

(2008) 06 BOM CK 0172
In the Bombay High Court
Case No : Civil Reference No. 2 of 2007

Principal Judge, Family Court

APPELLANT

Vs

Nil

RESPONDENT

Date of Decision : 12-06-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 113

Constitution of India, 1950 — Article 142

Hindu Marriage Act, 1955 — Section 10, 13, 13B, 13B(1), 13B(2)

Citation : AIR 2009 Bom 12 : (2008) 4 ALLMR 461 : (2008) 4 BomCR 539 :
(2008) 110 BOMLR 2089 : (2008) 5 MhLj 222

Hon'ble Judges : Swatanter Kumar, C.J;V.M. Kanade, J

Bench : Division Bench

Advocate : None, for the Appellant; Jyoti Dharmadhikari, for the Respondent

Judgement

Swatanter Kumar, C.J.

The Reference

1. The Principal Judge, Family Court, Nagpur confronted with the divergent views expressed by the learned Single Judge of this Court in writ petition No. 431 of 2006 (Smt. Savitri w/o. Sudesh Subba and Anr. v. The Principal Judge, Family Court, Nagpur) and Sau. Sonali Chandak and Manishkumar Chandak Vs. NIL, , in exercise of the limited jurisdiction vested in the court u/s 113 of the Civil Procedure Code, referred the matter for opinion and guidance of this Court vide his order dated 13th September, 2007 on the following questions:

i) Whether the statutory waiting period of six months u/s 13B(2) of Hindu Marriage Act can be waived by the Trial Court or not may kindly be decided.

ii) Necessary guidance or directions may kindly be issued as prayed.

2. Before discussing the merits of the arguments raised by the learned Counsel for the parties, reference to basic facts would be necessary. Facts giving rise to the reference

3. Tushar and Sou. Meenal were married at Nagpur on 9th May, 2006 according to Hindu rites. They lived together as husband and wife and cohabited at Vadodara, Gujarat State till 1st September, 2006. According to the parties, attitudinal differences arose between the parties and they started living separately. Various efforts to improve their relations were made by their relatives and friends but were in vain and they continued to live separately. On 11.9.2007, they filed the petition u/s 13B of the Hindu Marriage Act, 1955 (hereinafter to be referred to as the Act) for a decree of divorce by mutual consent. Alongwith the petition, a separate application was filed by the parties praying that the trial court should condone the period of six months as contemplated u/s 13B(2) of the Act and instantaneous decree of divorce be granted in the interest of justice. The parties had relied upon the case of Sou. Sonali (supra) in support of their prayer for condoning the period of six months and for passing of a decree of divorce on mutual consent instantaneously. A divergent view of another Single Judge of this Court in another judgment, as already noticed, was also brought to the notice of the learned trial Judge resulting in passing of the order dated 13th September, 2007 making a reference to this Court.

Law relating to marriage, divorce by mutual consent and its background

4. In fact, the legal impediment faced by the court making reference emerged from the divergent views taken by the different Benches of this Court as well as by other courts. In order to understand and appropriately answer the question framed by the learned reference court, it may be useful to refer to the legal history of the institution of marriage in India and particularly, between the Hindus. The origin of marriage amongst Aryans in India as amongst other ancient people is a matter for the science of anthropology. From the very commencement of the Rigvedic age, marriage was a well established institution, and the Aryan ideal of marriage was very high. Monogamy was the approved rule, though polygamy existed to some extent. It is said that there is no real evidence of existence of polyandry and matriarchy in Vedic times. Marriage life was a strict bond and certain matrimonial offences like adultery etc. were viewed seriously and for such an offence, either of the concerned spouse could be held guilty and punished. Dissolution of marriage was normally not an accepted concept. Men were expected to honour women. She was associated in all religious offerings and rituals with her husband. As the old writers said "a woman is a half of her husband and completes him". Manu, in impressive verses, exhorted men to honour and respect women. "Women must be honoured and adorned by their fathers, brothers, husbands, and brothers-in-law who desire their own welfare. Where women are honoured, there the gods are pleased; but where they are not honoured, no sacred rite yields rewards". "The husband receives his wife from the gods, he must always support her while she is faithful". In Hindus, marriage is one of the necessary sanskaras or religious rites for all Hindus to whichever caste they belong unless the individual concerned ought to be a perpetual Bramhachari or Sanyasi. While marriage, according to Hindu Law, is a sacrament, it is also a civil contract, which takes the form of a gift in the

Brahma, a sale in the Asura, and an agreement in the Gandharva. (Muttuswami Nydakuar v, Nasukanabu (1910) 33 Mad 342. It is also said that marriage is necessarily the basis of social organisation and the foundation of important legal rights and obligations. In the earlier times, in Hindu Law, there were no less than 8 different forms of marriage and each being different from the other and at the same time, each form of marriage depicts a different stage of social progress. In consequence of the varying rates at which society had advanced in different parts of India, the forms of marriage prevailing among the Hindus and the mixed Hindu races, mostly of nonAryan origin, were of the most varied description. Brahma was one of the most recognized form of marriages and was distinguished from the other that it was a gift of a girl pure and simple. The essential ceremonies of different marriages were more or less the same. The marriage was treated primarily as a sacrament clubbed with the binding civil contract. This Court while considering the sacramental and contractual aspect of a Hindu marriage, observed in the case of Miten (supra) thus

