SPEEDY REMEDY OR MURKY MUDDLE ? TRAGEDY OF DIVORCE ON GROUND OF MUTUAL CONSENT

I Introduction

LIKE ALL things made in Heaven, marriages also break and in this 'Age of Anxiety' (per Jimmy Carter) this is more common than rare. Irretrievable breakdown of marriage is therefore a reality to reckon with and marriage laws of most countries do provide for dissolution of such marriage by a decree of divorce. The law makers in India have in fact been more wise and far ahead of some other countries on this score. Section 28 of the Special Marriage Act 1954 provided for divorce on the ground of mutual consent. It took UK 15 more years to introduce such a provision by the Divorce Reforms Act 1969. They adopted the concept of two and five years separation. When the spouses have been living separately for not less than two years, either of them may present a petition, for divorce, after negotiating the consent of the other. When they have been living separately for more than five years, again either of them may petition for divorce and a decree of divorce shall be granted unless the court is of the opinion that the divorce will cause grave financial or other hardship to the respondent. It is pertinent to add here that in UK the decree of divorce is in two stages - *first*, decree *nisi* and *second*, after six months, decree absolute.

II Hindu Marriage Act

The Hindu laws were codified in 1955-56 and the Hindu Marriage Act 1955 was one of the most welcome measures to be adopted in the Republic of India. Commenting on these measures, Justice P.B. Gajendragadkar observed:[1]

> In adopting these four legislative measures, Parliament has acted upon the principle formulated by Dr. Radhakrishnan that "To survive, we need a revolution in our thoughts and outlook. From the alter of the past, we should take living fire and not the dead ashes. Let us remember the past to be alive to the present and create the future with courage in our hearts and faith in ourselves."

The provisions for divorce in the Act were first liberalised in 1964. In 1976, by the Marriage Laws Amendment Act, section 13 *B* for divorce by mutual consent on the lines of section 28 of the Special Marriage Act was inserted in the Hindu Marriage Act also. This was long overdue, as some spouses, married as per Hindu

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1. Law Commission of India, *59th Report on Hindu Marriage Act 1955 and Special Marriage Act 1954* (1974).

rites and customs, were getting their marriage registered under Special Marriage Act, as well, just to avail the "painless divorce" available under that Act. The object of this provision is the same as for section 2(1)(*d*) of the Divorce Reforms Act, and is to enable the marriage which has become a mere shell to be dissolved in, what is sometimes called, a civilised manner without the exacerbation of bitterness between the spouses by having to parade their unhappy marriage, to fight in public.

(1) Sections 13 B and 23 (1)

The points of relevance in section 13 *B* are as under :

(*i*) This section has a heading "Divorce *by* Mutual consent"[2] but in the section itself, there is no such formula as by mutual consent.

(*ii*) It is subject to other provisions of this Act and hence, *inter alia*, to section 23(2) which states that before proceeding to grant any relief under this Act, it shall be the duty of the court, in the first instance to make every endeavour to bring about a reconciliation between parties.

(*iii*) Hence, the process of seeking divorce is prescribed to be in two steps separately under sub-sections (1) and (2) of section 13 *B*, with a minimum time gap of six months, thus affording an opportunity for the parties to reconcile in between.

(*iv*) By sub-section (1), 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*.[3]

(*v*) The ground supporting this petition should have three ingredients as explained later in this paper.

(*vi*) In sub-section (2) the second stage of the proceedings towards divorce by mutual consent is described and the points of importance therein are as follows:

(*a*) It visualises a motion of both the parties as against a petition presented together by both the parties earlier.

(*b*) This motion must be made between six to eighteen months after presentation of the said petition.

(*c*) It visualises that the petition instead of being progressed by such a motion could also be withdrawn in the mean time and then no action is warranted under the sub-section.

(*d*) If these conditions are fulfilled by the motion then the court *shall* pass a decree of divorce subject to it being satisfied after hearing the parties and after making such inquiry as it thinks fit:

(*i*) That a marriage has been solemnised; and,
(*ii*) that the averments in the petition are true.

