

Karnataka High Court Smt. Roopa Reddy vs Prabhakar Reddy on 4 June, 1993 Equivalent citations: AIR 1994 Kant 12, II (1993) DMC 274, ILR 1993 KAR 2212, 1993 (2) KarLJ 599 Author: Hanumanthappa Bench: S Hakeem, N Hanumanthappa ORDER Hanumanthappa, J. 1. This appeal is under S. 19(1) of the Family Courts Act, 1984, against the order passed by the Principal Judge, Family Court, Bangalore, dated 24-10-1990 in M.C. No. 1019 of 1987 rejecting the appellant's petition filed u/S. 13(1)(1-a) and (1-b) of the Hindu Marriage Act. 2. A few facts which are necessary to dispose of this appeal are as follows: The appellant is the wife and the respondent is the husband. They were married on 30-8-1974 at Bangalore as per Hindu customs. After the marriage, they lived together at Wardha in Maharashtra where the respondent was working as a Lecturer. Out of the said wedlock 2 sons were born. The first son, Bharath was born on 24-11-1976 and the second son, Prathivi, was born on 22-8-1978. In the year 1980 they shifted to Thirupathi as the respondent got a job as a Lecturer in the S.V. University College, At the time of marriage, the petitioner was a B.Sc. graduate. After the marriage the petitioner completed her degree course in Library Science in 1975-76 and got the degree B.Lib. Science. In the year 1981-82 she completed post-graduate course in Library Science and acquired M. Lib. Science degree. After completing her studies the appellant again joined the respondent at Thirupathi and lived there for some time. It is alleged that as the respondent stated ill-treating the petitioner; always criticising her; referring to her parents and doubting the character of her sisters. He used to address her in filthy language and ill-treating her in the presence of relatives and her friends. Further, the respondent is excessively irritable and suspicious. Though the respondent is educated, he did not allow her to meet her friends. The suspicious nature of the respondent and the ill-treatment with cruelty forced the petitioner to leave the company of the respondent to join her parents with her children in the month of October 1983. Even after joining her parents, she was hopeful that the respondent would make honest efforts to take her and their children back. But, he refused to do so. Therefore, the respondent was also guilty of constructive desertion. Hence, she got issued a legal notice dated 27-1-1987 to the respondent. As there was no possibility of re-union, the petitioner filed the petition seeking a decree of divorce by dissolving her marriage with the respondent. 3. The respondent/husband filed his objections denying the allegations made by the appellant. He admitted the relationship and the fact of having 2 children by the marriage. But, he denied the allegation that he used to ill-treat her. He had not ill-treated her at any time. His case is that though he treated her with love and affection, the appellant herself developed an indifferent attitude towards him. The appellant alone is responsible for her withdrawal from his company. He has also stated that the appellant's intention to seek divorce is to join one of her sisters who is married to an Austrian and to stay in Austria. Further reason given by the respondent is that he cannot give up the Hindu way of life and adjust to the life of the appellant's sister and her parents. In his statement of objections, the respondent also denied the other averments made by the petitioner as incorrect. 4. On the basis of the pleadings, the Court below raised the following points for consideration : "Point

No. 1: Whether the respondent has treated the petitioner with cruelty? Point No. 2: Whether the respondent is guilty of constructive desertion? Point No. 3: Whether the petitioner is entitled to a Decree of Divorce?

