

K. Omprakash Vs. K. Nalini

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Court : Andhra Pradesh

Decided On : Jul-15-1985

Reported in : AIR1986AP167

Judge : P.A. Choudary and ;Jagannadha Rao, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13-B(2)

Appeal No. : A.A.O. No. 836 of 1983 and C.M.O. No. 10278 of 1985

Appellant : K. Omprakash

Respondent : K. Nalini

Advocate for Def. : N. Satyanarayana, Adv.

Advocate for Pet/Ap. : R. Venugopal Reddy, Adv.

Judgement :

P.A. Choudary, J.

1. This is a husband's appeal preferred to this Court against an order made by the Chief Judge, City Civil Court, Hyderabad dismissing his application filed under S. 13 of the [Hindu Marriage Act, 1955](#) for dissolving his marriage with his respondent-wife. The petitioning husband is the respondent's maternal uncle. This appears to be a case of familiarity breeding contempt rendering attraction of

novelty absent. The parties are Hindus and their marriage took place on 19th Feb., 1978. But ever thereafter, they do not appear to have lived for long happily together. The husband alleged in his petition filed for divorce that his wife was in love with one S even prior to her marriage with him and that she was living on terms of illicit intimacy with the said S both before and after her marriage. The petitioner alleged that the wife admitted her illicit relationship with S to him. The husband alleged that he was satisfied that the respondent-wife was trying to snap her relations with him somehow. The respondent had been living away from her husband and with her parents from Jan. 1980, without ever visiting the petitioner except once in the month of July 1980 for just five minutes when the petitioner lost his father. The husband alleged that since January 1980 the parties were living apart and that there was no possibility of reconciliation between them and that the efforts made by the elders for bringing reconciliation between them had failed. The husband also alleged that the petitioner and the respondent agreed for having a divorce by mutual consent and that a draft petition in that behalf was also prepared for being submitted to the Court. The husband alleged that as the respondent went back upon that agreement, he had no other go except to file the application for divorce.

2. On the other hand the respondent in her counter blamed the husband for the unhappy state of affairs existing between them. She said that it was the husband who was causing inexpressable agony and distress to her. The wife asserted that the husband was making against her reckless allegations of illicit intimacy with the abovesaid S. She disowned love with S. In her turn, she imputed illicit intimacy of her husband with a Gujarati lady and said that because of that relationship, the petitioner was 'seeking divorce with her. The respondent denied ever having admitted her relationship with S. But the respondent did not deny the fact that they were living apart from January.

3. The above petition for divorce was filed sometime in the year 1982. It dragged on for over an year. When the matter came up for trial, the lower Court framed the necessary issues and examined three witnesses for the husband and two witnesses for the wife and marked Exs. A.1, A.2, A.3, A.4 and A.5 documents Exs. A.2 and A.4 are the letters said to have been written by the abovementioned S to

the respondent-wife.

4. The lower Court, on assessment of the evidence, held that the petitioner-husband had failed to make out a case for dissolution of the marriage with the respondent. Accordingly, the learned Judge dismissed on 10-8-1983. Against that order, the husband has filed this appeal which has been admitted by this Court on 5th Dec. 1983.

5. Now the parties have filed in this Court on 12th July, 1985 a compromise memo signed by both the parties and their respective lawyers praying that this Court may pass a decree for divorce declaring the marriage between the parties to be dissolved by mutual consent ignoring the aforementioned allegations and counter allegations made by the parties.

6. In the circumstances mentioned above, we entertain no doubt that it would be in the best interests of the parties to order the dissolution of the marriage. We are of the clear opinion that the marriage between the parties had broken down irretrievably and that there is no reasonable chance for reunion of the parties. They have been living apart for the last 4 1/2 years. Any prolongation of the legal status of marriage is not likely to bring about reconciliation. It can only help to accentuate their unhappiness by further fomenting their mutual jealousies. This long separation strengthened by the serious charges of unfaithfulness made against each other must have drained off the matrimony its last drops of sweetness. The parties are fighting relentlessly in Courts against each other on the basis of those allegations for over a period of two years. In these circumstances, we are clearly of the opinion that the present application made by the parties for dissolution of the marriage under S. 13-B of the Hindu Marriage Act is not the result of any collusion between the parties nor was it the result of any passing phase of mental agony or temporary feeling of unhappiness. We have no doubt that the differences between the parties are long-standing and deep rooted and that this Court would only be acting just to decree dissolution of the marriage here and now on the basis of their mutual consent.

7. It may be noted that the parties are not only agreeable to an instant divorce but even eager and anxious to have such a decree of divorce by mutual consent here

and now. The question then is whether S. 13-B(2) of the Hindu Marriage Act under which divorce by mutual consent can be granted, permits the granting of such decree of divorce in this case

8. S. 13-B(2) of the Hindu Marriage Act, reads as follows :--

'S. 13-B(2) Divorce by mutual consent :

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized, before or after the commencement of the Marriage Laws (Amendment) Act, 1976 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;

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-sec. (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall on being satisfied after hearing the parties and after making such inquiry as it thinks fit that a marriage has been solemnized and that the averments in the petition are true, pass a decree for divorce declaring the marriage to be dissolved with effect from the date of decree.'

