

KERALA HIGH COURT

K.I. Mohanan

Vs

Jeejabai

M.F.A. No. 19 of 1982

(V. Sivaraman Nair and K. John Mathew, JJ.)

01.08.1986

JUDGEMENT

Sivaraman Nair, J.

1. An interesting question is sought to be raised by the appellant. That relates to the withdrawal of an application jointly filed by the spouses for divorce by mutual consent under Section 13-B of the Hindu Marriage Act. The appellant urges that once an application by mutual consent under that Section is filed, neither of the spouses is entitled to unilaterally withdraw such consent. It is also submitted that even assuming that one of the spouses withdraws the consent, the Court is not entitled to act on such withdrawal.

2. The facts of this case are only very few. The appellant and the respondent were married in June, 1980. An application for divorce by mutual consent was filed under Section 13B of the Hindu Marriage Act on 23-6-1981 and the same was numbered as H.M.O.P. No. 50 of 1981. On 27-6-1981, that petition was posted to 4-1-1982 for reporting reconciliation, if any. I.A. No. 2187 of 1981 was filed by the respondent on 29-10-1981 stating that she had not consented to the divorce and had not read the petition before she signed the same. She, therefore, requested that she might be allowed to withdraw the petition. That petition was allowed on 31-10-1981. On the same day, the Additional Subordinate Judge passed the order under appeal to the effect that in view of the order on I.A. No. 2187 of 1981, the Original Petition itself was not maintainable. Hence the hearing was advanced and the petition was dismissed.

3. The appellant submits that the respondent should not have been allowed to withdraw the consent. In any case, the court should not have acted on the withdrawal of the consent signified in the petition under Section 13B of the Act. It is further submitted that even assuming that an application in the nature of I.A. No. 2187 of 1981 could have been entertained, it should not have been ordered without notice to the appellant and without conducting an enquiry into the circumstances under which that application was filed. It is also submitted that the application for divorce should not have been disposed of on 31-10-1981 without notice to the appellant or his counsel since the petition was posted for reporting reconciliation on 4-1-1982 and the same was advanced without notice to him.

4. The question which is emphatically urged by counsel for the appellant is that once an application under Section 13B of the Hindu Marriage Act is filed on mutual consent of both the spouses, one of them cannot unilaterally withdraw the consent resulting in the dismissal of the petition. He referred us to a decision of the Bombay High Court reported in AIR 1984 Bombay 302, wherein a learned single Judge of that Court, on the analogy of Order 23, Rule 1 of the Code of Civil Procedure stated, that one of the applicants cannot unilaterally withdraw the consent given for divorce. We are not impressed by the analogy drawn by the learned Judge to a situation arising under Order 23, Rule 1 of Civil Procedure Code. That deals with a case where several plaintiffs file a suit. The rule provides that one of the several plaintiffs shall not be authorized to abandon a suit or part of a claim under sub-rule (1) or withdraw from a suit or part of a claim without the consent of the other plaintiffs. On a reference to the provisions contained in Section 13B of the Hindu Marriage Act, we feel that that analogy does not seem to be apposite.

5. Shri S. Sivaraman, counsel for the respondent, drew our attention particularly to Section 13B(2) of the Act, which provides that even after the filing of the application under mutual consent under Sub-section (1) of Section 13B, the Court is obliged to hear the parties and make such enquiries as it thinks fit for the purpose of being satisfied that the marriage had been solemnized and a decree for divorce may be desirable, if the averments in the petition are true. This provision, as is correctly pointed out by counsel, militates against an order to be mechanically passed without conducting an enquiry and without the court being satisfied about the genuineness of the consent, and whether the consent was willingly given by the parties. Satisfaction of the court, after hearing the parties and after conducting an enquiry, necessarily contemplates an opportunity for either of the spouses to withdraw the consent or to indicate from other circumstances that an order of divorce, in terms of the application, may not be desirable. The situation arising under Order 23, Rule 1 of the Civil Procedure Code cannot be considered as similar to the situation arising under Section 13B(2) of the Hindu Marriage Act.

6. It seems to us, however, that the complaint of the appellant, that the trial Judge acted improperly in ordering I.A. No. 2187 of 1981, without notice to the appellant, is well-founded. Counsel is also well-founded in his submission that the trial court should not have dismissed the application on 31-10-1981, which was posted for reporting reconciliation on 4-1-1982 without notice to the appellant or his counsel.

7. This should naturally result in the order being set aside and the matter remanded for reconsideration. But, if no useful purpose will be served, it is not obligatory that we shall do so. Counsel for the respondent submits that the withdrawal of consent for divorce, which was recorded in the petition filed under Section 13B of the Act, as far as the respondent is concerned, is absolute and unequivocal. It has been so stated in the affidavit accompanying I.A. No. 2187 of 1981 filed before the lower court. It has been reiterated in the counter affidavit filed before this court. If the respondent is correct in this submission, it will only be a waste of time if we remand the matter, since no useful purpose will be served thereby. Counsel also seems to be right in his submission, that the enquiry which the trial Judge is obliged to conduct under Section 13B(2) of the Act can as well be conducted by this court and in such enquiry, the materials available to the lower court as also the affidavit, which has not so far been controverted by the appellant, can be taken into consideration for purposes of the satisfaction which should be arrived at for passing

final orders thereunder.

8. We are satisfied that the withdrawal of consent by the respondent for divorce by mutual consent has been unequivocally expressed by her and it seems to be permissible on reading of Sub-section (2) of Section 13B of the Hindu Marriage Act. We are also of the opinion that the matter need not be remanded for reconsideration by the trial court in view of the unequivocal stand taken by the respondent.

9. We would also add that it will militate against the letter and spirit of Section 13B of the Hindu Marriage Act, which contemplates an opportunity for reconciliation within a period of six months, or an extended period of eighteen months to say that once an application is signed, a reconciliation or a withdrawal must be completely ruled out.

The appeal, therefore, fails and the same is hereby dismissed. The parties will suffer their costs.

Appeal dismissed.