
(2011) 05 BOM CK 0047
In the Bombay High Court
Case No : Family Court Appeal No. 61 of 2010

Mr. Prakash Alumat Kalandari	Vs	APPELLANT
Mrs. Jahnvi Prakash Kalandari		RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Family Courts (Maharashtra) Rules, 1987 — Rule 31
Family Courts Act, 1984 — Section 21
Hindu Marriage Act, 1955 — Section 13, 13B, 13B(2), 23, 9
Marriage Laws (Amendment) Act, 1976 — Section 23(1)
Penal Code, 1860 (IPC) — Section 498A

Citation : AIR 2011 Bom 119 : (2011) 3 ALLMR 807 : (2011) 4 BomCR 53 :
(2011) 4 CivCC 112 : (2011) 4 MhLj 187 : (2011) 8 RCR(Civil) 2444

Hon'ble Judges : Mridula Bhatkar, J; A.M. Khanwilkar, J

Bench : Division Bench

Advocate : S.P. Nanavati, for the Appellant; Anil Menon and S.B. Shetty, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This appeal takes exception to the judgment and Decree passed by the Family Court No. 3, Pune dated 31st March, 2009 in Petition No. A-877/2007. The Respondent/wife filed Petition for a decree of divorce on the ground of cruelty. The said Petition was contested by the Appellant/husband by filing written statement and counter claim. The Appellant also prayed for custody of children.

2. The marriage between the Appellant (husband) and Respondent (wife) was solemnized on 12th August, 1993 at Pune as per the Hindu Vedic rites. After their marriage, they lived and cohabited together initially at Moscow, then at France and lastly at Pune. Two children are born out of the said wedlock namely; daughter Lavanya born on 22nd June, 1995 and son Rahul born on 11th January, 1999. The children are in the care and custody of the Respondent mother. The

parties started living separately since June, 2006. Since then, there has been no cohabitation between them.

3. During the pendency of the abovesaid Petition, the parties decided to take divorce by mutual consent. Accordingly, Consent Terms were executed and signed by both of them on 6th October, 2008, which were placed on record before the Family Court being Exhibit 71. The parties thereafter jointly filed application at Exhibit 72 to convert the Petition for divorce into joint Petition for divorce by mutual consent. As per the Consent Terms, the Appellant had agreed that the custody of both the children would remain with the Respondent wife. The Respondent wife on the other hand, agreed to give access of both the children to the Appellant during the weekend on every Sunday at the designated place and time and during the Diwali and Christmas vacations every day at the same venue and same time. Insofar as summer vacation, temporary custody of both the children was to be given to the Appellant husband for the first half of the vacation when he could take the children away from Pune for vacation under intimation to the Respondent wife. The parties also agreed that they would jointly take decision in respect of education and other activities of the children. The Appellant agreed to pay maintenance of Rs. 5,000/- per month for each child with increase at the rate of 15% every two years. The Respondent wife waived her claim of maintenance and alimony and her streedhan. The Respondent wife also agreed to cooperate with the Appellant husband for the transfer of shares, properties-movable and immovable of the Respondent in Company KAPEXL Healthcare Private Limited. Besides, both parties agreed to withdraw all the criminal and civil proceedings filed against each other.

4. After filing of Consent Terms recording the above arrangement, the hearing was deferred for some time. The Advocate for the Appellant thereafter withdrew his Vakalatnama and on 16th February, 2009, the Appellant filed application Exhibit 80 to withdraw his consent given on the application Exhibit 71 to grant divorce by mutual consent. The sole reason mentioned in this application is that the Respondent wife failed to comply with her obligation to provide access of the children to the Appellant husband. He has asserted that he was therefore withdrawing his consent, keeping in mind the paramount interest and welfare of the children. The said application Exhibit 80 was resisted by the Respondent wife by filing reply Exhibit 81. According to the Respondent, she never refused to grant access of children to the Appellant. Whereas, the Appellant was arrested in connection with various criminal matters and could not avail of access during the relevant period, as he was in jail. In substance, she refuted the allegations in application Exhibit 80 that she failed to comply with any of the terms of Consent Terms executed between the parties. She has also asserted that the children were not keen on meeting the Appellant and refused to accompany the Appellant, which fact was known to the Appellant. She also asserted that the Appellant was not paying maintenance amount regularly and was in arrears. She also brought on record that after execution of the Consent Terms, she facilitated disposal of criminal cases filed against the Appellant husband being case No.

