REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPEALATE JURISDICTION

CIVIL APPEAL NO. 6288 OF 2008

Hitesh Bhatnagar …….. Appellant

versus

Deepa Bhatnagar ……..Respondent

J U D G M E N T

H.L. Dattu, J.

1) Marriages are made in heaven, or so it is said. But we are more often than not made to wonder what happens to them by the time they descend down to earth. Though there is legal machinery in place to deal with such cases, these are perhaps the toughest for the courts to deal with. Such is the case presently before us.

2) The appellant-husband and the respondent-wife got married according to the Hindu Marriage Act, 1955 [hereinafter referred to as 'the Act'] in 1994, and are blessed with a daughter a year thereafter. Some time in the year 2000, due to differences in their temperaments, they began

to live separately from each other and have been living thus ever since. Subsequently, in 2001, the parties filed a petition under Section 13B of the Act before the District Court, Gurgaon, for dissolution of the marriage by grant of a decree of divorce by mutual consent. However, before the stage of second motion and passing of the decree of divorce, the respondent withdrew her consent, and in view of this, the petition came to be dismissed by the Ld. Addl. District Judge, Gurgaon, though the appellant insisted for passing of the decree. The appellant, being aggrieved, has filed appeal No. F.A.O. No. 193 of 2003, before the High Court of Punjab and Haryana. The Learned Judge, by his well considered order, dismissed the appeal vide order dt. 08.11.2006. Being aggrieved by the same, the appellant is before us in this appeal.

3) We have heard the learned counsel for the parties and since the parties wanted to ventilate their grievances, we have heard them also.

4) The issues that arise for our consideration and decision are as under:

(a) Whether the consent once given in a petition for divorce by mutual consent can be subsequently withdrawn by one of the parties after the expiry of 18 months from the date of the filing of the petition in accordance with Section 13B (1) of the Act.

(b) Whether the Court can grant a decree of divorce by mutual consent when the consent has been withdrawn by one of the parties, and if so, under what circumstances.

5) In order to answer the issues that we have framed for our consideration and decision, Section 13B of the Act requires to be noticed :-

> 13B. Divorce by mutual consent. – (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, (68 of 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.
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> (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.

6) Admittedly, the parties had filed a petition for divorce by mutual consent expressing their desire to dissolve their marriage due to temperamental incompatibility on 17.08.2001. However, before the

stage of second motion, the respondent withdrew her consent by filing an application dated 22.03.2003. The withdrawal of consent was after a period of eighteen months of filing the petition. The respondent, appearing in-person, submits that she was taken by surprise when she was asked by the appellant for divorce, and had given the initial consent under mental stress and duress. She states that she never wanted divorce and is even now willing to live with the appellant as his wife.

7) The appellant, appearing in-person, submits that at the time of filing of the petition, a settlement was reached between the parties, wherein it was agreed that he would pay her `3.5 lakhs, of which he states he has already paid `1.5 lakhs in three installments. He further states in his appeal, as well as before us, that he is willing to take care of the respondent's and their daughter's future interest, by making a substantial financial payment in order to amicably settle the matter. However, despite repeated efforts for a settlement, the respondent is not agreeable to a decree of divorce. She says that she wants to live with the appellant as his wife, especially for the future of their only child, Anamika.

8) The question whether consent once given can be withdrawn in a proceeding for divorce by mutual consent is no more *res integra*. This Court, in the case of Smt. *Sureshta Devi v. Om Prakash*, (1991) 2 SCC 25, has concluded this issue and the view expressed in the said decision as of now holds the field.

9) In the case of *Sureshta Devi* (*supra.*), this Court took the view:

> *"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.*
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> *10. Under sub-section (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."

On the question of whether one of the parties may withdraw the consent at any time before the actual decree of divorce is passed, this Court held:

"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."

