Calcutta High Court (Appellete Side)
Smt. Rita Bhattacharjee vs Shanti Ranjan Bhattacharjee on 12 January, 2009
Author: Bhaskar Bhattacharya

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Appellate/Revisional/Civil Jurisdiction

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Rudrendra Nath Banerjee

F. A.T. No. 419 of 2008
With
C.A.N. 8852 of 2008

Smt. Rita Bhattacharjee
Versus
Shanti Ranjan Bhattacharjee
And
F.A. No.116 of 2006

Smt. Swapna Mukherjee (nee Roy)
Versus
Sri Jyotirmoy Mukherjee

For the Parties: Mr. Jiban Ratan Chatterjee,
Mr. Harish Tandon,
Mr. Biswajit Basu,
Mr. Kaushik Chatterjee,
Mr. Goutam Das,
Mr. Mahendra Prasad Gupta,
Mr. S.K. Tewari,
Mr. Prashant Agarwal,
Mr. Susenjit Banki.

Heard on: 18.12.08.
Judgment on: 12th January, 2009.

Bhaskar Bhattacharya, J.:-

These two applications were heard analogously as common questions of

laws are involved herein. These two applications have been filed by the parties to two different matrimonial appeals pending in this court thereby praying for granting divorce on mutual consent.

The question that primarily arises for determination in these applications is whether in a pending appeal against the dismissal of a suit for divorce on the grounds specified in Section 13 of the Hindu Marriage Act (hereinafter referred to as the Act), the parties to such proceedings, instead of filing a fresh application under Section 13B of the Act before the learned District Court, can file such an application and insist on passing a decree for divorce on mutual consent without waiting for six months as provided in Section 13B(2) of the Act.

Mr. Tandon and Mr. Basu, the learned counsel appearing for the respective parties have made separate submissions in support of the applications contending, in substance, that this Court, in a regular appeal against dismissal of a suit for divorce filed on various grounds mentioned in Section 13 of the Act, after being satisfied with the requirements of sub-section (1) of Section 13B grant a decree for divorce on mutual consent and that the formalities prescribed in sub-section (2) of Section 13B of the Act are not mandatory and can be dispensed with.

In order to appreciate the contentions of the learned counsel for the parties, it will be appropriate to refer to the provisions contained in Section 13B of the Act which are quoted below:

> " 13-B. Divorce by mutual consent.--(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have

> mutually agreed that the marriage should be dissolved.
> (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

On a plain reading of the aforesaid provisions, it appears that the parties to a marriage can present a petition for divorce on mutual consent before the District Court if the following three conditions are satisfied at the time of presentation of such petition:

1) The parties are living separately for a period of one year or more;
2) They have not been able to live together;
3) They have mutually agreed that the marriage should be dissolved.

Sub-section (2) of Section 13B prescribes further conditions to be satisfied in order to enable the District Court to exercise jurisdiction under the said provision. According to sub-section (2), after the filing of such application, the same is required to be moved jointly by the parties after the period of at least six months but not exceeding eighteen months from the date of initial presentation of the application if the same has not been withdrawn in the meantime. On such petition being jointly moved, the Court should, after hearing the parties and after making such enquiries, as it thinks fit, ascertain whether a marriage had really been solemnized between the parties and that the three conditions mentioned above are satisfied. On being so satisfied, the Court can pass a decree dissolving the marriage with effect from the date of such decree. Section 19 of the Act prescribes the forum for presentation of the petition specifying the territorial jurisdiction of the District Court to entertain all the applications under the Act including the one presented under Section 13B of the Act.

Therefore, the first question that arises for determination in these applications is whether this Court while exercising appellate jurisdiction in respect of an appeal filed against a decree passed in different proceedings under Section 13 of the Act by the Trial Court can entertain an original application under Section 13B which has nothing to do with the subject-matter of the pending appeal.

