

Bench: A Kabir, C Joseph

CIVIL APPEAL IN MATRIMONIAL MATTERS

CIVIL APPEAL NO.5952 OF 2009

(@ SPECIAL LEAVE PETITION (CIVIL)NO.14361 OF 2007) Anil Kumar Jain ... Appellant Vs.

Maya Jain ... Respondent J U D G M E N T

ALTAMAS KABIR, J.

1. Leave granted.

2. The short point for decision in this appeal is whether a decree can be passed on a petition for mutual divorce under Section 13-B of the Hindu Marriage Act, 1955, when one of the petitioners withdraws consent to such decree prior to the passing of such decree.

3. In the instant case, the appellant husband was married to the respondent wife on 22nd June, 1985, according to Hindu rites. On account of differences between them, they took a decision to obtain a decree of mutual divorce, which resulted in the filing of a joint petition for divorce under Section 13-B of the Hindu Marriage Act, 1955, (hereinafter referred to as 'the Act') on 4th September, 2004, in the District Court at Chhindwara. The same was registered as Civil Suit No.167-A of 2004. As required under the provisions of Section 13-B of the aforesaid Act, the learned Second Additional District Judge, Chhindwara, fixed the date for consideration of the petition after six months so as to give the parties time to reconsider their decision. On 7th March, 2005, after the expiry of six months, the learned Second Additional District Judge, Chhindwara, took up the matter in the presence of both the parties who were present in the Court. While the appellant husband reiterated his earlier stand that a decree of mutual divorce should be passed on account of the fact that it was not possible for the parties to live together, on behalf of the respondent wife it was submitted that despite serious differences which had arisen between them, she did not want the marriage ties to be dissolved. On account of withdrawal of consent by the respondent wife, the learned Judge dismissed the joint petition under Section 13-B of the Act.

4. Aggrieved by the order dated 17th March, 2005, passed by the learned Second Additional District Judge, Chhindwara, the appellant filed an appeal under Section 28 of the Act in the High Court of Madhya Pradesh at Jabalpur on 4th April, 2005, and the same was registered as First Appeal no.323 of 2005. Even before the High Court, on 12th March, 2007, the respondent wife expressed her desire to live separately from the appellant, but she did not want that a decree of dissolution of marriage be passed. In that view of the matter, by his order dated 21st March, 2007, the learned Single Judge dismissed the First Appeal. While dismissing the appeal, the learned Single Judge took note of the decision of this Court in similar circumstances in the case of Ashok Hurra v. Rupa Bipin Zaveri [1997 (4) SCC 226], wherein this Court granted a decree of mutual divorce by exercising its extra-ordinary powers under Article 142 of the Constitution of India. It was indicated that the High Court did not have such powers and Section 13-B required that the consent of the spouses on the basis of which the petition under Section 13-B was presented, had to continue till a decree of divorce was passed by mutual consent. On that basis, the learned Single Judge of the High Court, while dismissing the appeal, observed that the appellant would be free to file a petition of divorce in accordance with law, which would be decided on its own merits by keeping in mind the special fact that the parties were living separately for about five years and the respondent wife was adamant about living apart from her husband.

5. It is against the said order passed by the High Court rejecting the appellant's prayer for grant of mutual divorce that the present appeal has been filed.

6. Appearing on behalf of the appellant husband, Mr. Rohit Arya, learned Senior Advocate, contended that prior to the filing of the petition for mutual divorce, the parties had entered into a settlement which had been fully acted upon by the appellant and that under the said agreement valuable property rights had been transferred to the respondent wife, which she was and is still enjoying. Mr. Arya submitted that apart from the above, the attitude of the respondent wife in openly declaring that she had no intention to remain with the appellant, was sufficient to indicate that the marriage had broken down irretrievably and in similar circumstances this Court had invoked its extra-ordinary powers under Article 142 of the Constitution to grant a decree of divorce under Section 13-B of the Hindu Marriage Act, even though one of the parties had withdrawn consent before the passing of the final decree. Reference was made to the decision in Ashok Hurra's case(supra), which also involved a petition under Section 13-B of the Act.

7. However, the facts of the said case were a little different from those in the instant case. In the said case, after six months from the date of filing of the petition under Section 13-B, an application was filed by the husband alone for a decree of divorce on the petition under Section 13-B of the Act. Not only did the wife not join in the said application, she made a separate application for withdrawal of consent given by her for mutual divorce after the expiry of 18 months from the date of presentation of the divorce petition. At this juncture, reference may be made to the provisions of Section 13-B of the above Act and the same is extracted hereinbelow :-

"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 before or after the commencement of the Marriage Laws (Amendment) Act, 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."