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2. Emphasis added.
3. *Ibid.*

In section 23, sub-section (*bb*) was simultaneously introduced by the amending Act to prescribe the standard of satisfaction required for mutual consent cases in addition to the other conditions of section 23 (1). Altogether the substance of the law on this score is that the court shall decree such relief accordingly if :

(*a*) any of the grounds for granting relief exists and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief;

(*bb*) when divorce is sought on the grounds of mutual consent, such consent has not been obtained by force fraud or undue influence;

(*c*) the petition is not as a result of collusion;

(*d*) there has not been any unnecessary or improper delay in instituting the proceeding; and,

(*e*) that there is no other legal ground why relief should not be granted.

(2) What the law provides for

The scheme envisaged as per the clear and plain meaning of the section 13*B* and other relevant sections of the Act and High Court rules is as under:

1. The spouses together present a joint petition for divorce under sub-section 13 *B*(1) to the district judge on the ground comprising three ingredients, *viz* :

(*i*) that they have been living separately for a period of one year or more;

(*ii*) that they have not been able to live together;

(*iii*) that they have mutually agreed that the marriage should be dissolved.

2. This "ground" is supported by separate affidavits of the spouses that the averments in the petition are true, that the petition is not presented in collusion, that there has been no force or fraud or undue influence exercised by him or her.

3. Any condition agreed between the parties with respect to custody of child, maintenance, return of dowry articles, adjustment of property, *etc.*, may also be stated in the petition.

4. On taking up this petition, the judge shall, in terms of section 23(2), make every endeavour to bring about a reconciliation between the parties and if it is not possible, record the statements of the parties and pass orders, to admit the petition and consign the file to records to be dealt with in terms of section 13 *B*(2) after six months and once more advising parties to try their best to reconcile and live together. If the parties thus reconcile, they may withdraw the petition at any time, and if the petition is neither withdrawn nor any motion under section 13 *B*(2) moved before eighteen months, the petition will lapse.

5. After six months and before eighteen months, the parties, if they want to obtain a decree of divorce, may move a petition, referred to as second motion petition under section 13 (*B*)(2). This, in normal circumstances, is moved jointly. The court after due inquiry envisaged in the section and due satisfaction as prescribed in section 23(1) may pass a decree of divorce. It is also normal for courts to enforce other conditions mutually agreed between the parties, regarding alimony, custody of child, *etc.*, through its orders.

6. It is also nowadays normal to get a proceeding under section 498*A* IPC against the husband and/or his relatives, quashed by the High Court before or after the second motion petition.

7. If however, one of the spouses wants to resile from the position taken by

him/her during the first motion petition he/she may do so during the second motion petition. This is evident from two pertinent points visible in the relevant sections as under:

(*a*) Section 13(*B*)(2) does not unlike section 13(*B*)(1) make use of the word together and hence it is possible for one party to contest and assume the role of respondent. Further, the words are "motion OF both the parties" in section 13*B*(2) as against "BY both the parties in section 13*B*(1).

(*b*) Sub-section (*bb*) has been inserted under the general proviso in sub-section (1) "whether defended or not" though it is common knowledge that there is no question of plaintiff-defendant configuration under section 13*B*, in normal circumstances, when divorce is sought by mutual consent.

(3) The hitch

So far, so good. The only circumstance, the section does not seem to have provided for is when one of the parties does not at all join the second motion, either in agreement or in contest with the other. It is humbly submitted that it is for such a contingency that the applicability of Civil Procedure Code provided by section 21 of the Act should be resorted to and summons issued to the non-joining spouse under section 30 of the Code and compel his/her attendance if so necessary under section 32 of the Code. The same result could be achieved by giving a restrictive meaning to the words "both the parties" occurring in section 13*B*(2), as has been suggested by Justice Deshpande.[4]

