Supreme Court of India
Smruti Pahariya vs Sanjay Pahariya on 11 May, 2009
Author: .....C.J.I.
Bench: K.G. Balakrishnan, P. Sathasivam, Asok Kumar Ganguly

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3465 OF 2009
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 17402 OF 2008)

Smruti Pahariya .....Appellant(s)

- Versus -

Sanjay Pahariya ....Respondent(s)

J U D G M E N T

GANGULY, J.

1. Leave granted.

2. The wife, who is the appellant before this Court, filed this appeal seeking to impugn the judgment and order dated 5.6.2008 passed by the High Court of judicature at Bombay, which in a detailed judgment, was pleased to set aside the judgment and decree dated 5.12.2007 passed by the Family Court, Mumbai, in which the Family Court, dissolved the marriage between the appellant and the respondent by a decree of divorce on mutual consent under Section 13B of the Hindu Marriage Act, 1955 (hereinafter "the said Act").

3. Admittedly, the parties are Hindu and governed by the provisions of the said Act and they were married on 5.3.1993 at Mumbai following the Hindu Vedic rites. Marriage was also registered. After marriage, the parties resided together in Flat No. 601, 2nd Floor, Dinath Court, Sir Pochkhanwala Road, Worli, Mumbai. Two sons were born to them, one on 1.2.1995 and the other one on 3.4.1997. A few years after that, serious differences and incompatibility surfaced between them and all attempts of settlement failed. The parties stopped living together from January 2005 and decided to

file a petition seeking divorce by mutual consent under Section 13B of the said Act. A joint petition to that effect was filed before the Family Court at Bandra, Mumbai and the same was registered on 19.5.2007.

It was averred therein that incompatibility with each other made it difficult for them to co-exist and they stopped cohabiting as husband and wife from January 2005 (para 6). In paragraph 13, it was stated that there was no collusion between the parties in filing the petition for divorce by mutual consent and in paragraph 17 it was pointed out that there is no force or coercion between the parties in filing the petition. Along with the said petition, certain consent terms were also filed but with those terms we are not concerned in this proceeding.

4. Under the provisions of Section 13B (2) of the said Act, a minimum period of six month has to elapse before such petition can be taken up for hearing. In the instant case, the said period expired on or about 19.11.2007. In between, two dates were given, namely, 14.6.2007 and 23.8.2007 when the parties were given a chance for counselling but on both the days parties were absent and no counselling took place.

5. On 19.11.2007, after the mandatory period of six months, the matter came up before the Family Court. It appears from the affidavit filed by the wife in this proceeding before the Bombay High Court that on 3.11.2007, advocate of the parties informed the husband that the matter will be listed on 19.11.2007 and a draft affidavit of deposition was sent to him through E-mail. It is not in dispute that both the parties had the same advocate. It also appears from the affidavit of the wife that on 18.11.2007 the advocate received a text SMS in his mobile from the respondent-husband that he is unable to attend the court on 19.11.2007. Therefore, on 19.11.2007, when the matter appeared for the first time before the Court, the husband was absent and the Family Court asked the advocate to inform the husband of the next date of hearing of the matter, which was fixed on 1.12.2007.

6. On 19.11.2007 itself, an application was made by the wife to summon the husband directing him to be present in the Family court on the next date. Accordingly, summons were sent by the Court on 23.11.2007 by courier and the courier returned with the remark "not accepting". In this connection, the order which was passed by the Family Court, on 1.12.2007, on perusal of the service report is of some importance. The following order was passed on the service return: "Perused the first summons and subsequent orders thereto. I have seen service affidavit also, states that servant was present. Hence I am not able to accept it as a proper one. The courier endorsement is also vague. Considering the contents in affidavit, I allow petitioner No.1 to serve the notice by pasting on the address given in cause title to petitioner No.2. EPSB allowed. It is made returnable on 4.12.2007."

7. The petition was thus made returnable on 4.12.2007. It appears that the bailiff pasted the summons on 3.12.2007 outside the door of the husband's residence and the matter came up before the Family Court on 4.12.2007 and on that day the husband was absent. The Family Court adjourned the matter to 10.12.2007. But on 5.12.2007, the wife, filed a petition before the Family

Court with a prayer that the hearing of the matter may be pre-poned and be taken up on the very same day i.e. 5.12.2007. On the aforesaid prayer of the wife, though the matter was not on the board, it was taken on the board by the Family Court on 5.12.2007 and the decree of divorce was passed ex-parte on that date itself.

