

## DIVORCE BY MUTUAL CONSENT\*

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There is every need to look into recently added relief of Divorce by mutual consent under S-13-B of the Hindu Marriage Act, 1955. The provision has added a number of problems. The statutory provision appears to be very small but full of controversies :

The statutory provision reads :

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

(2) On the motion of both the parties made not **earlier than six months** after the date of the presentation of the petition referred to in sub-section (1) and **not later than eighteen months** after the said date, if the petition is **not withdrawn** in the meantime, the court shall, on being satisfied after **hearing the parties** and after making **such inquiry** as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.”

The problems faced by the Courts :

- Can the application for dissolution of marriage by decree of divorce on any of the grounds under S. 13 be transferred to S. 13-B ? Yes C.P.C. O 6 R 17.<sup>1</sup>
- **“both the parties to a marriage”** Application by husband for divorce on ground of desertion and cruelty – During pendency of same, husband making prayer in same application to treat it as motion under S. 13-B(2) for grant of divorce by

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<sup>1</sup> *Dhanjit Vadra v. Smt. Beena Vadra*, AIR 1990 Delhi 146; Arun B Saharya J

mutual consent – No joint application made by parties – Efforts of reconciliation between parties failed – Parties not desiring to live together and were desirous to get decree for divorce – Held, in the circumstances, decree could not be refused on ground that form of application was improper.<sup>2</sup>

- Requirement of motion **within time specified** under S. 13B(2) It is matter of formality – Decree for divorce by mutual consent can be granted without waiting for prescribed period.<sup>3</sup> The Andhra Pradesh, High Court, in *K. Omprakash v. K. Nalini*<sup>4</sup> (DB) has observed that S. 13-B(2) should be read as directory only. S. 13B(2) no doubt cautions the courts of its duty to fight the last ditch battle to save the marriage, but when the Court is fully satisfied, in the basis of the proved facts, that in the interests of justice of the society and the individuals marriage tie should be put as under immediately, S. 13B(2) does not impose any fetter on the powers of the Court to grant instant decree of divorce. *At any rate the time table fixed by S. 13B(2) does not apply to an Appellate Court.* Where in appeal in petition for divorce it was found that the parties had been living apart for long and their wedlock had virtually become a deadlock, and the chances of reunion had completely faded away, it was just and proper to grant a decree of divorce straightway.
- **“living separately”** – The expression living separately connotes **not living like husband and wife** – Immaterial whether spouses live under **same roof or in different houses**. It has no reference to the place of living.<sup>5</sup>
- **“not been able to live together”** – Indicates concept of broken down marriage and no possibility of reconciliation.<sup>6</sup>
- **“petition is not withdrawn”** – **Can it be withdrawn by both or unilaterally?** – The SC has observed that from the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorize the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This

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<sup>2</sup> Santosh Kumari v. Virendra Kumar, AIR 1986 Raj 128

<sup>3</sup> K. Omprakash v. K. Nalini, AIR 1986 A.P. 167, per P.A. Chouary and Jagannadha Rao JJ; Santosh Kumari v. Virendra Kumar, AIR 1986 Raj 128; ; *Dhanjit Vadra v. Smt. Beena Vadra*, AIR 1990 Delhi 146; Dr. Dhiran Harilal Garasia v. Mansu, AIR 1988 Gujarat 159;

<sup>4</sup> K. Omprakash v. K. Nalini, AIR 1986 A.P. 167.

<sup>5</sup> Sureshta Devi v. Om Parkash, AIR 1992 SC 1904, per K. Jagannatha Shetty and S.C. Agrawal JJ.

<sup>6</sup> Sureshta Devi v. Om Parkash, AIR 1992 SC 1904.

interregnum is obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-sec (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. It cannot be assumed that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. 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 *bonafides* 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 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.<sup>7</sup> Sub-section (2) requires the Court to **hear the parties**, which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", "or" I am not a willing party to the divorce the Court cannot pass a decree of divorce by mutual consent. 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 S. 13(B). Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree for divorce. The consent must continue to decree *nisi* and must be valid subsisting consent when the case is heard.

**Bombay, Delhi and MP decisions OVERRULED; Kerala, P&H and Rajasthan APPROVED.<sup>8</sup>**

<sup>7</sup> **Sureshta Devi v. Om Parkash**, AIR 1992 SC 1904.

<sup>8</sup> *Jayashree Ramesh v. Ramesh Khikaji*, AIR 1984 Bom. 302; *Chander Kanta v. Hans Kumar*, AIR 1989 Del. 73; *Meena Dutta v. Anirudh Dutta*, (1984) 2 DMC 388 (MP) **OVERRULED**; *K.I. Mohanan v. Jeejabai*, AIR 1988 Ker. 28; *Harcharan Kaur v. Nachhattar Singh*, AIR 1988 P&H 27; *Santosh Kumari v. Virendra Kumar*, AIR 1986 Raj 128 **APPROVED**.

- **“have not been able to live together”** – Indicates concept of broken down marriage and no possibility of reconciliation.
- **“making such inquiry”** – The scope of enquiry, **Leela Mahadeo Joshi v. Dr. Mahadeo Sitaram Joshi**,<sup>9</sup> The learned trial judge stated in his judgment that he did not agree with the parties that they had not been able to live together. He concluded, that there appeared to be no real difference between the husband and wife. Now we find it difficult to understand how the learned Trial Judge could have arrived at this conclusion – how rejected the evidence of both the parties. Perhaps he declined divorce as the parties had lived together in matrimony for long years. Held, if parties able to prove their case then no other course is open to Judge except to grant divorce.

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<sup>9</sup> **Leela Mahadeo Joshi v. Dr. Mahadeo Sitaram Joshi, AIR 1991 Bombay 105**