As will be clear from the above, sub-Section (1) of Section 13-B is the enabling Section for presenting a petition for dissolution of a marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties have been living separately for a period of one year or more and that they have not been able to live together, which is also the factual reality in the instant case. Sub-Section (2) of Section 13-B, however, provides the procedural steps that are required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the Court. The language is very specific in that it intends that on a motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-Section (1) and not later than 18 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, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

8. The question whether the consent of both the parties given at the time of presentation of the petition for mutual divorce under Section 13-B of the Act must continue till the decree is finally passed, has been the subject matter of several decisions of this Court. The issue was raised in the case of Smt. Sureshta Devi vs. Om Prakash [(1991) 2 SCC 25], wherein this Court held that the consent given by the parties to the filing of a petition for mutual divorce had to subsist till a decree was passed on the petition and that in the event, either of the parties withdrew the consent before passing of the final decree, the petition under Section 13-B of the Hindu Marriage Act would not survive and would have to be dismissed.

9. Subsequently, however, in Ashok Hurra's case (*supra*), doubts were expressed by this Court with regard to certain observations made in Sureshta Devi's case (*supra*) and it was felt that the same might require re-consideration in an appropriate case. Basing its decision on the doctrine of irretrievable break-down of marriage, the Hon'ble Judges were of the view that no useful purpose would be served in prolonging the agony of the parties to a marriage which had broken down irretrievably and that the curtain had to be rung down at some stage. It was further observed that the court had to take a total and broad view of the ground realities of the situation while dealing with adjustment of human relationships. Their Lordships placed reliance on the decision of this Court in Chandrakala Menon (Mrs.) & Anr. vs. Vipin Menon (Capt.) & Anr. [(1993) 2 SCC 6], in arriving at such a conclusion. In the said case, although, indisputably consent for the petition under Section 13-B of the Act was withdrawn within a week from the date of the filing of the joint petition, the Court, in exercise of its powers under Article 142 of the Constitution, granted a decree of divorce by mutual consent under Section 13-B of the Act and dissolved the marriage between the parties in order to meet the ends of justice, subject to certain conditions. It was also made clear that the decree would take effect only upon satisfaction of the conditions indicated therein.

10. The decision in Ashok Hurra's case (*supra*) to invoke the power under Article 142 of the Constitution was, thereafter, followed in several cases based upon the doctrine of irretrievable break-down of marriage.

11. In keeping with the trend of thought which found expression in Ashok Hurra's case (*supra*) another question arose before this Court in the case of Sandhya M. Khandelwal vs. Manoj K. Khandelwal [(1998) 8 SCC 369], which had come up before this Court by way of a transfer petition seeking transfer of a matrimonial suit. During the pendency of the transfer petition before this Court, the parties settled their disputes, and, although, the petition involved a proceeding under Section 13 of the Hindu Marriage Act, 1955, keeping in mind the settlement arrived at between the parties and also the interest of the parties, this Court granted a decree of divorce by treating the pending application as one under Section 13-B of the said Act.

12. The views expressed in Ashok Hurra's case (*supra*) were echoed in Anita Sabharwal vs. Anil Sabharwal [(1997) 1 SCC 490] and in the case of Kiran vs. Sharad Dutt [(2000) 10 SCC 243]. In the former case decree for mutual divorce was granted without waiting for the statutory period of six months. In the latter case, after living separately for many years and after 11 years of litigation involving proceedings under Section 13 of the Hindu Marriage Act, 1955, the parties filed a joint application before this Court for amending the divorce petition. Treating the said divorce petition as one under Section 13-B of the Act, this Court, by invoking its powers under Article 142 of the Constitution, granted a decree of mutual divorce at the SLP stage.

13. Without referring to the decisions rendered by this Court in Ashok Hurra's case (*supra*) and in Kiran's case (*supra*), a three Judge Bench of this Court in the case of Anjana Kishore vs. Puneet Kishore [(2002) 10 SCC 194], while hearing a transfer petition, invoked its jurisdiction under Article 142 of the Constitution, and directed the parties to file a joint petition before the Family Court at Bandra, Mumbai, under Section 13-B of the Hindu Marriage Act, 1955, for grant of a decree of divorce by mutual consent, along with a copy of the terms of compromise arrived at between the parties. This Court also directed that on such application being made, the Family Court could dispense with the need of waiting for six months as required by Sub-Section (2) of Section 13-B of the Act and pass final orders on the petition within such time as it deemed fit. This Court directed the Presiding Judge to take appropriate steps looking to the facts and circumstances of the case emerging from the pleadings of the parties and to do complete justice in the case.