In support of their rival contentions, both parties led evidence, both oral and documentary. The trial Court upon appreciation of the entire evidence, found that the attitude of the respondent towards his wife/appellant was always affectionate. It was he who had encouraged the appellant to study Library Science and enabled her to take the M. Lib Science; and in none of his letters he expressed any ill-will or criticised the way of living of the appellant. So observing, the Court below held that the appellant had failed to prove that the respondent treated her with cruelty. Regarding constructive desertion, the Court below found that the appellant failed to establish that the respondent deserted her; but, on the other hand, the appellant herself wanted to put an end to the marital relationship. While observing so, the Court held that the appellant is not entitled for a decree of divorce. Aggrieved by the said judgment of the Court below, the appellant has preferred this appeal contending, inter alia, that, when both parties live separately, the Court below should have granted a decree of divorce as there is no chance of re-conciliation and that, when the conduct of the respondent has resulted in an act of desertion, the Court, below should have granted the relief, viz., decree of divorce. 5. In support of their rival contentions, counsel appearing for both sides addressed their arguments. As required under the Hindu Marriage Act efforts were made by the Court to bring about re-conciliation. Both parties are educated and capable of understanding the effect of dissolution upon their children. The importance of striving together for the welfare of their children and their proper custody was explained to the parties. But the attempt proved to be futile. 6. During the pendency of this appeal, we directed the appellant to bring her 2 children. The respondent was also present. On our query the children submitted that they would like to be under joint custody of their parents. The respondent stated that he can give better education to his children at Thirupathi, since he is working in the University and entitled for certain benefits. Appellant did not object to such a suggestion. 7. On 12-10-1992 the parties filed a joint application under Order VI Rule 17 read with S. 151, CPC seeking amendment to the main petition filed by the appellant u/S. 13(1)(ia) and (ib) to be convened into one under S. 13B of the Hindu Marriage Act. The proposed amendment reads as follows: "Proposed Amendment All the averments made in paras 4 to 8 of the said M.C. No. 1019/87 on the file of the Family Court at Bangalore may be permitted to be deleted including the provisions of the law stand in the Petition by substituting in its place S. 13(B)(i) of the Hindu Marriage Act in its place. The following paras may be permitted to be incorporated in the petition as Paras 4, 5 & 6. Para 4: Both the Petitioner and the respondent submit that they are living separately since October 1981 continuously and they have not been able to live together as husband and wife ever since then. Para 5 : The Petitioner and the respondent have agreed not to make any allegation against each other in this petition. Para 6: Both petitioner and the respondent submit that they

have mutually agreed to make this application for dissolution of their marriage solemnised on 30-8-74 by decree of divorce and they further submit that their mutual consent is not influenced by any external threat or influence of coercion. The prayer made in the main petition may be deleted entirely and in its place the following lines may be permitted to be substituted. Wherefore both parties respectfully pray that this Hon'ble Court may be pleased to pass a decree of divorce by dissolving the marriage between the petitioner and the respondent solemnised on 30-8-74 and grant such other relief as this Court may deem fit in the circumstances of the case, allowing this petition." The said application is supported by the affidavits of both parties. Subsequent to this application both parties appeared again before the Court and reiterated that there is no possibility of reconciliation and they agree for divorce by mutual consent as the same will be in the interest of both parties and the children. They also submitted that there is no external threat, influence or collusion behind the proposal of the divorce by mutual consent. 8. In addition to the statements of both parties, learned counsel appearing for both sides submitted their arguments in support of the application seeking decree of divorce by mutual consent. According to them, in view of S. 13B of the Hindu Marriage Act there is no impediment to grant decree of divorce even at this stage when both parties have expressed their consent. In support of this contention, they have placed reliance on some authorities which will be referred to hereafter. 9. The question that arises for consideration is whether in the facts and circumstances of (the case the parties are entitled to seek divorce by consent at the appellate stage without there being a formal application under S. 13-B before the Family Court? 