

Rajasthan High Court - Jodhpur

Anil Khatwani vs Smt.Nisha Khatwani on 10 May, 2012

S.B.CIVIL MISC. APPEAL NO. 1250/2008

Anil Khatwani vs. Nistha Khatwani

Judgment dt:10/5/2012

1/81

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR  
JUDGMENT

Anil Khatwani

vs.

Nistha Khatwani

S.B.CIVIL MISC. APPEAL NO. 1250/2008

DATE OF JUDGMENT

:

10th May, 2012.

PRESENT

HON'BLE DR.JUSTICE VINEET KOTHARI

REPORTABLE

Dr.Sachin Acharya, for the appellant - husband.  
Mr. T.R.Singh Sodha, for the respondent - wife.

BY THE COURT:

1. The present appeal is directed against the order dated 14/7/2008 passed by learned District Judge, Bhilwara dismissing the joint petition filed on 3/1/2007 by the parties to the matrimony, Mr. Anil Khatwani and Smt. Nistha Khatwani under Section 13B of the Hindu Marriage Act, 1955 seeking divorce by mutual consent and S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 registered as case no. 16/2007. The appellant husband, Mr. Anil Khatwani has preferred this appeal being aggrieved by the dismissal of the petition jointly filed by both the parties under Section 13 B of the Act.

2. The brief factual matrix of the case is as under.

3. The marriage between appellant, Mr.Anil Khatwani and respondent, Nistha Khatwani took place at Ajmer on 30/11/2002 as per Hindu rites and a son, Siddharth was born out of this wedlock on 12/5/2004. The parties are admittedly living separately since November, 2005 on account of various disputes and incompatibility and criminal complaint under Section 406 and 498-A IPC & under the provisions of Domestic Violence Act were also filed by the respondent wife, Smt. Nistha Khatwani

against the appellant, Anil Khatwani and his family members. However, since the efforts of reconciliation between the parties failed, a written compromise was arrived at between the parties on 3/1/2007 at Bhilwara and pursuant to that, the present petition under Section 13B of the Act was jointly filed by both the parties before the learned District Judge, Bhilwara, S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 which was registered on the same day and was posted after statutory waiting period of six months on 5/7/2007. On subsequent dates fixed by the learned court below, the respondent wife was mostly not present before the court like on 23/7/2007, 8/8/2007, 5/11/2007 and 16/11/2007. On 11/1/2008 both the parties were not present before the court below and again on 4/2/2008, the appellant husband was present but respondent wife was not present. On 11/3/2008, the respondent wife seeking exemption for her appearance on 12/3/2008 before the court below, filed an application that she does not want to proceed further in this said case and the proceedings of the case deserve to be concluded at that stage itself. On 12/3/2008, the appellant husband also preferred an application that divorce decree by mutual consent in pursuance of petition under Section 13B of the Act jointly filed by both the parties on 3/1/2007 may be granted as the appellant husband has already paid a sum of Rs. 5 lacs by two Demand Drafts No.690031 dated 7/12/2006 of Rs.2.5 lacs and No. 690032 dated 7/12/2006 of Rs. 2.5 lacs drawn on Bank of Baroda to the respondent wife towards dowry items and future maintenance of herself and their son Siddharth and appellant husband also opposed the application dated 11/3/2008 filed by the respondent wife, seeking S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 exemption to appear on 12/3/2008. However, 12/3/2008, the fact of filing of the application dated 11/3/2008 by the respondent wife that the proceedings may be concluded at this stage was noted by the court below and copy of the application filed by the appellant husband was given to the counsel for the respondent wife and the matter was adjourned to 10/4/2008 for reply to the said application and for presence of the parties, though the consent divorce decree could have been passed on 12/3/2008 itself.

4. On 10/4/2008, a new counsel appeared on behalf of respondent wife, Mr. Naresh Daad & he sought further time to file reply and matter was again adjourned to 13/5/2008, on which date again the said Advocate concerned sought further time and matter was adjourned to 29/5/2008. On 29/5/2008, the respondent wife filed reply to the application dated 12/3/2008 of the husband in which she expressed for the first time that the compromise filed on 3/1/2007 was signed by her under pressure and the amount of Rs.5 lacs paid was for dowry items, furniture, household articles and jewelery items of respondent Nishtha, whereas, no amount was paid for maintenance of respondent wife and her son. In para no. 3 of the said reply, the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 respondent wife has also stated that divorce decree cannot be granted by consent of only one party and she did not appear in the court on various dates as her advocate did not call her and she wants to withdraw her petition under Section 13B of the Act. In the meanwhile, on the basis of compromise dated 3/1/2007 on a non-

judicial stamp paper of Rs.100/-, duly notarized on 3/1/2007, the parties also agreed to finish their criminal cases, namely; FIR No. 46/2006 under Section 408 and 498-A IPC and case no. 496/2006 (Nishtha Khatwani vs. Anil Khatwani) under Section 18 to 22 of the Domestic Violence Act, 2005.

Taking note of the compromise dated 3/1/2007, a coordinate bench of this court also allowed criminal misc.

petition no. 36/2007 (Anil Khatwani & ors. vs. State of Raj. & Ors.) on 28/5/2007 following the Supreme Court decision in the case of B.S.Joshi & ors. vs. State of Haryana - (2003) 4 SCC 675 and observed as under:-

"Taking into consideration the statement made by the learned counsel for the parties, I am satisfied that the parties have genuinely settled their matrimonial dispute and now they have no grievance against each other. In this view of the matter and S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 taking into account the judgment rendered by Hon'ble Supreme Court in the case of B.S.Joshi & ors.( supra), I find it to be a fit case where inherent jurisdiction under Section 482 Cr.P.C. should be exercised.

For the reasons as stated hereinabove, I allow this misc. petition and quash the FIR No. 46/2006 dated 22/11/006 registered at Police Station Mahila Thana District Bhilwara for offence under Sections 498-A and 406 IPC."

5. The said compromise along with receipts of respondent wife -

Nishtha Khatwani indicating the receipt of various jewelery and household articles and amount of Rs.5 lacs by two Demand Drafts were also produced before the learned court below.

6. However, the learned trial court by the impugned order dated 14/7/2008 held that with the withdrawal of the consent to the divorce by mutual consent by the respondent wife filed on 11/3/2008 within 14 months and 08 days of filing of the petition on 3/1/2007, the petition under Section 13B of the Act could not allowed and consequently the same deserves to be dismissed and the said petition was accordingly dismissed.

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7. Being aggrieved by the said order dated 14/7/2008, the appellant husband has approached this Court by way of present appeal under Section 28 of the Hindu Marriage Act on 13/8/2008, which is pending for last four years.

8. As mandated by law, this Court also made serious efforts of reconciliation between the parties and parties were summoned to this Court by a coordinate bench of this Court on 19/8/2010 and again on 18/5/2011 and the coordinate bench of this Court (Hon'ble Mr. Justice Sangeet Lodha, J) heard both the parties on 25/5/2011 and

recorded that, "Having talked with the parties in chamber in presence of the counsel for the parties, this Court is of the considered opinion that no amicable settlement between the parties is possible." Thus, the appeal was directed to be listed for final disposal after summer vacations of 2011. On 11/4/2012, the matter again came up before this Court and this Court passed the following order:

"The appellant-husband has preferred this appeal against the order dated 14.07.2008 by which the application under Section 13-B of Hindu Marriage Act, jointly signed by the both the parties, namely, Anil S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Khatwani and Smt. Nistha Khatwani, came to be rejected on account of another subsequent application filed by the respondent-wife on 29.05.2008, in which she said that a sum of Rs.5 lacs paid at the time of filing of application under Section 13-B of the Hindu Marriage Act, was only towards the dowry items, utensils and expenditure incurred by her in marriage but the same was not against the maintenance of herself and her son, namely, Sidharth, who is living with her. This is prima-facie contrary to the averments made in Section 13-B application and from a bare perusal of the the said application, it appears that consent given by the respondent-wife under Section 13-B of the H.M. Act, was withdrawn on 29.05.2008 by the respondent-wife only to secure more money for her maintenance.

The present appeal is in this Court is pending for last four years. The very purpose of divorce by mutual consent under Section 13-B of the H.M. Act is likely to be frustrated if such matters are kept pending for very long time.