III Different voices

On the crucial question of alleged withdrawal of consent by one of the spouses, the High Courts did not speak with one voice. There are courts which have held that free and valid consent cannot be withdrawn and there are others which have held that for a decree of divorce by mutual consent, consent of both spouses must be valid and subsisting right upto the time of grant of the decree and either spouse can withdraw his or her consent anytime before that, for reasons good, bad, indifferent or for no reason at all. Of the former school, was the *Jayshree* case[5] of Bombay High Court which was followed by the High Courts of M.P. and Delhi in *Meena Dutta*[6] and *Chanderkanta*[7] cases respectively. Justice B.C. Gadgil in *Jayshree*, reasoned that a petition under section 13*B*(1) is a joint petition with two plaintiffs and hence is hit by order 23, rule 1(5) of C.P.C. by which one of several plaintiffs cannot be permitted to abandon or withdraw a suit or part of a claim without the consent of the other plaintiff. In *Meena Dutta*, Justice K.N. Shukla in addition to following this reasoning, also reiterated the

4. See, V.S. Deshpande, "Mutuality in section 13B of the Hindu Marriage Act", 25 *J.I.L.I.* 511 (1983).

5. *Jayshree Ramesh Londhe* v. *Ramesh Bikaji Londhe*, A.I.R. 1984 Bom. 302.

6. *Meena Dutta* v. *Aniruddh Dutta*, 1984 II D.M.C. 388 ; 1985 H.L.R. 280.

7. *Chanderkanta* v. *Hanskumar*, A.I.R. 1989 Del. 73.

statutory position that the six months period given before second motion is meant for mutual adjustment and reconciliation and *not* for withdrawal of consent by one party. In the *Chanderkanta* case. Justice Sunanda Bhandari in addition to the above reasoning, also observed that unilateral withdrawal of consent by one party will be a harassment to the other spouse and an abuse of process of court.

In all these cases, the courts interpreted the law in such a manner as to ensure that the hapless wife is not left in the lurch, having been led up the garden path of divorce by mutual consent by the husband.

(1) Other side

The other side also has helped the wife by allowing her to withdraw her consent. It would have been helpful to avoid an unnecessary controversy had the concerned courts held, on the facts and circumstances of the case, that the consent of the wife was not free after due deliberation, instead of setting up a case for unilateral withdrawal of a valid consent, without the purpose of reconciliation. Added to this is the confusion created by the *obiter* in *Santosh Kumari's* case[8] where neither parties withdrew the consent These lead us to wonder, how true is the observation of Dworkin regarding the alleged ambiguity of a statutory provision. He observes:[9] "The description unclear is the result rather than the occasion of Hercules' method of interpreting statutory texts". Finally, in *Sureshta Devi's* case[10] a Division Bench of the Supreme Court has considered the question whether it is open to one of the parties at anytime till the decree of divorce is passed to withdraw the consent given in the petition (first motion petition) and it answered in the affirmative.

(2) Constrained logic on withdrawal of consent

It is respectfully submitted that some of the observations of some of the courts to uphold the right of withdrawal are rather amusing. For example the Supreme Court's observation : "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".[11] It is not understood whether the apex court is of the opinion that there is no element of mutuality and consent in the initial joint petition which has been presented together by the spouses. Similarly, in *Mohanan's* case[12] the Division Bench observes : "Satisfaction of the court after hearing the parties and after conducting an enquiry (*sic*), necessarily contemplates an opportunity for either of the spouses to withdraw the consent."[12a]

In *Harcharan Kaur's* case[13] the Division Bench observed [14]

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8. *Santosh Kumari* v. *Virendra Kumar*, A I R. 1986 Raj. 128
9. Ronald Dworkin, *Law's Empire* 352 (1986).
10. *Sureshta Devi* v. *Om Prakash*, (1991) 2 S C C. 25.
11. *Id.* at 31.
12. *K.I. Mohanan* v. *Jeejabai*, A.I.R. 1988 Ker. 28.
12a. *Id.* at 30.
13. *Harcharan Kaur* v. *Nachhattar Singh*, A I.R 1988 P. & H. 27.
14. *Id* at 30.

