

Kummo Devi Vs. Jai Pal

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Court : Himachal Pradesh

Decided On : Jan-08-2010

Reported in : AIR2010HP39

Judge : Sanjay Karol, J.

Appellant : Kummo Devi

Respondent : Jai Pal

Advocate for Def. : Mr. Bhupender Gupta

Advocate for Pet/Ap. : Mr. Anand Sharma

Disposition : Application allowed

Judgement :

ORDER

Sanjay Karol, J.

1. In terms of the present application, the appellant-wife is seeking permission to withdraw her consent recorded on 20-4-2009 with a further prayer that the matter be heard on merits.

2. The application is opposed by the respondent-husband.

3. The marriage between the parties was solemnized as per Hindu customary rites on 8-12-1980. The parties could not pull along. On 17-1-2001 respondent-husband filed a petition for dissolution of marriage by a decree of divorce under Section 13 (1)(ia) & (ib) of Hindu Marriage Act, 1955 (hereinafter referred to as the Act). The petition was opposed by the wife. In terms of judgment and decree dated 16-2-2004, the District Judge allowed the petition and dissolved the marriage on the ground of cruelty.

4. The same was assailed by the wife by filing the instant appeal. The appeal was admitted on 28-4-2004 and came up for hearing on 24-2-2009 when learned Counsel for the parties prayed for an adjournment to enable the parties to work out an out of Court settlement. The parties also appeared in person before the Court on 16-3-2009. Since the parties were still in the process of resolving their dispute amicably, the matter was adjourned for 20-4-2009. On 20-4-2009 the parties arrived at an amicable settlement and requested for recording of their statements. Accordingly, their statements were recorded and order passed to the following effect:

The parties are present today. With the efforts of the learned counsel, they have arrived at a mutual settlement. They pray that their statements be recorded and their marriage be dissolved by a decree of mutual consent and the terms arrived at inter se between themselves be also recorded. Let statement of parties be recorded.

Statement of parties have been recorded. Let the terms of compromise be placed on record by way of a separate application supported by affidavits.

List the matter on 18-5-2009.

Statement of Shri Jai Pal, Aged 57 years, son of Shri Dulo Ram, Resident of Village and PO Rihlu, Tehsil Shahpur, District Kangar, H.P. - respondent.

On SA

20-4-2009

I have amicably resolved all my disputes with my wife Smt. Kummo Devi-appellant. We have agreed to dissolve our marriage by mutual consent. I pray that a decree for divorce by mutual consent under Section 13-B of the Hindu Marriage Act may be passed. I withdraw all the allegations made in the petition initially filed under Section 13(1)(ia),(ib) of the Hindu Marriage Act. In lieu of the appellant's right of maintenance, alimony and right in my property, I have agreed to pay a lump sum amount of Rs. 7,50,000/- to the appellant. The same shall be deposited within three months from today in this Court. She shall be free to withdraw the same. I shall withdraw all cases pending inter se between the parties. I shall pay the maintenance as ordered by various Courts only up to today. I have heard the statement and I will agree with the same.

Statement of Smt. Kammo Devi, daughter of Shri Jobhi Ram, Aged 48 years, Resident of Village and PO Rihlu, Tehsil Shahpur, District Kangra, H.P. - appellant.

On SA

20-4-2009

I have heard the statement of Shri Jai Pal, my husband. We have arrived at a mutual settlement. I pray that the marriage be dissolved under Section 13B of the Hindu Marriage Act. In lieu of my claims towards maintenance, alimony and right in my husband's property I have agreed to receive a lump sum amount of Rs. 7,50,000/-. I have also agreed to vacate the possession of the house in Village Rihlu, Tehsil Shahpur, District Kangra, owned by my husband's brother Shri Jai Chand, on or before 31-12-2009. I shall hand over the vacant possession of the residential house to Shri Jai Pal, respondent or Shri Jai Chand. My children born out of the wedlock continue to remain with me and they shall also vacate the aforesaid residential premises before 31-12-2009. I undertake to withdraw all cases pending inter se between the parties. Henceforth I shall not claim any maintenance as ordered by the various Courts. I shall furnish an undertaking by way of an affidavit to this Court to the aforesaid effect.

