

## **DELHI HIGH COURT**

Chander Kanta

Vs.

Hans Kumar, (Delhi)

C.M. (M) No. 32 of 1987

(Mrs. Sunanda Bhandare, J.)

7.4.1988

### **JUDGEMENT**

#### **Mrs. Sunanda Bhandare, J.**

1. The petitioner who is an I.A.S. Officer and respondent 1 who is working in the Rajya Sabha Secretariat were married on 13th April 1976 in accordance with Hindu rites. On 20th Feb. 1978 a girl was born out of the said wedlock. Differences arose between the parties and the petitioner filed a petition for divorce being H.M.A. 237 of 1978 under Section 13 of Hindu Marriage Act, 1955 (hereinafter referred to as the Act) which was dismissed on 15th Jan., 1980. Tension and disharmony continued between the parties and thus they filed a petition for divorce by mutual consent under Section 13B(1) of the Act on 15th Dec., 1983. In view of sub-section(2) of Section 13B, a decree of divorce could not be passed straightway and, therefore, the file was ordered to be consigned to Record leaving the parties at liberty to take further action as contemplated under Section 13B(2) of the Act. Since respondent No. 1 failed to join in the second motion as required under Section 13B(2) within 18 months of the presentation of the petition, the petitioner filed an application on 1st July, 1985 seeking a decree of divorce based on the first motion itself.

2. It was averred in the said application that after the petitioner and respondent No. 1 had presented the petition under Section 13B(1) of the Act, the petitioner and respondent No. 1 have not lived together. Reconciliation between the parties is not possible and since respondent 1 was refusing to join in the second motion as required under sub-section(2) of Section 13B he be directed to appear and make his statement so that a decree of divorce by mutual consent can be passed. Respondent No. 1 filed a reply to this application and stated that he had

given his consent at the time of the presentation of the petition out of fit of anger and is not any more agreeable to divorce by mutual consent and, thus, the application is not maintainable. He stated that the averments in the petition under Section 13B(1) are not correct inasmuch as at the time of the presentation of the petition, the parties were not living separately and even thereafter lived together. Thus, the application is not maintainable and merits dismissal.

3. The Additional District Judge, Delhi came to a conclusion that the controversy raised between the parties cannot be resolved without evidence and thus by order dt. 1st Oct. 1986 fixed the case for evidence. The petitioner thereafter filed an application under Section 115 of the Evidence Act read with Section 114 of the Civil Procedure Code (hereinafter referred to as the Code) for review of the order dt. 1st Oct. 1986 contending therein that the respondent cannot be allowed to withdraw his previous statement giving consent for divorce and thus he is stopped from leading evidence. The trial Court by the impugned order dated 2nd Jan. 1987 rejected the application of the petitioner and held that even if the statement of the respondent-husband in the first motion that the petitioner and respondent had been living separately since 17th Oct. 1982 was taken to be conclusive *qua* him, the Court has to look into the subsequent conduct of the parties after the first joint motion. The trial Court held that if the husband was able to show that he had been living or had resumed cohabitation with the petitioner after the first motion, a decree of divorce cannot be granted. The trial Court thus held that the controversy cannot be resolved without evidence and allowed the husband to adduce evidence. This order of the trial Court is challenged by the petitioner wife by way of this petition under Article 227 of the Constitution of India.

4. It was contended by the learned counsel for the petitioner that under Section 13B of the Act, a petition for dissolution of marriage by a decree of divorce had to be presented by both the 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. Under Section 13B(2) of the Act the parties have to make a second joint motion not earlier than six months after the date of the presentation of the first motion but not later than 18 months and the Court is required to pass a decree of divorce after being satisfied that the averments in the first motion are true. Since respondent 1 had refused to join in the second

motion the petitioner was constrained to file an application on 1st July 1985 seeking a divorce based on the first motion itself. Learned counsel contended that the respondent in his reply affidavit has stated that he had agreed to join in the first motion in a fit of anger and the respondent cannot be allowed to approbate and reprobate at the same time. Learned counsel contended that a party cannot unilaterally withdraw the consent unless he proves that the consent was obtained by force, fraud or undue influence. The respondent, therefore, cannot be allowed to lead evidence contrary to the averments in the first motion because that will in effect amount to withdrawal of consent. Learned counsel submitted that the respondent was taking an inconsistent stand in order to defeat and delay the judicial process with a view to harass the petitioner. Reliance was placed on *Smt. Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe*,<sup>1</sup>

5. On the other hand, learned counsel for respondent 1 contended that a party who had joined in the first motion under Section 13B(1) of the Act can unilaterally withdraw the consent and it is open to a party who had joined in the first motion to lead evidence and prove that the averments in the first petition were false.

