
10. Consequently, this appeal fails and is dismissed with no order as to costs.

However, the C.M. is allowed.

R. N. R.

Before D. S. Tewatia & M. M. Punchhi, JJ.

KRISHNA KHETARPAL,—Appellant.

versus

SATISH LAL,—Respondent.

First Appeal from Order No. 131-M of 1984.

September 10, 1986.

Hindu Marriage Act (XXV of 1955)—Sections 13, 13-B (2), 23 and 28(1)—Code of Civil Procedure (V of 1908)—Section 96(3)—Divorce proceedings pending in trial Court—Parties filing compromise deed for dissolution of marriage by mutual consent—Court thereafter recording statements of the parties and passing decree thereon—Said decree—Whether appealable under Section 28 of the Act—Section 96 of the Code—Whether bars the maintainability of the appeal—Grant of divorce on the basis of compromise—Matrimonial Court—Whether required to strictly follow the procedure prescribed by Section 13B (2) before dissolving marriage—Court—Whether required to satisfy itself that such compromise is based on wilful consent as required by Section 23 of the Act.

Held, that an appeal against the decree of divorce by mutual consent distinctly is not merely on consent of the parties, for the matrimonial Court is involved in decision making so that it accords not only with the provisions of Section 13-B of the Hindu Marriage Act, 1955 but also Section 23 of the said Act. Thus a decree of divorce by mutual consent is not based merely on mutuality of the consenting parties but the Courts' involvement in decision making is inextricably a part of the decree. Since the possibility of an error, legal or factual, entering in the decision making cannot be ruled out, an appeal under Section 28 of the Act has been provided. Besides Section 21 of the Act says that subject to 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 of Civil Procedure, 1908. Thus

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the proceedings in the appeal are to be regulated as far as may be, by the Code without altering the substantive right of appeal to the parties concerned. Therefore, it has to be held that an appeal against a consent decree under Section 13B of the Act is appealable under Section 28 of the Act and sub-section (3) of Section 96 of the Code does not bar the maintainability of the appeal.

(Para 5)

Held, that the matrimonial Court can grant divorce by mutual consent to the parties where there is a background of litigation and acrimony and divorce by mutual consent appears to the Court to be the only solution as asked for by the parties. After all it is perceivable that while applying the mind in that regard the Court is put at the stage of Section 13B (2) of the Act and can look back to the conduct and relationship of the parties, to the litigious course they have travelled and other surrounding circumstances to mould the relief. Therefore, it has to be held that the Matrimonial Court can dissolve the marriage by a decree of divorce between two Hindus on the basis of a compromise entered into between the parties during the pendency of divorce petition without strictly following the procedure prescribed by Section 13B(2) of the Act but by satisfying itself that such compromise is based on the wilful consent of parties as required by Section 23(1) (c) and (bb) of the Act.

(Paras 16 and 17)

First Appeal from the order of the Court of Shri S. D. Arora, Additional District Judge, dated the 29th May, 1984 passing a decree of divorce in favour of the petitioner in terms of compromise deed Ex C. 1, which will form part of the decree-sheet and leaving the parties to bear their own costs.

K. G. Chaudhry, Advocate, for the Appellant.

Ashok Kumar, Advocate, for the Respondent.

JUDGMENT

Madan Mohan Punchhi, J.:

(1) Two significant questions of law, mentioned hereafter, have been referred by S. S. Kang, J., for determination by a larger Bench and under orders of Hon'ble the Chief Justice have been placed before us, for the purpose. They are :

- (1) Whether an appeal under section 28 of the Hindu Marriage Act ("the Act" for short) is competent against

a consent decree in the face of provisions of sub-section (3) of section 96 of the Code of Civil Procedure; and

- (2) Whether a Matrimonial Court can dissolve a marriage by a decree of divorce between two Hindus on the basis of a compromise entered into between the parties during the pendency of the divorce petition without following the procedure prescribed by section 13B(2) and without satisfying the requirements of section 23(1)(c) of the Act ?”

These have arisen in a narrow sphere.

(2) The appellant in the present FAO is the wife and the respondent is her husband. The husband on 26th July, 1980, filed a petition for divorce under section 13 of the Hindu Marriage Act, 1955 (for short, the Act) on various grounds. During the pendency of the petition on 29th May, 1984, a compromise deed was placed before the Court trying the cause. According to the terms of the compromise a decree for divorce was to be granted in favour of the husband it forming part of the decree-sheet. The learned Judge recorded the statements of the parties and relying on two decisions of this Court in *Devinder Singh Talwar v. Loveleen Kaur* (1), and *Jagjit Singh v. Gunwant Kaur* (2), granted a decree of divorce in favour of the husband. The wife has appealed to this Court. At her instance, the second question has cropped up and the first question at the instance of the husband.

