IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 725 OF 2015
WITH
CIVIL APPLICATION NO. 1551 OF 2015
IN
SECOND APPEAL NO. 725 OF 2015

Ajit Shashikant Mhetre ....Appellant
v/s.
Mrs. Leena Ajit Mhetre ....Respondent

WITH
SECOND APPEAL NO. 177 OF 2017
WITH
CIVIL APPLICATION NO. 953 OF 2015
IN
SECOND APPEAL NO. 177 OF 2017

Mrs. Kiran Ajit Mhetre ....Appellant
v/s.
Mrs. Leena Ajit Mhetre & Anr. ....Respondents

Mr. Himanshu Mahajan for the appellant in SA/177/2017.
Mr. Sachin R. Pawar for respondent no.2 in SA/177/2017 and for the appellant in SA/725/2015.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 12th / 13th JUNE, 2019.

P.C. :-

. The appellants herein have challenged the judgment and decree dated 17.10.2014 in Regular Civil Appeal No.92 of 2009 passed by the learned District Judge-1, Kolhapur.

2. Heard Mr. Himanshu Mahajan and Mr. Sachin Pawar, learned counsel for the respective appellants. I have perused the records.

3. The Appellant Ajit Mhetre was married to Respondent No.1 Leena Mhetre. They had allegedly filed an application under Section 13B of the Hindu Marriage Act for divorce by mutual consent. By judgment dated 13.10.2005, the 2nd Joint Civil Judge, Senior Division, Kolhapur allowed the application under Section 13(1)B of the Hindu Marriage Act and dissolved the marriage of the appellant Ajit Mhetre and the respondent no.1 Leena Mhetre.

4. The respondent-Leena Mhetre/wife challenged the judgment dated 13th October, 2005 in Regular Civil Appeal No. 92 of 2009 filed before the District Court, Kolhapur. She claimed that the petition for divorce had been filed without obtaining her consent. She had further alleged that the Trial Court had dissolved the marriage without conducting any inquiry, ascertaining the genuineness of the petition and existence of her consent. She therefore claimed that the judgment dated 13th October, 2005 was without jurisdiction.

5. During the pendency of the First Appeal, the Appellant Kiran Mhetre filed an application to implead her as a party to the appeal

alleging that she had married the Appellant Ajit Mhetre after dissolution of his first marriage with Leena Mhetre and that they have a child from the said wedlock. The Appellant Kiran Mhetre claimed that any adverse order in the appeal would affect her rights as a legally wedded wife and also the rights of her child. The said application was allowed and Kiran Mhetre was impleaded in the appeal as Respondent No.2.

6. The learned District Judge held that the Civil Judge, Senior Division, had not heard the parties and thus not ascertained existence of consent. Relying upon the decision of the Apex Court in ***Smt. Sureshta Devi v/s. Om Prakash, AIR 1992 S.C. 1904,*** the District Judge held that the marriage could not have been dissolved without complying with mandate of Sub Section 2 of Section 13 B of the Hindu Marriage Act. The learned District Judge therefore allowed the appeal and set aside the impugned judgment and decree dated 13.10.2005 passed by the Joint Civil Judge, Senior Division, Kolhapur in Hindu Marriage Petition No.5 of 2005. Being aggrieved by this judgment, the Appellant husband as well as Kiran Mehetre have filed these second appeals.

7. Admittedly, the marriage of the Appellant - Ajay Mehetre and

Leena Mehetre was solemnised on 16th May, 1995 as per the hindu religious rites. They have a child born from the said wedlock. They are governed by the provisions of Hindu Marriage Act, 1955.

8. An application purported to be under Section 13-B of Hindu Marriage Act, 1955 was filed before the Civil Judge, Senior Division, Kolhapur for dissolution of marriage by mutual consent. After the cooling period of six months, the Trial Court granted divorce based on the motion /affidavit filed by the husband-Ajit Mhetre. The Trial Court held that at the time of presentation of the application, the wife - Leena Mhetre had consented for divorce. She had subsequently remained absent. The Trial Court presumed consent of the wife -Leena Mhetre as she had not opposed the application/motion filed by the husband under Sub Section 2 of Section 13-B. The learned Judge relied upon the decision of this Court in ***Jayashree Ramesh Londhe vs. Ramesh Bhikaji Londhe, AIR 1984 Bombay 302*** to hold that once the husband and wife mutually agreed to dissolve the marriage and all other requirements under Section 13-B for making a joint application for divorce are proved it would be necessary for a court to grant a decree for divorce and the fact that at a later stage either party does not want a divorce would be irrelevant.

