

Delhi High Court

Swantantra Ved Sahni vs Santosh Kumari on 22 March, 1988

Equivalent citations: 1988 (15) DRJ 6, 1988 RLR 469

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Bench: S Wad

JUDGMENT S.B. Wad, J.

(1) A neat question of law arises turn consideration in this appeal, viz. where the two parties who have filed a joint petition for divorce by mutual consent under Section 13-B(1) of the Hindu Marriage Act, can the divorce be granted by the matrimonial court on a motion only by one of the spouses under Section 13-B(2) of the Act ?

(2) A joint petition for dissolution of the marriage by mutual consent was moved by the petitioner and the respondent on 10-8-1983. On 4-9-1984 the husband alone tiled the petition under Section 13-B(2) of the Act. The wife did not join the proceedings or in other words did not consent for the second motion to be made under the said sub-section. The learned Adj dismissed the petition filed by the husband holding that if one of the parties with held the consent a decree for divorce cannot be granted under the said sub-section. On the facts of the case the learned Judge also opined that there was every likelihood that the wife had joined the petition under Section 13-B(1) without her free consent. The learned Judge has disagreed with the two decisions cited before him. They are: Jayashree Ramesh Loadha v. Ramesh Bhikaji Loadha, (1984) D.M.C. 481 and Meena Duttav. Anirudh Dutta, Ii (1984) D.M.C. 388. These decisions are of the other High Court and there is no decision of this Court on this question.

(3) Section 13-B was added for the first time by the amending Act 68 of 1976. In the original text of the Hindu Marriage Act there was no provision for divorce by mutual consent. Section 13-B is, obviously, copied from Section 28 of the Special Marriage Act with some minor changes. The change introduced by Section 13-B is that whereas under Section 28 of the Special Marriage Act a second motion cannot be presented before one year and not later than two years, the Hindu Marriage Act, as amended, reduced the said periods to six months and eighteen months respectively. The Section 13-B may now be noted :- "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. 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."

(4) Section 13-B is subjected to the other provisions of the Act and, therefore, a petition for divorce by mutual consent cannot be presented before one year after the marriage, as provided by Section 14 of the Act. Section 13-B(1) requires that both the parties to a marriage should file a petition, but that petition must be filed together. In other words it must be a joint petition. The words "a petition"

make it clear that the parties to the marriage do not file separate petitions, but file one petition signed by both of them. In the joint petition they must state :-

(1) That they had been living separately for a period of one year or more ) (2) That they had not been able to live together ; & (3) That they have mutually agreed that the marriage should be dissolved.

(5) The period of one year or more is an objective fact which can be inferred from the date of the marriage, but so far as the second and the third requirements are concerned they are based on the volition of both the parties to the marriage. Both of them must agree that it is not possible for them to live together. But the requirement of the Section is not complete by their mere agreement on the fact that they are unable to live together. They may agree on this question, but still may not like to get their marriage dissolved. There can be various considerations, such as the personal status, social position or the interest of the children. Such a marriage may remain in animated suspension. Only when they mutually agree that they should dissolve their marriage, it can be said that the requirement of Section 13-B(1) is satisfied. It is obvious that the said second and third requirements for a valid application under Section 13-B(1) presupposes the consent of both the parties. Needless to say that the consent must be a free consent. After the joint application under Section 13-B(1) the parties must wait for six months, but they must also be quick enough to transform their mutual agreement into a formal motion before the Court within 18 months. If they do not do it, the presumption would be that they are not interested in divorce by mutual consent. If the joint motion is not made within 18 months the joint petition filed under Section 13-B(1) will be *oleos* and the Court will not be called upon to decide the petition at all. So is the case where both the parties want to withdraw the petition and do not want to prosecute the same. But, if the motion is made by both the parties within 18 months from the original petition and if it is not withdrawn in the meantime, the matrimonial court is called upon to decide the same. The Court can dissolve the marriage after bearing the parties and after making such enquiry as it thinks fit. But the enquiry is to be directed towards two facts : first is that the marriage has been solemnized under the Hindu Marriage Act ; and the second is that the averments made in the petition are true. It means that the Court must record its finding that the parties have agreed on the fact that they had been unable to live together and that their marriage should be dissolved.