14. Again in the case of Swati Verma (Smt.) vs. Rajan Verma & Ors. [(2004) 1 SCC 123], which was a transfer petition, the doctrine of irretrievable break-down of marriage was invoked. Pursuant to a compromise arrived at between the parties and leave granted by this Court, an application was filed under Section 13-B of the Hindu Marriage Act read with Article 142 of the Constitution and having regard to the aforesaid doctrine, this Court, in exercise of its powers vested under Article 142 of the Constitution, allowed the application for divorce by mutual consent filed in the said proceedings, in order to give a quietus to all litigation pending between the parties. The same procedure was adopted by this Court in the case of Jimmy Sudarshan Purohit vs. Sudarshan Sharad Purohit [(2005) 13 SCC 410], where upon a settlement arrived at between the parties, a joint petition was filed under Section 13-B of the Hindu Marriage Act and the same was allowed in exercise of powers under Article 142 of the Constitution.

15. The various decisions referred to above were considered in some detail in the case of Sanghamitra Ghosh vs. Kajal Kumar Ghosh [(2007) 2 SCC 220], and the view taken in the various cases was reiterated based on the doctrine of irretrievable break-down of marriage.

16. Although, the decision rendered in Sureshta Devi (supra) was referred to in the decision rendered in Ashok Hurra's case (supra) and it was observed therein that the said decision possibly required reconsideration in an appropriate case, none of the other cases has dealt with the question which arose in Sureshta Devi's case (supra), namely, whether in a proceeding under Section 13-B of the Hindu Marriage Act, consent of the parties was required to subsist till a final decree was passed on the petition. In all the subsequent cases, the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution of India in order to do complete justice to the parties when faced with a situation where the marriage-ties had completely broken and there was no possibility whatsoever of the spouses coming together again. In such a situation, this Court felt that it would be a travesty of justice to continue with the marriage ties. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

17. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

18. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.

19. The various decisions referred to above merely indicate that the Supreme Court can in special circumstances pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. The law as explained in Smt. Sureshta Devi's case (supra) still holds good, though with certain variations as far as the Supreme Court is concerned and that too in the light of Article 142 of the Constitution.

20. In the instant case, the respondent wife has made it very clear that she will not live with the petitioner, but, on the other hand, she is also not agreeable to a mutual divorce. In ordinary circumstances, the petitioner's remedy would lie in filing a separate petition before the Family Court under Section 13 of the Hindu Marriage Act, 1955, on the grounds available, but in the present case there are certain admitted facts which attract the provisions of Section 13-B thereof. One of the grounds available under Section 13-B is that the couple have been living separately for one year or more and that they have not been able to live together, which is, in fact, the case as far as the parties to these proceedings are concerned. In this case, the parties are living separately for more than seven years. As part of the agreement between the parties the appellant had transferred valuable property rights in favour of the respondent and it was after registration of such transfer of property that she withdrew her consent for divorce. She still continues to enjoy the property and insists on living separately from the husband.

21. While, therefore, following the decision in Smt. Sureshta Devi's case we are of the view that this is a fit case where we may exercise the powers vested in us under Article 142 of the Constitution. The stand of the respondent wife that she wants to live separately from her husband but is not agreeable to a mutual divorce is not acceptable, since living separately is one of the grounds for grant of a mutual divorce and admittedly the parties are living separately for more than seven years.

22. The appeal is, therefore, allowed. The impugned judgment and order of the High Court is set aside and the petition for grant of mutual divorce under Section 13-B of the Hindu Marriage Act, 1955, is accepted. There will be a decree of divorce on the basis of the joint petition filed by the parties before the Second Additional District Judge, Chhindwara, under Section 13-B of the Hindu Marriage Act, 1955, in respect of the marriage solemnized between the parties on 22nd June, 1985, according to Hindu rites and customs and the said marriage shall stand dissolved from the date of this judgment.

23. There will be no order as to costs.

.....J. (ALTAMAS KABIR)

.....J. (CYRIAC JOSEPH)

New Delhi

Dated: 01.09.2009.