10) In the case of *Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226, this Court in passing reference, observed:

"16. We are of opinion that in the light of the fact-situation present in this case, the conduct of the parties, the admissions made by the parties in the joint petition filed in Court, and the offer made by appellant's counsel for settlement, which appears to be bona fide, and the conclusion reached by us on an overall view of the matter, it may not be necessary to deal with the rival pleas urged by the parties regarding the scope of Section 13-B of the Act and the correctness or otherwise of the earlier decision of this Court in Sureshta Devi case or the various High Court decisions brought to our notice, in detail. However, with great respect to the learned Judges who rendered the decision in Sureshta Devi case, certain observations therein seem to be very wide and may require reconsideration in an appropriate case. In the said case, the facts were:

The appellant (wife) before this Court married the respondent therein on 21-11-1968. They did not stay together from 9-12-1984 onwards. On 9-1-1985, the husband and wife together moved a petition under Section 13-B of the Act for divorce by mutual consent. The Court recorded statements of the parties. On 15-1-1985, the wife filed an application in the Court stating that her statement dated 9-1-1985 was obtained under pressure and threat. She prayed for withdrawal of her consent for the petition filed under Section 13-B and also prayed for dismissal of the petition.

The District Judge dismissed the petition filed under Section 13-B of the Act. In appeal, the High Court 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. It was found that the appellant (wife) gave her consent to the petition without any force, fraud or undue influence and so she was bound by that consent. The issue that came up for consideration before this Court was, whether a party to a petition for divorce by mutual consent under Section 13-B of the Act, can unilaterally withdraw the consent and whether the consent once given is irrevocable. It was undisputed that the consent was withdrawn within a week from the date of filing of the joint petition under Section 13-B. It was within the time-limit prescribed under Section 13-B(2) of the Act. On the above premises, the crucial question was whether the consent given could be unilaterally withdrawn. The question as to whether a party to a joint application filed under Section 13-B of the Act can withdraw the consent beyond the time-limit provided under Section 13-B(2) of the Act did not arise for consideration. It was not in issue at all. Even so, the Court considered the larger question as to whether it is open to one of the parties at any time till a decree of divorce is passed to withdraw the consent given to the petition. In considering the larger issue, conflicting views of the High Courts were adverted to and finally the Court held that the mutual consent should continue till the divorce decree is passed. In the light of the clear import of the language employed in Section 13-B(2) of the Act, it appears that in a joint petition duly filed under Section 13-B(1) of the Act, motion of both parties should be made six months after the date of filing of the petition and not later than 18 months, if the petition is not withdrawn in the meantime. In other words, the period of interregnum of 6 to 18 months was intended to give time and opportunity to the parties to have a second thought and change the mind. If it is not so done within the outer limit of 18 months, the petition duly filed under Section 13-B(1) and still pending shall be adjudicated by the Court as provided in

Section 13-B(2) of the Act. It appears to us, the observations of this Court to the effect that mutual consent should continue till the divorce decree is passed, even if the petition is not withdrawn by one of the parties within the period of 18 months, appears to be too wide and does not logically accord with Section 13-B(2) of the Act. However, it is unnecessary to decide this vexed issue in this case, since we have reached the conclusion on the fact-situation herein. The decision in Sureshta Devi case may require reconsideration in an appropriate case. We leave it there."

11) These observations of this Court in the case of *Ashok Hurra (supra)* cannot be considered to be ratio decidendi for all purposes, and is limited to the facts of that case. In other words, the ratio laid down by this Court in the case of *Sureshta Devi (supra)* still holds the field.

12) In the case of *Smruti Pahariya v. Sanjay Pahariya*, (2009) 13 SCC 338, a bench of three learned judges of this Court, while approving the ratio laid down in the case of *Sureshta Devi (supra),* has taken the view :-

"40. In the Constitution Bench decision of this Court in Rupa Ashok Hurra this Court did not express any view contrary to the views of this Court in Sureshta Devi. We endorse the views taken by this Court in Sureshta Devi as we find that on a proper construction of the provision in Sections 13-B(1) and 13-B(2), there is no scope of doubting the views taken in Sureshta Devi. In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

41. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi.