560/2007 for offence u/s 498-A of the Indian Penal Code and case No. 66/2008 for offence of theft. Besides, as per the Consent Terms, she also informed the Police Station of Hadapsar Police Station to withdraw all pending complaints against the Appellant.

5. Considering the stand taken by the rival parties, the Family Court framed points for determination, amongst others, whether the application filed by the Appellant Exhibit 80 to withdraw the consent recorded in the Consent Terms should be allowed and whether decree of divorce by mutual consent u/s 13B of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act'), should be passed.

6. Dealing with the first point, the Family Court took the view that the Appellant cannot be allowed to withdraw his consent in the fact situation of the present case. The learned Judge held that the only ground pressed into service by the Appellant justifying withdrawal of consent for passing decree of divorce by mutual consent, was untenable and devoid of merits. The learned Judge relying on the case law pressed into service by the parties took the view that the Appellant cannot be allowed to withdraw his consent and instead, the Consent Terms executed between the parties ought to be taken on record and decree of divorce by mutual consent on the basis of the said Consent Terms was inevitable.

7. In the present appeal, the view so taken by the Family Court has been assailed. According to the Appellant, since the Petition was one u/s 13B of the Act, the same could be taken forward only if both the parties continued to support the same till the date of the decree. Whereas, even if one party to the said application were to resile from or withdraw his/her consent, the Court cannot get jurisdiction to pass a decree of divorce by mutual consent. To buttress this argument, reliance is placed on the decision of the Apex Court in Smt. Sureshta Devi v. Om Prakash reported in I (1991) DMC 313. Reliance is also placed on another decision in the case of Rupali alias Chetna Vs. Sunil Data, . In that view of the matter, contends learned Counsel, the impugned decree of divorce as passed cannot be sustained in law.

8. On the other hand, Counsel for the Respondent would contend that there is no infirmity either in the approach or the conclusion reached by the Family Court. The learned Counsel contends that considering the factual matrix of this case, it is more than clear that the Respondent acted upon the Consent Terms executed between the parties to her prejudice, for which reason, the Appellant cannot be permitted to resile from the commitment made in the Consent Terms and more particularly, because he has taken benefit of the Consent Terms. It is contended that the decree of divorce by mutual consent as passed by the Family Court in the fact situation of the present case, was inevitable.

9. To buttress this submission, learned Counsel for the Respondent has placed reliance on the decisions in the case of Sudhakar Vinayak Joshi Vs. Sulabha Sudhakar Joshi, , Rajesh Sainani Vs. Mrs. Bhavna Sainani, and Apurba Mohan

10. After having given our anxious consideration to the arguments advanced by the respective Counsel and going through the record of the case and more so, the legal position enunciated in the above said decisions, it may appear that ordinarily in a Petition filed u/s 13B of the Act, the consent and willingness of the parties to invite decree of divorce should not only be present when the Petition is filed but should also continue till the Court passes a decree on due satisfaction that the consent was voluntary and not obtained by force, fraud or undue influence. In other words, none of the party to a Petition for divorce by mutual consent u/s 13B of the Act of 1955, should withdraw the consent before passing of the decree of divorce. Further, it is open to the party to a Petition for divorce by mutual consent to unilaterally withdraw his/her consent within the specified period and including before the decree of divorce on the Petition filed u/s 13B of the Act is passed. It is not as if the consent given for filing the joint Petition for divorce by mutual consent is irrevocable. This legal position is reinforced from the decision of the Apex Court in the case of Sureshta Devi (supra). In paragraphs 13 to 15 of the said reported decision, the Apex Court expounded as follows:

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 decrees. This 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. 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 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 laws of England, Fourth Edition Vol. 13 para 645; (ii) Rayden on Divorce 12th Ed. Vol.1 P. 291 and (iii) Beales v. Beales 1972 (2) All E.R. 667 at 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.

11. The statement of law in Sureshta Devi (*supra*) is in the backdrop of the controversy before the Apex Court, wherein, the Appellant-wife was signatory to the joint Petition for divorce by mutual consent filed in the Family Court on 8th January, 1985. Her statement was recorded by the Court on 9th January, 1985. However, on 15th January, 1985, she filed application in the Court alleging that her statement was obtained under pressure and threat of the husband. She was not allowed to see or meet her relations and to consult them before filing of the divorce petition. Nor her relations were permitted to accompany her to Court. Hence, she asserted that she does not want to be party to the petition and prayed that the same be dismissed.

