

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH, NAGPUR**

**SECOND APPEAL NO. 538 OF 2018**

**APPELLANT**

Shri Ajay s/o Bhikulal Gujar,  
(Ori. Petitioner                      Aged about 48 years, Occ: Service,  
No.1/Respondent                  R/o Loharpura near Bajaria, Nagpur.  
No.1)

**VERSUS**

**RESPONDENT**

Smt. Shyamali w/o Ajay Gujar  
(Ori Ptnr. No.2/                      Aged about 45 years, Occu: Household  
Appellant)                              R/O C/O Sukhlal Kaithwas, Near Batra  
Daal Mill, Malipura, Yavatmal.

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Shri N.R. Bhishikar, counsel for the appellant.  
None for Respondent.  
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CORAM                                      : SMT. M.S. JAWALKAR, J.  
RESERVED ON                              : 31/01/2022  
PRONOUNCED ON : 09/02/2022

**ORAL JUDGMENT :**

1]                      Hearing was conducted through video conferencing  
and the learned Counsel agreed that the audio and visual  
quality is proper.

2] Vide order dated 29/11/2021, the matter was fixed for final disposal, in spite of service, the respondent chooses to remain absent.

3] **Admit.** Appeal is taken up for final disposal in view of order dated 20/01/2022.

4] Learned counsel for the appellant submits that, present appeal is filed being aggrieved by the impugned judgment and decree passed by the First Appellate Court setting aside the judgment and decree passed by the learned Trial Court by which, divorce by mutual consent was granted. It is submitted that on 01/02/1998, the appellant and respondent got married as per the Hindu rites and rituals. As, there were disputes arose between them, the parties approach, the learned Civil Judge, Senior Division, Yavatmal with their matrimonial dispute. Wife/Respondent filed suit for restitution of conjugal right whereas appellant/husband filed suit for decree of divorce. As wife's suit has decreed and suit of husband for divorce is dismissed, husband filed two separate appeals before First Appellate Court.

5] On 23/11/2013, the parties were referred to Lok-Adalat and matter was amicably settled, as party decided to seek a decree of divorce by mutual consent, by which the terms and conditions were agreed between them. Pursuant to that the appellant paid a sum of Rs. 6,50,000/- to the respondent towards maintenance as per terms. The parties jointly applied before the learned Trial Court for decree of divorce under Section 13B of the Hindu Marriage Act. Surprisingly, after receiving sumptuous amount from the appellant and also withdrawal of appeal filed by husband, the respondent/wife file a Pursis withdrawing her consent for divorce by mutual consent. On 03/02/2015, the learned Trial Court allowed the petition under Section 13B and passed the decree of divorce by mutual consent. The said decree of divorce was challenged by the respondent by filing an appeal on 28/04/2015. The learned First Appellate Court vide impugned judgment and decree quashed and set aside the decree of divorce by mutual consent passed by the learned trial Court.

6] The substantial question of law framed in this appeal by this Court vide order dated 29/11/2021 is as follows:

*“Once, the parties having acted upon the terms and conditions for decree of divorce by mutual consent and also the decree having been passed, whether it is open for a party to challenge the same?”*

In spite of service of notice respondent/wife remained absent.

7] It appears that the appellant and respondent filed petition for divorce by mutual consent. It was agreed to pay Rs.13,00,000/- by appellant herein to respondent/wife towards maintenance. Accordingly, on the date of filing of petition under Section 13B of the Hindu Marriage Act, the petitioner had deposited Rs. 6,50,000/-. Remaining amount was agreed to be paid on the date of second motion. In the meanwhile, on 26/08/2014, respondent/wife withdrawn her consent for divorce by filing Pursis Exhibit-8. The respondent objected the same and on the next date filed his evidence

affidavit (Exh.13). The respondent/wife also filed evidence affidavit (Exh.17). The learned trial Court after hearing both the parties and on the basis evidence on record, dissolved the marriage between the parties by mutual consent. The respondent/wife filed appeal, *inter-alia* contending that during the subsistence of marriage, the appellant/husband performed his second marriage and this fact was suppressed at the time of filing of petition for mutual divorce.

