

Delhi High Court

Smt. Rachna Jain vs Shri Neeraj Jain on 25 May, 2005

Equivalent citations: 120 (2005) DLT 365, II (2006) DMC 410

Author: M Mudgal

Bench: M Mudgal

JUDGMENT Mukul Mudgal, J.

1. Rule. Since the respondent did not appear after service and publication, the matter has already been proceeded ex parte against the respondent.

2. This petition under Article 227 of the Constitution of India challenges the order dated 31.3.2004 passed by Additional District Judge who declined to modify and rectify the order dated 1.10.2003 and for passing decree of divorce under Section 13B(2) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'Act').

3. In a troubled marriage there were pending criminal matters and divorce proceedings. Eventually divorce by mutual consent and settlement of all criminal and civil disputes was agreed to by both the spouses resulting inter alia in the wife withdrawing her criminal complaints and dropping all claims towards maintenance for herself and her daughter. The husband enjoyed all the benefits of the settlement and then remarried and has a child from the second marriage and yet withdrew his consent for divorce by mutual consent leading to the situation where by the impugned judgment the learned Additional District Judge has declined to grant divorce to the petitioner/wife by permitting the unilateral withdrawal of mutual consent by the respondent/husband leading to the present petition under Article 227 of the Constitution.

4. The facts of the case as per the unrebutted averments in the writ petition are as under:

a) The marriage between the petitioner/wife and the respondent/husband who are both Hindus, was solemnized on 12.3.1996 according to Hindu Rites and ceremonies.

b) That on 11.12.1997 one female child was born and the said child is in the custody of the petitioner.

c) After the marriage the petitioner was subjected to cruelty and humiliation by the respondent and was the victim of harassment caused by respondent for continuous demand of dowry, by beating and torturing the petitioner at the instigation of his parents with desire to fulfill the demand of dowry and cash which led to continuous mental tension, cruelty and agony to the petitioner. Under compulsion and torturous circumstances the parents of the petitioner paid lot of money to the respondent on demand and also arranged separate accommodation so that the matrimonial life of the petitioner may not get disturbed.

d) That because of violent behavior and greedy nature of the respondent, the petitioner was thrown out by the respondent from the matrimonial home. It is not in dispute that since 7th Feb. 2002 both the parties are living separately.

e) That on 18.2.2002 the respondent/husband filed a petition under section 10 of the 'Act' for judicial separation before the District Judge, Delhi and on 1.5.2002 petitioner filed a complaint under section 498A/406 IPC before Dowry Cell.

f) On 15.7.2002 the petitioner filed an application under Section 24 of the Act for maintenance before the Additional District Judge, Delhi after she put in her appearance on the receipt of summons in the above matter.

g) That on 16.9.2002, the respondent moved an application before the Ld. ADJ for withdrawal of his petition under Section 10 which was declined by the said court.

h) That on 8.9.2003 both the parties compromised their disputes and entered into a compromise deed. By virtue of the settlement under the said compromise the parties filed an application under Order 6 Rule 17 read with section 151 CPC for amendment converting the petition under Section 10 of Hindu Marriage Act into a petition under Section 13(B)(1) of the Hindu Marriage Act for divorce by mutual consent.

i) Along with the application for amendment both the parties filed their affidavit in support as well as both the petitions under section 13B(1) and 13B(2) of the said Act for dissolution of their marriage by way of mutual consent together with the compromise deed and prayed for waiving the stipulated period of 6 months and permission to place on record the petition under section 13B(2) along with the petition under Section 13B(1) of the said Act which is admitted by both the parties as per the records of the trial Court.

j) That on 25.9.2003 the learned ADJ allowed the above application for amendment and recorded the joint statements of both the parties knowing well that both the petitions under section 13B(1) and 13B(2) of the Act were on record. The said statement is as follows:-

"The marriage between both the parties was solemnized according to Hindu rites and ceremonies on 12.3.1996 at Delhi. After marriage, both the parties lived together as husband and wife and cohabited with each other and one female child, named Larika Jain was born out of the said wedlock. Due to differences in our attitudes and temperaments, we both are living separately since 7.2.2002 and now there is no possibility of our living together as husband and wife.

