

**MUTUALITY IN SECTION 13B OF HINDU MARRIAGE ACT:
COMMENT ON JAYSHREE V. RAMESH**

THE DECISION in *Jayshree v. Ramesh*¹ raises the question of what is mutuality under section 13B of the Hindu Marriage Act 1955. The section reads as follows :

- (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petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been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.

A reading of the section shows that the requirements of section 13B (1) were duly complied with in this case inasmuch as (i) the petition was presented by both the parties to the marriage together, and (ii) the petition stated (a) that they had been living separately for a period of one year; (b) that they had not been able to live together; and (c) that they had mutually agreed that the marriage should be dissolved.

The question that arose for determination, however, was whether the requirements of section 13B(2) were complied with or not. The requirements are: (i) The motion must be made by both the parties; (ii) it must be made not earlier than six months and not later than eighteen months after the presentation of the petition; and (iii) the court must be satisfied that the averments made in the petition are true.

The husband in this case refused to join in the motion to be made to the court by both the parties. The question, therefore, arose whether the court could pass a decree of divorce by mutual consent. It was argued for

1. A.I.R. 1984 Bom. 302.

the husband that the consent of the parties given at the time of presenting the petition must continue till the date of making the motion to the court by both the parties under section 13B(2). If the consent came to an end, then no motion could be made by both the parties to the court under this provision and the court could not pass a decree thereunder.

On behalf of the wife, who made the motion for a decree for divorce, it was contended that the husband could not withdraw the consent given at the time of making the petition as this would be contrary to the scheme of section 13B. Reliance was also placed on the provision of rule 1(5), order 23 of the Code of Civil Procedure 1908 (hereinafter cited as the CPC rule) which is as follows: "Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim without the consent of the other plaintiffs."

Section 21 of the Hindu Marriage Act applies the provisions of the CPC to proceedings under the Act "subject to the other provisions contained in the Act" and "as far as may be." This means that the CPC rule can be applied to a petition under section 13B only if this can be done consistently with the provisions of the Act. In the present case the provision which can be urged to be inconsistent with the rule is the provision that section 13B(2) requires that both the parties have to make a motion before the court for the passing of the decree of divorce. While under the rule a party is prohibited from withdrawing from the suit or abandoning a suit or a part of it, what is required under the section is that both the parties should move the court. It could be argued for the husband that the CPC rule only prohibited positive action on the part of a co-plaintiff. That is to say a co-plaintiff must not positively withdraw the suit or abandon the suit or any part of it. But what is not tolerated by the section is even negative action. That is to say that even if one of the parties merely refuses to join in the motion, this motion cannot be said to be a motion by both the parties. Therefore, a co-petitioner under section 13B may refuse to join in the motion under its sub-section (2) even without withdrawing the suit or abandoning the suit or a part of it by any positive action. Under the CPC rule every co-plaintiff is deemed to pursue the suit which is once filed by all the co-plaintiffs, unless at a later stage a co-plaintiff positively withdraws the suit or abandons it. Under section 13B(2) even negative action on the part of one of the parties to a petition can defeat the petition filed under section 13B(1), for even mere refusal to join in the motion under section 13B(2) and without doing any positive action to withdraw the petition or abandon the claim made under section 13B(1), the petition can be defeated. It may be arguable, therefore, that the negative action of refusing to join the motion under section 13B(2) is not covered by the positive action prohibited by the CPC rule.

B.C. Gadgil J. of the Bombay High Court held in this case that the husband could not withdraw from the petition unless in the inquiry held by the court under section 13B(2) it was found that the petition was not

validly presented under section 13B(1). The petition could be invalidated for lack of free consent etc. at the time it was presented. But the refusal by the court to allow the husband from refusing to join in the motion under section 13B(2) was mainly based on the CPC rule.

Since the application of the CPC rule is debatable as stated above it is necessary to construe section 13B itself with a view to know its true meaning which alone will justify the conclusion that the husband in such a case cannot be allowed to retract from the consent given by him initially at the time of filing the petition. The following approaches may be suggested to find the true meaning of section 13B.

