

## CASE COMMENT

### ADITI WADHERA Vs. VIVEK KUMAR WADHERA

**\*Saarang Kaushik**

Citation- 2017 11 SCC 241

Date of Judgement- August 4, 2016

Bench- Kurian Joseph, J. and Rohinton Fali Nariman, JJ.

#### FACTS-

This is a case of Divorce by Consent under Section 13(B) of the Hindu Marriage Act, 1955 where the parties have lived together for few days in the year 2010 due to some conflicts which aroused among them, with a background of living separately for more than five years, provided that there were certain dissimilarities of opinions regarding life like the respondent here named Mr. Vivek Kumar Varinder Wadhera had to return to his workplace in U.S.A for subsisting his life, and the petitioner Aditi Vivek Kumar Wadhera had some other plans for the betterment of her future, which conflicted both of their ideologies. Keeping in mind these differences of opinions they subsequently filed a joint petition for dissolution of marriage by mutual consent under Section 13(B)<sup>2395</sup>. Since the marriage stands dissolved by decree of mutual consent in the Districts & Sessions Court, Panchkula, Haryana. The parties here were referred to mediation in the course of the pendency of the proceedings of the Court, in which they reached at a harmonious settlement dissolving all the disagreements. Under Article 142<sup>2396</sup> to invoke their respective jurisdiction, the court granted a decree of divorce by the mutual consent of both the parties by waiving the statutory period of waiting.

#### JUDGEMENT-

There were a lot of pending cases of Criminal nature against the respondent in the case, i.e. the husband, but all of the same were quashed and accordingly decree was passed that there shall not be any limitation on the travel of both the parties and their family members.

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\*Symbiosis Law School, Pune

<sup>2395</sup> Hindu Marriage Act, 1955

<sup>2396</sup> Constitution of India

In the suit HMA No. 32 of 2013, from Districts and Sessions Court, Panchkula, Haryana then transferred to Family Court, Pune, Maharashtra where the court enabled or passed the decree where both the parties amicably and mutually consented for divorce after the mediation process. The First Class Judicial Magistrate, Pune quashed all the pending criminal cases-

- (i) Criminal Revision No. 134 of 2015
- (ii) Criminal Revision No. 73 of 2015
- (iii) Criminal Revision No. 51 of 2015
- (iv) Criminal Appeal No. 21 of 2012 all of the above pending cases were disposed and quashed and finding the same case fit as to invoke jurisdiction under Article 142 and Article 136<sup>2397</sup>, by way of mutual consent.

The Court also agreed to waive the statutory period of 6 months as both the parties were separated for quite a considerable amount of time.

## RULES

### *1. Section 13(B) of Hindu Marriage Act, 1955*

Divorce by mutual consent.

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)\*, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made no 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

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<sup>2397</sup> Constitution of India

marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

## *2. Article 142 of Constitution of India*

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

## *3. Article 136 of Constitution of India*

Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces

## **ANALYSIS**

The term 'Divorce' refers to the decree passed out by a competent court for the dissolution of the sacred relationship of marriage. In this modern society, marriage is considered as a social institution and not merely a contract between two individuals, with the inveterate social interest of the society in the safeguarding and fortification of the institution of marriage. A marriage is considered to be dissolved provided that only if either party either party or spouse is investigated to be guilty which disturbs the very sacred basis of matrimonial relations.

Divorce by mutual consent in simple words refers to the dissolution of a marriage between the two spouses due to certain differences that have aroused between them.

The divorce by mutual consent is predominantly based on the norm that, since the institution of marriage is totally based upon the ground of 'mutual fidelity', both the parties have the inherited right of the decision of dissolving the same due to certain unsolicited circumstances or encounters that have aroused among them. The Indian Divorce (Amendment) Bill, 2001 now acknowledged, Divorce by consent under the Hindu Marriage Act and the Special Marriage Act, the Christian Law, the Muslim Law, and the Parsi Law as well.<sup>2398</sup>

In Hindu Law, Section 13-B<sup>2399</sup> was acquainted with by the Marriage Act, 1976, Parsi Marriage, the Indian Divorce (Amendment) Act introduced in Divorce Act in 1988<sup>2400</sup>, the Special Marriage Act was already introduced to the same. In the case, Samistha v. Om Prakash<sup>2401</sup>, the mandatory and essential requirements were laid down for comprising the institution of a petition under mutual consent-

1. The spouse for a period of one year have not been living together
2. The condition for which they have not been able to live together
3. For the dissolution of their marriage there was mutual agreement between both the spouses.

Again, in Samistha v. Om Prakash<sup>2402</sup>, it was held that, also the term 'living separate' indicates that notwithstanding the fact that, both the parties are residing under the same roof or different houses, the parties are not living as husband and wife, and also where the parties have no desire to perform marital obligations

The crucial constituents of Section 13-B of the Hindu Marriage Act, 1955 are as follows-

- The first step would be to file a divorce petition by both the parties before the District Court.
- This respective provision only applies to marriages sanctified before or after the commencing of the Marriage Laws (Amendment) Act, 1976.

