

(2011) 09 CAL CK 0109

In the Calcutta High Court

Case No : F.A.T. No. 419 of 2008 (C.A.N. 8852 of 2008) and F.A. No. 116 of 2006 (C.A.N. 6878 of 2010)

Shrimati Rita Bhattacharjee

APPELLANT

Vs

Shri Santiranjan Bhattacharjee
 Shrimati Swapna Mukherjee (Nee Roy) Vs Shri Jyotirmay Mukherjee

RESPONDENT

Date of Decision : 01-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 3
Constitution of India, 1950 — Article 141, 142
Hindu Marriage Act, 1955 — Section 13, 13(1), 13(2), 13B, 13B(1)

Citation : (2012) 1 CHN 636 : (2011) 3 DMC 632

Hon'ble Judges : Tapan Kumar Dutt, J;Subhro Kamal Mukherjee, J;Prabhat Kumar Dey, J

Bench : Full Bench

Advocate : Lakshmi Kumar Gupta, Mahendra Prasad Gupta, in F.A.T. No. 419 of 2008, Biswajit Basu, Koushik Chatterjee, Susenjit Banik, P. Goswami and Riya Banerjee, in F.A. No. 116 of 2006, for the Appellant;Animesh Das in F.A.T. No. 419 of 2008, Pradyumna Sinha in F.A. No. 116 of 2006, for the Respondent

Judgement

Subhro Kamal Mukherjee, J.—We are called upon to answer a reference on the requisition of a Division Bench in connection with two matrimonial appeals.

2. Before we enter into the questions referred to before this Bench, we propose to deal with the facts relevant to decide this reference.

3. On April 28, 2008, Shrimati Rita Bhattacharjee filed Matrimonial Suit No. 298 of 2008 in the court of the learned District Judge, Hooghly. The suit was filed u/s 13(1)(ia) of the Hindu Marriage Act, 1955. Eventually, the suit was transferred to the court of the learned Additional District Judge, Third Court, Hooghly. By judgment and decree dated September 3, 2008, the learned Additional District Judge dismissed the suit ex parte.

4. Being aggrieved she has come up with this appeal, which has been tendered

under F.A.T. No. 419 of 2008. The appeal was filed on September 19, 2008.

5. In the said appeal, both the wife-appellant and the husband-respondent jointly filed an application for recording compromise. The application was filed on September 23, 2008 under filing number C.A.N. 8852 of 2008. In such application, the parties prayed for disposal of the appeal in terms of the compromise treating the terms of compromise to be part of the decree by granting a decree of divorce by dissolving the marriage of the parties.

6. Shrimati Swapna Mukherjee (nee Roy), as the Plaintiff, on January 22, 1998, instituted a suit for divorce against her husband u/s 13(1)(ia) of the Hindu Marriage Act, 1955. The suit was filed before the learned District Judge, Alipore, District - South 24-Parganas, and was registered as Matrimonial Suit No. 85 of 1998. The suit was eventually transferred to the court of the learned Additional District Judge, Ninth Court, Alipore, and was re-numbered as Matrimonial Suit No. 76 of 1998. Upon a contested hearing, the learned Additional District Judge, by judgment and decree dated January 30, 2006, dismissed the suit.

7. Being aggrieved the Plaintiff-wife has filed this appeal on March 1, 2006. The appeal has, since, been registered as F.A. No. 116 of 2006.

8. In the order of reference it was noted that two applications filed in those appeals were heard analogously. Mr. Biswajit Basu, learned advocate appearing for the Appellant in F.A. No. 116 of 2006 candidly conceded that as on the date of making the reference, that is, on January 12, 2009, no application in connection with the said appeal was pending before the Division Bench. The application for recording compromise in the said appeal was filed on July 29, 2010, that is, long after the date of requisition. The application was filed under C.A.N. 8678 of 2010.

9. Mr. Mahendra Prasad Gupta, learned advocate appearing for the Appellant and Mr. Animesh Das, learned advocate appearing for the Respondent in F.A.T. 419 of 2008, jointly submit that the said application dated September 23, 2008 is for recording compromise in an appeal pending against the decree of dismissal passed in a matrimonial suit.

10. Mr. Biswajit Basu, learned advocate appearing for the Appellant and Mr. Pradyumna Sinha, learned advocate appearing for the Respondent in F.A. No. 116 of 2006, jointly submit that the application dated July 29, 2010 is, also, an application for recording compromise in an appeal filed against a decree of dismissal in a matrimonial suit.

11. It was categorically stated by the learned advocates for the parties that they have never intended nor filed any original petition u/s 13B of the Hindu Marriage Act, 1955 inviting the court to pass decree in terms of Section 13B of the Hindu Marriage Act, 1955.

