

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.532 of 2018

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Dr. Pooja Sakshi wife of Dr. Manish, daughter of Dr. Indra Deo Ranjan,
resident of Rajivnagar, House No. 5, Road No. 25C, P.S.- Rahivnagar,
District- Patna- 800024

... .. Appellant/s

Versus

Dr. Manish son of Sri Bhukhal Prasad, resident of Mohalla- Shaktinagar,
Azakwae, near Upper Primary School, Kanhauli, P.S.- Mithanpura, District-
Muzaffarpur.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Girish Pandey
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard learned counsel for the appellant and learned
counsel for the respondent.

I.A. No. 6167 of 2018 / 1 of 2018

The above mentioned Interlocutory Application was filed for
condonation of delay of 3 days in filing the present appeal.

Being satisfied with the grounds taken in the Interlocutory
Application showing sufficient cause in not filing the appeal in
time, the delay of 3 days in filing the present Miscellaneous
Appeal is hereby condoned.

I.A. No. 6167 of 2018/1 of 2018 stands disposed of.



M.A. No. 532 of 2018

The present Miscellaneous Appeal has been filed by the appellant wife for setting aside the judgment dated 17.4.2018 passed by the learned Principal Judge, Family Court, Patna in Matrimonial Case No. 106 of 2016, whereby the Matrimonial case filed by the appellant wife under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) for grant of decree of divorce and consequential dissolution of her marriage with the respondent husband on the ground of cruelty and desertion, has been dismissed.

The factual matrix of the case is that the marriage between the appellant and the respondent was solemnized on 17.4.2009. The married couple were blessed with a female child on 7.10.2011. Subsequent to the marriage, some differences crept in between the parties, which reached to the point of no return, leading to filing of Matrimonial Case No. 106 of 2016 by the appellant wife, Dr. Pooja Sakshi on the ground of cruelty and desertion under Section 13(1)(ia)(ib) of the Act, on 9.1.2016 before the learned Principal Judge, Family Court, Patna.

The respondent husband appeared and contested the suit and the learned Principal Judge Family Court, Patna vide judgment dated 17.4.2018 dismissed the suit on the ground that the



petitioner-appellant wife failed to prove the case of cruelty and desertion, which led to the filing of the present Miscellaneous Appeal.

On issuance of notice vide order dated 24.8.2018, the respondent husband appeared in the present Miscellaneous Appeal.

On the joint prayer of the learned counsels for the parties, the appellant and the respondent were directed to appear in person for making effort to reconcile the issue. The appellant and respondent appeared before this Court in person and they both were not ready to reconcile the issue, rather they agreed for dissolution of marriage.

Learned counsel for the appellant wife submits that though the appeal was filed for setting aside the impugned judgment dated 17.4.2018 whereby the claim of the appellant wife for dissolution of marriage on the ground of cruelty and desertion has been dismissed by the learned Principal Judge, Family Court, Patna but now they have decided to part ways by getting the marriage dissolved with mutual consent.

An affidavit dated 24.4.2019 was filed on behalf of the appellant with specific stand in paragraph 3 thereof that the appellant wife gives consent for dissolution of marriage between



her and the respondent husband and is not claiming any financial benefit/one time settlement/alimony from the respondent.

Paragraph 3 of the affidavit reads as follows:

“3. That the Applicant-Appellant gives her consent that if the marriage solemnized between both the parties i.e. Dr. Pooja Sakshi and Dr. Manish, on 17.04.2009 is dissolved by this Hon’ble Court, the Applicant-Appellant will not claim any financial benefit/one time settlement/alimony from the Opposite Party-Respondent.”

The said affidavit further stipulated that the appellant wife has no objection if the respondent husband meets his daughter in presence of the appellant every fortnight with one week prior intimation to the appellant. Paragraph 4 of the affidavit reads as follows:

“That the Applicant-Appellant has no objection if the Opposite Party- Respondent, (the father of the daughter of both the parties) is allowed to meet his daughter in the presence of the Applicant-Appellant with a gap of 15 (fifteen) days with the prior information of one week before meeting at the Applicant’s-Appellant’s house where she will be residing.”



