Bombay High Court
Mr. Sanjay Pahariya vs Ms. Smruti Pahariya on 5 June, 2008
Author: R Desai
Bench: R Desai, R Sondurbaldota
JUDGMENT Ranjana Desai, J.

1. Rule. Respondents waive service. By consent of the parties, taken up for hearing forthwith.

2. The appellant is original petitioner 2 husband and the respondent is original petitioner 1 wife in M.J. Petition No.F 619 of 2007. For convenience, we shall refer to the appellant as "the husband" and the respondent as "the wife". They filed the aforesaid petition for divorce by mutual consent under Section 13 B of the Hindu Marriage Act, 1955 (for short, "the said Act") in the Family Court at Bandra, Mumbai.

3. The case of the husband and the wife, as stated in the petition, is that they are Hindus and are governed by the provisions of the said Act. They got married on 5/3/1993 at Mumbai as per Hindu Vedic rites. The said marriage was registered with the Registrar of Marriages. The couple has two sons viz. Veer and Shikhar born on 1/2/1995 and 3/4/1997 respectively. After marriage, they resided together in Flat No. 601, 2nd floor, Dinath Court, Sir Pochkhanwala Road, Worli, Mumbai. Irreconcilable differences arose between the two on account of temperamental differences. Incompatibility with each other made it difficult for them to co exist. They stopped cohabiting as husband and wife from January, 2005. Despite innumerable efforts made by them and their friends, they could not sort out their problems. They, therefore, decided to end their marriage by a decree of divorce by mutual consent under Section 13 B of the said Act. On these facts, on 18/5/2007, a joint petition for divorce by mutual consent was filed. To the petition, at Ex B, they annexed consent terms, which were to form part of the decree.

4. Consent terms stated that the wife will have custody of the two children. The husband was to have access to the children as stated in the consent terms. The husband was to have unhindered free access to the children keeping in mind their schedule and convenience. The husband was entitled to avail weekend access from Friday evening 6.00 p.m. to Sunday evening 6.00 p.m. whenever he visited the children. The vacations were to be shared equally by the husband and the wife. The husband was to avail first half of the vacation access and he was entitled to take the children abroad during the period of the said access. Certain admitted dates and events will have to be stated at this stage. The consent petition was registered on 19/5/2007. The copy of the Roznama which is filed in the court indicates that on 14/6/2007, both the parties were absent. The court was on leave. The petition was adjourned for counselling. On 23/8/2006, both the parties were absent. The petition was adjourned. Admittedly, no counselling was done in this case. On 19/11/2007, the husband was absent. The wife filed an application seeking issuance of summons. The Family Court directed issuance of summons upon payment of process as prayed. On 23/11/2007, learned advocate Smt. Deshmukh, who had filed the petition on behalf of both the parties, addressed a letter to the husband enclosing the summons of the Family Court and informing the husband that the matter is posted before 6th Family Court on 1/12/2007. On 1/12/2007, Santosh Jadhav, clerk of Smt. Deshmukh, learned advocate, filed a service affidavit stating that he had visited the residence of the

husband situate at 2nd floor, Dinath Court, Sir Pochkhanwala Road, Worli, on 26/11/2007 at 8.20 a.m. when servant of the husband told him that he was out of town since past two days and that he would be coming back to Mumbai after 10 to 12 days. Santosh Jadhav further stated in the affidavit that he told the husband to attend the court on 1/12/2007 as that was the court date. On 1/12/2007, the husband remained absent. The wife filed application seeking order of substituted mode of service to paste the summons on the door of the house of the husband. The Family Court allowed service of notice by pasting at the address of the husband after observing that after perusing the clerk's affidavit the court was not inclined to accept the first service as proper service. On 3/12/2007, the Family Court issued notice to the husband directing him to remain present in the Family Court on 4/12/2007 as the matter was fixed for hearing on that day. Bailiff's report dated 3/12/2007 states that when he went to paste the notice, he inquired about the whereabout of the husband. He was told that the husband had gone out. Therefore, he pasted the notice on the door of the residence of the husband and complied with the court's order. On 4/12/2007, the husband remained absent despite substituted service. Hence, the matter stood adjourned to 10/12/2007.

