

Hari Kumar Vs. B. Sudha

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Court : Kerala

Decided On : Jun-19-2012

Reported in : 2012(3)KLT888

Judge : K.T. Sankaran & M.L. Joseph Francis

Appeal No. : Mat.Appeal. No. 220 of 2006

Appellant : Hari Kumar

Respondent : B. Sudha

Judgement :

K.T. Sankaran, J.

The appellant and the respondent filed an application under Section 13B of the Hindu Marriage Act before the Family Court, Thiruvalla. The Family Court numbered the case as O.P. (HMA) No.461 of 2004. Six months after the filing of the Original Petition, both parties were present before the Family Court and they wanted a decree of divorce to be passed. 24.6.2005, the Family Court passed the following order.

“Both are present. The 1st petitioner is at present known to be living with another lady and is having two children in that relation. 2nd petitioner does not want to remarry. 1st petitioner is not paying any amount for the maintenance of 2nd petitioner also and that it appears that petition is a collusive one. Hence O.P.

dismissed.”

2. The order passed by the Family Court on 24.6.2005 is under challenge in the Matrimonial Appeal.

3. The respondent/wife filed an affidavit dated 1.7.2011 and an application to dispose of the appeal at the earliest. In paragraph 2 and 3 of the affidavit, the respondent stated thus:

“2. The present appeal was filed against the dismissal of a petition for divorce filed under section 13B of the Hindu Marriage Act. The marital life existed between the Appellant and me had been irretrievably broken down even before the time of filing of the Original Petition. Only to purchase peace that we have mutually decided to separate. But owing to the dismissal of the Original Petition we did not get divorce.

3. I am aged 42 years. If I wait for some more years, I may not get any alliance to enter into a second marriage. It is submitted that some good proposals of marriage came in the mean time. But I cannot take any steps without knowing the outcome of the above Appeal. Therefore, an urgent hearing and disposal of the appeal is necessary.”

4. We have perused the application under Section 13B of the Hindu Marriage Act. It is stated that both the parties are living separately since 10.12.1999. Even in the affidavit filed in 2011, the respondent/wife has expressed her desire to dissolve the marriage. The Family Court refused to grant a decree on the ground that the appellant is residing with another woman and he has two children in that relationship and also on the ground that there is collusion between the parties. It is hard to believe that if the husband is living separately with another woman, there would be collusion between the husband and the wife to get a decree on mutual consent.

5. Section 13B of the Hindu Marriage Act was inserted by the Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976). Before the introduction of Section 13B in the Hindu Marriage Act, a joint petition by the husband and wife to dissolve the

marriage was unknown. The Parliament thought it fit that a provision must be introduced in the Hindu Marriage Act to enable the parties to approach the Court to get a decree of divorce by mutual consent. The conditions to be satisfied under Section 13B of the Hindu Marriage Act are the following: (1) The petition shall be fixed by both the parties to the marriage together. (2) They must be living separately for a period of one year or more. (3) They have not been able to live together and that they have mutually agreed that the marriage should be dissolved. (4) After filing of the petition, the parties shall move the petition after six months of the presentation of the petition and before eighteen months. (5) The petition is not withdrawn in the meantime. (6) The Court must be satisfied, after making such enquiry as it thinks fit, that the averments in the petition are true.

6. Similar provision as Section 13B of the Hindu Marriage Act was introduced as Section 10A in the Divorce Act and Section 28 in the Special marriage Act.

7. Section 23 of the Hindu Marriage Act provides for a decree in the proceedings. It is provided in clause (bb) of sub-section (1) of Section 23 that the Court must be satisfied that when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence. Clause (bb) was inserted by Act 68 of 1976. Clause 9c) of sub-section (1) of Section 23, before the substitution by Act 68 of 1976, was to the following effect. "The petition is not presented or prosecuted in collusion with the respondent." By Act 68 of 1976, for the words "the petition". The words "the petition (not being a petition presented under section 11)" were substituted. Going by clause (bb) and clause (c) of sub-section (1) of Section 23 of the Hindu Marriage Act, even an application under Section 23 of the Hindu Marriage Act, even an application under Section 13B of the Hindu marriage Act can be dismissed by the Court, if it is found that the petition was presented or prosecuted in collusion with the respondent. Force, fraud or undue influence is quite distinct and different from collusion. In the case of force or fraud or undue influence, one party is subjected to the same by the other party without the consent or violation of the former. In the case of collusion, there would be a meeting of minds to attain something by the joint effort of both parties. In other words, in the case of collusion, there would be consensus between two parties to do or not to do something. It is possible that a divorce may be obtained

as a result of collusion between the parties. The parties may desire to get some benefit by getting a decree of divorce and they may collude together and get a decree of divorce easily by filing a petition under Section 13B of the Hindu Marriage Act. Section 23 of the Hindu Marriage Act is sufficient to contain such a situation, though it may not be easy for the Court to find out whether there is collusion between the parties. A consent between the parties voluntarily made by them before Court in the form of a petition under Section 13B of the Hindu Marriage Act cannot be said to be collusive only on the ground that both the parties agreed to dissolve the marriage. The very foundation of Section 13B is consensus between the parties to end their marital relationship with the assistance of the Court. If it is to be held that in every consent there is collusion, the very theory of consent and the opportunity afforded to the parties to the marriage to apply for a consent decree under Section 13B of the Hindu Marriage Act would be defeated. A consent under Section 13B of the Hindu Marriage Act is a consent to do a lawful thing as provided under Section 13B, while collusion as envisaged in clause (c) of sub-section (1) of Section 23 is a consensus between the parties to do an illegal thing. Though it may not be easy to distinguish consent from collusion, the Court cannot be unrealistic to the request for divorce under Section 13B and dismiss the petition for divorce by mutual consent on an apprehension that the application is collusive. If that is resorted to, the parties to the marriage who desire to get a divorce by mutual consent would be seriously affected and the very purpose of Section 13B would be defeated.

8. The reason stated by the court below that the husband is having connection with another woman and he has children in that illegal relationship cannot lead to the conclusion that there is collusion between the parties. Another reason stated by the court below that the wife does not want to remarry and the husband is not paying any maintenance to the wife, would not constitute a valid reason to dismiss a petition filed under Section 13B of the Hindu Marriage Act. The aforesaid factors are not sufficient to constitute collusion within the meaning of clause (c) of sub-section (1) of Section 23 of the Hindu Marriage Act. While dealing with an application under Section 13B, the Court must see the overall situation and the facts and circumstances of the case, the request made by the parties, their desire to dissolve the marriage, their miseries in continuing the marital relationship, the

welfare of the parties and their future plans in life. The Court should not approach the matter with suspicion and with a presumption that there may be collusion between the parties. If an application under Section 13B, which actually merits acceptance, is dismissed on a hyper-technical approach, the result would be compelling unwilling parties to continue the marital relationship. Certainly, that is not the purpose and object of Section 13B of the Hindu Marriage Act.

For the aforesaid reasons, we allow the Matrimonial Appeal and set aside the order passed by the Family Court. We also allow the petition under Section 13B of the Hindu Marriage Act and dissolve the marriage between the appellant and the respondent with effect from 24.6.2005.

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