8. It may be mentioned in this connection that the Family Court pre-poned the hearing on wife's application and in the absence of the husband. Admittedly, the pre-ponement was done ex-parte.

9. In the background of these facts, basically four questions fall for our consideration:

I. Whether impugned decree of divorce passed by the Family Court on 5.12.2007 is vitiated by procedural irregularity? II. Whether by conducting the proceeding, in the manner it did, the Family Court acted contrary to the avowed object of the Family Courts Act, 1984? III. Whether from the absence of the husband before the Family Court on 19.11.2007, 1.12.2007 and 4.12.2007 it can be inferred that his consent for grant of divorce on a petition on mutual consent subsists, even though he has not withdrawn the petition for divorce on mutual consent?

IV. Whether on a proper construction of Section 13B (2) of the said Act, which speaks of `the motion of both the parties', this Court can hold that the Family Court can dissolve a marriage and grant a decree of divorce in the absence of one of the parties and without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

10. This fourth question assumes general importance since it turns on the interpretation of the section. Apart from that, this question is relevant here in view of various recitals in the judgment and decree of the learned Judge of the Family Court. It appears that the Family Court granted the decree of divorce by proceeding on the presumption of continuing consent of the husband.

11. While dealing with the first question about procedural irregularity in the matter, this Court finds that the Family Court did not act properly even if it is held that it was correct in presuming the continuing consent of the respondent- husband.

12. From the sequence of events, it appears that on 19.11.2007 when the matter came up before the Court, the first day after the mandatory period of six months, the husband was absent. The Court directed service of summons on the husband on the request of the wife. The service return was before the Court on 1.12.2007. Looking at the service return, the Court found that service was not a proper one and the Court was also not satisfied with the endorsement of the courier. Under such circumstances, the Court's direction on the prayer of the appellant-wife, for substituted service under Order 5 Rule 20 of the Civil Procedure Code is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when Court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way".

13. In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have

directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her advocate's clerk that respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5 Rule 20 of the Code.

14. Apart from the aforesaid irregularity, the Court, after ordering substituted service and perusing service return on 4.12.2007, fixed the matter for 10.12.2007. Then, on the application of the wife on 5.12.2007, pre-poned the proceeding to 5.12.2007 and on that very day granted the decree of divorce even though the matter was not on the list.

15. This Court strongly disapproves of the aforesaid manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

16. On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in paragraph 34 of its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

17. While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

18. The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach - an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."

19. Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

20. In the instant case by responding to the illegal and unjust demand of the wife of pre-poning the proceeding ex-parte and granting an ex-parte decree of divorce, the Family Court did not discharge its statutory obligation under Section 13B (2) of the said Act of hearing the parties. When a proceeding is pre-poned in the absence of a party and a final order is passed immediately, the statutory duty cast on the Court to hear the party, who is absent, is not discharged. Therefore, the Family Court has not at all shown a human and a radically different approach which it is expected to have while dealing with cases of divorce on mutual consent.

21. Marriage is an institution of great social relevance and with social changes, this institution has also changed correspondingly. However, the institution of marriage is subject to human frailty and error. Marriage is certainly not a mere "reciprocal possession" of the sexual organs as was philosophized by I. Kant [The Philosophy of Law page 110, W. Hastie translation 1887] nor can it be romanticized as a relationship which Tennyson fancied as "made in Heaven" [Alymer's Field, in Complete Works 191, 193 (1878)].

22. In many cases, marriages simply fail for no fault of the parties but as a result of discord and disharmony between them. In such situations, putting an end to this relationship is the only way out of this social bondage. But unfortunately, initially the marriage laws in every country were `fault oriented'. Under such laws marriage can be dissolved only by a Court's decree within certain limited grounds which are to be proved in an adversarial proceeding. Such `fault' oriented divorce laws have been criticized as `obsolete, unrealistic, discriminatory and sometimes immoral' (Foster, Divorce Law Reform; the choices before State page

112).

23. As early as in 1920 possibly for the first time in New Zealand, Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1920 gave the Court the discretion to grant a decree of divorce to parties when they had separated for three years under a decree of judicial separation or separation order by the Magistrate or under a deed of separation or "even by mutual consent". Till such amendment, divorce after separation by parties on "mutual consent" was unknown.