5. On 5/12/2007, the wife made an application stating that the matter was adjourned to 10/12/2007 for filing of her claim affidavit and that she was currently staying with her parents at Delhi. She further stated that she will have to stay in Mumbai leaving the children behind and, hence, the matter may be taken on board today i.e. on 5/12/2007 to enable her to file her claim affidavit. Learned Judge allowed her to file her claim affidavit. Relying on the judgment of the Delhi High Court in Shipra Chatterjee v. Siddarth Chatterjee I (2007) DMC 360, learned Judge observed that if after filing a petition for divorce by mutual consent, the parties want to resile from consent, they must come before the court and inform the court. If the parties do not inform the court, it must be presumed that the initial consent is continuing. Learned Judge observed that the husband did not appear in the court after the period of six months from the date of filing of the petition when the matter was placed on board. He further observed that in order to give a chance to the husband, the wife was directed to serve notice to the husband. Notice served through the advocate was not accepted by the husband or any of his representatives present in the house. Learned Judge further observed that therefore, he had again directed substituted service. Notice was accordingly pasted at the husband's residence but the husband did not remain present. Learned Judge concluded that since the husband is not attending the court, it should be presumed that the consent is continuing even as on today. After so observing, learned judge allowed the petition. He dissolved the marriage by a decree of divorce by mutual consent under Section 13□B of the said Act. Being aggrieved by the said judgment and order, the husband has filed the present appeal.

6. We have heard Mr. Singh, learned senior counsel appearing for the husband at some length. Mr. Singh submitted that learned Judge of the Family Court has fallen into a grave error in allowing the petition in the absence of the husband on a unilateral motion made by the wife. Mr. Singh submitted that so far as petition under Section 13□B is concerned, essential jurisdictional fact is motion made by both parties. Mr. Singh submitted that mere filing of the joint petition does not entitle, the parties to get divorce by mutual consent after six months. Both parties have to make a joint motion under Section 13□B(2) of the said Act and a decree for divorce can be passed only thereafter. The court has to ascertain whether, consent is continuing or not. There is no presumption that the consent is continuing. In support of this submission, Mr. Singh relied upon the judgment of the

Supreme Court in Smt. Sureshta Devi v. Om Prakash . He also drew our attention to the judgment of the Supreme Court in Ashok Hurra v. Rupa Bipin Zaveri . He submitted that the respondent may try to draw some support from this judgment but the said judgment does not decide any question of law whatsoever and, therefore, it is not a precedent on any legal question. In that case, the Supreme Court merely exercised its power under Article 142 of the Constitution of India to finally resolve the matter by decreeing divorce about 13 years after the petition for divorce by mutual consent was filed. Mr. Singh submitted that in the circumstances attempt to read out of context, certain sentences from this judgment as laying down the law that motion contemplated under Section 13□B(2) may be made by one spouse alone, must not be allowed to succeed. Mr. Singh submitted that observations of the Supreme Court in paragraph 13 of Sureshta Devi's case (supra) that the spouse may not be a party to the joint motion under sub□section 2 of Section 13□B do not convey that a joint motion may be made by one spouse alone. These sentences only mean that one spouse may refuse to join the other in a joint motion under sub□section (2) of Section 13□B and that there is nothing in the section to prevent such spouse from refusing to make a motion to the court after six months. Mr. Singh submitted that the two Judge Bench in Ashok Hurra's case (supra) expressed its tentative view that one observation of the earlier two Judge Bench may require reconsideration in some future case, being the observation to the effect that mutual consent should continue till the divorce decree is passed even if the petition is not withdrawn by one of the parties within the period of 18 months. However, learned judges declined to refer the judgment in Sureshta Devi's case (supra) to a larger bench for reconsideration on this solitary point holding that it is unnecessary to decide the vexed issue. Mr. Singh submitted that since Ashok Hurra's case (supra) was decided purely on facts, without laying down any law, it cannot be used as a precedent. Mr. Singh also relied on a judgment of this Court in Rajashri R. Shasane v. Rajendra Shasane . He also relied on Girija Kumari v. Vijayanandan , Satyabhama Nayak v. Narendra Kumar Nayak and Swagata Ghosh v. Debasis Ghosh 2005(4) CHN 716. Mr. Singh contended that learned Judge had no reason to prepone the case to 5/12/2007 and grant a decree of divorce by mutual consent. There was no such emergent situation. Preponing of the case itself renders the decree vulnerable.

