

AFRCourt No. - 58**Reserved****Case :- MATTERS UNDER ARTICLE 227 No. - 7414 of 2015****Petitioner :-** Ashish Kumar Srivastava**Respondent :-**Smt. Ankita Srivastava**Counsel for Petitioner :-**Siddhartha Varma, Anup Kumar Srivastava, S.K. Varma**Counsel for Respondent:-** Dharendra Pratap Singh, H.M.B. Sinha**Hon'ble Ram Surat Ram (Maurya),J.**

1. Heard Sri S.K. Varma, Senior Advocate, assisted by Sri Siddhartha Varma, for the petitioner and Sri H.M.B. Sinha along with Sri Dharendra Pratap Singh, for the respondent.

2. This petition has been filed for setting aside the order of Principal Judge Family Court dated 08.10.2015, deferring disposal of application (28-C) filed by the petitioner and fixing a date for framing issues in Divorce Suit and to issue direction to Principal Judge Family Court, to decree Divorce Suit in view of compromise dated 10.10.2014, entered into between the parties.

3. Ashish Kumar Srivastava (the petitioner) married to Smt. Ankita Srivastava (the respondent) according to Hindu rites on 17.05.2011. The petitioner filed a suit on 26.05.2012 (registered as Divorce Suit No. 321 of 2012) under Section 13 of Hindu Marriage Act, 1955 (hereinafter referred to as the Act) for grant of decree of divorce. It is alleged that in retaliation to this suit, the respondent initiated following proceedings against the petitioner and his family members:-

(I) Criminal Case No. 721 of 2012, arising out of Case Crime No. 270 of 2012 under Section 498-A, 323, 504, 506 IPC and 3/4 of Dowry Prohibition Act, PS Shahpur, district Gorakhpur.

(II) Case No. 564 of 2012 under Section 125 Cr.P.C.

(III) Case No. 39 of 2013 under Prevention of Domestic Violence Act, 2005.

(IV) Case No. 116 of 2013 U/S. 406 IPC and 3/4 of Dowry Prohibition Act.

(V) Case No. 1393 of 2013 under Section 323, 504, 506, 379 IPC.

(VI) Case Crime No. 116 of 2013 under Section 504, 506 IPC

(VII) Matrimonial Suit No. 712 of 2013 under Section 9 of Hindu Marriage Act.

4. The petitioner filed an application under Section 482 Cr.P.C. (registered as Criminal Misc. Application U/S 482 Cr.P.C. No. 425 of 2013) for quashing, entire proceeding of Criminal Case No. 721 of 2012, under Section 498-A, 323, 504, 506 IPC and 3/4 of Dowry Prohibition Act, PS Shahpur, district Gorakhpur. This Court vide order dated 18.01.2013 referred the dispute to Mediation and Conciliation Center., Allahabad. The parties settled their dispute before Mediator, who submitted report dated 11.09.2013. Under the settlement the petitioner had to pay Rs. 18,00,000/- as one time permanent alimony to the respondent and permit her to take ornament from bank locker. After compliance of this condition, the respondents agreed to withdraw all the complaints and suit filed by her. Divorce Suit No. 321 of 2011 has to be decreed. When the case was listed before this Court on 09.09.2014, the petitioner took time for payment of aforesaid amount as such 09.10.2014 was fixed before this Court. On 09.10.2014, the petitioner gave two bank drafts of Rs. 18,00,000/- in favour of the respondents in Court. The case was adjourned for 10.10.2014 in order to enable the parties to file written compromise. On 10.10.2014, the parties filed joint affidavit in the shape of compromise, incorporating aforementioned terms. Both the parties appeared before the Court on 10.10.2004 and filed joint affidavit in shape of compromise. Two bank drafts of Rs. 18,00,000/- was handed over to the respondent by the Court. Criminal Misc. Application U/S 482 Cr.P.C. No. 425 of 2013 was allowed and Criminal Case No. 721 of 2012 was quashed by order dated 10.10.2014.

5. The petitioner filed an application (18-C) dated 22.10.2014, before Principal Judge Family Court, for decreeing Divorce Suit No. 321 of 2012 in view of the compromise dated 10.10.2014, the aforesaid. The respondent filed an application before this Court for recalling order dated 10.10.2014. When application (18-C) came for hearing before Principal Judge Family Court, the respondent raised an objection that as she had filed an application for recalling order dated 10.10.2014 as such disposal of application (18-C) be postponed. On which Principal Judge Family Court did hear the application (18-C) on 07.01.2015. This Court by order dated 24.07.2015 rejected the recall application filed by the respondent for recalling the order dated 10.10.2014.