First, the section was inserted in the Hindu Marriage Act 1955 by a recent amendment in 1976. It is obvious, therefore, that it denotes a change in the Act. This change came about by a change in the public opinion which took place after 1955 and in or about 1976. The legislature, which had originally abstained from allowing divorce by mutual consent in the Act in 1955 even though it had allowed it under the Special Marriage Act 1954, came to the conclusion by 1976 that it should be allowed even under the Hindu Marriage Act.

Second, section 13 of the Hindu Marriage Act, enabling the court to grant divorce on the grounds stated therein, was based on the fault theory. One of the parties to the marriage had to be shown to be at fault by the other party before divorce could be granted. But the fault theory was found unsuitable in the modern conditions for various reasons. These reasons have been indicated in a previous article by me entitled "Divorce under the Hindu Marriage Act—A Conflict of Principles"².

Third, it is interesting to note that the word "consent" is used only in the title of section 13B but not in the body of it. It is the contents of the section rather than its title which is to give the true meaning of the section.

Fourth, the scheme of the section as a whole is more important than an individual part of it. An individual part cannot be allowed to defeat the scheme as a whole. It has, therefore, to be construed in harmony with the scheme. What is the scheme of section 13B? It is mutuality which is the essence of the section. The mutuality is constituted by the requirements of sub-section (1), viz., (i) parties have been living separately for one year; (ii) they have not been able to live together; and (iii) they have mutually agreed that the marriage be dissolved. The mutuality lies in coming to the conclusion that the parties have found that they cannot live together. This conclusion is reinforced by the experience of living separately for one year. The parties have mutually agreed to dissolve the marriage without recourse to the fault theory in section 13. This mutual agreement is demonstrated by the parties together filing the petition.

2. *All India Reporter* (Journal Section) 113 (1971).

Why is it then that section 13B(2) says, "on the motion of both the parties"? Is it the argument for the husband that the consent given by both the parties initially must continue to subsist till the motion is made under section 13B(2)? It would appear that this is to foist a particular view on the meaning of section 13(B). The reason is that it is not the consent but mutuality which must exist at the time of the presentation of the petition as also at the time of making the motion for grant of divorce. Can the husband urge that the mutuality has ceased? I do not think so. Mutuality is broader than consent. It consists of all the circumstances and not of mere consent alone. These circumstances are that the parties have been living separately and that they have not been able to live together. These circumstances continue to exist. Their effect cannot be destroyed by the husband by withdrawing his consent subsequently. The withdrawal of such consent by itself does not show that the parties had mutually come to the conclusion that the divorce without resort to the fault theory should not be obtained from the court. In this sense the words "they have mutually agreed that the marriage should be dissolved" would still hold good even though the husband refuses to join in the motion for divorce. The whole question, therefore, turns on whether the object and scheme of section 13B should be defeasible by the husband refusing to join in the motion. Can the requirement of joining in the motion not be construed consistently with the section as a whole? It appears that this can be done.

We construe the requirement of motion by both the parties as implicit if all the other conditions of the section are satisfied. We have seen that the requirements of section 13B(1) are satisfied. We have also to see if the requirements of section 13B(2) are satisfied. These requirements consist mainly of the satisfaction of the court. This satisfaction would be based on hearing the parties and making such inquiry as the court may think fit. This inquiry is restricted to only two matters—that the marriage has been solemnized and that the averments in the petition are true. If the parties are married then the only thing the court has to satisfy is that the averments in the petition are true. The husband could not say that the parties were not living separately for one year and that they had not been able to live together. It is on the satisfaction of these two requirements that the parties had come to the conclusion and "mutually agreed that the marriage should be dissolved." This mutual agreement once arrived at cannot disappear because the husband now chooses not to join the motion to be made by both the parties.

