

**(2020) 09 PAT CK 0325**

**Patna High Court**

**Case No:** Miscellaneous Appeal No. 1071 Of 2016, Civil Miscellaneous Jurisdiction No. 105 Of 2016

Rajeev Ranjan @ Rajeev Sharma

APPELLANT

Vs

Nootan Kumari

RESPONDENT

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**Date of Decision:** Sept. 25, 2020

**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 12, 12(i)(a), 12(i)(c), 13, 13(B), 13(B)(2), 19
- Indian Penal Code, 1860 - Section 498A
- Dowry Prohibition Act, 1961 - Section 3, 4
- Family Courts Act, 1984 - Section 7
- Constitution Of India, 1950 - Article 141, 142

**Hon'ble Judges:** Dinesh Kumar Singh, J; Arvind Srivastava, J

**Bench:** Division Bench

**Advocate:** Manoj Kumar Sinha, Manoj Kumar

**Final Decision:** Disposed Of

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### **Judgement**

Heard learned counsels for the parties.

I.A. No. 8602 of 2016 was filed for condoning the delay of sixteen days in preferring the present appeal. The delay was condoned vide order dated

5.1.2018.

Initially, the appellant Rajeev Ranjan alias Rajeev Sharma, the husband of the sole respondent Nootan Kumari, preferred Civil Miscellaneous Case

No. 105 of 2016 against the order dated 29.2.2016 passed by the learned Principal Judge, Family Court, Patna in Matrimonial Case No. 576 of 2013

whereby the Matrimonial case filed by the respondent wife under Section 12(i)(a) and (c) of the Hindu Marriage Act, 1955 (hereinafter referred to as

the Act) for a decree of nullity of marriage was dismissed as withdrawn since the respondent filed withdrawal application with clear stipulation that

the matrimonial case was filed under pressure of the appellant. The provision, as quoted in the application has been wrongly quoted and the same is

required to be read as Section 12(1)(a) and (c) of the Act. The said Civil Miscellaneous Application was directed to be converted into the present

Miscellaneous Appeal vide order dated 4.8.2016 passed by a learned Single bench of this Court.

The factual matrix of the case is that the marriage between the appellant and the respondent was performed on 18.5.2013 but the marriage was never

consummated. Ultimately, the respondent wife preferred Miscellaneous Case No. 576 of 2013 under Section 12(1)(a) and (c) of the Act praying

therein for a decree of nullity of marriage. However, on 8.7.2014, the respondent wife filed a petition for withdrawal of the matrimonial case stating

therein that the same was filed under threat of the appellant husband. A rejoinder to the petition was filed by the appellant husband on 10.9.2015

before the learned Court below to the effect that he had filed the supplementary written statement dated 24.02.2014, whereby he had claimed to have

no objection to the declaration of nullity of marriage, and accordingly, the learned Principal Judge, Family Court, Patna dismissed the Matrimonial Case

No. 576 of 2013 as withdrawn. The same is under challenge in the present Miscellaneous Appeal.

It appears that while admitting this appeal vide order dated 9.3.2018 by the Division Bench of this Court, the appellant undertook to pay maintenance

amount of Rs.12,000/- per month to the respondent and for the month of March, 2018, such amount was agreed to be paid within a period of two

weeks and the appellant was directed to make payment of such amount till disposal of the appeal.

It is submitted by learned counsel for the appellant that the said monthly payment was made till July, 2019 and the matter was lastly heard on 5.8.2019.

During the course of hearing of the appeal, a joint affidavit dated 22.7.2019 vide I.A. No. 4 of 2019 has been filed for the amendment of the prayer in

the present appeal to the effect that now the appellant and the respondent have decided to get the marriage dissolved with consent on payment of one

time permanent alimony of Rupees Nineteen Lacs by the appellant to the sole respondent, out of which a draft of Rupees Nine Lacs drawn in the

Bank of Baroda, S.K. Puri Patna branch was handed over to the learned counsel for the respondent on 29.7.2019 which has been encashed by the

respondent. The balance amount of Rupees Ten Lacs was paid to the respondent through her counsel vide a draft drawn on SBI, Shivpuri Branch and

apart from the same, jewellery and other articles have been returned and the parties have decided not to claim anything against each other. The terms

of Agreement is stipulated in paragraph no. 5 of the joint affidavit dated 22.7.2019 which reads as follows:

“5. That the parties here to have agreed on the following terms and conditions:-

(i) The appellant herein shall pay a lump-sum amount of Rs.19,00,000/- (Nineteen Lakhs) as one time settlement vide two demand drafts in favour of

respondent wife Nootan Kumari details of D/D are given below:-

(1) D.D. No. 266059 dated 30.04.2019 State Bank of India “ 10 lakhs.

(2) D.D. No. 250750 dated 02.05.2019 Bank of Baroda “ 9 Lakhs. Both D/D shall be given in court to the counsel for the respondent.