(6) The question for consideration is whether a party after making the initial petition can withhold its consent at the second stage, viz. a motion under Section 13B(2) and if so, what is the effect on the proceedings ?

(7) In *Jnyashrw v. Ramesh*, , the Bombay High Court has considered the scope of Section 13-B. In that case at the stage of the motion under Section 13-B(2) the husband had stated that due to certain domestic difficulties, he was mentally disturbed and was on the horns of dilemma. In that confused state of mind he signed a joint petition under Section 13-B(1). The Court considered the evidence on record, including the return of the property and ornaments by both the sides and came to the conclusion that the husband's assertion that he signed the original matrimonial petition in a confused state of mind was incorrect. On the interpretation of Section 13-B the Court held that once it is established that the original petition under Section 13-B(1) was a mutually agreed petition, based on voluntary consent the fact that at a later stage either party does not want the divorce would

be relevant. The Court rejected the contention of the counsel for the husband that since the Section provides for divorce by mutual consent, it is permissible for either party to withdraw the consent till the decree is passed. Regarding the scope of the enquiry by the Court under Section 13-B(2) the Court held that the said enquiry was restricted only to find out whether at the stage and at the time of filing the joint petition under Section 13-B(1) the party had voluntarily consented and whether the requirements of the Section were satisfied or not.

(8) The said decision of the Bombay High Court is relied upon by the Single Judge of the Madhya Pradesh High Court in *Meena Dutta v Anurudh Dutta*, DMC Vol. II 1984 (1984,398). In that case the husband wanted to resile from his commitment in the joint petition for divorce made under Section 13-B(1), viz. to hand-over the original receipt of fixed deposit for Rs. 20,000.00 made by him in favor of the wife and children. The Court held that the sub-sequence developments of the husband withholding the consent on the said ground were not relevant. Since the question of the payment of Rs. 20,000.00 related to the permanent alimony and maintenance of minor children, the Court remanded the matter to the Matrimonial Court but the Court granted a decree of dissolution of marriage by mutual consent under Section 13-B of the Act.

(9) The scope of Section 13-B of the Act was also considered by a single Judge of Punjab and Haryana High Court in *Nachhattar Singh v. Harcharan Kaur*, . In that case, after filing of the joint petition under Section 13-B, at the second stage of the joint motion, the wife withdrew her consent by a statement before the court. The matrimonial court dismissed the petition on the ground that one of the parties was not willing to the dissolution of marriage by mutual consent. The husband filed an appeal in the High Court. On interpretation of Section 13-B the High Court held that the said section does not envisage withdrawal of consent by one party. The court found, that the matrimonial court was wrong in dismissing the petition as withdrawn without making an enquiry under Sub-section 2 of the said section. The appeal was allowed and the case was remanded to the matrimonial court for making an enquiry as envisaged by the said sub-section. With respect I am unable to agree with the said decisions of the three High Courts mentioned above.

(10) It has been held in the said decisions that the withdrawal of the consent under Sub-clause 2 of Section 13-B cannot be done by one party and the withdrawal should be by both the parties. The said sub-section does not in terms say that the withdrawal should be by both the parties. If we contrast the provision regarding withdrawal with that of the filing of the petition under Sub-clause 1 and the motion to be made under Sub-clause 2 the position would be clear. Under Sub-clause 1, the petition is to be filed "by both the parties to a marriage together". The motion under Sub-clause 2 has to be made by "both the parties". Since the Legislature has not used the words "both parties" in the context of the withdrawal of the petition, while it has used the said words in the same section for the purposes of initial petition, as well as the motion, it will have to be held that the petition can be withdrawn by either party with the leave of the court. The language used in Sub-section 2 is not withdrawal of 'consent' but "if the petition is not withdrawn". Therefore, a party wanting to withdraw the petition cannot merely state that he does not consent but must make an averment before a court that he wants to withdraw the petition.