12. Nevertheless, the Division Bench made this requisition for reference proceeding on the basis that those applications are, in substance, applications u/

s 13B of the Hindu Marriage Act, 1955 and the decree of divorce by mutual consent could only be granted in exercise of the powers vested in Court u/s 13B of the said Act.

13. The points for reference are as under:

1. Whether a Division Bench, vested with determination to take up appeals against the decree arising out of proceedings under Hindu Marriage Act and the applications in connection with such appeals, is entitled to take up an original application for divorce by mutual consent u/s 13B of the Act filed direct before such appellate forum?

2. Whether the directions given by the Supreme Court in the cases of Shasi Garg, Radha, Mrs. Payal Jindal and Sandhya Rani (supra), should be treated to be valid precedent in terms of Article 141 of the Constitution of India authorising any other courts to adopt the said procedure?

3. Whether Section 13B of the Act authorises an appellate court dealing with an appeal against a decree passed in the proceedings u/s 13 of the Act to grant relief in terms of Section 13B of the Act or such application should be filed only before the district court specified in Section 19 of the Act?

4. Whether the waiting period mentioned in Section 13B(2) of the Act is mandatory or directory?

14. u/s 3(b) of the said Act of 1955, "district court" means, in any area for which there is a City Civil Court, that Court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court, which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in the said Act.

15. Section 13 of the said Act provides that any marriage solemnized, whether before or after the commencement of the said Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the grounds mentioned in the said Section.

16. Section 13B of the said Act was inserted by the Marriage Laws (Amendment) Act, 1976 with effect from May 27, 1976. Section 13B speaks of divorce by mutual consent.

17. Under Sub-section (1) of Section 13B of the said Act, subject to the provision of the said 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 grounds 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.

18. Therefore, parties can maintain an application for divorce by mutual consent

before the district court provided the said three conditions are satisfied, that is, the parties are living separately for a period of one year or more; they have not been able to live together; and they have mutually agreed that the marriage should be dissolved.

19. Under Sub-section (2) of Section 13B, the Court shall on the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in Sub-section (1) of Section 13B and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of decree, if the court is satisfied that a marriage has been solemnized and that the averments in the petition are true.

20. Therefore, under Sub-section (2) of Section 13B, further conditions, as aforesaid, are to be fulfilled in order to pass a decree for divorce by mutual consent u/s 13B of the said Act.

21. Section 19 of the said Act provides for the forum. It provides that every petition under the said Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction:

- (a) the marriage was solemnized, or
- (b) the Respondent, at the time of presentation of the petition, resides, or
- (c) the parties to the marriage last resided together, or
- (d) in case the wife is the Petitioner, where she is residing on the date of presentation of the petition, or
- (e) the Petitioner is residing at the time of presentation of the petition, in a case where the Respondent is, at that time, residing outside the territories to which the said Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

22. Section 21 of the said Act provides that subject to other provisions contained in the said Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

23. Section 13B of the said Act gives a special power empowering the court to pass a decree for divorce by mutual consent even in the absence of existence of any of the ground mentioned in Section 13 of the Act. Section 13 of the said Act empowers the court to pass a decree for divorce on a petition presented by either the husband or the wife for a decree of divorce on any of the ground mentioned in the said Section. Section 13 does not specify any forum. On the contrary, Section 13B of the said Act provides that, subject to the provisions of the said 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. Section 13B is, therefore, to be read along with Section 3(b) and Section 19 of the said Act. Section 19 of the said Act specifically contemplates that every petition under the said Act shall be presented to the district court.

24. The said Section 13B of the said Act was enacted on the basis of public policy. Law prescribes a forum and, therefore, the parties have no choice to select their forum of convenience.

25. This is pointed out by Jessel M.R., in *Taylor v. Taylor* reported in (1876) 1 Ch. D. 426 "a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out, it means no other mode is to be adopted."

26. It was strenuously argued both by Mr. Biswajit Basu, learned advocate appearing for the Appellant and Mr. Pradyumna Sinha, learned advocate appearing for the Respondent in F.A. 116 of 2006, that the appeal court in an appeal from decree passed in any proceeding under the said Act could, also, entertain an application for recording compromise to dissolve the marriage by mutual consent. Our attention was drawn to the Section 21 of the said Act, which, inter alia, contemplates application of the Code of Civil Procedure, as far as may be, in all proceedings under the said Act. It was submitted that such compromise could be recorded under Order XXIII, Rule 3 of the Code of Civil Procedure. Strong reliance was, also, placed on a Division Bench decision in the case of *Apurba Mohan Ghosh Vs. Manashi Ghosh*, . The Division Bench held that the appeal court could record compromise and decree divorce on that basis under the general procedure provided under Order XXIII Rule 3 of the CPC in view of Section 21 of the said Act. However, it was simultaneously recorded that the appeal court could not decree divorce solely on the basis of compromise unless the appeal court was, also, satisfied that a ground for divorce specified in the statute could be traced on the record.

