

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9650 OF 2017

Priyanka w/o Amit Patil,
Age 32 years, Occ. Household,
R/o. C/o. Ramrao Shingare,
Near Hotel Aurangabad-Ashoka,
Adalat Road, Aurangabad. ... **Petitioner.**

VERSUS

Amit s/o Ramesh Patil,
Age 40 years, Occ. Medical Practitioner,
R/o. 701, Yeshraj Saha Niwas,
Bhalchandra Road, Hindu Colony,
Dadar-(East), Mumbai – 4000 14. ... **Respondent.**

...

Advocate for the Petitioner : Mr. Mane h/f Mr. Umesh Bodkhe,
Advocate for the Respondent : Mr. S.S. Gangakhedkar.

CORAM : MANGESH S. PATIL, J.
RESERVED ON : 04.12.2021.
PRONOUNCED ON : 10.12.2021.

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. Learned advocate for the respondent waives service. At the request of both the sides the matter is heard finally at the stage of admission.

2. The question that arises for determination by this Court is as to whether in a proceeding for divorce instituted by the respondent-husband on the ground of desertion under Section 13(1)(i-b) of the Hindu Marriage Act, 1955 (hereinafter 'the Act') when the parties i.e. petitioner-wife and the respondent-husband have settled the terms of compromise before the marriage counsellor *inter alia* agreeing to obtain a divorce by mutual

consent under Section 13-B of the Act he can be permitted to withdraw the consent. The issue arises from following facts :

(i) The parties solemnized the marriage on 24.04.2012. Due to matrimonial dispute they started living separately since March 2013. Respondent-husband instituted a petition for divorce on the ground of desertion under Section 13(1)(i-b) of the Act. The parties appeared before a marriage counsellor and settled the terms which were filed before the Family Court at Exh. 7 (Exh. 'C' of the Writ Petition). The learned Judge put up an endorsement on it which reads thus :

*"Both parties admit consent terms
sd/-
28.06.2017"*

(ii) The respondent-husband then filed an application (Exh. 11) *inter alia* contending that in terms of the compromise he has paid Rs. 25,00,000/- to the petitioner-wife but now it is difficult for him to pay the remaining amount from of Rs. 1,10,00,000/- (Rs. One Crore Ten Lakh only) and therefore he may be permitted to withdraw his consent.

(iii) The petitioner opposed that application by filing a say (Exh. 15). It was contended that the terms and conditions were settled before the counsellor and the consent could not be withdrawn. In view of the consent terms the petition ought to have been treated as a petition under Section 13-B of the Act. It was also contended that even the request for withdrawal of consent was moved after a lapse of more than a year and, therefore, he should be made to pay the remaining amount of Rs. 86,00,000/- (Rs. Eighty Six Lakh only) together with interest.

(iv) The learned Judge of the Family Court allowed the application of the respondent-husband (Exh. 11) and permitted him to withdraw the consent.

3. The learned advocate for the petitioner-wife submits that since the terms and conditions were settled before the marriage counsellor, there was

no question of withdrawal. The terms were duly presented before the Family Court and for all practical purposes the petition thereafter ought to have been proceeded under Section 13-B of the Act. The learned advocate would then submit that in view of the provisions of Rule 31 of the Family Courts (Maharashtra) Rules, 1987 the terms of settlement agreed before the marriage counsellor have sanctity and finality.

4. Learned advocate for the petitioner would then place reliance on the Division Bench decision of this Court in the case of **Prakash Aluma Kalandari Vs. Jahnavi Prakash Kalandari**; 2011(4) Mh.L.J. 187 and **Jayshree Ramesh Londhe Vs. Ramesh Bhikaji Londhe**; 1984 Mh.L.J. 308.

5. Per contra, the learned advocate Mr. Gangakhedkar for the respondent-husband submits that admittedly, in terms of the settlement he has already paid an amount of Rs. 25,00,000/- to the petitioner-wife. Since he has been unable to pay the remaining amount he sought to withdraw the consent. He would submit that the proceeding was never converted to the one under Section 13-B of the Act. Even till date it continues to be a petition for divorce on the ground of desertion under Section 13(1)(i-b) of the Act.

6. He submitted that the decision in the case of **Prakash Kalandari (supra)** was rendered in the peculiar facts and circumstances of the case. In that matter, pursuant to the terms of settlement the wife had proceeded to withdraw criminal matters and thereby had acted on the terms of settlement. In the matter in hand, except the fact that some time has lapsed between settling of the terms and moving of the application by the respondent-husband, the petitioner-wife was not required to perform anything under the settlement nor has she proceeded to behave in any other manner so that it can be said that she has taken steps pursuant to the terms of settlement.

7. He would, therefore, submit that as was held in the matter of **Smt. Sureshta Devi Vs. Om Prakash**; I(1991) DMC 313, referred to in the matter

of **Prakash Kalandari (supra)**, even if the parties had agreed to seek a divorce by mutual consent, such consent not only on the date on which the petition is filed but the date on which the decree of divorce is to be passed, is material. Therefore, the respondent-husband is entitled to withdraw the consent and has rightly been permitted to do so.

8. As can be appreciated there is no dispute about the factual matrix. The respondent-husband had filed a petition for divorce on the ground of desertion under Section 13(1)(i-b) of the Act. The parties entered into a settlement before the marriage counsellor on 28.03.2016. It was presented before the Court and the learned Judge passed an order on 28.06.2017 reproduced herein before. The terms of settlement are in vernacular and can be roughly translated as under :

(a) The marriage between the petitioner and the respondent was solemnized on 24.04.2012 according to the Hindu rites at Aurangabad.

