.

26. This application of the petitioner was opposed by the respondent interalia stating that the petitioner was well educated and a

wise businessman and that the pursis was signed by the petitioner and the respondent as both wanted divorce. The respondent's petition was for divorce as also the petitioner's case is that divorce was granted by the Dubai Court. The respondent contended that the divorce petition before the Dubai Court was decreed ex-parte and the decree was not binding on her.

27. The family Court by the impugned order held that it was the petitioner's contention that Dubai Court had decreed the petitioner's divorce petition ex-parte. It was observed that the petitioner had filed application in question on 11 July 2017 and the decree of divorce was dated 29 August 2013, the petitioner was well aware of this petition before Dubai Court, as also he knew about the ex-parte decree of divorce. Being a well educated and a wise businessman the wording of the pursis were not very difficult for the petitioner to understand, the petitioner cannot put a blame on the lawyers. The petitioner's application for these reasons was rejected. It would be relevant to note the relevant observations in the impugned order:-

“4. In this short application the respondent states that he acted on the erroneous legal advice from his former lawyer. The respondent had filed a divorce petition before Dubai Court which according to the petitioner is decreed ex-parte and therefore, not binding upon her. Petitioner filed the instant petition on 11.7.2017 and the decree of Dubai Court is dated 29.8.2013. Before appearing in this Court the respondent was well aware of his petition before Dubai Court. He also knew about the ex-parte decree of divorce. The wordings of the pursis are very simple. For the well educated worldly wise businessman, the wordings of pursis are not very difficult too understand. The respondent now cannot revert by putting the blame on another lawyer.

Hence, the ordere:-

:O R D E R:

1. Application Exh.45 is rejected.
2. No order of costs.”

28. Learned Counsel for the petitioner in assailing the impugned

order would contend that the Family Court has completely overlooked the legal position in rejecting the petitioner's application for withdrawal of the consent as contained in the pursis. It is submitted that a simplicitor consent of either of the parties as contained in the pursis, was of no consequence in the matrimonial proceedings. It is submitted that the impression of the family Court that the consent pursis is sacrosanct and would bind the petitioner for a divorce decree by mutual consent to be passed by the Court under Section 28 of the Special Marriage Act, 1954 or 13-B of the Hindu Marriage Act, would not stand the scrutiny of law when tested on the anvil of the said statutory provisions.

29. Learned Counsel for the petitioner submits that Section 28 of the Special Marriage Act and Section 13-B of the Hindu Marriage Act, which provide for divorce by mutual consent interalia stipulate requirement of a joint petition and only on satisfaction of the requirements specified by Section 34 of the Special Marriage Act and Section 23 of the Hindu Marriage Act in regard to free consent of the parties, the Court would proceed to pronounce a decree. It is submitted that a plain reading of the pursis itself clearly indicate that except for the consent for divorce, the prayers in regard to the maintenance, alimony and access to the children were kept at large to be adjudicated in the pending proceedings. It is thus submitted that merely the petitioner agreeing for a divorce in the following words as contained in the pursis that *“both parties have agreed to take divorce by consent”* itself is was of no consequence, unless the petitioner was to take further steps which would comply the requirement of law to act upon such consent. However, the petitioner had not acted upon the said consent and had decided to contest the proceedings. The petitioner therefore, could not have been precluded from withdrawing such consent, as recorded in the joint pursis. It is

submitted that in any event the petitioner even if had agreed, to take divorce by consent as recorded in the said pursis, under no provision of law the Court can proceed to pass an order granting decree of divorce on the pursis merely recording such consent of the petitioner. In support of this submission, learned Counsel for the petitioner has placed reliance on the following decisions: “*Smt.Sureshta Devi Vs.Om Prakash*”⁹; “*Hitesh Bhatnagar Vs. Deepa Bhatnagar*”¹⁰; and “*Bharti Bhausaheb Aher Vs. Bhausaheb Kautik Aher*”¹¹.