(11) For passing a decree of divorce under Sub-section 2 the motion has to be made by both the parties under Sub-clause 2. It is so because the court must be satisfied that the dissolution of marriage is mutually agreed by the parties and the agreement continues till the passing of the decree. It is difficult to reconcile the judgment of the Bombay High Court and Madhya Pradesh High Court with this requirement of Sub-clause 2 because in those cases the divorce by mutual consent was ordered by the High Court on a motion made by one of the parties.

(12) To say that the function of the matrimonial court at the second stage, namely, 13-B(2) is only to find out whether the averments in the petition were true at the stage and time when the original petition under Clause I was filed, is to unduly restrict the powers of the court. Such a restricted interpretation is also not warranted by the wordings of Sub-clause 2. Sub-clause 2 states that the court is to satisfy itself "that the averments made in the petition are true". Mark the present tense are and absence of word were. The word "are" in the present tense shows that the truth of the averment must exist at the time when the court is inclined to pass a decree after hearing the parties and making such enquiries as it thinks fit. Under the said sub-clause, court can pass a decree for divorce declaring the marriage to be dissolved with effect from the date of the decree. The sub-section does not say that the marriage would be dissolved with effect from the date when the original matrimonial petition was filed under Sub-clause 1. The language of the sub-section "with effect from the date of the decree" further suggests that the facts, namely, that the parties are unable to live together and that they have mutually agreed to dissolve their marriage, must be alive and existent when the decree for dissolution is to be passed. It is a rule of statutory construction that where the Legislature uses particular words and clauses in a section nothing has to be treated as redundant or unnecessary and equal weight is to be attached to all the provisions of the section. On reading the section in the light of this cannon of interpretation it is difficult to agree with the submission that subsequent facts after filing of the matrimonial petition are irrelevant. It is also difficult to agree with the submission that the matrimonial court should concern itself only with the original statement of facts at the stage and timing of the original petition and nothing more. Since Section 13-B is a special provision for divorce by mutual consent, the mutuality of their agreement must subsist till the date the matrimonial court passes a decree for dissolution of marriage.

(13) This interpretation echoes the principal object of divorce by mutual consent especially incorporated by amending Act 68 of 1976. While making the said amendment the Legislature had before it the history and working of matrimonial proceedings in the court on various grounds mentioned in Sub-clause I of Section 13. In most of the cases the grounds for divorce are cruelty or desertion. In some cases voluntary sexual intercourse after solemnization of marriage is trotted out the pleadings and the evidence is full of wild accusations and acrimony and not only the parties but the family members are also tarnished and humiliated. The Legislature has, therefore, found that if the parties are permitted to dissolve their marriage by consent the ill feelings between the parties and the families can be avoided. It would also be possible for the parties to lead their future life in peace. The provision for divorce by mutual consent is also a legislative recognition of an adult and civilized method of separating husband and wife who are unable to live together happily. With substantial increase in female education, women are trying hard to develop their independent personality. They are taking to employment and participating more freely in public life. Some of them are pursuing careers as artists or pursuing different professions. Out of economic necessity

(due to high inflation) some women are required to take jobs for supporting the families. All these factors have brought about a change in their expectations and hopes from the matrimonial tie. From the position of subservient and secondary status the women are now aspiring to be equal partners. These developments, on the one hand are creating a more enlightened and meaningful marriage relationship but on the other hand, unfortunately leading to demonstrable frictions amongst the spouses. Over suppression of women in the past had led to undue submissiveness, retarded personalities and neurotic resignation in the matrimonial life. But the new weapon of knowledge is making them bold to challenge their partners in a court of law. Therefore, if the marriage cannot work after a due trial for one year and if it is beyond redemption, a more rational and humane way, is to permit them to dissolve their marriage by mutual consent. Consent and volition is thus the essence of the new remedy of divorce by mutual consent. If it is so, the atmosphere of mutual consent must permeate through all stages of enquiry before the court till the filial decree is passed by the court. If either party bonafide believes and is able to satisfy the court that divorce is not the only solution for their problems when the matrimonial court sits for the enquiry under Section 13-B(2), the court is not powerless to record the realities of the matrimonial life of the said parties and to pass an appropriate order, including the one of rejecting the p:tion for a divorce by mutual consent.