Photocopies of both demand drafts are annexed herewith and marked as Annexure “ 1 to this petition.

(ii) List of Jewellery which the respondent has received on 07.05.2019:-

(1) Sona Ka Chudi -4.

(2) Kangan “ 2.

(3) Har Ka set.

(4) Anguthi,

(5) Jhumka,

(6) Nathia

(7) Teeka

(8) 01 set earring.

Photo copy of receiving is annexed herewith and marked as Annexure 2 to this petition.

(iii) The respondent herein shall withdrawn the maintenance case bearing Maintenance case no. 102(M)“ 2016 pending in the Court of Principal

Judge, Family Court, Patna filed on 29.03.2016 after receipt of D.D. of Rs.19,00,000 only as stated above.

(iv) It is further agreed that the respondent shall also withdraw the criminal case bearing Bihta P.S. Case no. 488 of 2015 lodged under section 498(A)

of Indian Penal Code and section 1 of Dowry Prohibition Act against the appellant and his family members pending in the Court of Learned

A.C.J.M., Danapur.

With respect to this Criminal case, two quashing are already pending in this Hon'ble Court vide Cr. Misc. No. 47711 of 2016 and Cr. Misc. No.

47967 of 2016.

(v) The respondent shall not make any further claim in future either in moveable or immoveable property of the appellant either in his name or in the

name of his parents or ancestors.

The appellant and the respondent appeared in the Court and expressed their desire to dissolve the marriage.

Having heard learned counsels for the parties, the issue which arises in the present Miscellaneous Appeal for consideration is that in case the

matrimonial case filed for annulling the marriage by a decree of nullity has been dismissed, whether the marriage between the parties can be dissolved

on an application filed with consent of the parties under Section 13-B of the Act at the appellate stage.

The similar issue arose in the case of Rita Bhattacharjee and Ors. Vs. Santiranjan Bhattacharjee and Ors. Before the Calcutta High Court reported in

2012(1) CHN 636 = 2011(3) CLJ (Cal.) 177, when the matrimonial case was dismissed under Section 13 of the Act and at the appellate stage the

parties sought the marriage to be dissolved with consent under Section 13-B of the Act. The matter was referred to a larger Bench with the following

point of reference, which reads as follows:

¶13. The points for reference are as under:

1. Whether a Division Bench, vested with determination to take up appeals against the decree arising out of proceedings under Hindu Marriage Act

and the applications in connection with such appeals, is entitled to take up an original application for divorce by mutual consent under Section 13B of

the Act filed direct before such appellate forum?

2. Whether the directions given by the Supreme Court in the cases of Shashi Garg, Radha, Mrs. Payal Jindal and Sandhya Rani (supra), should be

treated to be valid precedent in terms of Article 141 of the Constitution of India authorizing any other courts to adopt the said procedure?

3. Whether Section 13B of the Act authorizes an appellate court dealing with an appeal against a decree passed in the proceedings under Section 13

of the Act to grant relief in terms of Section 13B of the Act or such application should be filed only before the district court specified in Section 19 of

the Act?

4. Whether the waiting period mentioned in Section 13B(2) of the Act is mandatory or directory?

The Full Bench of Calcutta High Court answered the reference to the effect that the Division Bench of the High Court cannot entertain an application

for divorce with mutual consent filed directly before it, in a pending appeal under the Act. Such appeal can be filed only before the district court under

Section 13-B of the Act and the waiting period stipulated in Section 13-B of the Act is mandatory and not directory. Paragraph 49 of the judgment

reads as follows:

“49. Thus, we sum up our findings as under:

(i) The Division Bench, vested with the determination to take up appeal against the decree arising out of the proceedings under the Hindu Marriage

Act, 1955, is not entitled to take up an application for divorce by mutual consent filed direct before such appellate forum nor the appeal court while

dealing with an appeal against a decree passed in the proceedings under Section 13 of the said Act could grant decree in terms of Section 13B of the

said Act.

(ii) Neither Shashi Garg (supra), nor Radha (supra), nor Payal Jindal (supra), nor Sandhya Rani (supra), is binding precedents in terms of Article 141

of the Constitution of India. The Supreme Court of India passed directions in those cases in exercise of the power conferred under Article 142 of the

Constitution of India.

(iii) An application for divorce by mutual consent under Section 13B of the said Act being an original application could only be filed before the district court as referred to in Section 13B of the said Act.