27. The question involved in *Apurba Mohan Ghosh* (supra) was whether there could be a decree of divorce in an appeal arising out of a matrimonial proceeding u/s 13 of the said Act on the basis of compromise. However, the referring Division Bench held that the said Division Bench was not concerned with such question and, therefore, did not intend to enter into such question. We, therefore, refrain from answering such question.

28. The point for reference before us is whether a Division Bench vested with determination to take up appeal against the decree arising out of proceeding under the said Act was entitled to take up an original application of divorce by mutual consent u/s 13B of the said Act filed direct before such appellate forum.

29. Further, whether Section 13B of the said Act authorises an appeal court dealing with an appeal against a decree passed in a proceeding u/s 13 of the said Act to grant relief in terms of Section 13B of the Act or such application should be filed only before the district court specified in Section 13B of the said Act.

30. We are of the unanimous opinion that, having regard to the scheme of the said Act, an application for divorce by mutual consent u/s 13B of the said Act being an original application could only be filed before the district court as referred to in Section 13B of the said Act.

31. Section 13B is a special provision deviating from the general provision for granting divorce on establishment of grounds mentioned in Section 13. Section 13B provides for the forum for filing such original application. It is settled law that, while hearing an appeal, the court of appeal cannot enlarge its scope. If the trial court was unable to grant a decree for divorce u/s 13B of the said Act, the appeal court, also, cannot grant such decree in appeal arising out of such proceeding.

32. Law prescribes forum and prescribes the manner in which the provision of Section 13B of the said Act is to be exercised. The court is required to exercise such power only in the manner prescribed or not at all.

33. We, therefore, hold that the Division Bench, vested with the determination to take up appeal against the decree arising out of the proceeding under the Hindu Marriage Act, 1955, is not entitled to take up an application for divorce by mutual consent filed direct before such appellate forum nor the appeal court while dealing with an appeal against a decree passed in the proceeding u/s 13 of the said Act could grant decree in terms of Section 13B of the said Act. Such application for divorce by mutual consent u/s 13B of the said Act must be filed before the district court as specified in the said Act.

34. The Supreme Court of India in the case of Shashi Garg (Smt) Vs. Arun Garg, granted a decree for divorce by mutual consent in a transfer petition. It was categorically recorded that the decree was passed in order to do complete justice between the parties and to avoid unnecessary further litigation.

35. In Radha Vs. Mohinder Kumar, , the Supreme Court of India granted a decree of divorce by mutual consent in terms of the deed of compromise entered into by the parties. In the said decision, the Supreme Court did not lay down any proposition that an application u/s 13B of the said Act could be filed even in a pending appeal against a contested decree of dismissal of the suit for divorce. Again the decree of divorce by mutual consent was granted in the facts and circumstances of the case.

36. The Supreme Court, however, in the case of Mrs. Payal Jindal v. A.K. Jindal , recorded that it was no doubt correct that ordinarily the Supreme Court should have relegated the parties to the matrimonial court for filing a consent divorce petition, but the decree of divorce by mutual consent was granted holding that the marriage between the parties has irretrievably broken down and in order to do complete justice between the parties. In this case no law was declared nor any point was decided.

37. In Sandhya Rani v. Kalyanram Narayanan, reported as the Supreme Court

passed a decree of divorce by mutual consent to do complete justice between the parties as the said Court was satisfied that marriage between the parties has irretrievably broken down. In this case, also, no law is declared.

38. We hold, therefore, that neither in those cases any point was decided nor any law was declared. The Supreme Court of India recorded such directions while disposing of those matters to do complete justice between the parties.

39. Article 141 of the Constitution of India gives the Supreme Court of India the supreme authority in the sense that its judgements are binding on all subordinate Courts including the High Courts. What is binding is the law declared by the Supreme Court. It is trite to say that a decision is binding not because of its conclusions, but regard to its ratio and the principles laid down therein.

40. We, therefore, hold that neither Shashi Garg (supra) nor Radha (supra), nor Payel Jindal (supra), nor Sandhya Rani (supra) are binding precedents in terms of Article 141 of the Constitution of India. In the aforementioned cases, the Supreme Court of India passed those directions in exercise of the power conferred under Article 142 of the Constitution of India, when it appeared that the marriages were dead emotionally and there was no reason that such marriages should not continue. The said power is not vested with the High Court.