(14) The scope of enquiry under Clause (2) is much wider as is clear from the provisions of sub-section. The matrimonial court should not only hear the parties but make such other enquiry "as it thinks fit". The expansive terminology suggests that every aspect of the matrimonial tie should be borne in mind by the matrimonial court and it should record satisfaction after making full enquiry. When the parties initially agree for dissolution of marriage, they are naturally interested in providing for the other measures such as return of the dowry and property, permanent alimony and maintenance for children and custody and guardianship of children. If they are to lead a new life the parties are desirous of not leaving any of these problems unresolved. If they are not resolved simultaneously they are likely to disturb their peaceful life in future. The matrimonial court is, therefore, required to address itself to these multifarious aspects of breaking matrimonial tie. There are separate provisions for permanent alimony in Section 25 of the Hindu Marriage Act. There are provisions for interim maintenance in Section 24 and interim custody of children and their maintenance and education in Section 26 of the Act. The provisions for the guardianship of the children are in the separate enactment, namely, Hindu Minority and Guardianship Act. But to leave the parties to pursue their respective claims under the said provision by separate proceedings and to restrict the proceedings only to find out whether at the initial stage their averments in the petition were correct or not is, to my mind, not a satisfactory way of dealing with the matrimonial problem. These diverse aspects and incidences of the matrimonial tie are agreed to by parties as one package and are required to be attended to simultaneously. The legislative mandate of expeditious disposal of the matrimonial proceedings would be thwarted if all problems are not attended to in oils go. As a package agreement between the parties, husband may agree to leave the guardianship of children with the wife although tile Hindu Minority and Guardianship Act gives him predonaina.nt right. So also the husband may in a spirit of compromise agree to give larger maintenace considering his own status and standard of living then the wife may be able to prove in a separate application for maintenance. If at a later stage the husband tries to resile from these commitments, the wife should be entitled to tell the husband that she would not consent to make a joint motion under Section

13-B(2) of the Act. if the matrimonial court after hearing the parties and making other enquiries as it deems fit finds that the contentions of the wife are bona fide it should be entitled to refuse to dissolve the marriage under Section 13-B of the Act.

(15) The special duties of the matrimonial court under Section 23 of the Act are equally applicable to proceedings under Section 13-B of the Act, as Section 13-B is to be made applicable subject to other provisions of the Act. Under Section 23(1)(a) it is the duty of the matrimonial court to see that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief.

(16) The Madhya Pradesh case and the Bombay case referred to above show that the husbands were trying to take advantage of their own wrong, by refusing to give a fixed deposit of Rs. 20,000.00 to the wife and by frivolous plea of confusion in the mind, respectively. Since the petition under Section 13B(1) is a joint petition, both the parties are petitioners. The matrimonial court, therefore, has a duty to deny the fruit of avoiding a decree to a party which has committed wrong. The court can in such a circumstance hold that the agreement to have the dissolution continues to abide and pass a decree under Section 13B of the Act.

(17) Under Section 23(i)(bb) there is a further duty on the matrimonial court to satisfy that the consent has not been obtained by force, fraud or undue influence. The essence of divorce by mutual consent is the volition of the parties freely expressed. The cuisine is no consent in law, if it is secured by force, fraud or undue influence, if the court is satisfied that the consent is not a free consent it can refuse a decree under Section 13B of the Act.

(18) Similarly, the matrimonial court has to satisfy itself that there is no unnecessary and improper delay in instituting the proceedings under Sub-clause (d) and that "there is no other legal ground why relief should not be granted" under Sub-clause (e) of sub-section.