7. On merits, Mr. Singh drew our attention to the affidavit of the husband and submitted that after filing of the consent terms, the wife had surreptitiously, in breach of assurances given by her, admitted the children in a school in Delhi. The husband strongly protested against this. Mr. Singh submitted that the fact that due to this attitude of the wife, the husband had withdrawn his consent, was known to the wife as well as to their advocate. Mr. Singh submitted that the non□appearance of the husband in the court and his not signing or filing of the affidavit sent by their common advocate on e□mail clearly indicated that his consent did not continue. Mr. Singh submitted that it is, inter alia, the stand of the wife that the husband was not attending the court so as to harass her and that the husband deliberately refused to accept summons. Mr. Singh submitted that assuming all this to be true, that would only lead to the inference that the husband did not want to consent. Mr. Singh submitted that in any event, without going to the facts, on pure interpretation of Section 13□B, this Court will have to hold that the husband and wife have to make a joint motion for a decree of divorce by mutual consent. He submitted that in the circumstances, the impugned judgment and order be set aside.

8. Mr. Dada, learned senior counsel appearing for the respondent□wife submitted that the impugned order merits no interference. He drew our attention to the affidavit of the wife and submitted that the entire story that the wife had, without consulting the husband, admitted the two sons in a school in Delhi, is false. He submitted that the sons joined the school in Delhi on 3/5/2007. The husband knew that the children were admitted in a school in Delhi. Knowing this fact, he filed a joint petition on 18/5/2007. In fact, even the husband wanted to admit the children in a boarding school. He had earlier attempted to admit them in a boarding school, but the attempt failed. Mr. Dada submitted that reliance placed by the appellant on Sureshta Devi's case (supra) is misplaced. He submitted that in that case, the Supreme Court was seized only of the issue whether a party to the petition for divorce by mutual consent under Section 13□B of the said Act can unilaterally withdraw the consent or the consent once given is irrevocable. The petition under Section 13□B for divorce by mutual consent was moved on 8/1/1985. Application seeking dismissal was filed by the respondent□wife in a week's time i.e. on 15/1/1985 stating that her statement was obtained under pressure and threat. On the basis of these two material facts, the District Judge dismissed the petition for divorce. This dismissal was reversed by the High Court in appeal and a decree for dissolution of marriage by mutual consent was granted. The High Court reasoned that a spouse who had given consent could not unilaterally withdraw the consent. The Supreme Court observed that the question with which it was concerned was whether it is open to one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition. Mr. Dada pointed out that pertinently, the Supreme Court observed in paragraph 13 that "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". Mr. Dada submitted that this observation clearly indicates that both spouses need not be party to the joint motion. Mr. Dada submitted that the phrase "joint motion" is not to be found in Section 13□B(2). He submitted that the Supreme Court has held that one of the spouses need not be a party to the motion under sub□section (2). The Supreme Court has affirmed the position that the motion can be made even by one of the spouses alone. Mr. Dada submitted that if the Supreme Court was of the view that both spouses had to file the motion then the entire consideration of the aforesaid question would have been unnecessary.

9. Mr. Dada submitted that the Supreme Court has held that mutual consent to the divorce is the sine qua non for passing a decree for divorce under Section 13□B and it should continue till the divorce decree is passed. Mr. Dada submitted that if the motion under sub□section (2) had to be made by both the spouses then no question could ever arise of one of the spouses withdrawing consent prior to the filing of the motion under sub□section (2) or stating in court that he or she has withdrawn the consent.

10. Mr. Dada submitted that paragraph 14 of the judgment in Sureshta Devi's case (supra) also proceeds on the basis that the consent reposed in the petition continues until one of the spouses withdraws it by some overt statement or act. No second or 'repeat' consent is required at the sub□ section (2) stage. Hence, as long as the consent already given by the petitioner is not withdrawn (either by withdrawal of the petition itself or by withdrawal of the consent), the sine qua non to sub□ section (2) is met.

11. Mr. Dada submitted that in the present case, the husband has admittedly never withdrawn his consent. The same continued till the decree of divorce was passed. The husband has all throughout acted upon and taken benefit of the consent terms to his advantage from the date of filing of the consent petition till the date of decree and even after the present appeal was filed and, hence, he cannot be permitted to stall the passing of decree of divorce by mutual consent.

12. Mr. Dada relied on the observation of the Supreme Court in Ashok Hurra's case (supra) to the effect that certain observations made in Sureshta Devi's case (supra) are very wide and require reconsideration.

