

Santosh Kumari Vs. Virendra Kumar

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Court : Rajasthan

Decided On : Jan-29-1985

Reported in : 1986(1)WLN445

Judge : Kishore Singh Lodha, J.

Appeal No. : S.B. Civil Misc. Appeal No. 132 of 1984

Appellant : Santosh Kumari

Respondent : Virendra Kumar

Disposition : Appeal dismissed

Judgement :

Kishore Singh Lodha

1. This is a wife's appeal against that judgment and decree of the learned Distt. Judge, Sri Ganganagar dated 13-8-1984 dissolving the marriage between her and her husband by mutual consent.

2. The facts giving rise to this appeal may be briefly stated here. The parties are Hindus by caste and their marriage had taken place on 16.2.75 at Suratgarh. They lived together till 15-10-1979, and a daughter was born out of this wed-lock on 26-5-1978. The husband Shri Virendra Kumar filed an application Under Section 13 of the Hindu Marriage Act (here in after called 'the Act') for dissolution of the

marriage on the grounds of cruelty and desertion. The application was contested by the wife. The facts of the marriage and the birth of the daughter were admitted but the facts of cruelty and desertion were denied. On the other hand, cruelty was alleged on the part of the husband and his parents. Issues on the pleadings of the parties were framed on 22.3.84. However, before this, an effort was made for reconciliation between the parties on 2.9.83, but it was found that the husband was not willing to take the wife back.

3. While the matter was pending for the petitioner's evidence, one more issue was added on 20-4-1984, and the case was fixed for the petitioner's evidence on 9-11-1984. However, it appears that before that date, the parties appeared before the learned District Judge on 13-8-1984 and moved a joint application stating that the parties were desirous of getting a decree for dissolution of the marriage by mutual consent and therefore, the matter may be taken up on that very day. Another application purporting to be Under Section 13B of the Act was also jointly filed by the parties on that day and it was stated therein that the parties had been living separately since 15-10-1979 and it has not been possible for them to live together despite the efforts made by their friends and relations in this respect, and, therefore, it was in the interest of both of them to obtain a decree for dissolution of the marriage so that each one of them be able to get another match and live a happy life. It was further alleged that the husband had returned all the ornaments and cash belonging to the wife back to her and, therefore, the application Under Section 27 of the Act filed earlier by her became infructuous and that in future, the wife will not be entitled to any maintenance. It was also mentioned that the daughter Amandeep had been handed over by the wife to the husband who would now look after her and that the wife will not be entitled to any maintenance for the daughter and that she would withdraw the application Under Section 125 Cr.P.C. which had earlier been filed by her. In the last, it was prayed that the application earlier filed by the husband may be deemed to be a joint application of the parties with their mutual consent and a decree for dissolution of the marriage may be passed Under Section 13B of the Act.

4. On this application being filed, the learned District Judge again made an effort to bring about the reconciliation between the parties but without success and they

insisted that the application, of the husband may be treated as a joint application with mutual consent for the grant of a decree for divorce and the application filed on 13-8-1984 may be treated as a motion under Sub-section (2) of Section 13B of the Act and a decree for divorce may be passed. Looking to these circumstances, the learned District Judge accepted their prayer and granted a decree for dissolution of the marriage holding that he was satisfied that the application was voluntarily filed by the parties with their mutual consent, that there was no connivance,, between them, that neither of the parties was taking any advantage of its wrong nor there was any undue delay in the filing of the application. He also directed that the daughter Amandeep will stay with the petitioner and the wife will not be entitled to any maintenance for herself or for her daughter and that she would withdraw the application under Section 125 Cr.PC already filed by her. He also observed that neither party owned anything to the other and that the husband had already returned the ornaments to the wife.

5. Aggrieved of this decree, the wife has now come up in appeal.

6. I have heard the learned counsel for the parties and have gone through the record,

7. Two contentions have been raised before me by the learned counsel for the appellant. His first contention is that the learned District Judge had no jurisdiction to pass a decree for dissolution of marriage by mutual consent in this case because as a matter of fact, there was no joint application by the parties before him till 13-8-1984 and the application dated 13-8-1984 could not be deemed to be a joint application envisaged under section (1) of Section 13B as well as a motion under Sub-section (2) thereof because the motion under Sub-section (2) of Section 13B could have been made not earlier than six months after the date of the joint petition filed under Sub-section (1) and not later the eighteen months after the same date. Here, the joint application as well as the motion under Sub-section (2) of Section 13 had been made on the same day by a single application. According to him, therefore, the decree is a nullity being against the provisions of Section 13B. His second contention is that the decree passed by the learned District Judge also relates to matters other than the divorce with mutual consent

e.g. it debars the wife from claiming any maintenance for herself or her daughter or from asking for the return of the ornaments lying with the husband and, therefore, in any case, these directions regarding matters extraneous to the grant of a decree for divorce should be set aside. On the other hand, the learned counsel for the respondent supported the decree passed by the learned District Judge and also urged that since it was impossible for the parties to live together and they had asked for the dissolution of the marriage with their free will, the decree cannot be set aside merely because of some irregularities in the manner of the filing of the application. It was also contended that the period of eighteen months referred to in Sub-section (2) of Section 13B is in respect of the withdrawal of the joint application and not the outer limit for the filing of the motion for the grant of the decree by mutual consent and, therefore, according to the learned counsel for the respondent, the learned Dist. Judge was within his jurisdiction to pass the decree.

