(2017) 01 DEL CK 0177

DELHI HIGH COURT

Case No: C.M. APPL. 8610 of 2015 in CONT.CAS(C) 772 of 2013

Rajat Gupta	APPELLANT
Vs	
Rupali Gupta	RESPONDENT

Date of Decision: Jan. 9, 2017

Acts Referred:

- Hindu Marriage Act, 1955 - Section 13(2), Section 13B(1)

Citation: (2017) 161 DRJ 580

Hon'ble Judges: Mr. Manmohan, J.

Bench: Single Bench

Advocate: Mr. Prashant Mendiratta with Ms. Poonam Mehndiratta and Mr. Harshwardhan Pandey, Advocates, for the Petitioner in C.M. Appl. 8610 of 2015 In Cont.Cas(C) 772 of 2013; Mr. Ankur Mahindro with Mr. Shresth Choudhary, Ms. Megha Agarwal, Ms. Devna, Mr. Adhirath and Mr. Aarzoo Aneja, Advocates, for the Respondent in C.M. Appl. 8610 of 2015 In Cont.Cas(C) 772 of 2013; Mr. F.K. Jha with Mr. Sarvesh, Advocates, for the Petitioner in CONT.CAS(C) 584 of 2014; Mr. B.K. Srivastava and Mr. Rajeev Katyain, Advocates, for the Respondent in CONT.CAS(C) 584 of 2014; Mr. Ashish Virmani with Ms. Paridhi Dixit, Advocates, for the Petitioner in CONT.CAS(C) 483 of 2016 and C.M. APPLS. 15724 of 2016, 28622 of 2016, 42418 of 2016; Mr. Ajit Kumar with Ms. Nutan Kumari, Advocates, for the Respondent in CONT.CAS(C) 483 of 2016 and C.M. APPLS. 15724 of 2016, 28622 of 2016, 42418 of 2016; Mr. Ashish Virmani with Ms. Paridhi Dixit, Advocates, for the Petitioner in CONT.CAS(C) 484 of 2016 and C.M. APPLS. 15728 of 2016, 42419 of 2016; Mr. Ajit Kumar with Ms. Nutan Kumari, Advocates, for the Respondent in CONT.CAS(C) 484 of 2016 and C.M. APPLS. 15728 of 2016, 42419 of 2016; Mr. Sunil Mittal, Sr. Advocate with Ms. Seema Seth and Mr. Dhruv Grover, Advocates, for the Petitioner in CONT.CAS(C) 648 of 2014; Mr. Prashant Mendiratta with Ms. Poonam Mehndiratta and Mr. Harshwardhan Pandey, Advocates, for the Respondent in CONT.CAS(C) 648 of 2014; Mr. Amit Grover, Advocate, for the Petitioner in CONT.CAS(C) 1116 of 2016; Ms. Mrinalini Khatri, Advocate, for the Respondent in CONT.CAS(C) 1116 of 2016; Mr.C. Rajaram with Mr.Sashi Panwar and Mr.T.Kanniappan, Advocates, for the Petitioner in CONT.CAS(C) 1147 of 2016; Mr. Parvinder Chauhan, Advocate with Mr. Nitin Jain, Advocate, for the Respondent in CONT.CAS(C) 1147 of 2016; Mr. Atul Kharbanda, Advocate, for the Petitioner in CONT.CAS(C) 1251 of 2016; Mr. Jitendra Kumar Jha with Mr. Rupam Roy, Advocates, for the Respondent in CONT.CAS(C) 1251 of 2016; Mr. Akhilesh

Aggarwal, Advocate, for the Petitioner in CONT.CAS(C) 484 of 2014

Final Decision: Disposed Off

Judgement

Manmohan, J.(Oral)—Present batch of contempt petitions has been filed alleging wilful disobedience of undertakings given by a spouse to appear, sign and file both the 13B(1) petition and 13B(2) motion of the Hindu Marriage Act, 1955 (hereinafter referred to as "Act, 1955"). These undertakings have been accepted by a Court either at Section 13B(1) stage or incorporated in a consensual decree. In all cases except Cont.Cas(C) Nos.1147/2016 and 1251/2016 the undertakings are against consideration.

2. Mr. Prashant Mendiratta, learned counsel for Mr. Rajat Gupta and Ms. Pooja Sharma states that the Contempt of Courts Act, 1971 defines civil contempt to be a wilful breach of undertaking given to a Court or order of a Court. He submits that undertakings given to Courts and orders passed by Courts are to be complied with in all circumstances.

