

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 26th October, 2018

Date of decision : October, 31st, 2018

MAT APP. 93/2007

TINA GUPTA

..... Appellant

Through Mr. Laltaksh Joshi, Adv.

versus

VISHAL GUPTA

..... Respondent

Through: Mr. S. Mukerjee, Adv. with Mr. Yogendra Kumar, Adv. for LR of respondent.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant i.e. Tina Gupta vide the present appeal under Section 28 of the Hindu Marriage Act, 1955 as amended has assailed the impugned judgment and decree dated 06.10.2007 of the learned Additional District Judge, Delhi in HMA No. 801/06, whereby the marriage between the appellant and the respondent to the said divorce petition HMA No. 801/06 also arrayed as the respondent to the present appeal (since deceased) and who is now represented by his father was dissolved by a decree of divorce through mutual consent, it having been observed by the learned Trial Court that both the petitioners of the said petition i.e. Tina Gupta and Vishal Gupta could not live together as they have reached to a point of no return and their

marriage had broken down irretrievably.

2. The challenge to the said impugned order dated 06.10.2007 seeks the setting aside of the said judgment and decree submitting to the effect that the said decree of divorce is a nullity in the eyes of law and against the canons of acceptability and that divorce cannot be fastened on a litigant unilaterally and arbitrarily in the event of the litigant having not expressed his or her inclination to consent for a mutual consent divorce.

3. Arguments were addressed on behalf of either side by their learned counsel.

4. It is essential to observe that during the pendency of the present matrimonial appeal, the respondent to the HMA No. 801/06 i.e. Vishal Gupta expired and vide order dated 14.05.2008 in the present appeal, it was held by this Court in view of the verdict of the Hon'ble Supreme Court in *Smt. Yallawan Vs. Smt. Shantavva, AIR 1997 SC 35*, that the right to sue survived despite the demise of the spouse i.e. husband of the appellant herein during the pendency of the appeal in as much as the appeal had been filed seeking to setting aside the decree of divorce. The observations of the Hon'ble Supreme Court referred to in the order dated 14.05.2008 of this Court are reproduced hereunder : -

“It must, therefore, be held that after a decree of divorce is obtained by the petitioning husband against his wife she has right to file an appeal and such appeal does not abate on account of the death of the respondent husband whether such death takes place prior to the filing of appeal or pending the appeal. Similarly, if an ex parte decree of divorce is obtained against the wife and

thereafter if the husband dies, the aggrieved wife can maintain an application under Order IX Rule 13 C.P.C., even though the husband might have died prior to the moving of that application or during the pendency of such application. In all such cases other legal heirs of the deceased husband can be brought on record as opponents or respondents in such proceedings by the aggrieved spouse who wants such decree to be set aside and when the other heirs of the deceased husband would naturally be interested in getting such decree confirm either in appeal or under Order IX Rule 13 C.P.C. The second alternative contention as canvassed by the learned counsel for the appellant, therefore stands rejected.”

5. The amended memo of parties was filed whereby Sh. S.P. Gupta and Smt. Kiran Gupta, the parents of the deceased Vishal Gupta were arrayed. During the course of hearing Smt. Kiran Gupta is also reported to have expired. Though it was sought to be urged on behalf of the respondent placing reliance on the observations in para 10 of the verdict in *Yallawwa Vs. Shantavva AIR 1997 SC 35*, which read to the effect : -

“Now remains the question as to whether the proceedings for divorce as restored by the High Court by its impugned order and required to be proceeded further or the curtain must be dropped on the said proceedings. As the ex parte decree is found to be rightly set aside by the High Court, the marriage petition would automatically stand restored on the file of the learned Trial Judge at the stage prior to that at which they stood when the proceedings got intercepted by the ex parte decree. Once that happens it becomes obvious that the original petitioner seeking decree of divorce against the wife being no longer available to pursue the proceedings now, the proceedings will certainly assume the character of a personal cause of

action for the deceased husband and there being no decree culminating into any crystalized rights and obligations of either spouse, the said proceedings would obviously stand abated on the ground that right to sue would not survive for the other heirs of the deceased husband to get any decree of divorce against the wife as the marriage tie has already stood dissolved by the death of the husband. No action, therefore, survives for the court to snap such a non-existing tie, otherwise it would be like trying to slay the slain. At this stage there remains no marriage to be dissolved by any decree of divorce. Consequently, now the ex parte decree is set aside, no useful purpose will be served by directing the Trial Court to proceed with the Hindu marriage petition by restoring it to its file. The Hindu Marriage Petition No. 25 of 1989 moved by Shri Basappa, the husband of the respondent, on the file of the Court of Civil Judge, Gadag will be treated to have abated and shall stand disposed of as infructuous. The appeal is disposed of accordingly. In the facts and circumstances of the case, there will be no order as to costs.”