21. Some divergent views prevailed whether under Hindu Law, as applied by courts in India, marriage was a sacrament or both, a sacrament and contract. The courts expressed the view that it was not merely a sacrament but also a civil contract. This concept was examined in relation to determination of various cases for reliefs flowing from the marriage between the parties. Introduction of the principle of a civil contract while it helped to support the conclusion reached in the particular case was, however, apt to give rise to a misconception and greater difficulties in other cases. In Hindu Law, the admixture of religion and ethics with legal precepts was naturally congruent. The ultimate view followed by the courts has been that it is not always to draw any hard line of logical demarcation between matters, secular and religious, because certain questions such as for instance as marriage and adoption had the aspects of both. Marriage under Hindu Law was primarily and essentially a sacrament. Having elements both, religion and secularity, it was the source and foundation of the status of the parties; and of their right to associate in religious observance and also of correlative rights and duties in temporal matters. Under Hindu Marriage Act, the marriage must be solemnized in accordance with the customary rites and ceremonies of at least one of the parties thereto and must fulfill the conditions prescribed for the same. The Act may not have used the expression 'sacramental marriage' but speaks of a 'Hindu marriage' solemnized in accordance with the customary rites and ceremonies of either party, presumably because of the very wide connotation of the expression 'Hindu' and the inappropriateness of emphasizing the sacramental aspects when the customary rights and ceremonies are to be solemnized. The element of consent is important as well. Thus, Hindu marriage is essentially to be construed as a sacrament coupled with the rights and duties arising under the provisions of the Act.

5. After coming into force of the relevant laws, thorny question relating to divorce vexed all concerned. In earlier Hindu Law, divorce, strictly so called, was not allowed except in certain communities and in certain circumstances. Some of

the Smitikars, though not strictly dealing with the concept of divorce in the sense it is now understood, did declare that the woman could take a second husband in certain events. There was deep rooted sentiment against any provision of divorce, when the new legislation was being forged despite the protest. The Hindu Marriage Act, 1955 thereafter specifically provided for dissolution of marriage by a decree of divorce but only on the grounds stated in Section 13 of the Act. By virtue of subsequent events, as an exception, this strict rule was liberalised by introduction of Section 13B of the Act where it was made possible to obtain a decree of divorce by mutual consent irrespective of the grounds indicated in Section 13 of the Act. But the parties were required to follow the procedure and satisfy the grounds spelt out u/s 13B. (Mulla Hindu Law, Eighteenth Edition, Vol. 2 by Satyajeet A. Desai). The provisions of Section 13B are reproduced for the purpose of further discussion:

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 Subsection (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.

Recent view of this Court on constitutional validity of Section 13B

6. Before we proceed to embark upon a detailed discussion on the interpretation of the provisions of Section 13B of the Act, it will be very apt to refer to a recent Division Bench judgment of this Court in the case of *Miten v. Union of India*. In that case, the court was concerned with the constitutional validity or otherwise of the provisions of Section 13B of the Act in so far as it related to the prerequisite period of separation for one year for instituting the petition. The constitutional validity of the provision was challenged on the ground that it was not mandatory, the legislative fixation of period of one year was arbitrary and has no nexus to the object of the Act or the provision. The court while dealing with the different contentions raised before it and after referring to various judgments of the Supreme Court, concluded as under:

The inconvenience of the petitioners that they have to stay separate for few months more is disproportionate to the social good and legislative object of fair

chance of survival of marriage. The balance clearly tilts in favour of the legislation rather than it being ultra vires. We have already noticed that Hindu marriage is a sacrament coupled with an element of contract supported by statutory provisions. Thus, it cannot be treated as a contract simpliciter which is capable of being abruptly determined at the whim and fancy of the parties to the marriage. Any approach to the contrary will adversely affect the social fabric and the institution of marriage. The parties to marriage should realise their obligation towards each other and the family, in terms of law and its social and sacrosanct values. The law requires them to stay separately for a period of one year before presenting a petition for divorce by mutual consent which can hardly be termed as an exceptional inconvenience or hardship vitiating the law. Even cases of extreme hardship are not left without remedy under the scheme of the Act. A petition for divorce by mutual consent has to be treated on different footings and it must satisfy the conditions precedent to presentation of such a petition and it is obligatory upon the court to satisfy itself regarding solemnization of marriage and correctness of the averments made in the petition. Then alone a decree under this special provision can follow. No hardship or inconvenience is projected by the petitioners to seriously challenge the constitutional validity of Section 13B of the Act. We are unable to assent to the submissions made on behalf of the petitioners that the provisions of Section 13B of the Act are ultra vires to the constitutional mandate and/or great hardship or inconvenience flow therefrom which has the effect of interfering with the fundamental freedom guaranteed under the Constitution.

Divergent views : whether six months waiting is mandatory or directory?