8. I have given my careful consideration to the rival contentions. It is true that no joint application for grant of a decree for divorce by mutual consent was filed before 13-8-84 but in the application dated 13.8.84 a prayer was made that the original application filed by Virendra Kumar for grant of divorce may be deemed to be a joint application envisaged Under Section 13B(1) and this was alleged to be done by the Court. Such a course has been adopted by some High Courts as would be clear from the decisions reported in Jagmohan v. Smt. Sudesh 1979 H.L.R. 303, Joginder Kaur v. Mohan Singh 1979 H.L.R. 309 and Gurdev Kaur v. Malkiat Singh 1980 H.L.R. 331, Prem Lata v. Yash Paul 1985 (1) H.L.R 148 & Lalit Bhatia v. Kiran Bala 1985 (2) H.L.R. 371, which are cases of Punjab and Haryana High Court. The same view, of course, on a little different-reasoning appears to have been adopted by the Allahabad High Court reported in Indrawal v. Radhey Ramon : AIR1981 All151). In view of these authorities, the learned District Judge was right in treating the application dated 20-10-1982 as an application for divorce by mutual consent. Where the parties requested the Court to treat that application as an application for grant of a decree of divorce by mutual consent they must be deemed to have asked for an amendment of that application and when the Court acted upon it, it must be deemed to have allowed the amendment. It further appears that after the filing of the application dated 13-8-1984, the learned District Judge had tried to bring about reconciliation between the parties but had failed in

that effort as the parties stated that it was no longer possible for them to live together. As already stated earlier such an effort on a previous occasion had also failed. It was, therefore, abundantly clear that the parties did not want to live together and were desirous of getting a decree of divorce. In these circumstances, the insistence on the form of the application would be improper and unnecessary because if the decree is refused on such a ground the agony between the parties will hamper in their way of settling by their fresh marriages.

9. The application dated 13-8-1984 has been treated by the learned District Judge as a motion Under Section 13B(2) of the Act .It has been filed after six months of the earlier application dated 20-10-1982, which was sought to be deemed to be a joint application Under Section 13B(1),of the Act., The objection of the learned counsel for the appellant to this application being acted upon as a motion under Section 15B(2) is that it has not been filed within eighteen months of the earlier application anil, therefore, the Court had no jurisdiction to act upon it. His contention is that under Section 13B(2) the motion of both the parties has to be made nor earlier than six months after the date of the petition referred to in Sub-section (1) and not later than eighteen months after the same date and if the application is not made within that time, the Court cannot consider any subsequent application as a motion of both the parties for grant of divorce by mutual consent. At the first flash, the argument appeared to be attractive and plausible and with some substance but on a deeper consideration thereof, I do not find force in it. A logical conclusion of this argument would be that if the motion is not made by both the parties within eighteen months of the petition under Section 13B(1), the Court would become functus officio and the application filed under Section 13B would thus become infructuous. That does not appear to be the intent and purpose of sub-section .(2) of Section 13B and a proper construction of this provision would be that the application may be withdrawn by any of the parties not before six months and not later than eighteen months of the petition under Section 13B(1) and if it is not so withdrawn within that period, the Court may proceed to grant a decree on mutual consent if it is satisfied about the other requirements of the section, namely, that the marriage has been solemnized and that the averments in the petition are true. Looked at from another point of view, also, in my opinion, the same meaning was to be given to Sub-section (2) of Section 13B. According to

this section, the parties or any of them has a right to withdraw the application filed under Sub-section (1) of Section 13B till the expiry of the last day of the eighteenth months of the filing of the application under Section 13B(1) and till then the motion of the parties for the grant of the petition filed under Section 13B(1) cannot be made effective because that would deprive the parties from the right of withdrawing the application filed under Section 13B(1) and if that motion cannot be considered before the expiry of the aforesaid period of 18 months, the application cannot be thrown out on the ground that the motion had not been made within 18 months of the date of the application under Section 13B(1) when that motion could not have been taken into consideration till the expiry of the aforesaid period. In these circumstances, I am clearly of the opinion that even if the motion was not made within 18 months from 20-10-1982, the Court would not lose its jurisdiction to entertain the same and pass a decree in accordance with Sub-section (2) of Section 13B.

10. Apart from this interpretation of Section 13(2), it also appears that when it appears to the satisfaction of the Court that it is impossible for the parties to live together and a decree for divorce by mutual consent would be in the interest of both of them, it need not attach undue importance to the form of the application or the time within which it has been made, as would be clear from the authorities already referred to above.

11. So far as the other contention goes it does appear that the agreement with regard to the withdrawal of the application under Section 125 . Cr.PC and not to make any claim with regard to the ornaments etc., does not squarely fall under Section 13B but if the parties with their eyes open and of their free will enter into such an agreement and the Court embodies it in its decree, passed under Section 13B, no serious exception can be taken to it. The mutual consent is in the nature of a compromise and the Court has power to pass a decree in terms of that compromise. Reference in this connection may be made to Order 23 Rule 3 CPC which empowers the Court to pass a decree in accordance with the terms of the compromise so far as it relates to the suit whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit. Even if the provisions of Order 23 Rule 3 CPC are not strictly applicable to the

proceedings under Section 13B of the Act, the principle underlying it can certainly be invoked.

12. It will also not be out of place to mention that according to the information of the learned counsel for the respondent, both the parties have already re-married. The learned counsel for the appellant, however, pleads ignorance about this but I have no reason to doubt the statement of the learned counsel for the respondent. In this view of the matter also, the setting aside of this decree would lead to unnecessary complications.

13. For the reasons stated above, I do not find force in this appeal and dismiss the same. Looking to the facts and circumstances of the case, I shall make no order as to costs.

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