

# **BOMBAY HIGH COURT**

Jayashree

Vs.

Ramesh

First Appeal No. 392 of 1983

(B.C. Gadgil, J.)

15.02.1984

## **JUDGEMENT**

### **B.C. Gadgil, J.**

1. This is an appeal filed by the wife against the dismissal of the petition filed by her and the respondent (the husband) under Section 13B of the Hindu Marriage Act for getting a divorce by mutual consent.

2. The marriage between the parties took place on 12-3-1981. It appears that they lived together till 24th June 1981. The wife thereafter filed Hindu Marriage Petition No. 59 of 1982 against the husband for divorce. Divorce was claimed on many grounds including that of cruelty. Of course, there was also an alternative prayer for judicial separation. There is no dispute that on 12-7-1982 the said petition was withdrawn by the wife. In the application for withdrawal it is stated that she may be permitted to withdraw the petition with liberty to file separate petition for divorce by mutual consent. The Advocate for the husband made an endorsement of 'no objection'. The Court thereafter passed a formal order about the withdrawal of the petition.

3. On the very day, i.e. on 12-7-1982, both the parties (viz., the husband and the wife) filed another application viz., Hindu Marriage Petition No. 91 of 1382, under Section 13B. This appeal arises out of the decision in that petition. In the petition the husband and the wife made the following relevant averments:-

- (1) Since 24th June 1981 the husband and the wife have been living separately from each other due to several disputes and differences.
- (2) It is impossible for these to live together as husband and wife and the efforts of reconciliation were futile.
- (3) Both of them have mutually agreed that the marriage between them be dissolved by a

decree of divorce.

Both the parties, therefore, prayed for a decree of divorce Section 13B permits such divorce by mutual consent. Under sub-section (1), a petition for such divorce is required to be presented by both the parties on the grounds (1) that they have been living separately for a period of one year or more, (2) that they have not been able to live together and (3) that they have mutually agreed that the marriage should be dissolved Sub-section (2) provides amongst other things as to how a decree for dissolution of marriage should be passed after, making such inquiry. Of course, that sub-section says that such an inquiry should be made if the petition is not withdrawn in the meantime. The inquiry is directed to find out as to whether the averments made in the petition are true. Such an inquiry is to be made after six months from the filing of the petition. Thus, the Hindu Marriage Petition No. 91 of 1982 was kept pending in the District Court, Thane, for 6 months. 27th January, 1983, the husband made an application to the Court stating therein that he was not ready to give a divorce to his wife and that there was no cause for such a divorce. He has stated that at the time when that petition was filed he was in an indecisive and vacillating mood and he was in two minds. He also stated therein that he has started feeling that he and his wife would live together happily and that, therefore, the marriage should not be dissolved. An affidavit in similar terms has been filed by him in the District Court. As against that, the wife has filed her own affidavit asserting that the contents of the Hindu Marriage Petition are correct and that a decree for divorce should be passed.

4. The learned Assistant Judge heard the petition, After construing the provisions of Section 13B, he came to the conclusion that either party can withdraw the petition after thinking over the matter about divorce by mutual consent and that in this way a party can withdraw the earlier consent though not obtained by fraud, undue influence and coercion. He has also observed that if any of the Parties withdraws the consent, it would not be open to the Court to go into the question as to whether the earlier consent was proper or not or whether there was good basis for making an application for divorce by mutual consent. With this reasoning, the petition was dismissed and the wife has come in appeal.

5. I have already observed that by incorporating Section 13B the Legislature provided for a divorce by mutual consent. It will be convenient to reproduce sub-section (1) which reads as follows—

"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."

The application so made under sub-section (1) is inquired into if, in the meantime, it is not

withdrawn. Sub-section (2) provides that the Court shall, on being satisfied after hearing the parties and after making such inquiry as it thinks fit that the averments in the petition are true, pass a decree for divorce.