The learned counsel for the respondent-wife prays for and granted a day's time to seek instruction from his client, Smt. Nistha Khatwani as to what additional amount she expects to get from appellant- husband in order to abide by her consent under Section 13-B of the H.M. Act. He further prays that he may initially take telephonic instructions in this regard and apprise the Court tomorrow and then matter may be fixed to secure the attendance of both the parties so that the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 matter may be finalized on the next date.

List the case on tomorrow i.e. on 12.04.2012 as first case and subject to instructions of the learned counsel for the respondent-wife, the matter would be finally disposed of on the next date on 18.04.2012."

9. On 12/4/2012, this Court directed both the parties to remain present on 18/4/2012 and on 18/4/2012, since the parties were not present, arguments on merit of the appeal was heard by this Court. On 20/4/2012, this court again directed both the

parties to file their respective affidavits on the following points and again remain present before this court on 2/5/2012.

"Both the parties are directed to file their affidavits with regard to following:

(i) Whether they are willing to live together in the same matrimonial home even now or not;

(ii) Whether they want to have a divorce by mutual consent under Section 13B of the Act. If 'No', then they should assign reasons for the same and also indicate in S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 their affidavits the steps taken by them so far for restoration of matrimonial home and matrimonial relationship;

(iii) The respondent wife may also state in her affidavit as to whether she is ready and willing to take additional reasonable amount of permanent alimony, besides Rs.5 lacs already paid by appellant Husband, for her and her son's future maintenance and welfare from the appellant husband & to give her consent for divorce by mutual consent under Section 13 B of the Act. If so, how much amount and within what period she expects the same.

(iv) The appellant husband may also indicate such amount of additional permanent alimony, which he would be ready and willing to pay for maintenance of future welfare of respondent wife and their son, Master Siddharth, who is now stated to be about 8 years of age.

The aforesaid affidavits may be filed within a period of one week from today positively, failing which adverse inference may be drawn against them.

The parties may again remain present in the Court on 2/5/2012."

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10. The parties have accordingly filed respective affidavits. The appellant husband has filed his affidavit on 25/4/2012 and respondent wife has filed her affidavit on 27/4/2012 which was sworn & notarized at Bhilwara on 25/4/2012. The said affidavits are also respectively quoted below for ready reference:-

The affidavit filed by appellant husband reads as under:-

"ADDITIONAL AFFIDAVIT ON BEHALF OF THE PETITIONER.

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I Anil Khatwani S/o Shri Manohar Lal Khatwani, aged about 40 years, resident of B-27, LIC Staff Colony, Alwar Gate, Ajmer, at present 3-Kha 29 Guru Niwas Dhola Bhata Colony, Ajmer, , do hereby swear in the name of God and State as under:

1. That I am appellant in this case and am well aware with the facts of this case.
2. That I have filed the present Misc. Appeal challenging the order dated 14.7.2008 passed by learned District Judge, Bhilwara in Civil Misc. Case No.16/2007 whereby the application under Section 13B of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act of 1955) for mutual consent has been rejected.
3. That vide order dated 30.4.2012, this Hon'ble S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Court was pleased to direct me to file an affidavit with regard to certain facts.
4. That from Nov., 2005 till this date, there has been neither any cohabitation between me and my wife nor we are in talking terms or in touch with each other. The marital tie has thus severed and the marriage has come to a dead end. In such circumstances, after about 7 long years it is practically not possible for me to live with Smt. Nistha Khatwani or vice versa.
5. That as per the agreement arrived at in the year 2006-07, I want a divorce by mutual consent under Section 13B of the Act 1955. May I mention here that it was because of the fact that both of us were not in talking terms, relationship has become bitter-day by day between the two families, thus, resulting into taking a pragmatic approach of filing application under Section 13B of the Act of 1955. The false criminal cases instituted by my wife against me and my other family members was the last nail in the coffin and thus, ultimately we reach to a conclusion that it is not possible for us to live together as a couple and thus, the entire exercise of getting a divorce by mutual consent was undertaken with the consent of family members of both the parties. A receipt executed by Smt. Nistha Khatwani on 3.1.2007 and attested by the SHO, Police Station Mahila Thana would reveal that the entire stridhan, dowry articles and an amount of Rs.5 lacs as maintenance amount was S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 received by Smt. Nistha Khatwani and it was clearly given out in the said receipt that a petition seeking divorce by mutual consent is already filed before the learned District Judge, Bhilwara wherein my wife would appear as has been given out in the said receipt. A copy of the said receipt dated 3.1.2007 is submitted herewith and marked as Annexure- Aff./1.

6. That though I have already paid an amount of Rs.5 lac towards maintenance as also stridhan including golden ornaments worth Rs.5 lacs (approximate valuation in the year 2007), still looking to the welfare of my wife and son Master Siddharth I am ready to pay an amount of Rs.2.5 lacs. May I submit that I am working as an Assistant Administrative Officer with LIC of India and belongs to a lower medical class family. My father retired way back in the year 2004 as Head Clerk from North Western Railway and mother is simply a house wife. My father, having 3 sisters is about 75 years old and mother is about 70 years old and both of them are dependent on me and suffering from various ailments. My younger brother is living separately at Jaipur and is maintaining his own family.

7. That the document annexed with this additional affidavit is true and correct copy of it original."

The affidavit dated 25/4/2012 filed by respondent wife reads S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nisha Khatwani Judgment dt:10/5/2012 as under:-

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coordinate bench of this Court in criminal misc. petition under Section 482 Cr.P.C. between S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 the parties. Permanent alimony of Rs.5 lacs was paid by appellant husband by two Demand Drafts. Significantly, the respondent wife has also not stated anything even though the order passed by this Court on 20/4/2012 clearly called upon the parties to state the reasons that if they do not want divorce by mutual consent, they should assign reasons for the same and also indicate in their affidavits the steps taken by them so far for restoration of matrimonial home and matrimonial relationship. The respondent wife does not state anything about such steps taken by her for restoration of matrimonial home and relationship. She has not offered to refund the said amount of Rs.5 lacs also. The appellant husband is consistently praying for divorce by mutual consent under Section 13B of the Act & has fairly offered to pay even further sum of Rs. 2.50 lacs.

14. The questions, therefore, arise in the present appeal are:-

(i) whether the unilateral withdrawal of the consent by the respondent wife from her joint petition filed along with the appellant husband under Section 13B of the Act is genuine or not;

(ii) whether the consent given at the time of filing joint petition under Section 13B of the Act was a free consent or not or was S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 obtained by force, fraud or undue influence as stipulated under Section 23(1)(bb) of the Act inserted along with Section 13B of the Hindu Marriage Act,1955 by Act No. 68 of 1976 w.e.f. 27/5/1976.

15. Dr.Sachin Acharya, learned counsel appearing for the appellant husband relying upon various case laws vehemently submitted that the effort of the respondent wife to withdraw her consent in the face of admitted position that parties have been living separately since November, 2005 because of various matrimonial disputes and acrimonies and their continuing to live separately for all these seven years by now and there being no possibility of restoration of matrimonial home at this stage, the respondent wife cannot be allowed to withdraw her consent for obtaining decree of divorce by mutual consent under Section 13B of the Act and such withdrawal of consent is neither genuine and permissible in law and same is merely an effort to extort more money from the appellant husband by keeping such disputes and litigation pending, frustrating the purpose of Section 13B providing for quicker relief to the parties in matrimonial dispute and putting a quietus to their dispute and paving the way for their settlement in life in future. He emphatically submitted that the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 learned court below has not only proceeded to hold that the application dated 11/3/2008 filed by the respondent wife amounts to withdrawal of her consent under Section 13B of the Act, whereas the said application dated

11/3/2008 was nothing but an application by respondent wife merely seeking exemption to appear before the learned court below on 12/3/2008 and in which application in fact the respondent wife stated that final decision of the petition under Section 13B of the Act may be given on the same day, on which the learned court below ought to have actually passed divorce decree by mutual consent which was not withdrawn on 11/3/2008 & continued consent was there and in fact the respondent wife in reply to the application of the appellant husband filed on 12/3/2008 for granting such mutual consent decree upon change of thought and taking a `U' turn stated for the first time on 29/5/2008 that the compromise dated 3/1/2007 was signed by her under pressure and she wanted to withdraw her petition under Section 13B of the Act.