At the very outset, we should bear in mind that the Judges of a High Court, sitting either singly or in a Division Bench, derive authority to hear a matter on the basis of determination given by the Hon'ble Chief Justice of that Court. At this juncture, it will not be out of place to refer to the following observations of a Division Bench of this Court in the case of Sohan Lal vs. State, reported in AIR 1990 Cal 168, which have since been approved by the Supreme Court in the case of State of Rajasthan vs. Prakash Chand reported in AIR 1998 SC 1344:

> "It is pertinent to remember that the jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to value, place, nature of the subject matter and age of the case. The power of the Court may be exercised within the defined territorial limits. It may be qualified or confined to subject matter of prescribed value. The Court may have competence to deal only with the cases of a specified character, for instance, testamentary or matrimonial appeals, revisions or writs, or specified subjects, such a land or service, and so on and so forth. The jurisdiction may be further restricted with reference to the age of cases if the authority concerned directs the hearing of cases to take place before the Court according, to the date of filing. This classification as to territorial jurisdiction, pecuniary jurisdiction and jurisdiction over the subject matter is obviously of a fundamental character. The cardinal position cannot be overlooked that before jurisdiction over the subject matter is exercised, the case must be legally brought before the concerned Court for the hearing and determination and that a judgment pronounced by Court without investment of jurisdiction is void."
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> (Emphasis supplied by us).

By virtue of the determination given by the Hon'ble Chief Justice

conferring power upon us to hear matrimonial appeals and applications made in connection with such appeals, we are entitled to exercise jurisdiction to hear these two matrimonial appeals filed by the respective appellant against the decree passed by the learned Trial Judge dismissing the suit for divorce. The parties to such appeals now want that we should entertain and pass order on an application which has nothing to do with the pending appeal but is, in substance, an application under Section 13B of the Act required to be filed by the parties before the District Court having jurisdiction in terms of Section 19 of the Act. As the Hon'ble Chief Justice has not given us any determination to entertain an original application under Section 13B of the Act, we are of the opinion that on that ground alone we should return the application holding that we have no determination to hear such application.

Secondly, as an Appellate Court, in terms of the provisions contained in Section 107 of the Code of Civil Procedure and Section 28 of the Act, we have no power to go beyond the scope of the suit out of which the present appeals arise. The ground of divorce agitated before the Trial Court was different as prescribed in Section 13 of the Act whereas the parties now seek to rely upon the grounds mentioned in Section 13B of the Act which is foreign to the pleadings of the parties and the jurisdiction sought to be invoked is not an appellate jurisdiction but original in nature required to be exercised by the District Court referred to in Section 19 of the Act. Thus, the application does not come within the purview of the appeals preferred by the parties against dismissal of the suit for divorce and consequently, as an Appellate Court hearing an appeal against the dismissal of a suit for divorce, we cannot grant relief to the parties on the basis of a different provision of the statute which was not resorted to by the parties before the appropriate Court prescribed under the law.

Thirdly, the provision contained in Section 13B of the Act is a special power deviating from the other provision of grant of divorce on proving grounds mentioned in Section 13 by conferring power upon the District Court to grant divorce on mutual consent on the grounds provided in sub-section (1) of Section 13B in a manner indicated in sub-section (2) thereof. It is a well-known proposition of law often reiterated by the Supreme Court that if a statute vests certain power in an authority to be exercised in a particular manner, then, the authority so empowered is required to exercise such power only in that manner. (See: State of Uttar Pradesh vs. Singhara Singh reported in AIR 1964 SC 358; A.K.Roy vs. State of Punjab reported in AIR 1986 SC 358; Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and others reported in AIR 2001 SC 3868 at paragraph 27). Such power, in our opinion, cannot be exercised by an Appellate Court dealing with an appeal against an order passed under a different provision of the statute.

Lastly, we are quite alive to the position of law that a High Court can under the circumstances mentioned in Section 24 of the Code of Civil Procedure, withdraw any of the proceedings "pending" before a subordinate Court to it and try the same; but the law does not permit a High Court to exercise jurisdiction over a litigation by authorising a party to file a proceeding before it instead of filing the same before the prescribed forum. Therefore, by taking aid of the aforementioned provision of law, we are unable to entertain an original application under Section 13B of the Act in connection with the pending appeal under Section 28 of the Act which we are entrusted to hear by virtue of the determination given by the Hon'ble Chief Justice. Even if any pending application under Section 13B of the Act is withdrawn by High Court in exercise of its power under Section 24 of the Code, the manner of disposal of the proceedings mentioned in sub-section (2) must be followed and the grounds mentioned in

sub-section (1) thereof must be established to the satisfaction of this Court.