(19) Section 23(2) casts an overall duty on the matrimonial court "to make every endeavor to bring about a reconciliation between the parties." This sub-section shows deep concern of the Legislature to protect and maintain the institution of family, in spite of the fact that divorce can be secured by mutual consent. Apart from the biological necessity, the family as a institution represents human relationship based on understanding, sacrifice and mutual love. The family provides security and well being particularly to wives and children. The history of human institutions shows that the institution of family is a natural, indispensable and most abiding of all the social institutions. The society, and law has, therefore, an obligation to see that the institution of family does not degenerate or disintegrate. The experience of United States of America, after the sex revolution of 60s is of the increased disintegration of family creating unprecedented insecurity for wives and childrens. The User started with complete freedom of contract and easy divorces in the initial stages but the divorces are. .now refused on the ground of the well being of the children and similar considerations. In China the Communes were set up as a collective alternative lo the institution of family during the Cultural Revolution but the Communes are now disbanded. The husbands who were forced to work away from the family in large numbers are being sent back to the place where the family resides, thus restoring the institution of the family, In all societies, therefore, saving the

institution of family is a well recognised duty. If the provision for divorce by consent is abused by tantrums of incompatibilities or by impulsive decisions, the matrimonial court can through counselling save the family by wise advice and persuasion. This duty is to be discharged by the matrimonial court when it is considering the petition for divorce by consent. If the jurisdiction of the court is restricted only to the initial averments made under Section 13B(1), it might render the provisions of Section 23(2) nugatory.

(20) To sum up the duties of the matrimonial court under Section 13B read with Section 23 are multifarious and the jurisdiction is very wide. Depending on the facts of a case the matrimonial court may hold that a party was justified in holding back the consent after the first stage or may hold that the holding back the consent was untenable in law and presume that the mutual consent continues till the date of the decree. The judgments of the Bombay High Court and Madhya Pradesh High Court can, therefore, be explained on this interpretation. What those courts have done is to deem that the mutual consent continued till the date of the decree.

(21) Having noticed the correct legal position we may now turn to the facts of this case. The first joint petition was filed by the parties under Section 13B(1) on 5-7-1983 and was numbered as Petition No. 353/83. On 14-7-1983 the wife made a statement before the Adj that her consent was obtained by force, pressure and duress by the husband. The learned Adj, therefore, dismissed the petition holding that wife has not given her consent out of her own volition. The learned Adj in dismissing the said petition had acted without jurisdiction as the six months period had not elapsed from the date of presentation of the petition. The said order was, therefore, illegal and inconsequential. A second joint petition under Section 13B(1) was made by the parties on 8-8-1983 being Petition No. 442/83. A joint motion under Section 13B(2) (No. Hma 92/84) was made by the parties on 15-2-1984. This petition was listed before the Adj on 23-2-1984. On that date the parties were not present and, therefore, the petition was dismissed in default on 23-2-1984. The husband made an application for the restoration of the petition. He also filed another application (No. 425/84) alone purporting to be an application under Section 13B(2) of the Act. The Adj dismissed the application for restoration. This order was challenged before me in Fao 210/84. After considering the record I set aside the order of the Adj dismissing the Petitions No. 442/83 and 92/84 in default and restored the applications to the file of the Addl. District Judge and remanded the matter to the Adj for consideration on merits. Petition No. 425/84 moved by the husband alone had thus become redundant. Even otherwise the application was not maintainable as it was not a joint motion as envisaged by Section 13B(2). We are thus concerned with Petition No. 442/83 and Petition No. 92/84 in this appeal. Both these applications were joint applications. After the remand the Adj directed the parties to file their affidavits in evidence. Both the parties filed their affidavits. The husband also filed the affidavit of Shri Uma Chand Govind a working Member of the Social Organisation called Manav Mandir Gathan Sansthan. An affidavit of Smt. Kamla Thakur, General Secretary of the said Organisation was also filed. There is also on record a copy of the letter dated 12-9-1983 of Shri R.L. Gupta, Member Secretary, Delhi Legal Aid and Advice Board addressed to Smt. Kamla Thakur, the General Secretary of the said Organisation.