16. Dr. Sachin Acharya, learned counsel for the appellant husband submitted that the learned court below in the impugned order dated 14/7/2008 has actually not even referred to such withdrawal of S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 consent on 29/5/2008 but has proceeded to construe the application of the respondent wife dated 11/3/2008 as her withdrawal of consent, which in fact was not so. He also submitted that the application filed by the respondent wife on 11/3/2008, which has wrongly been noticed by the the learned court below in the impugned order as 3/11/2008, which would make it beyond the period of 18 months prescribed under Section 13B(2) of the Act from the date of filing the petition under Section 13B(1) of the Act, which was filed on 3/1/2007. He submitted that the application dated 11/3/2008 actually was merely an application filed by the respondent wife for seeking exemption to appear before the court below on the next date 12/3/2008 in which she even requested the court that proceedings may be concluded on the same day and, therefore, the learned court below ought to have proceeded to pass the decree of divorce by mutual consent under Section 13B of the Act. The period of 14 months and 08 days as noted by the court below was computed from 3/1/2007 till 11/3/2008 only, albeit wrongly. ON 12/3/2008, the husband had filed the application also for passing the decree of divorce by mutual consent and thus the consent of both the parties was very much there on that day which amounted to the joint motion S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 under Section 13B(2) of the Act & learned court below failed to exercise its jurisdiction & pass the decree on the same day.

17. He submitted that the marriage has irretrievably broken down and there is no possibility of any reconciliation between the parties & even twice over this Court has also made serious efforts for the same without any success, therefore, in view of the Supreme Court decision in the case of Naveen Kohli vs Neelu Kohli - (2006) 4 SCC 558 the defacto defunct marriage should be declared de jure defunct marriage and divorce decree under Section 13B of the Act deserves to be granted. He also relied upon the decision of Bombay High Court in the case of Smt. Jayashree Ramesh Londhe vs. Ramesh Bhikaji Londhe - AIR 1984 Bombay 302, Delhi High Court

decision in the case of Smt. Chander Kanta vs. Hans Kumar - AIR 1989 Delhi 73, which would be discussed herein after.

18. On the other hand, Mr. T.R.Singh Sodha, learned counsel appearing for the respondent wife submitted that the learned court below has rightly rejected the petition under Section 13B of the Act and the impugned order dated 14/7/2008 does not require any S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 interference by this Court. He urged that the joint motion as required under Section 13B (2) of the Act has not been filed by the parties and on the other hand the reply of the respondent wife dated 29/5/2008 amounts to withdrawal of the petition by the respondent wife and since the respondent wife does not want any divorce by mutual consent, the decree under Section 13B of the Act cannot be granted.

He, therefore, prayed for dismissal of the present appeal.

19. Having heard the learned counsels and having given my thoughtful consideration to the rival submissions and various judgments on the issue, this Court is of the considered opinion that the learned court below has erred in rejecting the petition jointly filed by both the parties under Section 13B of the Hindu Marriage Act, 1955 on the unilateral withdrawal of the consent by the respondent wife. The ingredients of awarding divorce by mutual consent under Section 13B(1) are; (i) that the parties have been living separately for a period of more than one year or more; (ii) that they have not been able to live together and (iii) that they have mutually agreed that marriage should be dissolved. These three ingredients contained in Section 13B (1) of the Act continued to exist admittedly up to the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 date of filing of joint petition under Section 13B of the Act on 3/1/2007 and also upto 11/3/2008 except on a `U' turn by respondent wife on 29/5/2008, which is not found to be genuine at all.

20. The ingredients of Section 13B(2) are; (i) A joint motion by both the parties is made not earlier than six months but not later than 18 months after the date of filing of petition under Section 13B(1) of the Act; (ii) the petition is not withdrawn in the meantime and (iii) 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 averments made in the petition are true, the court may pass the decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

21. The facts of the present case undeniably show that parties have been living separately since November 2005 and despite all reconciliation efforts made by family, friends and court below as well as this Court, the parties have failed to come together and restore the matrimonial home and matrimonial relationship. The marriage has thus, irretrievably broken down. It is equally undeniable from the

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 record that parties have arrived at a compromise on 3/1/2007 and jointly filed the petition under Section 13B(1) of the Act and said compromise dated 3/1/2007 was acted upon by both the parties and not only the appellant husband paid a sum of Rs. 5 lacs by two Demand Drafts, as aforesaid, to the respondent wife against the jewelery and dowry articles and for future maintenance of herself and their son Siddharth but criminal cases between the parties were also quashed on the basis of said compromise. This Court is fully satisfied that the consent given by both the parties for obtaining the decree of divorce by mutual consent was free and fair consent and was not obtained by force, fraud or undue influence. This Court is further satisfied that the alleged withdrawal of the consent by the respondent wife in the first instance on 29/5/2008 was not genuine and was merely with a view to extort more money from the appellant husband.

The averments in said reply dated 29/5/2008 by respondent wife are absolutely contrary to the averments made on oath in petition under Section 13B(1) of the Act dated 3/1/2007, her continued consent vide her application dated 11/3/2008 & documents executed by her and compromise having been acted upon by both the parties & even this Court put a seal of imprimatur on 28/5/2007 while allowing criminal S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 misc. petition no. 36/2007. All this cannot be wished away by her.

22. The latest affidavit dated 25/4/2012 filed by the respondent wife, quoted above, is also nothing but tissues of lies and simply an after thought and despite clear direction of this Court that if the parties are not giving their consent for decree of divorce by mutual consent under section 13B of the Act, they should assign reasons and the steps taken by them for restoration of matrimonial home in the meanwhile but no such steps or efforts taken by the respondent wife or her family members have been indicated in the said affidavit.

About receipt of permanent alimony of Rs. 5 lacs and to indicate if the respondent wife expects any further amount, the respondent wife in her latest affidavit strangely goes round about on the said issue, whereas, the appellant husband having complied with the compromise dated 3/1/2007 in letter and spirit and having paid total sum of Rs. 5 lacs by two Demand Drafts has waited patiently for past four years and could not resettle in his life & the respondent wife seeks to resile from the compromise without any valid rhyme or reason. She does not offer to refund said sum of Rs.5 lacs, if she really wants restoration of matrimonial home but the appellant S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 husband, on the other hand, even now offers to pay further sum of Rs.

2.5 lacs, even in the face of his middle class family standard and at the present age of 40 years with the retired father of 75 years, who was Head Clerk in North Western

Railway, and mother of 70 years and three sisters to support with his married younger brother living separately at Jaipur. The plight of the appellant husband can very well be appreciated by this Court and his offer even now to pay Rs. 2.5 lacs to the respondent wife clearly shows his desperateness to wriggle himself free from this cobweb of matrimonial dispute in which he has been engulfed by the errant respondent wife and mistaken failure on the part of court below to exercise its jurisdiction to award divorce decree by mutual consent on 11/3/2008 itself when in the application filed by respondent wife on 11/3/2008 for seeking exemption from appearance before the court below for 12/3/2008 and reiterating that proceedings under Section 13B of the Act may be concluded on that very date. That was sufficient to construe the continuation of consent on her part and second joint motion of the parties specially when the husband also filed his application for divorce decree on 12/3/2008 and nothing prevented the court below to proceed to pass divorce decree by mutual consent on 12/3/2008 S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 itself. The court below, however, granted more time to the parties allowing the respondent wife on a second thought to resile from her consent by taking a `U' turn in the matter without any bonafides and hanging the present litigation pending for next four years.

23. The provisions of Section 13A & 13B of the Act were brought on the statute book by the Act No.68 of 1976 w.e.f 27/5/1976 in the Hindu Marriage Act, 1955 besides Section 13, which provided for divorce on certain specified grounds like cruelty, desertion, conversion to another religion etc. The Statement of Objects & Reasons for bringing Section 13A & 13B on the statute book by the Parliament by Marriage Laws (Amendment ) Act, 1976 (Act No. 68 of 1976) is as under:-

"Objects & Reasons Clause 8.- New section 13-A is proposed to be inserted to provide that under certain circumstances the court may, while dealing with a petition for divorce, have a discretion to grant a decree for judicial separation instead. New section 13-B seeks to provide for divorce by mutual consent."

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24. The provisions of Section 13B are also reproduced hereunder for ready reference:-

"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 , (68 of 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 S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 of the decree.

25. The Hon'ble Supreme Court in Smt. Sureshta Devi vs. Om Prakash - (1991) 2 SCC 25 analyzed the provisions of Section 13B of the Act by holding that Section 13B is in pari materia with Section 28 of the Special Marriage Act, 1954 and three ingredients are necessary for operating Section 13B of the Act. They are; (i) They have been living separately for a period of one year or more; (ii) They have not been able to live together; and (iii) They have been mutually agreed that the marriage should be dissolved.