to contend that the right to sue did not survive against the legal representatives of the deceased respondent in as much as crystallized rights had culminated vide the impugned order dated 06.10.2007 of the learned Trial Court. The observations in para 10 of the impugned verdict relied upon on behalf of the respondent do not help the respondent in any manner for the same relates to the demise of the petitioner thereof who had sought the ex-parte decree of divorce against his wife and the petitioner thereafter after the setting aside of the ex-parte decree having died, no cause of action survived which is not so in the instant case.

6. In the circumstances, it is held that the right to sue survives in

the instant case in favour of the petitioner and against the legal representatives of the deceased respondent and the appeal seeking the setting aside of the impugned judgment dated 06.10.2007 of the learned Trial Court is thus held to be maintainable in the circumstances despite demise of the original respondent.

7. The impugned order itself reflects that the petitioner i.e. the husband Vishal Gupta had filed HMA No. 500/05 on 20.05.2005 under Section 13(1) (ia) of the Hindu Marriage Act, 1955 as amended for dissolution of the marriage against the respondent thereto who was served with the notice of the same and was contesting the same and during the pendency of the case both sides negotiated for a compromise especially on 19.09.2006, 26.10.2006, 08.11.2006, 23.11.2006, 24.11.2006 and 25.11.2006 and on 26.10.2006 the parties to the petition submitted that they had arrived at a settlement and would be parting their ways by filing the petition for divorce by mutual consent. The impugned order also reflects that it had been agreed that the petitioner i.e. the original respondent to the present appeal would be paying Rs.15 lakhs as alimony and that on 25.11.2006 both the sides had submitted that they had compromised all their disputes and had decided to part their ways amicably and would take a divorce by mutual consent and were seeking the grant of a decree of divorce. Thus their statements were recorded and they were identified by their counsel and furthermore both the petitioner and the respondent stated that they had parted amicably and the respondent to those proceedings i.e. the present appellant had also requested for withdrawal of her application under Section 24 of the

Hindu Marriage Act, 1955 as amended.

8. The appellant herein i.e. the petitioner no. 1 in HMA No. 801/06 seeks the setting aside of the impugned order submitting to the effect that the Trial Court erroneously did not take into account the factum that the petitioner herein had withdrawn her consent to the grant of the decree of mutual consent and that she having so refused to participate in the same cannot now be compelled to accept a divorce through mutual consent in as much as the mutuality to the consent does not exist.

9. The Trial Court vide the impugned order dated 06.10.2007 in view of the verdict of this Court in *Anita Sharma and another Vs. Nil 119 (2005) DLT 483* observed to the effect that the period of six months from the date of filing of the petition under Section 13B(1) of the Hindu Marriage Act, 1955 as amended from disposal of the petition HMA No. 800/06 on 25.11.2006, was waived. The Trial Court after waiver of the statutory period of six months from the date of the institution of the petition under Section 13B(1) of the Hindu Marriage Act, 1955 as amended till the date of the institution of the petition under Section 13B(2) of the Hindu Marriage Act, 1955 as amended i.e. the HMA No. 801/06 further held that the appellant herein after due identification of counsel on 04.08.2007 had made a statement in the Court that in case the petitioner no. 2 was willing to pay a sum of Rs.28 lakhs, she was ready for a divorce and that on 01.10.2007 she submitted before the Court that if an amount of Rs.36 lakhs was paid to her she will be willing for a divorce although she had made a statement in the Court on 04.08.2007 that an amount of Rs.28 lakhs be

paid to her and she would be ready for a divorce and it was observed by the Trial Court vide the impugned order that the petitioner no. 2 i.e. the respondent in the proceedings that the petitioner no. 2 had paid Rs.8 lakhs to the petitioner no. 1 at the time of the recording of the statements in the first motion petition on 06.10.2007 and had placed on record four drafts for a total amount of Rs.8 lakhs submitting that the same may be given to the petitioner no. 1. The Trial Court vide the impugned order thus held that there was no force, threat, pressure, coercion and undue influence exercised against the appellant herein and she had taken up a false plea in order to extort more money from the petitioner no. 2. It was also observed by the Trial Court to the effect : -