6. Then the petitioner filed another application (28-C) dated 30.07.2015, before Principal Judge Family Court, for decreeing Divorce Suit No. 321 of 2012 in view of the compromise dated 10.10.2014, the aforesaid, stating therein that recall application filed by the respondent has been rejected. By the impugned

order dated 08.10.2015, disposal of this application was deferred holding that divorce on compromise can only be granted according to provisions of Section 13-B and not in proceeding under Section 13 of the Act. The petitioner filed an appeal (registered as First Appeal No. 596 of 2015) under Section 19 of Family Court Act, 1984, against aforesaid order which was dismissed by order dated 18.11.2015 on the ground that the order dated 08.10.2015 was an interlocutory order and the appeal was not maintainable. Hence, this petition has been filed.

7. The counsel for the petitioner submitted that Section 28 of Special Marriage Act, 1954 provides for mutual divorce. Legislature thought it proper to provide more easy procedure of divorce to Hindus also. By Act No. 68 of 1976, Section 13-B was added under of the Act which provided divorce by mutual consent. Thereafter, Family Court Act, 1984 was enacted. Section 9 of Act, 1984 casts a statutory duty upon Family Courts to persuade the parties to settle their dispute in respect of the subject-matter of the suit. By virtue of Section 10 of the Act, 1984, entire provisions of Code of Civil Procedure, 1908 have been applied to the proceeding before Family Court. Thus provisions of Order 23 Rule 3 C.P.C. is applicable in the proceeding before Family Court. A combined reading of provisions of Section 9 and 10 of the Act, 1984 makes it clear that Family Court at first instance will persuade the parties to settle their dispute in respect of the subject-matter of the suit and if such settlement is arrived then they can file a compromise before Family Court in the suit and suit can be decided in terms of compromise. The suit for divorce under Section 13 of the Act, 1955 is not an exception to the application to Section 9 and 10 of the Act, 1984. As such suit for divorce can also be decided in terms of compromise. Phrase "Subject to the provisions of this Act" used under Section 13-B means in accordance with the provisions of Section 23 of the Act. The compromise operates as estoppel against the parties to it as held by Supreme Court in **Nagubai Ammal Vs. B. Shama Rao, AIR 1956 SC 593**. The compromise dated 10.10.2014 was duly signed by the parties and verified by this Court in presence of the parties. It is a lawful compromise and has been acted upon in part. The respondent took Rs. 18,00,000/- and ornaments from locker as agreed under this compromise. She had taken benefit of compromise. It is an estoppel by deed as well as estoppel by record. She is now estopped from raising objection that suit for divorce cannot be decreed in terms of compromise, as held by Supreme Court in **S. Shanmugam Pillai Vs. K. Shanmugam Pillai, AIR 1972 SC 2059**. This Court in **Jodhey Vs. State AIR**

1952 SC 788 held that High Court has unlimited judicial power. This compromise can be treated as “family settlement”. It acknowledges right and liability of the parties and can be enforced under the law as held by Supreme Court in **Sahu Madho Das Vs. Mukund Ram, AIR 1955 SC 481**. This Court in **Jokhan Vs. Ram Deo, AIR 1967 All 212** has held that the compromise cannot be ignored only for the reason that compromise was entered before the Court which has no jurisdiction. Supreme Court in **B.C. Chaturvedi Vs. Union of India, (1995) 6 SCC 749**, held that power conferred under Article 142 of the Constitution is also available to High Court for doing complete justice between the parties. Family Court placed reliance upon the judgment of Supreme Court in **Sanjeeta Das Vs. Tapan Kumar Mohanti, (2010) 10 SCC 222**. This judgment has not taken any notice of Section 9 and 10 of Family Court Act, 1984 as such it is *per-incuriam* and does not lay binding precedent as held by Supreme Court in **State of U.P. Vs. Synthetins and Chemicals Ltd. (1991) 4 SCC 139**. Otherwise also in this case, there was no clause for divorce in the compromise. This Court in **Indrawal Vs. Radhey Ram, AIR 1981 All 151** and Supreme Court in **Dr. (Mrs) Leena Roy Vs. Dr. Subrato Roy, AIR 1991 SC 92** and **Raj Kumar Rana Vs. Rita Rathore, AIR 2015 SC 2668**, decreed divorce petition under Section 13 of the Act, on compromise. Impugned order is illegal and liable to be set aside and Family Court is liable to be directed to decree the divorce suit in view of compromise dated 10.10.2014.

8. I have considered the arguments of counsel for the parties and examined the record. Old Hindu law did not allow divorce amongst Hindus of upper communities. In communities of lower strata of Hindus, custom relating to divorce was prevalent. After independence, Special Marriage Act, 1954 was enacted, which is applied to persons whose marriage was performed and registered under that Act for divorce. Section 27 provides for divorce and Section 28 provides for mutual divorce under this Act. Thereafter, Hindu Marriage Act, 1955 was enacted and provisions relating to divorce was provided under Section 13 for all the Hindus and its sub-sect. Thereafter, legislature thought to provide more easy procedure of divorce to Hindus. By Act No. 68 of 1976, Section 13-B was added under of the Act which provided divorce by mutual consent. Supreme Court in **Gurbux Singh v. Harminder Kaur, (2010) 14 SCC 301**, held that once the marriage has been solemnized among Hindus then it cannot be dissolved, except on the grounds enumerated in Section 13, of Hindu Marriage Act, 1955 or according to Section 13-B. Section 13-B of Hindu Marriage Act, 1955 is

quoted below:-

13-B. 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 sub-section (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.]