Further analyzing the provisions, the Apex Court emphasized that 'living separately' connotes that parties have not been living like husband and wife irrespective of their place of residence. They may be living separately under the same roof and on the other hand they could be living as husband and wife even though living at different houses. Therefore, maintenance of conjugal relationship and cohabitation as husband and wife was considered essential while construing the words, "living separately" in these provisions.

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Relevant para 7 to 10 of the said judgment are reproduced hereunder for ready reference:-

"7. Section 13-B is in pari materia with Section 28 of the Special Marriage Act, 1954. Sub-section (1) of Section 13-B requires that the petition for divorce by mutual consent must be presented to the Court jointly by both the parties. Similarly, sub-section (2) providing for the motion before the Court for hearing of the petition should also be by both the parties.

8. There are three other requirements in sub- section (1). They are:

(i) They have been living separately for a period of one year,

(ii) They have not been able to live together, and

(iii) They have mutually agreed that marriage should be dissolved.

9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the Court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 the consent was not obtained by force, fraud or undue influence. The Court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the Court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce."

26. The ratio of the judgment in Smt. Sureshta Devi vs. Om Prakash(supra) was that the consent of the parties to dissolve the marriage by mutual agreement in the backdrop of their living separately till actual decree of divorce was passed was rendered by the Apex Court in the said judgment and the court held that mere filing of petition with mutual consent does not authorise the Court to make a decree for divorce. There is a period of waiting of 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 their relatives and friends. In this transitional period one of the parties may have a second thought and change its mind not to proceed with the petition. The spouse may not be a party to joint motion under S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 sub-section (2) of Section 13B and there is nothing in this Section 13B, which prevents such a course. The section does not provide that if there a change of mind, it should be by one party alone but by both.

Para 13 and 14 of the judgment are also of great importance and, therefore, they are quoted below in extenso:-

"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 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 S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 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 maritalties. Sub-section (2) of Section 13-B is clear on this point. It provides that "onthe 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 bonafides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

14. Sub-section (2) requires the Court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the Court cannot pass a decree of divorce by mutual consent. If the Court is held to have the power S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 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".

27. Variety of complex factual situations do arise in matrimonial relationship more so in strained one, depending upon the multiple factors like age and family background of the parties, their qualifications, their occupation, business or profession, their place of residence, their bent of mind, psychology, presence of children out of the wedlock, behaviour of their family members, efforts by them for reconciliation etc. and, therefore, no straitjacket formula can be applied in such circumstances. Therefore, in a subsequent case of Anil Kumar Jain vs. Maya Jain - (2009) 10 SCC 415, the Hon'ble Supreme Court modified the ratio of Smt. Smt. Sureshta Devi vs. Om Prakash(supra) and allowed the divorce by mutual consent S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 under Section 13B of the Act

when even though the wife insisted upon living separately from the husband despite previous agreement to obtain such divorce by mutual consent but did not give such consent for decree of divorce, the two judges bench of the Hon'ble Supreme Court held as under:-

"Section 13-B(1) is the enabling section for presenting a petition for dissolution of marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties have been living separately for a period of one year or more and that they have not been able to live together, which is also the factual reality in the instant case. Section 13-B(2), however, provides the procedural steps that are required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the court.

The consent given by the parties to the filing of a petition for mutual divorce has to subsist till a decree is passed on the petition and in the event either of the parties withdraw the consent before passing of the final decree, the petition under Section 13-B would not survive and would have to be dismissed. This legal S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 position as explained in Sureshta Devi, (1991) 2 SCC 25 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."

28. Invoking their powers under Section 142 of the Constitution, their Lordships further held that even though in the present case respondent wife has made it very clear that she will not live with the petitioner husband but on the other hand she is also not agreeable to mutual divorce, the Court held that as a part of agreement between the parties, the appellant husband had transferred valuable property rights in favour of respondent wife and it was after registration of property that she withdrew her consent, while she continued to enjoy said property but insisted on living separately from the husband, the Court held that it was a fit case where Supreme Court may exercise powers under Article 142 of the Constitution and grant divorce by mutual consent under Section 13B of the Act by inferring the continued consent on the part of respondent wife. However, putting the word of caution, the Supreme Court said that these powers under Article 142 of the Constitution only vested with the Supreme Court and no lower court including High Court had such power to pass a S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 decree for mutual divorce, if one of the consenting party withdraws his/her consent before decree is passed on the doctrine of irretrievable breakdown of the marriage. Relevant extract from the judgment in para 27 to 35, as appearing in the Head Notes of SCC including the reference to various case laws, is reproduced here under for ready reference:-

"In several cases the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution of India in order to do complete justice to the parties when faced with a situation where the marriage-ties had completely broken and there was no possibility whatsoever of the spouses coming back together again. In such a situation, the Supreme Court felt that it would be a travesty of justice to continue with the marriage ties. Although, irretrievable breakdown of marriage is not one of

the grounds indicated either under Section 13 or Section 13B for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 waiting for the statutory period of six months stipulated in Section 13-B. Although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 into one under Section 13-

B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B.

Ashok Hurra v. Rupa Bipin Zasveri, (1997) 4 SCC 226; Chandrakala Menon v. Capt. Vipin Menon, (1993) 2 SCC 6 : 1993 SCC (Cri) 485; Sandhya M.Khandelwal v. Manoj M. Khandelwal, (1998) 8 SCC 369; Anita Sabharwal v. Anil Sabharwal, (1997) 11 SCC 490; Kiran v. Sharad Dutt, (2000) 10 SCC 243; Anjana Kishore v. Puneet Kishore, (2002) 10 SCC 194; Swati Verma v. Rajan Verma, (2004) 1 SCC 123 : 2004 SCC (Cri) 25; Jimmy Sudharshan Purohit v. Sudharshan Sharad Purohit, S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 (2005) 13 SCC 410; Sanghamitra Ghosh v. Kajal Kumar Ghosh, (2007) 2 SCC 220, clarified and followed.

In the instant case, the respondent wife has made it very clear that she will not live with the petitioner, but, on the other hand, she is also not agreeable to a mutual divorce. In ordinary circumstances, the petitioner's remedy would lie in filing a separate petition before the Family Court under Section 13, on the grounds available, but in the present case there are certain admitted facts which attract Section 13-B. The stand of the respondent wife that she wants to live separately from her husband but is not agreeable to a mutual divorce is not acceptable, since living separately is one of the grounds for grant of a mutual divorce and admittedly the parties are living separately for more than seven years. As part of the agreement between the parties the appellant had transferred valuable property rights in favour of the respondent and it was after registration of such transfer of property that she withdrew her consent for divorce. She still continues to enjoy the property and insists on living separately from the husband.

Therefore, while following the decision in the case of Sureshta Devi case, it must be held that this is a fit case where the Supreme Court may exercise the power under Article 142 of the Constitution.

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Sureshta Devi v. Om Prakash, (1991) 2 SCC 25 : 1991 SCC (Cri) 292, followed.

Accordingly, the petition for grant of mutual divorce under Section 13-B is accepted."

29. In a later judgment, three Judges Bench of Supreme Court in the case of Smruti Pahariya vs. Sanjay Pahariya - (2009) 13 SCC 338 = 2009 AIR SCW 4267 again reiterated that it is only on continued mutual consent of the parties that a decree of divorce under Section 13B of the Act can be passed by the court and it is a jurisdictional fact and the court has the statutory obligation to hear the parties to ascertain their consent before the decree under Section 13B of the Act is passed and mere absence of one of the parties on some of the dates would not give rise to such inference of such continued consent. The head note giving relevant facts and ratio of the judgment at page 339 is extracted below for ready reference:-

"The appellant wife and respondent husband married as per Hindu rites and ceremonies, had two children, but started living separately after about 12 years of marriage i.e. since January 2005. Thereafter, on 19/5/2007 they, through their common advocate, filed an application for dissolution of marriage by S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 mutual consent under Section 13-B of the Hindu Marriage Act, 1955. The husband remained absent on the day of hearing, which was fixed on 19/11/2007 as per the requirements of Section 13-B(2) that a minimum period of six months has to elapse before such petition can be taken up for hearing. The matter was adjourned to 1/12/2007 and the Family Court asked the advocates to inform the husband in this regard. But the wife on the same day i.e. 19/11/2007, made an application to summon the husband. The summon was not properly served and endorsed and it returned. The Family Court thereafter, on wife's affidavit directed for substituted service of summons under Order 5 Rule 20 CPC, whereupon the bailiff pasted the summons on 3/12/2007 outside the door of the husband. On the designated day i.e. 4/12/2007, the husband still was absent and the Family Court, therefore, adjourned the matter to 10/12/2007.