9. Section 13-B of Hindu Marriage Act, 1955 which is relevant to decide the controversy reads thus:-

> *" (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*
>
> *(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."*

10. The Apex Court while interpreting the provisions of Section 13-B of Hindu Marriage Act, 1955 in ***Smt. Sureshta Devi v/s. Om Prakash, AIR 1992 S.C. 1904 ,*** has held thus :-

> *" .....7. 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.*
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> *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 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 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.

11. xxx

12. xxx

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 untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub- section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties .... if the petition is not withdrawn in the meantime, the Court shall pass a decree of divorce What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the 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 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". [See (i) Halsbury Laws of England, Fourth Edition Vol. 13 para 645; (ii) Rayden on Divorce, 12th Ed. Vol. 1 p. 291 and (iii) Beales v. Beales, [1972] 2 All E. R. 667 at 674] "

11. In ***Smruti Paharia Vs. Sanjay Pahariya S.C. 2841 2009,*** the three Judge Bench of the Supreme Court has endorsed the view taken in ***Sureshta Devi (supra)*** and has observed thus :-

" .....49. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

50. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be

slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein."

12. It is thus well settled that the petition for divorce by mutual consent must be presented by both the parties and has to meet three basic requirements viz. (i) that they are living separately for a period of one year or more; (ii) they have not been able to live together and; (iii) they have mutually agreed that the marriage should be dissolved. Sub Section 2 of Section 13-B stipulates filing of motion by both the parties after six months but not later than 18 months from the date of the presentation of the petition referred to in Sub Section 1. Sub Section 2 of Section 13-B casts a statutory duty on the court to hear the parties and make such inquiry as it thinks fit as regards genuineness of the averments in the petition and existence of mutual consent between the parties. It would also be relevant to note that Section 23 (1) (bb) of the Hindu Marriage Act also mandates that when a divorce is sought on a ground of mutual consent, whether such proceedings are defended or not, the Court should be satisfied that such consent has not been obtained by force, fraud or undue influence. From the plain reading of

these provisions, it is evident that the Act confers jurisdiction on the Court to pass a decree for divorce by mutual consent only on being satisfied that the consent expressed by the parties is bonafide and genuine and that the consent for divorce continues till the decree for divorce is passed.

13. In the instant case, the records reveal that the said application under Section 13-B (I) was not presented by the parties but was presented by an Advocate who was allegedly representing both the parties. The trial Court had directed both the parties to appear before the Court on 06/06/2005. The records indicate that on 03/10/2005 the appellant / husband had filed the affidavit in support of the petition. The respondent / wife – Leena Mhetre was not present before the Court. She had not signed the motion filed by the Appellant nor filed a separate motion under Sub Section 2 of Section 13-B. The learned Judge did not secure her presence and did not make any inquiry as regards genuineness of the contents of the petition and existence of her consent. The learned Trial Court has proceeded on a footing that the initial consent given by the respondent - Leena Mhetre is irrevocable. Suffice it to say that this view is not sustainable in view of the settled position of law that the consent should continue as on the

date of the decree.

14. It is also pertinent to note that the Trial Court had presumed consent of the wife - Leena Mhetre merely because she had not come forward before the Court to oppose the motion filed by the petitioner - husband. Existence of consent has to be ascertained by complying with the basic requirement of Sub Section 2 of Section 13-B and cannot be presumed as it has been done by the Trial Court. Furthermore, the Court gets jurisdiction to pass a decree for divorce under Section 13-B only when the parties mutually consent for divorce. In short, mutual consent is a sine qua non for passing a decree for divorce under Section 13-B of the Act. In the instant case, the learned Trial Judge has granted divorce without complying with the basic requirements of Sub Section 2 of Section 13-B of the Act and without being satisfied about the existence of consent of the respondent - wife. The learned District Judge was therefore perfectly justified in holding that the order of divorce was without jurisdiction.

15. Under the circumstances and in view of discussion supra, I find no infirmity or error in the impugned judgment. The Appeals do not involve substantial question of law. Hence, both the Appeals are

dismissed. Civil Applications stand disposed of in view of disposal of the appeals.

(SMT. ANUJA PRABHUDESSAI, J.)