The learned counsel for the parties vehemently contended before us that the provision contained in Section 13B (2) are not mandatory in nature and thus, the waiting period mentioned therein can be dispensed with by the Court dealing with such application. In our opinion, after the decision of the Supreme Court in the case of Surestha Devi vs. Om Prakash reported in AIR 1992 SC 1904, there is no scope of argument that the time period mentioned in sub-section (2) of Section 13B is directory. The following observations of the Supreme Court in that case are quoted below:

> "From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties ... if the petition is not withdrawn in the meantime, the Court shall..... pass a decree of divorce.." What is significant in this provision is that there should also be mutual consent when they move the Court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."

We are quite cognisant that the propriety of the decision in the case of Smt. Surestha Devi (supra), has been questioned by another Bench consisting of two Judges in a subsequent decision of the Supreme Court in the case of Asoke

Hurra vs. Rupa Asoke Hurra reported in AIR 1997 SC 1266 where the said Bench disagreed with the view taken in the case of Smt. Surestha Devi (supra), and but without referring the matter to a Larger Bench, in the facts of that case, decided to grant relief to the husband by not only granting a divorce but also quashing the criminal proceedings under Section 494 of the Indian Penal Code on condition of payment of Rs.10 lakh by the husband. At this stage, it will be profitable to refer to the following observation of the Supreme Court in the case of Vijay Laxmi Sadho vs. Jagdish reported in AIR 2001 SC 600 while pointing out the duty of a co-ordinate Bench, if it is unable to agree with the earlier decision of another Bench of the same strength:-

> "It is well settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a Larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."

We are, therefore, unable to accept the said decision in the case of Ashoke Hurra as a valid binding precedent and respectfully rely upon the decision in the case of Surestha Devi (supra).

As pointed out in the case of Surestha Devi, the time period mentioned in Section 13(B) being enacted based on public policy, there is even no scope of waiving such time limit mentioned in the Statute. (See: Muralidhar vs. State of U.P. reported in AIR 1974 SC 1924). If the intention of the legislature is to confer jurisdiction upon the Court to grant decree for divorce on mutual consent on moving the same jointly by both the parties at least after six months from the date of initial presentation of the application but not beyond the expiry of eighteen months thereof, giving the parties opportunities to think over the matter during such period, such time period cannot, at any rate, be curtailed by the

court which gets jurisdiction over the matter only if the petition is moved jointly within the said period. If the Court asks the parties to move the same jointly before six months from the date of its presentation, it will be acting without jurisdiction as it is yet to be vested with the jurisdiction; similarly, if the parties are unable to make up their minds by jointly moving the same within eighteen months from the date of its presentation, the Court becomes funtus officio.

We now propose to deal with the decisions cited by the learned counsel for the parties. The learned counsel have relied upon the following decisions in support of their contentions:

1) Shasi Garg vs. Arun Garg reported in 1997(7) SCC 565;

2) Balwant Singh vs. Anand Kumar Sharma reported in 2003(3) SCC 433= AIR 2003 SC 1637;

3) Dr. Leena Ray vs. Dr. Subrata Ray and others reported in AIR 1991 SC 92;

4) Gautam Basu vs. Nina Basu reported in 1990(1) CHN 183;

5) Rajesh Lakhotia vs. Smita Lakhotia reported in 2001(1) CLJ 565;

6) Apurba Mohan Ghose vs. Manashi Ghose reported in 93 CWN 79.

In the case of Shasi Garg (surpra), when a transfer application came up for hearing before the Supreme Court, the parties desired to settle their disputes by filing a memorandum of agreement. The Supreme Court transferred the case pending before the District Court to itself and proceeded to pass a decree by mutual consent by treating the same as one under Section 13B of the Act. In paragraph 8 of the judgement, the Apex Court specifically recorded that it adopted the aforesaid procedure for doing "complete justice between the parties and to avoid unnecessary further litigation". It is, therefore, apparent that the

Supreme Court in that case exercised its power under Article 142 of the Constitution of India and as such, the said decision cannot be cited as a precedent in support of the contention that this Court can also entertain such type of agreement as a petition under Section 13B of the Act. Moreover, in that decision, no proposition has been laid down that such application can be filed even in a pending appeal against contested decree of dismissal of the suit for divorce before a High Court.