> Either of the parties to the petition under S 13-B that is husband or wife is at liberty to revoke its consent any time before the petition is finally disposed off; and if the other party is still keen to have the marriage dissolved, the other provisions of the Hindu Marriage Act are still available for the grant of necessary relief if a case is made out for the same. The object of S 13*B* is to provide an additional speedy remedy....

It is not clear how the court is reconciled to the idea that the intention of Indian law makers is likely to be such as to make the spouses whose marriage has irretrievably broken down to go on fighting in the courts by different means for the same result. Or, of what use is the "additional speedy remedy", if it can be made sick in mid-course and the party left in the lurch has to resort to other provisions of the Act. Or, of what significance is the provision in section 21*B* expressly introduced in 1976, by the legislature, alongwith section 13*B* in the Hindu Marriage Act, for expeditious conclusion of petitions and appeals under the Act.

(3) Beales v. Beales

In *Sureshta Devi's* case,[15] the Supreme Court has drawn support to its view from the references to Halsbury's,[16] and Rayden's compendiums[17] and to the case of *Beales* v. *Beales*.[18] Though three authorities have been impressively referred to, Halsbury's and Rayden have no legs to stand on their own, but rely on *Beales* v. *Beales* only. Out of the eight page judgment in that case, only half a page is devoted to the crucial question of withdrawal of consent, the rest dealing with awarding costs in such proceedings taking into account the legal aid, a problem peculiar to that country, and not relevant to us. It is a direct sequel to Justice Sir George Baker's rule in an earlier case, *Hymns* v. *Hymns*[19] wherein he had observed, that the state does not yet pay for people's marriages, and so why should it pay for people's divorces?

This rule caused problems and it had to be recalled in this case Section 2(1)(*d*) of the Divorce Reforms Act (which was later made section 1(2)(*d*) of the Matrimonial Causes Act 1973) reads as under:

> [T]hat the parties of the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (...) and the respondent *consents* to a decree being granted.[20]

On this, Justice Baker was constrained to note that more generally however the 1969 Act provides the respondent *consents* to a decree being granted. This is a deliberate use of the present tense, when 'has consented' could have been used.

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15. *Supra* note 10.
16. 13 *Halsbury's Laws of England*, para 845 (4th ed.).
17 1 *Rayden on Divorce* 291 (12th ed.).
18. *Beales* v. *Beales*, [1971] 2 All E.R. 667.
19. *Hymns* v. *Hymns*, [1971] 3 All E.R. 596.
20. Emphasis added.

The only possible conclusion is that such consent must continue to decree *nisi* and consequently it must be valid, subsisting consent when the case is heard.

The distinction between this and the language of section 13*B* is plain, glaring and stares at the face. The legislature in India has chosen to use the following words:

1. "that they have mutually agreed that the marriage should be dissolved in 13*B*(1) (present perfect tense)".

2. "such consent has not been obtained ...." in section 23(1)(*bb*) (Present perfect tense in passive voice for which no continuous tense exists in the English language). What is more, present tense has been used in section 23(1)(*a*), (*c*) and (*e*), which provides a clear contra-distinction.

After all, the decision in *Beales* v. *Beales* (1972) was known in 1974-76 when section 13*B* was inserted in the Hindu Marriage Act and if the intention of Indian lawmakers was to conform to the English law, they could have done so. That they have not done so, would suggest a different scheme in the Indian Act.

(4) Some more on Beales v. Beales

It would have been apparent to the reader that the English provision is even otherwise different, the petition being moved by one of the spouses and not by both of them together as in section 13 *B*(1). Further, the stage of passing a "*decree nisi*" in this English scheme is comparable to the admission of a petition under section 13 *B*(1) and consigning it to records to come up after six months. This is only after the efforts for reconciliation of the district judge have failed and after recording the statements of the spouses thereafter. Should any reconciliation take place or either spouse resiles in his/her statement from the position stated in the affidavits accompanying the petition he/she may do so and the petition will not be admitted.