The affidavit dated 24.4.2019 further states in paragraph 5 thereof that the appellant, on the request of the respondent husband, is ready to send the daughter to meet her grand father with prior intimation to the appellant or her counsel. Paragraph 5 of the affidavit reads as follows:

“That on the request of the Opposite Party-Respondent the Applicant-Appellant is ready to send her daughter to meet her paternal grandfather once in presence of the Advocates of both the parties with prior information to the Applicant-Appellant or her Advocate Mr. Amit Kumar Malik.”

Paragraph 6 of the affidavit dated 24.4.2019 further states that the respondent husband should undertake to ensure the safe return of the daughter to her on the same day after meeting her grand father. Paragraph 6 of the affidavit reads as follows:

“That the Opposite Party-Respondent must under place to ensure the safe and sound return of the daughter of the meeting her paternal ground father on the same day.”

The respondent husband also filed an affidavit on 6.5.2019 stipulating in paragraph 3 thereof that though in the interest of his minor child, he is ready to reconcile the issue but in view of



the stand of the appellant wife he gives his consent for dissolution of marriage. Paragraph 3 of the affidavit dated 6.5.2019 reads as follows:

“That the respondent in the interest of his minor child Palak Sakshi aged about 7 years 6 months, and for her over all growth and development is still ready to reconcile whatever differences appellant has with him and is still ready to live amicably together, but because of the specific stand taken by the appellant with respect to dissolution of marriage, the respondent gives his consent for the marriage to be dissolved.”

The respondent husband however in paragraph 4 of the affidavit dated 6.5.2019 has stated that in spite of order dated 1.10.2016 passed in Matrimonial Case No. 106 of 2016 by the learned Principal Judge, Family Court, Patna with agreement of the parties for allowing the respondent husband to meet his daughter Palak Sakshi, fortnightly, at the residence of the appellant wife, but for one reason or the other the appellant did not allow the respondent to meet his daughter. Hence, the respondent has prayed for allowing him to visit and meet his daughter every fortnight at the residence of the appellant for about three hours on Saturday and Sunday, without any interference by the appellant or her parents or any other relatives, even after the marriage between them is dissolved. The



respondent has further sought permission to let him to talk to his daughter through phone or video conferencing and that he also be allowed to meet the daughter on the occasions, like, birthday, Holi and Diwali festivals and also that the respondent be allowed to keep his daughter with him for twenty four hours once in two months. Paragraph 5 of the affidavit dated 6.5.2019 reads as follows:

“5(i) That therefore, it is humbly submitted that even after dissolution of marriage the respondent be allowed to visit and meet his daughter fortnightly at the residence of the appellant for about 3 hrs on Saturday or Sunday without any interference by the appellant or her parents or any of her relatives.

(ii) That the respondent also humbly prays before Your Lordship that the appellant be directed to ensure that her daughter at least once a week talks to her father (respondent) through video call and she should also inform the respondent in advance the date of parent teacher meeting, so that he may also visit the school and participate in such meetings to ensure welfare of his daughter.

(iii) That the respondent may also be allowed to meet his daughter on her birthday and also during holi and diwali festivals and the appellant shall not create any problems/obstacles in that.

(iv) That it is also respectfully submitted that the



respondent once in every 2 months be allowed to keep his daughter with him for 24 hours, with an undertaking that on expiry of 24 hours, he will ensure the safe and sound return of his daughter to the appellant.”

From the affidavits filed by the respective parties, it appears that the relationship between the appellant wife and respondent husband have reached at the brink of no return, but both have tremendous love and affection for the girl child, namely, Palak Sakshi who is aged about 8 years. The affidavit filed by the appellant wife has been filed prior to the affidavit filed by the respondent and the stipulations made in paragraph nos. 4 and 5 reflect that the appellant does not have any objection with respect to the meeting of the respondent husband with the minor child every fortnight and the meeting of the child with her grand father. However, the learned counsel for the appellant submits that the averments made in paragraph 5 (iv) of the affidavit dated 6.5.2019 whereby the respondent husband has claimed to be permitted to keep the child for 24 hours every two months, is not acceptable to the appellant.

