

DIVORCE BY MUTUAL CONSENT

EVER SINCE the provision regarding mutual consent was introduced as a ground for divorce in the Hindu Marriage Act 1955¹ it has been raising controversies in the courts. Under this provision it is a condition for the grant of relief that there must be a joint petition by the parties, on the basis of which the court can dissolve the marriage in accordance with section 13B(2) of the Act, which runs thus:

On the motion of both the parties made not earlier than six months after the date of the presentation referred to in sub-sec.(1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been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.

Recently before the Punjab and Haryana High Court² the question was raised as to whether a petition can be dismissed at the instance of one party only. The High Court pointed out that since the provision is premised on mutual consent, the petition cannot be withdrawn only by one party.

In another case³ the issue before the same court was whether, at the time of filing the petition for divorce by mutual consent, it is necessary that the statements of the parties be recorded. The additional district judge in this case had observed that they had not been so recorded and, on this ground, the case was adjourned for six months, with the observation that time was given to the parties to "re-think" over the matter. The High Court, setting aside this order in revision, pointed out that such recording of statements is not contemplated by the law. After expiry of a period of six months from the first date of hearing, the case has to be taken up as provided by section 13B(2), and it is on this date that the court needs to be satisfied, after hearing the parties and making such inquiry as it thinks fit, that the marriage be dissolved. In the present case, both the spouses had made separate statements before the additional district judge to the effect that they could not live together and had mutually agreed for dissolution of the marriage. No other material was neces-

1. S.13B.

2. *Nachhattar Singh v. Harcharan Kaur*, A. I. R. 1986 P. & H. 201.

3. *In the matter of Sharan Kumar*, A. I. R. 1986 P. & H. 213.

sary for the satisfaction of the court for granting a divorce. In the circumstances, the High Court passed, in favour of the parties, a decree of divorce by mutual consent.

While the points discussed above may be regarded as dealing with areas on the periphery, a more important and difficult question confronted the High Court of Andhra Pradesh.⁴ This was, whether the appellate court (the High Court in this case) was fettered by the provisions of section 13B(2) of the Hindu Marriage Act. The court answered the question in the negative. It became necessary to deal with this point, because the facts of the case were peculiar. The petition for divorce in this case was filed by the husband, apparently on the ground of the wife's adultery. He could not make out a case for dissolution of the marriage and the chief judge, city civil court, Hyderabad, therefore, dismissed it. Against this judgment, he filed an appeal, which was admitted by the High Court in December 1983. Undoubtedly, up to this point, the petition was to be decided on the original allegation, *i.e.*, the wife's adultery. In July 1985 however the parties filed a compromise memo, praying for dissolution of the marriage *by mutual consent*, and requesting the court to ignore the allegations and counter-allegations made by them in the original petition and its hearing. Having regard to their long standing differences, the High Court dissolved the marriage. As regards the obstacle created by section 13B(2), the court surmounted it by holding, (i) that the provision was not mandatory; and (ii) that, in any case, it did not bind the appellate court.

There is no doubt that the facts were peculiar. However, there is some uncertainty as to the universal acceptance of the High Court view that section 13B(2) is *directory*. One cannot rule out the possibility of a different view being taken on the point, looking to the legislative policy of leaving some time for reflection. If this is a needed safeguard, it is as much needed in respect of "compromise" filed in the appellate court, as when the original petition was filed. It is true that in this case, a fairly long period had elapsed since the filing of the petition. But the general conclusion that section 13B(2) does not bind the appellate court, if taken in all its width, might lead to unsatisfactory results on occasion. The better course would be to amend section 13B(2) by giving the court power to relax the prohibition in cases of exceptional hardship. Such power will then come to be vested in the appellate as well as in the trial courts.

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4. *K. Omprakash v. K. Nalini*, A. I. R. 1986 A. P. 167.

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