

Bench: R S Dalvi

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PGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Writ Petition No.1381 of 2010

Rakesh Harsukhbhai Parekh .. .. Petitioner v/s.

1.State of Mah.

2.Niti R. Parekh .. .. Respondents

Mr.Uday Prakash Warunjikar i/by Mr.Pravartak Pathak with Mr.Hitesh Bhutekar for Petitioner.

Mr.S.N. Bhosale, AGP for Res.No.1.

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CORAM : SMT.ROSHAN DALVI, J.

DATED : 23rd February, 2010

ORAL ORDER :

1.Rule, returnable forthwith.

2.The Petitioner and Respondent No.2 are husband and wife. They married on 20.5.2005. They started living separately since 19.5.2006. The Petitioner-husband filed a Petition under Section 13 of the Hindu Marriage Act for divorce on the ground of cruelty of Respondent No.2 on 12.6.2007. After part evidence was recorded in the Petition, the parties settled their dispute. They withdrew allegations against one another and filed 2

Consent Terms on 16.12.2009 with regard to the grant of divorce for withdrawal of the allegations and the grant of lump sum alimony to the wife. Thereafter they made a joint application for waiver of the 6 months period for acting upon the Consent Terms and obtaining a divorce by mutual consent under Section 13B of the Hindu Marriage Act on 14.1.2010. Their application has come to be rejected on the ground that the period cannot be waived and that the Petition has to be adjourned for 6 months.

3.Section 13 of the Hindu Marriage Act is in respect of dissolution of a marriage by a decree of divorce on the grounds stated therein. Consequently, under that section upon proof of any of the grounds the marriage could be dissolved by decree of divorce.

4.Section 13B of the Hindu Marriage Act is in respect of dissolution of a marriage by decree of divorce upon a Petition presented to the District Court by both parties to a marriage together on the ground that they have been living separately for a period of one year or more and that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

5.Under Section 13B(2), the Court is required to pass a 3

decree of divorce declaring the marriage to be dissolved upon the motion of both the parties made after 6 months of the presentation of the Petition and within 18 months thereof.

6.It is on the premise that the application for divorce by mutual consent which came to be treated as a Petition for divorce by mutual consent under Section 13B of the Act, the learned Judge in the impugned order did not grant the divorce but observed that the Petition had to be adjourned for 6 months mandatory period. It must be appreciated that Section 13B was by the Amendment Act 68 of 1976 enacted to allow the parties to file Petitions for divorce by mutual consent upon the grounds stated therein which are that they are living separately and are not able to live together. Section 13B contemplates a Petition initially filed by the parties. It would be filed upon the premise that the parties have decided that they could not and hence have not lived together but have lived separately.

7.The provision under Section 13B(2) is the respite period granted to such parties to reconsider their decision to dissolve their marriage. The provision lays down what a Judge is required to do if the Petition is not withdrawn before 6 months to 18 months statutory period when it remains on the file of the 4

Court. If a Petition under Section 13 has remained on the file of the Court for as long as 3 years as in this case, the parties require no respite period to reconsider their decision to dissolve a broken marriage in which various allegations based upon the grounds under Section 13 have been made and later withdrawn upon seeing reason.

8.The Court must further consider Section 9 of the Family Courts Act,1984, which enjoins the Family Court to consider the alternative mode of reconciliation between the parties. A reconciliation may be positive in which case parties may come together as husband and wife. If not, reconciliation by way of amicable settlement of their dispute by divorce could also be arrived at.

9.Section 89 of the Code of Civil Procedure (CPC), which applies to the Family Court since it is the Civil Court under Section 10(1) of the Family Courts Act, further enjoins the Court to follow the resolution of the dispute by an alternative mode, including the mode of mediation. If that is followed, the parties would settle their dispute and withdraw the allegations and if in the meantime a period of 6 months has transpired, the statutory period of respite is availed of by the parties. Consequently, the literal interpretation of Section 13B(2)of the Hindu Marriage Act would not be 5

required in case of parties filing Consent Terms and withdrawing the allegations against one another after a Petition for divorce has been filed more than 6 months prior to such withdrawal of allegations and filing of Consent Terms thereunder, be it under Section 13 and not under Section 13B of the Act.

10.The learned AGP appearing for Respondent No.1-State tenders a judgment in the case of Anil Kumar Jain vs. Maya Jain, II (2009) DMC 449 (SC) in which the Supreme Court allowed such a Petition to be granted under its powers under Article 142 of the Constitution of India. The order of the Family Court has not been challenged on the ground that it could be passed under Article 142 of the Constitution of India. Even this Court cannot and is not passing an order under Article 142 of the Constitution of India. However, upon a harmonious construction of the aforesaid provisions of the Family Courts Act, the CPC and the Hindu Marriage Act, 1955, it can be seen that the period of respite is not required to be waived . It is the period which has passed when the Petition was pending under Section 13 of the Hindu Marriage Act. It is only upon conversion of that Petition under Section 13B of the Hindu Marriage Act that the Petition filed on the grounds of cruelty making allegations of cruelty is converted into a Petition where the allegations stand withdrawn upon 6

the parties having settled their disputes.

11.The parties, who settle their dispute, are not required to be penalised for settling their disputes. They have gone through the process of divorce in the Court for more than 6 months when the Petition remained pending. They have only modified their views upon settlement of the dispute. Hence such a Petition, though for divorce by mutual consent which would be granted to both parties and not for divorce upon the grounds under Section 13 of the Hindu Marriage Act, has lived through 6 months period in the Family Court already. Consequently, that period of 6 months, which the law requires the parties to undergo while the Petition remains pending, is undergone; only the acrimonious allegations are withdrawn so that the divorce can be granted amicably to both rather than to one of the spouses.

12.It may be appreciated that any Petition, which is filed in Court, may or may not be contested. If it is uncontested, an ex-parte decree may be passed under Order IX of the CPC, which applies to Family Courts as Civil Courts. A decree of divorce could be passed under that provision also. That can be passed within less than 6 months of filing the Petition. That, of course, would be based upon the allegations made in the 7

Petition which are not controverted by the Respondent therein. That enables the Petitioner to obtain a decree of divorce. If those allegations came to be withdrawn, as in this case, and as is desirable under the reconciliatory mode in which Family Courts are expected to function, the parties who withdraw the allegations must both be entitled to a decree of divorce without the burden and restraint which is cast by Section 13B(2) for parties who appear initially in the Court together by way of a Petition for divorce by mutual consent.

13.Consequently, the view expressed by the learned Judge, considering all the above modes in harmony, is seen to be erroneous. The impugned order dated 7.1.2010 passed by the learned Judge of 7th Family Court at Mumbai is, therefore, set aside. The Writ Petition is allowed and the Petition is remanded to the Family Court to pass the necessary orders under Section 13B of the Hindu Marriage Act on the next date of hearing. Rule is made absolute accordingly.

14.No order as to costs.

(SMT.ROSHAN DALVI, J.)