8] Learned Lower Appellate Court held that, if the petition is filed simplicitor under Section 13 B of the Act for divorce by mutual consent, the Court must satisfy itself that the consent given by the parties continues till the date of granting decree of divorce. Even if, one party unilaterally withdraw his/her consent, the Court does not get jurisdiction to grant decree of divorce by mutual consent, in view of the mandate of Section 13 B of the Act. Though learned Appellate Court observed that, 'it is no doubt true that in the terms of compromise before Lok-Adalat, parties arrived at amicable settlement and, thereby, filed petition for mutual

divorce and, accordingly, made part payment to the appellant', the Appellate Court set aside the decree of divorce. The Court further observed that as per Section 13B (2) of the Hindu Marriage Act, the consent given by parties needs to be continued till the date of granting decree of divorce.

9] Learned counsel for the appellant relied upon the following citations to support the contentions of the appellant/husband:-

- 1] **Prakash Alumal Kalandari V/s Jahnavi Prakash Kalandari reported in AIR 2011 Bom 119.**
- 2] **Anil Kumar Jain V/s Maya Jain, reported in AIR 2010 SC 229.**
- 3] **Ashok Hurra and others V/s Rupa Bipin Zaveri and others reported in AIR 1997 SC 1266.**

10] In the matter of *Prakash Alumai Kalandari (supra)*, this Court held that the parties having acted upon the Consent Terms even in part including withdrawal of the pending matter, another party cannot be allowed to extricate himself from his commitment. This Court held that :

**Para-16**

*“As aforesaid, if the Petition is filed “simplicitor under Section 13B of the Act” for divorce by mutual consent, the Court must satisfy itself that the consent given by the parties continues till the date of granting decree of divorce. Even if one party unilaterally withdraws his/her consent, the Court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate of Section 13B of the Act. However, the situation would be different if the parties in the first instance resort to Petition for relief under Section 9 or 13 of the Act and during the pendency of such Petition, they decide to invite decree for divorce by mutual consent. On the basis agreed agreement, if the parties were to execute Consent Terms and then file a formal Petition/Application to convert the pending Petition to be treated as having been filed under Section 13B of the Act to grant decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the Consent Terms either wholly or in part to his/her detriment. In other words, the Court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.”*

11] My attention is drawn by the counsel for the

appellant to award passed in Lok-Adalat dated 23/11/2013. By this award, the appeals which were filed by the appellant/ husband against the decree in favour of wife for restitution of conjugal rights and dismissing the petition for divorce were withdrawn. Not only this, the appellant deposited half of the amount i.e. Rs. 6,50,000/- (as per the terms of consent decree) and the said amount was duly withdrawn by the wife. As held by this Court, once the respondent acted upon consent terms and appellant performed his part of obligation and committed himself to pay the amount as agreed upon towards maintenance and also withdrawn appeals, the respondent cannot be permitted to withdraw her consent unilaterally. Therefore, the trial Court has rightly rejected the unilateral withdrawal of consent. The learned trial Court also observed while passing order for dissolution of marriage that the parties have not only entered into compromise, but acted upon by the wife and has received amount of Rs. 6,50,000/- in terms of compromise. Appeals filed by husband also disposed off by an Award before Lok-Adalat.

12] It is also matter of record that the petitioner No.1/ husband deposited remaining amount of Rs. 6,50,000/- in the Court. Wife has consented before the Court in earlier pending proceedings i.e. in pending appeal before Lok-Adalat and therefore Award disposing of the appeal came to be passed. Thus, her contention that her consent was obtained by inducing her was held having no substance. The learned trial Court has rightly held that the petition under Section 13B is outcome of settlement between the parties in earlier proceeding before Lok-Adalat.