7. While arriving at the above conclusion, the court also had an occasion to notice the divergent view taken by different courts including this Court in relation to the period of six months contemplated u/s 13B(2) as mandatory or directory and whether it could be condoned or not by the court. These views were noticed in para 9 of the judgment which reads as under:

9. Of course, divergent views have been expressed by different High Courts and even by different Benches of the same High Courts. Various High Courts have taken view that period of six months for presentation of second motion is a mandatory requirement and the courts have no jurisdiction to waive or vary such a period. Some of the judgments taking this view are, Mohinder Paul v. Gurmit Singh 2001 (3) PLR 424, Vinod Kumar v. Kamlesh 2002(1) LJR 210, Nitin Ramniklal Jhaveri v. Padmini Nitin Jhaveri 1985(1) DMC 347, Hitesh Narendra Doshi v. Jesal Hitesh Doshi AIR 2000 A P 362. However, contrary view has been expressed by other High Courts in the cases of Dinesh Kumar Shukla Vs. Smt. Neeta, , Krishna Khetarpal Vs. Satish Lal, , Sau. Sonali Chandak and Manishkumar Chandak Vs. NIL, .

10. High Court of Andhra Pradesh in the case of Hitesh Narendra Doshi v. Jesal Hitesh Doshi AIR 2000 A P362 and this Court in Savitri w/o Sudesh Subba and Anr. v. The Principal Judge, Family Court, Nagpur W.P. No. 431 of 2006 decided

on 28th February 2008, have taken the view that the period of six months intervening the filing of the application and motion being taken out by the parties was strictly to be mandatory and not dispensable while Delhi High Court in Sh. Abhay Chauhan Vs. Ms. Rachna Singh, has taken the view that a period of six months can be waived.

8. Obviously, the Division Bench in that case was not concerned and had no occasion to conclude on this legal issue arising from the provisions of Section 13B(2) but the observation of the Division Bench in regard to the period of one year being mandatory or directory and whether compliance thereof was essential before praying for a decree of divorce on the ground of mutual consent, is relevant. The court while taking the view that these were mandatory provisions and the parties were expected to satisfy the essential ingredients of these provisions, held that the petition u/s 13B could be filed and upon due enquiry and after recording of satisfaction, a decree of divorce could be recorded by the court concerned.

13. The legislature, while introducing the Amending Act 1976, did take into consideration the following: (i) to liberalise the provisions relating to divorce (ii) to enable expeditious disposal of proceedings under the Act and (iii) to remove certain anomalies and handicaps in the existing law. These ingredients are evident from the plain language of the section and do not leave any scope for ambiguity. Thus, it would not be necessary for the court to expand its meaning and convert a mandatory provision into directory which may even result in defeating the object of the provision. In *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, the Supreme Court observed thus

It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature.

13.1 Provisions of Section 13B of the Act are mandatory and the condition precedent to the presentation of the petition set out therein had to be satisfied strictly. Further, Section 14 of the Act prior to 1976 amendment had put a further bar stating that notwithstanding anything contained in the Act, the courts shall not be competent to entertain any petition for dissolution of marriage by a decree of divorce unless the petition had been presented after a lapse of three years since the date of marriage. However, proviso to Section 14(1) provided an exception to the effect that a petition could be presented even before the expiry of the said period of three years if circumstances of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent existed and in such cases the courts may, after hearing, pronounce a decree subject to the condition that the decree shall not have effect until after the expiry of three years. In this backdrop and while amending the Act in the year 1976, the Legislature while keeping the three of its aforesaid objects in mind, reduced the period from three years to one year and maintained the language of Section 14 as well as its proviso otherwise intact. In other words, the Legislature did not

alter or change the contents of ingredients of Section 14 except to the extent of reducing the period from three years to one year. This is despite the fact that the Law Commission in its recommendations relating to Section 14 of the Act in its 59th Report in March 1974 had asked for deletion of Section 14 of the Act.

14. As already noticed, by the same Act 68 of 1976, Section 14 was amended and Section 13B was introduced in the Act. The language of Section 13B is clear and unambiguous. The Legislature in its wisdom did not introduce any relaxation in Section 13B of the Act. There is nothing in the language of section which can suggest that the provisions of Section 13B are simplicitor procedurally directed and can be moulded by the court in exercise of its judicial discretion depending on the facts and circumstances of the case. This provision is intended to liberalise the provisions relating to divorce. Being aware of the existing provisions, report of the Law Commission and the need of the society still the Legislature chose not to add any proviso granting relaxation to the conditions imposed u/s 13B(1) and/or 13B(2). It would not be permissible for the court to read the expression 'living separately for a period of one year or more' as by adding the word 'may' or for such period as the court in its discretion may consider appropriate. We shall shortly proceed to discuss the purpose of introduction of Section 13B and its object. It is a settled rule of interpretation that court while interpreting the statutory provisions would not add or subtract the words from the section nor would it give meaning to the language of the section other than what is intended on the plain reading of the provisions. Reference can be made to the judgment of the Supreme Court in *Smt. Vijayalakshamma and Another Vs. B.T. Shankar*, where the court held as under:

21. The nature, object and purpose of the Act in question have already been noticed supra. Parliament has consciously and deliberately effected certain vital and substantial changes in the personal law relating to adoptions. The statement of Objects and Reasons, so far as it pertains to the law on adoption reads as follows:

This part of the Hindu Code deals with the subject of adoptions and maintenance among Hindus.

2. With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, it has now become possible to simplify the law of adoption among Hindus. The Bill provides for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a Hindu widow will hereafter be in her own right. No person need be divested of any property which has vested in him by reason only of the fact that subsequent to such vesting an adoption has been made. This rule of divesting has been the cause of many a ruinous litigation.