6. The only short question which requires determination in the present case is whether the trial Court was right in allowing the respondent to adduce evidence to show that even at the time of filing of the first joint motion, the petitioner and the respondent were living together and they have continued to live together even thereafter.

7. At this stage it will be convenient to reproduce Section 13B of the Act which deals with divorce by mutual consent. Section 13B reads as follows:

"13B(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."

8. On a plain reading of this provision, it is clear that under sub-section (1), a petition for mutual divorce is required to be presented by both the parties together on the ground: (i) that they have been living separately for a period of one year or more; (ii) that they have not been able to live together; and (iii) that they have mutually agreed that the marriage should be dissolved.

9. Sub-section (2) provides that if the petition is not withdrawn in the meantime, on a joint motion made by the parties not earlier than six months after the date of the presentation of the first petition referred to in sub-section(1) and not later than 18 months after the said date, if the Court is satisfied after hearing the parties and after making inquiries that a marriage has been solemnized and the averments in the petition are true, it can pass a decree of divorce. Though sub-section(2) of Section 13B envisages withdrawal of the joint petition, it does not prescribe the procedure for withdrawal of the joint petition. I also do not find any other provision in the Act or the Rules dealing with withdrawal of a joint petition presented under Section 13B(1). However, Section 21 of the Act provides that subject to the other provisions contained in the Act and to such Rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code. Thus, it is necessary to refer to the provisions dealing with withdrawal and abandonment of plaint in the Code. Order 23, Rule 1 prescribes the procedure for withdrawal and abandonment of a suit. Sub-rule (5) of Rule 1 of Order 23 specifically deals with the power of the Court to permit withdrawal or abandonment of a suit or part of a claim presented jointly by one or more plaintiffs. Sub-r.(5) of Rule 1 of Order 23 reads thus :-

"(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

Thus, when the suit is filed by two or more plaintiffs, the Court cannot permit one of the several plaintiffs to abandon a suit or part of a claim without the consent of the other plaintiffs.

10. Section 13B(1) of the Act also contemplates joint presentation of a petition. It is similar to a suit filed jointly by one or more plaintiffs. Thus just as a suit or part of a claim cannot be abandoned or withdrawn by one plaintiff, one of the parties to the petition cannot be permitted to withdraw the petition or abandon the prayer without the consent of the other party. In other words, a petition presented under Section 13B(1) of the Act cannot be also withdrawn by one party unilaterally. Of course, if the Court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence then it is a different matter because in such a case the court is empowered specifically to refuse to grant the decree. The Legislature introduced Section 13B in the Act by Marriage Law (Amendment) Act 1976 to provide for a speedy dissolution of marriage when it is found that the marriage is irretrievable. The Legislature provided for an interval of a period of six months between the first motion and the second motion in order to afford the parties further opportunity for reconciliation. If one party is allowed to withdraw the consent even when other grounds, namely that the parties continue to live separately and have not been able to live together, still subsist and reconciliation is not possible then it will frustrate the very purpose of the enactment. Very precious time of one of the parties who has waited for over six months for filing the second motion will be wasted and a party who wants to harass and is guilty of abuse of the process of the Court will benefit. This position is made further clear by insertion of Sub-section (bb) to Section 23(1) of the Act. Under this section, the Court is empowered to grant the decree even in an undefended case if it is satisfied that the averments in the petition are true and the consent for mutual divorce has not been obtained by force, fraud or undue influence. In my opinion, since the second motion as contemplated in Section 13B(2) has to be a joint motion, Section 23 would come into operation in a case like the present one when one of the parties refuses to join in the second motion and the other party has no alternative but to make an application to the court for orders on the petition already presented under Section 13B(1) of the Act before the specified time of 18 months expires. If unilateral withdrawal of consent is permitted the Court will not be able to pass a decree in an undefended case under Section 23(bb) of the Act. I am thus unable to accept the contention of the learned counsel for the

respondent that he could unilaterally withdraw the consent without proving that the consent was obtained by force, fraud or undue influence.

