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An Insight to The Concept of Divorce by Mutual Consent with reference to Hitesh Bhatnagar v. Deepa Bhatnagar

ESH GUPTA¹

ABSTRACT

The following article gives an insight to the concept of Divorce by Mutual Consent under Hindu Law with reference to a landmark judgment of Hitesh Bhatnagar v. Deepa Bhatnagar decided by the Apex Court. The author tries to highlight the sanctity of marriage under Hindu Law and how the court shall use its Power under Article 142 of the Constitution to allow complete justice departing from the strict interpretation of statutory provisions. However the author further identifies some grey areas in the law point and tries to fill the gaps by offering some recommendations which gives an opportunity to research on those specific points.

I. THE CASE

The Appellant-husband and the Respondent-wife got married according to the Hindu Marriage Act, 1955 [hereinafter referred to as 'the Act'] in 1994, and were blessed with a daughter a year thereafter. Sometime in the year 2000, due to differences in their temperaments, they began to live separately from each other and have been living thus ever since. Subsequently, on 17.08.2001, the parties filed a petition under Section 13B of the Act before the District Court, Gurgaon, for dissolution of the marriage by grant of a decree of divorce by mutual consent. However, before the stage of second motion and passing of the decree of divorce, the Respondent withdrew her consent by filing an application dated 22.03.2003, and in view of this, the petition came to be dismissed by the Ld. Addl. District Judge, Gurgaon, though the Appellant insisted for passing of the decree. The respondent, appearing in person, submitted that she never wanted divorce and was even willing to live with the appellant as his wife. The Appellant, being aggrieved, had filed an appeal no. F.A.O. No. 193 of 2003, before the High Court of Punjab and Haryana. The Learned Judge, by his well-considered order, dismissed the appeal vide order dated 08.11.2006. Being aggrieved by the same, the Appellant appealed in

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the Supreme Court which forms the present case.

II. ANALYSIS OF JUDGMENT

“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 last parting.”

-George Eliot

The court while deciding on the issues and delivering the judgment has aimed at all times to protect the sanctity of the marriage between the appellant and the respondent.

- **Mutual Consent**

The apex court while delivering the judgment in the present case has made clear observations about the element of ‘mutual consent’ under Section 13 (B) of the Act. The provision is solely based on divorce by mutual consent. Literal or dictionary meaning of the term implies that ‘mutual consent’ is the common consensus on some particular point of two or more parties. Mutual consent cannot be unilateral. Hence if there is no consent of either of the spouse while passing a decree of divorce, it will not be considered as divorce under section 13(B) of the act. Similarly, apt observation was made by the apex court concurring with the decision of the Punjab and Haryana High Court. The apex court while referring to the *Sureshta Devi*² case dismissed the application of the appellant for grant of decree of divorce as the consent of the respondent was withdrawn before passing the decree for divorce. Also the court stated that there was doubt about the *bona fides* about the consent of the respondent in the petition for divorce. If the doubt was correct, the court would have never had the authority to grant a decree of divorce as mutual consent of the parties is a jurisdictional fact.

The stand taken by the court is correct. If the spouse is not allowed to withdraw his consent before the actual decree of divorce is passed or the second motion as mandated by section 13(B) is moved, then the whole idea about the six months cooling period is over. Moreover, the rationale behind six months cooling period is given so the spouse can change their mind and withdraw their consent. It is implied that the consent shall be again taken before passing a decree of divorce.

- **Testing of conditions for divorce by mutual consent**

The court tested its authority to pass a decree for divorce on three conditions as interpreted

² Sureshta Devi v. Om Prakash, (1991) 2 SCC 25

from section 13(B) of the Act.

Condition i) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months:- The second motion was not made by either of the spouses who consented for divorce while filing the petition. If the second motion has not been made, the court does not have the authority to pass a decree of divorce as its one of the essential conditions which needed to be met. Hence the consent can be withdrawn by one party even after 18 months as the second motion was not passed in the present case.

Condition ii) After hearing the parties and making such inquiry as it thinks fit, the Court is satisfied that the averments in the petition are true.