22. This Court also endorsed the said position in the decision reported in *G. Appaswami Chettiar and Another Vs. R. Sarangapani Chettiar and Others*, . The extent to which and the areas and aspects or facets of old Hindu law which

required modernisation, modification and alteration are matters of legislative policy and merely because a particular change has been brought into effect in respect of one facet of law in force and a provision has been made specifically only to that limited extent, the courts can neither by means of an interpretative process nor under the guise of ensuring parity in what it may seem to the court would be desirable to achieve uniformity (an area once again exclusively pertaining to policy of legislation) add to or alter the language, structure and content of a provision by reading into it what was not specifically intended or what perhaps was deliberately and consciously avoided by Parliament itself. Section 7 bears the caption "Capacity of a male Hindu to take in adoption" in the same manner the immediately following Section 8 bears the heading "Capacity of a female Hindu to take in adoption." When Parliament resolved to provide for and insist upon the obtaining of the consent of the wife or if there are more than one living wife the consent of all of them, unless they or any one of them suffered any of the enumerated infirmities rendering such consent unnecessary, the conscious and positive as well as deliberate omission to provide for a female Hindu seeking or obtaining any such consent from a co or junior widow is a definite pointer to indicate that the legislative intent and determination was not to impose any such clog on the power specifically conferred upon the female Hindu may be for the obvious reason that under the scheme of the Act the Hindu female has been enabled and empowered to adopt not only to herself but also to her husband, and also in tune with the changed and modern concept of equality of women and their capabilities to decide independently statutorily recognised, and the very reason for insisting upon such an authority or consent from the husband or the sapindas under the old Hindu law having lost its basis and thereby ceased to be of any relevance or valid purpose whatsoever. In such circumstances, acceding to the submission to read into Section 8 the stipulation in the proviso to Section 7 with the Explanation thereto would amount to legislation by courts on the lines as to what in its view the law should be, which is wholly impermissible for courts, dehors any justification or necessity for such a provision. In our view, there is no necessity even for such a provision in the context of the changed circumstances brought about by the various alterations and amendments to the Hindu Code regulating hitherto the personal law of the Hindus.

Ratio in the case of Sureshta Devi

8. The learned Counsel appearing for the parties had also relied upon the judgment of the Supreme Court in the case of Smt. Sureshta Devi Vs. Om Prakash, , to buttress their submission. It may be noticed that this judgment hardly helps the cause of the petitioners. In this case, the Supreme Court had primarily interpreted the expression appearing in Section 13B of the Act and held that parties could be living under the same roof but still may be living separately in law as there is no cohabitation of matrimonial relationship between them. While deciding this as a principal controversy, the Supreme Court clearly observed that the jurisdiction of the court to pass a decree by mutual consent is

a limited jurisdiction, the court has to pass a decree upon satisfaction of the requirements of law and after expiry of the specified period. While referring to the judgments of the different courts in para 12 of the judgment and analysing the provisions of Section 13B of the Act, the Supreme Court 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. Subsection (2) of Section 13B 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.

9. The above dictum of the Supreme Court clearly lays down the law that the period specified by Legislature as prerequisite to filing and grant of a decree for divorce on mutual consent is expected to be complied with and its observance is not discretionary at the whim of the court. The legislative scheme clearly shows that the specified periods are not optional for the parties to be complied with because the cause of action is completed only upon conclusion of the period and clearly mandates the court to satisfy the requirements of law before passing a decree.

10. As far as the judgment of the Delhi High Court in the case of Pooja Gupta v. Nil 2005(1) DMC 571, relied upon by the parties is concerned, it relates to the period of one year stated u/s 13B(1) of the Act and it is in apparent conflict with the Division Bench judgment of this Court in the case of Miten (supra) and for the reasons recorded in that judgment, we are unable to concur and accept the view of Delhi High Court in the case of Pooja Gupta. In the cases of Anjana

Kishore v. Puneet Kishore, (2002) 10 SCC 194 and Sanghamitra Ghosh Vs. Kajal Kumar Ghosh, , the Supreme Court was primarily concerned with the transfer petitions filed before it and keeping in view the peculiar facts and circumstances of those cases and being satisfied that the marriages had broken down irretrievably, the Supreme Court in exercise of its special jurisdiction under Article 142 of the Constitution of India had allowed a decree of divorce by mutual consent. No question of law was discussed in these cases and thus, they cannot be treated as binding precedence especially when the Supreme Court itself noticed in the judgment that in the peculiar facts and circumstances of the case and particularly in exercise of its power under Article 142 to do complete justice between the parties, the court has passed those orders. No other court including the High Court is empowered to exercise jurisdiction under Article 142 of the Constitution of India and in fact, the courts do not have powers akin to such powers particularly in face of the provisions of the special Act viz. Hindu Marriage Act. In the present case, we are concerned with the propositions of law simplicitor.