“It is clear from the record that there is no force, fraud, threat, pressure, coercion or undue influence exercised against petitioner No.1 and she is coming up with a false plea of the same in order to extort more money from petitioner No. 2. In the first motion petition as well in the order sheet dated 26.10.06 of the main case bearing HMA No. 500 of 05, the total amount to be paid by Vishal Gupta to Tina Gupta is stated to be Rs. 15 lacs but in the statement dated 25.11.06 recorded in the first motion petition the amount has been mentioned as Rs. 16 lacs. In the Second Motion Petition amount is again stated to be Rs. 15 lacs while the amount of Rs. 16 lacs is being mentioned verbally and petitioner number 2 has stated that he would be giving the same vide drafts.

These facts indicate that initially an amount of Rs. 15 lacs has been settled between the parties which was to be given by petitioner no.2 to petitioner no.1 but during her statement in the first motion petition she has taken an extra Rs.1 lac. This settlement also appears to have made voluntarily between the parties as petitioner no.2 has

today placed on record Rs. 8 lacs vide four drafts to be given to petitioner no. 1 in terms of settlement arrived between them.

The petitioner number 1 has not shown any thing on the record, whether a complaint against petitioner number 1, and FIR, a letter, or even a complaint against petitioner 2 or her previous counsel to substantiate her averments that she has been defrauded by petitioner number 2 in any manner. She is simply enjoying the benefits of Rs.8 lacs which was given to her in cash at the time of recording of the statement in the first motion petition and-has not returned the same to petitioner number as is clear from the order sheet dated 23.07.2007.

Petitioner number 1 is apparently not telling the truth when she says that she has signed the petitions without reading them as besides her signing the petitions, she has also signed on the affidavits, the application for waiver of the stipulated period as well as the joint statement in the first motion petition. It is pertinent to observe that the joint statement in the first motion petition was recorded before the Court after making all the relevant queries including about force, fraud, threat etc. Petitioner number 1 in fact has also deposed in the joint statement in the first motion petition that the consent has not been obtained by threat, pressure, coercion, force, fraud and undue influence. It is clear that the consent is without any threat, pressure, coercion, force, fraud and undue influence and is voluntary.

The greed of petitioner No. 1 is also very clearly seen from her statement dated 04.08.2007 wherein she has deposed that she is ready for a divorce if petitioner no.2 pays a total of Rs. 28 lacs to her. The greed of petitioner no.1 also is seen to be increased as on 01.10.2007 she has made a statement that she is ready for a divorce if a total amount of Rs. 36 lacs is paid to her.

This is a very specific case in which ingredients of force and fraud seems to be handmaid of petitioner no.1 and not petitioner no. 2. She is attempting to unilaterally

withdraw her consent on the basis of malafide, baseless and unjust averments which indicate her chicanery and duplicity as petitioner no.2 has been reduced to a helpless victim. Petitioner number 1 is already enjoying the benefits by having taken Rs. 8 lac in cash at the time of recording of statement in the first motion petition and. even not cared to return the same to petitioner no.2 which also indicate, her malafide intention.

Infact on 23.03.2007 petitioner no.1 has submitted that she cannot return, Rs. 8 lac which she has taken in the first motion petition. She has also befooled the petitioner number 2 to make a statement in HMA petition number 500 of 2005 under section 13 (1) (ia) HMA for its disposal as compromised and now petitioner, number 2 cannot even continue with that case.

This case is a glaring example of how one spouse i.e. the wife is exploiting the situation to her benefit and harassing the other spouse i.e. the husband in. order to extort more and more money from him.

This is a fit case in which succour and relief should be provided to the husband who otherwise would be left ruing the misfortune befallen on him.

In these circumstances, petitioner no.1 cannot be permitted to unilaterally withdraw her consent as there is apparently no force, fraud, coercion, threat or undue influence used against her.

The application of petitioner no. 1 for leave to withdraw under section 151 is hereby dismissed.