13. Mr. Dada relied upon the judgment of the Rajasthan High Court in Smt. Suman v. Surendra Kumar . He submitted that neither in facts nor in law, the husband has made out any case warranting interference with the impugned order.

14. The crucial question involved in this appeal is whether under Section 13□B(2) of the said Act, the husband and the wife have to make a joint motion in the court after six months from the date of presentation of the petition for divorce by mutual consent and before 18 months from the said date for a decree of divorce by mutual consent or whether the initial consent given at the stage of presentation of the petition must be presumed to have continued during such period until one of the spouses withdraws it by some overt act or withdraws the petition.

15. Section 13□B of the said Act needs to be quoted. It reads thus:□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 solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub□section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised 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.

16. We must first begin with the judgment of the Supreme Court in Sureshta Devi's case (supra). In that case, the husband and wife were married on 21/11/1968. On 8/1/1985, both of them moved a petition under Section 13□B for divorce by mutual consent. On 9/1/1985, the court recorded the statement of the parties. On 15/1/1985, the wife filed an application stating that her statement dated 1/9/1985 was obtained under pressure. She prayed for dismissal of the petition. District Judge dismissed the petition for divorce. Upon appeal, the High Court observed that the spouse who has given consent to a petition for divorce cannot unilaterally withdraw the consent and such withdrawal, however, would not take away the jurisdiction of the court to dissolve the marriage by

mutual consent, if the consent was otherwise free. The High Court also recorded a finding that the wife gave her consent to the petition without any force, fraud or undue influence and, therefore, she was bound by that consent. The Supreme Court had to, therefore, decide whether a party to a petition for divorce by mutual consent under Section 13□B of the said Act can unilaterally withdraw the consent or whether the consent once given is irrevocable. The Supreme Court analyzed Section 13□B. The Supreme Court observed that Section 13□B(1) requires that the petition for divorce by mutual consent must be presented jointly by both the parties. Similarly, motion under sub□section (2) must also be made jointly by both the parties. This motion enables the court to proceed with the case to satisfy itself, inter alia, as to whether the consent is free or not. The Supreme Court observed that the filing of the petition with mutual consent does not authorize the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum, observed the Supreme Court, 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 Supreme Court further observed that 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 Supreme Court further observed that 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 Supreme Court then observed that the view taken by the High Courts of Bombay and Delhi 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, is not correct. The Supreme Court observed that 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. The Supreme Court clarified that if there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce and, 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. The Supreme Court further observed that 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, observed the Supreme Court, is a sine qua non for passing a decree for divorce under Section 13□B and it should continue till the divorce decree is passed. The Supreme Court further observed that it is a positive requirement for the court to pass a decree for divorce. The consent must continue to decree nisi and must be valid subsisting consent when the case is heard. The Supreme Court observed that the view taken by the Kerala High Court and Punjab & Haryana High Court that it is open to one of the spouses to withdraw the consent given to the petition at any time before the court passes a decree for divorce, is the correct view.

17. In our opinion, in view of the above clear and authoritative pronouncement of law by the Supreme Court, it is really not necessary for us to interpret Section 13□B(2). The Supreme Court has clearly ruled that motion contemplated under Section 13□B(2) must be made jointly by the parties and that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. During the waiting period from 6 to 18 months, one of the parties may change the mind and may not want to proceed with the petition. The Supreme Court has clarified that there should

also be a mutual consent when the parties move the court with a request to pass a decree of divorce by mutual consent and the court must be satisfied about the consent of the parties. The Supreme Court has further clarified that if there is no mutual consent at the time of enquiry under Section 13□B(2), the court gets no jurisdiction to make an enquiry and pass a divorce decree at the instance of one of the parties and against the consent of other, because such a decree would negate the whole idea of mutual consent for divorce. We are of the opinion that these observations answer the question which is posed before us. The motion contemplated under Section 13□B(2) is a joint motion made by both the parties. Decree of divorce by mutual consent cannot be passed by the court, on a motion made by one spouse, on the assumption that initial consent is continuing because the petition is not withdrawn or consent is not withdrawn by some overt act by the other spouse during the relevant period.

