

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

CM-6035-CII-2024 in/and
FAO-1612-2024 (O/M)
Date of Decision : 18.04.2024

BHARTI SHARMA

...Appellant

Versus

SAGAR MATHUR

...Respondent

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

Present : Mr. Sudhir Aggarwal, Advocate
for applicant-appellant.

HARSH BUNGER, J.

CM-6035-CII-2024

This is an application filed under Section 5 of Limitation Act
for condonation of delay of 63 days in filing the accompanying appeal.

For the reasons stated in the application, which is accompanied
by affidavit of appellant, same is allowed and delay of 63 days in filing the
accompanying appeal is condoned.

Application is accordingly disposed of.

CM-6036-CII-2024

This is an application filed under Section 151 CPC for placing
on record the Deed of Settlement (Ex.P.1).

For the reasons stated in the application, same is allowed and
Deed of Settlement (Ex.P1) is taken on record, subject to all just exceptions.

Application is accordingly disposed of.

FAO-1612-2024

By way of present appeal, the appellant (Bharti Sharma) seeks
setting aside of order dated 22.12.2023 passed by the Court of learned

Principal Judge, Family Court, Gurugram; whereby the petition filed by the appellant and her husband namely, Sagar Mathur (respondent, herein) under Section 13-B of the Hindu Marriage Act, 1955 (in short “the 1955 Act”), seeking divorce 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-Bharti Sharma and respondent-Sagar Mathur, is stated to have been solemnized on 07.12.2019 as per Hindu rites and ceremonies and out of the said wedlock, one male child was born on 09.06.2021. It appears that due to differences between the parties, they started living separately and eventually they agreed for mutual divorce on the terms and conditions set out in the settlement dated 29.09.2022 (Ex. P.1). Thereafter, a joint divorce petition by way of mutual consent under Section 13-B of the 1955 Act came to be filed by both the parties before the concerned Court at Gurugram. The statements of the parties on first motion were recorded on 23.12.2022 and the matter was fixed for 14.07.2023 for recording of statements of parties on second motion.

The respondent herein was not able to appear on 14.07.2023 before the court as he was in custody in FIR No. 340 of 2023 under Sections 379-B, 34, 201, IPC and Section 25 of Arms Act in Jhajjar Jail, however, the respondent was produced by the jail authorities before the family court on 22.12.2023.

3. It appears that on the 22.12.2023 the respondent (Sagar Mathur) made a statement before the Family Court that he did not want to give divorce to the appellant (Bharti Sharma).

4. Upon considering the matter, the learned Principal Judge, Family Court, Gurugram, vide impugned order dated 22.12.2023, dismissed the divorce petition filed under Section 13-B of the 1955 Act, on account of withdrawal of consent by respondent (Sagar Mathur) 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, a settlement deed dated 29.09.2022 was executed. It is submitted that the appellant had complied with the conditions of the deed/settlement and performed her part and it was the respondent who had withdrawn his consent, therefore, in the given circumstances, the learned Court below ought to have dissolved the marriage. It is further contended that once the respondent-husband had executed a settlement deed with appellant-wife after accepting the terms and conditions thereof and agreed to seek divorce by way of mutual consent then he was precluded from withdrawing his consent. Accordingly, it is prayed that the impugned order be set aside and the necessary directions/order be issued/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.....

xxx

xxx

xxx

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 (Bharti Sharma) alongwith respondent (Sagar Mathur) 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 14.07.2023 for recording of statements of parties on second motion, which was further fixed for 22.12.2023 as the respondent (Sagar Mathur) was in custody but on 22.12.2023 the respondent made a statement before the family court that he did not want to give divorce to the appellant (Bharti Sharma). Therefore, keeping in view the above referred legal position, once the respondent (Sagar Mathur) withdrew his 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.

13. As regard the appellant's other contention that once the respondent-husband had executed a settlement deed after accepting the terms and conditions thereof and agreed to seek divorce by way of mutual consent, therefore, he was precluded from withdrawing his consent; copious reliance has been placed upon the decision of Bombay High Court in the case of ***Mr. Prakash Alumal Kalandari Versus Mrs. Jahnavi Prakash***

Kalandari, AIR 2011 Bombay 119 and the decision of Kerala High Court in the case of **Benny Versus Mini**, Mat. Appeal No. 1066 of 2017.

14. We have considered the aforesaid contention and have also perused the judgments relied upon by learned counsel for appellant, however, we find no merit in the said contention.

15. It is borne out from the above referred judicial pronouncements in the cases of **Smt. Sureshta Devi** (supra), **Smruti Pahariya** (supra) and **Hitesh Bhatnagar** (supra) 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. Further, the judgments relied upon by appellant have been rendered in the peculiar facts and circumstances in those cases and the said judgments are distinguishable on facts as regards the factual position in the present case. In **Prakash's** case (supra), the Bombay High Court has made the following observations in para 16 thereof :-

“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 of agreed arrangement, 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.”

In the present case, appellant has failed to point out as to what terms and conditions of the settlement have been complied with by her and to her detriment. It is also not stated as to what irreversible prejudice has been caused to her. Further, **Benny's** case (supra) was decided on the basis of judgment rendered by the Bombay High Court in the case of **Prakash** (supra). Therefore, the aforesaid contention as well the reliance placed by learned counsel for the appellant upon the decisions in the case of **Prakash** (supra) and Kerala High Court in the case of **Benny** (supra), is misplaced.

16. Apart from the above, para No. 7 of the Settlement Deed reads as under :-

“7. That the first party/wife will withdraw all the cases and complaints as per law after the first motion and, if the husband will not appear in second motion, then wife has all the right to revive all the complaints and cases. The second party/husband and his family members also withdraw any complaint and cases immediately on and after the signing of this deed and before the first motion.”

In view of the above extracted terms of settlement between the parties, the appellant, if so advised, may avail her remedies in accordance with law.

17. In view of the above discussion, we do not find any illegality or perversity in the impugned order dated 22.12.2023, passed by learned Principal Judge, Family Court, Gurugram. Resultantly, finding no merit in this appeal, the same is dismissed.

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

(SUDHIR SINGH)
JUDGE

(HARSH BUNGER)
JUDGE

18.04.2024
sjks

Whether speaking/reasoned: Yes / No

Whether reportable: Yes / No