Today petitioner number 1 has not even cared to put in appearance which also shows the scant regard which she has for the Court and under these circumstances even the joint statement of both the petitioners is not required. The petition is being disposed off on the basis of the material on record. Petitioner no.1 is at liberty to collect the four draft of Rs. 8 lac which have been filed today by petitioner no.2.”

and thus the application of the petitioner no. 1 i.e. the appellant herein

in HMA No. 801/2006 seeking leave to withdraw her consent was dismissed and it was observed to the effect that she having not cared to put in appearance before the learned Trial Court even the joint statement of both the petitioners was not required and the petition was disposed of on the basis of the material on record with it having been observed further to the effect that the petitioner no. 1 i.e. the appellant herein was at liberty to collect the 4 drafts of Rs.8 lakhs which had been filed by the respondent no. 2 i.e. the present petitioner represented by his LR i.e. his father.

10. It was observed by the Trial Court to the effect that the marriage of the parties to the petition being Hindu by religion was solemnized on 28.02.2001 at Amritsar according to Hindu rites and ceremonies and that the matrimonial home of both the parties being in Delhi and that they having been living separately since 05.06.2004 due to the differences in their temperaments and attitude and having not resumed cohabitation, there was no possibility of their living together as husband and wife and the marriage had broken and that they had settled their claims and disputes as per terms and conditions mentioned and there was no collusion between the parties and that the petition was filed by the petitioner under Section 13B(1) of the Hindu Marriage Act, 1955 as amended having been allowed on 25.10.2006 and they have undertaken to abide by the terms and conditions thereof the petition under Section 13B(2) of the Hindu Marriage Act, 1955 as amended was allowed.

11. It has been submitted on behalf of the appellant that the appellant having withdrawn her consent to the grant of decree of

divorce by mutual consent vide her application under Section 151 of the CPC dated 12.03.2007, the decree of divorce through mutual consent under section 13B(2) of the Hindu Marriage Act, 1955 as amended could not have been granted in relation to which it was observed on behalf of the LR of the deceased respondent that in view of the statement dated 04.08.2007 of the appellant before the Trial Court wherein she has stated to the effect : -

“I have already received Rs.8 lacs from the petitioner no. 2 at the time of recording of the statement in the first motion petition. I have moved an application in the second motion petition for withdrawal of consent as settlement had been effected between us that the petitioner no. 2 would be returning my istridhan value of rupees i.e. a sum of Rs.20 lacs and Rs.8 lacs totalling of Rs.28 lacs, which is not paying for this reason I may be permitted to withdraw my consent. In case petitioner no. 2 is willing to pay Rs.20 lacs for istridhan and Rs.8 lacs totalling of Rs.28 lacs, I am still ready for divorce.”

wherein it was thus stated that she be permitted to withdraw her consent and in the event of the petitioner no. 2 i.e. the husband (since deceased) being willing to pay Rs.28 lakhs in total of which she had received Rs.8 lakhs, she was still ready for the divorce, it has been submitted on behalf of the respondent that the appellant having not stated that she wanted to continue with the marriage but had added the condition of the additional sum to be paid, could not take advantage of the same and that she having stated that she was ready for divorce after her terms were accepted, the consent for divorce *per se* had not been withdrawn.

12. It is essential to observe that vide her affidavit dated 01.05.2007

placed on the record of the TCR in support of her application seeking withdrawal of consent to the petition under Section 13B(2) of the Hindu Marriage Act, 1955 as amended, it was stated by the appellant herein :-

“3. That I have moved an application under Section 151 CPC for leave to withdraw the said petition as the petitioner no. 2 has miserably failed to remain alive to his commitments which were conceded and concurred between the parties and is guilty of having flouted the mutually conceded terms.

4. That I state that I have a right of co-ownership in the property bearing No.19, Bunglow Road, Roop Nagar, Delhi-110 0 07 and I have equally share in M/s. Standard Enamel Works Pvt. Ltd., 35, Rama Road, Near Moti Nagar, New Delhi-110 015.

5. That I am taking steps to claim and assert my rights in the said property as well as in the business establishment. I have already stated times and again that huge amounts were spent and incurred by my family in my marriage and my stridhan is being unlawfully retained by my in-laws who are guilty of having committed criminal breach of trust.

6. That taking undue advantage of my being a homely innocent family girl, certain papers without permitting me to read the contents thereof were also got signed from me and I apprehend that some foul game may not be played by the petitioner No. 2 as, well as his other associates since certain papers in blank were also obtained from me under misrepresentation and coercion. Similarly for signing the mutual consent petition for divorce, I was allured, a fraud was practised and on certain solemn assurances I opted to' sign which have thereafter turned false and bogus.