18. It was pointed out by Mr. Dada learned Counsel for the respondent that in this judgment the Supreme Court has observed that the spouse may not be a party to the joint motion under sub□ Section 2 of Section 13□B; that there is nothing in the section which prevents such course and that the section does not provide that if there is a change of mind, it should not be by one party alone but by both. Mr. Dada submitted that this observation support the respondents' case that motion contemplated under Section 13□B(2) may not be joint. He submitted that in fact Section 13□B(2) does not contain the words "joint motion". He also drew our attention to the definition of word "motion" as contained in Words & Phrases Permanent Edition Volume 27A and submitted that motion can be made by one party.

19. We are not impressed by this submission. We have already quoted extensively from Sureshta Devi's case (supra). A reading of this judgment leaves no room for doubt that there should be mutual consent when parties move the court under Section 13□B(2). No decree under Section 13□ B(2) can be passed on initial consent and the court must be satisfied about existence of mutual consent at the time it passes the decree. It is true that ordinarily, a motion can be made by one party to a proceeding. But, Section 13□B(2) begins with words "on the motion of both the parties". Therefore, motion contemplated therein has to be made by both parties. In fact, in Sureshta Devi's case (supra), the Supreme Court has laid stress on these words and made the observations quoted above. It is not open for us to differently interpret Section 13□B of the said Act.

20. In our opinion, sentences from Sureshta Devi's (supra) judgment on which reliance is placed by Mr. Dada, learned Counsel for the respondent which we have quoted earlier, are torn out of context. We are inclined to accept the submission of Mr. Singh, learned Counsel for the appellant that all that these sentences mean is that one spouse may refuse to join the other in a joint motion under sub□ section (2) of Section 13□B and that there is nothing in the section to prevent such spouse from refusing to make a motion to the court after six months. Nothing much can be read into these sentences.

21. Though we are of the opinion that in view of Sureshta Devi's judgment (supra), no further discussion is necessary on the question involved in this petition, it is necessary to refer to the judgment of the Supreme Court in Ashok Hurra's case (supra), because it is contended by Mr. Dada that in this judgment, the Supreme Court has expressed reservations about the view taken by it in

Sureshta Devi's case (supra).

22. In Ashok Hurra's case (supra) the marriage between the appellant-husband and the respondent-wife was solemnized on 3/12/1970 according to the Hindu rites. On account of differences, they could not stay together. From 30/6/1983, they started staying separately. On 21/8/1984, a joint petition for divorce was filed under Section 13-B of the said Act. Both of them appeared before the court and filed the petition. On 4/4/1985, the husband alone moved an application praying for a decree of divorce. Court issued notice to the wife. Hearing of the petition commenced on 15/4/1985. The case was adjourned to various dates for some reason or the other. On 27/3/1986, the wife moved an application for withdrawing consent. The husband contended that the wife could not revoke the consent after a period of 18 months. He prayed that decree of divorce by mutual consent be passed. The trial court dismissed the petition as the consent was withdrawn before the decree could be passed. In appeal a Single Judge of the High Court held that once the transitional period of 18 months was over and if the petition is not withdrawn or consent is not revoked in the meantime, the court shall pass a decree of divorce by consent after making enquiry to satisfy the requirements of Section 13-B. The Single Judge also observed that the marriage had irretrievably broken down. The Single Judge thus set aside the trial court's order and passed a decree for dissolution of marriage. In letters patent appeal, the Division Bench of the High Court set aside the Single Judge's order holding that irretrievable break down of marriage is no ground for divorce and that the wife had withdrawn her consent even before the trial court could make an enquiry. It was argued relying on Sueshta Devi's case (supra) that it is open to one of the parties to withdraw the consent, and that the mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. On facts, the Supreme Court was of the opinion that the marriage had broken down irretrievably and, therefore, the Supreme Court dissolved the marriage by a decree of divorce by mutual consent.