11. It is necessary at this stage to refer to two later judgments of other High Courts wherein similar question came up for consideration but different view was taken by the two Division Benches. In *K.I. Mohanan v. Smt. Jeejabai*,<sup>2</sup> a Division Bench of the Kerala High Court considered the question of unilateral withdrawal of consent by one of the parties. The Division Bench disagreed with the view taken by the Bombay High Court in *Smt. Jayshree Ramesh Londhe* (supra) and observed that the situation arising under Order 23, Rule 1 of the Code cannot be considered similar to the situation arising under Section 13B(2) of the Act and a party can unilaterally withdraw the consent given under Section 13B(2) of the Act. The Punjab and Haryana High Court in *Harcharan Kaur v. Nachhattar Singh*,<sup>3</sup> dealing with the question observed that unless the parties to the petition under Section 13B of the Act who have mutually consented to have the marriage dissolved, continue to signify their mutual consent for the dissolution of the marriage right up to the date of decree, the marriage cannot be dissolved under Sub-section(2) of Section 13B of the Act merely on the basis that six months earlier the parties had together presented the petition for dissolution of marriage by mutual consent. If one of them fails to agree and does not want to oblige the other party by extending the requisite consent to the divorce, decree of divorce cannot be passed under Section 13B of the Act.

12. With respect I am unable to agree with the view expressed in *K.I. Mohanan's* case (supra) and *Harcharan Kaur's* case (supra) because the question has to be considered in the light of Section 23(bb) of the Act and as discussed hereinabove if unilateral withdrawal of consent is held to be permissible, Section 23(bb) will be redundant. In my view, a party cannot unilaterally withdraw the consent unless it is proved that the consent was obtained by force, fraud or undue influence. I am, therefore, in agreement with the view expressed by the Bombay High Court in *Smt. Jayashree Ramesh Londhe* (supra).

13. By the impugned order the trial Court has allowed the respondent husband to lead evidence. Now, though a party cannot withdraw the consent can still be allowed to lead evidence. When the Court makes an enquiry under sub-section(2) of Section 13B it has to be satisfied that the averments in the petition are true. Since in the first joint motion the parties are required to state whether

they have been living separately for a period of one year or more and that they have not been able to live together, the Court must verify whether even that statement made by the parties is true. If the Court finds that the averments made in the petition are not correct and the parties have been living together at the time of the presentation or thereafter, the Court will not grant a decree under Section 13B(2) of the Act. Similarly when the parties do not make a joint motion and the Court is required to consider the grant of relief under Section 23(1)(bb) of the Act it has to be first satisfied that the grounds made out in the first motion are correct and further that the consent has not been obtained by force, fraud or undue influence.

14. In the present case, the respondent has filed an objection to the application filed by the petitioner stating therein that the averment made by the parties is not correct and the parties never lived separately and continue to live together. In my view, since the Court has to be satisfied about the correctness of the averments in the first joint motion made by the parties, the controversy can be resolved either by allowing the parties to lead oral evidence or by way of affidavits. The Court must thereafter weigh the evidence and decide whether a decree of divorce should be granted. Thus, in my opinion, the trial Court rightly held that even if the averments made by the respondent in the first motion may be conclusive *qua* him, since the Court has to be satisfied about the correctness of the averments and this controversy raised between the parties cannot be resolved without evidence.

15. In the result, the petition is dismissed. However, since long time has elapsed the trial Court is directed to dispose of the case expeditiously. No costs.

Petition dismissed.

Cases Referred.

1. AIR 1984 Bombay 302.
2. AIR 1988 Kerala 28,
3. AIR 1988 Punjab and Haryana 27