

**Om Parkash Vs. Sureshta Devi**

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**Court :** Himachal Pradesh

**Decided On :** Aug-01-1989

**Reported in :** I(1990)DMC127

**Judge :** Bhawani Singh, J.

**Acts :** [Hindu Marriage Act, 1955](#) - Section 13B

**Appeal No. :** F.A.O. (HMA) No. 28 of 1989

**Appellant :** Om Parkash

**Respondent :** Sureshta Devi

**Advocate for Def. :** K.C. Rana, Adv.

**Advocate for Pet/Ap. :** A.K. Goel, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**Bhawani Singh, J.**

1. This appeal, by the husband, arises out of the judgment of District Judge, Hamirpur in H.M.P. No. 2 of 1985 decided on 31-12-1988. The grievance is that this petition, jointly moved by the parties under Section 13-B of the [Hindu Marriage Act, 1955](#) (in brief 'the Act') for dissolution of marriage by a decree of divorce, has

been dismissed by this Judgment and the appellant appeals that the decision is illegal and deserves to be set aside and the application under Section 13-B of the Act deserves to be allowed.

2. The facts, in brief, are that the appellant and the respondent were married on 21-11-1968 but soon they fell apart. They have no issue out of this wedlock. The matter came to such a pass that finally on January 8, 1985, a joint petition was moved under Section 13-B of the Act for the dissolution of marriage by a decree of divorce. The statements of the parties, on oath, were separately recorded by the Court on 9-1-1985. This is the first stage of the case. The Second stage started with the filing of an application stated to have been prepared on January 15, 1985 but actually presented in the Court on behalf of the respondent, Sureshta Devi, on March 22, 1985, which, inter alia, mentions that the statement of January 9, 1985, was given by her under pressure and threat by the petitioner and before giving it she was not allowed to see or meet her relations to consult them before filing the petition nor were they permitted to accompany her to the Court. The relations, it is further alleged, were not informed about: the proposed divorce by mutual consent. It was thus prayed that in these circumstances, she may be permitted to withdraw her consent and the petition accordingly dismissed. The Court passed the following order on May 4, 1985 :

'The respondent failed to appear and is proceeded ex parte. In fact, a joint petition under Section 13-B(1) of H.M.A. was filed on 8-1-85. Statement of parties were recorded and case adjourned for 1-8-1985. Meanwhile, applicant-wife has sought to withdraw the petition claiming that she filed the application under duress of husband. I am satisfied that the applicant is no more interested in seeking divorce. The application as such is allowed. Announced.'

The Court also passed the following order on the same day : .

'None for the petitioner. Case taken up today. As per separate order dated 4-5-85 in the application the petition is dismissed as respondent is not interested in divorce. Hence dismissed. File be consigned. Announced.'

3. The appellant felt aggrieved by these orders and assailed the same in this Court through Civil Revision No. 78 of 1988 and F.A.O. (HMA) No. 15 of 1988. Both these matters were allowed by a common judgment dated 1-7-1988 passed in FAO No. 15 of 1988 and the case was remanded to the District Judge for fresh disposal in accordance with law and in light of the observation made in the judgment.

4. Thus the matter came for consideration before the District Judge who tried the matter and consequently dismissed the application under Section 13-B of the Act. It is this order, thus passed, which is under challenge in this appeal.

5. The principal submission of Sh. A.K. Goel, who appears for the appellant in this case, is that the District Judge has committed grave error in coming to the conclusion that the complaint of the respondent on the basis of which the application for withdrawal of her consent was made was factually wrong and thus legally impermissible. In other words, it is contended that the application for mutual divorce was made jointly by the parties with their free will and they were represented by their respective lawyers and there was no question of exercising any pressure or influence or compulsion as alleged and further that once consent is so given and petition moved, the same could not be withdrawn by such a consenting party. It is also urged that by allowing the party to withdraw the consent at any stage, the object of the provision enacted by the Legislature would be rendered nugatory and the court a place for playing gimmicks by the parties.

6. Sh. K.C. Rana, who appears for the respondent, has, on the other hand, contended that the averments of the respondent in the application and the evidence led in this case clearly demonstrates that the decision of the District Judge is in accordance with law and facts on the record. Therefore, it is urged that the same deserves to be maintained.

7. In order to appreciate the rival contentions of the parties, it is pertinent to refer to the evidence led by them during the course of the trial of this application.

