

Amitabha Ghosh

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Court : Kolkata

Decided On : Mar-21-1994

Reported in : 98CWN808,I(1994)DMC638

Judge : M.G. Mukherjee and ;S.N. Mallik, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1), 13B and 133; ;Code of Civil Procedure (CPC) - Order 6, Rule 17

Appellant : Amitabha Ghosh

Advocate for Def. : Monish Sen, Adv.

Advocate for Pet/Ap. : Milon Mukharjee and ;T.K. Sen, Adv.

Judgement :

M.G. Mukherjee, J.

1. This is a revisional application filed by the husband petitioner impugning an order No. 8 dated 2-2-94 passed by the learned Additional District Judge. Second Court at Alipore South 24 Parganas (S) in Matrimonial Suit No, 53 of 1993 whereby the learned Trial Judge refused to pass an order straightway on a joint petition filed by both the husband and wife under Order 23 Rule 3 read with Section 13-B of the Hindu Marriage Act praying for dissolution of marriage between the parties on mutual consent. The learned Trial Judge was of the view

that a date has to be fixed after six months, from the date of filing of the application since it is a suit for divorce under Section 13(1)(ia) of the Hindu Marriage Act and accordingly fixed 3rd August, 1994 for hearing of the petition and for passing appropriate orders.

2. The wife opposite party entered appearance in the matter and submitted inter alia through her learned Advocate that since she was a party to the joint petition filed on 2nd February, 1994, she also wanted a dissolution of the marriage between the parties by a decree of divorce on mutual consent and wanted to have the order impugned dated 2-2-94 as passed by the Trial Judge set aside.

3. The husband filed the suit for dissolution of the marriage by a decree of divorce on the ground inter alia of cruelty both physical and mental against the wife and prayed alternatively for declaration of the marriage as a nullity contending inter alia that the essential ceremonies to a valid Hindu Marriage were not performed and that the marriage certificate was illegal, invalid and of no effect. The wife did not initially contest the suit by filing a written statement and ultimately the suit was transferred by the learned District Judge to the Second Court of the Additional District Judge for ex parte disposal. The learned Additional District Judge fixed 7th January, 1994 for ex parte hearing and ultimately on 2nd February, 1994 to which the matter was subsequently adjourned, the wife filed the written statement along with the show-cause petition and here written statement was accepted by the Court on the cause shown being treated as sufficient for non-filing of the written statement earlier. As and when the wife respondent was so permitted to contest the suit, both the parties filed a joint petition under Order 23 Rule 3 of the Code of Civil Procedure read with Section 13-B of the Hindu Marriage Act praying for dissolution of the marriage by a decree for divorce on mutual consent and ultimately the learned Additional District Judge was not pleased to pass any order straightway on the application but fixed 3rd August, 1994 for hearing of the suit petition for appropriate orders.

4. It has been submitted by Mr. Milon Mukherjee Advocate appearing in the matter with Mr. T.K. Sen for husband petitioner & Mr. Monish Sen for the wife respondent that the Court was competent to pass an appropriate order on the date of the

presentation of the application itself under Section 13B of the Hindu Marriage Act since the words 'not earlier than six months after the date of the presentation of the petition' was merely directory and not mandatory and if the other criteria were satisfied, the Court ought to have passed a divorce by mutual consent.

5. Reliance was placed before us on various judgments of the Supreme Court and of different High Courts. In *Smt. Sureshta Devi v. Om Prakash* reported in : [1991]1SCR274 , it was observed inter alia in paragraph 14 of the said judgment at page 1908 that if the Court 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'. It is against the background of one of the parties withdrawing the consent before the final date of hearing that the question arose before the Supreme Court to reconcile the conflicting views of the different High Courts on the point, the view taken by the Bombay High Court in *Jayasthree Ramesh Londhe v. Ramesh Bhikaji Londhe* reported in : AIR1984 Bom302 , the view of the Delhi Court in *Smt. Chander Kant a v. Hans Kumar* reported in : AIR1989 Delhi73 and the view taken by the Madhya Pradesh High Court in *Meena Dutta v. Anirudh Dutta*, 1984(2) DMC 388 that the crucial time for the consent of divorce under Section 13B of the Hindu Marriage Act was the time when the petition was filed, was found by the Supreme Court to be not good law and the Supreme Court expressly overruled the views expressed in the said decisions. The Kerala High Court in *K.I. Mohanan v. Jeejabai* reported, : AIR1988 Ker28 , the Punjab and Haryana High Court in *Haracharan Kaur v. Nachhattar Singh* reported in and Rajasthan High Court in *Santosh Kumari v. Virendra Kumar*, reported in took a contrary view and held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the Court passes a decree for divorce. That satisfaction of the Court after holding an inquiry about the genuineness of the consent, necessarily contemplates an opportunity for either of the spouses to withdraw the consent. The Kerala High Court in particular has ruled out the application of analogy under Order 23 Rule 1 of the Code of Civil

Procedure since it is dissimilar to the situation arising under Section 13-B of the Hindu Marriage Act. The Supreme Court in this case held that from the analysis of the provision of Section 13-B of the Hindu Marriage Act, 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. Ultimately one of the spouses may back out and there is nothing in the Section which prevents such a course of action. 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 Supreme Court expressly overruled the contention of the different High Courts that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently moved for divorce decree.

