IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FAMILY COURT APPEAL NO. 37 OF 2023

Aniket Arun Dhatrak

.. Applicants

Versus

.. Respondent

...

Advocate for appellants : Mr. Mukul S. Kulkarni
Advocate for the respondent : Mr. Subodh P. Shah

...

CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.

RESERVED ON : 24 JULY 2024
PRONOUNCED ON : 01 AUGUST 2024

JUDGMENT (MANGESH S. PATIL, J.) :

Admit.

2. At the joint request of the parties, we have heard both the sides finally at the stage of admission.

3. We had been called upon to decide a very interesting issue, as to whether the right to sue survives to the mother and brothers of the deceased husband of the respondent - wife in a petition for divorce by mutual consent filed under section 13-B of the Hindu Marriage Act, 1955 (‘**Act’**), when he dies even before the second motion under sub section (2) of section 13-B of the Act is moved.

4. The facts can be stated in brief as under:

i) Deceased (hereinafter referred to as ‘**Aniket**’) and respondent - Shalaka submitted a petition for divorce by mutual consent on 14-10-2020.

ii) Pursuant to some mutual agreement, Aniket had agreed to pay Rs.5,00,000/- to Shalaka while filing of petition as per terms he paid Rs.2,50,000/- to her.

iii) Unfortunately, Aniket died during COVID - 19 on 15-04-2021.

iv) Respondent - Shalaka submitted a purshis (**Exhibit - 8**) on 28-04-2021, withdrawing the consent for granting divorce and requested for disposing of the petition.

v) However, the appellants herein who are the mother and brothers of Aniket submitted application (**Exhibit - 15**) purportedly under Order XXII Rule 3 of the Code of Civil Procedure and requested for an order for allowing them to be brought on record as his legal heirs. Respondent - Shalaka opposed the application stating that the cause of action did not survive.

vi) Even before the impugned order was passed, Advocate D.G. Patil of Dhule Bar Association apparently un-connected with either of the sides, submitted an application (**Exhibit - 17**) stating that father of Aniket had handed over Rs.2,50,000/- to him for being paid at the time of final decision. The Family Court permitted him to deposit it and accordingly, the amount was deposited in Court on 21-09-2021.

vii) The appellants submitted application (**Exhibit – 19**), soliciting a direction to respondent – Shalaka, to re-deposit the amount of Rs.2,50,000/- received by her on 14-10-2020 as per the consent terms filed on record. Respondent - Shalaka opposed that application as well.

viii) Accordingly, the learned Judge of the Family Court heard both the sides and by a common order under challenge, refused permission to the appellants to come on record as legal heirs of deceased Aniket and as requested by the respondent - Shalaka, disposed of the petition for divorce. Even the appellants' request for

direction to her to re-deposit the money i.e. Rs.2,50,000/- was rejected. Hence, this Appeal.

5. Learned advocate Mr. Kulkarni for the appellants would take us through the provisions of section 13-B of the Act and would submit that though the right to seek a divorce is a personal right and would not survive to the legal heirs. However, pursuant to the terms of settlement, respondent - Shalaka was paid an amount of Rs.2,50,000/- and merely a procedural compliance was to be made by moving a second motion under sub-section (2) of section 13-B of the Act. Since substantial part that was to be performed by deceased - Aniket was already performed, in the light of division bench decision of this Court in the matter of ***Prakash Alumal Kalandari V. Jahnavi Prakash Kalandari; AIR 2011 Bom. 119***, the request of respondent - wife seeking to withdraw her consent would tantamount to her unjust and inequitable enrichment and deceased - Anikat had earned the right to seek divorce by mutual consent.

6. Mr. Kulkarni would also seek to rely upon the decisions in the matters of ***Yallawwa v. Shantavva; (1997) 11 SCC 159*** and three decisions of Single Judges of this Court in; i) ***Jayshree Ramesh Londhe Vs. Ramesh Bhikaji Londhe; AIR 1986 Bom. 302***, (ii)***Kamalabai V. Ramdas Manga Ingale; AIR 1981 BOM. 187*** and (iii) ***Lubhan Gopal Nikhare Vs. Sandhya; 2012(3) Mh.L.J. 378***.

7. Mr. Kulkarni would submit that respondent - Shalaka had merely submitted a purshis Exhibit – 8, without seeking to make out any ground as contemplated under section 23 of the Act, whereby exception could have been taken on the ground that her consent was vitiated by coercion, fraud or undue influence.