8. Appellant Om Parkash (PW-1) states that he is a teacher and was married to the respondent on 21-11-1968. They lived together for 6/7 months till 1969.

Thereafter, the respondent did not stay with him except from 9-12-1984 to 7-1-1985 under the orders of the Court but during this time they did not live like husband and wife. On 7-1-1985 the respondent told him to accompany her to Hamirpur on 8-1-1985 as she wanted to give him divorce. In this way they come to Hamirpur. The respondent had a talk with her counsel. Sh. Madan Rattan, for about an hour and thereafter a joint petition for mutual divorce was filed in the Court at Hamirpur. That petition was kept for the statements of the parties on 9-1-1985 and their statements were recorded on that day. He did not put any pressure on her. In cross-examination he states that when they came to Hamirpur on 8-1-1985 none of the relations of the respondent accompanied them to Hamirpur. He withdrew the case for restitution of conjugal rights which he had filed against the respondent on 8-1-1985 before their statements were recorded in the petition for mutual divorce. He also wanted to divorce her because she was not residing with him for the last so many years. He denies the suggestion that he brought the respondent to Hamirpur on 8-1-1985 under pressure and without her consent or that she was brought by misrepresentation in connection with the withdrawal of the case for restitution of conjugal rights. He also denies that the petition for mutual divorce was exclusively filed at his instance. She had, in fact, told in the presence of Pardhan of Lahru that she would divorce him. He also denies having given any threat to the respondent in case she did not make the petition of divorce by mutual consent.

9. Hoshiar Singh (PW-2) is the Pardhan of Gram Panchayat Lahru. He knows both the parties. He states that in December, 1984, brother of the respondent come to Lahru and told him that his sister, was residing with Om Parkash, appellant, at Lahru for one month under the orders of the Court and as the relations between them were bad, he should take care of his sister. He went to see her at the house of the petitioner with Up-Pardhan Harnam Singh and found that the respondent was sleeping and the appellant was preparing meals. On enquiry, the respondent told them that she did not have cordial relations with the appellant and she had come just for one month to stay with the appellant under the orders of the Court and thereafter she will divorce him. She also stated that her relations with the appellant were not cordial for the last fifteen years.

10. Hoshiar Singh (PW-3) also knows both the parties as all of them are teachers. He states that the respondent stayed with the petitioner for about a month and during this time he used to visit them. He alongwith Pardhan and Up-Pardhan went to the house of the appellant in the last week of December, 1984 and at that time the respondent told them that she did not have cordial relations with the petitioner since the time of marriage. Therefore, she will give him divorce.

11. Sh. Madan Rattan (PW-4) is an Advocate at Hamirpur. He states that the respondent remained his client and the petition for divorce by mutual consent dated 8-1-1985 bears his signatures. He was counsel on behalf of the respondent. The petition was drafted in consultation with the respondent and under her instructions. Besides drafting the petition, the respondent told him that she had strained relations with her husband and she could not live with him. Whatever instructions were given to him by her, were given by her of her own. He was present at the time her statement was recorded by the Court. He also signed the statement dated 9-1-1985 which was made by the respondent. In cross-examination, he states that the application for the withdrawal of the consent dated 15-1-1985 was also filed by him on the instructions of the respondent and whatever was said that was incorporated in the application. On the day the petition for divorce by mutual consent was filed, the brother of the respondent was also present.

12. On the other hand, the respondent, Sureshta Devi (RW-1) states that the petitioner had filed a petition against her for restitution of conjugal rights in 1983. In that petition she was directed by the Court to accompany the petitioner and she accordingly accompanied him and stayed with him for one month from 10-12-1984 to 10-1-1985. At that time the petitioner was posted at Lahru in Tehsil Hamirpur and she was posted as a teacher in a school at Ghanayara. On 8-1-1985, the petitioner brought her to Hamirpur telling that he had to withdraw the petition for restitution of conjugal rights. Under that pretext, he filed the petition for divorce in the Court of the District Judge, Hamirpur, by misrepresentation. The petitioner got her statement recorded in the Court for a petition for mutual divorce. None of her relations was with her at that time. The petitioner gave her threat that in case she did not sign the statement, that will adversely affect her. On 8-1-1985, they both