<sup>2398</sup> Section 10(A) of Divorce Act, 2001

<sup>2399</sup> Hindu Marriage Act, 1955

<sup>2400</sup> Section 32-B, Hindu Marriage Act, 1955

<sup>2401</sup> AIR 1992 SC 1909 Samistha v. Om Prakash

<sup>2402</sup> *Ibid*

- Both the parties to the marriage should have been living separately for a period of one year or more (**there should be no conjugal relations**)
- The parties should satisfy the Court that they have not been able to live together and that they have mutually agreed with the presence of free consent, that the marriage should be dissolved.
- **Period of Interregnum**- within 6 months the petition should not have been withdrawn after the date of the presentation of the petition and not later than eighteen months after the said date.

When a suit is filed based on Mutual consent, under the law, it requires that, the final order will be delivered after the time interval of **6 months**, after both the parties' consent per se, and the maximum time for a pending suit is **18 months** and not more than the same. The High Court of Rajasthan in the case of Suman v. Surendra Kumar<sup>2403</sup> delivered the judgement and also explained the rationale behind the 6 months' period, 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. Again as already mentioned, the period of six to eighteen months' time is given in the cases of divorce by mutual consent as to give time and opportunity, provided that the element of mutual consent should subsist, unless the divorce decree is passed by the competent court and vice-versa may lose its jurisdiction if there was nonexistence of consent at the crucial time of enquiry. If there is no consent at the time of enquiry the court acquires no jurisdiction to pronounce a decree for divorce. Again, it was held, in the case of Sureshta Devi v. Om Prakash<sup>2404</sup> since the consent of the wife was achieved by deception or fraud, and the wife was not willing to consent, there could be unilateral withdrawal, of consent.

## LATEST POSITION OF THE LAW

Under the latest position of Section 13-B, of Hindu Marriages Act, 1955 the bench of Justice Adarsh K Goel, and Uday U Lalit, passed an opinion that the waiting period of 6 months now can be waived off in the cases of divorce through mutual consent. It was also contended that a total of 18 months is provided in suits of divorce by mutual consent and introduced the same

<sup>2403</sup> AIR 2003 Raj 155 Suman v. Surendra Kumar

<sup>2404</sup> AIR 1992 SC 1904 Sureshta Devi v. Om Prakash

in the Section 13-B of the Hindu Marriage Act, 1955. The bench noted that, “*the object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation.*”

- *The contention of the application of ‘Article 142 of Constitution of India’ in the case*

In the past, the Supreme Court has given waiver to parties for this 'cooling period' but these cases have been exceptional. The question posed before the court was that whether courts can give relaxation to parties with regard to the 6-month waiting period mentioned under the section without placing reliance on Art. 142 of the Constitution. If the provisions are not mandatory, then there is no need for the courts to apply Art. 142 for waiving off this period.

In the case of Aditi Wadhera v. Vivek Kumar Wadhera, a transfer petition case, after the court quashed all the pending criminal cases against the respondent, i.e. the husband, from District and Sessions Court, Panchkula, Haryana, the matter of monetary settlement was disputed in Family Court, Pune, through the process of “mediation”, along with the memorandum produced before the Supreme Court. The entire subject matter of dispute was transferred to the Supreme Court through the application of Article 142 of the Constitution of India.

Article 142 of the Constitution of India, which indicates the Supreme Court may exceed its respective jurisdiction or may pass any decree for the purpose of administering widespread justice that is enforceable throughout the territory of India, which may be prescribed by the Parliament or the President. The nature of the power of jurisdiction is curative and the Supreme Court must set parameters for the aforementioned to implement such powers. In the case of Manish Goel v. Rohini Goel<sup>2405</sup> the Court couldn't apply the rule under Article 142 to waive the statutory period of six months due to its contradiction with the Section 13-B as a statutory provision.

- *Importance of “Mediation” in connection with family dispute or any other civil disputes.*

The parties were referred to mediation due to the consequence of which they were able to settle the disputes amicably. **Alternative dispute resolution (ADR)** is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. Mediation

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<sup>2405</sup> (2010) 4 SCC 393 Manish Goel vs. Rohini Goel

refers to the process or the way of undertaking disputes by a mediator, usually between people in conflict. **Alternative dispute resolution (ADR)** enables the aggrieved parties to arrive in a conclusive settlement which satisfies the both. E.g. separated married couple are encouraged to use family mediation to help resolve their disputes about children, instead of using the family law courts, where numerous amounts of time and money has to be invested to institute or succeed a suit.

- **Relevant Cases-**

1. *Avneesh Sood vs. Tithi Sood*<sup>2406</sup>

In this case, it was decided by the Court that when either party of a marriage issue an undertaking to the court in the First motion to abide by the consent under Section 13-B of Hindu Marriage Act, the same is not permitted to resile from such an undertaking on the basis of agreement between the two parties.