(3) So far as the first question is concerned, nothing much has been said to the maintainability of the appeal. Yet since the question has been referred we need examine it. It is well-known that a right of appeal is a creature of the statute. It is a substantive right and not part of procedure. Section 28(1) of the Act provides a right of appeal. It says : All decrees made by the court in any proceeding under the Act shall, subject to the provisions of sub-section (3) be appealable as decree of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction. It is significant that all original decrees made by the Court under

(1) 1982 Marriage Law Journal 94.

(2) 1978 H.L.R. 696.

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the Act are appealable. These decrees may be consent decrees or otherwise. Another significant feature in the Act is the provision of section 13B whereunder divorce by mutual consent can be obtained. Decree of divorce by mutual consent is also appealable under section 28 of the Act. So the scheme of the Act is not averse to passing of consent decrees (considerations under section 23 apart) and the appeal against such decree is maintainable by either party as of right.

(4) In contrast, the appeal under section 96 of the Code of Civil Procedure is on a different footing, for sub-section (3) thereof debars an appeal from a decree passed by the Court with the consent of the parties. The bar to an appeal against consent decree is based on the broad principle of estoppel. It presupposes that the parties to an action can, expressly or by implication, waive or forgo their right of appeal, by any lawful agreement or compromise or even by conduct. See in this connection *K. C. Dora v. Guntreddi Annamanaidu* (3). Here the Court plays no role of justicing. The parties do justice to themselves by consent and the Court puts a seal thereon as if the decision is of its own. It is for this reason that the Legislature in its wisdom considered it advisable not to provide a re-hearing of the matter, for else appeal is in our procedural law nothing but that.

(5) An appeal against the decree of divorce by mutual consent distinctly is not merely on consent of the parties, for the matrimonial Court is involved in decision making so that it accords not only with the provisions of section 13B of the Act but also section 23 of the Act. In sub-section (1) of section 13B of the Act, a joint petition by the spouses can be presented to the District Court on the ground that they have been living separately for a period of one year or more before the presentation of the petition and that they have not been able to live together and further that they have mutually agreed that the marriage should be dissolved. The petition then lies in hibernation for six months and under sub-section (2) both the parties have to activate it on motion to the Court. It is then that the Court enters upon an enquiry into the facts whether the marriage has been solemnized and whether the averments in the petition are true and further there are no impediments in the way as conceived of in section 23 and in particular of sub-section (1)(bb) that such consent has not been obtained by

force, fraud or undue influence. Thus, a decree for divorce by mutual consent is not based merely on mutuality of the consenting parties but the court's involvement in decision making is inextricably a part of the decree. And since the possibility of an error, legal or factual, entering in the decision making cannot be ruled out, an appeal under section 28 of the Act has advisedly been provided. Besides, section 21 of the said Act says that subject to other provisions contained in the said Act and to such rules as the High Court may make in this behalf all proceedings under the said Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908. Thus the proceedings in the appeal are to be regulated as far as may be, by the Code of Civil Procedure without altering the substantive right of appeal to the parties concerned. On the above analysis and differentiation, the conclusion is inescapable that an appeal against a consent decree under section 13B of the Act is appealable under section 28 of the Act and sub-section (3) of section 96 of the Code of Civil Procedure is no bar. Similarly any other consent decree passed under the said Act is also appealable, for the Court under section 23 will record its approval thereto only if satisfied :

- “(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and
- (b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and
- (bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence and
- (c) the petition (not being a petition presented under Section 11) is not presented or prosecuted in collusion with the respondent; and

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- (d) there has not been any unnecessary or improper delay in instituting the proceeding; and
- (e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

(6) Thus, we answer the first question in the affirmative, i.e., in favour of the appellant-wife and against the respondent-husband.

(7) One can get gripped with the second question by taking a close look at the provisions of section 13B reproduced hereafter and the provisions of section 23(1)(bb) and (c) reproduced above:

"13-B. *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, 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."