stayed with Massar of her husband, namely, Om Parkash, who was residing at Hamirpur. When on 10-1-1985 she went to Ghanayara, she narrated this fact to her mother. On 15-1-1985, she come to Hamirpur with her brother Dr. V.P. Mahajan who contacted her counsel Sh. Madan Rattan, (PW-4). Sh. Madan Rattan advised that application for mutual divorce can be taken back and thus the application for withdrawing the petition was made. In cross-examination, she states that she was a teacher since 1962 and was a matriculate. She admits that she knew English as well as Hindi. She admits her signatures in the affidavit dated 8-1-1985. She admits that she was identified before the Oath Commissioner by her counsel Sh, Madan Rattan. She also admits her signatures on the petition dated 8-1-1985 and also on the verification. She also admits her signatures of that date on the Vakalatnama. She admits her statement in the Court but states that the same was under pressure of the petitioner. She denies that the statement given to the Court was read over to her. She denies that the petition was written by Sh. Madan Rattan, Advocate, at her instance. She admits that in the petition for restitution of conjugal rights filed by her husband, her counsel was Sh. Madan Rattan. She states that her mother asked her as to why she had made such a statement and told her that she should not get divorce from the petitioner and that she had committed a mistake. Her brother also resides with her mother at Ghanayara and her brother was also there at that time. She had no grievance against Shri Madan Rattan, Advocate. She admits that earlier petition for restitution of conjugal rights was withdrawn on 8-1-1985. She states that she knew Dr. Dogra who was practising at Hamirpur and she used to visit him whenever she would come to Hamirpur. She did not tell him about the threats extended by the petitioner. Her brother was accompanying her when the application dated 15-1-1985 was drafted. She denies that the application dated 15-1-1985 was filed at the instance of her brother.

13. Dr. V.P. Mahajan (RW-2) is the brother of the respondent. He states that the application for mutual divorce was got written from the respondent and he alongwith respondent went to Hamirpur for consultation with the lawyer., They were advised that the petition could be withdrawn and an application for the same was made. He admits in cross-examination that he had been accompanying the respondent on each and every bearing but not for pursuing the proceedings. He

denies the suggestion that he gave all guidance to Sureshta Devi and that the application for withdrawing the petition for mutual divorce was moved at his instance.

14. A perusal of the evidence, discussed above, clearly establishes that the petition for mutual divorce was moved by the parties with their free will. No pressure of any nature was exercised on the respondent nor she was in any way threatened in doing so. Both the parties are teachers. They married on 21-11-1968 and except for a few visits, it appears clearly from the evidence, they did not live together. They have no issue. They are educated. The respondent had engaged her own counsel. She has not said anything against him. Sh. Madan Rattan was her counsel in the earlier petition for restitution of conjugal rights filed by the appellant. The present case was the second case which was entrusted to the same lawyer. It has been stated categorically by Sh. Madan Rattan that whatever instructions were imparted by the respondent, he moved accordingly and the petition was filed at the instance of the respondent. Thereafter the parties gave their statements in the Court on 9-1-1985. These statements eliminate the complaint which was subsequently set up by the respondent. These statements are reproduced in extenso in Hindi :

'Byaan Sh. Om Parkash putr Sh. Basant Ram aayu 45 saal Sankanaa Sujanpur Teehrraa, praarthee dharara se. Byaan kiya ki merree pratyarthee Sureshta ke saath shaadi 21-11-1968 ko hui thee. Shaadi ke baad hum kewal 5 maheene he ikattbe rahe aur uske baad aaz din tak ikatthe na rahe hain aur aaeendaa bhee ikatthe rahne kee sambhaawana nahin hai. Isliye talaq kiya jaave.'

R.O. and A.C. Sd/-Sd/- Om Parkash District Judge, Sd/- Sushil Kumar Hamirpur. 'Sd/- Madan Rattan'Byaan Shrimati Sureshta Devi patni Om Parkash aayu 42 saal Sankanaa Ghaniara, Tehsil va Zilaa Kangraa. Pratyarthee dharam se. Byaan kiya ki byaan praartee sun liya hai. Theek hai. Hum bataur pati-patnee nahi rah sakte hain Maine apni marjee se yah darkaart baraaye haasil karne talaq dee hai.' R.O. and A.C. Sd/-Sd/- Sureshta Devi District Judge, Sd/- Madan Rattan Hamirpur.'

15. The change in the attitude of the respondent appears to be at the instance of her mother and her brother who had been looking after her litigation and to say that she was not interested in litigation cannot be believed.