However, the Family Court advanced the matter to 5/12/2007 and that too on the very same day when ex parte application this regard was made by the wife. And thereafter passed on ex parte order of divorce on the very same preponed day i.e. 5/12/2007. The High Court by the impugned order had set aside the order of the Family Court.

Disposing of the appeal filed by wife, the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Supreme Court held:

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. Under Section 13-B, mutual consent of the parties is a 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.

Sureshta Devi v. Om Prakash, (191) 2 SCC 25 : 1991 SCC (Cri) 292; Beales v. Beales, 1972 Fam 210: (1972) 2 WLR 972: (1972) 2 All ER 667; Rupa Ashok Kumar Hurra v. Ashok Hurra, (2002) 4 SCC 388, relied on."

30. Recently, the two Judges bench of Apex Court in Hitesh Bhatnagar vs. Deepa Bhatnagar - 2011(2) RLW (SC) 1471 after discussing the previous case laws referred to above, held that if the second motion is not made within a period of 18 months then the Court is not bound to pass the decree of divorce by mutual consent and most important requirement for grant of divorce on mutual consent is free consent of both the parties and in that case where no S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 second motion was made by the parties, which was mandatory requirement of law, no Court can pass the decree of divorce in the absence of that. The period of 18 months was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent. Ultimately, the Court refused to grant the decree of divorce by mutual consent even though parties have lived separately for 11 years, quoting the poet George Eliot painting the pain of separation. One could not do better than to quote para 15, 16 and 26 from the said judgment:

"15. 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.

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Otherwise, in our view, the expression `divorce by mutual consent' would be otiose.

16. In the present fact scenario, the second motion was never made by both the parties as is a mandatory requirement of the law, and as has been already stated, no Court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. We are of the view of that the eighteen months period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant.

26. In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In light of these facts and circumstances, it would be travesty of justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, we hope S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment

dt:10/5/2012 that they will give this union another chance, if not for themselves, for the future of their daughter. We conclude by quoting the great poet George Eliot "What greater thing is there for two human souls than to feel that they are joined for life - to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting."

31. In Sanghamitra Ghosh vs. Kajal Kumar Ghosh - 2007 DNJ (SC) 13, the two Judges Bench of Supreme Court again invoking the powers under Article 142 of the Constitution invoking irretrievable breakdown of marriage as a ground, granted divorce by mutual consent in the backdrop of mutual compromise of the parties. The terms of which were produced before the Supreme Court only and Hon'ble Court proceeded to grant the decree by observing as under:-

"17. We have heard learned counsel for the parties. This Court adjourned the proceedings from time and again to ensure that the parties may reconcile the difference and live together again, but this has not happened. It is indeed the obligation of the Court and all concerned that the marriage status S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 should, as far as possible, as long as possible and whenever possible, be maintained. But as aptly observed by this Court, in a recent decision in Naveen Kohli Vs. Neelu Kohli reported in (2006) 4 SCC 558, that when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist.

18. In the instant case, we are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto as observed in Naveen Kohli's case (supra).

19. In view of peculiar facts and circumstances of this case, we consider it appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution.

20. In order to ensure that the parties may live S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of. According to our considered view, unless all the pending cases are disposed of and we put a quietus to litigation between the parties, it is unlikely that they would live happily and peacefully in future. In our view, this will not only help the parties, but it would be conducive in the interest of the minor son of the parties.

32. In Naveen Kohli vs. Neelu Kohli (2006) 4 SCC 558, the Hon'ble Supreme Court observed as under:

"A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented with concrete instances of human behaviour as they bring the institution of marriage into disrepute.

In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. Preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. Looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the trial court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would untimely be conducive in the interest of both the parties.

In the extraordinary facts and circumstances of the case, to resolve the problem in the interest of all concerned, while dissolving the marriage between the parties, we direct the appellant to pay Rs.25,00,000 (Rupees twenty-five lakhs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs.5,00,000 (Rupees five lakhs with interest) deposited by the appellant on the direction of the trial court. The respondent would be at liberty to withdraw this amount with interest. Therefore, now the appellant would pay only Rs.20,00,000 (Rupees twenty lakhs) to the respondent within the stipulated period. In case the appellant fails to pay the amount as indicated above within the stipulated period, the direction given by us would be of no avail and the appeal shall stand dismissed. In awarding permanent maintenance, financial standing of the appellant has been taken into consideration.

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 The Supreme Court noted that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the chance of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into service, the divorce cannot be granted. Ultimately, it is for the legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not. Therefore, the Supreme Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce."

33. In Smt. Jayashree Ramesh Londhe vs. Ramesh Bhikaji Londhe - AIR 1984 Bombay, 302, the Bombay High Court observed as under:-

7. Section 21 of the Hindu Marriage Act provides that all proceedings under the Act shall be regulated by the Code of Civil Procedure, 1908. Of course, this would be subject to the provisions contained in the Act or the rules framed by the High Court, the Act or the rules do S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 not make any provision as to how a proceeding under the Hindu Marriage Petition can be withdrawn. It would, therefore, be necessary to go to the provisions of the Code of Civil Procedure for finding out as to when and under which contingency a proceeding can be withdrawn. Order XXIII, Rule 1 deals with abandonment of a suit as well as withdrawal of a suit.

Sub-rule (1) contemplates abandonment of a suit or part of a claim. Sub-rule (3) has made a provision for withdrawal of a suit with liberty to file a fresh suit on the same cause of action if the grounds mentioned in that sub-rule exist. Sub-rule (5) which is material reads as follows:--

"Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdraw under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

9. ....A reading of Section 13B would show that what is necessary is that there should be a consent for mutual divorce at the time when the petition is filed. If that consent is a free consent of both the parties, it will not be possible for any of them to nullify the petition by saying that though initially the consent was voluntarily given, still the said party now intends to withdraw it. This position can very well be seen S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 when we take into account the scope of an inquiry contemplated under Sub-section (2). I have already observed that the inquiry should be more particularly directed in order to find out as to whether the averments in the petition are true or not. As far as the consent aspect is concerned, the inquiry should obviously be with respect to the consent that was mentioned in the petition. It will not be possible for any party to voluntarily agree to have a divorce by mutual consent or to revoke or withdraw that consent at a later stage. Such permission would nullify the very purpose of a joint application and hence I am not able to accept this contention of Shri Gokhale."

34. The Delhi High Court in Smt. Chander Kanta vs. Hans Kumar & anr. - AIR 1989 Delhi 73, observed as under:-

"(9) Sub-section (2) provides that if the petition is not withdrawn in the meantime, on a joint motion made by the parties not earlier than six months after the date of the presentation of the first petition referred to in Sub-section (1) and not later than 18 months after the said date, if the court is satisfied after hearing the parties and after making inquiries that a marriage has been solemnized and the averments in the petition are S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 true, it can pass a decree of divorce. Though Sub-

section (2) of Section 13B envisages withdrawal of the joint petition, it does not prescribe the procedure for withdrawal of the joint petition. I also do not find any other provision in the Act or the Rules dealing with withdrawal of a joint petition presented under Section 13B(1). However, Section 21 of the Act provides that subject to the other provisions contained in the Act and to such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated as far as may be, by the Code. Thus, it is necessary to refer to the provisions dealing with withdrawal and abandonment of plaint in the Code. Order 23 Rule I prescribes the procedure for withdrawal and abandonment of a suit. Sub-rule(5) of Rule I of Order 23 specifically deals with the power of the court to permit withdrawal or abandonment of a suit or part of a claim presented jointly by one or more plaintiffs. Sub-rule (5) of Rule I of Order 23 reads thus:-

"(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Thus, when the suit is filed by two or more plaintiffs, the court cannot permit one of the several plaintiffs to abandon a suit or part of a claim without the consent of the other plaintiffs.

