

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO-M-9-2024 (O&M)
Date of Decision: 20.03.2024

NIHAR MALHOTRA

...Appellant

Versus

TEENA

...Respondent

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER**

Present : Mr. Ranjan Lakhanpal, Advocate
for the appellant.

HARSH BUNGER, J.

By way of present appeal, the appellant (Nihar Malhotra) seeks setting aside of order dated 01.03.2024 passed by the Court of learned Additional District Judge, Chandigarh; whereby the divorce petition filed by the appellant and his wife namely, Teena (respondent, herein) under Section 13-B of the Hindu Marriage Act, 1955 (in short "*the 1955 Act*"), by way of mutual consent, has been dismissed on account of withdrawal of consent by respondent herein, before recording of statements of parties on second motion.

2. Briefly, the marriage between the appellant-Nihar Malhotra and respondent-Teena, is stated to have been solemnized on 19.12.2012 at Goga Madi Mandir, Sector 19, Chandigarh and out of the said wedlock, one baby girl was born on 08.02.2016. It is stated that the respondent herein already had a child before the marriage between the parties. It appears that due to differences between the parties, they started living separately and eventually

a divorce petition came to be filed by the appellant (Nihar Malhotra) against the respondent (Teena) before the concerned Court at Chandigarh, which was dismissed in default. However, the same stood restored subsequently on 13.12.2022. During the pendency of the afore-said divorce petition, it transpires that the matter was compromised between the parties and they decided to part company and filed a divorce petition by way of mutual consent under Section 13-B of the 1955 Act. The statements of the parties on first motion were recorded and the matter was fixed for 20.09.2023 for recording of statements of parties on second motion.

3. It appears that on the date fixed for recording of statements of parties on second motion, an application came to be filed by the respondent herein, seeking to withdraw from the petition filed under Section 13-B of the 1955 Act. The said application filed by the respondent herein for withdrawal from petition under Section 13-B of the 1955 Act, was contested by the appellant herein by filing his reply.

4. Upon considering the matter, the learned Additional District Judge, Chandigarh, vide impugned order dated 01.03.2024, dismissed the divorce petition filed under Section 13-B of the 1955 Act, by holding it to be not maintainable on account of withdrawal of consent by respondent (Teena) before recording of statement of parties on second motion.

5. In the afore-mentioned circumstances, the appellant has filed the present appeal before this Court.

6. Learned counsel for the appellant submits that the learned Court below has erred in law and fact in dismissing the petition under Section 13-B of the 1955 Act, without considering the fact that the matter

has been compromised between the parties and in pursuance thereof, the appellant has already paid an amount of Rs.2,00,000/- out of total settled amount of Rs.7,00,000/- to respondent (Teena) and therefore, respondent was precluded from withdrawing her consent from the petition under Section 13-B of the 1955 Act. It is contended that the learned Court below should have dissolved the marriage in the given circumstances. Learned counsel for the appellant further submits that the learned Court below has wrongly dismissed the petition under Section 13-B of the 1955 Act by holding that the appellant can exercise his legal rights to recover the amount given by him to the respondent herein. Accordingly, it is prayed that the impugned order be set aside and the necessary directions/order be passed for dissolving the marriage between the parties.

7. We have heard learned counsel for the appellant and perused the paper-book with his able assistance.

8. In ***Smt. Sureshta Devi v. Om Parkash, 1992 AIR (Supreme Court) 1904***; Hon'ble Supreme Court had held as follows: -

“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.....

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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 13B 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 mutuality and consent

for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13B. 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 England Reporter 667 at 674] ...”

9. In the case of ***Smruti Pahariya v. Sanjay Pahariya, 2009(2) RCR (Civil)***, a bench of three learned judges of the Hon'ble Supreme Court, while approving the ratio laid down in the case of Sureshta Devi (supra), has taken the following view :-

"40. In the Constitution Bench decision of this Court in Rupa Ashok Hurra this Court did not express any view contrary to the views of this Court in Sureshta Devi. We endorse the views taken by this Court in Sureshta Devi as we find that on a proper construction of the provision in Sections 13B(1) and 13B(2), there is no scope of doubting the views taken in Sureshta Devi. In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

41. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi.

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 13B 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 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13B 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..."

10. In **Hitesh Bhatnagar v. Deepa Bhatnagar, 2011 AIR (Supreme Court) 1637**; Hon'ble Supreme Court observed as follows:-

"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..."

11. A perusal of the afore-said judicial pronouncements would manifest that the most important requirement for grant of divorce by mutual consent is free consent of both the parties and only on the continued mutual consent of the parties, a decree of divorce under Section 13-B of the 1955 Act can be passed by the Court. Therefore, it is the mutual consent of the parties, which gives the Court a jurisdiction to pass a decree of divorce under Section 13-B of the 1955 Act. Thus, mutual consent of the parties is a jurisdictional fact.

12. In the instant case, appellant (Nihar Malhotra) alongwith respondent (Teena) filed a divorce petition by way of mutual consent under Section 13-B of the 1955 Act. The statements of the parties on first motion were recorded and the matter was fixed for 20.09.2023 for recording of

statements of parties on second motion. Concededly, when the matter was fixed before the Family Court, Chandigarh, for recording of statements of parties on second motion, the respondent (Teena) filed an application to withdraw from the petition filed under Section 13-B of the 1955 Act. Therefore, keeping in view the above referred legal position, once the respondent (Teena) withdrew her consent for divorce by way of mutual consent, the Court below lost its jurisdiction to pass a decree of divorce under Section 13-B of the 1955 Act. Consequently, we do not find any illegality or perversity in the impugned order dated 01.03.2024 passed by the Court of learned Additional District Judge, Chandigarh, whereby the divorce petition filed by appellant (Nihar Malhotra) and respondent (Teena) under Section 13-B of 1955 Act was held to be not maintainable.

13. We also do not find any merit in the contention of the appellant that once the respondent-wife has accepted an amount of Rs.2,00,000/- in pursuance to the compromise executed between the parties to seek divorce by way of mutual consent, she was precluded from withdrawing her consent. It is borne out from the above referred judicial pronouncements that one of the parties may withdraw their consent at any time before passing of the decree by way of mutual consent under section 13-B of 1955 Act. In fact, the basic purpose of provisions of Section 13-B (2) of the 1955 Act, is to give an opportunity to the contesting parties to re-think over their decision to get separated. Moreover, learned Court below, while dismissing the Divorce petition, has observed that the respondent-wife is duty bound to return the amount and on her failure to do so, the appellant is entitled to exercise his legal rights to recover the same or alleged penalties, if any, in accordance

with law. Therefore, the appellant (if so advised) may avail his remedies in accordance with law, as observed by the learned Court below.

14. In view of what has been discussed, herein above, we do not find any merit in the present appeal, resultantly, the same is dismissed.

15. All pending applications (if any) shall also stand closed.

(SUDHIR SINGH)
JUDGE

(HARSH BUNGER)
JUDGE

March 20, 2024
gurpreet

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No