Condition iii) The petition is not withdrawn by either party at any time before passing the decree. It is implied that withdrawal to the consent can be made before the passing of the decree for divorce. The withdrawal was done by the respondent before passing of the decree, therefore the third condition is also not satisfied.

- **Inapplicability of Article 142**

It was contended by the appellant that the marriage had irretrievably broken down and prayed the court for dissolving the marriage by exercising court's power under Article 142 of the Constitution. The court distinguished the judgment relied by the appellant wherein divorce was given under extraordinary circumstances where wife agreed to receive payments and property in terms of settlement from the husband and still did not agree for divorce.³ However the apex court in the present case stated that the judgment cannot be applied as the facts were different. However, no elaboration was given as to what are extra-ordinary circumstances and under what conditions the divorce may be decreed by exercising Article 142.

It is well established that acting under Article 142, Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.⁴ The power is to be used sparingly in cases which cannot be effectively and approximately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties.⁵ The current issue deals with divorce in a marriage. It is advisable to maintain the sanctity of the marriage as the life of two families is at stake and one minor child born out of the wedlock. It is advisable to settle the dispute amicably to the utmost means possible. Therefore the apex court's decision to not

³ Anil Kumar Jain v. Maya Jain, (2009) 10 SCC 415

⁴ Laxmidas Moraji v. Behrose Darab Madan, (2009) 10 SCC 425

⁵ *Ibid*

exercise its wide power under Article 142 in the present case is highly cherished on two grounds:-

- a) Exercising power under Article 142 would have been inconsistent and against the provisions of Section 13(B) of the Act
- b) It would have been against the principle for prevention of the sanctity of marriage

One chance shall be given for the couple to re-unite and if things do not work well, they may further move a petition for divorce as the principles of *res judicata or estoppel* do not apply.

- **Irretrievable breakdown of marriage not the sole ground for divorce**

In the present case the appellant and the respondent had been living separately for more than eleven years. However, since the issue in question is very sensitive i.e. divorce it is suggested to take maximum precaution as possible in preventing the breakdown of marriage. Living separately for so many years can be one such marriage which is irretrievable but if there is even a minimal chance of reviving the marriage; the chance shall not be skipped. Moreover it has been held that irretrievable breakdown of a marriage cannot be the sole ground for the dissolution of a marriage.⁶ The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them have broken down; no useful purpose would be served to keep it alive.⁷ The court must use its extra-ordinary power under Article 142 only when it is impossible to save the marriage and all efforts have been made by the court in that regard as in the case of *Samar Ghosh v. Jaya Ghosh*⁸. In the present case, the wife (respondent) had been insisting for the continuation of the marriage and she wanted to secure the future of their teenage child. Henceforth, the court's decision to not dissolve this marriage as having broken down is apt.

- **Consent may be withdrawn**

The question arises whether any party can at any time till the decree of divorce is passed withdraw the consent given in the petition for divorce by mutual consent. The High Courts disagreed on the issue. The High Court of Bombay, Delhi and Madhya Pradesh hold that the consent once given voluntarily cannot be withdrawn unilaterally by one of the parties.⁹ These courts were of the view that the crucial time for giving consent was at the time of filing of divorce and not the time when the decree for divorce is passed. On the contrary the High Courts

⁶ V. Bhagat v. Mrs. D. Bhagat, (1994) 1 SCC 337

⁷ Savitri Pandey v. Prem Chandra Pandey

⁸ (2007) 4 SCC 511

⁹ Jayashree Ramesh Londhe v. Ramesh Bhikhaji Londhe, AIR 1984 Bom 302; Chander Kant v. Hans Kumar, AIR 1989 Del 73; Meena Dutta v. Anirudha Dutta, (1984) II DMC 142

of Kerala, Punjab and Haryana, Rajasthan and Karnataka have held that it is open to any spouse to withdraw his or her consent at any time before the decree is passed.¹⁰ The Supreme Court in the case of *Sureshta Devi v. Om Prakash*¹¹ was in the favor of the latter view and stated that the view taken by the former courts was untenable. The provision for motion by both parties is made just to enable any party if he or she likes to retrace his or her step. The purpose of the provision to give the parties a second chance would have been defeated if the view of the former view was adopted. “Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce.”¹² In *Prem Lata v. Ashok Kumar*¹³, the court held that continuing consent of both the parties is *sine qua non* for passing a decree of divorce by mutual consent. If the petition is filed simply under Section 13-B of the Act for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continues till the date for granting of divorce.¹⁴