8. Per contra, the learned advocate for respondent - wife - Shalaka would submit that admittedly, a mandatory second motion, as contemplated under sub section (2) of section 13-B of the Act was never moved. No right had accrued in deceased - Aniket which could have survived to the appellants. The right to seek divorce is a personal right. No decree for divorce was ever passed and the appellants could not have been legally allowed to prosecute the cause after demise of Aniket. Right to sue did not continue beyond the lifetime of appellant - Aniket and, therefore, no fault can be found in the impugned order in refusing permission to the appellants to come on record.

9. Mr. Shah would submit that the decision in the matter of ***Yallawwa*** (supra) would rather operate against the appellants. The issue was considered even in the matters of (i) ***Sureshta Devi V. Om Prakash; (1991) 2 SCC 25***, (ii) ***Hitesh Bhatnagar V. Deepa Bhatnagar; (2011) 5 SCC 234*** and (iii) ***Kimti Lal V. Indu Kundra; 1999 (50) DRJ 459*** (Delhi High Court). He would submit that ***Hitesh***

Bhatnagar (supra) has even considered the aspect of withdrawal of consent by either side beyond the period of 18 months. He would submit that it has been held that a party can withdraw the consent till the moment a decree for divorce is passed even beyond the period of 18 months.

10. We have considered the rival submissions and perused the papers. There is not much of dispute on facts.

11. It would be appropriate to reproduce section 13-B of the Act, which reads as under :

> ***"Section 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 (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 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."*

12. A bare reading of entire section 13-B makes it abundantly clear that submission of second motion under sub section (2) is a

condition precedent for passing a decree of divorce. It is only on making of such a motion by both the sides, the Court can proceed for hearing both the sides and can undertake requisite enquiry as deemed necessary. Upon its satisfaction that the marriage was solemnized and the averments in the petition were true that it can pass the decree. Keeping aside the aspect of the period mentioned in sub-section (2), it is only on the basis of a motion, that the Court would get the jurisdiction to undertake further enquiry for reaching its decision about performance of marriage and the contents of the petition. It is not automatic. In other words, even after filing of a petition for divorce by mutual consent, if no motion is moved by the parties jointly, there would be no question of Court undertaking any further enquiry. It cannot happen at the instance of only one of the spouses.

13. Suffice for the purpose to refer to the decision in the matter of ***Hitesh Bhatnagar*** (supra), which in turn referred to and relied upon the following observations from ***Sureshta Devi*** (supra):

> *"9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken*

down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.

....

13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that 'on the motion of both the parties. … if the petition is not withdrawn in the meantime, the court shall … pass a decree of divorce …'. What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the

> *instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."*

14. Incidentally, in ***Hitesh Bhatnagar*** (supra), it was noticed that a two Judge bench in ***Ashok Hurra Vs. Rupa Bipin Zaveri***; ***(1997) 4 SCC 226*** had expressed a view that observations in ***Sureshta Devi*** (supra) were too wide and did not logically accord with section 13-B(2). The observations in ***Ashok*** (supra) were held to be not *ratio decidendi*.

15. Rather, ***Hitesh Bhatnagar*** (supra) referred to a three Judge bench decision in the matter of ***Smruti Pahariya Vs. Sanjay Pahariya; (2009) 13 SCC 338*** and it was observed that the ratio laid down in ***Sureshta Devi*** (supra) was approved in ***Smruti Pahariya***, it relied upon following paragraphs from **Smruti Pahariya** (supra) **:**

> *"40. In the Constitution Bench decision of this Court in Rupa Ashok Hurra [(2002) 4 SCC 388] this Court did not express any view contrary to the views of this Court in Sureshta Devi [(1991) 2 SCC 25]. We endorse the views taken by this Court in Sureshta Devi, as we find that on a proper construction of the provision in Sections 13-B(1) and 13-B(2), there is no scope of doubting the views taken in Sureshta Devi. In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra [(1997) 4 SCC 226] has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.*
>
> *41. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi.*
>
> *42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a*

> *statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.*
>
> *43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."*

Referring to all these, the following were the conclusions drawn in ***Hitesh Bhatnagar*** (supra):

> *"14. The language employed in Section 13-B(2) of the Act is clear. The court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met:*
>
> > *(a) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;*
> >
> > *(b) After hearing the parties and making such inquiry as it thinks fit, the court is satisfied that the averments in the petition are true; and*
> >
> > *(c) The petition is not withdrawn by either party at any time before passing the decree.*
>
> *In other words, if the second motion is not made within the period of 18 months, then the court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression "divorce by mutual consent" would be otiose.*

> *15. In the present fact scenario, the second motion was never made by both the parties as is a mandatory requirement of the law, and as has been already stated, no court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. We are of the view that the eighteen-month period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant."*

16. In view of such an emphatic decision on the issue, when admittedly, Aniket died even before the couple moved the second motion under sub-section (2) of section 13-B of the Act, as has been correctly observed by the learned Judge in the impugned order, the petition itself had become infructuous.