12. Applying the abovesaid exposition, coupled with the fact that the Appellant withdrew his consent vide Exhibit 80, it may appear as if the Family Court exceeded its jurisdiction in passing the decree of divorce by mutual consent. However, what is significant to bear in mind, is that, in the present case, the parties had not in the first instance resorted to Petition u/s 13B of the Act. Whereas, the Respondent had filed Petition for a decree of divorce on the ground of cruelty against the Appellant/husband on 7th September, 2007. Even the Appellant/husband in the written statement and counter claim filed on 9th April, 2008, prayed for dissolution of the marriage. The parties during the pendency of the said proceedings decided to compromise the matter. Accordingly, they entered into Consent Terms (Exhibit 71) which were duly executed by the parties on 6th October, 2008. Amongst the several terms agreed upon between the parties to bring quietus to the entire dispute, they chose to convert the pending Petition for divorce into a joint Petition for divorce by mutual consent and withdraw all allegations against each other. Not only that, the parties immediately acted upon the said Consent Terms. The Respondent, as per the

terms of Consent Terms, offered access of both the children to the Appellant. It is a different matter that the access did not fructify for reasons stated by the Respondent. That plea of the Respondent has been accepted by the Family Court. On this finding, the sole ground stated by the Appellant as justification to withdraw the consent given for decree of divorce by mutual consent becomes unavailable. In any case, the said justification, even if it were to be accepted, would, at best, be a case bordering on noncompliance of the terms and conditions of the Consent Terms.

13. Notably, in the application filed by the Appellant for withdrawing his consent (Exhibit-80), no material facts have been pleaded to even remotely suggest that he had signed the Consent Terms (Exhibit-71) due to force, fraud or undue influence. In other words, the parties having acted upon the Consent Terms in part and more particularly, the Respondent-wife having acted to her detriment, including having withdrawn the criminal cases filed against the Appellant, the Appellant cannot be allowed to extricate himself from his commitment. In such a situation, in absence of assertion that the consent was obtained by force, fraud or undue influence, by virtue of Section 23(1)(bb) read with Section 23(1)(e) of the Act of 1955, the Court would assume jurisdiction to pass a decree u/s 13B on being satisfied that a marriage was solemnized between the parties and that the averments in the petition are true. As regards the grievance of the Appellant regarding non-observance of the terms and conditions of the Consent Terms, the Court can always grant liberty to the parties to pursue the remedy in that regard - which will have to be decided on its own merits.

14. Be that as it may, what is significant to note is that under the Consent Terms (Exhibit-71), the Respondent had also voluntarily waived her claim of maintenance and alimony and her streedhan. She also agreed to cooperate with the Appellant to transfer the shares, properties - movable and immovable to the Appellant. Further, she agreed to withdraw all the criminal and civil proceedings filed by her against the Appellant. She acted upon the said terms as were agreed between the parties vide Consent Terms dated 6th October, 2008 at Exhibit 71, before the Appellant filed the application Exhibit 80 on 16th February, 2009 to withdraw his consent. Somewhat similar situation was considered by the learned Single Judge of this Court in a recent decision in the case of Rajesh Pratap Sainani (supra). Even in that case, the Petitioner before the High Court had challenged the order passed by the Family Court refusing to permit the Petitioner to withdraw his consent and to dismiss the Petition u/s 13B(2). In that case also, the original proceeding filed between the parties was one u/s 9 for decree of restitution of conjugal rights and not u/s 13B of the Act of 1955. When the said Petition was pending, criminal complaint was filed by the wife against the husband for offence u/s 498-A of the Indian Penal Code. Thereafter, the parties realized that their marriage was irreconcilable and there was no possibility to save the same. Accordingly, they filed application u/s 13B of the Act for a decree of divorce by mutual consent, which was duly signed by both the parties. While the said application was pending, the husband moved the Family Court to permit