As hinted earlier, both the sub-sections of the said provision operate at different points of time. The first one operates when presenting the petition. The second one operates when deciding the petition. At both points of time, both parties must present it and pursue it. At the first point of time, the parties jointly have to present a petition on grounds :

- (i) they have been living separately for a period of one year or more before the presentation of the petition;

(ii) they have not been able to live together; and

(iii) they have mutually agreed that the marriage should be dissolved.

The Court at that stage except for receiving and registering the petition takes no notice of it. For six months, the petition remains dormant. After six months if the parties remain consensual they move the Court under sub-section (2). They cannot do so later than 18 months after the presentation of the petition. If the petition is withdrawn in the meantime, the Court has nothing to do in the matter. It is only within that period, if the petition is pending, that the court embarks on an enquiry to be satisfied on the following particulars :—

- (a) was the marriage solemnized between the parties ?
- (b) were the parties living separately for more than one year before the presentation of the petition ?
- (c) were they not able to live together at the time of the presentation of the petition and continue to live apart?
- (d) was there mutual agreement of the dissolution of marriage arrived at before or at the time of the presentation of the petition ? and
- (e) that the averments made in the petition are true and conditions under section 23 of the Act are fulfilled;

It is then and only then that the Court grants decree of divorce by mutual consent. In other words, amongst other factors the Court will exclude the possibility of the consent of either party being obtained by force; fraud or under influence and see through if there is any collusion. There is a world of difference between consent and collusion. Whereas consent between two people is a state of being of the same mind, collusion between the two is a secret agreement to deceive. It is an effort to mislead the Court from the true state of affairs. So far goes the letter of the law. But the spirit caught by this Court is reflected from the decisions quoted hereafter.

(8) In *Jagjit Singh v. Gunwant Kaur (Supra)* A. S. Bains, J., accorded approval to a compromise between the two spouses at the

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appellate stage and granted divorce by mutual consent under section 13B(1) of the Act without resorting to any discussion. The same judgment is repeated in 1979 H.L.R. 26.

(9) In *Jagmohan Ahuja v. Smt. Sudesh*, (4), M. R. Sharma, J., while deciding a revision petition called for the original record of the divorce petition pending between the parties before the Additional District Judge, Ludhiana, and by permitting the conversion of the same to one for divorce by mutual consent under section 13B of the Act granted divorce on recording satisfaction that the petition had not been filed with any delay nor the parties were in collusion with each other.

(10) In *Gian Dev v. Pushap Lata*, (5), M. R. Sharma, J., granted divorce to the spouses on their joint statement at the appellate stage and the original petition for annulment of marriage was deemed to have been amended to one for divorce.

(11) In *Dharamvir v. Dr. (Mrs.) Promila*, (6), M. R. Sharma, J., allowed divorce by mutual consent at the appellate stage by a deeming amendment to the original petition from back date.

(12) In *Dr. Surinder Pal Kaur v. Mohinder Partap Dass*, (7), M. R. Sharma, J., at the appellate stage entertained a petition under section 13B of the Act directly in this Court and having adjourned the same for six months, on the resumed date of hearing recorded statements of the parties and granted divorce by mutual consent by recording satisfaction that the petition was not collusive.

(13) In *Jai Bhagwan v. Anita Rani*, (8), I. S. Tiwana, J., upset a decree passed under section 13-B of the Act by the trial Court on the ground that proper procedure had not been adopted in that case laying emphasis on the procedural requirements of joint filing of the petition, six months elapsing, but not more than eighteen months, satisfaction of the Court with regard to the marriage and the averments of the petition being true.

(4) 1979 H.L.R. 303.

(5) FAO 110—M/76 decided on 28th March, 1977.

(6) FAO 76/78, decided on 18th October, 1978.

(7) 1982 M.C.J., 87.

(8) 1984 M.L.J. 7.

(14) In *Jagroop Singh and another v. The General Public* a Division Bench consisting of P. C. Jain and D. S. Tewatia, JJ., allowed a divorce petition by mutual consent in appeal, an upset the view of the trial Judge denying relief on the sole ground that the spouses had grown-up children. The Bench observed that there was no collusion between the parties and the fact that they had five grown-up children would not be a ground for not allowing the divorce by mutual consent.

(15) In *Ritu Sobha v. Dr. Dharampal*, (9), a Division Bench consisting of D. S. Tewatia and Surinder Singh, JJ., decided at the motion stage, allowed the divorce under section 13B of the Act at the appellate stage. The Bench observed :

“In view of the fact that the parties have been living separately for a period of more than a year, which fact is evident from the findings of the matrimonial court and the parties having now desired to secure a decree of divorce by mutual consent in terms of section 13-B of the Hindu Marriage Act and having made statements to that effect in Court we are inclined to declare their marriage dissolved and grant a decree of divorce without waiting for the period of six months as envisaged in sub-section (2) of section 13-B of the Hindu Marriage Act as the said period is merely meant to give time to the parties for rethinking.”

