

RAJASTHAN HIGH COURT

Santosh Kumari

Vs.

Virendra Kumar

Civil Misc. Appeal No. 132 of 1984

(K.S. Lodha, J.)

29.01.1986

JUDGMENT

K.S. Lodha, J.

1. This is a wife's appeal against the judgment and decree of the learned District Judge, Sriganganagar dated 13-8-84 dissolving the marriage between her and her husband by mutual consent.

2. The facts giving rise to this appeal may be briefly stated here. The parties are Hindus by caste and their marriage had taken place on 16-2-75 at Suratgarh. They lived together till 15-10-79 and a daughter was born out of this wedlock on 20-5-78. The husband Shri Virendra Kumar filed an application under section 13 of the Hindu Marriage Act (hereinafter called 'the Act') for dissolution of the marriage on the grounds of cruelty and desertion. The application was contested by the wife. The fact of the marriage and the birth of the daughter were admitted but the facts of cruelty and desertion were denied. On the other hand, cruelty was alleged on the part of the husband and his parents. Issues on the pleadings of the parties were framed on 22-3-84. However, before this, an effort was made for reconciliation between the parties on 2-9-83 but it was found that the husband was not willing to take the wife back.

3. While the matter was pending for the petitioner's evidence, one more issue was added on 20-7-84 and the case was fixed for the petitioner's evidence on 9-11-84. However, it appears that before that date, the parties appeared before the learned District Judge on 13-8-84 and moved a joint application stating that the parties were desirous of getting a decree for dissolution of the marriage by mutual consent and, therefore, the matter may be taken up on that very day. Another application purporting

to be under section 13-B of the Act was also jointly filed by the parties on that day and it was stated therein that the parties had been living separate since 15-10-79 and it has not been possible for them to live together despite the efforts made by their friends and relations in this respect and, therefore, it was in the interest of both of them to obtain a decree for dissolution of the marriage so that each one of them may be able to get another match and live a happy life. It was further alleged that the husband had returned all the ornaments and cash belonging to the wife back to her and, therefore, the application under section 27 of the Act filed earlier by her had become in fruituous and that in future, the wife will not be entitled to any maintenance. It was also mentioned that the daughter Amandeep had been handed over by the wife to the husband who would now look after her and that the wife will not be entitled to any maintenance for the daughter and that she would withdraw the application under section 125 Cr. P.C. which had earlier been filed by her. In the last, it was prayed that the application earlier filed by the husband may be deemed to be a joint application of the parties with their mutual consent and a decree for dissolution of the marriage may be passed under section 13-B of the Act.

4-5. On this application being filed, the learned District Judge again made an effort to bring about the reconciliation between the parties but without success and they insisted that the application of the husband may be treated as a joint application with mutual consent for the grant of a decree for divorce and the application filed on 13-8-84 may be treated as a motion under Sub-section (2) of Section 13-B of the Act and a decree for divorce may be passed. Looking to these circumstances, the learned District Judge accepted their prayer and granted a decree for dissolution of the marriage holding that he was satisfied that the application was voluntarily filed by the parties with their mutual consent, that there was no connivance, between them, that neither of the parties was taking any advantage of its wrong nor there was any undue delay in the filing of the application. He also directed that the daughter Amandeep will stay with the petitioner and the wife will not be entitled to any maintenance for herself or for her daughter and that she would withdraw the application under section 125 Cr. P.C. already filed by her. He also observed that neither party owed anything to the other and that the husband had already returned the ornaments to the wife.

6. Aggrieved of this decree, the wife has now come in appeal.

7. I have heard the learned counsel for the party and have gone through the record.

8. Two contentions have been raised before me by the learned counsel for the appellant. His first contention is that the learned District Judge had no jurisdiction to pass a decree for dissolution of marriage by mutual consent in this case because as a matter of fact, there was no joint application by the parties before him till 13-8-84 and the application dated 13-8-84 could not be deemed to be a joint application envisaged under Sub-section (1) of Section 13-B as well as a motion under Sub-section (2) thereof because the motion under Sub-section (2) of Section 13-B could have been made not earlier than six months after the date of the joint petition filed under Sub-section (1) and not later than eighteen months after the same date. Here, the joint application as well as the motion under Sub-section (2) of Section 13 had been made on the same day by a single application. According to him, therefore, the decree is a nullity being against the provisions of Section 13-B. His second contention is that the decree passed by the learned District Judge also relates to matters other than the divorce with mutual consent e.g. it debars the wife from claiming any maintenance for herself or her daughter or from asking for the return of the ornaments lying with the husband and, therefore, in any case, these directions regarding matters extraneous to the grant of a decree for divorce deserved to be set aside. On the other hand, the learned counsel for the respondent supported the decree passed by the learned District Judge and also urged that since it was impossible for the parties to live together and they had asked for the dissolution of the marriage with their free will, the decree cannot be set aside merely because of some irregularities in the manner of the filing of the application. It was also contended that the period of eighteen months referred to in Sub-section(2) of Section 13-B is in respect of the withdrawal of the joint application and not the outer limit for the filing of the motion for the grant of the decree by mutual consent and, therefore, according to the learned counsel for the respondent, the learned District Judge was within his jurisdiction to pass the decree.