For unilateral withdrawal of consent by one party without assigning any reason, *Beales* v *Beales* is not relevant. But, the legal position after decree *nisi* is relevant. It has been observed:[21]

> [T]he court may in an application made by the respondent at any time before the decree is made absolute, rescind the decree if it is satisfied that the petitioner misled the respondent, whether intentionally or unintentionally about any matter which the respondent took into account in deciding to give consent.

In the Indian scheme, section 13(*B*)2 is better drafted and in all cases it is the duty of courts before passing a decree of being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true. This has to be done even when the motion under section 13*B*(2) is also a joint motion.

21. *Supra* note 16, para 646

Before we part with *Beales* v. *Beales*, it is necessary to add that Justice Sir George Baker has ruled in favour of the right to withdraw the consent but has kept the question of estoppel, decided in *Smallman* v. *Smallman*[22] by Lord Denning M.R., open, inspite of his decision in *Beales* v. *Beales*.[23]

IV Lure of English law

It is respectfully submitted that the temptation to look to English authorities should be avoided, particularly when Indian law is clear and more particularly with respect to such laws as Hindu law. It would have been far more profitable to look for guidance from Derrett[24] for divorce between Hindu couples than to Rayden. Emphasis in Hindu law is for enabling rather than disenabling. Law favours the termination of disputes. Law must encourage a sense of responsibility. Viewed in this light, the constrained logic adopted by some courts to uphold the unrestrained right of withdrawal of consent unilaterally by one spouse, inspite of proof of irretrievable breakdown of marriage appears to be entirely non-productive and fails to meet the aspirations of the lawmakers who had the courage and wisdom to reject the dead ashes and take living fire from the altar of the past. The following observation of Duncan Derrett is very relevant in this context:[24a]

> Where the statute specifically directs the judge to have regard to the conduct of the parties, he must consider their conduct by Hindu standards and when he does so, he does not consider merely what standard could have been expected from them at law. A special place must be allotted to "*anrishamsyam*" (humaneness). Judges should not suppose that the *shastras* took the Anglo-Saxon view that what should not be enforced as strict law did not count as an obligation.

V Negation of clear indicators in native law

It is regrettable that while importing *Beales* v. *Beales* into the fabric of section 13*B*, courts have neglected to note the clear indicators available in the provision itself. The non-use of "present tense" has already been pointed out. Further if we proceed we see the following:

(*i*) There is no labelling "divorce by mutual consent" in the section itself. It occurs only as the heading and it is settled law that a heading cannot be used to give a different effect to clear words in the section, where there is no doubt as to the ordinary meaning of the words.[24b]

(*ii*) The legislature as deliberately used the word "ground" both in sections 13*B*(1) and 23(1)(*bb*) and the ground consists of three sub-grounds, the agreement or consent being only one of them.

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22. [1971] 3 All E.R. 717.
23. *Supra* note 18.
24. J. Duncan M. Derrett, *A Critique of Modern Hindu Law* (1970).
24*a*. *Id.* at 50.
24*b*. A.I.R. 1959 S.C. 963.

(*iii*) The six to eighteen months given between the first and second motion petitions is for the parties to reconcile and repair their differences and start living together in the spirit of section 23(2).

(*iv*) If the parties are able to thus reconcile, the petition may be withdrawn by them. The words in section 13*B*(2) are "if the petition is not withdrawn in the meantime" and *not* "if the consent is not withdrawn". It goes without saying, that the petition having been presented jointly, can be withdrawn only by a joint motion.

(*v*) The word in section 13 *B*(2) is "Inquiry" and *not* "Enquiry". This subtle difference should not be missed and thus it is not the duty of the court to merely ascertain that the averments in the petition are true but investigate as it thinks fit that the averments in the petition are true.

(*vi*) By such inquiry, the court has to satisfy itself as per section 23(1)(*bb*), in so far as it relates to consent that such consent has not been obtained by force, fraud or undue influence. There is no doubt, that the reference is to the consent at the time of presentation of the petition.