16. Coming to the second stage of the case, the question to be seen is whether a petition jointly moved can be withdrawn unilaterally by any of the parties. I have already held that no pressure or misrepresentation or any other influence was exercised by the appellant on the respondent for moving the application. Therefore, the question to be seen is whether in these circumstances the respondent could move the application unilaterally for the withdrawal of her consent.

17. Sh. K.C. Rana, who appears for the respondent, refers to Paras 5 and 8 of the judgment reported in AIR 1988 Kerala 28 (K.I. Mohanan v. Jeejabai) it is reproduced as under :

'5. Shri S. Sivaraman, counsel for the respondent drew our attention particularly to Section 138(2) of the Act, which provides that even after the filing of the application under mutual consent under Sub-section (1) of Section 13B, the Court is obliged to hear the parties and make such enquiries as it thinks fit for the purposes of being satisfied that the marriage had been solemnised and a decree for divorce may be desirable, if the averments in the petition are true. This provision, as is correctly pointed out by counsel, militates against an order to be mechanically passed without conducting an enquiry and without the court being satisfied about the genuineness of the consent, and whether the consent was willingly given by the parties. Satisfaction of the Court, after hearing the parties and after conducting an enquiry, necessarily contemplates an opportunity for either of the spouses to withdraw the consent or to indicate from other circumstances that an order of divorce, in terms of the application, may not be desirable. The situation arising under Order XXIII, Rule I of the C.P.C. cannot be considered as similar to the situation arising under Section 13B(2) of the Hindu Marriage Act.'

'8. We are satisfied that the withdrawal of consent by the respondent for divorce by mutual consent has been unequivocally expressed by her and it seems to be

permissible on reading of Subsection (2) of Section 13B of the Hindu Marriage Act.'

18. On the strength of this judgment, it is contended that the respondent could withdraw her consent and the application initially filed jointly by the parties and thus it is urged that the judgment under appeal is legally sustainable.

19. Sh. A.K. Goel seeks assistance from AIR 1989 Delhi 73 (Smt. Chanderkanta v. Hans Kumar and another). In this judgment, the learned Judge has dealt with the provisions of Section 13-B of the Act quite exhaustively and the view taken in this judgment is better, more instructive and practicable as compared to the view of the learned Judge of Kerala High Court in K.I. Mohanan's case (supra). It is relevant to quote paras 8, 9, 10, 11 and 12 of this judgment :

'8. On a plain reading of this provision, it is clear that under Sub-section (1), a petition for mutual divorce is required to be presented by both the parties together on the ground : (i) that they have been living separately for a period of one year or more ; (ii) that they have not been able to live together ; and (iii) that view have mutually agreed that the marriage should be dissolved.

9. Sub-section (2) provides that if the petition is not withdrawn in the meantime, on a joint motion made by the parties not earlier than six months after the date of the presentation of the first petition referred to in Sub-section (1) and not later than 18 months after the said date, if the Court is satisfied after hearing the parties and after making inquiries that a marriage has been solemnized and the averments in the petition are true, it can pass a decree of divorce. Though Sub-section (2) of Section 13B envisages withdrawal of the joint petition, it does not prescribe the procedure for withdrawal of the joint petition. I also do not find any other provision in the Act or the Rules dealing with withdrawal of a joint petition presented under Section 13B(1). However, Section 21 of the Act provides that subject to the other provisions contained in the Act and to such Rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code. Thus, It is necessary to refer to the provisions dealing with withdrawal and abandonment of plaint in the Code. Order 23 Rule 1 prescribes the procedure for withdrawal and abandonment of a suit. Sub-rule (5) of Rule (1) of Order 23

specifically deals with the power of the Court to permit withdrawal or abandonment of a suit or part of a claim presented jointly by one or more plaintiffs. Sub-rule (5) of Rule 1 of Order 23 reads thus :

'(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.' Thus, when the suit is filed by two or more plaintiffs, the Court cannot permit one of the several plaintiffs to abandon a suit or part of a claim without the consent of the other plaintiffs.