We have amicably settled all our disputes with regard to dowry articles, maintenance and permanent alimony and Istridhan etc. as per the compromise Deed, which is annexed with the petition and is Exb.P.1. It has been agreed between both of us that the child above named shall remain with the petitioner wife and petitioner husband shall not claim the custody of the child in future, nor he shall have the visiting right to meet the child. The petition is Exb. P-2, both undertake to abide by the terms and conditions of the petition contained therein, as well as the compromise deed. The petition has not been filed in collusion with each other. Our consent for divorces free from any force, fraud or undue influence. The petitioner wife undertakes to get the FIR quashed, filed by her against the petitioner husband".

k) On 1.10.2003 the learned Additional District Judge passed the following order:-

"From the statement of the petitioners it is also evident that the consent of the petitioners for divorce is free from force, fraud or undue influence and there is no collusion in filing this petition.

I am therefore satisfied that the requirements of section 13(B)(1) of the Act have been duly satisfied in this case. However, the marriage of the petitioners can not be dissolved straight away in view of the provisions of section 13(B)(2) of the H.M. Act. Both the petitioners are therefore advised to try to live together and to patch-up their differences in due course of time. In case, they fail to do so, they may move their second motion petition within the statutory period in accordance with law."

l) That on 9.10.2003 the petitioner moved an application under Section 151 CPC for modification of the above order dated 1.10.2003 and submitted that on 25.9.2003 both the petitions under section 13B(1) and 13B(2) of the Act were on record and the parties have compromised their disputes and given their consent for dissolving the marriage by way of decree of divorce by mutual consent. It was also admitted by both the parties that the Learned Additional District Judge granted permission to file the second motion petition under Section 13B(2) of the Act by waiving the stipulated period of 6 months on the oral request and prayer of the parties. Therefore, it was prayed that the order dated 1.10.2003 passed by the said Court be rectified/modified to the extent that the marriage between the parties stands dissolved after the joint statement was recorded on 25.9.2003.

m) That on 19.1.2004 the respondent filed an application for withdrawal of his consent in a second motion and admitted in the said application that the Learned Additional District Judge was pleased to grant permission to file the second motion then by waiving the stipulated period of 6 months. The only ground mentioned for withdrawal of the consent was that the respondent after signing the second motion has realized his approach on matrimonial matter is not correct and further felt that the matrimonial relationship must continue.

5. That on 31.3.2004 the Learned Additional District Judge dismissed the application of the petitioner for modification of the order dated 1.10.2003 and allowed the application of the respondent for withdrawal of the consent in the second motion under Section 13B(2) and dismissed the said petition. This petition challenges the order dated 31.3.04 permitting the respondent to withdraw his counsel.

6. That the impugned order dated 31.3.2004 declining to modify the order dated 1.10.2003 thereby dismissing the petition under section 13B(2) of the Hindu Marriage Act reads as follows;

" Before advertng to the submissions made by the Ld. Counsel for both the parties, it will be proper to know the back ground of the case. In fact petition bearing HMA No. 165/2002 for judicial separation was filed by petitioner Neeraj Jain U/s 10 H.M. Act against the respondent wife Rachna Jain on 15.2.2002 but during the proceedings. Both the parties settled the matter amicably and agreed to seek divorce by mutual consent and accordingly an application U/s 6 rule 17 CPC for converting that petition into a petition for divorce by mutual consent u/s 13(B)(1) HM Act was moved on 20.9.2003 along with amended petition U/s 13B(1) H.M. Act and even the second motion

petition U/s 13B(2) H.M. Act was also got assigned to this Court from the Ld. District and sessions Judge, Delhi. Although application U/o 6 rule 17 CPC for converting the petition u/sec. 10 Hindu Marriage Act was allowed by Ld. Predecessor of this Court vide order dated 25.2.2003 and joint statement of both the petitioners to the first motion petition was recorded on the allowed vide order dated 1.10.2003 and second motion petition U/s 13 H.M. Act was adjournment to 29.10.2003 for consideration.

It is pertinent to mention here that second motion petition u/s 13B(2) H.M. Act was filed by the parties without any application for waiving the statutory period of six months. On 22.12.2003 an application for modification of the order/ judgment dated 1.10.2003 passed in the first motion petition on behalf of the petitioner No. 2 Rachna Jain and thereafter an application on behalf of the petitioner No. 1 Neeraj Jain for withdrawal of his consent for his second motion petition was also moved.