10. From the material on record it is clear that both parties who are educated and are in a position to understand the concept of marriage and their responsibilities as husband and wife. Their feelings and temperament make it apparent that no amount of persuasion for reconciliation will be fruitful. In the circumstances the only alternative is to consider whether it is permissible to grant divorce by mutual consent. 11. Before the Hindu Marriage (Amendment) Act, 1976, the relationship between wife and husband concerned was one of a sacrament. But, by 1976 Amendment the rigidity in continuing the relationship is liberalised. The object of introducing, S. 13B is obviously to avoid prolongation of separation and misery to the parties. S. 13B of the Act reads thus: "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, 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 presentation of the petition referred to in sub-sec. (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.” Earlier to the amendment to the Act there was no provision for divorce by mutual consent. But, by virtue of the present amendment divorce by mutual consent is made possible. What is required is a motion by both parties seeking divorce by mutual consent and an order be made out earlier than 6 months and not later than 18 months. Earlier thinking was that there cannot be any compromise in the matrimonial proceedings. But the amendment has made it possible by mutual consent of both parties as held by the Supreme Court in *Smt. Saroj Rani v. Sudarshan Kumar Chadha*, the relevant portion of which is extracted hereunder: “Apart from that we are in agreement with the majority of the learned Judges of the Division Bench (Full Bench) of Punjab and Haryana High Court in the case of *Joginder Singh v. Smt. Pushpa* (supra) that all cases of consent decrees cannot be said to be collusive. Consent decrees per se in matrimonial matters are not collusive. As would be evident from legislative intent of S. 13-B that divorce by mutual consent is no longer foreign to Indian law of divorce but of course this is a subsequent amendment and was not applicable at the time when the decree in question was passed. In the premises we accept the majority view of the Division Bench (Full Bench) of Punjab and Haryana High Court on this point.” Similar question, namely, whether there can be compromise in matrimonial cases had come up for consideration before this Court and also other Courts. In *Santosh Kumari v. Virendra Kumar*, considering the scope of S. 13B(1) and (2) of Hindu Marriage Act and the applicability of Order 23 Rule 3 of CPC in matrimonial cases by mutual consent the High Court of Rajasthan held that mutual consent is in the nature of compromise though Order 23 Rule 3, CPC is not strictly applicable. It is observed that the principle underlying compromise can certainly be invoked to matrimonial proceedings. Regarding the power under S. 13B(1) and (2) to make a motion for dissolution of marriage the Court observed that the period mentioned thereunder shall be read as directory and not mandatory. It held that an order for dissolution can be made even before and after 18 months from the date of presentation of the petition as the Court would always get jurisdiction to entertain the petition and grant a decree of divorce in accordance with law. 12. A division Bench of the High Court of Andhra Pradesh in *K. Omprakash v. K. Nalini*, explaining the scope of S. 13B of the Hindu Marriage Act held that it shall be read as (i) directory; (ii) the Section does not prevent the Court from granting immediate relief of divorce, when any amount of persuasion for patching up of differences is impossible and (iii) further, if the object of S. 13B(2) is properly understood, the period fixed in the section does not apply to Appellate Court. The relevant paras of the judgment are extracted hereunder: “Section 13-B is introduced into the statute book by means of the Marriage Laws (Amendment) Act, 1976. It permits, for the first time, dissolution of a Hindu marriage by mutual consent of parties, provided the parties have been living separately after their marriage for a period of one year or more and that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. S. 13-B radically altered the legal basis of a Hindu marriage by treating it as an

ordinary form of contract which competent parties can enter into and put an end to like any other contract by mutual consent. Just as the parties can obtain a consent decree from the Courts under Order 23, Rule 3, CPC so they can now under S. 13-B of the Hindu Marriage Act obtain a consent divorce. Sri S. V. Gupte in his Hindu Law 3rd (1981) edition, Vol. 1, page 800, commenting on this change, wrote: This is a very radical amendment as it enables divorce by consent. It also virtually puts a death-nail on the old concept of Hindu Law and Hindu morality that marriage is a sacrament and not a contract.’ However, a petition filed for divorce by consent under S. 13-B of the Hindu Marriage Act is required to be kept in abeyance for a minimum period of six months. This is in sharp contrast with a petition filed for divorce by consent under Special Marriage Act which is liable to be kept in abeyance at least for one year. This liberalising trend of law in the matter of granting divorce by consent cannot be lost sight of by Courts in interpreting that section. But even then Cl. (2) of S. 13-B requires a Court not to pass a decree for divorce before six months of time lapses and after 18 months of time passes from the date of filing of such a petition for divorce by mutual consent. This is the last hope of the legislature for saving the marriage. The intention of the legislature is to provide a minimum period of six months for re-thinking of the parties.” 13. The next question is whether the requirement under S. 13-B of the Hindu Marriage Act has to be considered as mandatory or directory. The words used in the Section shall have to be read in the context in which the liberalised provision has been made by the legislature enabling the unwilling parties to seek divorce instantaneously and thus to put an end to the untold misery. When the intention of the Legislature in introducing S. 13-B(2) is to liberalise and to unlock the wedlock, the legislature has never intended the period of 6 months mentioned in the Act shall be strictly complied with. But, in spirit the Section is directory in nature and it has been incorporated to help 2 discordant spouse to get quick separation and to lead their remaining life without any agony. If S. 13-B(2) is read as mandatory, the very purpose of liberalising the policy of decree of divorce by mutual consent will be frustrated. Thus, S. 13-B(2), though it is mandatory in form is directory in substance. Explaining this position the High Court of Andhra Pradesh observed as under: “For all the above reasons, we are of the opinion that S. 13-B(2) of the Hindu Marriage Act should be read as directory only. S. 13B(2), no doubt cautions the Courts of its duty to fight the 5ast ditch battle to save the marriage; but when the Court is fully satisfied, on the basis of the proved facts, that in the interests of justice of the society and the individual marriage tie should be put asunder immediately, S. 13-B(2) does not impose any fetter on the powers of the Court to grant instant decree of divorce. At any rate, we are clearly of the opinion that the time-table fixed by S. 13-B(2) does not apply to an appellate Court.” 14. In *Dhanjit Vadra v. Smt. Beena Vadra*, , while explaining the scope of S. 13(1)(ia) and 13-B of the Hindu Marriage Act and the effect of compromise under Order 23, Rule 3, CPC and Order 6 Rule 17, CPC held that the Court would allow amendment with prospective effect. The relevant discussion at paras 11 and 16 is extracted hereunder: “A bare perusal of the application for amendment under Order 6 Ruler 17, CPC as also

of the petition under S. 13-B(2) of the Act shows that the agreement between the parties to separate as also the terms with regard to alimony. Maintenance, custody of the child and disposal of property were negotiated and settled only during the pendency of the diverse petition. These were obviously subsequent events. It is now well established by a decision of a Division Bench of this Court in the case of *Jawaharlal Mamtani v. Bhagchand Motumal Mamtani*, that an amendment to take into consideration subsequent events would necessarily be effective from a future date and not the suit. From these various decisions of different High Courts, it is clear that the requirement of a motion within the time specified under sub-sec. (2) of S. 13-B is merely a matter of formality and that a decree for divorce by mutual consent can be granted without waiting for the period of six months specified under sub-sec. (2) of S. 13B if a Court is satisfied in a case that the requirement of sub-sec. (1) of S. 13B is fulfilled. In other words, the time specified in sub-sec. (2) can be waived if the Court is satisfied that the parties have been living separately for a period of one year or more, that they have mutually agreed that the marriage should be dissolved as envisaged by sub-sec. (1) of S. 13-B of the Act.” 15. Similar view has been taken by a single Judge of this Court in *Hanamappa Chetrappa Koppal v. Nil* 1991 (1) Kar LJ 316 at paras 16 and 17 of the judgment. The relevant observation reads as under: “Thus on a proper analysis of S. 13-B the intendment of the Legislature is clear that six months as well as eighteen months time fixed by S. 13-B(2) is not a rule relating to jurisdiction of the Court to entertain petition for divorce by consent. The question of jurisdiction to entertain the petition is dealt with by sub-sec. (1), which must be strictly complied with. Sub-sec. (2) of S. 13-B is a part of a procedure and it is well laid down law that procedural provision must be construed as handmaid of justice in order to advance further the interest of justice. Section 13-B(2) does not impose fetters on the powers of the Court in granting divorce if the Court is satisfied that, such a divorce by consent could be granted. When it appears to the satisfaction of the Court that it is impossible for the parties to live together for any reason and they have been living separately for more than one year and the decree by divorce would be in the interest of both of them, it need not attach much importance of waiting for the expiry of the period of six months or eighteen months, the Court could grant a decree of divorce by mutual consent instantly if motion is made by the parties.” 