(b) The petitioner and respondent have been residing separately since 2013.

(c) They do not have any issue out of the wedlock.

(d) The petitioner (husband) would pay to the respondent an amount of Rs. 1,11,00,000/- as past and future one time maintenance. The respondent is agreeable to such amount.

(e) The petitioner would deposit the aforementioned amount of maintenance by way of cheque in the Court before passing of the order of divorce. He would deposit that money before 15.06.2016.

(f) No dispute remains in respect of 'Streedhan' and household articles.

(g) Neither of them would claim maintenance from each other in future.

(h) Neither of them would assert any right in the movable and immovable property of the other and respondent would not lay any claim for residence in the immovable property of the petitioner.

(i) Neither of them would lodge any proceeding against the other in respect of any earlier episode which had occurred and would not file any proceeding for maintenance against each other.

(j) Petitioner and respondent agreed to convert the divorce proceeding into a proceeding under Section 13-B of the Hindu Marriage Act, 1955.

Perusal of these terms and conditions would clearly indicate that the parties *inter alia* had agreed to convert the divorce proceeding as the one for a divorce by mutual consent under Section 13-B of the Act. Though these terms were subsequently admitted by both of them before the learned Judge of the Family Court who put up the endorsement thereon, admittedly, the petition was never converted as the one under Section 13-B of the Act.

9. It is pertinent to note that if at all the parties had really agreed to convert the divorce proceeding as the one under Section 13-B of the Act, no further steps were taken either by the Family Court or the parties themselves to actually convert the proceeding and solicit some orders thereon pursuant to such conversion. As can be appreciated, by virtue of a mandatory provision contained in sub Section 2 of Section 13-B of the Act, a period of six months has to be extended for enabling the parties to reflect and it is thereafter that the Court having been satisfied after hearing the parties can pass a decree of divorce.

10. This is what has been observed by the Supreme Court in the matter of **Smt. Sureshta Devi (supra)**. The following observations of the Supreme Court would clearly demonstrate that in such a proceeding under Section 13-B of the Act, the consent not only on the date of filing of the petition but even the consent on the date on which the order of divorce is to be passed is a *sine qua non*. Incidentally a contrary view of this Court was held to be not a good law:

"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 a 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 decrees. This 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 bona fides 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.]*

15. *In our view, the interpretation given to the section by the High Courts of Kerala, Punjab and 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."*

In view of such emphatic view of the Supreme Court, the respondent cannot be compelled to go ahead and seek a divorce by mutual consent under Section 13-B of the Act if does not wish to do that.

11. It is true that in the matter of **Prakash Kalandari (supra)** the division bench of this Court dismissed the appeal preferred by the husband seeking a similar relief of withdrawal of consent in terms of settlement. However, conspicuously, the factual matrix in that case were completely different. In that matter in terms of settlement the matter was converted as a proceeding under Section 13-B of the Act. Pursuant to the terms of settlement the wife had withdrawn criminal cases. The wife had acted to her detriment pursuant to the terms of settlement and it is on the backdrop of such peculiar facts and circumstances the order of the Family Court refusing to grant permission to the husband to withdraw the consent was held to be good. Therefore, the petitioner is not entitled to derive any benefit from the decision of **Prakash Kalandari (supra)** and on the contrary the facts and circumstances in the matter in hand would clearly indicate that there is absolutely nothing to demonstrate about the petitioner-wife having acted to her detriment in any other manner. In fact, except the condition of not filing any proceeding for divorce or claiming any other right against the respondent-husband she was not supposed to do any other thing. Mere lapse of about a year between the settlement of the terms and filing of the application by the respondent-husband for withdrawal of the consent, to my mind, does not alter the scenario. It is not such a long time as can be said to have worked to the detriment of the petitioner-wife.

12. Turning to the provision of Rule 31 of the Family Courts (Maharashtra) Rules, 1987, it reads thus :

“31. Settlement before Counsellor : When the parties arrive at a settlement before the Counsellor relating to the dispute or any part thereof, such settlement shall be reduced to writing and shall be signed by the parties and countersigned

by the Counsellor. The Court shall pronounce a decree or other in terms thereof unless the Court considers the terms of the settlement unconscionable or unlawful or contrary to public policy.”

As can be seen from these Rule the Court has to pronounce the decree on the basis of the terms signed by the parties and countersigned by the counsellor. However, as is clear from the provision, the obligation on the part of the Court to pronounce a decree or order comes with a rider that it has to record a satisfaction that the terms of settlement are unconscionable, legal and not contrary to the public policy.

13. If the parties in the matter in hand have agreed to convert the petition for divorce as the one under Section 13-B of the Act, mere signing of these terms would not give jurisdiction to the Family Court to pronounce a judgment and grant a decree of divorce by mutual consent. Further rigours of Section 13-B would still come into picture including a time of six months for reflection contemplated under Section 13(2) of the Act as has been laid down in the matter of **Smt. Sureshta Devi (supra)**. If the respondent-husband is entitled to withdraw the consent, when the circumstances do not indicate about the petitioner-wife having acted to her detriment as was the case in the case of **Prakash Kalandari (supra)**, Rule 31 (supra) would not come to the rescue of the petitioner.

14. In the facts and circumstances discussed herein above, the impugned order passed by the Family Court allowing the respondent to withdraw his consent cannot be said to be illegal.

15. The Writ Petition is dismissed.

16. The Rule is discharged.

(MANGESH S. PATIL, J.)

mkd/-