9. Section 13-B is introduced into the statute book by means of the Marriage Laws (Amendment) Act, 1976. It permits, for the first time, dissolution of a Hindu marriage by mutual consent of parties, provided the parties have been living separately after their marriage for a period of one year or more and that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. S. 13-B radically altered the legal basis of a Hindu marriage by treating it as an ordinary form of contract which competent parties can enter into and put an end to like any other contract by mutual consent. Just as the parties can obtain a consent decree from the courts under O. 23, R.3 C.P.C., so they can now under S. 13-B of the Hindu Marriage Act obtain a consent divorce. Sri S. V. Gupte in his Hindu Law 3rd (1981) edition, Vol. 2, page 800, commenting

on this change, wrote:

'This is a very radical amendment as it enables divorce by consent. It also virtually puts a death-nail on the old concept of Hindu Law and Hindu morality that marriage is a sacrament and not a contract.'

However, a petition filed for divorce by consent under S. 13-B of the Hindu Marriage Act is required to be kept in abeyance for a minimum period of six months. This is in sharp contrast with a petition filed for divorce by consent under Special Marriage Act which is liable to be kept in abeyance at least for one year. This liberalising trend of law in the matter of granting divorce by consent cannot be lost sight by Courts in interpreting that section. But even then Cl. (2) of S. 13-B requires a Court not to pass a decree for divorce before six months of time lapses and after 18 months of time passes from the date of filing of such a petition for divorce by mutual consent. This is the last hope of the legislature for saving the marriage. The intention of the legislature is to provide a minimum period of six months for re-thinking of the parties. If the above time-table fixed by S. 13-B(2) of the Hindu Marriage Act is applied to the present application made by the parties in this case on 12th July 1985. We have to adjourn this case till January, 1986 for passing a decree for divorce under that section, notwithstanding the fact that we are of the opinion that there is no chance of reconciliation between the parties who have been living away from each other for the last 41/2 years and are today most anxious and ready to obtain such a decree here and now. That situation raises somewhat an important legal question as to the meaning which we should attribute to S. 13-B(2) of the Hindu Marriage Act. That question is whether the Legislature intended that S. 13-B(2) of the Hindu Marriage Act should be treated as a mandatory provision of law or the Legislature intended that section to be treated merely as a directory provision of law. We have already noticed the language of S. 13-B(2). On first impression it is not impossible to hold S. 13-B(2) to be mandatory. As a mandatory provision of law calls for its pound of flesh and requires to be complied strictly and it not being satisfied with offerings of more substantial compliance of its commands, we will have to adjourn this matter for six months and postpone the deliverance to the parties from this deadlock by the that period of time (sic). It is well-settled proposition of law that a statutory provision, though

mandatory in form, can yet be treated as directory in substance. The question then arises whether there is anything in the text of S. 13-B(2) of its context or purpose or design that calls for S. 13-B(2) being interpreted as directory? In our opinion, there are weighty reasons warranting the reading of S. 13-B Cl. (2) as directory. In that context, we must first call attention to the design of the law expressed in its liberalising tendency of providing relief to parties on the basis of their mutual consent from their broken marriages. We must remember that this relief is granted by bringing about a profound alteration in the concept of a Hindu marriage from that of a sacrament to a contract. By that alteration, law has definitely set its face against forcible perpetuation of the status of matrimony between unwilling partners. Next, we must note that this six month's time fixed by S. 13-B(2) is not a rule relating to the jurisdiction of the Courts to entertain a petition filed for divorce by consent. That question of jurisdiction is dealt with by S. 13-B(1) of the Act and must be strictly complied with. S. 13-B(2) is a part of mere procedure. A procedural provision must be interpreted as a handmaid of justice in order to advance and further the interests of justice and not as a technical rule. Above all we should note that if S. 13-B(2) is read as a mandatory provision and as applicable to the exercise of matrimonial jurisdiction by the appellate Courts also, S. 13-B(2) becomes totally unworkable. According to the literal reading of S. 13-B(2) the courts cannot pass consent decree of divorce beyond 18 months period from the date of its filing. In the event that such an application is filed by the parties and the Courts for some reason of human error or failure did not or could not dispose it of within the said period of 18 months, the literal reading of S. 13-B(2) prevents the Courts from granting that relief thereafter. Similarly if a petition for divorce by mutual consent is filed before the lower Court and was dismissed by the lower Court for some reason, the appellate Court would be powerless to grant that relief on the basis of the application filed in the lower Court because 18 months must have elapsed by the time the matter reached the appellate forum although the parties are still fighting relentlessly in the appellate Court. These considerations lead us to hold that it could not have been the intention of S. 13-B(2) that the appellate Court should always drive the fighting parties to go through the purposeless forms of meaningless ceremony of petitioning again for consent divorce waiting and watching the completion of necessary number of revolutions of

this mother Earth around the unmoving sun.

10. For all the above reasons, we are of the opinion that S. 13-B(2) of the Hindu Marriage Act should be read as directory only. S. 13-B(2), no doubt cautions the Courts of its duty to fight the last ditch battle to save the marriage; but when the Court is fully satisfied, on the basis of the proved facts, that in the interests of justice of the society and the individuals marriage tie should be put asunder immediately, S. 13-B(2) does not impose any fetter on the power of the Court to grant instant decree of divorce. At any rate, we are clearly of the opinion that the time-table fixed by S. 13-B(2) does not apply to an appellate Court. The great Telugu poet Vemana said that the broken iron can be joined together, but not broken hearts. Parties have been living apart for long and their wedlock has now virtually become a deadlock. Chances of reunion had completely faded away. In these circumstances, we think it just and proper to grant a decree of divorce straightway. Accordingly we pass a decree of divorce declaring the marriage between the appellant and the respondent as dissolved with immediate effect.

11. The appeal is allowed in terms indicated above; but it is made clear that this judgment is based on mutual consent and not on the merits of the allegations made by the parties against one another. No cost.

12. Appeal allowed.