5. Instead of moving an application placing on record the terms of the compromise, the appellant-wife filed three application (i) CMP No. 522 of 2009, under Order 41, Rule 27 read with Section 151, Code of Civil Procedure, for adducing additional evidence, (ii) CMP No. 837 of 2009 under Sections 24 and 25 of the Act for interim maintenance and (iii) CMP No. 907 of 2009 under Section 13-B(2) of the Act read with Section 151, CPC, for withdrawing her consent recorded on 20-4-2009.

6. In terms of the present order CMP No. 907 of 2009 is being disposed of.

7. In support of his case, Mr. Anand Sharma, learned Counsel for the appellant-wife has invited my attention to the decisions reported in Chander Kaur v. Raj Kaur (died) and Ors. : AIR 1997 P & H 155, N. Vijaya Raghavan v. K. Sharada AIR 2001 Karnataka 300 and Smt. Sureshta Devi v. Om Prakash : AIR 1992 SC 1904.

8. Mr. Bhupender Gupta, learned Counsel for the respondent-husband has opposed the application on the ground that in the absence of any fraud, misrepresentation, coercion the appellant wife cannot be allowed to withdraw her consent. In any event, since the marriage between the parties already stood dissolved by a decree of divorce, prayer for dissolving the marriage by a decree under the provisions of Section 13-B of the Act can be accepted by the Court and the original decree modified to dissolve the marriage by mutual consent. In these circumstances the requirement of moving motions twice, is not necessary. Based on the consent given, decree of divorce by mutual consent be passed. In support, he has also referred to the following decisions:

Bimal Kumar v. Ram Kumar and Ors. : AIR 2007 HP 70; Smt. Rakesh Rani v. Ram Lal : AIR 1987 P & H 60; Om Prakash v. Sureshta Devi 1990 (1) Sim LC 229; Vijay Kumar v. Smt. Asha 1990 (2) Sim LC 240; Munshi Singh and Anr. v. Ewaz Singh and Ors. : AIR 1952 All 890; Krishan Mohan Singh v. Sri Chand Gupta and Ors. : AIR 1993 Delhi 365, and Hari Shankar v. Vijay Kumar 1986 All L J 297.

9. The codified law governing the matrimonial relationship between the parties is the Hindu Marriage Act. Marriage solemnized between two Hindus can be dissolved by a decree of divorce only on the grounds specified under Sections 13

and 13-B of the Act.

10. Section 13-B reads as under :

13B. 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 on or after the commencement of the Marriage Laws (Amendment) Act, 1976 (69 of 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 the presentation of the petition referred to in Sub-section (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 of divorce declaring the marriage to be dissolved with effect from the date of the decree.

11. The essential ingredients for dissolution of marriage by mutual consent being (i) petition is to be presented to the District Judge by both the parties to a marriage; (ii) the parties should have been living separately for a period of one year or more (iii) they have not been able to live together (iv) they have mutually agreed to dissolve their marriage (v) a joint motion to be filed by the parties and the time gap between the two motions should not be less than 6 months and more than 18 months and (vi) consent is not withdraw before passing of the decree.

12. The object of Section 13-B is obviously to provide for a speedy remedy to the parties to have their marriage dissolved by mutual consent. The parties, however, are at liberty to withdraw the consent till the time the decree is passed by the Court.

13. The Apex Court in Suresha Devi : AIR 1992 SC 1904 (supra) has held that the mutual consent to a divorce is a sine qua non for passing a decree for divorce

under Section 13-B of the Act. The mutual consent should continue till the decree is passed. The divergent view of various High Court on the question of unilateral withdrawal of consent given by a party before the passing of the decree by the Court stands resolved by the Court. It has been held that:

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. The Bombay High Court in *Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe* : AIR 1984 Bom 302, has expressed the view that the crucial time for the consent for divorce under Section 13-B was the time when the petition was filed. If the consent was voluntarily given it would not be possible for any party to nullify the petition by withdrawing the consent. The Court has drawn support to this conclusion from the principle underlying Order XXIII, Rule 1 of the Code of Civil Procedure which provides that if a suit is filed jointly by one or more plaintiffs, such a suit or part of a claim cannot be abandoned or withdrawn by one of the plaintiffs or one of the parties to the suit. The High Court of Delhi adopted similar line of reasoning in *Smt. Chander Kanta v. Hans Kumar* : AIR 1989 Delhi 73 and the Madhya Pradesh High Court in *Meena Dutta v. Anirudh Dutta* (1984) 4 DMC 388 also took a similar view.