6. it is indeed true that in *Dr. (Mrs.) Leena Roy v. Dr. Subrato Roy and Ors.*, reported in : AIR 1991 SC92 when a joint petition was filed for divorce on mutual consent and filing an application for compromise before the Supreme Court for the custody of the child surreptitiously taken away by the father of child from United State of America to India, the Supreme Court held that since a divorce application was already pending before the City Civil Court at Calcutta in which proceeding also a decree for nullity of marriage granted by an American Court sought by the husband on the ground *Inter alia* that irretrievable breakdown of marriage was no ground under the Hindu Law, the Supreme Court directed both the parties to file an appropriate application under Order 23 Rule 3 read with Section 13-B of the Hindu Marriage Act before the City Civil Court at Calcutta and directed further that if such an application is filed, the Court will dispose of the application as expeditiously as possible preferably within two weeks from the date of filing of such application, in view of the fact that one of the parties intends to go back to America in connection with her service. It was thereafter that both the husband and wife prayed for an amendment of the original application as filed by the husband so as to convert the original proceeding to a proceeding under Section 13-B of the Hindu Marriage Act and thereafter the City Civil Court passed a decree

of divorce by mutual consent. Here the facts are entirely distinguishable since the original application as filed by the husband has not been amended suitably so as to convert it into an application under Section 13B of the Hindu Marriage Act but after filing of the written statement, the wife joined the husband in filing a fresh application under Section 13-B of the Hindu Marriage Act.

7. The learned Advocates for both the parties cited before us a Division Bench judgment of the Karnataka High Court in Smt. Roopa Reddy v. Prabhakar Reddy reported in : AIR1994 Kant12 where it was held that for considering whether the requirement under Section 13-B is mandatory or directory, the words used in the Section shall have to be read in the context in which the liberalised provision has been made by the legislature enabling the unwilling parties to seek divorce instantaneously and thus to put an end to the untold misery. When the intention of the Legislature in introducing Section 13-B(2) is to liberalise and to unlock the wedlock, the Legislature has never intended the period of six months mentioned in the Act to be strictly complied with. But in spirit the Section is directory in nature and it has been incorporated to hold that two discordant spouse to may get quick separation and lead their remaining life without any agony. If Section 13-B(2) is read as mandatory, the very purpose of liberalising the policy of decree of divorce by mutual consent will be frustrated. Thus the Karnataka High Court held that Section 13-B(2) of the Hindu Marriage Act though it is mandatory in form is directory in substance. In the facts of the said case, the wife had filed divorce petition on the ground of cruelty. On appreciation of evidence it was found that both parties were not interested in continuing the marriage. Efforts were made by Court to bring about reconciliation but such attempts proved to be futile. The parties filed a joint application under Order 6 Rule 11 of the Civil Procedure Code seeking amendment to that main petition filed by wife to be converted into one under Section 13-B of the Hindu Marriage Act for divorce by mutual consent. An application filed under Order 6 Rule 17 C.P.C. was found to be more than six months old and it was treated by the Division Bench of the Karnataka High Court as a compromise petition for divorce by mutual consent. The Karnataka High Court Division Bench was of the opinion that since law permits that when the consent is not tainted with mala fides, fraud or coercion but given out of free will and with the knowledge of its consequences, the application presented can be

treated as seeking divorce by mutual consent and has to be accepted. In the background of the circumstances it was found that where separation is of a longer period and chances of re-union an impossibility, a decree of divorce is the only prudent course and it was accordingly granted. The distinguishing feature of this case too is that the original application as filed by the wife for divorce on the ground of cruelty was ultimately sought to be converted by an amendment of the plaint to an application under Section 13-B of the Hindu Marriage Act.

8. In the facts and circumstances of the present case we do not find that the parties sought to amend the original petition filed by the husband to be converted into an application under Section 13-B of the Hindu Marriage Act, but filed a fresh application under Section 13-B of the Hindu Marriage Act on 2-2-94 after the wife chose to file a written statement. Hence the Karnataka decision is strictly not called into play. There is also no direction by the Supreme Court as in *Dr. (Mrs.) Leena Roy v. Dr. Subrato Roy* reported in : AIR 1991 SC92 , In the facts and circumstances of the present case which will compel the Court to dispose of the application under Section 13-B of the Hindu Marriage Act within a period of two weeks from the date of presentation or dating back the said application from the date of filing of the original petition by the husband by way of amendment so as to be treated as an application filed under Section 13-B of the Hindu Marriage Act.

9. We, however, grant liberty to both the husband and wife to take appropriate course of action before the Court below by filing an amendment application to the ordinal application filed by the husband so as to convert it into an application under Section 13-B of the Hindu Marriage Act, if it is otherwise permissible in Accordance with law, by either withdrawing the application filing filed on 2-2-94 or by keeping it on the file to be disposed of along with the properly amended original application on it being converted into a proper application under Section 13-B of the Hindu Marriage Act.

10. At the present stage we do not think that the order dated 2-2-94 needs any modification but we direct the learned Additional District Judge, 2nd Court, Alipore to entertain an application for amendment of petition under Order 6 Rule 17 of the Code of Civil Procedure so as to convert the original application to be one under

Section 13-B of the Hindu Marriage Act if the parties decide to do so and to pass appropriate order in accordance with law, after pre-dating the date of disposal from 3-8-94 to a suitable date earlier as may be fixed by the Court in this context. The order dated 2-2-94 stands modified accordingly. Let there be an ex-parte disposal of the matter on the Court below.

11. The revisional application stands disposed of. There will be no order as to costs. Let a xerox copy of this order be given to the learned advocate for this parties on usual.

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