9. Aim and object of enactment of Family Court Act, 1984 was to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. Under Section 7 of this Act, jurisdiction of Family Court was conferred to exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation to Section 7 of the Act. Thus Family Court has to exercise same jurisdiction, which is exercisable by the Court under the law. Thus it is clear that if a petition is filed under the provisions of Hindu Marriage Act, 1955, then Family Court will exercise jurisdiction that Act only. So far as application of Civil Procedure Code, 1908 is concerned, procedure provided under it has to be followed for exercising jurisdiction Hindu Marriage Act, 1955. In case of contradiction, provisions of Hindu Marriage Act, 1955 would have overriding effect. The counsel for the petitioner relied upon Section 9 and 10, of Family Court Act, 1984 which are quoted below:-

9. Duty of Family Court to make efforts for settlement.— (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit of proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the

Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.

10. Procedure generally.—(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made there under, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one Party and denied by the other.

20. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

10. A bare reading of the aforesaid provisions shows that although Act, 1984 has an overriding effect but Section 7 of the Act provides for Family Court to exercise jurisdiction conferred under the Act, in which petitions enumerated in Explanation to Section 7 have been filed. For trial of suit for divorce under Section 13 of Hindu Marriage Act, 1955, Family Court has to follow the procedure of C.P.C. but decree of divorce can be granted only on the grounds enumerated under Section 13 of the Act. Hindu Marriage Act, 1955 provides two modes for divorce namely (i) on the grounds mentioned under Section 13 of the Act or (ii) on mutual consent for which a petition has to be presented by both the parties to the marriage and after interregnum period of six they again attain their consent before the Court. It is well settled principle that when the statute provides a particular procedure for doing an act then the act has to be done according to that procedure and not at all. In this respect judgment of Supreme Court in **K.S. Saini Vs. H.C. Delhi, (2012) 4 SCC 307** may be referred.

11. Issue as the whether consent given at the initial stage for divorce can be withdrawn at the later stage came for consideration before Supreme Court in **Sureshta Devi v. Om Prakash, (1991) 2 SCC 25**, in which it has been held

that 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 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 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.

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 under Section 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”.

12. Again a Bench of three Hon'ble Judges of Supreme Court in **Smruti Pahariya v. Sanjay Pahariya, (2009) 13 SCC 338**, held that we are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.

In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. Same view has been taken in **Sanjeeta Das v. Tapan Kumar Mohanty, (2010) 10 SCC 222**, in which it has been held that more importantly, the consent of the parties is of no relevance in the matter. No court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties dehors the grounds enumerated under Section 13 of the Act, unless of course the consenting parties proceed under Section 13-B of the Act.

13. Supreme Court in **Hitesh Bhatnagar v. Deepa Bhatnagar, (2011) 5 SCC 234**, held that the language employed in Section 13-B(2) of the Act is clear. The court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met:

- (a) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;
- (b) After hearing the parties and making such inquiry as it thinks fit, the court is satisfied that the averments in the petition are true; and

(c) The petition is not withdrawn by either party at any time before passing the decree.

In other words, if the second motion is not made within the period of 18 months, then the court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression “divorce by mutual consent” would be otiose.

14 In **Hitesh Bhatnagar v. Deepa Bhatnagar, (2011) 5 SCC 234**, it has also been held that the power under Article 142 of the Constitution is plenipotentiary. However, it is an extraordinary jurisdiction vested by the Constitution with implicit trust and faith and, therefore, extraordinary care and caution has to be observed while exercising this jurisdiction. Even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably.

15. In the present case, no petition under Section 13-B of the Act has been filed. The petitioner wants for a decree in divorce suit under Section 13 of the Act, in view of compromise dated 10.10.2014, as this compromise would operate as estoppel against the respondents. Rule of estoppel is a rule of evidence. There can be no estoppel against statute. Supreme Court in **State of Bihar v. Project Uchcha Vidya, Sikshak Sangh, (2006) 2 SCC 545**, held that it is now well known, the rule of estoppel has no application where contention as regards a constitutional provision or a statute is raised.. Section 13-B itself gives liberty for second thought to the parties. The consent must continue during the interregnum period and after this period the parties should again confirm their consent before the Court. As held by Supreme Court in various cases cited above, the parties can withdraw their consent during this period. As such Rule of estoppel has no application in a petition under Section 13-B of the Act.

16. In view of aforesaid discussions, this petition has no merit and is **dismissed**.

Order Date :- 8.4.2016
Jaideep/-