7. That I am presently sick and unable to move under these circumstances, I am not in a position to attend the Court. As such the present affidavit be taken on record in

support of my contention to withdraw from the proceedings and to dismiss the petition.”

13. On a consideration of the submissions that have been made on behalf of either side and on a perusal of the Trial Court Record and the factum of the application having been filed by the appellant herein seeking withdrawal of her consent to the grant of a decree of divorce through mutual consent under Section 13B (2) of the Hindu Marriage Act, 1955 as amended and as it is settled law as laid down vide the verdict of the Hon’ble Division Bench in reference in **REFERENCE IN CONT.CAS(C) 772/2013, 347/2013, 484/2014, 584/2014, 648/2014, 48/2016, 483/2016, 484/2016, 1147/2016, 1116/2016, 1251/2016, 78/2017, 132/2017, 197/2017, 204/2017, 216/2017 and 270/2017 dated 15.05.2018** that to the question (B) to the reference, which reads to the effect : -

“Question (B) Whether by undertaking before a Court to file a second motion under Section 13B(2) of the Act, 1955 at Section 13B(1) stage or by giving an undertaking to a Court to that effect in a separate court proceeding, a party waives its right to rethink/renege under 13B(2) of the Act, 1955? If yes, whether such right can be waived by a party under Section 13B(2) of the Act, 1955?”

which reference was answered as

“Answer:(a) The answer to the first limb of Question (B) is no. Notwithstanding any undertaking given by a party before a court to file a Second motion under Section 13B(2) or at the Section 13B(1) stage or in any separate court proceedings, its right to rethink/renege under Section 13B(2) of the Act, cannot be waived for the reason that such a waiver is proscribed by the Statute that

keeps a window open for the parties to withdraw their consent at any stage till the decree of divorce is finally granted. The element of mutual consent remains the leitmotif of the said provision and its existence is a salient and recurring theme that like warp and weft, weaves its way through the entire process set into motion at the Section 13B(1) stage, followed by the Section 13B(2) stage, till the very end when a decree of divorce is granted. The right of withdrawal of consent in the above proceedings can be exercised at any stage and exercise of such a discretion cannot be treated as being opposed to public policy. Any other interpretation given to the aforesaid provision would negate the underlying aim, object and intent of the said provision. Once a party decides to have a second thought and on reflection, backs off, the concerned court cannot compel the defaulting party to give its consent on the basis of an earlier settlement/undertaking. (b) In view of the answer given to the first limb of Question (B), the second limb of the said question needs no answer”

(emphasis supplied),

it is apparent that the element of mutual consent having not continued at the stage of proceedings under Section 13B(2) of the Hindu Marriage Act, 1955 as amended till the date when the decree of divorce was granted, no such decree of divorce under Section 13B(2) of the Hindu Marriage Act, 1955 as amended, as granted vide the impugned order, could have been granted.

14. During the course of the submissions that have been made on behalf of the appellant it was contended that even the basic parameters under Section 13B (2) of the Hindu Marriage Act, 1955 as amended were not adhered to in as much as the impugned order itself reflects that the appellant was not even present on the date when the decree of

divorce was granted and had thus not even been heard. It is essential to observe that even in the verdict of the Hon'ble Supreme Court in *Hitesh Bhatnagar Vs. Deepa Bhatnagar* (2011) 5 SCC 234 it is observed to the effect : -

“13) The appellant contends that the Additional District Judge, Gurgaon, was bound to grant divorce if the consent was not withdrawn within a period of 18 months in view of the language employed in Section 13B(2) of the Act. We find no merit in the submission made by the appellant in the light of the law laid down by this Court in Sureshta Devi's case (supra).

14) 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;

15) 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."

15. The verdict of the Hon'ble Supreme Court in *Smruti Pahariya Vs. Sanjay Pahariya (2009) 13 SCC 38* lays down to the effect : -

"42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.

43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."

16. It has been laid down by the Hon'ble Supreme Court in *Sureshta Devi Vs. Om Prakash AIR 1992 Supreme Court 1904* to the effect : -

“10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the Court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The Court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the Court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.