The Bench further observed:

“In the present case, the parties have been litigating for quite some time and having not reconciled to live together, it would be futile to prolong their agony by allowing six months' period before passing the decree of divorce.”

And lastly, one of us (M. M. Punchhi, J.) in *Major Ranbir Sangha v. Mrs. Nargis Sangha*, (10), on the statements of the parties embroiled in long litigation entertained a petition under section 13B of the Act in this Court and granted divorce by observing as follows :

“..... ..

I can see no violation of the spirit of the statute when marital discord has otherwise been brought to surface in

(9) FAO 33M/85, decided on 22nd November, 1985.

(10) Cr. M.5/309M/80 decided on 3rd August, 1982.

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court, though in criminal proceedings, leaving out any chance of collusion between the parties so as to play a fraud on the statute. Collusion being out of picture and litigation between the parties having remained rife for a time more than six months tends me to invoke the inherent jurisdiction of the High Court (for it is not a District Court hedged by a time factor under section 13-B of the Act) and grant divorce to the parties under the spirit of section 13-B of the Hindu Marriage Act, though not in accordance with its letter. I cannot shut my eyes to the reality of the situation that I have placed before me two human beings, who have wrecked their lives in mutual acrimony, but now standing at their respective launch pads look forward to start their lives anew. I see no reason why I should refuse their prayer to grant them relief now and let them wait for six months, and make it prone to many a slip between the cup and the lip. And even otherwise the spirit of section 13-B of the Hindu Marriage Act in providing for a six months' period to lapse between the prayer and ultimate grant of divorce is, as it seems to me, based on the good legislative sense that there may be a chance for conciliation between the parties. I have satisfied myself that there is none whatsoever in the instant case and rather the parties want to break their matrimonial bond right now at this moment."

(16) As is plain from the afore-quoted judgments this Court, has granted relief to the parties spirit-actuated, where there was a background of litigation and acrimony and divorce by mutual consent appeared to the Court to be the only solution as asked for by the parties. After all it is perceivable that while applying mind in that regard the Court is put at the stage of section 13-B(2) of the Act and can look back to the conduct and relationship of the parties, to the litigious course they have travelled and other surrounding circumstances to mould the relief. It is also significant to note that the above cases arose only in the backdrop of a long litigious course between the parties. In all these cases, there was more than one year period of the parties living apart and their litigious postures and conduct revealed that their living together was not possible. And additionally there was no collusion when divorce by mutual consent was asked by waiving the six months hibernating period. This Court in each of the said cases,

as it appears to us, perceived substantial compliance of the requisite elapse of periods conditional to the grant of relief and on recording satisfaction of free consent and lack of collusion, granted the relief instantly. And in our view rightly. The fact of fruitful years in human life being short and the possibility of the litigating parties rearranging their lives after the divorce by mutual consent, also seem to have been the pervasive factors when this Court granted instant relief without letting the parties to go in for another bout of litigation in the processual mill.

(17) For the aforesaid view thus, we are of the view that if the circumstances warrant, as has been spelled out above, the matrimonial Court can dissolve a marriage by a decree of divorce between two Hindus on the basis of a compromise entered into between the parties during the pendency of the divorce petition without strictly following the procedure prescribed by section 13-B(2) but on satisfying itself of not only the requirements of section 23(1)(c) but also of the specifically applicable section 23(1)(bb) of the Act. Thus question No. 2 aforeposed is answered in the said manner.

(18) Since the questions of law have been answered, the main matter be sent back to the Hon'ble Single Judge for decision.

D. S. TEWATIA, J.—I agree.

H. S. B.

Before K. S. Tiwana and Pritpal Singh, JJ.

GURDIAL SINGH and another,—*Petitioners.*

versus

STATE OF HARYANA,—*Respondent.*

Criminal Revision No. 613 of 1986.

September 12, 1986.

Terrorist and Disruptive Activities (Prevention) Act (XLVI of 1985)—Sections 6, 9, 10(1)—Arms Act (XI of 1878)—Section 25—Indian Penal Code (XLV of 1860)—Sections 307 and 323—Accused on trial before Sessions Court for offences committed under the