By relying upon the decision in the case of Balawant Singh vs. Anand Kumar Sharma (supra), it was sought to be argued that if a thing is required to be done by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified in the Statute. According to the learned counsel, in section 13B, no consequence having been mentioned for non-compliance of the time schedule indicated therein, the provision must be held to be directory. There is no dispute with the aforesaid proposition of law but we fail to appreciate how the said principle can support the contention of Mr. Tandon and Mr. Basu. According to Section 13B, a duty is cast upon the "parties" to move the petition jointly before the District Court between six months and eighteen months from the date of presentation of the petition and the Court gets jurisdiction to grant relief only "on the motion of both the parties" being made during the said period. Therefore, duty being cast upon the litigants to move jointly within a specified period, even according to the aforesaid decision, the provision is mandatory. The law is equally settled that where a power or authority is conferred by a Statute with a direction that certain formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority (See:

paragraph 13 of the judgement of the Supreme Court in the case of Haridwar Singh vs. Bagun Sumbrui reported in AIR 1972 SC 1242). As pointed out in Baccon's Abr. Tit G statute quoted in Craies: Statute Law, 6th Edition pages 264-265, "if an affirmative statute which is introductory of a new law directs a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

We, therefore, find that the decision of the Supreme Court in the case of Balwant Singh (supra) is of no avail to the appellants.

In the case of Dr. Leena Roy vs. Dr. Subrata Roy (supra), the Supreme Court delivered the following short judgement quoted below:

> "We have considered the entire matter. The parties are present before us and have filed an application for compromise and also for an order for decree of divorce by mutual consent. Since we are not in seisin of the matter it is better to direct the parties to file the application before the City Civil and Sessions Court, Calcutta. If such an application is filed, the Court will dispose of the application as expeditiously as possible preferably within two weeks from the date of filing of such application, in view of the fact that one of the parties intends to go back to America in connection with her service. Regarding the custody of the child in view of the compromise being effected between the parties we direst the writ applications and the special leave petition to be disposed of in terms of the compromise. There will be no order as to costs."

In our view, the aforesaid decision did not lay down a proposition of a law that an application under Section 13B of the Act can be disposed of within two weeks from the date of filing of the same. By the said judgement, only some directions were given in exercise of power conferred under Article 142 of the Constitution of India and as such, the said decision is not a binding precedent when the period mentioned in Section 13B has been held to be mandatory in the case of Surestha Devi (supra).

In the case of State of Orissa and others v. Balaram Sahu and others,

reported in AIR 2003 SC 33, the Supreme Court in paragraph 13 of the judgement made the following clear observations:

> "An order made to merely dispose of the case before court by issuing certain directions on the facts and for the purposes of the said case, cannot have the value or effect of any binding precedent and particularly in the teeth of the decision in Jasmer Singh's case (supra)."

By following the aforesaid observations, we are of the opinion that in view of the decision of Supreme Court in the case of Surestha Devi (supra), the decisions in the cases of Dr. Leena Roy (supra) and Shasi Garg (supra), cannot be held to be a precedent within the meaning of Article 141 of the Constitution of India.

In the case of Gautam Basu vs. Nina Basu (supra), one of the questions involved before a Division Bench of this Court was whether the time frame indicated in Section 13B(2) of the Act was mandatory or directory. The Division Bench specifically pointed out that the time limit for moving the application jointly by the parties was mandatory and held that once the petition was moved jointly within the said time limit, the Court gets jurisdiction to entertain the matter but the Court is not divested of its jurisdiction simply because it could not dispose of the matter within eighteen months from the date of presentation of the application. We respectfully agree with the said view taken by the Division Bench because of the fact that the said section does not direct the court to dispose of the application within eighteen months from the date of presentation of the application. The said decision of the Division Bench of this Court, therefore, is in conformity with the view we propose to take that before waiting for six months from the date of initial presentation of the application, the District Court is not vested with the jurisdiction to entertain the same even if jointly moved by the

parties.