9. I have given my careful consideration to the rival contentions. It is true that no joint application for grant of a decree for divorce by mutual consent was filed before 13-8-84 but in the application dated 13-8-84, a prayer was made that the original application filed by Virendra Kumar for grant of divorce may be deemed to be a joint application envisaged under section 13-B(1) and this was alleged to be done by the Court. Such a course has been adopted by some High Courts as would be clear from the decisions reported in *Jagmohan v. Smt. Sudesh* ¹ *Joginder Kaur v. Mohan Singh* ² and *Gurdev Kaur v. Malkiat Singh* ³ *Prem Lata v. Yash Paul* ⁴ and *Lalit Bhatia v. Kiran*

Bala ⁵ which are cases of Punjab and Haryana High Court. The same view, of course, on a little different reasoning appears to have been adopted by the Allahabad High Court reported in *Indrawal v. Radhey Raman* ⁶ In view of these authorities, the learned District Judge was right in treating the application dated 20-10-82 as an application for divorce by mutual consent. When the (sic?) requested the Court to treat that application for grant of a decree of divorce by mutual consent they must be deemed to have asked for an amendment of that application and when the Court acted upon it, it must be deemed to have allowed the amendment. It further appears that after the filing of the application dated 13-8-84, the learned District Judge had tried to bring about reconciliation between the parties but had failed in that effort as the parties stated that it was no longer possible for them to live together. As already stated earlier, such an effort on a previous occasion had also failed. It was, therefore, abundantly clear that the parties did not want to live together and were desirous of getting a decree of divorce. In these circumstances, the insistence on the form of the application would be improper and unnecessary because if the decree is refused on such a ground, the agony between the parties will continue and will hamper in their way of settling by their fresh marriages.

10. The application dated 13-8-84 has been treated by the learned District Judge as a motion under section 13-B(2) of the Act. It has been filed after six months of the earlier application dated 20-10-82, which was sought to be deemed to be a joint application under section 13-B(1) of the Act. The objection of the learned counsel for the appellant to this application being acted upon as a motion under section 13-B(2) is that it had not been filed within eighteen months of the earlier application and, therefore, the Court had no jurisdiction to act upon it. His contention is that under section 13-B(2) the motion of both the parties has to be made not earlier than six months after the date of the petition referred to in Sub-section(1) and not later than eighteen months after the same date and if the application is not made within that time, the Court cannot consider any subsequent application as a motion of both the parties for grant of divorce by mutual consent. At the first flash, the argument appeared to be attractive and plausible and with some substance but on a deeper consideration thereof, I do not find force in it. A logical conclusion of this argument would be that if the motion is not made by both the parties within eighteen months of the petition under section 13-B(1), the Court would become *functus officio* and the application filed under section 13B(1) would thus become infructuous. That does not appear to be the intent and purpose of Sub-section(2) of Section 13-B and a proper

construction of this provision would be that the application may be withdrawn by any of the parties not before six months and not later than eighteen months of the date of the petition under section 13-B(1) and if it is not so withdrawn within that period, the Court may proceed to grant a decree on mutual consent if it is satisfied about the other requirements of the section, namely, that the marriage has been solemnized and that the averments in the petition are true. Looked at from another point of view, also, in my opinion, the same meaning has to be given to Sub-section(2) of Section 13-B. According to this (Sub-section) the parties or any of them has a right to withdraw the application filed under Sub-section(1) of Section 13-B till the expiry of the last day of the eighteenth month of the filing of the application under section 13-B(1) and till then the motion of both the parties for the grant of the petition filed under section 13-B(1) cannot be made effective because that would deprive the parties from the right of withdrawing the application filed under section 13-B(1) and if that motion cannot be considered before the expiry of the aforesaid period of 18 months, the application cannot be thrown out on the ground that the motion had not been made within 18 months of the date of the application under section 13-B(1) when that motion could not have been taken into consideration till the expiry of the aforesaid period. In these circumstances, I am clearly of the opinion that even if the motion was not made within 18 months from 20-10-82, the Court would not lose its jurisdiction to entertain the same and pass a decree in accordance with sub- s.(2) of Section 13-B.

11. Apart from this interpretation of Section 13(2), it also appears that when it appears to the satisfaction of the Court that it is impossible for the parties to live together and a decree for divorce by mutual consent would be in the interest of both of them, it need not attach undue importance to the form of the application or the time within which it has been made, as would be clear from the authorities already referred to above.

12. So far as the other contention goes, it does appear that the agreement with regard to the withdrawal of the application under section 125 Criminal Procedure Code and not to make any claim with regard to the ornaments etc., does not squarely fall under section 13-B but if the parties with their eyes open and of their free will enter into such an agreement and the Court embodies it in its decree, passed under section 13-B, no serious exception can be taken to it. The mutual consent is in the nature of a compromise and the Court has power to pass a decree in terms of that compromise. Reference in this connection may be made to Order 23 Rule 3, Civil Procedure Code which empowers the Court to pass a decree in accordance with the terms of the

compromise so far as it relates to the parties to the suit whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit. Even if the provision of Order 23, Rule 3 Civil Procedure Code are not strictly applicable to the proceedings under section 13-B of the Act, the principle underlying it can certainly be invoked.

13. It will also not be out of place to mention that according to the information of the learned counsel for the respondent, both the parties have already re-married. The learned counsel for the appellant, however, pleads ignorance about this but I have no reason to doubt the statement of the learned counsel for the respondent. In this view of the matter also, the setting aside of this decree would lead to unnecessary complications.

14. For the reasons stated above, I do not find force in this appeal and dismiss the same. Looking to the facts and circumstances of the case, I shall make no order as to costs.

Appeal dismissed.

Cases Referred.

1. 1979 Hindu LR 303
2. 1979 Hindu LR 309
3. 1980 Hindu LR 331
4. (1985) 1 Hindu LR 148
5. (1985)2 Hindu LR 371
6. AIR 1981 All 151