(22) In the joint application filed by the parties (HMA 442/83) on 8-8-1983 both the parties had stated that they were married on 4-5-1980 and had lived together in the matrimonial home up to

21-7-1980 where they had co-habited as husband and wife. A male child was born out of the wedlock on 18-3-1981. They have stated that they have been living separately for a period of 21 years from 21-7-1980, that it was not possible for them to live together and they had mutually agreed that the marriage should be dissolved. They further stated that they had agreed and exchanged their items/goods belonging to each other as per agreement (Ex. P1) and that they did not claim or dispute as to whatever is left between the parties. They also stated that son Vicky who was then residing with the wife shall now for ever continue to reside with her and that she alone would have the custody. It was also asserted in the joint application that the consent of the parties was not obtained by force, fraud, coercion or undue influence. It was then stated that the common relations and friends had tried to patch up the misunderstandings between the parties but in vain and, therefore, it was unnecessary and improper to delay the filing of the petition. This application was signed by both the parties. The petition was also supported by the affidavits of the husband and wife duly verified. In the verification it was asserted that nothing stated in the affidavit was false, nor any material has been concealed. Exhibit-Pi, the agreement is signed by both the parties on all the pages. It is stated in the agreement that their marital tie has come to an end and that both the parties shall be free to re-marry any person of their choice. It was then stated in the agreement that son Vicky will remain with the wife permanently and that the husband would pay a sum of Rs. 10,000.00 to the wife in lumpsum towards all claims/demands for past and future maintenance of the wife and son Vicky and that son Vicky will not have any right to the property of the husband. It was then stated that the parties have resumed the goods belonging to each other by way of dowry or otherwise. A list of dowry articles returned to the wife also forms part of Ex. PI. There are forty-one such articles.

(23) In her affidavit filed after the remand by way of evidence. Respondent wife had admitted that a joint application was made under section 13-B(1) accompanied by a separation agreement dated 8-8-1983. Under the said separation agreement the wife was to get back all the dowry articles and permanent custody of the son. She, however, submits that the petition was made under fraud, pressure, coercion and undue influence by the husband. He even threatened to kidnap the minor son. She further stated that the first petition was dismissed as the father of the wife was given a slap by the father of the husband in the court. She then stated that it was the husband who had approached the Nari Raksha Samiti which was more helpful to the husband out of monetary considerations. As regards the second petition, she stated that she was threatened by the husband to involve her and her parents in criminal proceedings. The second petition was also signed by her due to fraud, coercion, threat and undue influence. She then stated that after the first petition was dismissed, she had resided with the husband at his house and co-habited as wife. As a wife believing in Hindu mythology, she wanted to die in the house of her husband after her marriage and not in her parental house. She still wanted to live with the husband and hoped for the re-union. She submitted that at earlier stages she could not make a specific charge of undue influence, coercion fraud and threat since the lawyer was a common lawyer for both of them. who did not provide any legal and proper advice to her. All these allegations are denied by the husband in his counter affidavit. He has submitted that pursuant to the separation agreement dated 8-8-1983 the wife has already received the dowry articles and had also got the custody of the son. It was the wife who approached the Nari Raksha Samiti first at the stage of the first petition and after the dismissal of the same again at the stage of the second petition. The dowry articles were collected by Nari Raksha



Samiti from the husband's house and they were delivered to her by Nari Raksha Samiti in October, 1983. The husband denied the allegation, of his father slapping the wife's father, or his threats of kidnapping the child. He also denied any fraud, coercion and undue influence allegedly practiced by him. He submitted that at the early stage of the marriage it was discovered that they were temperamentally different and through intervention of Nari Raksha Samiti divorce by consent was sought. He further denied that the wife stayed in his house after the first divorce petition was dismissed or that they had co-habited. The husband then submitted that through a letter dated 6-5-1983 the wife had herself proposed that they should dissolve the marriage (the wife had countered this submission slating that the said letter was forged letter).