him to withdraw his consent and to dismiss the Petition u/s 13B of the Act. The Court found that the wife had already acted upon the Consent Terms. In that, before the husband moved application for withdrawal of consent, she withdrew the criminal complaint filed against the husband - as is the case on hand. She also returned the ornaments which were given to her in marriage by husband's family. She waived her right to present and future maintenance including that of minor son. The wife was made to agree to a limited custody of minor son and access to the husband. The wife was also saddled with the liability of son's future education and welfare. The Family Court, therefore, rejected the husband's application for allowing him to withdraw the consent to decree of divorce by mutual consent, as the wife had already acted upon the terms of compromise to her prejudice, on the basis of the representation made by her husband. The Court invoked the principle of doctrine of Estoppel to uphold the order of the Family Court disallowing the prayer of the husband for withdrawing his consent. The Court observed that the husband cannot be permitted to take advantage of his own wrong. Further, the Family Court cannot be a helpless spectator inspite of the duplicity of the husband to induce the hapless wife to waive her maintenance claim and to withdraw the criminal complaints with the hope of starting her life afresh. The Court went on to observe that if the husband was allowed to withdraw his consent, it would be nothing short of husband resorting to fraud and misrepresentation, which cannot be permitted by the Courts of Law and Equity. The Court further observed that in such situations, no spouse can be allowed to withdraw consent unilaterally, unless he/she was able to substantiate a just cause to the satisfaction of the Court.

15. In another reported decision of this Court in the case of Sudhakar Joshi (supra), on which reliance is placed by the Respondent, the husband had filed Petition for divorce on the ground of desertion, cruelty and adultery. During the pendency of the said Petition, parties filed Petition for divorce by consent. However, after filing of such Petition, one party continued to remain absent. The Trial Court opined that if one of the spouse remains absent, he had no jurisdiction to pass the decree for divorce in favour of the spouse who attends the Court. The learned Single Judge of this Court overturned the conclusion of the Trial Court by observing that a decree of divorce could be granted on the ground of desertion as Advocates for parties agreed to pass such a decree. The Court then referred to the provisions of Order XXIII Rule 3 of the Code of Civil Procedure. It observed that before advent of Section 13B on the Statute Book, it was not possible for the Trial Court to resort to Order XXIII Rule 3 of the Code of Civil Procedure. It went on to hold that with the legislative change, the Court can now decree even a Petition for divorce filed u/s 13 of the Act, by consent of the parties, if the Court were to be satisfied that such a decree was not collusive one. It further observed that the provisions of Section 13B and Section 23(1)(c) of the Act were mutually inconsistent. We do not agree with such a wide statement of law. For, the petition u/s 13B stands on a completely different pedestal. The procedure to try the said petition is well defined in Section 13B

read with Sections 23(1)(bb) and Section 23(1)(e) of the Act of 1955. These provisions are self contained Code. Whereas, while trying the petitions for divorce on grounds other than Section 13B, the mandate of the relevant provisions such as Section 13 read with Section 23 of the Act (except Section 23(1)(bb)) would apply. In the latter cases for a decree of divorce, the Court is obliged to record its satisfaction on the basis of evidence before it in respect of the ground alleged by the Petitioner or Respondent, as the case may be. The Apex Court in the case of Balwinder Kaur Vs. Hardeep Singh, held that Section 23 of the Act of 1955 mandates the Court before granting decree for divorce, "whether defended or not", to satisfy itself in respect of several factors mentioned in that Section and including duty in respect of conciliation efforts. Suffice it to hold that petitions on grounds other than petition for a decree of divorce by mutual consent u/s 13B of the Act, cannot be disposed of merely on the basis of compromise by invoking Order XXIII Rule 3 of the CPC. We are of the view that insertion of Section 13B and Section 23(1)(bb) by Marriage Laws (Amendment) Act 1976 (68 of 1976), which came into force with effect from 27th May, 1976, was not to dilute the mandate under other provisions casting duty on the Court to be satisfied about the existence of the stated ground as condition precedent, before passing a decree in terms of the reliefs claimed in the Petition. We would, however, agree with the exposition of the Calcutta High Court in the case of Apurba Ghosh (supra) that, decree of divorce in a Petition u/s 13 of the Act cannot be passed solely on the basis of compromise by resorting to provisions of Order XXIII Rule 3. Whereas, even the Court must be satisfied that a ground for divorce in the Statute can be traced from the record.

