

(1992) 08 GUJ CK 0031
In the Gujarat High Court
Case No : First Appeal No. 1265 of 1992

Kiritbhai Girdharbhai Patel

APPELLANT

Vs

Prafulaben Kiritbhai Patel

RESPONDENT

Date of Decision : 25-08-1992

Acts Referred:

Hindu Marriage Act, 1955 — Section 13B, 13B(1), 28

Citation : AIR 1993 Guj 111 : (1993) 1 CivCC 296 : (1993) 1 DMC 577 : (1992) 2 GLR 1595

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Advocate : A.J. Shastri, for the Appellant; B.G. Jani, for the Respondent

Final Decision : Allowed

Judgement

J.N. Bhatt, J.—In this appeal u/s 28 of the Hindu Marriage Act, 1955 ("Act" for short), the appellant/original petitioner No. 1 husband, has questioned the legality and validity of dismissal of the petition for divorce by mutual consent, u/s 13B(1) of the Act, by the learned City Civil Court Judge, on 22-4-1992, in Hindu Marriage Petition No. 34 of 1992. In view of the peculiar circumstances of the case, this matter was fixed urgently for final hearing.

2. A few material facts leading to the rise of the present appeal may be, shortly, stated at the outset.

The appellant is the original petitioner No. 1-husband and the respondent, herein, is the original petitioner No. 2-wife, who preferred a joint petition u/s 13B(1) of the Act for divorce by mutual consent, contending that -

- a) they have been living separately for a period of more than one year, and
- b) they have not been able to live together, and
- c) they have mutually agreed that marriage should be dissolved.

3. The marriage between the parties took place, on 28-5-1973, at village Bakrol, Taluka Anand, District Kheda, in accordance with Hindu Rites. Out of the said wedlock, the parties have three children, namely, one daughter and two sons. It was a common contention in the original petition that on account of broken marriage, the spouses have been residing separately and their relation, as husband and wife, has not been consummated since December 1986. Despite several efforts for reconciliation by the friends, relatives and well-wishers, there was no improvement in the strained relationship and, therefore, the spouses mutually agreed that the marriage should be dissolved.

4. On appreciation of the facts and the circumstances, the learned trial Court Judge reached to the conclusion that one of the conditions that the spouses have been living separately for a period of one year or more was not satisfied as the spouse stayed together, at London, under same roof at the house of the father of the original petitioner No. 2 the wife, for about six months after 4-1-1991 and, therefore, he was pleased to dismiss the petition. Being aggrieved by the said judgment and decree, the original petitioner No. 1-husband has assailed it in this First Appeal.

5. The question which emerges for consideration, at this juncture, is, as to whether the expression "have been living separately" in Section 13B(1) of the Act is, properly, examined and appreciated by the trial Court. It appears from the facts and circumstances that the view adopted by the trial Court is not only erroneous but is perverse and illegal. The spouses, admittedly, went to London and stayed there for about six months for the purpose of attending the post-death ceremonies of the, unfortunate, demise of the father of the original petitioner No. 2-wife. The original petition was filed on 4-1-1992.

The parties went to London for the aforesaid purpose after 4-1-1991. Babubhai Somabhai Patel, father of the petitioner No. 2-wife, had expired, at London, on 31-12-1990. The appellant herein-original petitioner No. 1, husband, returned to India, on 28-6-1991. It is the consistent case of both the spouses that there was a broken marriage and there was no consummation of matrimonial relationship after December 1986. Mere stay under one roof, at London, on account of the aforesaid, unfortunate, circumstance, without having consummated the matrimonial relationship, could be said to be a ground for denial of divorce by mutual consent, holding that they have not been living separately for a period of one year from the date of filing of the petition u/s 13B(1) of the Act. The obvious answer would be in the negative. Divorce by mutual consent is provided in Section 13B(1) of the Act designedly by the legislature in its wisdom. The requirements of the said provisions are as under:

(i) there must be a petition jointly presented to the competent Court by both the spouses,

(ii) the ground for dissolution of the marriage by a decree of divorce should be clearly and categorically shown-

(a) that the parties have been living separately for a period of one year or more before the presentation of the petition,

(b) that they have not been able to live together, and

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

6. Needless to mention that the granting of decree for divorce by mutual consent by the competent Court, on fulfilment of the aforesaid conditions, does not seem to be a matter of discretion with the Court. But the Court shall have to pass a decree for divorce by mutual consent, subject to the provisions of Section 13B(1), as aforesaid, and after following the procedure prescribed in Sub-section (ii) of Section 13B(1) of the Act, namely :--

(i) both the spouses should apply to the Court not less than six months of the presentation of the petition and not later than 18 months after the presentation of the petition and they may be heard and decree dissolving the marriage may be granted,

(ii) the Court must give a hearing to the parties,

(iii) the Court may make such an inquiry into the correctness of the grounds stated in the petition.