13] It appears that learned Appellate Court relied on citations *Anil Kumar Jain vs. Maya Jain, reported in AIR 2010 SC 229* held that these powers of granting divorce by mutual consent is exercised under Article 142 of Supreme Court. It would not be out of place to refer and rely recent judgment of the Hon'ble Apex Court i.e. *Amardeep Singh v/s Harveen Kaur, reported in (2017) 8 SCC 746*, wherein it is held that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under

Section 13-B (2), it can do so after considering the following :-

*“(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B (1) of separation of parties is already over before the first motion itself;*

*(ii) all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23 (2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;*

*(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;*

*(iv) the waiting period will only prolong their agony.*

*Since the period mentioned in Section 13-B (2) is not mandatory but directory, it will be open to the court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.*

*It further held that, object of Section 13-B (2) is to enable parties to dissolve marriage by consent if marriage has irretrievably broken down and to enable parties to rehabilitate as per available options. Further held that object of cooling-off*

*period of six months before grant of decree of divorce is to safeguard against hurried decision, if there is possibility of reconciliation. Object is not to perpetuate purposeless marriage or to prolong agony of parties where there are no chances of reconciliation.*

14] The Hon'ble Apex Court further guided that while exercising discretion the court consider following factors:-

*(i) statutory period of six months specified in S.13-B (2) in addition to statutory period of one year separation under S.13-B (1) is already over before first motion itself;*

*(ii) no likelihood of reconciliation between parties;*

*(iii) parties have genuinely settled all their differences including alimony, custody of child or any other pending issue; and*

*(iv) whether waiting period would only prolong agony.*

By this judgment, it is clarified the concerned Court may exercise its discretion to waive period and not only Hon'ble Apex Court under Article 142. After satisfying Court may exercise its discretion to put an end to prolonged agony of

parties.

15] In the present matter, the appellant and respondent residing separately since 2001. As both of them filed petition for divorce by mutual consent for which wife shown her consent. In view thereof, appeals pending before the Appellate Court filed by appellant husband were withdrawn. The terms of award in Lok-Adalat reflecting number of petition under Section 13B. Thus the said petition is filed on representation of wife that she is agreeable to divorce by mutual consent. Not only this, the amount of Rs. 6,50,000/- was deposited by the appellant husband and wife has withdrawn the same. The husband/appellant acted to her prejudice by accepting terms of compromise favourable to wife i.e. withdrawal of appeal and depositing of amount of Rs. 6,50,000/-. Wife is, thus, estopped from withdrawing her consent. As held in *Prakash (supra)* consent cannot be withdrawn unilaterally until and unless it is shown that (i) there is sufficient, good and just cause for allowing the parties to withdraw his/her consent, lest, it results in

permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. The decree passed by learned trial court is perfectly justified as there is no sufficient good and just cause for such withdrawal on vague allegations. The learned Appellate Court failed to take into account all these important aspects while setting aside the judgment and decree passed by learned Trial Court. In my considered opinion, the learned Trial Court rightly appreciated the facts that parties are residing separately since 2001, the husband has withdrawn the appeal in view of filing of H.M.P for divorce by mutual consent. Both the parties acted as per the terms in the petition by mutual consent and rightly exercised its discretion rejecting unilateral withdrawal by the wife.

16]        The judgment passed by the First Appellate Court is liable to be set aside. The substantial question of law involved in the matter is answered in the negative and accordingly, I proceed to pass the following order:

**ORDER**

- a) Appeal is allowed.
- b) The judgment and decree dated 07/04/2018 passed by the learned District Judge-3, Yavatmal in Regular Civil Appeal No. 49/2015, is hereby quashed and set aside.
- c) The judgment and decree dated 03/02/2015 passed by 3<sup>rd</sup> Joint Civil Judge, Senior Division, Yavatmal in H.M.P No. 260/2013, is hereby confirmed.
- d) Decree be drawn accordingly. No order as to costs.
- e) Liberty is granted to the respondent/wife to withdraw the remaining amount deposited by the appellant/husband herein before the learned Trial Court.

**[SMT. M.S. JAWALKAR, J.]**

**rk**

Signed By: RAJESH K  
NANDURKAR

Signing Date: 10.02.2022 10:57