2. *Sureshta Devi vs. Om Prakash*<sup>2407</sup>

The judgement delivered by the Apex court ruled that for passing the decree of divorce, mutual consent is a *sine qua non*, provided that the consent is valid, until the final decree of divorce is passed.

3. *Smruti Pahariya vs. Sanjay Pahariya*<sup>2408</sup>

In this case, the Apex Court held that, end of the 6 months' period in mutual divorce petition, absence of either party's consent cannot be presumed by the Court, and there is a presence of obligation by the Court to satisfy itself whether the consent by both the parties is a valid one.

4. *Jyoti vs. Darshan Nirmal Jain*<sup>2409</sup>

In this case, the contention laid by the petitioner, i.e. the wife was that her part of the consent was acquired by deceit and fraud, and also claimed that both the parties were

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<sup>2406</sup> 2012 SCC Online 2445 *Avneesh Sood vs. Tithi Sood*

<sup>2407</sup> (1991) 2 SCC 25 *Sureshta Devi vs. Om Prakash*

<sup>2408</sup> (2009) 13 SCC 338 *Smruti Pahariya vs. Sanjay Pahariya*

<sup>2409</sup> AIR 2013 Gujarat 2018 *Jyoti vs. Darshan Nirmal Jain*

not even separated for a period of minimum one year, accordingly for which the Court did not grant the dissolution of marriage.

5. *Amardeep Singh v. Harveen Kaur*<sup>2410</sup> (Latest position of Law)

This is a recent landmark case, in which the parties were living separately for almost 8 years and arrived at a mutual settlement for all the disputes between them before filing the petition for divorce. It was also contended by both the parties that since they have been separated for a considerable amount of time, i.e. 8 years, there was no need for them to wait for another six months as required under the Section 13-B of Hindu Marriages Act, 1955. The Supreme Court in this case held that 6-18 months provided under Section 13-B (2) is no longer mandatory.

6. *Hirabhai Bharucha v. Pirojshah Bharucha*<sup>2411</sup>

The High Court in this case observed and held that of the matrimonial contract between the spouses are viewed to be running against public policy, the same would be considered as *void ab initio* as well as unenforceable in law.

## • SUGGESTIONS OR CRITICISMS

In this modern era, marriages are not considered as sacred that it used to be in the history especially in the Indian culture, where it was believed that marriages were arranged by some eternal body of heaven, but as already mentioned above, now that eternal, pure and the sacred recognition of marriages are fading away with numerous social reforms, various differences of individualistic minds of people who conceive different ideal with relation to living a life.

As per my observations, the statutory period of 6- 18 months is actually a viable, ethical and a moral legal rule as it avails both the parties a second chance to reunite or to find out the solutions to their dissimilarities which arose among them, which may positively help them in their relationships whatsoever. For my predilection the waiving off of the statutory period will be a kind of hindrance for matrimonial relationships as they will not get a good opportunity to improve or resolve the conflicts, dissimilarities or individual goals.

<sup>2410</sup> CA NO, 11158 OF 2017 *Amardeep Singh v. Harveen Kaur*

<sup>2411</sup> (1945) 47 BOMLR 514 6. *Hirabhai Bharucha v. Pirojshah Bharucha*



## CONCLUSION

As an article on the subject matter of Hindu Marriage Act, not only Hindus, all religions across the Earth consider marriage to be a very pure and a sacred bond, and most probably due to the presence of eminent orthodox and radical people of the country, prior to the legislation of the Hindu Marriage Act of 1955, there was no provision for the term divorce. Men during that time were considered as the possessor of their wife and they were deliberated as the sole authoritarian of the family as well as their wife. Women were reflected to be weak and had no rights to have speak, as mentioned mainly due to the **patriarchal** male dominating society, where the wives were the silent victims of such a pathetic rigid system. As time changed, the tables have turned around, where situations have changed, and the law made for the equal protection of every citizen's right, provides a way to withdraw one from the hurdles binding in a matrimonial struggle by seeking divorce in a court of law.

Again after getting a brief knowledge about how the Indian Judiciary is lately proceeding with the family suits, it may be sometimes felt that break down of marriages are not looked upon as a subject matter seriously, which many legal experts believe and fear that it will completely pause the system of marriages. The court concluded in the previous cases that the provision of section 13 B (2) of the Hindu Marriage Act is not mandatory but is directive, which can be viewed from a positive aspect, but if observed from some critical aspect it may result towards some serious unwanted matrimonial confrontations regarding policies or rules for the same.

In my opinion as already discussed, Article 142 (1) of the Constitution of India, is a provision which empowers the Supreme Court, to do complete justice in cases, provided where the law is silent or in cases which have uncharacteristic facts and positions. The Hon'ble Supreme Court has exhibited maturity and faith in the rule of law by imposing on itself restraints, so as to prevent the abuse the inherent powers.

## • REFERENCES-

*Book references-*

1. Agarwal, R.K, *Hindu law, Central law agency, Print 2014.*
2. Diwan, Dr. Paras, *Family Law*