16. As aforesaid, if the Petition is filed "simplicitor u/s 13B of the Act" for divorce by mutual consent, the Court must satisfy itself that the consent given by the parties continues till the date of granting decree of divorce. Even if one party unilaterally withdraws his/her consent, the Court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate of Section 13B of the Act. However, the situation would be different if the parties in the first instance resort to Petition for relief u/s 9 or 13 of the Act and during the pendency of such Petition, they decide to invite decree for divorce by mutual consent. On the basis of agreed arrangement, if the parties were to execute Consent Terms and then file a formal Petition/Application to convert the pending Petition to be treated as having been filed u/s 13B of the Act to grant decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the Consent Terms either wholly or in part to his/her detriment. In other words, the Court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw

his/her consent.

17. Reverting to the facts of the present case, we are in agreement with the finding recorded by the Trial Court that the sole reason or justification given by the Appellant husband for withdrawing his consent already given (that he was denied access of the children), is not substantiated by him. Whereas, the material on record would indicate that the real reason was the inability of the Appellant husband to meet the children as he was in jail in connection with criminal cases and also because the children were unwilling to meet the Appellant. Thus, it was not a case of Respondent coming in the way of providing access of the children to the Appellant. In other words, there was no sufficient or just cause established by the Appellant for permitting him to withdraw his consent. Further, it has come on record that the Respondent acted upon the Consent Terms dated 6th October, 2008 and performed her obligations and committed herself to waive the claim of maintenance for herself and also streedhan including to withdraw civil and criminal actions initiated by her against the Appellant. Even for this reason, the Appellant cannot be permitted to withdraw his consent as it would result in bestowing premium on the Appellant inspite of his unjust and inequitable request to allow him to of unilaterally withdraw the consent. We are in agreement with the said conclusion reached by the Family Court.

18. In this view of the matter, the rejection of the application preferred by the Appellant for withdrawal of his consent was inevitable; and at the same time, the Court was duty bound to dissolve the marriage between the parties and pass a decree of divorce by mutual consent on the basis of the Consent Terms already filed on record accompanied by a formal application/Petition filed by the parties to grant such decree. The Family Court has also adverted to Rule 31 of the Family Courts (Maharashtra) Rules, 1987. The same reads thus:

31. Settlement before Counselor: - When the parties arrive at a settlement before the Counselor relating to the dispute or any part thereof, such settlement shall be reduced to writing and shall be signed by the parties and countersigned by the Counselor. The Court shall pronounce a decree or order in terms thereof unless the Court considers the terms of the settlement unconscionable or unlawful or contrary to public policy.

19. Notably, these Rules have been framed by the High Court in exercise of power bestowed in Section 21 of the Family Courts Act, 1984. In terms of Section 21(2)(c) of the Act, Rules can be framed to deal with the subject of efforts to be made by the Family Court and the procedure to be followed for assisting and persuading parties to arrive at a settlement. Rule 31, inter-alia, deals with that subject. In terms of this Rule, therefore, the Court may pronounce a decree on the basis of the consent terms reduced into writing and signed by the parties, unless it were to be of the opinion that the terms of the settlement arrived at between the parties are unconscionable or unlawful or contrary to the public policy. None of these issues have been raised by the

Appellant. We, however, make it clear that Rule 31 will be of no avail to pass a decree on the basis of petition such as for relief u/s 13 of the Act of 1955, as those petitions cannot be decreed merely because it is not defended or that parties have consented for passing decree on the ground pleaded therein. We have already alluded to this aspect hitherto.

20. For the view that we have taken, we find no infirmity in the order passed by the Family Court in rejecting the application (Exhibit 80) preferred by the Appellant and instead, having decreed the Petition by dissolving the marriage solemnized between the Appellant and the Respondent and granting decree of divorce by mutual consent on the basis of the terms specified in Consent Terms (Exhibit 71).

21. We, reserve the remedy of the parties to resort to appropriate proceedings for effectuating the terms agreed upon including regarding access of children as provided in the Consent Terms (Exhibit 71), which proceedings will have to be decided on its own merits in accordance with law. All questions in that behalf are left open.

22. Hence, this Appeal ought to fail. The Appeal is, therefore, dismissed with costs quantified at Rs. 20,000/- (Rupees Twenty Thousand) to be paid to the Respondent within four weeks from today.