
(2009) 03 OHC CK 0072
In the Orissa High Court

Miloo Mishra @ Mohapatra

APPELLANT

Vs

Apun Kumar Mohapatra

RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Hindu Marriage Act, 1955 — Section 13B

Citation : AIR 2009 Ori 136 : (2009) 107 CLT 807 : (2010) 1 DMC 615 : (2009) 1 OLR 786 : (2011) 7 RCR(Civil) 1533

Hon'ble Judges : S.R. Singharavelu, J

Bench : Single Bench

Judgement

S.R. Singharavelu, J.—I have heard Mr. Anupam Rath, learned Counsel for the petitioner-wife and Mr. Bhabani Shankar Das Parida, learned Counsel for the O.P.-husband,

2. Both the husband and wife have filed application for divorce on mutual consent. The husband is living in USA and the wife is living in India. All the formalities have been admitted and followed u/s 13-B of the Hindu Marriage Act. Nowhere it is stated in the impugned order that the statutory formalities had not been adhered to. Such non-adherence is also not a ground for impugned order. Only ground in which the impugned order is passed is that as envisaged u/s 13-B of the Hindu Marriage Act, the Court has to hear the parties and for which hearing the trial Court wanted the presence of both the parties in Court. True it is that Section 13-B of the Hindu Marriage Act in its proviso (2) provides that on the consent of both the parties, the Court shall on being satisfied, after hearing the parties and after making such enquiry as it thinks fit, pass a decree of divorce. By relying the word "after hearing the parties" the trial Court wanted the presence of the husband from USA to hear him.

3. The learned Counsel for the husband submitted that it is very difficult and more expensive for the husband to come all the way from USA to say that he agreed for this divorce on mutual consent.

The learned Counsel for the petitioner relied upon observation in 1995 (2) CCC 629 (A.P) in the case of P. Venkatarama Reddi & D.H. Nasir while dealing with Section 13-B of this above enactment the learned Subordinate Judge with the cited case took the view that both the parties to the marriage should necessarily be present in the Court for examination and the filing of the affidavit will not be a substitute for that requirement. The learned judge observed that unless the parties are personally present, it would be difficult for the Court to assess whether they have changed their mind since the date of filing the petition. High Court of Andhra Pradesh has found that it is not a correct view to be taken. "Hearing" does not necessarily mean that both parties have to be examined. The word "hearing" is often used in a broad sense which need not always mean personal hearing. In any case, the evidence of one of the parties, i.e., the appellant herein was recorded by the Court. Thus, even if the word "hearing" is construed in a literal sense that requirement must be deemed to have been satisfied in the instant case in view of the examination of the appellant. On the husband's side there is evidence in the form of an affidavit which can be legitimately taken into account in view of Order XIX Rule 1 CPC.

4. I may add that hearing of the parties contemplated under proviso Sub-section (2) of Section 13-B of the Hindu Marriage Act, a right of opportunity of being heard, given to the parties concerned and it should never be taken as an mandate or, obligatory element on the part of the Court to necessarily hear, even if circumstances do not indicate such necessities. In this case, we can take that circumstances do not indicate the necessity of hearing the parties because they have filed respectively affidavit consenting for mutual divorce. So, the perception of the lower Court that the above term found in proviso (2) of Section 13-B an obligatory and mandatory on the part, of the Court is erroneous approach of law. When parties themselves waived their right of being heard, we cannot put an imperative element on their part to necessarily exercise their right and in that event only one can ask their presence. Again in this particular case, both parties have filed affidavit and both the learned Counsels before me submitted that they have adhered to the statutory formalities provided. They have also indicated the difficulties of the husband to come all the way from the USA. Beneficial element to the parties enshrined in the provision should not be construed as a burden on the parties especially when they waived the right of benefit.

5. In this view of the matter, the trial Court is directed to act upon the affidavit and pass suitable orders on merits in favour of the parties when all the other statutory formalities are found adhered to. The impugned order is set aside. Necessary orders on merits be passed as early as possible preferably within a period of two weeks.