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**(2010) 01 P&H CK 0230**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** FAO No. M-205 of 2009 (O and M)

Prem Lata

APPELLANT

Vs

Ashok Kumar

RESPONDENT

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**Date of Decision:** Jan. 29, 2010

**Acts Referred:**

- Divorce and Matrimonial Causes (Amendment) Act, 1920 - Section 4
- Hindu Marriage Act, 1955 - Section 13B, 13B(1), 13B(2)

**Citation:** AIR 2010 P&H 169 : (2010) 2 CivCC 683 : (2010) 2 RCR(Civil) 464

**Hon'ble Judges:** Rajesh Bindal, J

**Bench:** Single Bench

**Final Decision:** Allowed

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**Judgement**

@JUDGMENTTAG-ORDER

Rajesh Bindal, J.

For the reasons stated in the application, delay of 117 days in filing the appeal is condoned.

2. The application stands disposed of.

FAO No. M-205 of 2009

3. The wife is in appeal against the judgment and decree dated 8.12.2008, passed by the learned court below, whereby the Respondent-husband has been granted divorce in a petition initially filed by the parties u/s 13-B of the Hindu Marriage Act, 1955 (for short, "the Act"), in which the Appellant-wife did not appear when the petition was taken up in second motion after expiry of the statutory period of six months.

4. Briefly, the pleaded facts are that marriage of the parties was solemnised on 27.1.2006 at Chahra Wali Dhani, Post Office, Bishanpura, Tahsil Rai Singh Nagar,

District Ganga Nagar (Rajasthan). Though the marriage was consummated, but no child was born out of the wedlock. As the parties could not pull on together peacefully and happily due to temperamental differences, they started living separately from February, 2006 and brought their matrimonial relations to an end. As the parties could not resolve the dispute to live together after burning their differences, it was decided to separate gracefully and a petition for divorce by mutual consent u/s 13-B of the Act was filed on 27.5.2008. On the date of presentation, both the parties appeared in the court and got their statements recorded. However, on the next date of hearing given after the expiry of statutory period of six months, only the Respondent appeared and the Appellant did not appear, but the court still granted divorce by mutual consent vide judgment and decree dated 8.12.2008. It is this judgment and decree, which is impugned by the wife-Appellant before this Court.

5. Learned Counsel for the Appellant raised a brief argument that in a petition filed for divorce by mutual consent, both the parties are required to appear in Court on the date when the petition is initially presented and also the date on which the same is to be taken up after expiry of statutory period of six months. Still in her absence, the learned court below presumed her consent and granted the decree of divorce by mutual consent, thereby committing patent irregularity in the dealing with the petition. Reliance was placed upon [Smruti Pahariya Vs. Sanjay Pahariya](#), .

6. On the other hand, learned Counsel for the Respondent-husband while not disputing the fact that on the date when the petition was fixed after recording of initial statements of the parties, the Appellant did not appear and a decree of divorce by mutual consent was passed. However, he sought to explain the same by stating that absence of the Appellant-wife on the date of hearing necessarily means that she had no objection to the grant of divorce by mutual consent as in the present case, the Respondent had in fact returned all the dowry articles and also paid a sum of Rs. 2,50,000/- to the Appellant as permanent alimony. As all the disputes had been settled, merely because there is some procedural irregularity, the impugned judgment of the learned court below does not deserve to be set aside.

7. Heard learned Counsel for the parties and perused the paper book.

8. Section 13-B of the Act, under which the petition for divorce was filed by the parties for dissolution of marriage by mutual consent, is extracted below:

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 solemnised 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.

(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 solemnised 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.

9. The undisputed facts on record are that a petition for divorce by mutual consent u/s 13-B of the Act was filed on 27.5.2008, when the parties got their statements recorded. The petition was thereafter adjourned for 8.12.2008 after statutory period of six months. On the next date of hearing, the Appellant-wife did not appear but still the court below passed decree of divorce by mutual consent. The issue is as to whether such a mechanism followed by the court would stand injudicial scrutiny regarding the procedure followed by the court. The court proceedings must have sanctity and fairness. These are not to be conducted for the convenience of one party alone. The matrimonial disputes between the parties are required to be settled with human approach to achieve socially desirable results. Hon"ble the Supreme Court in [Smruti Pahariya Vs. Sanjay Pahariya](#), has dealt with the issue regarding dissolution of marriage by mutual consent and traced the history of divorce by mutual consent, which was recognised with the insertion of Section 13-B of the Act in the following terms:

21. Marriage is an institution of great social relevance and with social changes, this institution has also changed correspondingly. However, the institution of marriage is subject to human frailty and error. Marriage is certainly not a mere "reciprocal possession" of the sexual organ as was philosophized by I. Kant [The Philosophy of Law page 110, W. Hastie translation 1887] nor can it be romanticized as a relationship which Tennyson fancied as "made in Heaven" [Alymer's Field, in Complete Works 191, 193 (1878)].

22. In many cases, marriages simply fail for no fault of the parties but as a result of discord and disharmony between them. In such situations, putting an end to this relationship is the only way out of this social bondage. But unfortunately, initially the marriage laws in every country were "fault oriented". Under such laws marriage can be dissolved only by a Court's decree within certain limited grounds which are to be proved in an adversarial proceedings. Such "fault" oriented divorce laws have been criticized as "obsolete, unrealistic, discriminatory and sometimes immoral" (Foster, Divorce Law Reform; the choices before State page 112).

23. As early as in 1920 possibly for the first time in New Zealand, Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1920 gave the Court the discretion to grant a decree of divorce to parties when they had separated for three years under a decree of judicial separation or separation order by the Magistrate or under a deed of separation or "even by mutual consent". Till such amendment,

divorce after separation by parties on "mutual consent" was unknown.