To prevent the scheme of the section from being defeated a rule of interpretation of statutes empowers the court to give a restrictive meaning to the words "on the motion of both the parties". This is illustrated by the decision of the Supreme Court in *Narendra v. Manikrao*.³ Section 23(3) of the Representation of the People Act 1950 permits inclusion of the names

3. A.I.R. 1971 S.C. 2171.

in the electoral roll *till the last date for making nominations* for an election in the constituency. Section 33(1) specifies that the nomination paper shall be presented “between the hours of 11 O’ clock in the forenoon and 3 O’ clock in the afternoon.” Reading these provisions together in the light of the object behind them the court construed the last date in section 23 of the Act as follows :

If the purpose of the provision were to illumine its sense, if the *literality* of the text is to be invigorated by a sense of rationality, if *conscionable commonsense* were an attribute of statutory construction, there can hardly be any doubt that the expression “last date for making nominations” must mean the last hour of the last date during which presentation of nomination papers is permitted under S. 33 of the 1951 Act.⁴

Applying this principle of restrictive interpretation (of putting restrictive interpretation on a part of the section to give effect to the meaning of the whole of it) to section 13B it may be suggested that if all the other requirements are satisfied and if the very object of the section is not to be defeated then the words “on the motion of both the parties” should apply not only to the actual motion made by both the parties, but to a deemed motion made by them. What is a deemed motion? It would be deemed that both the parties have made the motion even though one of the parties refuses to join it under section 13B(2) if the court on hearing the parties is satisfied that all the requirements of section 13B(1) as also of section 13B(2) have been complied with. How can the court be so satisfied? The satisfaction can be based on the following grounds :

One, the purpose of the section is to give divorce without resort to fault theory because after one year’s experience and after having done their best, the parties have mutually agreed that the marriage should be dissolved.

Two, it is this mutual agreement which must subsist from the time of the presentation of the petition to the time of making the motion for a decree of divorce under section 13B(2).

Three, this mutual agreement can be said to have ceased to subsist only if the conditions on which this mutual agreement was based cease to exist. These conditions are that parties have lived separately for one year and have not been able to live together and that these averments have been found to be true by the court. If so, it must be said that the parties had mutually agreed to a divorce and this mutual agreement still subsists. The non-joinder of the husband in the motion to be made under section 13B(2) does not in any way indicate that the mutual agreement has come to end. Therefore, the court has to conclude that the parties have not lived together, that they have not been able to live together and that they have

4. *Id.* at 2180.

agreed that in these circumstances divorce should be granted by the court without proof of fault. On the satisfaction of these conditions the court would be justified in holding that the motion for divorce made by one party alone would be *deemed to be made by both the parties* because the conditions on which the mutual agreement was based continue to subsist. The Supreme Court has also applied this principle in several decisions.⁵

Following this principle the court may hold that it was incumbent on the husband to join in the motion for divorce inasmuch as none of the conditions, after the satisfaction of which such a motion could be made, had changed. It is only when both the parties have agreed to live together that these conditions could be said to have changed. The object of section 13B is to enable the court to grant divorce if both the parties have not been able to live together and if they have agreed not to live together. The period of six months to eighteen months which is given to the parties by sub-section (2) is the cooling off period. That is to say the parties may rethink and change their previous opinion that they cannot live together. It is only when their previous opinion is changed—they have now come to believe that they can live together and would like to live together—that the conditions for making of the motion by both the parties would cease to exist and thereafter such a motion cannot be made. But so long as the conditions exist the motion is deemed to have been made by both the parties and this would justify the court in granting divorce to give effect to the scheme of section 13B and to prevent it from being defeated by the act of one of the parties which is irrelevant to the purpose of the section. Such an irrelevance can be ignored and the motion may be deemed to have been made by both the parties in spite of this irrelevance. One also hopes that the interpretation of section 13B suggested above may be regarded as constructive and that it would enable the courts to give relief to a spouse under section 13B even though one of the spouses refuses to join in the motion under its clause (2).

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5. See, e.g., *Sardar Govindrao v. State of Madhya Pradesh*, A.I.R. 1965 S.C. 1222; *State of Uttar Pradesh v. Joginder Singh*, A.I.R. 1963 S.C. 1618; *Official Liquidator v. Bharthi Dhan*, A.I.R. 1977 S.C. 740.

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