(iv) the Court must thereafter be satisfied that the marriage between the spouses had been solemnised after the Act came into force, after 1955, and the material averments made in the petition are true.

7. The provision in the aforesaid Section was introduced by the legislature in 1976 with the design and object to grant divorce in case of broken down case of marriage by mutual agreement for avoiding multiplicity of proceedings. The underlying purport and purpose of this Section is not, properly, appreciated by the learned trial Court Judge. There is evidence on record and it is the consistent case of both the spouses that on account of unfortunate circumstances there was a broken down marriage and they have not consummated the matrimonial relationship since December 1986. There appears to be no any reason as to why this evidence should not be believed. Apart from that, mere joint tour and stay, at London, on account of unfortunate demise of the father of the wife, without consummation of the matrimony, would not "ipso facto" disentitle the spouses from earning a decree of divorce by mutual consent as provided in Section 13B(1) of the Act. The expression "have been living separately" in Section 13B(1) of the Act does not, necessarily, mean that the spouses has to live in different places. What the expression would seem to require is that they must be living apart, viz., not living with each other as "husband" and "wife". It must be borne in mind that separation may be consensual or compulsory. The averment that the spouses, unfortunately, could not consummate the matrimonial relations since December 1986, is not "ipse-dixit" negated by the mere fact that they jointly went and then stayed under one roof, at London for sometime. There may be cases where the parties may have been compelled to stay in the same house

and under same roof or premises and yet can be said to be living separately for want of consummation of matrimonial relations.

8. The underlying purport of the said provision is to find out by the competent Court that the spouses have not been able to live together on account of broken down marriage and they have mutually agreed for the dissolution of the marriage. It cannot be construed even for a moment that in such a case of separation the parties should live separately in separate premises. If the Court is satisfied that the spouses have not consummated or enjoyed the matrimonial relations as "husband" and "wife" for a period of one year or more, than the first statutory condition could be said to have been satisfied. There is a clear averment in the petition and also a reliable evidence that it was impossible for the parties (original petitioners) to live together as "husband" and "wife" and in fact they have been living separately for a period of one year or more. Unfortunately, with due respects, the learned trial Judge has taken a very erroneous view while interpreting the expression "have been living separately". The trial Court ought to have granted the joint petition for divorce by mutual consent. The interpretation made by the learned trial Judge that there was no fulfilment of the first statutory condition that the parties have been living separately for a period of more than one year, is not only erroneous but running diametrically opposite to the spirit of its provisions incorporated in Section 13B(1) of the Act.

9. Apart from the aforesaid interpretation, it is not in dispute that the parties have been living separate even on return from London trip. It is very clear from the evidence that the original petitioner No. 1 husband, the appellant herein, returned to India on 28-6-1991 and the wife has been living in London. During the pendency of the appeal, alternatively, the period of separation for more than one year has also been established and, therefore, on that count also the parties should be allowed to conclude their broken down marriage by granting decree of divorce by mutual consent. It will not be expedient to direct the parties to resort to a second inning for earning a decree of divorce by mutual consent in the circumstances of the case. Therefore, this Court has no any hesitation in finding that the parties have been living separately for a period of more than one year and that they have not been able to live together as husband and wife and further that they have mutually agreed that the marriage should be dissolved, which would entitle the spouses to get a decree u/s 13B(1) of the Act for divorce by mutual consent.

10. In view of the aforesaid facts and circumstances and on both counts, the impugned judgment and decree, refusing to grant divorce by mutual consent, is not only erroneous but illegal and is required to be quashed.

11. Incidentally, it may be mentioned that the wife is already given her "streedhan" ornaments by the husband. It is not in dispute that such ornaments are returned by the husband to the uncle of the wife, residing in India, by an agreement dated 5-7-1991. The children born out of the said, unfortunate,

wedlock arc with the wife, at London, and there is no dispute about the custody and maintenance of the children.

12. In view of the aforesaid factual and legal position, the present appeal is required to be allowed and the impugned judgment and decree is required to be quashed and set aside.

13. In the result, the impuned judgment and decree is quashed and set aside. Decree for divorce by mutual consent, as contemplated under the provisions of Section 13B(1) of the Act, by dissolving the marriage between the parties, is, hereby, granted, as prayed for, in the original joint petition, The appeal is allowed. In the circumstances, there shall be no order as to costs.