(*vii*) For the satisfaction of the court before passing a decree of divorce, two means are provided : namely hearing the parties and making such inquiry as it thinks fit. The court has to satisfy itself on the solemnisation of the marriage, on the requirement of section 23(1) and that the averments in the petition are true.

(*viii*) If so satisfied the court shall pass a decree and *not* court may pass a decree.

(*ix*) Section 21*B* has also been introduced by the same Act which introduced section 13*B*. It visualises expeditious relief in matrimonial cases and therefore it will not be in conformity with legislative intent to allow abandonment of a divorce petition under section 13*B* and ask the parties to keep on fighting for the same result by a variety of other means.

(*x*) Section 23*A* which was also introduced in 1976, by the epoch making Marriage Amendment Act is a further pointer in this direction, by which a respondent has been allowed to obtain relief without institution of separate proceedings.

(*xi*) Let us say that the *volte face* or retraction of consent by one of the parties is something like what Tagore said in a song :

"The stray wind brings the smell of days I have known
And the half-forgotten smiles and tears
Give the heart a sudden turn"

Such a sudden turn should obviously be directed towards a better alternative than divorce and he/she should make sincere efforts to reconcile the differences with the other spouse. It is for this purpose that a flexible time-span of six to eighteen months has been prescribed in section 13*B*(2) for the second motion Taking the worst case, that such a sudden turn of heart came only at the fag-end of this period, there is nothing in the section to prevent such a spouse from moving the court to seek some more time to be given for attempts at reconciliation.

(*xii*) The Act however, does not permit passing of a decree of divorce under section 13*B* without hearing both the parties in the normal course. But should it be impossible for the court to procure the attendance of one of the spouses, then in those peculiar circumstances passing an *ex parte* decree may also be considered

in view of subsection (*bb*) of section 23(1). This, of course, is still an unclear area.

VI Conclusion

In conclusion, it is respectfully submitted that the view of the apex court as held in *Sureshta Devi's* case does not appear to be a correct exposition of section 13*B*; nor does it appear to meet the object of its introduction in the Hindu Marriage Act by the amending Act of 1976. Of course, the same comments apply to section 28 of the Special Marriage Act 1954 as it is *pari materia*. The *ratio* of *Beales* v. *Beales* relied upon by the Division Bench does not lead to the view arrived at in *Sureshta Devi* or *Harcharan Kaur* cases. If anything, the English case supports the view that the crucial time for mutual consent is at the time of admission of the first motion petition.

If that consent is to be later withdrawn, it is possible only in one of the following ways:

(*a*) The parties having reconciled, there is no more any need for divorce and the petition is withdrawn.

(*b*) That one of the spouses satisfies the court that his/her consent was obtained by force, fraud or undue influence or the other party has intentionally or unintentionally misled him/her about any matter which he/she took into account in deciding to give consent.

(*c*) That one of the spouses is able to satisfy the court that he/she is genuinely interested in reconciliation and the court should accordingly take action under section 23(2) as far as possible and keep the petition pending for a reasonable time for reconciliation.

If the withdrawal is not covered by any of the above classifications, it is submitted that the court is bound to pass a decree of divorce even in the face of alleged withdrawal of consent by one of the parties.

Sureshta Devi has opened the flood gates for harassment, suspense and torment to one spouse and abject abuse of the process of the court. Usually, it is a hapless woman who will be victimised. It is respectfully submitted that the mischief is not due to the makers of law. The old English jingle quoted by Justice V.R. Krishna Iyer in *Shakuntala Sahni* v. *Kaushalya Sahni*[26] is not applicable in this case. The jingle runs thus:[27]

I'm the parliamentary draftsman
I compose the country's laws
And of half the litigation
I'm undoubtedly the cause.

It was Justice Krishna Iyer again, who once remarked that to ask for a review from the apex court is to ask for the moon. But "Sureshta Devi" is a different matter and begs for review, on the very face of it.

M.S. Balaganesan

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25. *Supra* note 17.

26. *Shakuntala Sawhney* v. *Kaushalya Sawhney*, (1980) 1 S.C.C. 63.

27. *Id.* at 64.

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