6. The application (Exhibit 5) made by the husband and his affidavit filed in the lower Court both together can be construed to mean that the husband wants to withdraw his consent. In addition, there are also certain averments to suggest that he wants to say that his consent was not a free consent, though there was no question of fraud, undue influence, etc. The question is as to whether a party to a joint petition for divorce by mutual consent can withdraw the petition. It was contended by Shri Tipnis that such a withdrawal by, one party alone is not, permissible. He argued that Section 13B contemplates a joint application by both and that a withdrawal of this type of application can be made jointly by both and not by either party. He further submitted that the scheme of Section 13B would be frustrated if it is held that after having made a joint application any party can withdraw that application and that too without the consent of the other party. Of course, he is frank enough in stating that during an inquiry contemplated under sub-section(2), either party can satisfy the Court that the conditions necessary, for passing a decree for divorce by mutual consent were not existing at the time when the petition was filed. As against this, Sri Gokhale for the respondent submitted that the said section has made a provision for divorce by mutual consent and that so long as a decree for divorce is not passed, it would be permissible for either party to withdraw the consent and thereby withdraw the petition.

7. Section 21 of the Hindu Marriage Act provides that all proceedings under the Act shall be regulated by the Civil Procedure Code, 1908. Of course, this would be subject to the provisions contained in the Act or the rules framed by the High Court. The Act or, the, rules do not make any provision as to how a proceeding under the Hindu Marriage Petition can be withdrawn. It would, therefore, be necessary to go to the provisions of the Civil Procedure Code for finding out as to when and under which contingency a proceeding can be withdrawn. Order 23, Rule 1 deals with abandonment of a suit as well as withdrawal of a suit. Sub-rule (1) contemplates abandonment of a suit or part of a claim. Sub-rule (3) has made a provision for withdrawal of a suit with liberty to file a fresh, suit on the same cause of action if the grounds mentioned in that sub-rule exist. Sub-rule (5) which is material reads as follows:-

"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."

8. Sri Tipeis contended that without the consent of the wife the husband would have no, right either to abandon the Hindu Marriage petition filed under Section 13B or to withdraw that petition with permission to file a fresh petition on the same cause of action. He argued that the words 'without the consent of the other plaintiffs' would cover both the cases viz., (1) the abandonment of suit under sub-rules (1) and (2) the withdrawal of a suit under sub-rule (2). It is

not necessary to consider this aspect in details. If what Shri Tipnis argued is correct, there cannot be any abandonment of the marriage petition without, the consent of the parties. The position will be still worse from the point of view of the husband if it is assumed that the above-mentioned, words do not apply to the abandonment of the suit. In that case, there would be a total prohibition for abandonment of the suit by, one of the spouses. It would thus be clear that in any case one of the co-plaintiffs would not be able to abandon the suit more particularly when the other co-plaintiff has not consented to such abandonment. As the record stands, it is beyond any controversy that the wife has not consented to the abandonment of the Hindu Marriage Petition as suggested by the husband. Under these circumstances, it would be very difficult to accept the contention of Sri Gokhale that an of the spouses can withdraw a joint petition filed under Section 13B.

9. It was next contended by Sri Gokhale that at any rate either the husband or the wife would be able to withdraw the consent that was given (while filing the divorce petition) for having a mutual divorce. He argued that the consent of the parties should be there at the time when the petition was filed and it should also continue to be in existence till the Court grants a decree for divorce. A reading of Section 13B would show that what is necessary is that there should be a consent for mutual divorce at the time when the petition is filed. If that consent is a free consent of both the parties, it will not be possible for any of them to nullify the petition by saying that though initially the consent was voluntarily given, still the said party now intends to withdraw it. This position can very well be seen when we take into account the scope of an inquiry contemplated under sub-section (2). I have already observed that the inquiry should be more particularly directed in order to find out as to whether the averments in the petition are true or not. As far as the consent aspect is concerned, the inquiry should obviously be with respect to the consent that was mentioned in the petition. It will not be possible for any party to voluntarily agree to have a divorce by mutual consent or to revoke or withdraw that consent at a later stage. Such permission would nullify the very purpose of a joint application and hence I am not able to accept this contention of Sri Gokhale.