During the course of arguments Shri R.K. Mehta Ld. Counsel for the petitioner No. 2 Rachna Jain submitted that order dated 1.10.2003 passed in the first motion u/s 13B(1) H.M. Act requires modification and in fact a decree of divorce should have been passed by the court because the second motion petition u/s 13B(2) H.M. Act was also pending when joint statement of both the petitioners was recorded on 25.9.2003. It was also averred that Petitioner No. 1 cannot withdraw his consent without any allegations of fraud, force or undue influence in obtaining his consent. In support of his submissions. Ld. Counsel of the petitioner No. 2 Rachna Jain placed reliance on the case reported as Smt. Krishna v. Atar Singh 1992 RLR 95 = 46 (1992) DLT 171, K. Om Prakash v. Nandi AIR 1980 A.P. 167 and Dhanjit v. Beena 1990 R.L.R. 167.

The Learned counsel for the petitioner No. 1 Neeraj Jain has however submitted that a party to the petitioner U/s 13B H.M. Act can withdraw his/her consent before passing the decree of divorce and decree of divorce by mutual consent can not be passed in this case because of the willingness of Petitioner No. 1 to withdraw his consent. In support of his submissions Ld. Counsel for the petitioner No. 1 placed reliance on the cases reported as K.R. Mohanan v. Jeejatai AIR 1988 Kerala 28, Girija Kumari v. Vijaanandan AIR 1995 Kerala 159 and Sureshta Devi v. Om Prakash (1991) DMC 313 (SC) = AIR 1992 SC 1904.

I have carefully perused the aforesaid case relied upon by the Id. Counsel for both the petitioners in support of their respective submissions are not much helpful in view of the judgment of the Supreme Court in the case Sureshta Devi v. Om Prakash I (1991) DMC 313 (SC) = AIR 1992. SC 1904 where of the Hon'ble High Courts held that a party to a petition U/s 13B HMA for seeking divorce by mutual consent can unilaterally withdraw his/her consent before the passing of the decree and the consent once give is not irrevocable. Although later on in the case of Ashok Hura v. Rupa Bipin Zeveri reported as I (1997) DMC 491 (SC) = AIR 1997 SC page 1266, the Hon'ble Supreme Court observed that the decision in the case of Sureshta Devi v. Om Prakash requires reconsideration because the observations made therein about the time limit for withdrawal of the consent is too wide and that question what left open and as such the observations made by the Hon'ble Supreme Court in the case Sureshta Devi v. Om Prakash (supra) are still pending. Moreover in the case of Ashok Hura v. Rupa Bipin Zeveri reported as I (1997) DMC 491 (SC) = AIR 1997 SC page 1266 the main

question that arose for consideration was whether a party to a petition for mutual divorce can withdraw the consent after the expiration of the period of 18 months after the filing of the first motion petition U/s 13(B)(1) H.M. Act. In the present case second motion petition U/s 13(B)(2) H.M. Act was filed even prior to passing of the order on the application U/s 6 rule 17 CPC for converting the petitioner u/s 10 H.M.A. into a petition U/s 13(B)(1) H.M. Act for divorce by mutual consent and even no application u/s 151 CPC for waiving the statutory period of six months was moved and even no such permission was orally given by the Court. No doubt the first motion petition U/s 13 HMA has been allowed by this court vide order/ judgment dated 1.10.2003 but in the second motion petition U/s 13 H.M. Act joint statement of the parties is yet to be recorded and as such either of the party to this second motion petition has right to withdraw his/her consent as the consent given in the first motion petition U/s 13(B)(1) H.M. Act is an irrevocable and it can be unilaterally withdrawn by either party before the passing of the decree of divorce as has been held by the Hon'ble Apex Court in the case of Sureshta Devi v. Om Prakash (supra). Since the petitioner No. 1 Neeraj Jain has already moved an application for withdrawal of his consent to this second motion petition through his counsel and as such this application moved on behalf of the petitioner No. 2 Rachna Jain for modification of the order dated 1.10.2003 is dismissed. Since the petitioner No. 1 Neeraj Jain has withdrawn his consent to this second motion petition U/s 13(B)(2) H.M. Act for divorce by mutual consent hence this petition is also dismissal. File be consigned to record room after necessary compliance".