3. According to him, the consent for mutual divorce by way of joint petition under Section 13B of the Act, 1955 cannot be withdrawn by a party for mala fide and extraneous reasons. In support of his submission, he relies upon a judgment of the Bombay High Court in **Rajesh Pratap Sainani v. Mrs. Bhavna, 2008 SCC OnLine Bom 800** wherein it has been held as under:-

"34. The Family Court cannot be helpless spectator and duplicity of the petitioner-husband to induce the hapless wife, the respondent to waive maintenance claim for not only herself and her son, also compelled her to withdraw the criminal complaint in the hope of starting her life afresh. The husband by his conduct has caused the wife huge disadvantage. No spouse can unilaterally, wilfully be allowed to withdraw consent even on the grounds; such as fraud, undue force, representation unless grounds are proved satisfactorily, hi the present case, if the withdrawal of consent by the petitioner-husband is upheld, it will cause anomalous situation and serious prejudice to the respondent-wife, who is law abiding person. She will be left high and dry without recourse to any remedy and saddled with dead marriage. The respondent-husband has resorted to fraud and misrepresentation which cannot be permitted by the Courts of Law and equity."

4. Mr. Mendiratta further submits that in circumstances similar to the present batch of matters, the Delhi High Court in **Avneesh Sood v. Tithi Sood, Cont.Cas(c) 559/2011** and **Shikha Bhatia v. Gaurav Bhatia & Ors., 2010 SCC OnLine Del 1962** has held that contempt is attracted for breach of undertaking accepted by the Court to file a petition as well as second motion for divorce. The relevant portion of the aforesaid judgments is reproduced herein below:-

A) **Avneesh Sood** (supra) wherein it has been held as under:-

"46. As aforesaid, the respondent was not bound to give the said undertaking to the Court. However, having given the same, voluntarily and consciously, with a view to derive the benefit of the agreement with the petitioner, if the respondent walks out of the same, only for the reason that she has changed her mind with regard to the custody/visitation rights of the minor child, she must take the consequences. Pertinently, even now, the respondent is not averse to proceeding with the mutual divorce petition and filing a second motion petition. However, she wants to do the same on her own terms in relation to alimony and custody/visitation rights, contrary to her earlier agreement which formed the basis of the first motion petition. It is, therefore, clear that her decision to withhold her consent for moving the second motion petition does not stem out of any new development or mitigating circumstance which would justify the same, but only on account of her having a change of mind on the aforesaid two aspects. It is not that the respondent has decided to continue with the marriage with the petitioner. She has not expressed any desire to resume marital life with the petitioner. It is not her case that her initial decision to move the mutual consent divorce petition was a decision taken by her in haste or was a mistake. Even now she does not dispute the fact that the marriage has, in fact, broken down but she wants to use her right not to give consent for the second motion petition as a bargaining point, which the petitioner prefers to call a black mail tactics.

47. No doubt the law gives the right to both the parties to take a decision whether, or not, to continue with the mutual consent divorce proceedings, and for that purpose a cooling off period of at least 6 months is provided under the scheme of the Act. It does not mean that an undertaking given by them to the Court to continue their consent even for moving the second motion petition can be said to be an illegal consent or undertaking or an undertaking recorded by the Court without jurisdiction. She, while giving her undertaking, did not undertake to commit an illegality, or to do anything which is barred by law. No one compelled the respondent to give the said undertaking. She could have kept her options open whether, or not, to give her consent for moving the second motion petition at the end of the cooling of period of six months. But she did consciously decide to give the said undertaking to the Court. This she did to derive benefit under the agreement with the petitioner.

48. If a party is permitted to resile from an undertaking given to the Court, in pursuance of an agreement arrived at between the parties, without any penal consequences, the same would completely destroy the sanctity attached to such solemn undertakings, and would encourage dishonesty and disrespect for the judicial process. It would also undermine the majesty and authority of courts, and instill doubts in the minds of the litigating public with regard to the efficacy of the judicial process and, in particular, with regard to the process of accepting

undertakings by the Court and of the efficacy of the undertakings given to the Court by a party, and the acceptance thereof by the Court, as a part of a settlement process. It was on account of the respondent''s conduct of voluntarily giving her undertaking to the Court to abide by her settlement, and the acceptance thereof by the Court, which led the petitioner to agree to pay an amount of Rs. 7 crores in all to the respondent, and to part with a huge amount of Rs. 1.5 cores at the first motion stage. The respondent cannot make mockery of the law and mock at the Courts by now claiming that she has decided not to give her consent for moving the second motion petition, and that too for the reasons that she wants to renegotiate the terms of settlement, both in relation to her monetary compensation and custody/visitation rights in respect of the minor child. It is clear that the respondent has exploited and abused the process of the Court to serve her purpose, without intending to adhere to her solemn undertaking given to the Court.