In the case of Rajesh Lakhotia vs. Smita Lakhotia (supra), a division bench of this Court, in a situation like the present ones, on the basis of an application filed in connection with the first appeal preferred against the dismissal of a suit for divorce, granted decree on mutual consent on April 18, 2001 although such application was filed on March 15, 2001. In granting such relief, the division bench relied upon the following decisions of the Supreme Court:

1) Shasi Garg vs. Arun Garg (supra).

2) Radha vs. Mohinder Kumar- 1998(8) SCC 530;

3) Mrs. Payal Jindal vs. A.K. Jindal- 1995(supp) 4 SCC 411;

4) Sandhya Rani vs. Kalyanram- 1994(supp) 2 SCC 588;

By relying upon those decisions, it held that having regard to the view expressed by the Apex Court in those cases, it found no difficulty in converting the proceedings even at the appellate stage from one under Section 13 of the Hindu Marriage Act to one under Section 13B of the said Act. According to the said Division Bench, the waiting period mentioned in Section 13B (2) of the Act would have no application before the appellate stage as the said time had already expired before the Trial Court and that as the marriage had broken down irretrievably, it thought it fit to rely upon the decision of the Supreme Court in the case of Sneh Prabha vs. Ravinder Kumar reported in AIR 1995 SC 2170.

With great respect to the learned Judges of the said division bench in the case of Rajesh Lakhotia, we are unable to follow the said decision as a valid precedent for the following reasons:

First, the division bench totally overlooked that the decisions of the

Supreme Court in the cases of Shasi Garg, Radha, Mrs. Payal Jindal and Sandhya Rani (supra), were all passed in exercise of power conferred under Article 142 of the Constitution of India which can be exercised only by the Supreme Court and not by the other Courts. We have earlier pointed out that in paragraph 8 of the judgement in the case of Shasi Garg (supra), the Supreme Court specifically borrowed the language of Article 142 of the Constitution of India holding that it adopted the procedure for doing "complete justice between the parties".

In the case of Radha vs. Mohinder Kumar (supra), the Supreme Court passed the following short judgement:

> "1. The judgment and decree under appeal relates to the annulment of the marriage tie between the parties. It is the husband who was successful in obtaining it. Now, the wife is in appeal before us. The parties have entered into a compromise; the terms whereof have been put on record in writing. In terms therewith, the parties have desired that the marriage between them may be kept dissolved but not on annulment and instead by "mutual consent" effective from the date of the High Court judgment, i.e., 29-7-1994. Such request, in the facts and circumstances, appears to us to be reasonable. We, therefore, substitute the order of the High Court as if from the date of its judgment, the marriage between the parties stood dissolved by a decree of divorce upon mutual consent.
> 2. The second term in the deed of compromise relates to the settlement of permanent alimony. Let those terms be observed as agreed upon between the parties.
> 3. The third term relates to the steps which the parties expect each other to take in order to bring this litigation to an end. Let those steps be also taken, as envisaged.
> 4. The appeal thus stands allowed in terms of the aforesaid "deed of compromise".
> 5. No costs."

By the aforesaid judgement, no law was laid down and it only contained directions while disposing of the said appeal. Therefore, the said judgement is not a binding precedent in terms of Article 141 of the Constitution of India.

In the case of Mrs. Pyal Jindal (supra), the following short judgement was delivered:

> "1. The petitioner Mrs Payal Jindal is present in person. On behalf of the

respondent his father, Lt. Colonel S.L. Jindal (Rtd.), is also present in the

Court. The respondent who is an army officer has not been able to come because of his posting. This is an unfortunate case with chequered history. On an earlier occasion also this Court tried to settle the matter between the parties but with no result. After hearing the learned counsel for the parties and also the parties in person and going through the merits of the case, we are of the view that the marriage between the parties has irretrievably broken down and there is no chance of their living together. In this view of the matter it is in the interest of justice that the parties be permitted to have their own ways in life. The parties have mutually agreed for divorce. It is no doubt correct that ordinarily we should have relegated the parties to the matrimonial court for filing a consent divorce petition. But keeping in view the facts and circumstances of this case and in order to do complete justice between the parties we grant decree for divorce by the consent of the parties with immediate effect. In lieu of permanent alimony the respondent has agreed to pay Rs 2 lakhs to the petitioner in full and final settlement of all the claims of the petitioner. Out of this amount Rs 1 lakh shall be paid on or before December 31, 1992. A further sum of Rs 50,000 shall be paid on or before June 30, 1993 and the remaining Rs 50,000 on or before December 31, 1993. The sum of Rs 800 per month which the petitioner is receiving in lieu of maintenance from the army authority shall continue only up to December 31, 1992. It shall not be paid to her thereafter.