(24) In her affidavit Smt. Kamla Thakur, General Secretary of the Nari Raksha Samiti had stated that the wife, Smt. Santosh Kumari approached their organisation in May, 1983 and requested to intervene and settle the matter between her and her husband as she did not want to live with her husband and wanted to live separately. Thereafter, Shri Swatantra Ved Sahni, the husband, was called to the office of Nari Raksha Samiti. They were being persuaded to live harmoniously together in three-four meetings arranged in the month of June, 1983. The efforts failed because the wife Smt. Santosh Kumari was adamant to break the relations with the husband. No complaint was made by her regarding the demand of dowry. It was at the instance of Santosh Kumari that the husband was persuaded to arrive at a settlement and separation of the marital relations. It was agreed between the parties that the goods and articles will be returned to the wife and the child will remain with the wife permanently and they would file a joint petition for dissolution of marriage. According to the list given by the wife the workers of the Nari Niketan Samiti collected the articles from the residence of the husband and kept in the premises of the Samiti for inspection by the wife. The goods were not lifted by the wife and the Samiti was required to pay the storage charges to the landlord. The wife made a complaint to the Delhi Legal Aid and Advisory Board for the return of the goods. On informing the true facts to the Legal Aid Board, according to the Board's directions the articles and goods were given to the wife on or about 26/27th October, 1983. A post dated cheque for Rs. 11,000.00 was given by the husband towards future maintenance and the same was handed over to the wife Santosh Kumari by the Samiti. The Samiti, at the request of the parties, arranged for a common Advocate Shri Subhash Chawla whose fees were paid by both the parties. No undue pressure, force or coercion was used either by the Samiti or by the husband Shri Swatantra Ved Sahni as the settlement for divorce and separation of the relationship was arranged at the instance of Smt Santosh Kumari.

(25) In my order dated April 29, 1985 I had stated : "IT is strange to find that one after another three joint petitions were moved which were duly verified and signed by the wife and also supported by an independent affidavit. When asked why after making allegations against the family of the husband she how wants to live with husband, and why she does not want divorce now, her only explanation is that the child is with her and that she does not think that the status of a divorcee would be in the interest of the child. She has already received all the dowry articles."

This observation was recorded by me because at the first instance the wife alone had appeared in the chamber. She gave an impression that the husband was manipulating joint petitions before the court. But when the original record was called and the applications Along with the affidavits of the

wife were seen and when the husband was also heard in the chamber the whole picture looked quite different. The matter was remanded because I wanted a finding from the trial court after due recording of the evidence as to whether the husband had, as a matter of fact, forced the wife to sign the joint. petitions and to file the affidavit in their support. On remand the learned Addl. District Judge had asked the parties to file the affidavits by way of evidence.

(26) The learned Addl. District Judge did not record a positive finding as to whether the petitions were made by the wife under force from the husband or not. The Judge held : "Without going into the merits or otherwise of this allegation of petitioner No. 1. the very Sacs. that petitioner No. I has declined to endorse the averments the petitions, in itself shows that she is not agreeable to a divorce by mutual consent. On the strength of the evidence and material brought on record and more particularly the fact that prior to the first joint motion being case No. 442/1983 another petition, was dismissed for want of free consent of petitioner. There is every likelihood of petitioner No. 1 having joined the later two petitions without her free consent. Looking as the matter from any angle whatsoever it does not. seem to be possible or in any case expedient in the interest of justice to allow this petition and to dissolve the marriage of the parties by a decree of divorce."

(27) It is unfortunate that after remand the trial court did not record positive findings and decided the matter without going into the merits. The matrimonial petition was filed in 1983. Five years have already elapsed and no useful purpose would now be served by remanding the matter once more to the trial court. I will, therefore, proceed to consider the merits of the matter.

(28) The petitions under Section 13-B(i) and 13-B(ii) with which we are now concerned were jointly filed by the parties duly supported by affidavits. The submission of the wife is that they were filed under coercion, undue influence, fraud and threats of the husband. No factual averments or evidence has been produced by the wife in support of the said allegation. Moreover each of these terms has a definite connotation in law and in many cases they are mutually exclusive. Even if one of them is present the consent obtained is vitiated and the law does not regard the consent as a free consent. If the coercion or threat is practiced, there can be no question of any fraud or undue influence and vice versa. The allegations thus lack in material particulars. The wife has alleged that the husband had threatened to kidnap the son and to involve her and her parents in a criminal case. These allegations are also without any supporting material. No person is even named in whose presence the alleged threats were given. As the father, the husband has a preferential right in law to be the guardian and, therefore, it was not necessary for him to kidnap the son. There was no reason for the husband also to involve the wife or her parents in a criminal case. On the contrary the wife could have filed a criminal case against the husband for the detention of the dowry articles, as is being done by the wives in many cases. The respondent- wife has, therefore, failed to provisions that she has signed the said petitions without her free consent or under coercion, threat, fraud or undue influence.