23. We notice that in the context of the reliance placed by the husband in that case on the judgment in Sureshta Devi's case (supra), the Supreme Court observed that in Sureshta Devi's case (supra) the consent was withdrawn within a week from the date of filing of the joint petition under Section 13-B i.e. within the time limit prescribed under Section 13-B(2) of the said Act and the crucial question was whether consent once given could be withdrawn unilaterally. The Supreme Court observed that the question whether a party to a joint application filed under Section 13-B can withdraw the consent beyond the time-limit prescribed under Section 13-B(2) did not arise for consideration. It is in this context that the Supreme Court observed that the observation of the Supreme Court in Sureshta Devi's case (supra) to the effect that mutual consent should continue till the divorce decree is passed, even if the petition is not withdrawn by one of the parties within the period of 18 months, appears to be too wide and does not logically accord with Section 13-B(2) of the said Act. Reservation expressed by the Supreme Court is only regarding the view expressed by the Supreme Court in Sureshta Devi's case (supra) that mutual consent must continue even beyond 18 months if the petition is not withdrawn within the period of 18 months. No disagreement or reservation is expressed about the view expressed that under Section 13-B(2), there should be mutual consent when the parties move the court with a request to pass a decree of divorce within the stipulated period. The Supreme Court has not dissented from the observation that under Section 13-B(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. In any case, the Supreme Court has not expressed any final opinion on any question. The Supreme Court has expressed that the judgment in Sureshta Devi's case (supra) may require reconsideration in an appropriate case but since it had reached the conclusion on the facts that the marriage had irretrievably broken down, it was unnecessary to decide the vexed issue. It is pertinent to note that though the Supreme Court has held that the decision in Sureshta Devi's case (supra), requires reconsideration it has not declared that Sureshta Devi's case (supra) is no longer a good law. In our opinion, therefore, judgment in Sureshta Devi's case (supra), still holds the field. The observations of the Supreme Court in Sureshta Devi's case (supra), that there should be mutual consent when the parties move the court with a request to pass a decree for divorce, that under Section 13□B(2) they have to make a joint motion, that the court should be satisfied about the bonafides and the consent of the parties and that if there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree of divorce, lay down the law on the point. Since Ashok Hurra's case (supra) is decided on facts and since it does not lay down any law, it cannot be used as a precedent. Ashok Hurra' case (supra) does not help the respondent.

24. It is also pertinent to note that several High Courts have followed Sureshta Devi's case (supra). We may usefully refer to the judgment of the Kerala High Court in Girija Kumari's case (supra). In that case, the appellant and her husband i.e. the respondent had filed a petition before the Family Court for a decree of divorce under Section 13□B of the said Act. After expiry of the period of six months on the motion of the respondent□husband, the Family Court took up the matter and examined him. The appellant□wife was absent. Nor did she withdraw the petition. After examining the respondent husband, the Family Court held that as the appellant□wife did not turn up to withdraw the petition, she is consenting to the divorce and accordingly passed a decree of divorce. Relying on Sureshta Devi's case (supra), the Kerala High Court held that mere filing of the petition by both the parties together is not sufficient and if one of the parties did not join in moving the court as contemplated under sub□section 2 of Section 13□B, then a decree of divorce passed by the Family Court cannot be termed to be a consent decree of divorce. Family Court's judgment was in the circumstances, set aside.

25. In Swagata Ghosh's case (supra), relying on Sureshta Devi's case (supra), the Calcutta High Court held that in order to get the relief of mutual divorce on the application of the parties, it is necessary that it must be moved by both the parties on the second occasion; but if one of them is absent, the ingredients of Section 13□B(2) are absent and the court could not presume that the wife has not withheld her earlier consent.

26. Attention of Calcutta High Court was drawn to Section 23(1) (bb) which states that when a divorce is sought on the ground of mutual consent and the court is satisfied that such consent has not been obtained by force, fraud or undue influence the court shall decree the relief accordingly. It was contended that even if one of the parties does not move the court for decree six months after presentation of the petition, the court may decide whether there is any force, fraud or undue influence exerted at the time of filing of the petition and, if the court comes to the conclusion that no such force, fraud or undue influence was exerted, it may ex parte pass a decree of divorce by mutual consent. The Calcutta High Court rejected this submission by observing that the legislature has cast

a duty upon the court to not only see that the consent was not obtained by force, fraud or undue influence but also to be satisfied that even after six months from filing of the application, the parties have not changed their earlier decision and such fact must be conveyed to the court on the motion of both the parties. We respectfully agree with this view.

27. In Smt. Satyabhama Nayak's case (supra), the Family Court had proceeded on the basis that for a decree under Section 13□B consent granted at the time of filing the petition is sufficient. The Orissa High Court relying on Sureshta Devi's case (supra) held that the course adopted by the Family Court is not sanctioned in law. The Orissa High Court reiterated what the Supreme Court has said in Sureshta Devi's case (supra) that under Section 13□B(2) there should also be a mutual consent when the parties move the court with a request to pass a decree of divorce.