16. The waiting period mentioned in S. 13-B(2) of the Act has been explained by the Supreme Court in the case of *Sureshta Devi v. Om Prakash* wherein the Court explained thus : “Section 13-B is in pari materia with S. 28 of the Special Marriage Act, 1954. Sub-section (1) of S. 13-B requires that the petition for divorce by mutual consent must be presented to the Court jointly by both the parties. Similarly; Sub-sec (2) providing for the motion before the Court for hearing of the petition should also be by both the parties. There are three other requirements in sub- sec. (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. Under Sub-sec, (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.” Explaining the object of S. 13B of the Act, in para 10 of its judgment the Court observed that the period of waiting 6 to 18 months is with an intention to see that the parties to seek advice from their relations. The Supreme Court further observed that, while considering the request by mutual consent the Court has to be satisfied first whether the petition presented for divorce has been presented by mutual consent and the consent given by the parties is a bona fide one. 17. From the facts made available and the views of various courts on the point, it is clear that where separation is of a longer period and chances of re-union an impossibility a decree of divorce is the only prudent course and be granted. In the present case, subsequent to October 1983 no honest attempt was made by the parties to reconcile and live together. Even when attempt was made by this Court to know whether the parties are willing to reconcile, the answer given was one of refusal. This circumstance compelled the parties to seek a decree of divorce by mutual consent as they are entitled under S. 13B(2) of the Act. The application filed in this case under Order 6 Rule 17, CPC is of more than six months old and it can be treated as a compromise petition, i.e., petition for divorce by mutual consent. Since law permits that When he Consent is not tainted with mala fides, fraud or coercion, but given out of free will and with the knowledge of its consequences, the application presented seeking divorce by mutual consent has to be accepted. 18. Marriage is an union of 2 hearts. Success of married life depends on the edifice built with the mutual trust, understanding, love, affection, service and self sacrifice. Once this edifice is shaken, happy married life will be shattered into pieces. The result is one of misery and emotion. Whether one accepts it or not liberalisation in the way of living of individuals and reformation in age old customs and due to modernisation and understanding of individual rights and equal status irrespective of sex it is natural for either of the spouse to seek for dissolution. Where the marriage tie has been broken, the Court has to look to the interest of the parties and the welfare of the children as paramount. When it is impossible to live tike husband and wife, any compulsion to unite them will lead to social evils and disturbance of mental peace and disorder in the family life. However rigid social fabric it is not the social system but the persona] safety of the parlies to the wedlock, shall prevail. This should be the guiding principle in view of S. 13B(1) of the Act. There is complete destruction of the essence of marriage between parties and it has reached the stage of irretrievable breakdown. 19. In the background of the circumstances narrated in the case, the request made by both parties for divorce by mutual consent is the only just and proper way to allow them to spend their remaining period of life happily with contentment instead of com-

elling them to lead a miserable and emotional life without any constructive purpose. 20. Hence, the request made by the parties for a decree of divorce by mutual consent has to be granted since it is in their interest and for the welfare of their children. Hence, I.A. No. IV for amendment of the petition is allowed. 21. Consequently, this appeal is allowed. The judgment of the Court below is set aside and the decree of divorce by mutual consent is granted by ordering dissolution of the marriage between the parties. It is also made clear that this judgment is passed on the basis of the mutual consent and not on the basis of the allegations made by the parties against each other. 22. Since there is no valid objection to the custody of the children, I.A. No. III is allowed and it is ordered that custody of the children be handed over to the respondent/husband as he has undertaken to educate them, or the children also agreed to be with him. The respondent has to educate and bring up the children. During vacation the children are at liberty to stay with their mother if they so desire. No costs. 23. Appeal allowed.