Divergent view of Learned Single Judge

11. In the case of Sou. Savitri (supra), the learned Single Judge of this Court had followed the reasoning given by the Supreme Court in the case of Smt. Sureshta Devi and concluded that the Family Court's view as recorded in paragraph 7 of that order that such application should be considered after the expiry of six months was correct and thus, declined to entertain such petitions before the specified period. However, in the case of Sou. Sonali, another Single Judge of this Court recorded that the broken iron can be joined together but not broken hearts and while referring to the judgment of Andhra Pradesh High Court in K. Omprakash Vs. K. Nalini, and Pooja Gupta (supra), it is held that the period of six months could be waived by the court and made the rule absolute in that case. In this judgment, neither the legislative scheme nor principles of legislative interpretation were discussed. Furthermore and pertinently the judgment of the Supreme Court relied upon by the learned Single Judge in the case of Smt. Savitri, was not even referred to. The said judgment was decided on 28th February, 2006 while the case of Sou.Sonali was decided on 3rd August, 2007 and even the other view of the earlier judgment of the learned Single Judge was not even noticed in the subsequent judgment.

Meaning and interpretation of Section 13B

12. After having dealt with these judgments let us proceed to examine and interpret the provisions of Section 13B of the Act on their plain reading. Section 13B is a complete code in itself. It 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. The Act contemplates different remedies which are available to a spouse to a marriage under different circumstances. For availing of that relief, it is

mandatory for the parties to satisfy the requirement and grounds specified under that provision. For example, seeking a decree for judicial separation, the parties must satisfy the grounds spelt out by the legislature u/s 10 of the Act wherefrom, the parties seek a decree of divorce. They are expected to comply with the statutory requirements and establish and prove by due and cogent evidence either of the grounds stated in subclauses 13(1)(i) to (vii) and the other provisions of that section. Unless the court is satisfied that either of the grounds stated u/s 13 of the Act is satisfied, the court obviously cannot pass a decree dissolving the marriage between the parties by passing a decree of divorce. In other words, the jurisdiction of the court to grant a relief under the provisions of the Act is controlled by legislative limitation of the respective provisions. To enact law is a matter in the domain of the legislature. Despite observations of the Supreme Court in paragraph 91 of its judgment in the case of Naveen Kohli Vs. Neelu Kohli, to consider irretrievable breakdown of marriage as a ground of divorce, the legislature in its wisdom has not vested the Courts with the power to dissolve a marriage by a decree of divorce on the ground that marriage between the parties has irretrievably broken down.

13. The rule of reasonable proof is applicable to the proceedings before the court of competent jurisdiction either u/s 10 or u/s 13 of the Act, as the case may be. In other words, burden of proof shall lie upon that party to establish and prove the grounds pleaded by it for seeking such a relief from the court. There is clear distinction between the provisions of Sections 10 and 13 on one hand and Section 13B of the Act on the other. In terms of Section 13B, there is hardly any burden of proof on either of parties as the foundation thereof is by mutual consent. The court is granted power to dissolve the marriage between the parties by a decree of divorce on the ground of mutual consent. In fact, it is an exception to the proceedings under any other provision before the court of competent jurisdiction for dissolving the marriage between the parties. Mutuality, in terms of the judgment of the Supreme Court in Smt. Sureshta Devi's case, must exist at the time of filing of the petition as well as at the time of passing of a decree with exception where consent was obtained by fraud etc. In other words, the mutuality between the parties should exist at all relevant times and it has to be in conformity with the provisions of the Act. Section 13B does not provide omnibus jurisdiction to the court but grant such specific and/or special jurisdiction. The court can pass decree for divorce on mutual consent only upon satisfaction of the grounds stated therein and subject to the satisfaction of the period specified in law. The court has not been vested with any specific or even general power to condone the delay or waive the period stipulated either u/s 13B(1) and for that matter, u/s 13B(2). The legislature in its wisdom allow the parties a limited right to seek divorce by mutual consent provided the parties present the petition in the court of competent jurisdiction on the ground that they have been living separately for a period of one year or more, they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Once such a petition is filed, the court has to satisfy itself of

these requirements and thereafter, the parties are expected to take out a second motion which again has to be a joint motion but not earlier than six months and later than 18 months. Still the parties have to satisfy the court that the said petition was not withdrawn and the court is expected to record its satisfaction after hearing the parties and on making such enquiry as it thinks fit that the averments in the petition are true, court may pass a decree declaring the marriage to be dissolved on the ground of mutual consent. Apparently, the decree for divorce by mutual consent is dependent on fulfillment of the requirements aforementioned and due satisfaction of the court. This cannot be termed as merely directory as the statute does not even impliedly indicate such intent of the legislature. The provision of a statute must be given its plain meaning and requirement of law stated under those provisions should be satisfied before the relief under the specific provision can be granted to the parties.

Wisdom behind waiting period of six months and why it should not be waived

14. The provisions of Section 13B(2) of the Act provide that parties should be given six months period to ponder and reconsider their decision which is obviously after filing of the first motion in terms of Section 13B(1) of the Act. This is a kind of benefit founded on social outlook and undisputed legislative intent. The parties are expected to consider whether their mutually taken decision to file a petition u/s 13B(1) was correct one and it should be affirmed by filing a second motion and praying for a decree of divorce on mutual consent or they should withdraw the first motion or render it ineffective and live together if their marriage can be saved. 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 u/s 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 13B 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. In the case of Vijaya Raghavan (N) v. Sharada (K) AIR 2001 Karn 300, the court expressed the view that democracy will flourish only if the courts follow the rule of law. Justice is to be imparted according to law and not according to whims and fancies of court. The section when directs that remedy u/s 13B can be availed of by moving the District Court, petition u/s 13B should be filed in that court and in accordance with law. In the case of Mohanan v. Jijiya Bai (1987)2 HLR 709, the Court expressed the view that the court is expected to conduct an enquiry and the court without being satisfied about the genuineness of the consent and whether consent was willingly given by the parties, it will not be desirable to pass an order. It is for the parties to affirm their consent or to withdraw for good and bonafide reasons the consent at a subsequent stage. (Mayne's Hindu Law & Usage, revised by Justice Ranganath Misra, Former Chief Justice of India, 15th Edition).