7. That the respondent/husband had availed all the benefits and enjoyed the fruits of settlement and compromise between the parties in the following manner :-

- (i) by not giving any stridhan and maintenance to the petitioner or to his minor child,
- (ii) by handing over the custody of the child to the petitioner without taking any liability for her welfare,
- (iii) by forcing the petitioner under the garb of the said compromise to withdraw the complaint under section 498 and 406 IPC filed with the Anti-Dowry Cell and the said complaint was in fact not pursued by the petitioner and the same was closed on account of such compromise.
- (iv) by re-marrying himself and having a child out of the said re-marriage.

8. The finding of the learned Additional District Judge regarding the non filing of the application for waiving the statutory period of 6 months is unsustainable because both the petitions under Section 13B(1) and 13B(2) along with application under Order 6 Rule 17 as well as compromise deed were on record. The respondent had in fact admitted the factum of grant of permission by the said Court to file the second motion by waiving the stipulated period of 6 months in his application for withdrawal of his consent.

9. Further, from the pleadings of the parties before the Learned Additional District Judge it is clear that both the parties had agreed for the grant of decree of divorce by mutual consent and compromised all their disputes and also prayed orally for the waiver of period of 6 months which

was permissible as at the time of recording the joint statements as both the petitions under section 13B(1) and 13B(2) were already on record and indeed as per the position of law stated below.

10. Sections 13B(1) and (2) of the Hindu Marriage Act read as under;-

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

(2) On the motion of both 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."

11. Reliance was placed by the learned counsel of the petitioner, Shri Mukesh Anand on the position of law laid down in the following judgments

(a) Andhra Pradesh High Court in K. Omprakash v. K. Nalini reported in AIR 1986 AP 167 wherein it was held as under:-

"10. For all the above reasons, we are of the opinion that S. 13B of the Hindu Marriage Act should be read as directory only. S. 13B(2), no doubt cautions the Courts of its duty to fight the last ditch battle to save the marriage but when the Court is fully satisfied on the basis of the proved facts, that in the interest of justice of the society and the individuals marriage tie should be put as under immediately, S. 13B(2) does not impose any fetter on the powers of the court to grant instant decree of divorce. At any rate, we are clearly of the opinion that the time table fixed by S. 13B(2) does not apply to an appellate Court. The great Telegu poet vemana said that the broken iron can be joined together but not broken hearts. Parties have been living apart for long and their wedlock has now virtually become a deadlock. Chances of reunion had completely faded away. IN these circumstances, we think it just and proper to grant a decree of divorce straightaway. Accordingly we pass a decree of divorce declaring the marriage between the appellant and the respondents as dissolved with immediate effect."

b) Karnataka High Court in Smt. Roopa Reddy v. Prabhakar Reddy reported as II (1993) DMC 274 (Kar.) = AIR 1994 Karnataka 12 wherein it was held that the period of 6 months provided under section 13B(2) is directory and not mandatory and the following position of law was laid down:-

"13. The next question is whether the requirement under S. 13B of the Hindu Marriage Act has to be considered as mandatory or directory. The words used in the Section shall have to be read in the

context in which the liberalised provision has been made by the legislature enabling the unwilling parties to seek divorce instantaneously and thus to put an end to the untold misery. When the intention of the Legislature in introducing S. 13B(2) is to liberalize and to unlock the wedlock the legislature has never intended the period of 6 months mentioned in the Act shall be strictly complied with. But, in spirit the Section is directly in nature and it has been incorporated to help 2 discordant spouse to get quick separation and to lead their remaining life without any agony. If S. 13B(2) is read as mandatory, the very purpose of liberalizing the policy of decree of divorce by mutual consent will be frustrated. Thus, S. 13B(2), though it is mandatory in form is director in substance".

18. Marriage is an union of 2 hearts. Success of married life depends on the edifice built with the mutual trust, understanding, love affection service and self sacrifice. Once this edifice is shaken, happy married life will be shattered into pieces. The result is one of the misery and emotion. Whether one accepts it or not liberalization in a way of living of individuals and reformation in age old customs and due to modernization and understanding of individual rights and equal status irrespective of se it is natural for either of the spouse to seek for dissolution. Where the marriage tie has been broken the court has to look to the interest of the parties and the welfare of the children as paramount. When it is impossible to live like husband and wife any compulsion to unite them will lead to social evils and disturbance of mental peace and disorder in the family life. However, rigid social fabric it is not the social system but the personal safety of the parties to the wedlock, shall prevail. This should be the guiding principle in view of S. 13B(1) of the Act. There is complete destruction of the essence of marriage between parties and it has reached the stage of irretrievable breakdown".