2. The divorce proceedings pending before the Family Court, Bandra at Bombay have thus become infructuous and as such are disposed of.

3. The above order is a composite order and will depend on the payment of the money as directed by us. In the event of any default in the payment of money, this order shall automatically stand revoked and the divorce proceedings pending in the Family Court, Bandra at Bombay shall revive and in that eventuality those proceedings shall stand transferred to the file of the District Judge, Delhi. He may hear the case himself or entrust the same to any other Additional District Judge. The proceedings for maintenance under Section 125 pending before the Delhi Court shall come to an end with effect from January 10, 1993.

4. Learned counsel for the petitioner undertakes that the petitioner shall not prosecute any other proceedings civil or criminal in any court arising out of this matrimonial dispute.

5. The transfer petition is disposed of."

In the above decision also, no law was declared nor was any point decided.

In the case of Sandhya Rani (supra), the decision of the Supreme Court was as follows:

> "1. We have heard the parties in person. Learned counsel for the parties have also assisted us. It is not disputed that the parties are living separately for the last more than three years. We have no doubt in our mind that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. The parties have made joint request for mutual divorce. The written request

by the parties has been placed on the record. In order to do complete justice between the parties, we are inclined to grant decree in divorce on the following agreed terms:

"1. The respondent Kalyanram Narayanan gives up all his claims in respect of plot No. 119 in V.G.P. Pushpa Nagar which is in the name of the petitioner Sandhya Rani. The said plot measures 3200 sq. yds.;

2. Two-third share in the said plot shall go to Kartak Narain son born out of wedlock. The remaining 1/3 share shall be owned by the petitioner Sandhya Rani;

3. The title deed in respect of the property has been handed over to the petitioner Sandhya Rani; and

4. the petitioner Sandhya Rani shall not claim any maintenance past or future, for herself or for her son Kartak Narain from the respondent."

2. We grant decree for divorce in the above terms. The Divorce Petition No. O.P. 1019 of 1992 filed by the respondent (husband) pending before the Principal Family Court, Madras shall stand disposed in the above terms. No costs."

In the aforesaid case, as it appears, no law was decided.

In this connection, we may profitably refer to the following observations of the Supreme Court in the case of Indian Bank v. ABS Marine Products Pvt. Ltd. reported in AIR 2006 SC 1899 while distinguishing a precedent from mere directions:

"One word before parting. Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under Article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should, therefore, be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Art.

142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Art.

142. Be that as it may."

It is thus apparent that the four decisions of the Supreme Court referred to above are not at all precedent and were passed in exercise of power under Article 142 of the Constitution of India although the reference of the Article 142 was not made in the judgements At this stage, we propose to refer to the following decisions of the Supreme Court where the said court converted the proceedings before it to one under Section 13B of the Act and dispensed with the formalities prescribed therein by specifically mentioning that it had adopted such procedure in exercise of power conferred under Article 142 of the Constitution of India:

1) Sanghamitra Ghosh vs. Kajal Kumar Ghosh- (2007) 2 SCC 220;

2) Harpit Singh Anand vs. State of West Bengal-(2004) 10 SCC 505;

3) Kanchan Devi vs. Promod Kumar Mittal- (1996) 8 SCC 90;

4) Swati Verma vs. Ranjan Verma- (2004) 1 SCC 123;

5) Madhuri Mehta vs. Meet Verma- (1997) 11 SCC 81;

6) Anita Sabharwal vs. Anil Sabharwal- (1997) 11 SCC 490;

7) Jimmy Sudarsan Purohit vs. Sudarsan Sharad Purohit- (2005) 13 SCC 410;