30. On the other hand, learned Counsel for the respondent would submit that the entire basis for withdrawal of the consent in the joint pursis is on the sole ground that a decree for divorce was passed by Dubai Court which itself was invalid and illegal having passed ex-parte. It is submitted that the whole intention of the petitioner is to avoid payment of alimony and maintenance and to avoid providing permanent residence to the respondent at Mumbai. It is submitted that the conduct of the petitioner itself is completely inconsistent and contradictory, as on one hand the petitioner contends that there is a divorce between the parties by virtue of decree of divorce of the Dubai Court and on the other hand the petitioner intends to withdraw the consent as made by him of his free will in the joint pursis. According to the learned Counsel for the respondent, the consequence of the joint pursis is that the scope of adjudication in the matrimonial proceedings would be confined only to the issue of alimony, maintenance and the right of the respondent to have permanent residence at Mumbai. However, now to deprive the petitioner from all the legitimate entitlements, the petitioner now dubiously intends to contest the grant of a divorce decree by the Family Court at Bombay. This is a stand

9 (1991)2 SCC 25

10 (2011)5 SCC 234

11 2017(3) Mh.L.J. 264

completely divergent and obverse from the conduct of the petitioner supporting the decree of divorce granted by Dubai Court. It is submitted that none of the decisions as relied on behalf of the petitioner are applicable inasmuch as in all these decision, the parties wanted to stay in matrimony. However, this a case where both the parties intend a divorce. Learned Counsel for the respondent has justified the impugned order to contend that the family Court has rightly rejected the petitioner's application for withdrawal of the consent for a consent divorce decree.

31. I have heard the learned Counsel for the parties. The issue which has arisen for consideration is a short but interesting issue. The question is as to what is the legal sanctity of the petitioner recording his willingness for the following statement made in the joint pursis :-

“Both parties have agreed to take divorce by consent”

As noted above, if the parties were to abide by the aforesaid statement then the scope of adjudication of the matrimonial petition would be confined only on the question of maintenance, alimony and access to the children and it could have been presumed that the parties would take further steps to obtain a divorce by mutual consent. It is not in dispute that the parties profess Hindu religion. However, the parties got married under the provisions of Special Marriage Act on 20 May 1999. In this context the respondent has made the following prayer for a decree of divorce:-

“a) This Hon'ble Court be pleased to dissolve the marriage between the Petitioner and the Respondent solemnized on 20th May 1999 by a decree of divorce under section 27(1)(d) and Section 36 and 37 of the Special Marriage Act,1954;”

Section 28 of the Special Marriage Act,1954 provides for divorce by mutual consent. Section 28 of the Special Marriage Act reads thus:-

“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.”

(emphasis supplied)

Section 34 of the Special Marriage Act provides for the duty of the Court in passing decrees, and reads thus:-

34. Duty of court in passing decrees.—

(1) In any proceeding under Chapter V or Chapter VI, whether defended or not, if the court is satisfied that,—

(a) any of the grounds for granting relief exists; and

(b) [where the petition is founded on the ground specified in clause (a) of sub-section (1) of section 27, the petitioner has not in any manner been accessory to or connived at or condoned the act of sexual intercourse referred to therein], or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

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

(d) the petition is not presented or prosecuted in collusion with the respondent; and

(e) there has not been any unnecessary or improper delay in instituting the proceedings; and

(f) there is no other legal ground why the relief should not be granted; then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

[Provided that nothing contained in this sub-section shall

apply to any proceeding wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause (f), clause (g) and clause (h) of sub-section (1) of section 27.]

[(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.]”