10. Section 13B(1) of the Act also contemplates joint presentation of a petition. It is similar to a suit filed jointly by one or more plaintiffs. Thus just as a suit or part of a claim cannot be abandoned or withdrawn by one plaintiff, one of the parties to the petition cannot be permitted to withdraw the petition or abandon the prayer without the consent of the other party. In other words, a petition presented under Section 13B(1) of the Act cannot be also withdrawn by one party unilaterally. Of course, if the Court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence then it is a different matter because in such a case the Court is empowered specifically to refuse to grant the decree. The Legislature introduced Section 13-B in the Act by Marriage Law (Amendment) Act 1976 to provide for a speedy dissolution of marriage when it is found that the marriage is irretrievable. The Legislature provided for an interval of a period of six months between the first motion and the second motion in order to afford the parties further opportunity for reconciliation. If one party is allowed to withdraw the consent even when other grounds, namely, that the parties continue to live separately and have not been able to live together, still subsist and reconciliation is not possible then it will frustrate the very purpose of the enactment. Very precious time of one of the parties who has waited for over six months for filing the second motion will be wasted and a party who wants to harass and is guilty of abuse of the process of the Court will benefit. This position is made further clear by insertion of Sub-section (bb) to Section 23(1) of the Act. Under this section, the Court is empowered to grant the decree even in an undefended case if it is satisfied that the averments in the petition are true and the consent for mutual

divorce has not been obtained by force, fraud or undue influence.

In my opinion, since the second motion as contemplated in Section 13B(2) has to be a joint motion, Section 23 would come into operation in a case like the present one when one of the parties refuses to join in the second motion and the other party has no alternative but to make an application to the court for orders on the petition already presented under Section 13(1) of the Act before the specified time of 18 months expires. If unilateral withdrawal of consent is permitted the Court will not be able to pass a decree in an undefended case under Section 23(b) of the Act. I am thus unable to accept the contention of the learned counsel for the respondent that he could unilaterally withdraw the consent without providing that the consent was obtained by force, fraud or undue influence.

11. It is necessary at this stage to refer to two later judgments of other High Courts wherein similar question came up for consideration but different view was taken by the two Division Benches. In *K.I. Mohanan v. Smt. Jeejabai*, AIR 1988 Kerala 28, a Division Bench of the Kerala High Court considered the question of unilateral withdrawal of consent by one of the parties. The Division Bench disagreed with the view taken by the Bombay High Court in *Smt. Jayshree Ramesh Londhe* (AIR 1984 Bom. 302) (supra) and observed that the situation arising under Order 23 Rule 1 of the Code cannot be considered similar to the situation arising under Section 13B(2) of the Act and a party can unilaterally withdraw the consent given under Section 13B(2) of the Act. The Punjab and Haryana High Court in *Harcharan Kaur v. Nachhatar Singh*, AIR 1988 Punj. and Har. 27 dealing with the question observed that unless the parties to the petition under Section 13B of the Act who have mutually consented to have the marriage dissolved, continue to signify their mutual consent for the dissolution of the marriage right up to the date of decree, the marriage cannot be dissolved under Sub-section (2) of Section 13B of the Act merely on the basis that six months earlier the parties had together presented the petition for dissolution of marriage by mutual consent. If one of them fails to agree and does not want to oblige the other party by extending the requisite consent to the divorce, decree of divorce cannot be passed under Section 13B of Act.

12. With respect I am unable to agree with the view expressed in K.I. Mohanan's case (supra) and Harcharan Kaur's case (supra) because the question has to be considered in the light of Section 23(bb) of the Act and as discussed hereinabove if unilateral withdrawal of consent is held to be permissible, Section 23(bb) will be redundant. In my view, a party cannot unilaterally withdraw the consent unless it is proved that the consent was obtained by force, fraud or undue influence. I am, therefore, in agreement with the view expressed by the Bombay High Court in Smt. Jayshree Ramesh Londhe (supra).

20. I am in respectful agreement with the views expressed in this judgment and hold that the joint petition initially filed by the parties in this case should have been decided on merits by the learned District Judge. The dismissal thereof on the grounds that the consent initially given could be unilaterally withdrawn later on and that the same was the result of undue pressure on her by the husband could not have been arrived at in the light of the clear cut evidence on the record.

21. An effort for uniting the parties was unsuccessfully made. The parties have not lived together for the last many years as already discussed. They have reached a stage of no return. The only option left in view of the facts and circumstances of this case is that the petitioner has clearly made out a case for divorce by mutual consent. There is merit in this appeal. The case is accordingly allowed and the marriage between the parties is dissolved by a decree of divorce under Section 13-B of the Act. However, the parties are left to bear their own costs.