28. In N.G. Rama Prasad's case (supra), the Karnataka High Court was considering whether the court before which a petition under Section 13□B of the said Act seeking decree of divorce by consent is presented can proceed to consider the petition on merits after the expiry of six months from the date of presentation, if one of the parties to the petition withdraws the consent given or refuses to join the other to make a motion for consideration of the petition on merits. While dealing with this question, the Karnataka High Court inter alia held that a petition under Section 13□B must be made by consent of both the parties and the motion for consideration of the petition after six months from the presentation of the petition must be made by both the parties.

29. On this question, the lone voice which states that consent of the husband or wife who remains absent at the time of motion contemplated under Section 13□B(2) can be inferred is that of Rajasthan High Court. In Suman's case (supra), on which reliance is placed by Mr. Dada, a joint petition was filed by the husband and wife for obtaining divorce by mutual consent on 15/1/1999. In spite of a few adjournments, the husband did not appear before the Family Court at the stage of second motion though the wife appeared on each date of hearing. The wife moved an application for summoning the husband as a witness to record his statement. The Family Court rejected the application and declined to issue notice to the husband. The Family Court was of the view that it was for both the parties to appear before the Family Court to obtain decree of divorce by mutual consent. By its judgment dated 27/9/1999, the Family Court rejected the application. The Rajasthan High Court allowed the appeal carried from the said judgment on the ground that by his continued absence, the husband had frustrated the proceedings. He had adopted a course of silence to harass the wife. The Rajasthan High Court further observed that merely because the second motion was not signed by both the parties, it cannot be said that consent of the husband was missing at the second stage. When the husband had left the matter for inference, then the inference ought to be drawn in favour of consent rather than for absence of consent. The Rajasthan High Court further observed that what is of importance is consent and not the format of moving the second motion. In our opinion, in view of the authoritative pronouncement of the Supreme Court in Sureshta Devi's case (supra), the reliance placed on this judgment is wholly misplaced. It appears that attention of the Rajasthan High Court was not drawn to the judgment in Sureshta Devi's case (supra). Rajasthan High Court has not noticed it. Therefore, its judgment in Suman's case (supra) is per incuriam and unsustainable.

30. In view of our conclusion based on Sureshta Devi's case (supra), that there should be mutual consent when the parties move the court with a request to pass a decree of divorce under Section 13□B(2), that motion contemplated under Section 13□B is joint, that the court gets no jurisdiction to make a decree of divorce in the absence of mutual consent and that the court cannot presume that the initial consent has continued because one of the spouses has not withdrawn the petition or the consent within the stipulated period, the impugned judgment which takes a contrary view must be set aside. Learned Judge of the Family Court was clearly in error in observing that "the law must presume the consent having been given at the threshold before the court being authenticated, the same is continuing one unless otherwise proved to be contrary". Had learned Judge's attention been drawn to Sureshta Devi's case (supra), he would have perhaps not made such observations. Learned Judge's reliance on Delhi High Court's judgment in Shipra Chatterjee's case (supra) is in our opinion wholly misplaced.

31. Even if we accept the affidavit of the wife filed in this Court as giving the correct facts, it only means that the husband was willfully remaining absent from the court, that he had made false allegations against her and that his attempt was to cause harassment to her and to frustrate the divorce proceedings. Non appearance of the husband in the court, his not signing or not filing of the affidavit sent by their common advocate on e□mail are indicative of the fact that the consent did not continue. Assuming that the court can draw inference about consent or presume consent from the conduct of a spouse, on the facts stated by the wife, the husband's consent can never be inferred. The wife's case militates against any inference that consent of the husband was continuing. By no stretch of imagination, learned Judge could have reached the conclusion which he has reached.

32. Though we have given the gist of the facts, we have refrained from commenting on them because any observation made by us on facts may have impact on the proceedings which the parties may initiate in future. Besides, for determination of the question of law raised in this petition, it was not necessary to comment on facts. But we will be failing in our duty if we do not refer to a very disturbing aspect of this case. We are distressed at the manner in which the petition was preponed by learned Judge.