B) **Shikha Bhatia** (supra) wherein it has been held as under:-

"26. In this case, the respondents had entered into an agreement with the petitioner herein with open eyes and the terms of the agreement have been acted upon. No doubt the law provides that a party has a right to withdraw the consent given but the reasons for withdrawal as in the case of Smt. Sureshta Devi (supra) was that the wife had been coerced and forced to enter into signing the petition for mutual consent without allowing her to consult her family members nor she was permitted to bring her family members to Court at the time when the statement was made, besides that the wife at the first opportunity available withdraw her consent. Crime against women are on the rise. Keeping in view the facts of this case, if the husband respondent No. 1 is allowed to resile from the settlement recorded in Court on the basis of express statement and representation of respondent No. 1 to the effect of settlement between the parties, the Court considered the anticipatory bail application of the respondents favourably, it would amount to allowing the respondent to steal an order of bail from the Court and thus interfering in the course of justice. It would encourage unscrupulous persons and would certainly open flood gates for such litigants, to sham settlement at the time when the bail application is being considered and later on simply plead that the settlement was not out of free will. The respondents cannot be permitted to make a mockery of the legal system and such wilful and deliberate disobedience of the order of the Court would weaken the rule of land. The mindset of the respondent No. 1 and his conduct is established by the statement made during cross-examination that the settlement was signed by him as was asked by his lawyer, that it was necessary for the anticipatory bail in the criminal cases. This itself speaks volume of the legal advice rendered and the conduct of the respondents. In the case of **Kapildeo Prasad Sah v. State of Bihar, (1999) 7 SCC 569**, it was held as under:

"For holding the respondents to have committed contempt, civil contempt at that, it has to be shown that there has been wilful disobedience of the judgment or order of

the Court. Power to punish for contempt is to be resorted to when there is clear violation of the Court''s order. Since notice of contempt and punishment for contempt is of far reaching consequence, these powers should be invoked only when a clear case of wilful disobedience of the Court''s order has been made out. Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Judicial orders are to be properly understood and complied. Even negligence and carelessness can amount to disobedience particularly when attention of the person is drawn to the Court''s orders and its implication. Disobedience of Court''s order strikes at the very root of rule of law on which our system of governance is based. Power to punish for contempt is necessary for the maintenance of effective legal system. It is exercised to prevent perversion of the course of justice. In his famous passage, Lord Diplock in **Attorney General v. Times Nexvspapers Ltd., (1973) 3 All.E.R. 54** said that there is also ''an element of public policy in punishing civil contempt, since administration of justice would be undermined if the order of any Court of law could be disregarded with impunity''. Jurisdiction to punish for contempt exists to provide ultimate sanction against the person who refuses to comply with the order of the Court or disregards the order continuously. Initiation of contempt proceedings is not a substitute for execution proceedings though at times that purpose may also be achieved. No person can defy Court''s order. Wilful would exclude casual, accidental bona fide or unintentional acts or genuine inability to comply with the terms of the order. A petitioner who complains breach of Court''s order must allege deliberate or contumacious disobedience of the Court''s order.

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31. It may also be noticed that respondent No. 1 has not signed the first motion it cannot be said that the second motion would have been filed without the gap of six months. This submission is also accordingly rejected. Since there is no quarrel with regard to the proposition that there has to be gap of six months between the first motion and the second motion, the judgment relied upon by Counsel for the respondents **Smt. Sureshta Devi v. Om Prakash, (1991) 2 SCC 25** as also Anil Kumar Jain (supra) require no discussion as in this case the first motion was not signed by the parties."

5. Mr. Mendiratta also submits that it is a trite position in law that a person can contract themselves out of a statutory right intended for their benefit provided such act does not impinge on the public policy. Release of statutory right by a person is also called waiver. According to him, a person is said to waive his/her statutory right if he/she voluntarily relinquishes the same in consideration of some act by another person. A waiver of right, based upon contract, gives rise to a cause of action. A contract under which a person has waived his/her right is valid and enforceable provided such waiver does not impinge upon public policy. In support of his submission, he relies upon the following judgments:-

(i) **Shri Lachoo Mal v. Shri Radhey Shyam, (1971) 1 SCC 619** wherein the Supreme Court has held as under:-

"6. The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is cuilibet licet renuntiare juri pro se introducto. (See Maxwell on Interpretation of Statutes, Eleventh Edn., pp. 375 and 376). If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy��"

(ii) **Krishna Bahadur v. Purna Theatre & Ors., (2004) 8 SCC 229** wherein the Supreme Court has held as under:-

"10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein.

Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

(iii) **Union of India v. Pramod Gupta (D) By Lrs. & Ors., (2005) 12 SCC 1** wherein the Supreme Court has held as under:-

"111. It is, therefore, not correct to contend that there cannot be any waiver of the right to claim interest. Statutory provisions are made for payment of interest with a view to compensate a party which had suffered damages owing to a positive action or inaction of the other resulting in blockade of money which he would otherwise have received. A party which itself represents before the court of law that it would not claim interest with a view to obtain an order of stay which would be for its own benefit, in our opinion, could not be permitted to take advantage of its own wrong. (See **Sushil Kumar v. Rakesh Kumar [(2003) 8 SCC 673]** and **Laxminarayan R. Bhattad v. State of Maharashtra [(2003) 5 SCC 413].**)"

6. He points out that in **Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants'' Association and Ors., (1988) Supp. SCC 55**, the Supreme Court held that procedure under Section 5A of the Land Acquisition Act with respect to hearing of objections to the proposed land acquisition could be waived. The relevant portion of the judgment relied upon is reproduced herein below:-

"18. The right to claim enhanced compensation or for that matter the right to seek reference to the civil Court with a view to get the enhanced compensation is a right intended solely for the benefit of the landholder. It is purely a personal right

conferred on him. If such right is waived or given up by his voluntary action, no considerations of public policy would arise, much less would there be any negation of public rights. Nor is there any prohibition in law against waiving the right conferred on him under Section 18. We do not therefore visualise any legal impediment for applying the doctrine of waive.

7. Mr. Sunil Mittal, learned senior counsel for petitioner Dr. Arun Sharma in Cont. Cas.(C) 648/2014 states that in pursuance to the 59th Report (1974) of the Law Commission, Order 32A was inserted by Act 104 of 1976 in Code of Civil Procedure to deal with the matters concerning family disputes. He points out that simultaneously in 1976, Section 13B was introduced in the Act, 1955 to allow dissolution of marriage by mutual consent. According to him, as the legislature felt the need in public interest to establish Family Courts for speedy settlement of family disputes, it enacted Family Court Act, 1984. He submits that all the aforesaid amendments were brought about in law to encourage settlement between the parties in Family Law matters.

8. According to Mr. Sunil Mittal, wherever the parties have signed the mediation settlement and the same has been accepted/approved by the referral court, it has to be taken as if the parties to the settlement had waived their individual right to withdraw their consent.

9. On the other hand, Mr. Ankur Mahindro, learned counsel for respondent in Cont. Cas. (C) No. 772/2013 submits that if one of parties refuses to join/give consent for recording of statement under Section 13B(2) of the Act, 1955, then the Family Court cannot pass a decree of divorce based upon mutual consent as contemplated under Section 13B of the Act, 1955 and such an act cannot constitute contempt. In support of his submission, he relies upon the judgement of the Division Bench of this Court in **Dinesh Gulati v. Ranjana Gulati, MAT. APP. (F.C.) 70/2016 decided on 2nd August, 2016.**

10. Mr. Ankur Mahindro submits that the concept of marriage is not a contract under Hindu law and despite the inclusion of 13B of the Act, 1955, the intention of the legislature is not to allow divorce on grounds of irreconcilable differences.

11. He further submits that Section 13B of the Act, 1955 is a complete code in itself which provides for cause of action, grounds and reasons which are required to be satisfied by the parties, the procedure to be followed by the Court and the premise which ought to be taken into consideration by the Court before it passes a decree of divorce on the ground of mutual consent and jurisdiction of the Court to grant a relief under the provisions of the Act, 1955 is controlled by legislative limitation of the respective provisions. In support of his submission, he relies upon following judgments:-

A) **Miten S/o. Shyamsunder Mohota (Goidani) and Anr. v. Union of India, 2008 (5) Mh.LJ. 27** wherein it has been held as under:-

"23.....Prior to the amendment Act of 1976, the remedy of divorce under Hindu Marriage Act was entirely based upon guilt theory i.e. where one party accused other of having committed acts and deeds which would entitle other for seeking divorce in compliance with the provisions of the Act. The 1976 amendments added a concept of mutuality in relation to dissolution of marriage. The purpose of introducing mutuality was not to dissolve the marriages between the newly wed at the drop of the hat without any reason/justification..... The purpose of providing time is to give an opportunity to the parties to harmonise their lives rather than taking steps hastily to destroy the institution of marriage and convert Hindu marriage purely to a contractual relationship."