11. The question with which we are concerned is whether it is open to one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition. The need for a detailed study on the question has arisen because of the fact that the High Courts do not speak with one voice on this aspect. The Bombay High Court in Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe, AIR 1984 Bom. 302, has expressed the view that the crucial time for the consent for divorce under Section 13-B was the time when the petition was filed. If the consent was voluntarily given it would not be possible for any party to nullify the petition by withdrawing the consent. The court has drawn support to this conclusion from the principle underlying Order XXIII Rule 1 of the Code of Civil Procedure which provides that if a suit is filed jointly by one or more plaintiffs, such a suit or a part of a claim cannot be abandoned or withdrawn by one of the plaintiffs or one of the parties to the suit. The High Court of Delhi adopted similar line of reasoning in Smt. Chander Kanta v. Hans Kumar and Anr., AIR 1989 Delhi 73 and the Madhya Pradesh High Court in Meena Dutta v. Anirudh Dutta, [1984] 11 DMC 388 also took a similar view.

12. *But the Kerala High Court in K.L Mohanan v. Jeejabai, AIR 1988 Kerala 28 and the Punjab and Haryana High Court in Harcharan Kaur v. Nachhattar Singh, AIR 1988 Punjab & Haryana 27 and Rajasthan High Court in Santosh Kumari v. Virendra Kumar, AIR 1986 Rajasthan 128 have taken a contrary view. It has been inter alia, held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the Court passes a decree for divorce. The satisfaction of the Court after holding an inquiry about the genuineness of the consent, necessarily contemplates an opportunity for either of the spouses to withdraw the consent. The Kerala High Court in particular has ruled out the application of analogy under Order XXIII Rule I of the Code of Civil Procedure since it is dissimilar to the situation arising under Section 13-B of the Act.*

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 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 mutualitly 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 : (1972) 2 WLR 972).

15. In our view, the interpretation given to the section by the High Courts of Kerala, Punjab & Haryana and Rajasthan in the aforesaid decisions appears to be correct and we affirm that view. The decisions of the High Courts of Bombay, Delhi and Madhya Pradesh (supra)

cannot be said to have laid down the law correctly and they stand overruled.

16. In the result, we allow the appeal and set aside the decree for dissolution of the marriage. In the circumstances of the case, however, we make an order as to costs."

which makes it apparent that in the absence of the continued mutual consent a decree of divorce under Section 13 B(2) of the Hindu Marriage Act, 1955 as amended cannot be granted as laid down in ***Smruti Pahariya Vs. Sanjay Pahariya*** and from the absence of one of the parties before the Trial Court, the presumption of consent for divorce cannot be attributed to that party as consent needs to continue till the date of the decree of divorce under Section 13B (2) of the Hindu Marriage Act, 1955 as amended and the Court has the statutory obligation to **hear** the parties to ascertain their consent which was clearly not done in the instant case, the appellant not even being present on the date 06.10.2007 i.e. the date of the decree of divorce granted through mutual consent.

17. In the circumstances, the impugned order which granted the decree of divorce through mutual consent dated 06.10.2007 of the learned Additional District Judge, Delhi in HMA No. 801/06 is set aside.

18. The amount of Rs.8 lakhs deposited during the course of the proceedings under Section 13(B) 2 of the Hindu Marriage Act, 1955 as amended vide demand drafts details of which are :-

(1) dated 05.10.2007 for a sum of Rs.6,10,000/- bearing no. 918220 drawn on Syndicate Bank, Kamla Nagar,

Delhi – 110007 in favour of Tina.

(2) dated 03.10.2007 for a sum of Rs.1,00,000/- bearing no. 342546 drawn on Centurion Bank of Punjab Limited, Kamla Nagar, New Delhi in favour of Tina.

(3) dated 03.10.2007 for a sum of Rs.50,000/- bearing no. 342547 drawn on Centurion Bank of Punjab Limited, Kamla Nagar, New Delhi in favour of Tina.

(4) dated 03.10.2007 for a sum of Rs.40,000/- bearing no. 342548 drawn on Centurion Bank of Punjab Limited, Kamla Nagar, New Delhi in favour of Tina.

on 06.10.2007 and directed to be converted into an FDR in the name of the appellant initially for a period of one year so that an interest amount may be ensured to the benefit of the successful party vide order dated 29.04.2011 in CM no. 1162/2010 of this Court, which have been converted into FDRs for the payment of interest thereon w.e.f. 29.04.2011 as observed vide the proceedings dated 27.07.2018 in CONT. CAS (C) No. 492/2018 **with interest accrued thereon** are directed to be released to the legal representatives of the respondent i.e. to Sh. S.P. Gupta, father of the deceased respondent by the banks concerned.

The MAT APP. 93/2007 is disposed of accordingly.

ANU MALHOTRA, J

OCTOBER 31st, 2018/mk