(10) Section 13B(1) of the Act also contemplates joint presentation of petition. It is similar to a suit filed jointly by one or more plaintiffs. Thus just as a suit or part of a claim cannot be abandoned or withdrawn by one plaintiff, one of the parties to the petition cannot be permitted to withdraw the petition or abandon the prayer without the consent of the other party. In other words, a petition presented under Section 13B(1) of the Act cannot be also withdrawn by one party unilaterally. Of course, if the court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence then it is a different matter because in such a case the court is empowered specifically to refuse to grant the decree. The legislature introduced Section 13B in the Act by Marriage Law (Amendment) Act 1976 to provide for a speedy dissolution of marriage when it is found that the marriage is irretrievable. The Legislature provided for an interval of a period of six months between the first motion and the second motion in "order to afford S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 the parties further opportunity for reconciliation, if one party is allowed to withdraw the consent even when

other grounds, namely that the parties continue to live separately and have not been able to live together, still subsist and reconciliation is not possible then it will frustrate the very purpose of the enactment. Very precious time of one of the parties who has waited for over six months for filing the second motion will be wasted and a party who wants to harass and is guilty of abuse of the process of the court will benefit. This position is made further clear by insertion of Sub-section (bb) to Section 23(1) of the Act. Under this section, the court is empowered to grant the decree even in an undefended case if it is satisfied that the averments in the petition are true and the consent for mutual divorce has not been obtained by force, fraud or undue influence. In my opinion, since the second motion as contemplated in Section 13B(2) has to be a joint motion. Section 23 would come into operation in a case like the present one when one of the parties refuses to join in the second motion and the other party has no alternative but to make an application to the court for orders on the petition already presented under Section 13B(1) of the Act before the specified time of 18 months expires. If unilateral withdrawal of consent is permitted the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 court will not be able to pass a decree in an undefended case under Section 23(bb) of the Act. I am thus unable to accept the contention of the learned counsel for the respondent that he could unilaterally withdraw the consent without proving that the consent was obtained by force, fraud or undue influence.

(11) It is necessary at this stage to refer to two later judgments of other High Courts wherein similar questions came up for consideration but different view was taken by the two Division Benches. In K.I. Muhanan v. Smt. Jeejabai, AIR1988 Kerla 28 , a Division Bench of the Kerala High Court considered the question of unilateral withdrawal of consent by one of the parties. The Division Bench disagreed with the view taken by the Bombay High Court in Smt. Jayshree Ramesh Londhe (supra) and observed that the situation arising under Order 23 Rule I of the Code cannot be considered similar to the situation arising under section 13B(2) of the Act and a party can unilaterally withdraw the consent given under Section 13B(1) of the Act. The Punjab & Haryana High Court in Harcharan Kaur vs. Nachhattar Singh, AIR 1988 Punj & Har 27 dealing with the question observed that unless the parties to the petition under Section 13B of the Act who have mutually consented to have S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 'the marriage dissolved, continue to signify their mutual consent for the dissolution of the marriage right up to the date of decree, the marriage cannot be dissolved under Sub-section (2) of Section 13B of the Act merely on the basis that six months earlier the parties had together presented the petition for dissolution of marriage by mutual consent. If one of them fails to agree and does not want to oblige the other party by extending the requisite consent to the divorce, decree of divorce cannot be passed under Section 13B of the Act.

(12) With respect I am unable to agree with the view expressed in K.I. Mohanan's case (supra) and Harcharan Kaur's case (supra) because the question has to be considered in the light of Section 23(bb) of the Act and as discussed hereinabove if unilateral withdrawal of consent is held to be permissible, Section 23(bb) will be redundant. In my view, a party cannot unilaterally withdraw the consent unless it is proved that the consent was obtained by force, fraud or undue influence I am, Therefore, in agreement with the view expressed by the Bombay High Court in Smt. Jayshree Ramesh Londhe (supra)."

35. Now let us have a look at some of the judgments of our own S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 jurisdictional Rajasthan High Court.

(i) In Santosh Kumari vs. Virendra Kumar - AIR 1986 Rajasthan 128, the learned Single Judge of this Court way back in 1986 held that the jurisdiction of the court to grant divorce by mutual consent would not be ousted merely because the second motion is not made within a period of 18 months of the first motion. The relevant extract from para 10 of the judgment is quoted below for ready reference:-

"10. The application dated 13-8-84 has been treated by the learned District Judge as a motion under Section 13B(2) of the Act. It has been filed after six months of the earlier application dated 20-10-82, which was sought to be deemed to be a joint application under Section 13B(1) of the Act. The objection of the learned counsel for the appellant to this application being acted upon as a motion under Section 13B(2) is that it had not been filed within eighteen months of the earlier application and, therefore, the Court had no jurisdiction to act upon it.

His contention is that under Section 13B(2) the motion of both the parties has to be made not earlier than six S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 months after the date of the petition referred to in Sub-section (1) and not later than eighteen months after the same date and if the application is not made within that time, the Court cannot consider any subsequent application as a motion of both the parties for grant of divorce by mutual consent. At the first flash, the argument appeared to be attractive and plausible and with some substance but on a deeper consideration thereof, I do not find force in it. A logical conclusion of this argument would be that if the motion is not made by both the parties within eighteen months of the petition under Section 13B(1), the Court would become functus officio and the application filed under Section 13B(1) would thus become infructuous. That does not appear to be the intent and purpose of Sub-section (2) of Section 13B and a proper construction of this provision would be that the application may be withdrawn by any of the parties not before six months and not later than eighteen months of the date of the petition under Section 13B(1) and if it is not so withdrawn within that period, the Court may proceed to grant a decree on mutual consent if it is satisfied about the other requirements of the section, namely, that the marriage has been solemnized and that the averments in the petition are true. Looked at from another point of S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 view, also, in my opinion, the same meaning has to be given to Sub-section (2) of Section 13B. According to this (Subsection) the parties or any of them has a right to withdraw the application filed under Sub-section (1) of Section 13B till the expiry of the last day of the eighteenth month of the filing of the application under Section 13B(1) and till then the motion of both the parties for the grant of the petition filed under Section 13B(1) cannot be made effective because that would deprive the parties from the right of withdrawing the application filed under Section 13B(1) and if that motion cannot be considered before the expiry of the aforesaid period of 18 months, the application cannot be thrown out on the ground that the motion had not been made within 18 months of the date of the application under Section 13B(1) when that motion could not have been taken into consideration till the expiry of the

aforesaid period. In these circumstances, I am clearly of the opinion that even if the motion was not made within 18 months from 20-10-82, the Court would not lose its jurisdiction to entertain the same and pass a decree in accordance with Sub- section (2) of Section 13B."

The ratio of the aforesaid judgment was similar to later Supreme Court decision in Hitesh Bhatnagar vs. Deepa Bhatnagar S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 (2011) 2 RLW SC1471, though with different result of decrees in the two cases.

(ii) In Smt. Suman vs. Surendra Kumar - AIR 2003 Raj.

155, the Division Bench of this Court held that even when the respondent husband did not stand by his consent for divorce initially given by him, it was open to him to appear before the Court and say that he did not want to give consent to the proceedings, which could lead to rejection of the application for grant of divorce by mutual consent but mere silence cannot be taken as withdrawal of consent and the court proceeded to grant the divorce decree by mutual consent under Section 13B of the Act by holding that :-

"5. It is well recognised that the object of second motion after six months of the first motion and a further period of one year being allowed after expiry of the initial period of six months from the date of the first application, is to allow the parties to do some re-

thinking because dissolution of a marriage is a serious matter and has serious consequences for the parties and the children, if any from the marriage. The period of 6 to 18 months provided in Section 13B of the Act is S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 a period of interregnum which is intended to give time and opportunity to the parties to reflect on their move. In this transitional period the parties or either of them may have second thoughts. Either party or both of them may change their mind and decide not to proceed with the petition. Either party can, therefore, approach the Court and convey its decision to the Court either way. But, this cannot be left as a matter of inference to be drawn by the Court. A positive act on the part of either party is required.

6. In the facts of the present case as noted above, the next date of hearing after six months was fixed in the presence of the parties and, therefore, the next date of hearing was known to both the parties. The wife appeared on the next date of hearing while the husband did not appear. The matter was adjourned on a couple of occasions, still the husband did not appear. The wife moved application for summoning the husband which the Court declined to do. In the appeal before this Court also the counsel for the respondent- husband did not take a stand that the husband had withdrawn his consent to the decree of divorce by mutual consent. The appeal is being opposed on technical grounds i.e., non compliance of Sub-section (2) of Section 13B The argument on behalf of the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 respondent is that under Sub-section (2) a joint application had to be moved by both the parties and since the application had not been jointly moved by the parties, therefore, it was

rightly rejected by the Family Court, We are unable to accept this stand of the husband.