B) **Principal Judge, Family Court, Nagpur v. Nil, AIR 2009 BOM 12** wherein it has been held as under:-

"14. The Supreme Court in the case of Smt. Sureshta Devi termed this period as a waiting period, obviously, intended to give 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 second thought and change mind not to proceed with the petition. The mutual consent ought to continue from the date of institution of first motion till passing of the decree. This is the significance of the provisions of section 13B(2) of the Act. It will not only be unjust but would be impermissible on accepted norms of statutory interpretation that this period of six months is treated as optional, condonable or could be waived at the request of the parties. The law must be given a meaning that would be applicable and acceptable generally and not to a particular case. Firstly, the legislature has not provided any power of relaxation to the Court in regard to the stated period of six months under section 13B(2). Secondly, if this procedure is adopted at the behest of the parties by the Court, it will amount to denial of a statutory benefit of rethinking. The period of six months is the product of the legislature and the Courts have always upheld its validity. To waive or abolish by judicial dictum a specific provision of the legislature would amount to negating a statutory provision which is otherwise constitutional and cannot easily be dropped in reality. No prejudice is caused to the parties by merely waiting for a short period of six months before they take a vital and pertinent decision in regard to their marriage which is a social sacrament coupled with civil rights and obligations and which they had entered upon voluntarily and happily. Impulsive and impatient decisions rarely guide the parties to the logical and correct decision. They must have time to ponder over their decision and reassure themselves that the decision of dissolving their marriage is correct and needs to be implemented. For arriving at such a vital decision, the period of six months is to be held as mandatory and in conformity with the legislative intent expressed in no uncertain terms in the relevant provisions.

15. We can hardly see any reason for giving an unnecessary liberal interpretation to the provisions of section 13B(2) of the Act by reading into these provisions power of

relaxation with the Court. Wherever the legislature wanted to grant such a relaxation, it has undoubtedly spelt out so in the provisions itself. Reference can be made in this regard to section 14 of the Act wherein extreme hardship or cruelty has been given as grounds for the Court to entertain the petition by granting relief to present the petition for divorce even before the expiry of the specified period of one year. If that being the scheme of the Act, we are unable to assent to the view that the power of relaxation or waiver should be read into section 13-B of the Act in face of the clear language of the provision and the judgment of the Supreme Court in the case of Smt. Sureshta Devi. Legislative scheme and object of the Act shows that object of the Act is to attribute social and matrimonial security to the institution of marriage rather than to dissolve marriage at the drop of the hat. ....."

12. Mr. Ankur Mahindro submits that waiver is a question of fact and it must be properly pleaded and proved. He states that in the present cases neither any plea of waiver has been pleaded nor the factual foundation for it has been laid in the pleadings. In support of his submission, he relies upon **Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Ors., (1979) 2 SCC 409.**

13. Mr. Ankur Mahindro also submits that the public policy of India as enshrined in Section 13B of the Act, 1955 does not allow marriage to be dissolved, in any other manner, except in accordance with its provisions.

14. He points out that the Kerala High Court in the case of **K.V. Janardhanan v. N.P. Syamala Kumari & another, M.F.A. No. 386/1988 decided on 15th January, 1990** has observed that an agreement to dissolve a marriage in derogation of the provisions of the Act, 1955 is violative of the public policy of India. The relevant portion of the judgment relied upon by him is reproduced herein below:-

"6. But compromise between parties in divorce proceedings, agreeing with each other to dissolve the marriage was never regarded in law as consistent with public policy. Even evidence given by parties admitting matrimonial offences was frowned at by the courts. Lord Mansfield expressed his disapproval against such admission of parties themselves in divorce proceedings way back in 1777 (vide Goodright''s case, (1) COWP 591). The same was the stand adopted by the House of Lords in **Russel v. Russel, (1924) AC 687.** The legislative policy, in India has not changed from the aforesaid approach. That is why the statutes governing law of divorce even now insist that the court should guard against collusion between parties for wangling unmerited divorce decrees. The Hindu Marriage Act with all its progressive innovations still retains the provision which cautions the court to guard against collusion between spouses. Marriage as an institution has a bearing on the society and in divorce proceedings the parties are not actually restricted to the spouses alone since their children are also affected persons. This is one of the main reasons which stands against such compromises. Section 13B in the Act is not to be understood as carte blenche granted by Parliament to the spouses to dissolve the marriage on mutual agreement. The said provision contains certain other postulates

also despite the dominance of mutual agreement factor therein. Section 23 of the Act emphasises that the court can pass a decree only on satisfaction that any of the grounds for granting relief exists. The said section imposes a duty on the court to consider and decide on the existence or non-existence of certain other factors enumerated therein. The closing words in Section 23(1) reflects the Parliament''s concern in the matter. Those words are these: ''then, an in such a case, but not otherwise, the court shall decree such relief accordingly''. The prohibition incorporated in the paranthetical clause is eloquent and cannot be overlooked."