10. It is true that the marriage petition will have to be dismissed if any of the three conditions contemplated by sub-section(1) is found to be not existing when the petition was filed. As far as the content question is concerned, the Court will have to make an inquiry as to whether the consent given by a party when filing the petition was a voluntary and a genuine consent. The learned trial Court has not held that there was no such voluntary and genuine consent of the husband when the petition was filed. Apart from that, I have heard the learned Advocate in order to find out, as to whether the husband has made out any case that his consent was not a genuine or a voluntary consent. I have already observed that in Exhibit 5 and in the affidavit in support thereof he has frankly stated that he signed and verified the said application of his free will and there was no fraud force or coercion. After making this statement on oath, he then states that due to certain domestic difficulties he was mentally disturbed and was on the horns of dilemma. He was little bit confused and in such a state of confused mind he signed and verified the petition.

11. In my opinion, there appears to be no substance in this contention of the husband I have already observed that the earlier Hindu Marriage Petition No. 59 of 1982 was withdrawn by the wife principally for the purpose of filing another application for divorce by mutual consent. The withdrawal of the said petition was not opposed and on that very day the present petition for divorce by mutual consent was filed by both the husband and the wife. At Exhibit 11 there is a receipt executed by the husband stating therein that he got possession of the various articles mentioned therein. Serial No. 1 is the Mangalsutra, i.e., one Vati and two beads. Serial No. 9 is also another Mangalsutra. The husband got these articles back. At Serial Nos. 2 to 8 there were other miscellaneous articles such as coat, pant, which were given, to the husband (presumably from the bride's side) at the time of the marriage. There is also a mention of a cap, a shirt, a pair of shoes, a neck-tie and a pair of socks, etc. In addition, at Serial No. 7 there is a mention of a sari which must have been, given to the mother of the husband at the time of the marriage. The receipt (Exhibit 11) states that the husband did not like to take back all these sundry articles and that he got possession of the two Mangalsutras. At Exhibit 10 there is another receipt executed by the wife on the very day, i.e., on 12-7-1982. It is a receipt with respect to certain articles handed over by the husband to the wife. It is needless to say that that receipt contains a number of household articles, clothes, saris, etc. All this shows that on the day on which the marriage petition was filed, the parties exchanged the articles (including ornaments) which were agreed to be kept by each of them. These two documents would be a good indication, to show that the husband was not in a vacillating or indecisive mood when the joint petition for divorce by mutual consent was filed on that very day. The husband was cross-examined in the trial Court. The cross-examination appears on page 19 of the paper book. Neither fraud was practised on him nor there was any coercion when he filed the petition for divorce by mutual consent. He admitted that on that very day he returned all the ornaments and articles as discussed above and that this was done in the presence of his Advocate. He also admitted that he received back the Mangalsutra. The abovementioned circumstances would definitely show that the husband has filed the petition along with his wife for a divorce by mutual consent and that while doing so, he acted voluntarily. There was no question of any confused state of mind. Thus, here is a case where there is abundant evidence to show that at the time when the application was made the husband and the wife had mutually agreed that the marriage should be dissolved. Similarly, the various circumstances do indicate that the parties have been residing separately for more than one year and that there was no possibility of their living together. These are all the requirements under Section 13-B for making a joint application for divorce. Once these requirements are proved, it would be necessary for the Court to grant a decree for divorce. The fact that at a later stage either party does not want a divorce would be irrelevant. What is material is as to whether the abovementioned requirements were existing when the petition was filed.

12. In view of the above discussion, this is a clear case where a divorce by mutual consent should have been granted. The appeal is, therefore, allowed. The decree passed by the trial Court is set aside and in its place a decree for divorce (by mutual consent as contemplated by Section 13-B) is hereby passed so as to dissolve the marriage between the husband and the wife. Parties to bear

their own costs throughout.  
Appeal allowed.