24. Considering the said amendment of 1920 and exercising the discretion the amended law conferred on the Judge, Justice Salmond in *Lodder v. Lodder* 1921 NZLR 876, came to the conclusion that it is not necessary to enquire into the merits of the disputes between the parties since the man and the wife had put an end to their relationship 13 years ago and the learned Judge found that their alienation is "permanent and irredeemable". The learned Judge also felt that in the circumstances of the case "no public or private interest is to be served by the further continuance of the marriage bond" and a decree for its dissolution was passed. (See page 881).

25. This seems to be the first decision of a Court granting divorce on a "no-fault" basis and because of the fact that a marriage had broken down for all practical purposes as parties were staying separately for a very long time.

26. The British society was very conservative as not to accept divorce on such a ground but in 1943, Viscount Simon, Lord Chancellor, in the case of *Blunt v. Blunt* 1943 2 All ER 76, speaking for the House of Lords, while categorizing the heads of discretion which should weigh with the courts in granting the decree of divorce, summed up four categories but at page 78 of the Report, the Lord Chancellor added a fifth one and the views of His Lordship were expressed in such matchless words as they deserve to be extracted hereinbelow:

To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between (sic) respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.

27. In *Irtidia* also, prior to the amendment in our laws by insertion of Section 13-B in the said Act, the courts felt the necessity for an amendment in the divorce law. The Full Bench of the Delhi High Court in the judgment of [Ram Kali Vs. Gopal Dass](#), felt the inadequacy of the existing divorce law. Chief Justice Khanna (as His Lordship then was) speaking for the Full Bench came to the following conclusion:

...It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife. (See page 12).

28. In coming to the aforesaid conclusion, the learned Chief Justice relied on the observation of the Viscount Simon, Lord Chancellor, in the case of *Blunt v. Blunt*

(supra).

29. Within a year thereafter, Hon''ble Justice Krishna Iyer, in the case of Aboobacker Haji v. Mamu Koya 1971 KLT 663, while dealing with Mohammedan Law relating to divorce correctly traced the modern trend in legal system on the principle of breakdown of marriage in the following words:

When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days.(See page 668).

30. In coming to the said finding the learned Judge relied on the principles laid down by Justice Saimond in Lodder v. Lodder (supra).

31. After the said amendment in 1976 by way of insertion of Section 13-B in the said Act in the 74th Report of the Law Commission of India (April, 1978), Justice H. R. Khanna, as its Chairman, expressed the following views on the newly amended Section 13-B:

Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals.

A modified version on the basis of consent is to be found in the theory of divorce by mutual consent.

The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognizes this theory in Section 13-B.

10. In the aforesaid judgment; Hon''ble the Supreme Court with approval quoted its earlier judgment in [Smt. Sureshta Devi Vs. Om Prakash](#) , wherein requirements of Section 13-B(1) of the Act were summed up in the following terms:

8. There are three other requirements in Sub-section (1). They are:

(i) They have been living separately for a period of one year,

(ii) They have not been able to live together, and

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

11. While noticing the different judgments given by various High Courts on the issue of continuing consent and overruling the judgments of Delhi High Court in [Chander Kanta Vs. Hans Kumar and Another](#), and Bombay High Court in [Smt. Jayashree Ramesh Londhe Vs. Ramesh Bhikaji Londhe](#), , opined that interpretation given therein to the provisions of Section 13-B of the Act is contrary to the plain language of the statute. In paragraphs 13 and 14 of [Smt. Sureshta Devi Vs. Om Prakash](#) ,

Hon"ble the Supreme Court expressed its opinion in the following terms:

13. At the time of 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.

14. If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree of divorce u/s 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce. "The consent must continue to decree nisi and must be valid subsisting consent when the case is heard." (See (i) Halsbury's Laws of England, 4th Edn. Vol. 13 para 645; (ii) Rayden on Divorce, 12th Edn., Vol. 1, P. 291; and (iii) Beales v. Beales).

12. While endorsing the views expressed by Hon"ble the Supreme Court in its earlier judgment in [Smt. Sureshta Devi Vs. Om Prakash](#), , in [Smruti Pahariya Vs. Sanjay Pahariya](#), , it was held as under:

47, We endorse the views taken by the Court in Sureshta Devi (supra) 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 (supra).

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49. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce u/s 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 facts situation, discussed above.

50. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce u/s 13-B. So in cases u/s 13-B. mutual consent of the parties is a jurisdictional fact. The court while passing its decree u/s

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. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the Respondent herein.

(Emphasis supplied).

13. If the authoritative consistent enunciation of law by Hon"ble the Supreme Court is considered in the light of the facts of the present case, the inescapable conclusion is that the learned court below has committed patent irregularity in the matter of grant of divorce by way of mutual consent, when as per the material on record, continuing consent was not available, which is sine qua non for passing a decree of divorce u/s 13-B of the Act, as only one of the parties had appeared on the date the petition was fixed after expiry of statutory period of six months after recording their initial statements at the time of presentation of the petition. It is not a case where the settlement between the parties has been given effect to before filing of petition for divorce by mutual consent in other proceedings pending in court or amount of permanent alimony has been paid or custody of children settled, wherein on the basis of material on record and making such inquiry the court may pass such order as it deems fit. Nothing of the sort has been pointed out in the present case.

14. For the reasons mentioned above, the impugned judgment of the learned court below cannot be sustained. Consequently, the decree of divorce by mutual consent passed in favour of the Respondent, is set aside. The parties are directed to appear before the learned court below on 27.2.2010 for further proceedings in accordance with law.

15. The appeal stands disposed of.