15. He states that the Punjab & Haryana High Court in **Usha Devi v. Mahinder, Criminal Revision No. 2362 of 2008 (O&M) decided on 1st July, 2009** has held that a divorced wife cannot waive its claim to maintenance under Section 125 Cr. P.C. by making a statement to this effect, at the time of divorce. The relevant portion of the judgment relied upon by him is reproduced herein below:-

"A perusal of these extracts leaves no manner of doubt that a statement made by a wife, giving up her right of maintenance or an agreement to that effect would not estop a wife, whether divorced or otherwise, from filing a petition under Section 125 of the Code. Such a statement or agreement would be opposed to public policy and would violate Section 23 of the Indian Contract Act , 1872 being an agreement unenforceable in law. Any conclusion to the contrary would be opposed to the statutory provisions of the Act and would be violative of the public policy that underlines the provisions of Section 125 of the Code."

16. Mr. Ankur Mahindro lastly submits that the Court has no jurisdiction to go into the bona fides or reasonableness of withdrawal of consent and the Court cannot adjudicate upon the merits of such withdrawal. In support of his submission, he relies upon the judgment of the Division Bench of the Kerala High Court in **Rajesh R. Nair v. Meera Babu, AIR 2014 Ker 44** wherein it has been held as under:-

"18. The further question to be considered is whether once consent is given and is later withdrawn by one of the parties, whether the Court can enquire into the bona fides or otherwise of the withdrawal of the consent. By providing that the enquiry under Section 13B(2) shall be only if consent is not withdrawn, the statute specifically recognises the right of the parties to withdraw the consent even at the stage of the enquiry contemplated under Section 13B(2). That right available to the parties is an unqualified right and for any reason whatsoever, if the parties or one of them, choose to withdraw their consent, such withdrawal of consent is in exercise of the right available under Section 13B(2). If that be so, it is not for the court to probe into the bona fides or reasonableness of withdrawal of consent and once consent is withdrawn, the only option available to the Court is to close the matter at that stage. If that be the legal position, we are unable to find any fault on the part of the Family Court in having dismissed the petition on the ground of non-compliance of the requirement of Section 13B(2) of the Act."

17. In rejoinder, Mr. Sunil Mittal, learned senior counsel for petitioner submits that the Division Bench judgment in Dinesh Gulati (supra) is per incuriam inasmuch as it has not taken note of the judgment of this Court in Avneesh Sood (supra) and **Shikha Bhatia v. Gaurav Bhatia, 2011 SCC OnLine Del 1014.**

18. He further submits that the judgments relied upon by learned counsel for respondent are not good law as they have not considered the effect of the judgment of the Supreme Court in the case of **Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction Co. (P) Ltd. & Ors., (2010) 8 SCC 24** wherein it has been held as under:-

"38. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non-adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the settlement agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms.

39. Where the reference is to a neutral third party (''mediation'' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as the court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it.

40. Whenever such settlements reached before non-adjudicatory ADR fora are placed before the court, the court should apply the principles of Order 23, Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject-matter of the suit/proceeding. In regard to matters/disputes which are not the subject-matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of the AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a mediator). Only then such settlements will be effective."

19. Having heard learned counsel for the parties, this Court is of the view that it is first necessary to determine as to whether Section 13B of the Act, 1955 postulates mutuality/consent for divorce to continue till the time the decree of divorce is passed and if so, whether such a condition precedent incorporates a legislative policy which cannot be waived by either of the spouses, even for valuable consideration.

20. Consequently, it is essential to analyse Section 13B of the Act, 1955. The said Section reads as under:-

"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, 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."

