

## DIVORCE BY MUTUAL CONSENT

A HAPPY marriage is a harbour in the tempest of life; an unhappy marriage is a tempest in the harbour of life. And these days with the spread of education, consciousness, emancipation of women, economic independence and breakdown of the joint family system, more and more marriages are becoming unstable. In keeping with this change there has been a noticeable liberalisation in divorce laws, especially under the Hindu Marriage Act 1955. In fact, strict divorce laws may hold a marriage *de jure* but *de facto* the parties become mentally and emotionally divorced from each other when relations become strained beyond tolerance. What preserves and sustains a marriage in true sense is not the fact that legally it subsists or that morally the couple is impelled to continue in it. It is the reality and the sincerity with which the bond is kept intact which matters.

The working of divorce laws over a period of few decades reveals that obtaining a divorce on the basis of a matrimonial ground specified under the law is not only very time consuming and nerve breaking but also involves a lot of harassment and embarrassment. All sorts of allegations are cooked up in order to bring the case within the pigeon hole of the ground. This leads to a lot of mud slinging thereby creating bad blood between the parties. And if after all the long drawn battle the evidence falls short of proving the matrimonial offence, the petitioner is denied the relief claimed. In fact there are many cases of such broken marriages hanging *in limbo*. In order to avoid such unhappy situations irretrievable breakdown of marriage as a ground for divorce was recommended by the Law Commission of India in 1978.<sup>1</sup> A period of separation with no hopes of reconciliation was laid down as the criterion for such a breakdown. There were a lot of debates on the *pros* and *cons* of such a provision and a bill was also introduced in Parliament introducing irretrievable breakdown as a ground of divorce in Hindu law, but ultimately it had to be dropped owing to opposition mainly from women's organisations. There was a general feeling amongst them that men would exploit the situation and women would be the sufferers.

Mutual consent as a ground for divorce, however, has been on the Hindu marriage law since 1976. Prior to 1976 the only Indian statute providing for divorce by mutual consent was the Special Marriage Act 1954.<sup>2</sup> Persons married under the provisions of this Act could get their marriage dissolved by mutual consent if the marriage failed and the parties so wished. The Marriage Laws (Amendment) Act 1976 added section 13B to the Hindu Marriage Act thereby introducing mutual consent as a ground for divorce.

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1. *Seventy-first Report : The Hindu Marriage Act, 1955—Irretrievable Breakdown of Marriage as a Ground of Divorce* (1978).

2. S. 28.

The main requirements which have to be satisfied before a petition for divorce by mutual consent can be made are: *First*, the parties have been living separately for a period of at least one year. The idea behind this requirement is that if they have lived separately for so long there is a presumption that they are not interested to continue with the relationship. *Second*, they have not been able to live together. *Third*, they have mutually agreed to have the marriage dissolved.

Under the second clause of the section if the petition is not withdrawn, then, on the motion of both parties, made not earlier than six months after the date of petition and not later than 18 months after this date, the court shall proceed with it. Before passing a divorce decree it has to satisfy itself, after hearing both the parties and making requisite inquiries, that averments made in the petition are true. It is only after such satisfaction that a decree for divorce by mutual consent may be passed.

In the light of these provisions two judgments, namely, *Jayashree v. Ramesh*<sup>3</sup> and *Nachhattar Singh v. Harcharan Kaur*,<sup>4</sup> are significant. They give rise to certain issues and queries as regards the application and interpretation of the section.

In *Jayashree*, a wife filed a petition for divorce or, in the alternative, for judicial separation on various grounds. Later, this was withdrawn and on the same day, a joint petition for divorce by mutual consent under section 13B was filed. The parties stated in the petition (as is mandatory under the provision) that they had been living separately, that it was impossible for them to live together and that both of them had mutually agreed that the marriage be dissolved. During the transitional period, that is, after six months and before 18 months, the husband changed his mind and made an application to the district court saying that he did not want to give divorce to his wife. His argument was that he was very indecisive and wavery at the time of the joint application and realised thereafter that they could live together amicably. The wife, however, was firm in her earlier stand and wanted divorce. The district court under these circumstances, refused to dissolve the marriage.

The wife appealed to the High Court. The main issue was whether a party to a joint divorce petition could withdraw his or her consent to the divorce. After consideration of the provisions of section 13B and order XXIII of the Code of Civil Procedure 1908,<sup>5</sup> the court came to the conclusion that such a petition could not be withdrawn without the consent of both the parties. In this case since the wife, who was a party to the joint petition, had not consented to the withdrawal or abandonment of the petition, the same was proceeded with. The court held that the crucial time for the consent for divorce under the section was the time when the petition was filed. If the consent was free and not vitiated, it was not possible for any

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3. A.I.R. 1984 Bom. 30.

