

Sureshta Devi

Vs

Om Prakash

C.A.No.633 of 1991

(K. Jagannatha Shetty, S.C. Agrawal JJ)

07.02.1991

JUDGEMENT

K. JAGANNATHA SHETTY, J.:-

1. Special Leave granted.

2. This appeal from a decision of the Himachal Pradesh High Court concerns the validity of a decree of dissolution of marriage by mutual consent, and is said, probably rightly, to raise an important issue. The issue is whether a party to a petition for divorce by mutual consent u/ S. 13B of the Hindu Marriage Act, 1955 ('Act') can unilaterally withdraw the consent or whether the consent once given is irrevocable.

3. The appellant is the wife of the respondent. They were married on 21 November 1968. They lived together for about six to seven months. Thereafter, it is that the wife did not stay with the husband except from 9 December 1984 to 7 January 1985. That was pursuant to an order of the Court, but it seems that they did not live on the ground that they have been living like husband and wife during that period also . On 8 January 1985, both of them came to that they have not been able to live together and Hamirpur. The wife was accompanied by her counsel, Shri Madan Rattan. After about an hour discussion, they moved a petition u/ s. 13-B for divorce by mutual consent in the District Court at Hamirpur. On 9 January 1985, the Court recorded statements of the parties and left the matter there.

4. On 15 January 1985, the wife filed an application in the court, inter alia, stating that her statement dated 9 January 1985 was obtained under pressure and threat of the husband and she was not even allowed to see or meet her relations to consult them before filing the petition for divorce. Nor they were permitted to accompany her to the Court. She said that she would not be party to the petition and prayed for its dismissal. The District Judge made certain orders which were taken up in appeal before the High Court and the High Court remanded the matter to the District Judge for fresh disposal. Ultimately, the District Judge dismissed the petition for divorce. But upon appeal the High Court has reversed the order of the District Judge and granted a decree for dissolution of the marriage by mutual consent. The High Court has observed that the spouse who has given consent to a petition for divorce cannot unilaterally withdraw the consent and such withdrawal, however, would not take away the jurisdiction of the Court to dissolve the marriage by mutual consent, if the consent was otherwise free. The High Court also recorded a finding that the wife gave her consent to the petition without any force, fraud or undue influence and therefore she was bound by that consent.

5. Section 13-B was not there in the original Act. It was introduced by the Amending Act 68 of 1976. Section 13-B provides:

"13-B.(1) Subject to the provisions of the Act a petition for dissolution of marriage by a 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-sec. (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."

6. It is also necessary to read S.23(1)(bb):

"23(1)). In any proceeding under this Act, whether defended or not, if the court is satisfied that -

(bb) When a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and.....

7. Section 13-B, is in pari materia with S. 28 of the Special Marriage Act. (1) of S. 13-B requires that the divorce by mutual consent must be to the Court jointly by both. Similarly, sub-sec. (2) providing for the motion before the Court for hearing of the petition should also be by both the parties.

8. There are three other requirements in sub-sec. (1). They are:

(i) They have been living separately for a period of one year

(ii) They have not been able to live together, and

(iii) They have mutually agreed that marriage should be dissolved.

9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

10. Under sub-sec. (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the Court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The Court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the Court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.

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 u/S. 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) 2 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 Rajasthan 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 hdraw 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 authorise 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 (i) 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 & 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.

16. In the result, we allow the appeal and set aside the decree for dissolution of the marriage. In the circumstances of the case, however, we make no order as to costs. Appeal allowed.

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