(29) The respondent wife had averred that the first petition under Section 13-B(i) was dismissed because the father of the husband slapped her father in the court It only means that because of the alleged incident she made a statement before the Addl. District and Sessions Judge that her consent was not a free consent. The husband had denied this allegation. But even assuming that the

allegation is correct, it was a totally irrelevant ground for her to withdraw her consent and to allege that even the filing of the application at the earliest stage was obtained by force, fraud etc. She or her father had all the remedies open in law to proceed against the father of the husband if he had really slapped in the court, as was alleged. The submission of the wife that she could not state in so many words at the earlier stages that her consent was obtained by coercion, fraud, threat and undue influence because. Advocate Chawla, who was the Advocate for both the parties did not correctly advice her, is dearly an alter thought. It is quite unnatural that a parly who allegedly suffered at the hand? of the Advocate at one time would again agree for the engagement of the same Advocate at a subsequent stage in the proceedings.

(30) The next submission of the wife that the husband went to Nari Raksha Samili and secured the undue consent from her for filing both the petitions is un-trustworthy. The evidence of Urmila Thakur, the Secretary of Nari Raksha Samiti completely demolishes the story of the wife. Smt. Kamla Thakur is an independent witness and a responsible Secretary of a social institution devoted to the protection of the women. Her testimony is more reliable. She had stated that the wife had approached the Samiti twice, first at the stage of the petition under Section 13B(i) and again at the stage of the petition under Section 13B(ii). She had stated that the wife approached the Samiti in the month of May, 1983 and three four meetings were held in the month of June, 1983 so as to explore for the reconciliation between the parties. The statement of the husband that on 6-5-1983 the wife had herself written to him for severance of the matrimonial tie is thus confirmed by the independent evidence of Smt. Thakur. Smt. Thakur had further said that the wife was adamant and wanted only severance of the matrimonial tie and, therefore, by an agreement between the parties the joint petition was filed for the dissolution of marriage by consent. The separation agreement dated 8-8-1983, admitted by the wife, was made at the instance of the Samiti under which it was agreed that the husband should return the dowry articles to the wife, that the custody of the son should be permanently given to the wife and that the parties would be free to marry again after the dissolution and lead their independent life. The separation agreement was filed Along with joint petition in the court. Pursuant to the said agreement the wife received the dowry articles and also the custody of the son. Having accepted the said two benefits under the agreement, she cannot now turn back and say that she had not given her consent for the dissolution of marriage. She is estopped from doing so in law. If the first petition fails the separation agreement also would not have any legal sanctity. The wife would have to prove her claim to the dowry articles and the custody of the son in the proper court over again. It is clear to me that after securing these benefits from the husband who in the spirit of compromise agreed to the said terms because of the wife's promise of dissolution of marriage, with the hope of starting a new life. The plea of wife that the husband was demanding additional dowry is also falsified by the evidence of Mrs. Thakur who has stated that no such complaint was made by the wife during the course of negotiations in the Samiti. The evidence leaves a clear impression that the wife is taking advantage of her own wrong. She had secured the benefits of the return of articles/goods aad had secured the permanent custody of the son through the joint agreement with the husband and wants to hide behind a false and indiscriminate plea of coercion, threat, fraud and undue influence. I have no hesitation in holding that the wife at her own free will had signed both the petitions and had given voluntary consent for the dissolution of marriage under Section 13-B of the Act. I, therefore, pass a decree of the dissolution of marriage under Section 13B of the Hindu Marriage Act and declare that the marriage between the appellant and the respondent

stands dissolved under the said section. So far as the payment of Rs. 11,000.00 agreed to be paid by the husband to the wife is concerned, there is no clear evidence of the actual payment received by the wife. It may be that the post dated cheque was issued by the husband at the initial stage but he had stopped the payment subsequently. If this is so, the appellant husband shall make a payment of Rs. 11,000.00 to the wife within three months from today in full and final settlement of all the claims of the wife including the one for permanent alimony, as agreed between the parties by agreement dated 8-8-1983.

(31) The appeal is allowed but on the facts and circumstances of the case there shall be no order as to costs.