41. In Smt. Sureshta Devi Vs. Om Prakash, , the Supreme Court held:

12. But the Kerala High Court in K.I. Mohanan v. Jeejabai and the Punjab and Haryana High Court in Harcharan Kaur v. Nachhattar Singh and Rajasthan High Court in Santosh Kumari v. Virendra Kumar have taken a contrary view. It has been, inter alia, held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the Court passes a decree for divorce. The satisfaction of the Court after holding an inquiry about the genuineness of the consent, necessarily contemplates an opportunity for either of the spouses to withdraw the consent. The Kerala High Court in particular has ruled out the application of analogy under Order 23 Rule 1 of the CPC since it is dissimilar to the situation arising u/s 13B of the Act.

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 six to eighteen months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under Sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable.

At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 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.

42. However, in a subsequent decision in *Ashok Hurra Vs. Rupa Bipin Zaveri*, , the decision in *Sureshta Devi* (supra) was doubted. It was observed that the observations in *Sureshta Devi* (supra) to the effect that mutual consent should continue till the decree of divorce is passed, even if the application is not withdrawn by one of the parties within the period of eighteen months, were too wide and required re-consideration in the appropriate case. The Supreme Court, however, in exercise of the power under Article 142 of the Constitution of India passed a decree of divorce by mutual consent u/s 13B of the said Act in order to meet the ends of justice in all the circumstances of the case.

43. *Ashok Hurra* (supra) was considered by a larger Bench of the Supreme Court of *Rupa Ashok Hurra Vs. Ashok Hurra and Another*, The larger Bench expressed no doubt on the principles of law laid down in *Sureshta Devi* (supra).

44. In *Manish Goel Vs. Rohini Goel*, it was held, following *Anil Kumar Jain and Maya Jain* reported in *Anil Kumar Jain Vs. Maya Jain*, that an order of waiving the statutory requirements could be passed only by the Supreme Court of India in exercise of its powers under Article 142 of the Constitution of India. The said power was not vested with any other Court. It was, further, held that statutory period of six months for filing a second motion has been prescribed for providing an opportunity to the parties to reconcile and withdraw the petition for dissolution.

45. In *Anil Kumar Jain* (supra) the Supreme Court of India observes:

31. The various decisions referred to above merely indicate that the Supreme Court can in special circumstances pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. The law as explained in *Sureshta Devi* case still holds good, though with certain variations as far as the Supreme Court is concerned and that too in the light of Article 142 of the Constitution.

46. In *Smt. Poonam Vs. Sumit Tanwar*, the Supreme Court of India held that the

Family Court, Delhi, had passed an order asking the parties to wait for statutory period of six months to file their second motion under Sub-section (2) of Section 13B of the said Act strictly in accordance with law.

47. In Hitesh Bhatnagar Vs. Deepa Bhatnagar, the ratio in Sureshta Devi (supra) has, again, been followed.

48. The issue is, therefore, no longer res integra. We hold that the waiting period mentioned in Section 13B of the said Act is mandatory and not directory.

49. Thus, we sum up our findings as under:

(i) The Division Bench, vested with the determination to take up appeal against the decree arising out of the proceedings under the Hindu Marriage Act, 1955, is not entitled to take up an application for divorce by mutual consent filed direct before such appellate forum nor the appeal court while dealing with an appeal against a decree passed in the proceedings u/s 13 of the said Act could grant decree in terms of Section 13B of the said Act.

(ii) Neither Shashi Garg (supra), nor Radha (supra), nor Payal Jindal (supra), nor Sandhya Rani (supra), is binding precedents in terms of Article 141 of the Constitution of India. The Supreme Court of India passed directions in those cases in exercise of the power conferred under Article 142 of the Constitution of India.

(iii) An application for divorce by mutual consent u/s 13B of the said Act being an original application could only be filed before the district court as referred to in Section 13B of the said Act.

(iv) The waiting period mentioned in Section 13B of the said Act is mandatory and not directory.

50. The reference is, thus, answered. We return the cases with our opinions upon the points of law for final adjudication by the Division Bench.

51. We record our appreciation for the valuable assistance rendered by Mr. Lakshmi Kumar Gupta, learned senior advocate, as amicus curiae.

52. The office is directed to supply xerox certified copy of this order to the applicant, if applied for, on urgent basis.

Tapan Kumar Dutt, J.

I agree.

Prabhat Kumar Dey, J.

I agree.