The fact that in all those seven cases the Supreme Court specifically exercised power under Article 142 of the Constitution of India itself indicates that by virtue of the provision contained in Section 13B of the Act, it was not possible to entertain such application unless the Court took recourse to Article 142 of the Constitution of India. In the case of Anjana Kishore vs. Puneet Kishore reported in (2002) 10 SCC 194, a three-Judges-Bench of the Supreme Court while hearing an application for transfer of a matrimonial proceedings, on the prayer of both the parties, gave liberty to the parties to file joint application for divorce under Section 13B of the Act before the Family Court with a direction to the said Court to dispense with the requirement of complying with the provision of the waiting period in exercise of power conferred under Article 142 of the Constitution of India by specifically recording that such waiting period is otherwise required to be maintained. The following observations of the Supreme Court in the said decision are quoted below:

> "In view of the developments which have taken place during the pendency of proceedings in this Court, we decline to transfer the case from the Family Court at Bandra, Mumbai to the Family Court at Saharanpur. We, however, direct that as agreed to by learned counsel for the parties, a joint petition shall be filed by the parties before the Family Court at Bandra, Mumbai for grant of divorce by mutual consent. Terms of compromise as filed before us shall also accompany the joint petition. An application for curtailment of time for grant of divorce shall also be filed along with the joint petition. On such application being moved the Family Court may, dispensing with the need of waiting for six months, which is required otherwise by sub- section (2) of Section 13-B of the Hindu Marriage Act, 1955, pass final order on

> the petition within such time as it may deem fit. This direction we are making under Article 142 of the Constitution, as looking at the facts and circumstances of the case emerging from pleadings of the parties and disclosed during the course of hearing, we are satisfied of the need of making such a direction to do complete justice in the case."

(Emphasis supplied by us).

Therefore, we are unable to subscribe to the view of the division bench in the case of Rajesh Lakhotia (supra), that there no difficulty in entertaining an application under Section 13B of the Act in an appeal against the dismissal of the suit for divorce on the grounds mentioned in Section 13 of the Act.

Secondly, the Division Bench in the case of Rajesh Lakhotia failed to take notice of the decision of the Supreme Court in the case of Surestha Devi (supra) holding that the time period mentioned in Section 13B(2) is mandatory. It also failed to take note of the earlier division bench decision of this court in the case of Gautam Basu vs. Nina Basu taking the same view that the minimum time period of six months mentioned in section 13B of the Act is mandatory and the court does not get jurisdiction to entertain the application under Section 13B of the Act unless the same is moved jointly by the parties after the expiry of six months from the date of initial presentation of the application.

Thirdly, the Division Bench in the case of Rajesh Lakhotia (supra), relied upon the decision of the Supreme Court in the case of Sneh Probha vs. Ravinder Kumar (supra), in concluding that the marriage having been broken down irretrievably it was free to pass a decree for divorce. In our opinion, the Supreme Court has never held that a Court dealing with a matrimonial proceeding under the Hindu Marriage Act is competent to grant a decree for divorce if it finds that the marriage has broken down irretrievably notwithstanding the fact that the applicant fails to prove the grounds made out in Section 13 of the Act. The Supreme Court, in various decisions, has exercised its power under Article 142 of the Constitution of India by granting a decree for divorce on the ground of irretrievable breakdown of marriage in order to do complete justice between the parties and the case of Sneh Prabha (supra) is one of those decisions. But such power cannot be exercised by the Courts other than Supreme Court and therefore, the division bench in the case of Rajesth Lakhotia could not exercise such power. The fact that "irretrievable breakdown of marriage" is not a ground of divorce will appear from the fact that a three-Judges-Bench of the Supreme Court in the case of Navin Kohli vs. Neelu Kohli reported in AIR 2006 SC 1675 made the following recommendation in paragraph 96 of the judgement for amendment of the Hindu Marriage Act incorporating the irretrievable breakdown of marriage as a ground for divorce:

> "Before we part with this case, on the consideration of the totality of facts, this 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. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government

> of India for taking appropriate steps."

Notwithstanding such recommendation, the Act has not been amended till this date. Thus, the learned judges of the Division Bench in the case of Rajesh Lakhotia (supra) could not grant a decree for divorce on that ground nor can we follow such course.

We are, therefore, unable to accept the said decision in the case of Rejesh Lakhotia as a valid precedent on the aforesaid grounds.