16. We have already noticed that in number of cases, different High Courts have also taken a view that waiting period of six months is mandatory for granting divorce by mutual consent and it is not directory. The court also has no power to relax the period. Reference can also be made to the case of Hitesh Narendra Doshi v. Jesal Hitesh Doshi 2000(2) HLR 45.

Mandatory nature of conditions stated in Section 13B

17. The consent given by the parties for filing petition for divorce on mutual consent is not an irrevocable consent. The parties can withdraw such consent of course, for appropriate reasons. Even second motion has to be presented by both

parties by filing a joint petition. The provisions of Section 13B do not in any way, encroach upon the jurisdiction of the court of competent jurisdiction under the provisions of Sections 10 and 13 of the Act. This itself indicate that Section 13B is certainly a special provision but has to operate upon satisfaction of the conditions and grounds specified in that section. In any other cases of serious nature, the parties are not left without remedy and they can always approach the court under different provisions but if they wish to seek dissolution of marriage by mutual consent, it essentially must be in compliance and in conformity to the provisions of this special section.

18. Section 13B of the Act states the grounds on which and the period of limitations which shall constitute a complete cause of action for the parties to file a petition for divorce by mutual consent. Wherever any of the ingredients are missing or are not satisfied, the petition itself cannot be presented, as it would affect the very jurisdiction of the court to entertain such a petition. Legislature has not granted any power to waive or condone the periods of limitation specified under that provision. *Ex turpi causa non oritur actio*. Absence of complete cause of action would be a legal impediment in institution and continuation of such proceedings. Thus, the parties have to satisfy the court that ingredients of Section 13B(2) are satisfied and the averments made in the petition are correct to enable the court to pass a decree.

19. Term "waiver" means abandonment of a right which is express or implied from conduct. The word "waiver" is used in many senses. A waiver is relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. It is well known that waiver is an intentional relinquishment. In other words, the principle of "waiver" connotes action between the parties. In the proceedings u/s 13B either the concept of waiver or condonation as understood in strict legal parlance is not applicable. Absence of these two concepts of law in the language of the provisions cannot be supplied by implication and addition or subtraction of words.

20. As the rule of plain interpretation is squarely attracted to the provisions of Section 13B(2) of the Act, there is hardly any need for the court to either adopt stringently strict or unnecessarily liberal construction by subtraction or addition of words to the provisions. It must be given its ordinary plain meaning and enforced accordingly without unjust and unintended exceptions. The Maxim *Ubi jus, ibi remedium* is an accepted maxim in its application to the field of interpretative process of statute but equally true is the canon that every available remedy has to be invoked in accordance with the provision which provides for such remedy. The section lays down the basic requirements which must be fulfilled before invocation of the remedies specified. It also imposes the duty upon the court to adhere to those stated requirements and there is hardly any occasion for the court to avoid the specified conditions. Just because the parties would have to wait for a period of six months from the date of

presentation of the first motion, cannot be termed as hardship much less an undue hardship justifying avoidance of rule of plain interpretation. In the case of *Sterling General Insurance Co. Ltd. Vs. Planters Airways Pvt. Ltd.*, the Supreme Court stated that the words "undue hardship" mean something which is not merited by the conduct of the claimant, or is very much disproportionate to it. It is also held that "undue hardship" indicates that the extent of hardship must be undue and not merely any hardship which is bound to result from the application of the provisions. Thus, on understanding of the word "undue hardship", it is clear that the hardship has to be exceptional. Here it is relevant to refer to observations of this Court in *Miten's* case (supra).

23. Of course, one idea being the reasoned reform is to liberalise law relating to marriages. Hindu marriage is complete only after the performance of Shastrik rites and ceremonies or by customary rites and ceremonies prevalent on the side of either party to the marriage. According to Shastrik ceremony marriage, Saptapadi is essential 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 reasons/justification. Differences of trivial nature and inconveniences simplicitor arising in daytoday life are obviously not the grounds intended by the legislator to be grounds for dissolution of marriage by mutual consent, particularly before seriously attempting for proper reconciliation. 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. The basic human and social problem is of maladjustment of couples, as marriage could fail not because of wickedness of one party or the other but they just fail. Many couples despite attempts of reconciliation over a reasonable time and despite of trying their best to make their marriages a success, may still fail and take recourse to dissolution of marriage. But every trivial difference may not be a justifiable ground for invoking this provision without permitting the statutory period to lapse. Educated and more civilized persons are expected to have greater respect for the institution of marriage and to their togetherness. In their togetherness, they could always make space for each other's shadow. This maladjustment should discernly be distinguished and understood in law from intransigent incompatibility or irretrievable breakdown of marriage. The principle of breakdown has found recognition in different forms. Somewhere such breakdown may be left to be judged under the discretion of the court while in the other, the Legislature may provide the criterion and impose certain limitations. Section 13B of the Act is a combination to some extent of both these principles. It is not necessary for any

party to prove culpability or guilt or innocence or either of them but marriage is expected to be dissolved because it has broken down irretrievably and it should satisfy the limitation stated in the provisions. It is evident that if divorce is made too easy or too difficult, both will result in frustrating the legislative object and the rule of reasonable interpretation is best applied to such provisions. In matters of divorce, the court has to view not in terms of success or failure of a legal action alone but also examine a social therapeutic problem which needs a socially desirable, humane and just solution.