42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.

43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."

13) The appellant contends that the Additional District Judge, Gurgaon, was bound to grant divorce if the consent was not withdrawn within a period of 18 months in view of the language employed in Section 13B(2) of the Act. We find no merit in the submission made by the appellant in the light of the law laid down by this Court in Sureshta Devi's case (supra).

14) The language employed in Section 13B(2) of the Act is clear. The Court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met:

a. A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;
b. After hearing the parties and making such inquiry as it thinks fit, the Court is satisfied that the averments in the petition are true; and
c. The petition is not withdrawn by either party at any time before passing the decree;

15) In other words, if the second motion is not made within the period of 18 months, then the Court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a

complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression 'divorce by mutual consent' would be otiose.

16) In the present fact scenario, the second motion was never made by both the parties as is a mandatory requirement of the law, and as has been already stated, no Court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. We are of the view that the eighteen month period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant.

17) In the light of the settled position of law, we do not find any infirmity with the orders passed by the Ld. Single Judge.

18) As a last resort, the appellant submits that the marriage had irretrievably broken down and prays that the Court should dissolve the marriage by exercising its jurisdiction under Article 142 of the Constitution of India. In support of his request, he invites our attention to the observation made by this Court in the case of *Anil*

Kumar Jain v. Maya Jain, (2009) 10 SCC 415, wherein though the consent was withdrawn by the wife, this Court found the marriage to have been irretrievably broken down and granted a decree of divorce by invoking its power under Article 142. We are not inclined to entertain this submission of the appellant since the facts in that case are not akin to those that are before us. In that case, the wife was agreeable to receive payments and property in terms of settlement from her husband, but was neither agreeable for divorce, nor to live with the husband as his wife. It was under these extraordinary circumstances that this Court was compelled to dissolve the marriage as having irretrievably broken down. Hence, this submission of the appellant fails.

19) In the case of *Laxmidas Morarji v. Behrose Darab Madan,* (2009) 10 SCC 425, a Bench of three learned Judges (of which one of us was a party), took the view:

> *"25. Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined. The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or*

ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties."

20) Following the above observation, this Court in the case of *Manish Goel v. Rohini Goel*, (2010) 4 SCC 393, while refusing to dissolve the marriage on the ground of irretrievable breakdown of marriage, held:

"19. Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy."

21) In other words, the power under Article 142 of the Constitution is plenipotentiary. However, it is an extraordinary jurisdiction vested by the Constitution with implicit trust and faith and, therefore, extraordinary care and caution has to be observed while exercising this jurisdiction.

22) This Court in the case of *V. Bhagat v. Mrs. D. Bhagat*, (1994) 1 SCC 337 held that irretrievable breakdown of a marriage cannot be the sole ground for the dissolution of a marriage, a view that has withstood the test of time.

23) In the case of *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73, this Court took the view:

> *"17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses....."*

24) This Court uses its extraordinary power to dissolve a marriage as having irretrievably broken down only when it is impossible to save the marriage and all efforts made in that regard would, to the mind of the Court, be counterproductive [See *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511].

25) It is settled law that this Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair. Even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably. We may make it clear that we have not finally expressed any opinion on this issue.

26) In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In light of these facts and circumstances, it would be travesty of justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, we hope that they will give this union another chance, if not for themselves, for the future of their daughter. We conclude by quoting the great poet

George Eliot "*What greater thing is there for two human souls than to feel that they are joined for life – to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting."*

27) Before parting with the case, we place on record our appreciation for the efforts made by Shri. Harshvir Pratap Sharma, learned counsel, to bring about an amicable settlement between the parties.

28) In the result, the appeal fails. Accordingly, it is dismissed. No order as to costs.

…….J.
[D. K. JAIN]

…….J.
[H. L. DATTU]

New Delhi,
April 18, 2011.