21. In the opinion of this Court, the consent given by the parties either at the time of execution of a settlement agreement bearing the imprimatur of a Court or at the time of filing of the petition under Section 13B(1) of Act, 1955 for divorce, has to subsist till the date the decree of divorce is issued. The period of waiting ranging from six to eighteen months is intended to give an opportunity to the parties to reflect/renege and if one of the parties does not wish to proceed ahead with the divorce during this period, then divorce cannot be granted. Further, the Court has to be satisfied about the bona fide and consent of the parties till the date of decree - and if it is not so, the Court gets no jurisdiction to pass a decree for divorce. In fact, the Supreme Court in **Smt. Suresta Devi v. Om Prakash, (1991) 2 SCC 25** has held as under:-

"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 subsection (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. [illegible] if the petition is not withdrawn in the meantime, the court shall [illegible] pass a decree of divorce [illegible]'' 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. Sub-section (2) requires the court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the court cannot pass a decree of divorce by mutual consent. 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 for divorce under Section 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) Hasbury''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 [(1972) 2 All ER 667, 674].**

15. In our view, the interpretation given to the section by the High Courts of Kerala, Punjab and Haryana and Rajasthan in the aforesaid decisions appears to be correct and we affirm that view. The decisions of the High Courts of Bombay, Delhi and Madhya Pradesh (supra) cannot be said to have laid down the law correctly and they stand overruled."''

(emphasis supplied)

22. The aforesaid view has been reiterated by the Supreme Court in the case of **Hitesh Bhatnagar v. Deepa Bhatnagar, (2011) 5 SCC 234.**

23. The Supreme Court in the case of **Anil Kumar Jain v. Maya Jain, (2009) 10 SCC 415** has also held that the period of six months between filing a petition of divorce

by mutual consent under Section 13B(1) of the Act, 1955 and grant of decree of divorce under Section 13B(2) of the Act, 1955 cannot be waived off by the parties or by any civil court or High Court. The relevant portion of the said judgment is reproduced herein below:-

"29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable breakdown 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 breakdown 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 the 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."

(emphasis supplied)

24. Further, if the submission of the petitioners is accepted then it would amount to applying two contrary parameters inasmuch as though the parties would be asked to wait for the mandatory period of six months, yet at the same time neither of the parties would be allowed to rethink or go back on their undertaking during the waiting period, i.e., between allowing the petition under Section 13B(1) and before filing of motion under Section 13B(2) of the Act, 1955. In the opinion of this Court, a strict enforcement of undertaking/settlement agreement/consent decree would make the mandatory waiting period otiose and defeat the statutory object to rethink and reconsider the decision to go ahead with mutual divorce before pronouncement of decree under Section 13B(2) of the Act, 1955.

25. This Court is of the opinion that the legislative intent is not that a marriage should be dissolved only on the basis of consent given in a prior settlement agreement bearing the imprimatur of a Court or at the stage of Section 13B(1) petition just because it was coupled with consideration.

26. Undoubtedly, as held in Avneesh Sood (supra) and Shikha Bhatia (supra), no litigant can be allowed to wriggle out of a solemn undertaken given to a Court and orders of the Courts have to be obeyed until and unless they are set aside in appeal/revision, yet this Court is of the view that the statutory option to reflect and retract cannot be taken away just because one of the parties has given an undertaking or has accepted either some money or benefit at the 13B(1) stage. However, one cannot retain a benefit received at the 13B(1) stage, if he/she is not willing to go ahead with the second motion. A party who has developed second thoughts has to return the benefit received either under the settlement agreement or at 13B(1) stage. But, in the opinion of this Court, it would not be proper to force the party who has developed second thoughts in accordance with the option given by the statute, to go ahead with the divorce at the pain of contempt. Consequently, this Court has grave doubts as to the applicability of the judgment in Afcons Infrastructure Ltd. & Anr. (supra) to the present batch of matters.

27. Also, if the statutory requirement is of continuous consent till the second motion is allowed, then this Court has grave doubt as to whether the action of a party exercising its statutory right to rethink/renege can be termed as mocking at the Court or encouraging dishonesty or indulging in fraud/ misrepresentation as held in Avneesh Sood (supra) and Shikha Bhatia (supra).

28. Moreover, as rightly pointed out by learned counsel for the respondent, the judgment of the Division Bench of this Court in the case of Dinesh Gulati (supra) has taken a diametrically different view than the one taken by learned Single Judges of this Court in Avneesh Sood (supra) and Shikha Bhatia (supra). The judgment in Dinesh Gulati (supra) is reproduced herein below:-

"1. The appellant is aggrieved by the order dated 04.04.2016 whereby he was issued show cause notice to answer why contempt proceedings ought not to be proceeded with against him for noncompliance of the order recording the joint statement of the parties. The brief facts are that the appellant had initiated proceedings for dissolution of marriage between him and the respondent wife by HMA 545/ 2014. During the pendency of those proceedings the parties stated before the court that they had resolved their differences and they would move for a mutual consent divorce under Section 13- B of the Hindu Marriage Act, 1956. Apparently, for one reason or the other mutual consent divorce proceedings were not initiated. In these circumstances, the appellant moved contempt proceedings for initiating actions against the respondent wife. The contempt petition was dismissed by the impugned order. At the same time, the court initiated of its own accord suo motu contempt proceedings against the present appellant for non-compliance of the order and the

joint statement dated 22.07.2014.