24. The learned Counsel appearing for the petitioner was unable to make good his submission or any plausible ground that provisions of Section 13B, in so far as it imposes the condition requiring parties to live separately for a period of one year prior to filing of the petition, is unconstitutional or it is not in line with the object of the statute. The Act is a social legislation primarily intended to regulate and control the law relating to marriage and divorce. The Act specifically accepts the customary law to the extent indicated in the provisions. The legislative intent and judicial pronouncements in such matters have a great impact on the social values and the institution of marriage. Both these factors are relevant considerations and have to be kept in mind by the court while interpreting or adjudicating upon the vires of these provisions. All that the provision requires is the petition for divorce on mutual consent should be filed at least not before the period of one year immediately preceding the presentation of the petition when the parties live separately. This period is intended to provide healing time to the parties to seriously ponder over their differences and settle their minds so as to know whether their disputes or differences are capable of resolution and whether they could restore their matrimonial home happily or the differences are of such kind or they belong to such class where continuation of matrimonial relationship is impossible as it has irretrievably broken down. If the continuation of the marriage results in continued mental torture, there is no compatibility and the parties would be free to ask for the relief of dissolution. Liberal construction, as suggested by the petitioner, in fact, would frustrate the very object of the Act and encourage complete disharmony in the continuance of institution of marriage and may even be without a rational reason.

24.1. The legislature after considering various facets, in its wisdom, has provided the period of one year when parties would live separately and then alone approach the court of law for a decree of divorce by mutual consent. The school of thought advocating instant dissolution of marriage on the pretext of social freedom has obviously not found favour with the legislature. There is no justification for the court to grant such a meaning to the provisions of the section. This stage should not come in a hurried manner by impulsive decisions taken in the heat of the moment. It goes with the principle of canons of common prudent human behaviour that you must think objectively, purposefully and avoid hasty decisions. Human behaviour is not static. It alters with time and situation. Objectivity and rationality should be the foundation of such vital decisions and they ought not to be taken casually to avoid little inconveniences.

Every difference or little inconvenience in married life necessarily would not result in irretrievable breakdown of the marriage as most of such differences/inconveniences can be amicably resolved provided parties are given the time and space to consider and reconsider their decisions rather than rushing to the court for dissolving the marriage. For example, where a couple has just been married, they may instantly on a small issue or a difference of immaterial consequences, may rush to the court because of hurt ego or otherwise and decide to dissolve their marriage within a few days after marriage is solemnized.

24.2. Hindu marriage being a sacrament, in the matters of divorce, an approach of serious reconsideration over a reasonable time coupled with limitations of law is preferred rather than of instant actions and reactions resulting in declaring their marriage as failure. Complete procedure is provided u/s 13B which is in consonance with law and constitutional mandate. None of the provisions of Section 13B affects mandate of equality before law or equal treatment in law. Merely because the Legislature in its wisdom requires the parties to wait for a period of one year while living separately, it can neither be termed as unconstitutional or having no nexus with the object of the Act. As already noticed, marriage is performed in accordance with the customary rites of the community, the family and friends are effectively involved in a marriage of the parties. Once the marriage is solemnised, it is expected from the family and the friends that they would make all efforts to save the marriage between the parties and help them to overcome their differences and difficulties. Undue anxiety to have recourse to legal proceedings attracts young generation as it appears to be an easy resolution of their problems. This may appear to be so at the first blush but when examined in some depth with reflections on consequences and effects of such an approach, it turns out to be more disadvantageous than beneficial to the parties. In the age of Information Technology with modernization in various facets of human life, tendency to take impulsive decisions is on the rise. Tolerance in its basic application, as opposed to hurried, ill considered decisions, is on the decline. Today when the entire world has become a global family, there is tremendous scope for better mutual understanding and sensitive attitude towards human relationship even within family. Ability to act faster in the modernized age necessarily must not result in instant decisions relating to delicate human relationship. It is socially and even legally obligatory for the parties to attempt a serious reconciliation of a failing matrimonial relationship and even the courts are duty bound to ensure that such an attempt is made. Like commercial commodities and/or services, marriage should not become a commodity as it will prove disastrous to the social fabric and the very institution of marriage under the Hindu Law. Impulsive decisions to be recognized by law without even affording an opportunity to seriously ponder over the marital issues is not what the legislature had mandated in the language of Section 13B of the Act. Instantaneous reaction to a situation may be arising out of the mistake or error on part of either of the spouse and, therefore, to dissolve the marriage between them without even letting a reasonable time to pass, would not be in

conformity with the concept of the marriage being a sacrament backed by legal provisions. Impulsiveness in human behaviour is a factor which even according to the Psychologist would adversely affect rational decisions in human relationship