(emphasis supplied)

32. Similar are the provisions of section 13 B and Section 23 of the Hindu Marriage Act. A conjoint reading of Section 28 and Section 34 of the Special Marriage Act, shows that the parties can pray for a decree of divorce by mutual consent on a joint petition to be presented by both the parties inter alia satisfying the requirement of sub section (1) of Section 28 namely specifying the ground that the parties have been living separately for a period of one year or more and they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Thus, there is a necessity of a joint petition to be filed by the parties before the Court. Once such a petition is presented then the provisions of sub-section 2 stipulates that on a *‘motion of both the parties’* made not earlier than six months after the date of presentation of petition as presented under 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 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. Section 34(1)(c) provides that when divorce is sought by mutual consent, such consent has not been obtained by force, fraud or undue influence. Further Section 34(1)(f) also requires the Court to consider that there is no other legal ground why the relief should not be granted. These are the considerations to be borne in mind before a decree of divorce is granted. The contents of Section 28 of the Special Marriage Act are *pari materia* to the provisions of Section 13B of the Hindu Marriage Act. In ***Smt.Sureshta Devi Vs.Om Prakash*** (*supra*) 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. It would be necessary to note the observations of the Supreme Court as made in paragraphs 13 and 14

which 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 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 shallpass 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].”

33. In *Hitesh Bhatnagar Vs. Deepa Bhatnagar* (supra) 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. 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.”

34. The Division Bench of this Court of which I was a member, in *Bharti Bhausaheb Aher Vs. Bhausaheb Kautik Aher* (supra) 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 its mandatory stipulations, only accepting the version of the respondent-husband therein 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, 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 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 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.

....

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.”

35. Adverting to the above principles of law it cannot be said that there was any legal bar for the petitioner to withdraw his consent as recorded in the pursis when the pursis referred that “***both the parties have agreed to take divorce by consent.***” In any event if at all the parties were to maintain their consent for divorce as stated in the pursis, then the requirement of law was that the parties, would present an appropriate application by complying necessary requirements provided by Section 28 of the Special Marriage Act and seek a decree of divorce by mutual consent. However, before such an application/petition could be presented, the petitioner intended to withdraw his consent by the application on which the impugned order is passed. In my opinion, considering the aforesaid clear position in law there was no legal

impediment for the petitioner to withdraw his consent as recorded in the pursis. The petitioner having withdrawn his consent, the necessary consequence would be that the family Court would be required to proceed and adjudicate the petition on the issue of divorce on all the grounds which are available to the parties. Thus, considering the requirement of law it was not proper and appropriate for the family Court to reject the application of the petitioner to withdraw the joint pursis dated 25 July 2015. The impugned order is manifestly illegal.

36. Apart from the above clear legal position, the Court cannot overlook that the situation in the present case is not akin to the situation as fell for consideration of the Supreme Court and this Court in the above referred decisions in which one of the parties intended to remain in matrimony. This is a peculiar case where the petitioner as noted above has intended to assert that the marriage between the petitioner and respondent stands dissolved by a decree dated 29 August 2013 of the Dubai Court. The contention as urged on behalf of the respondent is that even if the petitioner intended to formally resile or abandon his consent, such resilience cannot be accepted as bonafide or truthful gesture on the part of the petitioner for the reason that the petitioner has continued to contend that the parties are already divorced in view of the decree passed by the Dubai Court and so far as the petitioner continues to assert this position, it will be required to be presumed that there is no other intention of the petitioner but to ultimately have a position that the marriage between the petitioner and the respondent is dissolved. Considering the strange and peculiar stand as taken by the petitioner namely that on one hand the petitioner asserts that the marriage between the petitioner and respondent stands dissolved in view a decree passed by the Dubai Court being a court of competent jurisdiction and on the other hand not to agree

for a decree of divorce before the family Court, certainly are the issues which would require due consideration as pointed out on behalf of the respondent. However, considering the limited scope of this petition, it may not be appropriate in these proceedings for this Court to delve on this issue. It would be open to the parties to urge all contentions on merits of their respective pleas. These contentions are expressly kept open. Needless to observe that the family Court would adjudicate on the matrimonial petition on its own merit and in accordance with law.

37. In view of the above observations, the Writ Petition is allowed in terms of prayer clause (a). No order as to costs.

(G. S. KULKARNI, J.)