(c) In N.S. Padmanabhan v. Padmini reported in vol.62 (1996) Delhi Law Times Page 533 this Court held that under the Section 13 the parties who have already litigated for nearly six years and have not been able to change their minds about living together and are making prayer for waiver, should be allowed, the prayer as no useful purpose would be served by keeping the matter pending or allowing the things to get prolong.

"During the pendency of the petition, parties reached an amicable settlement and filed a petition before this Court, being Exhibit C-1. The petitioner paid the air fare for the respondent and her mother to enable them to appear before the Court to make statements in support of the said compromise petition. In their statements in support of the said application, both the parties have prayed that the proceedings pending be converted into a petition under Section 13B and divorce of mutual consent be awarded and the time likely to be taken for the second motion should be waived in the said circumstances of the present case since there is absolutely no doubt that the marriage has already broken down irretrievably. The Trial Court record, which is already her before this Court, was also examined. I have seen the Trial Court record also and from the material available, it is sufficiently clear that it will not be possible for the parties to live together. I had an occasion to examine even the demeanour of the parties and from their manner also, it appeared quite clear that the marriage between them is as good as dead. Sending the proceedings back together with the compromise petition, to my mind, would be a futile exercise leading to further prolongation of the litigation and continued agony of the parties. From the address of both the counsel also, it became

quite clear that the marriage between the parties is lying dead and over. In these circumstances, and keeping in view the litigation in different Courts which has been going on between the parties over the last about six years, it will be a fit case for cutting across any procedural objections to resolve the matter between the parties in terms of their mutual agreement instead of directing them to go before the Court below."

d) This Court in FAO NO. 264 and CR 1400/89 = 1990 RLR 167 in the matter of Dhanjit v. Beena Badra where it was held that:-

" In a petition for divorce on the ground of cruelty, parties can seek amendment of petition U/O 6, R. 17, CPC so as to convert it into a petition for mutual divorce. Date of amended petition cannot relate back to date of original petition. Period of 6 months waiting in S. 13B(2) is not mandatory. It is directory and Court may grant divorce early if fact and circumstances so warrant. Period of 6 months does not relate to jurisdiction. It is a matter of procedure and parties may waive it."

" Even otherwise, the application u/S 13B of the Act, moved on 5.9.89 fulfilled all the requirements of S. 13B(1) of the Act. The trial Court, in my opinion could have treated this application as a motion for the purpose of Sub-section (2) also, and, of the basis of the material already on record, the Court ought to have passed a decree for divorce by mutual consent u/s 13B of the Act."

e) In K. Omprakash v. K. Nalini, reported in 1987 (2) H.L.R. 230 it was held as under:-

"The intention of the Legislature is to provide a minimum period of six months for rethinking of the parties" In this context, the question considered by the Bench was whether the Legislature intended that S. 13B(2) be treated as a mandatory provision of law or merely as a directory provision. In view of the text, context, purpose and design of the said provision, it was held that S. 13(2) is a part of mere procedure and is, therefore, directory. It has been explained in this judgment that the six months time fixed by S. 13B(2) is not a rule relating to the jurisdiction of the Court to entertain a petition for divorce by consent, and that the question of jurisdiction is dealt with by Sub sec. (1) which must be strictly complied with and Sub-sec. (2) is part of mere procedure. Further, it has been reiterated that a procedural provision must be interpreted as a handmaid of justice in order to advance and further the interest of justice. Further, it has been explained in this judgment that S. 13B(2) does not impose any fetter on the powers of the Court to grant instant decree of divorce."

12. In the light of above position of law, I am in respectful agreement with the view taken by the above judgments to the effect that 13-B(2) are directory and not mandatory.