(iv) The waiting period mentioned in Section 13B of the said Act is mandatory and not directory.â€

Another similar issue arose in the case of Anil Kumar Jain Vs. Maya Jain before the Apex Court, reported in (2009) 10 Supreme Court Cases 415

where the issue was whether in the situation of irretrievable breakdown of marriage, which is not a ground for decree of divorce under Section 13 or

13-B of the Act, the High Court can convert a proceeding under Section 13 of the Act into a proceeding under Section 13-B of the Act or can

dissolve the marriage even without waiting for statutory period of six months stipulated in Section 13-B of the Act. In the said case, it has been held

that such power can be exercised by the Supreme Court under Article 142 of the Constitution and not by the Civil Court or High Court. Paragraph

nos. 28, 29 and 30 of the judgment read as follows:

â€œ28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article

142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down

irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of

marriage is not one of the grounds indicated whether under Sections 13 or 13- B of the Hindu Marriage Act, 1955, for grant of divorce, the said

doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise

of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the

statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available

even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the

civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds

not provided for in Sections 13 and 13-B of the Hindu Marriage Act, 1955.

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution,

convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without

waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a

decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent

given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes

up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article

142 of the Constitution, can pass orders to do complete justice to the parties.â€

In view of the aforesaid ratio, it is apparent that the statutes mandates under Section 12 of the Act for declaring the marriage void and passing the

decree of nullity on certain grounds. Section 12 of the Act reads as follows:

â€œ12. Voidable marriages. (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be

annulled by a decree of nullity on any of the following grounds, namely:-

(a) that the marriage has not been consummated owing to the impotence of the respondent; or]

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under section 5, as it stood

immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978], the consent of such guardian was obtained by force

[or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife-after the force had ceased to operate

or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1), shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such

commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of [the said ground].â€

The issue with regard to the dissolution of marriage with consent was not before the learned Principal Judge, Family Court, hence, at the appellate stage, the original application cannot be entertained.

In view of the ratio laid down by the Full Bench of Calcutta High Court and the Supreme Court as quoted above, it is not permissible to allow the

appellant and the respondent to get their marriage dissolved with mutual consent under the provision of Section 13-B of the Hindu Marriage Act, 1955,

at this stage. However, in spite of the fact that the matrimonial suit filed by the appellant for annulling the marriage has been dismissed as withdrawn

by the learned Court below, that does not preclude the parties to maintain an application under Section 13-B of the Act. Section 13-B of the Act reads

as follows:

â€œ13B. Divorce by mutual consent. â€" (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.â€

The above provision does not suggest that if either side, husband or wife has maintained his/her application under Section 13 of the Act and the same

has been dismissed, he/she cannot maintain application at subsequent stage under Section 13-B of the Act.

It is well settled law that while hearing an appeal, the court of appeal cannot enlarge its scope. If the trial court was unable to grant a decree for

divorce under Section 13-B of the Act, the appellate court also cannot grant such decree in appeal arising out of that proceeding. The law prescribes

forum under Section 13-B of the Act to the district court, which now, by virtue of Section 7 of the Family Courts Act, 1984 is being exercised by the

Principal Judge, Family Court. Hence, the Court is required to exercise such power only in the manner prescribed or not at all.

It is made clear that for dissolution of marriage with mutual consent, the only preconditions are that the parties are living separately for a period of one

year or more, or they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. The affidavits of

the respective parties suggest that they are ready for dissolution of their marriage in terms of the joint affidavits filed before this Court, part of which

have already been acted upon, but this Court cannot venture to entertain the application in view of the ratio laid down by the Apex Court.

In the circumstances, in our view, the Division Bench, vested with the determination to take up appeal against the judgment/decreed arising out of the proceeding under the Act, is not entitled to take up an application for divorce by mutual consent filed direct before the appellate court, nor the appellate court while dealing with an appeal against a decree passed in the proceeding under Section 13 of the Act, could grant decree in terms of Section 13-B of the Act.

However, in view of the fact that with consent of the parties, one time settlement amount has been paid, we allow the appellant to file the petitions/affidavits, filed before this Court, in the Court of the learned Principal Judge, Family Court, Patna who will treat the said application under

Section 13-B of the Act. We make it clear that withdrawal of the matrimonial case under Section 12 (1)(a) and (c) of the Act will not preclude the

learned Court below to entertain such petition under Section 13-B of the Act, if any.

It is further expected from the learned Principal Judge, Family Court, Patna to dispose of such application, if any filed, expeditiously and in accordance

with the provision applicable thereto, considering the fact that the parties have been living separately since long, they have not been able to live

together and that they have mutually agreed to get the marriage dissolved, which satisfies the preconditions as stipulated in Section 13-B of the Act.

The parties have also filed application to that effect before this Court, and the parties have shown the intent and have acted thereupon to settle the

issues between them, for the purposes of finally parting ways and getting separated, particularly the fact that the one-time settlement amount has been

paid by way of draft to the respondent through her learned counsel has settled the matter to rest, between them.

Accordingly, this appeal stands disposed of. Let this order be transmitted to the learned Principal Judge, Family Court, Patna along with the copy of

the joint affidavit of the parties dated 22.7.2019.