4. A.I.R. 1986 Punj. & Har. 201.

5. Rule 5 of this order provides restriction on withdrawal of a petition or claim by one petitioner without the consent of the other.

party to nullify the petition by withdrawing the consent. In view of this, divorce by mutual consent was decreed.

The same issue was involved in *Nachhattar Singh*. A couple filed a joint petition for divorce under section 13B. On the adjourned date of hearing the wife made a statement that she was not willing to give divorce. The trial court, therefore, dismissed the petition. The husband filed an appeal against this order. The High Court, in a very brief judgment, allowed the appeal and held that the trial court's order suffered from legal infirmity and was, therefore, not sustainable. According to the court :

[T]he Act does not envisage withdrawal of consent by one party. The petition can be dismissed as withdrawn only if both the parties who had filed the petition together agree to withdraw the same.<sup>6</sup>

It further held :

[I]f both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other conditions mentioned in sub-section (1) of s. 13B of the Act are fulfilled, it will not be open to a party to withdraw the consent.<sup>7</sup>

Both these judgments raise some important issues: *First*, is one of the spouses competent to withdraw his or her consent to mutual divorce before a decree is passed, or is he or she totally estopped from doing so? *Second*, what is the crucial time for giving consent? Is it the time of application alone or is the consent to continue all through until the time of the decree?

In both the cases the courts ruled that a spouse cannot withdraw the consent and that the crucial time for giving consent is the time of application.

If we look at the wording of the section we find that nowhere does it say that the withdrawal of the application has to be by both the spouses together and that one of the parties cannot withdraw. And obviously when even one of the parties withdraws, the mutuality of consent to have the marriage dissolved, which they had contemplated, is no more.

Under the section, divorce does not immediately follow the joint petition. There is a period of waiting (six to 18 months) and the very idea of providing for such a period is to give time and opportunity to the parties to reflect and give a second thought to their move. It is a cooling off period. Counselling, reflection, passage of time and good offices of friends and relatives can at times be of great help in resolving the differences. It was with this in view that legislators have made a provision for a time gap instead of providing for an immediate divorce on a joint application.

The Bombay and Punjab and Haryana High Courts, however, held that

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6. *Supra* note 4 at 201.

7. *Id.* at 201-02.

the time is given to provide an opportunity to both the parties to withdraw their application *jointly*. In other words, there can only be a joint withdrawal of the application. Such an approach does not appear to be convincing and justified. Nor is there anything in the wording of the section to suggest that there can be no withdrawal of consent by one of the parties alone. The withdrawal can be jointly by both the parties or severally by one of them. In fact where both change their mind and decide not to proceed with divorce application, there is no need for them to even withdraw the application. No covert act of withdrawal is required. The same stands automatically withdrawn after a period of 18 months if the parties do not move for a divorce. Thus viewed in this context also, withdrawal is more significant when there is a change of mind by one of them.

As regards the aspect of time when consent is more significant, the courts held in both the cases that the crucial time for giving mutual consent for divorce is the time of application and not the time when they move for the divorce decree. This again does not stand to reason. At the time of application the parties are aware that a mere application does not snap marital ties and that there is a period within which a more serious thought can be given to the matter. So, in the opinion of the author, the crucial time is the time when the irreversible decision has to be taken and the relationship is to be finally axed; and that is the time when the parties renew their demand for divorce and make a joint move again. A bare reading of the opening words of clause(2) of section 13B indicates this. The words used are: "On the motion of both the parties...if the petition is not withdrawn in the meantime the Court shall...pass a decree of divorce....".

Thus what is needed is, *first*, that the petition should not have been withdrawn and, *second*, that both the parties shall make the move for the decree. There is yet another argument to support this contention. The section envisages jointness and mutuality right from the time of initial application upto the time when the court has to make the decree for divorce. Under sub-clause(2), before a decree of divorce is passed, the court has to hear the "parties" and satisfy itself. If one of them does not become a party to the move because either he or she has withdrawn covertly or just stays away because he or she is not interested to have a divorce, this requirement, namely, "after hearing the parties" is also not satisfied because, in that case, only one party to the move will be left. Thus it is obvious that it was the intention of legislators to hear both the parties until the marriage is dissolved.

In fact the interpretation, given to the section in two cases, negates the whole idea of mutuality and consent for divorce. The crux of the provision is mutual consent to the divorce and not withdrawal of the petition (in case it is to be withdrawn) by mutual consent. If within the provided time one of the parties wishes to withdraw his or her consent, he or she should not be estopped from doing so. Proceeding with the application and granting

divorce, in spite of one party's withdrawal would, by no stretch, be a divorce by mutual consent. True it is that a marriage which is not workable and broken should not be thrust on the hesitant party but to dissolve a broken marriage under the guise of mutual consent simply because there was consent at the time of application which was later withdrawn, would not be reasonable and justifiable. The mutuality and consent should continue until the divorce decree is passed; then and then alone can divorce be called a divorce by mutual consent.

*Kusum\**

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