33. Learned Judge has observed in the impugned order that as the husband did not appear in the court, he directed the wife to serve him. He has referred to the fact that the notice sent through the advocate was not accepted by the husband or any one present in his house and, therefore, he again directed that the husband be served by bailiff. Learned Judge has referred to the bailiff's report. Affidavit of Mr. Santosh Jadhav, clerk of advocate Smt. Deshmukh filed in the Family Court is also on record. Mr. Santosh Jadhav has in his affidavit stated that on instructions of Smt. Deshmukh, he visited the house of the husband on 26/11/2007. One Mr. Shiv Narayan Singh was present. He told Mr. Singh that he had come to serve court summons. Mr. Singh told him that the husband was out of town and was to come back to Mumbai after about 10 to 12 days. Therefore, as per this affidavit, the husband was to come back to Mumbai by 12/12/2007.

34. It is the wife's case that on 4/12/2007, the husband remained absent and, hence, the petition stood adjourned to 10/12/2007. On 5/12/2007, the wife made an application stating that she was staying with her parents at Delhi, that the petition was adjourned to 10/12/2007 for filing of the

claim affidavit and for that she will have to stay in Mumbai leaving the children behind and, therefore, the petition may be taken on board to enable her to file her claim affidavit. Surprisingly, learned Judge took up the petition itself for final hearing on 5/12/2007 and passed an ex-parte decree of divorce by mutual consent. We are surprised at this. If learned Judge was satisfied about the case made out by the wife in the application, he could have only permitted her to file her claim affidavit. But, there was no need for learned Judge to take up the petition for final hearing and dispose it of. Learned Judge had before him affidavit of Mr. Santosh Jadhav to which we have made a reference. As per this affidavit, the husband was not in Mumbai and he was to come to Mumbai by 12/12/2007. Even if it is assumed for a moment that Mr. Singh, employee of the husband was not telling the truth, learned Judge should have realized that he had to pass a decree of divorce by mutual consent and it was safe to take up the petition on 10/12/2007 as that was the adjourned date. There were no emergent circumstances warranting learned Judge to prepone the petition on 5/12/2007 and pass an ex-parte decree. Courts have to be careful while passing ex-parte decrees. Under Section 13-B of the said Act, only mutual consent gives the court jurisdiction to pass a decree. Such ex-parte decrees would destroy the very concept of divorce by mutual consent. We note our dissatisfaction about the manner in which the petition was preponed and disposed of.

35. In the view that we have taken, the impugned judgment and decree dated 5/12/2007 passed by the Family Court, Mumbai in Petition No.F-619 of 2007 is quashed and set aside.

36. The petition is disposed of in the aforestated terms.

9/6/2008 We declared our judgment in this appeal on 5/6/08. We directed the parties to maintain status quo because the respondent wants to challenge our judgment in the Supreme court. On 5/6/08 our attention was drawn by learned Counsel for the respondent to Section 22 of the Hindu Marriage Act, which says that proceedings under the Hindu Marriage Act should be held in camera and any matter in relation to such proceedings may not be printed or published except judgment of the High Court or the Supreme Court printed or published with the previous permission of the court. It was pointed out to us that the press has given undue publicity to this matter on account of the fact that the respondent is related to a politician. Learned Counsel for the respondent requested this Court to pass an order restraining the press from publishing any matter in relation to present proceedings.

It appears that no request was made to the trial court that proceedings be held in camera. No such request was made to this Court when the appeal was heard for admission. No such request was made when we started final hearing of this appeal. Press has already published news report about this appeal. We, therefore, posted the appeal for appropriate orders on 9/6/08. We requested learned Advocate General to assist us. As per our order this appeal has appeared on our board today. In view of the request made on behalf of the respondent, we had directed our office not to give copy of our judgment to anybody till further orders.

We have heard learned Advocate General Shri Kadam and Mr. C.U. Singh learned Senior Counsel appearing for the appellant. Mr. Dada learned Senior Counsel appearing for the respondent has made a statement that the respondent does not wish to press the prayer made by her. In view of this

statement question of passing any restraint order does not arise. However, it is necessary to note that the present matter is like any other matrimonial matter and the fact that the respondent is related to a politician, does not change it's character. Section 22 is couched in unambiguous language. We trust the discretion of the press. We are sure that having regard to Section 22 of the Hindu Marriage Act and considering the fact that two minor children are involved in this matter, the press will not mention the names of the spouses and the children in their news report. The law point which, we have decided is of some importance and can be published without naming the parties. We must record that learned Counsel for the parties have no objection, if the judgment is reported in the Law Reports mentioning the names of the parties.