25. Social tolerance understood in its correct perspective would take in its ambit individual tolerance within family. It is essential that spouse should have certain element of tolerance and better understanding for harmonious relationship. Mutual respect should coexist with temperamental harmony within the family and parties to a marriage should always be provided with fair opportunity and environment before they take serious decisions affecting the marital life. Tremendous increase in institution of divorce petitions either by mutual consent or otherwise may not be considered as a sign of social freedom or progressiveness but it exhibits intolerance. Changing socioeconomic conditions and effect of modernization may encourage persons to adopt liberal lifestyle but it should not be to such an extent that sanctity of institution of marriage and the law governing the same is seriously prejudiced. The shift from "cannot live without you" to cannot live with you" may sound in poetic rhythm or may reflect phonetic similarity but viewed from the angle of law, social values and concept of marriage being a sacrament, the gap between the two is very wide. This distance is intended to be covered by bridges formed from proper advice, counseling, expiry of reasonable time (healing period) providing opportunity to the parties to arrive at a balanced decision. They are expected during this period to see life 'without each other' in contrast to 'with each other'. They are required to think about the inconveniences and hardships which they would face individually and together and impact of their collective decision on their social life, welfare of the family and the society of which they are part. They are expected to put their minds together to examine the cause of irritations or inconveniences in their married life and weigh it against a happy married life which possibly could be revived. Impulsive and abrupt decisions in relation to such a vital aspect of life should normally be avoided. The period of separation prior to presentation of petition for divorce could safely be treated as a healing or cooling period for the parties which enable them to reassure each other of their collective existence.

21. Merely that the parties to the marriage would have to wait for a period of six months where they have the choice to live apart from each other and even live under the same roof without cohabitation, is certainly not a reason which can be termed as an undue hardship arising from the application of the provisions of Section 13B of the Act in its correct perspective. Any other interpretation is likely to defeat the legislative intent of protecting institution of marriage as well as granting opportunity to the parties to ponder over their decision with some seriousness and rethinking upon the pros and cons and consequences of their decision in moving the first motion. In the case in hand, the applicants have neither pleaded nor made out any case of hardship and/or undue hardship.

22. In our considered opinion, there is no occasion for the courts to exceed the limits of the specified jurisdiction and make exceptions to the application of law.

Very strong and exceptional circumstances should exist before departure can be made from observance of law and that too such an interpretation should also be completely in line with legislative object and must not defeat public good or public policy. A communi observantia non est recedendum. (From common observance there should be no departure.) No compulsive grounds have been made out by the petitioners which can persuade the court to establish any exception to the rule of common observance to law. With respect, differing with the views taken by the other High Courts as well as the learned Single Judge of this Court in the case of Sou. Sonali, we would, in addition to the reasoning given in this judgment, concur with the view expressed by the Single Bench of this Court in Smt. Savitri's case (supra) and particularly, the Division Bench judgment of Andhra Pradesh High Court in Hitesh N. Joshi's case (supra). The Division Bench of Andhra Pradesh High Court after discussing the law in some detail stated that the timeframe of six months of wait has been set in the provision u/s 13B(2) with a definite purpose and object of giving time to the parties for introspection and reconciliation as it may be possible for the parties to reunite by setting aside their differences and when even they failed to do so, they are always free to file the second motion. Otherwise, there was no purpose or object for the Parliament to fix the period of 6 months as the minimum period and expanding it to the period of 18 months.

23. This reasoning needs to be reemphasized in the light of the fact that Marriage under the Hindu Law is not a contract simplicitor. Once Section 13B(2) stands as a valid piece of legislation on the statute book, it needs to be interpreted on its plain language and without any variation in as much as the Legislature has not vested the courts with any power to give away with the statutory period of six months u/s 13B(2). The legislative policy as reflected from the various provisions of the Hindu Marriage Act is to protect the institution of marriage and prevent decay of social values related to the institution of family. Of course, by amendments, the process for dissolving the marriage has been liberalised but essentially the liberalized process has to operate within the framework of the provisions which provide for such remedy. It can hardly be permissible that the statutory provisions should be moulded to suit the facts of each case and that too only on the ground of convenience of parties. In no case, the legislature has left the parties without remedy. As already noticed, Section 14 is a clear example of intention of legislature which allows the parties to file a petition for divorce even prior to the period of one year stated u/s 13 of the Act under exceptional circumstances. To expand the scope of specified jurisdiction of the court under the special statute by judicial pronouncement and that too to the extent that it will be opposed to the specific language of the provision would hardly be permissible.

Reference answered

24. For the reasons aforerecorded , we have no hesitation in answering the question referred to this Court by the learned Principal Judge, Family Court,

Nagpur as under:

i) The waiting period of six months (i.e. from the institution of the first motion to the moving of the second motion) is mandatory and cannot be waived by the court of competent jurisdiction. It is a period during which the parties are expected to ponder and seriously consider their decision to sever the matrimonial ties. Thus, the second motion should be entertained and decided in accordance with the provisions of Section 13B(2) by the court upon due application of mind and recording the satisfaction as contemplated under that provision.

ii) It is desirable that each case is decided by the court of competent jurisdiction with reference to the facts and circumstances of such case and in accordance with law. No further guideline is called for.