17. In our considered view, even ***Yallawa*** (supra) would weigh against the appellants. In that matter, the husband had succeeded in obtaining the divorce decree against the wife *ex parte*. He thereafter died and the issue was, as to whether after his demise, the wife can file an application for setting aside *ex parte* decree under Order IX Rule 13 of the Code of Civil Procedure against the legal heirs of the deceased husband. After reaching the conclusion, it was observed in paragraph no. 10, as under :-

> *"10. Now remains the question as to whether the proceedings for divorce as restored by the High Court by its impugned order are required to be proceeded further or the curtain must be dropped on the said proceedings. As the ex parte decree is found to be rightly set aside by the High Court, the marriage petition would automatically stand restored on the file of the learned trial Judge at the stage prior to that at which they stood when the proceedings got intercepted by the ex parte decree. Once that happens it becomes obvious that* ***the original petitioner seeking decree of divorce against the wife being***

> ***no longer available to pursue the proceedings now, the proceedings will certainly assume the character of a personal cause of action for the deceased husband and there being no decree culminating into any crystallized rights and obligations of either spouse, the said proceedings would obviously stand abated on the ground that right to sue would not survive for the other heirs of the deceased husband to get any decree of divorce against the wife as the marriage tie has already stood dissolved by the death of the husband. No action, therefore, survives for the court to snap such a non-existing tie, otherwise it would be like trying to slay the slain. At this stage there remains no marriage to be dissolved by any decree of divorce****. Consequently, now that the ex parte decree is set aside, no useful purpose will be served by directing the trial court to proceed with the Hindu marriage petition by restoring it to its file. The Hindu Marriage Petition No. 25 of 1989 moved by Shri Basappa, the husband of the respondent on the file of the Court of Civil Judge, Gadag will be treated to have abated and shall stand disposed of as infructuous. The appeal is disposed of accordingly. In the facts and circumstances of the case, there will be no order as to costs." (emphasis supplied).*

18. These observations would clearly operate against the appellants and since the right to seek divorce was a personal right of deceased Aniket and the principle being *actio personalis moritur cum persona*, cause of action would not survive to the appellants and the petition for divorce by mutual consent would stand abated as has been correctly concluded by the learned Judge in the impugned order.

19. So far as the division bench judgment in ***Prakash Kalandari*** (supra) is concerned, the fact situation was clearly different. A petition for divorce was filed which was initially not a petition for divorce by mutual consent as contemplated under section 13-B of the Act. The parties had arrived at a compromise before a counsellor in terms of rule 31 of the Family Courts (Marriage Rules), 1987, which

were framed under section 21 of the Family Courts Act, which enabled the Court to pronounce the decree on the basis of the consent terms reduced into writing and signed by the parties unless it were contrary to the public policy. It was also noticed that substantial compliances were made by one of the spouses and the consent was sought to be withdrawn unilaterally by the other spouse without making out the ground that it was obtained by coercion, fraud or undue influence as contemplated under section 23.

20. The issue before us is peculiar. The question of considering withdrawal of the consent by respondent, is not the matter. In fact, admittedly, Aniket died on 15-04-2021 and the respondent submitted the *purshis* Exhibit 8, withdrawing her consent and seeking disposal of the petition on 28-04-2021.

21. Once having concluded as herein-above that moving of motion under sub section (2) of section 13-B of the Act, is a *sine qua non* for passing of a decree of divorce by mutual consent, when it was not made in the present matter, such withdrawal of consent after demise of Aniket was redundant since that second motion has to be a joint motion. The appellants are not entitled to derive any benefit from the decision in the matter of ***Prakash Alumal Kalandari*** (supra).

22. Once having reached such a conclusion, the appellants being the heirs of deceased - Aniket, his mother and two brothers, they have no right to come on record, even they would not get any right to prefer an appeal under section 19 of the Family Courts Act.

23. We find no illegality in the order under challenge.

24. The Appeal is dismissed.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/