

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.726 of 2017

=====

Akhilesh Kumar son of Late Satya Narayan Thakur, R/o Dubahan, P.S. Sakara, District Muzaffarpur At Present residing at Government Quarter No. 17/B Damuchak, P.S. Kazimohammadpur, District- Muzaffarpur.

... .. Appellant

Versus

Smt. Sujata Kumari W/o Akhilesh Kumar, D/o Umesh Kumar Trivedi, R/o Dubahan, P.S. Sakara, District Muzaffarpur At Present residing with her father at Village and Post- Madhopur, P.S. Mushari, District- Muzaffarpur.

... .. Respondent

=====

Appearance :

For the Appellant : Mr. Rajesh Kumar, Advocate
For the Respondent : Mr. Vijay Kumar, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date : 10-01-2020

1. Heard learned counsel for the appellant as well as learned counsel appearing for the respondent.

2. This miscellaneous appeal has been preferred against the impugned judgment dated 5.7.2017, passed by the learned Principal Judge, Family Court, Muzaffarpur in Matrimonial (Divorce) Case No. 441 of 2014 against the respondent under section 13 of the Hindu Marriage Act, 1955 on the ground of cruelty, desertion and ill behaviour.

3. Notice was issued to the respondent by Family Court but in spite of issuance of notice and its publication in the daily



newspaper, respondent did not appear before the Family Court in order to contest the said matrimonial case. As a result whereof, the learned Family Court proceeded ex-parte against the respondent and subsequently, after recording the evidence of the appellant, learned Family Court passed the impugned judgment dated 5.7.2017 which is under challenge before this Court.

4. However, during pendency of the appeal good sense prevailed between the parties and they decided to part their ways by a decree of divorce by mutual consent and accordingly, they have filed a joint affidavit dated 25.10.2019 before this Court mentioning the terms and conditions of the settlement. According to the joint affidavit, the appellant has to pay Rs.11 lacs to the respondent as One Time Settlement (OTS) and further both parties agreed to get their marriage dissolved under section 13-B of the Hindu Marriage Act, 1955.

5. Three separate cheques of Rs.4 lacs, 4 lacs and 3 lacs bearing cheque nos. 342838, 342839 and 342840 respectively, prepared in the name of respondent Smt. Sujata Kumari, are being handed over to Mr. Vijay Kumar, learned counsel representing the respondent and in lieu thereof, he put his signature in the margin of the order sheet.



6. In course of hearing, learned counsel of both the parties submit that this Court has ample power to pass decree of divorce by mutual consent under section 13-B of the Hindu Marriage Act, 1955. Section 13-B of the Hindu Marriage Act, 1955 provides that if a petition for dissolution of marriage by a degree of divorce is presented to the District Court by both the parties to a marriage 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, the Court after six months of presentation of the aforesaid petition can pass a decree of divorce dissolving the marriage of the parties.

7. Section 10 of the Code of Family Court Act, 1985 provides that subject to the other provisions of the Act and the Rules, the provisions of the Code of Civil Procedure, 1908 and any other law for the relevant time shall apply to the suit and the proceedings (other than the proceedings under Chapter 9 of the Cr.P.C.) before the Family Court and for the purpose of the said proceeding the Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court. The aforesaid provision goes to show that if a petition under section 13 of the Hindu Marriage Act is filed before the Family Court, the Family



Court shall be deemed to be the Civil Court and shall have all the powers of such Civil Court. Furthermore, the aforesaid provision goes to show that the provisions of the Code of Civil Procedure, 1908 shall apply to suits or the proceedings except the proceeding of Chapter 9 of Cr.P.C., pending before the Family Court.

8. It is well settled principle of law that the appeal is continuation of the suit and therefore, there is no dispute that the provisions of the Code of Civil Procedure, which are applicable to the suit and the proceedings pending before the Family Court, shall apply before the Appellate Court also. Order 41 Rule 24 of the Code of Civil Procedure, 1908 says that where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. Bare perusal of the aforesaid provision makes it clear that the Appellate Court can decide suit on other ground though the Court below has not proceeded on the said ground, provided that sufficient evidence should be available on the record.



9. In the present case, admittedly, the suit was filed under section 13 of the Hindu Marriage Act, 1955 on the ground of cruelty, desertion and ill behaviour but now the parties want to convert the suit under section 13-B of the Hindu Marriage Act, 1955. Section 13-B of the Hindu Marriage Act, 1955 gives power to pass a decree of divorce by mutual consent, if the following conditions are fulfilled:-

(a) marriage having been solemnized between the parties;

(b) the parties have been living separately for a period of one year or more than one year before presenting the petition;

(c) they have not been able to live together at the time of presenting the petition;

(d) they have mutually agreed to dissolve the marriage and

(e) the averments made in the petition are true and conditions under section 23 are fulfilled.

10. In the present case, admittedly, the appellant led evidence before the learned Family Court and the evidence available on the record goes to show that the marriage of appellant with the respondent took place on 29.2.2012 and cohabitation between them had not taken place since the time of marriage and



therefore, it is obvious that though they were residing in the same house but they have been living separately for more than a year before presenting the petition under section 13 of the Hindu Marriage Act, 1955. Furthermore, the affidavit jointly filed by the parties goes to show that they are not ready to live together and at the time of presentation of the petition under section 13 of the Hindu Marriage Act, 1955, they were not able to live together and furthermore, they have mutually agreed to dissolve their marriage.

11. In the aforesaid circumstances, we think it proper to convert the original petition filed on behalf of the appellant under section 13 of the Hindu Marriage Act, 1955 into a petition filed under section 13-B of the Hindu Marriage Act, 1955, as both parties have prayed before this Court to pass a decree of divorce by mutual consent under section 13-B of the Hindu Marriage Act, 1955.

12. Since, both the parties do not want to continue their married life and agreed to dissolve their marriage by getting the decree of divorce by mutual consent, we set aside the impugned judgment dated 5.7.2017, passed in the Matrimonial (Divorce) Case No. 441 of 2014, and accordingly, the marriage of the parties is dissolved by passing the decree of divorce by mutual consent under section 13-B of the Hindu Marriage Act, 1955. The decree



be prepared accordingly. Joint affidavit dated 25.10.2019 shall be part of the decree. The parties shall bear their own cost.

13. It is made clear that the respondent shall not be entitled to make any claim against the appellant in future. Further, if the above stated cheques are dishonoured, then in that circumstance, the respondent shall have the right to revive this appeal.

14. In the aforesaid manner, this miscellaneous appeal stands disposed of.

(Hemant Kumar Srivastava, J)

(Prabhat Kumar Singh, J)

Shashi

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	20.3.2020.
Transmission Date	