13. This court in a judgment in FAO No. 756 of 2003 118 (2005) DLT 492 = I (2005) DMC 571 (Delhi) in Pooja Gupta and Anr. v. Nil in respect of a petition under Section 13 of the Act had also held as follows:-

" The above statement of objects and reasons though made in the context of parity with Section 28 of Special Marriage Act also clearly indicates that the legislative intent was expeditious disposal of divorces by mutual consent. In my view as long as the court is satisfied as an essential reason for



exemption for filing a divorce by mutual consent prior to expiry of one year after the marriage that the plea for mutual consent is not under coercion/intimation or undue influence and there are no chances of reconciliation and the parties have fully understood the impact and effect of the divorce by mutual consent, the continuance of such a marriage is bound to cause undue hardship to the spouses. The other relevant considerations which may be considered for granting the exemption from passage of one year before filing a petition for divorce by mutual consent are:-

- a) the maturity and the comprehension of the spouses;
- b) absence of coercion/ intimation/ undue influence;
- c) the duration of the marriage sought to be dissolved;
- d) absence of any possibility of reconciliation;
- e) lack of misrepresentation or concealment.
- f) the age of the spouses and the deleterious effect of the continuance of a sterile marriage on the prospects of re-marriage of the parties".

14. Thus keeping in view the above findings of that and position of law laid down in the above decisions as well as the facts of the present case, the learned Additional District Judge should have waived the period of 6 months for the petition under section 13B(2) which was already on record along with petition under section 13B(1) and the compromise deed at the time of recording the joint statements of both the parties who had given the consent without any undue influence, coercion and pressure and when there was not even the remotest possibility of any reconciliation. All the parameters laid down by this Court in Pooja Gupta's case (supra) were satisfied. Coupled with the admitted prayer made by both the parties for waiver of the six month period permissible as per Pooja Gupta's case, the waiver ought to have been granted by the learned Additional District Judge who has failed to see through the illusory change of heart of the respondent/husband obviously with a view to spite his estranged spouse in spite of availing the benefits of the settlement which led to the joint petition for divorce by mutual consent. The impugned judgment loses sight of the fact that the husband has fully availed of the benefits of the mutual consent divorce by making the petitioner wife forego all the claims for maintenance for herself and her daughter and also withdrawing the criminal complaint against the husband. Thus, the Learned Additional District Judge was duty bound in law pass a decree of divorce by way of mutual consent which was the only remedy available in such a situation as the marriage between the parties was totally dead and had irretrievably broken down.

15. The judgment of the Learned Additional District Judge in permitting the respondent to withdraw the consent unilaterally after the filing of both the petitions under section 13B(1) and under section 13B(2) of the Act along with the compromise deed and joint statements of both the parties in this behalf, was challenged by the learned counsel for the petitioner to be not only contrary to the position in law but also contrary to the interest of justice.

16. The counsel for the petitioner has rightly assailed the judgment of the learned Additional District Judge for the following reasons:-

(a). That the respondent had himself filed the petition for judicial separation under section 10 of the Hindu Marriage Act.

(b). During the pendency of the said petition joint petition for divorce by mutual consent was filed under Section 13 and 13B(2) of the Hindu Marriage Act by both the parties along with the application under order 6 rule 17 CPC for converting the petition for judicial separation into petition for grant of decree of divorce by way of mutual consent together with affidavit and compromise deed between the parties.

(c). The period of six months as contemplated under section 13B(2) for moving the second motion was agreed to be waived and this was so orally submitted before the Learned Trial Court by both the parties. According to the unrebutted plea of the petitioner, the learned ADJ was pleased to grant the permission to place on record petition (IIInd motion) under Section 13B(2) of the Act by waiving the stipulated period of six months as admitted by the respondent in his application dated 19.1.2004 d. Joint statement of the parties was recorded by the Learned ADJ whereby both the parties consented to dissolve their marriage by mutual consent and admitted to have settled their matrimonial disputes.

(e). During the pendency of the above petition for divorce the respondent had re-married and has even got a child from the second marriage.

f. That the parties to the present petition are living separately since 7.2.2002.

g. The marriage between the parties is dead and has irretrievably broke down.

h. There are bitter allegations and counter allegations between the parties.

i. That admittedly there are no grounds for withdrawal of the consent by the husband respondent. The consent given by the parties was not obtained by compulsion, force, fraud, coercion and undue influence and indeed the respondent/husband is estopped from backing out of the said consent as he has fully availed of the benefits of the settlement as detailed earlier in this judgment and as summarized in the succeeding sub-paragraph (j).

(j) That the respondent fully took advantage of the settlement by which the petitioner wife had forsaken all stridhan, maintenance for herself and the child and had further withdrawn her criminal complaint pursuant to the settlement.

(k). The respondent is involved in criminal cases under section 419/420/465/467/468/471 and 120B IPC registered at Ludhiana in Punjab and further involved in a Customs case under section 135 of the Customs Act. The respondent was arrested and sent to Judicial custody and while in transit remand to Punjab, he absconded and is not traceable till date.