Having heard learned counsels for the parties, the issue which arises in the present Miscellaneous Appeal is, whether in a



Miscellaneous Appeal preferred against the judgment of the learned Principal Judge, Family Court whereby the Miscellaneous Case filed for dissolution of marriage was dismissed, a petition under Section 13-B of the Act with mutual consent of the parties can be entertained at the appellate stage, or whether such petition under Section 13-B of the Act can be filed only before the District Court specified in Section 19 of the Hindu Marriage Act, 1955.

Similar issue arose in the case of Rita Bhattacharjee and Ors. Vs. Santiranjana Bhattacharjee and Ors. before the Calcutta High Court reported in 2012(1)CHN 636 = 2011(3) CLJ (Cal.) 177, where the matrimonial suit was filed for dissolution of marriage under Section 13(1)(ia) of the Act before the learned District Judge, Hooghly. The matter was transferred to the court of learned Additional District Judge-3, Hooghly who dismissed the matrimonial suit ex parte.

Aggrieved with the order, First Appeal was preferred before the Calcutta High Court and there, two applications on two different dates were separately filed by both the husband and wife, for dissolution of marriage under Section 13-B of the Act. The matter was referred to a larger Bench with the following point of reference, which reads as follows:



“13. The points for reference are as under:

1. Whether a Division Bench, vested with determination to take up appeals against the decree arising out of proceedings under Hindu Marriage Act and the applications in connection with such appeals, is entitled to take up an original application for divorce by mutual consent under Section 13B of the Act filed direct before such appellate forum?

2 . Whether the directions given by the Supreme Court in the cases of Shasi Garg, Radha, Mrs. Payal Jindal and Sandhya Rani (supra), should be treated to be valid precedent in terms of Article 141 of the Constitution of India authorizing any other courts to adopt the said procedure?

3. Whether Section 13B of the Act authorizes an appellate court dealing with an appeal against a decree passed in the proceedings under Section 13 of the Act to grant relief in terms of Section 13B of the Act or such application should be filed only before the district court specified in Section 19 of the Act?

4 . Whether the waiting period mentioned in Section 13B(2) of the Act is mandatory or directory?”

The Full Bench of Calcutta High Court answered the reference to the effect that the Division Bench of the High Court cannot entertain an application for divorce with mutual consent



filed directly before it, in a pending appeal under the Act. Such appeal can be filed only before the district court under Section 13-B of the Act and the waiting period stipulated in Section 13-B of the Act is mandatory and not directory. Paragraph 49 of the judgment reads as follows:

“49. Thus, we sum up our findings as under:

(i) The Division Bench, vested with the determination to take up appeal against the decree arising out of the proceedings under the Hindu Marriage Act, 1955, is not entitled to take up an application for divorce by mutual consent filed direct before such appellate forum nor the appeal court while dealing with an appeal against a decree passed in the proceedings under Section 13 of the said Act could grant decree in terms of Section 13B of the said Act.

(ii) Neither Shashi Garg (supra), nor Radha (supra), nor Payal Jindal (supra), nor Sandhya Rani (supra), is binding precedents in terms of Article 141 of the Constitution of India. The Supreme Court of India passed directions in those cases in exercise of the power conferred under Article 142 of the Constitution of India.

(iii) An application for divorce by mutual consent under Section 13B of the said Act being an original application could only be filed before the district court as referred to in Section 13B of the said Act.



(iv) The waiting period mentioned in Section 13B of the said Act is mandatory and not directory.”

Another similar issue arose in the case of Anil Kumar Jain Vs. Maya Jain before the Apex Court, reported in (2009) 10 Supreme Court Cases 415 where the issue was whether in the situation of irretrievable breakdown of marriage, which is not a ground for decree of divorce under Section 13 or 13-B of the Act, the High Court can convert a proceeding under Section 13 of the Act into a proceeding under Section 13-B of the Act or can dissolve the marriage even without waiting for statutory period of six months stipulated in Section 13-B of the Act. In the said case, it has been held that such power can be exercised by the Supreme Court under Article 142 of the Constitution and not by the Civil Court or High Court. Paragraph nos. 28, 29 and 30 of the judgment read as follows:

“28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion



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

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other courts can exercise such powers. The other Courts are not competent to pass a decree for



mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.”