- **Rationality behind period of interregnum**

The period of interregnum as provided in the section is between 6 months to 18 months. The rationale for the minimum period of six months is to provide time to parties to think over; the outer limit is provided so that the matter does not linger on indefinitely.¹⁵ The eighteenth month period was specified only to ensure quick disposal of cases by mutual consent, and not to specify the time period of withdrawal of consent.¹⁶ If the parties do not move until the expiry of 18 months the petition would, logically speak, lapse. The parties will be however free to file a fresh petition as the same would not be bared by the principle of *res judicata* or estoppel.

III. CONCLUSION & SUGGESTIONS

It can be concluded from the above analysis of the judgment and various judicial precedents that a divorce petition may be withdrawn by either of the party before a decree of divorce is passed and after 18 months have elapsed, moreover because the court does not have the authority to pass any decree after the stipulated time period. On the second issue, the court cannot grant a decree of divorce if the mutual consent of the parties is withdrawn under Section 13(B) of the Act as mutual consent itself gives the jurisdiction to the court to entertain the petition.

¹⁰ K. I. Mohanan v. Jeejabai, AIR 1988 Ker 28; Harcharan Kaur v. Nachhattar Singh, AIR 1988 P&H 27; Santosh Kumari v. Virendra Kumar, AIR 1986 Raj 128; NG Rama Prasad v. BC Vanamala, AIR 1988 Kant 162

¹¹ AIR 1992 SC 1904

¹² *Ibid*

¹³ AIR 2010 P&H 169

¹⁴ Prakash Alupal Kalandari v. Jahanvi, AIR 2011 Bom 119

¹⁵ Kumund Desai, Indian Law of Marriage and Divorce, 240 (10th ed. 2017)

¹⁶ Hitesh Bhatnagar v. Deepa Bhatnagar, AIR 2011 SC 1637

There are certain recommendations which may be put forward in light of other issues and discussions in the court.

1. Irretrievable breakdown of Marriage may be added as a separate ground for divorce – Sometimes courts face difficulty in granting a decree of divorce due to some technical loopholes in the existing theories of divorce. Irretrievable breakdown ends up being a very subjective term and courts may end up giving contradictory and undesired opinions. Hence it should be included as a proper separate ground of divorce. The positive result of the same would be that if any of the party to the marriage is not ready to live with the other party the relationship will not be a happy relationship. Stretching such a relationship will do no good, rather will develop hatred and frustration among the parties for each other. In relation to that, The Marriage (Amendment) Bill, 2010 which is long pending may be passed at the earliest.

2. Amendment to Section 13(B) – Section 13(B) of the Act may be amended as the legislative intent and judicial interpretation is not in consonance with the language of the text in the provision. Literal interpretation of the rule may lead to absurd results as the language indicates that the court shall pass a decree of divorce if the petition is not withdrawn till the end of 180 days. However the correct interpretation of the rule demands further consent of both the spouses in order to ask for a decree of divorce for mutual consent.

3. Limited use of the power under Article 142 – It is recommended that the apex court's wide power under Article 142 may not be extended liberally to cases of divorce as that would affect the sanctity of marriage. Only in very rare cases, the powers of this constitutional provision may be exercised.

4. Revisiting 'one year separation' ground – It is recommended to revisit this condition under this section. We are in a modern society where husband and wife are both working and living separately for work purposes even after marriage. The 'one year' separation condition may become prone to misuse. It is recommended that there should be no bar on time of separation of the couple. Since the petition moved under this section is not unilateral, the existence of such condition only creates agony between the couple and their family as they would have to live separate in order to move the petition.

Family – counseling programs may be made compulsory before moving any petition of divorce as self-reconciliation is better on any day.