24. Considering the said amendment of 1920 and exercising the discretion the amended law conferred on the Judge, Justice Salmond in Lodder Vs. Lodder, [1921, New Zealand Law Reports, 876], came to the conclusion that it is not necessary to enquire into the merits of the disputes between the parties since the man and the wife had put an end to their relationship 13 years ago and the learned Judge found that their alienation is "permanent and irredeemable". The learned Judge also felt that in the circumstances of the case "no public or private interest is to be served by the further continuance of the marriage bond" and a decree for its dissolution was passed. (See page 881).

25. This seems to be the first decision of a Court granting divorce on a `no-fault' basis and because of the fact that a marriage had broken down for all practical purposes as parties were staying separately for a very long time.

26. The British society was very conservative as not to accept divorce on such a ground but in 1943, Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt, [1943, 2 All ER 76], speaking for the House of Lords, while categorizing the heads of discretion which should weigh with the courts in granting the decree of divorce, summed up four categories but at page 78 of the Report, the Lord Chancellor added a fifth one and the views of His Lordship were expressed in such matchless words as they deserve to be extracted herein below:-

"To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused".

27. In India also, prior to the amendment in our laws by insertion of Section 13B in the said Act, the Courts felt the necessity for an amendment in the divorce law. The Full Bench of the Delhi High Court in the judgment of Ram Kali Vs. Gopal Dass - ILR (1971) 1 Delhi 6, felt the inadequacy of the existing divorce law. Chief Justice Khanna (as His Lordship then was) speaking for the Full Bench came to the following conclusion:- "...It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the fagade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife." [See page 12].

28. In coming to the aforesaid conclusion, the learned Chief Justice relied on the observation of the Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt (Supra).

29. Within a year thereafter, Hon'ble Justice Krishna Iyer, in the case of Aboobacker Haji Vs. Mamu Koya - 1971 K.L.T. 663, while dealing with Mohammedan Law relating to divorce correctly traced the modern trend in legal system on the principle of breakdown of marriage in the following words:-

"When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days."(See page 668)

30. In coming to the said finding the learned Judge relied on the principles laid down by Justice Salmond in Lodder Vs. Lodder (supra).

31. After the said amendment in 1976 by way of insertion of Section 13B in the said Act in the 74th Report of the Law Commission of India (April, 1978), Justice H.R. Khanna, as its Chairman, expressed the following views on the newly amended Section 13B: "Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals. A modified version of the basis of consent is to be found in the theory of divorce by mutual consent.

The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognizes this theory in section 13B."

32. On the question of how to ascertain continuing consent in a proceeding under Section 13B of the said Act, the decision in the case of Smt. Sureshta Devi Vs. Om Prakash - (1991) 2 SCC 25, gives considerable guidance.

33. In Paragraph 8 of the said judgment, this Court summed up the requirement of Section 13B (1) as follows:

"8. There are three other requirements in sub-section (1). They are:-

(i) They have been living separately for a period of one year.

(ii) They have not been able to live together, and

(iii) They have mutually agreed that marriage should be dissolved."

34. In paragraph 10, the learned Judges dealt with sub-section (2) of Section 13B. In paragraphs 11 and 12, the learned Judges recorded the divergent views of the Bombay High Court [Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe - AIR 1982 Bom 302: 86 Bom LR 184], Delhi High Court [Chander Kanta v. Hans Kumar - AIR 1989 Del 73], Madhya Pradesh High Court [Meena Dutta v. Anirudh Dutta - (1984) 2 DMC 388 (MP)], and the views of the Kerala High Court [K.I. Mohanan v. Jeejabai - AIR 1988 Ker 28: (1986) 2 HLR 467: 1986 KLT 990], Punjab and Haryana High Court [Harcharan Kaur v. Nachhattar Singh - AIR 1988 P & H 27: (1987) 2 HLR 184: (1987) 92 Punj LR 321] and Rajasthan High Court [Santosh Kumari v. Virendra Kumar - AIR 1986 Raj 128: (1986) 1 HLR 620: 1986 Raj LR 441] respectively on Section 13B.

35. In paragraphs 13 and 14 of the Sureshta Devi (supra), the learned Judges gave an interpretation to Section 13B (2) and in doing so the learned Judges made it clear that the reasons given by the High Court of Bombay and Delhi are untenable inasmuch as both the High Courts held that once the consent is given by the parties at the time of filing the petition, it is impossible for them to withdraw the same to nullify the petition.

36. We also find that the interpretation given by Delhi and Bombay High Courts is contrary to the very wording of Section 13B (2) which recognizes the possibility of withdrawing the petition filed on consent during the time when such petition has to be kept pending.