2. The recourse to the contempt proceedings in the circumstances of the present case as well as the orders passed on 04.04.2016 and 22.07.2014 (order recording joint statement of the parties) is baffling given that it completely neglects the mutuality aspect as provided for under Section 13B. It is not understandable how the court through its order initiated the coercive process of contempt proceedings, foreclosed the choice which the parties have by virtue of the mechanism under Section 13B to award mutual consent divorce in two stages. To put it differently through the impugned order, the parties'' right to step back at any stage stood negated. If the law permits the parties to rethink and not proceed with mutual consent divorce a concept which is based upon mutuality, an agreement to divorce cannot be enforced in a manner that is sought to be done in the present case. It is settled law that even if a compromise is embodied in an order, its essential characteristics of being founded on a contract that casts upon an enforceable contract, is not in any manner undermined. If this essential reality is lost sight of, the parties may be faced with dangerous consequences unintended legal result i.e. a residuary ground of divorce otherwise not thought of by Parliament or made into a separate ground for dissolution of marriage.
3. Having regard to the fact that the parties are unable to or do not wish to proceed with the agreement dated 22.07.2014 for a mutual consent divorce, the appropriate recourse in our opinion would be to restore the original divorce petition HMA 545/2014 on the file of the case. The parties are directed to be present before the concerned Family Judge on the date fixed. The court shall thereafter proceed with the main petition for divorce referred by the appellant on its merits.

4. Appeal is allowed in the above terms. The pending application also stands disposed of."

(emphasis supplied)

29. Keeping in view the aforesaid reasons, this Court has serious doubts as to view taken by earlier Coordinate Benches in Avneesh Sood (supra) and Shikha Bhatia (supra). Consequently, it deems it appropriate to refer the matter to a Division Bench. This Court may mention that the decision of this Court to refer the matter to a Division Bench is in conformity with the decision of the Supreme Court in **Sant Lal Gupta and Others v. Modern Cooperative Group Housing Society Limited and Others, (2010) 13 SCC 336** wherein it has been held as under:-

"17. A coordinate Bench cannot comment upon the discretion exercised or judgment rendered by another coordinate Bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciate the rules of law form the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a coordinate Bench must

be followed. (Vide **Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel [AIR 1968 SC 372]**, **Sub-Committee of Judicial Accountability v. Union of India[(1992) 4 SCC 97]** and **State of Tripura v. Tripura Bar Assn. [(1998) 5 SCC 637 : 1998 SCC (L&S) 1426])**

18. In **Rajasthan Public Service Commission v. Harish Kumar Purohit [(2003) 5 SCC 480 : 2003 SCC (L&S) 703]** this Court held that a Bench must follow the decision of a coordinate Bench and take the same view as has been taken earlier. The earlier decision of the coordinate Bench is binding upon any latter coordinate Bench deciding the same or similar issues. If the latter Bench wants to take a different view than that taken by the earlier Bench, the proper course is for it to refer the matter to a larger Bench."

(emphasis supplied)

30. In the opinion of this Court, the following questions of law arise for consideration by a division bench of this Court :-

A) Whether a party, which has under a settlement agreement decreed by a Court undertaken to file a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both and has also undertaken to appear before the said Court for obtaining divorce can be held liable for contempt, if the said party fails to file or appear in the petition or motion or both to obtain divorce in view of the option to reconsider/renege the decision of taking divorce by mutual consent under Section 13B(2) of the Act?

B) Whether by undertaking before a Court to file a second motion under Section 13B(2) of the Act, 1955 at Section 13B(1) stage or by giving an undertaking to a Court to that effect in a separate court proceeding, a party waives its right to rethink/renege under 13B(2) of the Act, 1955? If yes, whether such right can be waived by a party under Section 13B(2) of the Act, 1955?

C) Whether any guidelines are required to be followed by the Court while recording the undertaking/agreement of the parties with respect to a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both for obtaining divorce?

D) Whether the judgment in Avneesh Sood (supra) and Shikha Bhatia (supra) are good law in view of the doubts expressed by this Court in paras 19 to 28 and in view of the Division Bench judgment in Dinesh Gulati (supra).

Accordingly, list the matters before Division Bench on 07th February, 2017 subject to orders of Hon''ble the Chief Justice.