12. But the Kerala High Court in *K.I. Mohanan v. Jeejabai* : AIR 1988 Kerala 28 and the Punjab and Haryana High Court in *Harcharan Kaur v. Nachhattar Singh* : AIR 1988 Punjab & Haryana 27 and Rajasthan High Court in *Santosh Kumari v. Virendra Kumar* AIR 1986 Raj 128 have taken a contrary view. It has been inter alia, held 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. The 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 XXIII, Rule 1 of the Code of Civil Procedure since it is dissimilar to the situation arising u/S. 13-B of the Act.

13. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorises 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 a 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 13-B 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 bona fides 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 13-B. 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 (1) 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 ER 667 at p. 674 : (1972) 2 WLR 972).

15. In our view, the interpretation given to the section by the High Courts of Kerala, Punjab and Haryana and Rajasthan in the aforesaid decisions appears to be correct and we affirm that view. The decisions of the High Courts of Bombay, Delhi and Madhya Pradesh (supra) cannot be said to have laid down the law correctly and they stand overruled.

(Emphasis supplied)

14. In the instant case, the statements of the parties are evidently clear. They intended to dissolve their marriage by mutual consent under Section 13-B of the Act. Also the order passed by the Court is also evidently clear. No written application was on record on the date when statements of the parties were recorded. It may be a mere formality but the Court had directed the parties to place on record the terms, of the compromise by way of a separate application. No doubt on the basis of the statements of the parties the Court could have proceeded further, but it is also a fact that on 20-4-2009 no decree for divorce had been passed under the provisions of Section 13-B of the Act.

15. Hence, it would be permissible for the applicant-wife to withdraw her consent for dissolution of her marriage by mutual consent. The agreed terms of settlement were for dissolution of marriage by consent. It was a composite package.

16. In view of the specific findings of the Apex Court in Sureshta Devi : AIR 1992 SC 1904(supra), no reliance can be placed upon the decisions relied upon by the respondent. In fact decision reported in Om Prakash (supra) 1990 (1) Sim LC 229 was specifically reversed by the Apex Court in Sureshta Devi (supra).

17. It cannot be said that no petition for dissolution of marriage by mutual consent can be entertained by this Court as has been so held by a Division Bench of High

Court of Karnataka in N. Vijaya Raghavan : AIR 2001 Kant 300(supra). With respect, I am not in agreement with the view taken by the High Court of Karnataka for the simple reason that original petition, in an appeal filed before this Court, can be amended, entertained and a decree for divorce can be passed, particularly, when the marriage between the parties already stood dissolved. The Division Bench of High Court of Punjab and Haryana has also taken a similar view in Mamta Sabharwal v. Ravinder Kumar Sabharwal (1996) 2 HLR 1.

18. The Apex Court has entertained such petitions and dissolved the marriages by mutual consent. (Sandhya M. Khandelwal v. Manoj M. Khandelwal : (1998) 8 SCC 369 : 1999 AIR SCW 4738, Shashi Garg (Smt.) v. Arun Garg : (1997) 7 SCC 565, Anita Sabharwal v. Anil Sabharwal : (1997) 11 SCC 490, Dr. (Mrs.) Leena Roy v. Dr. Subrato Roy 1992 Supp (2) SCC 110 : : AIR 1991 SC 92, Kanchan Devi (Smt.) v. Promod Kumar Mittal : (1996) 8 SCC 90 : AIR 1996 SC 3192, Verma (Smt.) v. Rajan Verma : (2004) 1 SCC 123 : AIR 2004 SC 161, Anjana Kishore v. Puneet Kishore : (2002) 10 SCC 194 and Kiran v. Sharad Dutt : (2000) 10 SCC 243)

19. Since the parties did not file application in terms of order dated 20-4-2009 passed by this Court and no decree for divorce was passed, appellant-wife is allowed to withdraw her consent. Consequently, consent of both the parties recorded on 20-4-2009 is treated to be withdrawn and not binding on them.

20. The application is allowed.

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