(1). There is no public interest involved in maintaining the marriage as a façade, when the emotional basis for the marriage has disappeared by the conduct of the absconding husband who had already remarried in spite of attempting to withdraw unilaterally his consent and even has a child from his remarriage.

17. The learned Additional District Judge allowed the respondent to withdraw his consent unilaterally because of a misreading of the position of law laid down by the Hon'ble Supreme Court in (1991) DMC 313 (SC) = AIR 1992 SC 1904 in Sureshta Devi's case but in my view the said decision is not applicable in the present facts and circumstances of the case. In Sureshta Devi's case the wife had pleaded that her initial consent had been obtained by pressure and threats from the husband and a situation obtaining in the present case is that the husband cheated his wife in tricking her into a mutual consent divorce and after enjoying all benefits of the settlement, sought to back out of such consent. Consequently the position of law laid down in Sureshta Devi's case (supra) is inapplicable in the present case.

18. A reading of sub section (2) of 13B of the Act would show that the scheme of Section 13B of the Act does not envisage withdrawal of consent by one party. In the case of Nachhattar Singh v. Harcharan Kaur AIR 1996 Punjab and Haryana 201 it was held that ;

"The petition can be dismissed as withdrawn only if both the parties who had filed the petition together agree to withdraw the same. Six months after the date of the presentation of the petition and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties, the Court has to satisfy itself, after hearing the parties and after making such inquiries as it thinks fit, that the petitioner was in fact presented by both the parties to the marriage, that they have mutually agreed that the marriage should be dissolved. If both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other conditions mentioned in sub-sec. (1) of S. 13B of the Act are fulfilled, it will not be open to a party to withdraw the consent. In the present case without making an inquiry under sub-sec. (2) the trial Court has dismissed the petition as withdrawn which could not be done merely on the asking of one party".

19. A similar view was also taken by this Court in Smt. Chander Kanta v. Hans Kumar and another in I (1988) DMC 509 = AIR 1989 Delhi 73 where it was held that;

"A petition presented under s. 13B(1) of the Act cannot be withdrawn by one party unilaterally. Of course, if the Court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence then it is a different matter because in such a case the Court is empowered specifically to refuse to grant the decree. If one party is allowed to withdraw the consent even on other grounds, namely that the parties continue to live separately and have not been able to live together, still subsist and reconciliation is not possible then it will frustrate the very purpose of the enactment. Under S. 23(1)(bb), the court is empowered to grant the decree even in an undefended case if it is satisfied that the averments in the petition are true and the consent for mutual divorce has not been obtained by force, fraud or undue influence. If unilateral withdrawal of consent is permitted the Court will not be able to pass a decree in an undefended case".

20. Thus it is clear that it is settled law that unless it is shown by one party that his/her consent was as a result of force, fraud or undue influence, consent given for grant of divorce by mutual consent in the petition under section 13B(1) of the Act cannot be unilaterally withdrawn by the said party, which position of law has also been followed in vol. 41 (1990) Delhi Law Times 266 = II (1990) DMC 142 in the case of *Rajrani v. Roop Kumar*.

21. In (1997) DMC 491 (SC) = AIR 1997 SC 1266 in *Ashok Hura v. Rupa Bipin Zaveru*, the Hon'ble Supreme Court, while dealing with such questions of withdrawal of consent unilaterally by one party and a situation where it can be safely concluded that the marriage between the parties has been irretrievably broken and there was no chance of their coming together or living together, held that;

"We are of the view that the cumulative effect of the various aspects in the case indisputably point out that the marriage is dead, both emotionally and practically and there is no chance at all of the same being revived and continuation of such relationship is only for name-sake and that no love is lost between the parties, who have been fighting like "Kilkenny cats" and there is long lapse of years since the filing of the petition and existence of such a state of affairs warrant the exercise of the jurisdiction of this Court under Article 142 of the Constitution and grant a decree of divorce by mutual consent under section 13B of the Act and dissolve the marriage between the parties, in order to meet the ends of justice, in all the circumstances of the case subject to certain safeguards."

"Irretrievable breakdown of marriage is now considered, in the laws of number of countries, good ground of dissolving the marriage by granting a decree of divorce.

Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as a cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage."

The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage can not be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared.

