

MANU/RH/0636/2002



Equivalent Citation: AIR2003Raj155, I(2003)DMC805, 2004(1)RCR(Civil)621, RLW2004(2)Raj1258, 2003(1)WLC257, 2002(5)WLN718

IN THE HIGH COURT OF RAJASTHAN

C.R. Petition No. 05/2002

Decided On: 30.08.2002

Appellants: **Smt. Suman**
Vs.
Respondent: **Surendra Kumar**

Judges/Coram:

Arun Kumar, C.J. and P.C. Tatia, J.

Counsels:

For Appellant/Petitioner/Plaintiff: M.L. Kala, Adv.

For Respondents/Defendant: Haider Aga, Adv.

Subject: Family

Subject: Civil

Acts/Rules/Orders:

- Hindu Marriage Act, 1955 - Section 13B

Disposition:

Appeal Allowed

CaseNote:

Hindu Marriage Act, 1955 - Section 13-B--Divorce--Mutual consent--Petition dismissed for absence of husband on subsequent date--Appeal dismissed hence review--Held, consent initially given continues and it could be withdrawn by positive act and not by absence--Consent is important and not format--Impugned judgment set- aside--Decree of divorce by mutual consent granted.

Review Petition Allowed

ORDER

1. This review petition has been filed seeking review of the order dated 2-12-1999 whereby an appeal filed by the applicant against the decision of the Family Court rejecting an application under Section 13B of the Hindu Marriage Act (in short, referred to hereinafter as 'the Act') was dismissed. After hearing counsel for the parties, the review application is allowed. The impugned judgment of this Court which is sought to be reviewed, in our view, suffers from an error apparent on the face of the record and, therefore, the review application is allowed.

2. We have heard learned counsel for the parties on merit.

3. Briefly, the facts are that a marriage was solemnised between the parties at Jodhpur on 24th May, 1995. Soon thereafter differences arose between the parties and they started living separately. We need not go into further details of the dispute. On 15-1-1999, the parties filed a Joint petition under Section 13B of the Act for obtaining a decree of divorce with mutual consent in the Family Court at Jodhpur. The Family Court recorded statements of the parties as per the procedure and fixed a date for appearance of the parties which was six months later. On the next date of hearing fixed by the Family Court, the husband did not appear the wife appeared. It appears from the order of the Family Court dated 27-9-1999 that in spite of a few adjournments the respondent-husband did not appear before the Family Court at the stage of second motion though the wife appeared on each date of hearing. The Family Court has further noted that neither the husband put in appearance nor he sent any information to the Family Court. Rather, in view of this conduct of the husband, the wife moved an application for summoning the husband as a witness to record his statement. This application was rejected by the Family Court on the ground that there was no procedure for recording evidence. The Family Court further declined to issue any notice to the husband to appear in Court on the ground that there was no such procedure. The Family Court mainly proceeded on the basis that it was for the both parties to appear before the Family Court to obtain decree of divorce with

mutual consent and in the absence of both the parties decree for divorce could not be passed. The application under Section 13B of the Act was, therefore, dismissed by the Family Court. The present appeal is directed against the said judgment of the Family Court.

4. Learned counsel for the appellant (wife) argued that the respondent-husband cannot frustrate the proceedings under Section 13B by such a conduct on his part. It is not disputed that under Section 13B(2) the words used are : "on the motion of both the parties". It is argued that initial motion had been made by both the parties together when they appeared before the Court and their statements signifying consent for divorce were recorded and next date was fixed by the Court six months afterwards. By his continued absence from the Court at the stage of the second motion the husband was trying to frustrate the proceedings. If the respondent husband did not stand by his consent for decree of divorce initially given by him, it was open to him to appear before the Court and say that he did not want to consent to the proceedings which could lead to rejection of the application for grant of divorce by mutual consent. But, by non cooperation i.e., by keeping away from the Court the husband could not be allowed to frustrate the proceedings.

5. It is well recognised that the object of second motion after six months of the first motion and a further period of one year being allowed after expiry of the initial period of six months from the date of the first application, is to allow the parties to do some re-thinking because dissolution of a marriage is a serious matter and has serious consequences for the parties and the children, if any from the marriage. The period of 6 to 18 months provided in Section 13B of the Act is a period of interregnum which is intended to give time and opportunity to the parties to reflect on their move. In this transitional period the parties or either of them may have second thoughts. Either party or both of them may change their mind and decide not to proceed with the petition. Either party can, therefore, approach the Court and convey its decision to the Court either way. But, this cannot be left as a matter of inference

to be drawn by the Court. A positive act on the part of either party is required.

6. In the facts of the present case as noted above, the next date of hearing after six months was fixed in the presence of the parties and, therefore, the next date of hearing was known to both the parties. The wife appeared on the next date of hearing while the husband did not appear. The matter was adjourned on a couple of occasions, still the husband did not appear. The wife moved application for summoning the husband which the Court declined to do. In the appeal before this Court also the counsel for the respondent-husband did not take a stand that the husband had withdrawn his consent to the decree of divorce by mutual consent. The appeal is being opposed on technical grounds i.e., non compliance of Sub-section (2) of Section 13B, The argument on behalf of the respondent is that under Sub-section (2) a joint application had to be moved by both the parties and since the application had not been jointly moved by the parties, therefore, it was rightly rejected by the Family Court, We are unable to accept this stand of the husband.

7. Silence cannot be taken to amount to withdrawal of consent. By his continued silence the respondent-husband has frustrated the proceedings for more than three years. If he was withdrawing his consent for dissolution of marriage by a decree of divorce by way of mutual consent, nothing prevented him from taking that stand before the Family Court at the stage of second motion. The husband on the other hand decided to adopt a course of silence in order to further harass the wife. We are not inclined to take a too technical view of Sub-section (2) of the Section 13B of the Act and fall in the same error as the Family Court did. Merely because the second motion was not signed by both the parties it cannot be said that the consent of the husband was missing at the second stage. On account of silence of the husband, rather we would like to take a view that the consent to decree of divorce being granted has to be presumed. What is important is consent of parties. Format is not important. Substance is to be seen.

8. This is a case of total silence on the part of the husband on the question of consent at the stage of the second motion. Should we infer the negative from silence? We are of the view that if the husband wanted to withdraw his consent he should have taken a positive stand for that purpose. There was nothing which prevented him from informing the Court that he was withdrawing his consent for decree of divorce by mutual consent. When the husband has himself left the matter for inference, the inference ought to be drawn in favour of consent rather than for absence of consent. The husband had already given his consent for the decree of divorce at the time of the first motion and he alone could withdraw the consent by a positive act, otherwise the inference would be that the consent which was initially given continues. Therefore, in the facts of the present case, the conclusion is inevitable that the consent of the husband for divorce by mutual consent was available at the stage of the second motion and the Family Court ought to have granted the decree of divorce. The words "on the motion of both the parties" occurring in Sub-section (2) of Section 13B have to be read as meaning that consent of both the parties is available at the stage of second motion. What is of importance is consent and not the format of moving the second motion.

9. Accordingly, we allow this appeal and set aside the impugned judgment of the Family Court dated 27th Sept. 1999. We grant a decree of divorce on the basis of mutual consent thereby dissolving the marriage between the parties under Section 13B of the Act.

© Manupatra Information Solutions Pvt. Ltd.