7. Silence cannot be taken to amount to withdrawal of consent. By his continued silence the respondent- husband has frustrated the proceedings for more than three years. If he was withdrawing his consent for dissolution of marriage by a decree of divorce by way of mutual consent, nothing prevented him from taking that stand before the Family Court at the stage of second motion. The husband on the other hand decided to adopt a course of silence in order to further harass the wife. We are not inclined to take a too technical view of Sub-section (2) of the Section 13B of the Act and fall in the same error as the Family Court did. Merely because the second motion was not signed by both the parties it cannot be said that the consent of the husband was missing at the second stage. On account of silence of the husband, rather we would like to take a view that the consent to decree of divorce being granted has to be presumed. What is important is consent of parties. Format is not S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 important. Substance is to be seen.

8. This is a case of total silence on the part of the husband on the question of consent at the stage of the second motion. Should we infer the negative from silence? We are of the view that if the husband wanted to withdraw his consent he should have taken a positive stand for that purpose. There was nothing which prevented him from informing the Court that he was withdrawing his consent for decree of divorce by mutual consent. When the husband has himself left the matter for inference, the inference ought to be drawn in favour of consent rather than for absence of consent. The husband had already given his consent for the decree of divorce at the time of the first motion and he alone could withdraw the consent by a positive act, otherwise the inference would be that the consent which was initially given continues. Therefore, in the facts of the present case, the conclusion is inevitable that the consent of the husband for divorce by mutual consent was available at the stage of the second motion and the Family Court ought to have granted the decree of divorce. The words "on the motion of both the parties" occurring in Sub-section (2) of Section 13B have to be read as meaning that consent of both the parties is available at the stage of second motion.

S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 What is of importance is consent and not the format of moving the second motion.

9. Accordingly, we allow this appeal and set aside the impugned judgment of the Family Court dated 27th Sept. 1999. We grant a decree of divorce on the basis of mutual consent thereby dissolving the marriage between the parties under Section 13B of the Act."

(iii) Another Division Bench of this Court in Nand Kanwar vs. Rajendra Singh Bhati - 2005(2) DNJ (Raj.) 756 also similarly granted divorce decree by mutual consent by holding reconciliation talks between the parties and coming to the conclusion that it was not possible for the parties to live together and that they have mutually agreed for dissolution of marriage. The Court allowed the joint application of the parties and granted the decree and quashed the pending civil and criminal cases between the parties in view of compromise in order to put the mutual disputes to peace. The relevant para 14 and 15 are quoted below for ready reference:

"14. Though in the application all the ingredients of Sec.13-B and Sec.23 of the Act, 1955 are not specifically pleaded but we have talked to both the S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 parties and are satisfied that they are living separately for more than one year; they are not able to live together and have mutually agreed for dissolution of their marriage by a decree of divorce by mutual consent. We are also satisfied that the mutual consent of the husband and wife for dissolution of their marriage by a decree of divorce, has not been obtained by fear, force, fraud or undue influence. The parties have filed litigation after litigation. Looking to their conduct, it is not gainsay, we of the opinion that there is an irretrievable break down by their marriage and there is no scope of settlement between them.

15. As a result of aforesaid discussion, the joint application filed by the husband and the wife for dissolution of their marriage by a decree of divorce by mutual consent, is allowed; their marriage, solemnized on 9/3/1989 at Village Gidani, Tehsil Dudu, District Jaipur, is dissolved by a decree of divorce. The parties are free in all respect."

36. In Section 13B of the Act, the word `consent' only figures in the heading of the Section, which reads, "Divorce by mutual consent".

The other phrase describing such consent comes in sub-section (1) viz., "they have mutually agreed" that the marriage should be S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 dissolved. This phrase, "they have mutually agreed" that the marriage should be dissolved is coupled with the clause, "that they have not been able to live together". Sub-section (1) of Section 13B of the Act, which provides for a mechanism for an early end of a marriage, which took place between the parties who are incompatible to each other and without going into the labyrinth of legal process to establish the grounds of divorce specified in Section 13 of the Act. The mutual consent upon mutual make up of mind that they cannot live together for their own reasons and the fact that they failed to live together for a specific period of one year or more and that they have agreed to dissolve their marriage by mutual consent is the backdrop of different channel of divorce provided in law in the form of Section 13B of the Act, which came on the statute book after 21 years of the original enactment, Hindu Marriage Act of 1955.

37. The cooling period of six months and extendable upto 18 months in sub-section (2) is to provide an opportunity of rethinking to the parties so that if they can reconcile and go back to the matrimonial home by putting an end to their dispute, hatred, acrimonies, separation, they should be allowed to do so. The decree S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 of divorce upon mutual consent was not intended to be hastened in the name of quick relief, but at the same time the continued consent for decree by mutual consent in the circumstances of their living separately in acrimony and not as husband and wife, was provided as a jurisdiction authorising the concerned court to grant a decree by mutual consent under Section 13B of the Act. Coupling of `consent' with the factum of their living separately not as a husband and wife is a sine quo non for operating Section 13B of the Act and this is what the ratio of various judgments cited and discussed above is.

38. The question which still arises is as to whether the `consent' for the decree of divorce initially given at the stage of first motion or first petition under Section 13 B (1) of the Act by both the parties to the marriage can be withdrawn unilaterally even though the said party to the marriage insists that though they cannot live together but she or he would not move for the second motion as required under sub-

section (2) of Section 13B of the Act. Whether such a party can frustrate the application under Section 13B (1) of the Act itself and whether the court would be deprived of its jurisdiction to grant such decree under Section 13B of the Act, specially when both the parties S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 upon their initial agreement to obtain such decree acted in a certain manner like transfer of property by one party to another, payment of permanent alimony, issue relating to custody of child agreed etc. etc. & that party continues to derive benefit of such settlement arrived at the time of making joint petition under Section 13B(1) of the Act.

39. The question, more particularly, which arises in the present day society in such cases is that the `consent' at the stage of second motion is not again given in positive form or mischievously withheld or delayed to extort more amount of permanent alimony than the one initially agreed upon and received by the estranged wife from the forlorn husband. The stoic silence at the stage of second motion or even an application to formally withdraw the petition under Section 13B(1) of the Act moved unilaterally without real intent to join back & restore the matrimonial home can be used as a tool of harassment of the husband to extort more money from him, knowing well that at that stage pushing him to the channel of regular divorce petition under Section 13 of the Act would not only be a long drawn process but the same would not allow him any opportunity to remarry with the advancing age if he still wants it & settle in life again.

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40. The present case projects this kind of a situation. Whether the withdrawal of consent can be said to be genuine, particularly when party apparently so withdrawing his or her consent insists even now that he or she cannot live together with the other party. In the opinion of this Court, such a withdrawal of `consent' without anything shown for restoration of the matrimonial home and which may be just to extort more money or just to put a front against the jurisdiction of the Court by not taking the positive steps of filing second motion, cannot deprive the court of its jurisdiction to grant the decree of divorce under Section 13B of the Act. The withdrawal of `consent' for divorce by mutual consent should be coupled with the efforts made for restoration of matrimonial home rather than continued living separately of the parties, otherwise such withdrawal of `consent' would not amount to the withdrawal of the petition under Section 13B (1) of the Act. The party, who alleges or withdraws the consent for joint motion under Section 13B(2) of the Act ought to establish before the Court that he or she has taken steps for restoration of matrimonial home in the cooling period, but has failed for the stated reasons. This interpretation is found to be in consonance of last clause of sub-section (1) of Section 13 B, which provides that, "they have S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 not been able to live

together and that they have mutually agreed that the marriage should be dissolved." The mere silence or not filing of joint motion under Section 13B(2) or even withdrawal of `consent' cannot frustrate the petition under Section 13B(1) of the Act. The same would also be contrary to the provisions of Section 23(1)(bb) of the Act which permits decree even without a contest.