In view of the aforesaid ratio laid down by the Supreme Court, this Court is of the view that the provision under Section 13-B of the Act was enacted on the basis of public policy. The law prescribes a forum and, therefore, the parties have no choice to select their forum of convenience, but they are required to abide by the forum and procedure prescribed. The Act mandates two procedures for dissolution of marriage; one is under Section 13 of the Act where the marriage can be dissolved at the instance of either party if after solemnization of marriage, the other party voluntarily indulges in sexual intercourse with any person other than his or her spouse or treats the spouse, after marriage with cruelty or deserts the petitioner for continuous period of not less than two years immediately preceding the presentation of the



petition or either side ceases to be a Hindu by conversion to another religion or either side has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. The other procedure is under Section 13-B of the Act when divorce can be granted with mutual consent.

In the present case, the matrimonial case was filed by the appellant wife before the learned Principal Judge, Family Court on the ground of desertion and cruelty. So, she adopted the procedure under Section 13 of the Act and thereafter, at the appellate stage she wants to get the marriage dissolved by adopting the second procedure prescribed under Section 13-B of the Act.

In view of the ratio laid down by the Full Bench of Calcutta High Court and the Supreme Court, as quoted above, it is not permissible to allow the appellant wife to get her marriage dissolved at this stage under Section 13-B of the Act. However, in spite of the fact that the matrimonial suit filed by the appellant wife for dissolution of marriage on the ground of desertion and cruelty has been dismissed by the learned Court below, that does not preclude the appellant to maintain her application under



Section 13-B of the Act. Section 13-B of the Act reads as follows:

“13B. Divorce by mutual consent. – (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, 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 subsection (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.”

The above provision does not suggest that if either side, husband or wife has maintained his/her application under



Section 13 of the Act and the same has been dismissed, he/she cannot maintain application under Section 13-B of the Act. It is well settled law that while hearing an appeal, the court of appeal cannot enlarge its scope. If the trial court was unable to grant a decree for divorce under Section 13-B of the Act, the appellate court also cannot grant such decree in appeal arising out of that proceeding. The law prescribes forum under Section 13-B of the Act to the district court, which now, by virtue of Section 7 of the Family Courts Act, 1984 is being exercised by the Principal Judge, Family Court. Hence, the Court is required to exercise such power only in the manner prescribed or not at all.

It is made clear that for dissolution of marriage with mutual consent, the only pre-conditions are that the parties are living separately for a period of one year or more, or they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. The affidavits of the respective parties suggest that all the three pre-conditions are available in the present case but this Court cannot venture to entertain the application in view of the ratio laid down by the Apex Court.

In the circumstances, in our view, the Division Bench, vested with the determination to take up appeal against the decree arising out of the proceeding under the Act, is not entitled



to take up an application for divorce by mutual consent filed direct before the appellate court, nor the appellate court while dealing with an appeal against a decree passed in the proceeding under Section 13 of the Act, could grant decree in terms of Section 13-B of the Act.

In view of the discussions made above, we allow the appellant and the respondent to file an application under Section 13-B of the Act before the learned Principal Judge, Family Court, Patna. We also remit the affidavits filed by both the parties before this Court to the learned Principal Judge, Family Court, Patna when the learned Court below is expected to exercise the jurisdiction under Section 13-B of the Act without being prejudiced by the fact that the matrimonial case filed under Section 13 of the Act by the appellant wife for dissolution of marriage on the ground of cruelty and desertion has been dismissed.

It is further expected from the learned Principal Judge, Family Court Patna to dispose of such application, if any filed, in view of the fact that the present Miscellaneous Appeal was pending before this Court since long. It goes without saying that if any application with prayer to meet the child is filed, the learned Court below may pass appropriate order keeping in view



the agreed conditions between the parties as deliberated above
However, till the matrimonial proceeding is decided by the
learned Principal Judge, the respondent husband is permitted to
meet the minor child every fortnight and so far talking to the
child on phone is concerned, the respondent husband is permitted
to do so to the extent the parties have agreed as stipulated in their
respective affidavits.

Accordingly, this appeal is disposed of.

Let this order be transmitted to the learned Principal Judge,
Family Court, Patna along with the copies of the affidavits dated
24.4.2019 and 6.5.2019 filed by the appellant and respondent,
respectively.

(Dinesh Kumar Singh, J)

(Prabhat Kumar Singh, J)

anil/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