The question involved in Apurba Mohan Ghose vs. Manashi Ghosh(supra), was whether there can be compromise decree in a matrimonial proceeding under Section 13 of the Act. We are not concerned with such question in these applications. Thus, we do not intend to enter into such question. However, Mr. Tandon, before referring the said decision, ought to have consulted the view of the subsequent decision of the Supreme Court in the case of Asha Devi vs. Chatur Das reported in AIR 2003 SC 2175 on the said question. The said decision is of no avail for the purpose of deciding the disputes involved herein. The decisions cited by the learned counsel for the parties, thus, do not help their clients in anyway.

We, therefore, hold that this Bench vested with the determination to hear matrimonial appeals under Section 28 of the Hindu Marriage Act and the applications connected therewith is not competent to entertain these applications which are in substance the ones mentioned in Section 13B of the Act on the grounds set forth above.

Before parting, we cannot help mentioning that the Appellate Court, in general, possesses the same power and jurisdiction as that of the Trial Court which it enjoyed in the proceedings out of which the appeal arises. If, in a given case, the Trial Court was unable to grant a particular relief within the scope of the suit, the Appellate Court also cannot grant such relief in the appeal arising out of such proceedings. The scope of an appeal has been succinctly narrated by the Supreme Court in the case of Vasant Ganesh Damle vs. Shrikant Trimbak Datar and another reported in the AIR 2002 SC 1237 in the following words:

> "The appeal is considered to be an extension of the suit because under S. 107 of the Code of Civil Procedure, the appellate Court has the same powers as are conferred by the Code on Courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate Court "as nearly as may be" exercised by the trial Court under the Code. If the powers conferred upon the trial Court are under a specified statute and not under the Code, it has to be ascertained as to whether such a power was intended to be exercised by the appellate Court as well. Such a position can be ascertained by having a reference to the specified law by keeping in mind the legislative intention of conferment of power on the appellate Court either expressly or by necessary implication."

Similarly, while dealing with the power of an Appellate Court under the Code of Criminal Procedure, the Apex Court, in the case of Shankar Kerba Jadhav and others vs. The State of Maharashtra,

reported in AIR 1971 SC 840, made the following observations as regards the general power of an Appellate Court, apart from the power conferred upon the Appellate Court under the Code of Criminal Procedure:

> "Let us look at the question apart from the authorities. An appeal is a creature of a statute and the powers and jurisdiction of the appellate Court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial Court. It cannot and ought not to do something which the trial Court was not competent to do. There does not seem to be any fetter to its power to do what the trial Court could do."

By relying upon the aforesaid well-settled principles of law, we have no doubt in our mind that while acting as an Appellate Court arising out of a proceeding under Section 13 of the Act, our scrutiny should be restricted to the materials on record before the Trial Court and that we cannot now exercise the power of the original Court under Section 13B of the Act which is altogether alien to the proceedings before us.

However, as we propose to adopt a view which is inconsistent with the one expressed by an earlier Division Bench in the case of Rajesh Lakhotia (supra) on its own interpretation of the Supreme Court decisions referred to above which we do not agree, judicial decorum demands that we should refer the matter to the Hon'ble Chief Justice to constitute a Larger Bench for resolving the following points:

> 1) Whether a Division Bench, vested with determination to take up appeals against the decree arising out of proceedings under Hindu Marriage Act and the applications in connection with such appeals, is entitled to take up an original application for divorce by mutual consent under Section 13B of the Act filed direct before such appellate forum?
>
> 2) Whether the directions given by the Supreme Court in the cases of Shasi Garg, Radha, Mrs. Payal Jindal and Sandhya Rani (supra), should be treated to be valid precedent in terms of Article 141 of the Constitution of India authorising any other courts to adopt the said procedure?
>
> 3) Whether Section 13B of the Act authorises an appellate court dealing with an appeal against a decree passed in the proceedings under Section 13 of the Act to grant relief in terms of Section 13B of the Act or such application should be filed only before the district court specified in Section 19 of the Act?
>
> 4) Whether the waiting period mentioned in Section 13B (2) of the Act is mandatory or directory?

Let this matter be placed before the Hon'ble Chief Justice in terms of the third Proviso to Rule 1 of Chapter II of the Appellate Side Rules.

(Bhaskar Bhattacharya, J.) I agree.

(Rudrendra Nath Banerjee, J.)