41. Sub-section (2) which provides for taking positive steps within stipulated time frame namely, six months after the date of presentation of first petition under sub-section (1) and not later than 18 months after the date on which the first petition was presented, if the said 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 the averments made in the first petition are true viz. that the parties have failed to live together for a period more than one year and that they have mutually agreed that marriage should be dissolved, the court shall proceed to pass the decree of divorce declaring the marriage to be dissolved from the date of decree. Thus, continuity of factum of living separately of the parties not as husband and wife and the continuity of consent to obtain the divorce by S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 mutual consent are necessary for grant of such decree. The significant words in sub-section (2) are `if the petition (not the consent) is not withdrawn in the meantime.' If consent is sought to be withdrawn on some frivolous grounds or just to open a front to extort more money while the parties insist that they cannot live as husband and wife together and upon rethinking during cooling period, the period between six months to eighteen months, the parties as well as their relatives and friends have failed to bring them together to live as husband and wife, then the withdrawal of such consent has to be examined in the background of the reasons given for such withdrawal of consent. Such a withdrawal of consent for name sake cannot be made a tool to frustrate the first petition under Section 13B of the Act or to extort more amount of permanent alimony, if the court comes to the conclusion that such withdrawal of consent is merely a facade or a false pretext, in the opinion of this Court, the court can draw the inference of continued consent of the party so frivolously withdrawing his or her consent for name sake and still grant the decree of divorce by mutual consent under Section 13B of the Act on the basis of initial petition filed before it. What is of importance is that upon enquiry, the Court finds that averments made in the petition S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 under Section 13B(1) of the Act are true.

42. The significance of words, "if the petition is not withdrawn in the meantime" is distinguishable from words, "consent not withdrawn in the meantime" can also be seen in the light of Order 23 Rule 1(5) of Civil Procedure Code also. Order 23 deals with withdrawal or abandonment of suits. Rule 1 (5) of Order 23 provides that nothing in this rule shall be deemed to authorise the Court to permit one of the several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs. The petition under Section 13 B(1) of the Act is a joint petition by two parties. Both the parties are plaintiffs before the Court, therefore, unilateral withdrawal of the same without the consent of other party would be in contravention of Order 23 Rule 1(5) CPC. Even though sub-section (2) of Section 13B of the Act provides that on the motion of both the parties the court can proceed but, sub-section (2) cannot be read bereft of sub-section (1) of Section 13B of the Act. The mutual agreement between the parties in the backdrop of the fact that they have been living separately for one year or more and it is not possible for them to live S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs.

Nistha Khatwani Judgment dt:10/5/2012 together as husband and wife is a fact which should continue till the decree is granted and if under sub-section (2) the motion is not jointly filed but the parties continue to live separately, the jurisdiction of the court to grant divorce on mutual consent is not ousted. It subsists on the basis of sub-section (1) of Section 13B itself. The withdrawal of consent has to be established in the form of disappearance of the fact that they have not been able to live together & mere withdrawal of `consent' would not per se amount to the withdrawal of this petition under Section 13B(1) of the Act and the party withdrawing the `consent' at this stage of joint motion under Section 13B(2) of the Act has to show that it is possible for both the parties to live together and for which the party concerned has taken sincere and positive steps but has failed for the stated reasons. Nothing of this sort has been shown or established by the respondent wife before the court below or this Court before purportedly withdrawing her consent for divorce by mutual consent. The said purported withdrawal of consent by withdrawal of consent by respondent wife is, therefore, found to be not genuine at all.

43. It is only after such withdrawal of consent is shown to be S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 genuine, the Court would refuse to grant the decree by mutual consent under this provision but on the other hand if withdrawal of consent is found to be not genuine as it is found here in the present case and the Court still finds that it is not possible for the parties to live together and the marriage between the parties has irretrievably broken down and initial consent was not obtained by any force, fraud and undue influence at the time of filing of petition under Section 13 B (1) of the Act, particularly when such initial consent involved acting of the parties in certain manner like payment of permanent alimony, transfer of certain properties and custody of child, if any, etc. etc., then the court can pass the decree under Section 13B of the Act to give finality & quietus to such dead marriage so as to leave both the parties free again to choose their further course in the life and the other party cannot be unnecessarily hooked on to the litigation, even though the court comes to the conclusion that withdrawal of consent by the other party is not genuine. This cannot be the intent and object behind providing hedges under sub-section (2) of Section 13B of the Act frustrating the provisions of sub-section (1) of Section 13B of the Act.

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44. Therefore, it will depend upon the facts and circumstances of each case and the decree by mutual consent under Section 13B of the Act can be granted, if the withdrawal of consent by one of the parties at the stage of moving a joint motion under sub-section (2) of Section 13B of the Act is found to be not genuine by the court and in such circumstances, an interference of continued consent can be drawn by the court giving it jurisdiction to pass the decree under Section 13B of the Act.

45. This Court finds, in view of affidavits, conduct of parties and compromise dated 3/1/2007, which has been acted upon by the parties, that subsequent withdrawal of consent by respondent wife in her reply dated 29/5/2008 before the court below and before this Court in her affidavit dated 25/4/2012 is not genuine and is a farce.

This Court is further satisfied upon inquiry, reconciliation talks and other material on record that averments made in the petition under Section 13B (1) of the Act dated 3/1/2007 are true and the consent of both the parties for dissolving the marriage was not obtained by any force, fraud or undue influence & the circumstances & facts satisfying the requirements of Section 13B of the Act continue to S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 exist & an inference of continued consent of respondent wife for grant of divorce by mutual consent can be safely drawn even now.

46. Therefore, this Court respectfully following the decisions of Hon'ble Supreme Court in Naveen Kohli's case, Anil Kumar Jain's case (supra) & Bombay High Court decision in the case of Smt.

Jayashree Ramesh Londhe vs. Ramesh Bhikaji Londhe & Delhi High Court decision in the case of Smt. Chander Kanta vs. Hans Kumar & of Division Bench of this Court in Suman vs. Sumendra Kumar (supra) & Nand Kanwar vs. Rajendra Singh Bhati (supra) is of the considered opinion that the respondent wife could not unilaterally withdraw her consent to the joint petition under Section 13B of the Act nor her withdrawal of such consent before the court below on 29/5/2008 and before this Court vide affidavit dated 25/4/2012 are genuine and such withdrawal of consent is liable to be ignored.

47. The averments in affidavit dated 25/4/2012 that she does not want divorce is merely an eye wash & not bonafide. The consent for obtaining divorce decree by mutual consent was free and without any S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 force, fraud or undue influence by the appellant husband or his family members. The compromise dated 3/1/2007 was genuine and voluntary by both the parties and same has been acted upon and, therefore, both the parties are bound by the same and appellant husband has already paid the permanent alimony of Rs. 5 lacs to the respondent wife in discharge of his obligation under the compromise against the dowry articles, jewelery of respondent wife and her 'Istridhan' and also for future maintenance of herself and their son Siddharth. The petition under Section 13B of the Act satisfies the criteria provided in the Act and this Court is satisfied that the said factual position is still continuing, namely the parties have not been able to live together and that they have been living separately for a period of more than six years since November 2005 and there is irretrievable break down of the marriage.

48. The learned District Judge has erred in dismissing the petition under Section 13B of the Act vide impugned order dated 14/7/2008 & the court below could have and ought to have proceeded to pass decree for divorce by mutual consent on 12/3/2008 itself and therefore, the impugned judgment and decree of learned District S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Judge, Bhilwara deserves to be set aside and petition under Section 13B of the Act jointly filed by both the parties to the marriage, Mr. Anil Khatwani and Mrs. Nishtha Khatwani, on 3/1/2007 deserves to be allowed.

49. Consequently, the present appeal filed by husband is allowed.

The impugned order of the learned District Judge, Bhilwara dated 14/7/2008 is quashed and set aside and allowing the petition under Section 13B of the Hindu Marriage Act, 1955, the divorce decree by mutual consent is granted and the marriage between the appellant Anil Khatwani and respondent Nishtha Khatwani, which took place at Ajmer on 30/11/2002 is hereby dissolved.

50. Though the appellant husband has paid the agreed amount of lumpsum permanent alimony of Rs. 5 lacs to the respondent wife by two Demand Drafts, as aforesaid, but since in his latest affidavit dated 25/4/2012 he has expressed that he would be willing to pay a further sum of Rs. 2.5 lacs for future maintenance of his wife - Nishtha Khatwani and her son Siddharth, this Court directs that the appellant husband Anil Khatwani may deposit a sum of Rs.2.5 lacs in Fixed S.B.CIVIL MISC. APPEAL NO. 1250/2008 Anil Khatwani vs. Nistha Khatwani Judgment dt:10/5/2012 Deposit with any Nationalised Bank for a period of ten years in the joint name of Master Siddharth and Smt. Nishtha Khatwani and the original Fixed Deposits may be deposited with the Deputy Registrar (Judl.) of this Court within six months from today, which may be handed over to the respondent wife after a period of six months from today under separate orders of this Court.

51. The divorce decree be made accordingly. No order as to costs.

(DR.VINEET KOTHARI), J.

item no.

baweja/-