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties

and the children to terms with the new situation and developments by working out the most satisfactory basis upon which may regulate their relationship in the changed circumstances" (underlining supplied) In my view the impugned judgment totally loses sight of the above salutary principles of law laid down by the Hon'ble Supreme Court in Ashok Hura's. In my view the law which applied to the present case was the law laid down in Ashok Hura's case and not Sureshta Devi's case (supra) as wrongly held by the impugned judgment. The impugned judgment has deprived a wronged and cheated wife of an opportunity to work out the most satisfactory basis for regulating the lives of herself and her daughter as per the above judgment of the Supreme Court. A pedantic interpretation of the law has led to a situation which occasions the grossest miscarriage of justice in denying a young woman with her abandoned daughter an opportunity to start their life afresh. In Ashok Hura's case (supra), the Hon'ble Supreme Court dealt with the judgment of the Hon'ble Supreme Court in Sureshta Devi's case (supra) and observed as under:-

"It appears to us, the observations of this Court 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 13B of the Act. However, it is unnecessary to decide this vexed issue in this case, since we have reached the conclusion on the fact situation herein. The decision in Sureshta Devi case (AIR 1992 SC 1904) (supra) may require reconsideration in an appropriate case. We leave it there."

22. Furthermore, this Court cannot be a helpless spectator to the chicanery and duplicity of the respondent-husband who induced the hapless wife, the petitioner, to forego the maintenance claims of not only herself and her daughter but also duped her into agreeing to the withdrawal of the criminal complaints in the hope of starting her life afresh. The husband has by this conduct put the wife in a position of a huge disadvantage. In view of the position of the law as noted above, no spouse can unilaterally withdraw its consent for divorce by mutual consent when the grounds such as fraud, undue influence, force, misrepresentation and such consent not being free not having been pleaded and proved satisfactorily. In the present case, if the withdrawal of the consent by the respondent-husband is upheld, it will lead to an anomalous situation where the petitioner-wife who is law abiding is left high and dry without recourse to any remedy and saddled with a dead marriage whereas the respondent-husband who has resorted to fraud and misrepresentation enjoys his freedom and enjoys another marriage. The respondent-husband in spite of forsaking his mutual consent for divorce by remarrying has on his own showing committed a crime of bigamy under Section 494 of Indian Penal Code and is enjoying his life afresh whereas the wife is tethered to a dead marriage. Courts of law particularly a writ court under Article 227 in its power of superintendence must reach out to correct such obvious and gross miscarriage of justice to provide succor and relief to the petitioner-wife who otherwise will be left ruing the misfortune befallen on her by the interpretation of law in the impugned judgment. The Hon'ble Supreme Court has laid down the following parameters of interference by a High Court in petitions under Article 227 of the Constitution:-

(a). where the impugned order results in manifest injustice as per the decision in T.G. Telang v. R.S. Bhinde, AIR 1997 SC 1222 = 1997 (2) SCC 437 para 3 which reads as follows:-

"3. As would be apparent from the above narrative, the instant case does not involve any substantial question of law of general or public importance. Although counsel for the appellants has strenuously assailed the correctness of the findings of the Revenue Tribunal and of the High Court, we are unable to accede to his contention. We have not, despite careful consideration of the judgments and objections submitted to us, been able to discern any legal infirmity or error either in the decision of the Revenue Tribunal or of the High Court. It is a well settled rule of practice of this Court not to interfere with the exercise of discretionary power under Articles 226 and 227 of the Constitution merely because two views are possible on the facts of a case. It is also well established that it is only when an order of a Tribunal is violative of the fundamental basic principles of justice and fair play or where a patent or flagrant error in procedure or law has crept in or where the order passed results in manifest injustice, that a court can justifiably intervene under Article 227 of the Constitution."

23. In this view of the matter it is evident that the withdrawal of the consent by respondent is tainted with malafide, baseless and is unjust. Thus, it is a fit case where a decree of divorce by way of mutual consent should have been granted. Accordingly, the impugned orders dated 1.10.2003 and 31.3.2004 of the Learned Additional District Judge is set aside and the present petition is allowed and the marriage solemnized between the parties Rachana Jain and Neeraj Jain on 12.3.1996 is dissolved by decree of divorce under section 13B(2) of the Act.

24. The petition stands allowed and disposed of accordingly. Office to draw up the decree accordingly.