37. In paragraph 13 of Sureshta Devi (supra), the learned Judges made the position clear by holding as follows:

"At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-Section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties,.... if the petition is not withdrawn in the meantime, the court shall....pass a decree of divorce...". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."

38. Therefore, it was made clear in Sureshta Devi (supra) that under Section 13B (2), the requirement is the `motion of both the parties' and interpreting the same, the learned Judges made it clear that there should be mutual consent when they move the Court with a request to pass a decree of divorce and there should be consent also at the time when the Court is called upon to make an enquiry, if the petition is not withdrawn and then pass the final decree.

39. Interpreting the said Section, it was held in Sureshta Devi (supra) that if the petition is not withdrawn in the meantime, the Court, at the time of making the enquiry, does not have any jurisdiction to pass a decree, unless there is mutual consent.

40. Learned Judges made it further clear that if the Court makes an enquiry and passes 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 a decree by mutual consent.

41. In paragraph 14 of the said judgment, learned Judges made it further clear as follows:-

"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 to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce. "The consent must continue to decree nisi and must be valid subsisting consent when the case is heard." {See (i) Halsbury's Laws of England, 4th edn. Vol. 13 para 645;

(ii) Rayden on Divorce, 12th edn., Vol. 1, P. 291; and (iii) Beales V. Beales}."

42. In paragraph 15 of the judgment, this Court held that the decisions of the High Courts of Bombay, Delhi and Madhya Pradesh cannot be said to have laid down the law correctly and those judgments were overruled. We also hold accordingly.

43. The decision in Sureshta Devi (supra) was rendered by a Bench of two learned Judges of this Court. In a subsequent decision of two learned Judges of this Court in the case of Ashok Hurra Vs. Rupa Bipin Zaveri

- (1997) 4 SCC 226, the judgment in Sureshta Devi (supra) was doubted as according to the learned Judges some of the observations in Sureshta Devi (supra) appear to be too wide and require reconsideration in an appropriate case.

44. Learned Judges in Ashok Hurra (supra) made it clear that they were passing the order in that case on the peculiar fact situation. This Court also held that in exercise of its jurisdiction under Article 142 of the Constitution, a decree of divorce by mutual consent under Section 13B of the Act was granted between the parties. (See paragraph 16 and 22 of the report).

45. It appears that those observations were made by the learned Judges without considering the provisions of the Family Courts Act. In any event, the decision in Ashok Hurra (supra) was considered by a larger Bench of this Court in Rupa Ashok Hurra Vs. Ashok Hurra and Anr. - (2002) 4 SCC 388. No doubt was expressed by the larger Bench on the principles laid down in Sureshta Devi (supra). It appears that a petition for review was filed against the two judge decision in Ashok Hurra (supra) and the same was dismissed. Thereafter, the question before the Constitution Bench in Rupa Ashok Hurra (supra) was as follows:-

"Whether the judgment of this Court dated 10.3.1997 in Civil Appeal No.1843 of 1997 [1997 (4) SCC 226] can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgment of this Court after the petition for review of the said judgment has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court."

46. In the Constitution Bench decision of this Court in Rupa Ashok Hurra (supra), this Court did not express any view contrary to the views of this Court in Sureshta Devi (supra).

47. We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Section 13B (1) and 13B (2), there is no scope of doubting the views taken in Shreshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

48. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).

49. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done

by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

50. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein.

51. It is nobody's case that a long period has elapsed between the expiry of period of six months and the date of final decree.

52. For the reasons aforesaid, we affirm the view taken by the learned Judges of the Bombay High Court in the order under appeal.

53. The appeal is disposed of as follows:-

(i) On receipt of the copy of this judgment, the Family Court is directed to issue notice to both the parties to appear in the Court on a particular day for taking further steps in the case.

(ii) On that day, the parties are at liberty to engage their own counsel and they may be personally present before the Court and inform the Court as to whether they have consent to the passing of the decree under Section 13B of the Act. If both the parties give their consent for passing of the decree under Section 13B, the Court may pass appropriate orders.

(iii) If any of the parties makes a representation that he/she does not have consent to the passing of the decree, the Court may dispose of the proceedings in the light of the observations made by us.

There shall be no order as to costs.

.....C.J.I. (K.G. BALAKRISHNAN) .....J. (P. SATHASIVAM) .....J. New Delhi (ASOK KUMAR GANGULY) May 11, 2009