

Order reserved on 04.04.2018
Order delivered on 06.04.2018

A.F.R.

Case :- FIRST APPEAL No. - 227 of 2018

Appellant :- Smt. Pooja

Respondent :- Vijay Chaitanya

Counsel for Appellant :- Shiv Bahadur Singh, Anjani Kumar Dubey

Hon'ble Pankaj Mithal,J.

Hon'ble Rajiv Joshi,J.

The wife has preferred this appeal under Section 28 of the Hindu Marriage Act, 1955 read with Section 19 of the Family Courts Act, 1984 against the decree for dissolution of marriage passed under Section 13-B of the Hindu Marriage Act, 1955 with the consent of the parties vide order dated 11.1.2018 passed by the Family Court, Agra.

The argument of Sri Anjani Kumar Dubey, learned counsel for the appellant-wife is that the aforesaid decree has been obtained by fraud by getting the signatures of the appellant-wife on the petition by coercion. The wife was confined in the house of the husband and thus taking undue advantage of such confinement her signatures were obtained to get the divorce. The Family Court could not have passed the decree of divorce under Section 13-B of the Hindu Marriage Act, 1955 without the second motion and that too before expiry of six months from the first motion.

The law is well settled that a decree passed by consent cannot be challenged by way of appeal.

The appeal has been preferred under Section 19 of the Family Courts Act, 1984 which specifically prohibits filing of

an appeal against a decree passed with the consent of the parties.

The moot question, therefore, is whether an appeal would lie under Section 19 of the Family Courts Act, 1984 against a decree passed under Section 13-B of the Hindu Marriage Act, 1955 by mutual consent.

The certified copy of the petition filed under Section 13-B of the Hindu Marriage Act, 1955 jointly by the wife and the husband is signed by both of them on each and every page and it has been duly verified by the wife and the husband both. The said petition is accompanied by their joint affidavit which is also signed on each and every page by both of them.

The petition was presented before the Family Court on 11.7.2017. The affidavit in support of the petition is also of the same date.

The petition filed under Section 13-B of the Hindu Marriage Act, 1955 came up for consideration as fixed by the Court, after six months i.e. on 11.1.2018. On the said date, both the husband and the wife appeared before the Court. None of the parties in the meantime either withdrew the petition nor the consent for divorce either orally or by moving any application. They filed another joint affidavit may be for initiating the second motion on 11.1.2018 acknowledging the earlier facts and that the mediation between them has failed. The Court in view of the fact that the marriage between the parties was solemnised on 30.5.2015 and they were living separately since 15.3.2016 with no issue of the wedlock, after

recording its satisfaction that the petition is bonafide, passed the decree of dissolution of marriage by mutual consent.

A decree of divorce by mutual consent can only be passed if all essential ingredients contained in Section 13-B of the Hindu Marriage Act, 1955 are satisfied to the satisfaction of the Court.

Section 13-B of the Hindu Marriage Act, 1955 is reproduced herein-below:

“13-B. 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 Law (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 first part of the above provision contemplates for presentation of petition for dissolution of marriage by mutual consent by both the parties to the marriage, if they are living separately for a period of one year or more and that have agreed to the dissolution of the marriage. The second

part of the above provision has two sub parts. The first sub part provides for moving a motion by both the parties not earlier than six months from the date of presentation of the divorce petition and not later than eighteen months of the said date. In other words, it contemplates initiation of the second motion by both the parties after expiry of six months but before the expiry of eighteen months from the date of presenting petition for divorce.

The second sub part contemplates that if the petition is not withdrawn in the meantime, the court shall, on being satisfied after hearing the parties and after making inquiries that the averments in the petition are true, pass a decree for divorce.

In the case of **Hitesh Bhatnagar**¹ the Supreme Court has held that if the second motion is not made within period of eighteen months of the first motion petition, then court is not bound to pass a decree of divorce by mutual consent. The aforesaid time limit is not for withdrawal of the petition or consent, rather consent can be withdrawn at any time before a decree of divorce is passed.

In the case of **Smt. Sureshta Devi**² it has been laid down that on the joint motion of the parties to grant divorce by mutual consent the court is supposed to make an inquiry, hear and examine both the parties to ascertain that the averments made in the divorce petition are true and that the consent of the parties has not been obtained by force, fraud or undue influence.

1 **Hitesh Bhatnagar Vs. Deepa Bhatnagar (2011) 5 SCC 234**

2 **Smt. Sureshta Devi Vs. Om Prakash (1991) 2 SCC 25**

Section 23(1)(bb) of the Hindu Marriage Act, 1955 also casts an obligation upon the courts in the matter of divorce by mutual consent to satisfy itself that the consent has not been obtained by force, fraud or undue influence. Thus, the Court is obliged to make requisite inquiry in the matter before proceeding to pass a decree of divorce by mutual consent.

It means that for a decree of divorce by mutual consent joint petition is mandatory and that the second motion has to be made by the parties after six months but before expiry of eighteen months of the first motion petition and that the parties are free to withdraw the petition anytime before the passing of the decree. The decree has to be passed after making due inquiry as to the genuineness and bonafide of the parties to the petition.

Section 28 of the Hindu Marriage Act, 1955 which permitted filing of appeal against the decrees and orders passed under the Act placed no rider on filing appeal even against a consent decree. It permitted appeal against all decrees made by the Court in any proceedings under the Act, except those relating to award of costs. Thus, by necessary implication, even consent or compromise decree, if passed under the Hindu Marriage Act, 1955 were open to appeal.

This is also the view taken by the Punjab High Court in the case of **Smt. Krishna Khetarpal Vs. Satish Lal AIR 1987 Punjab & Haryana 191** and **Charanjit Singh Mann Vs. Neelam Maan AIR 2006 Punjab and Haryana 201** and it has been held that against the decree of divorce by mutual

consent appeal is maintainable under Section 28 of the Hindu Marriage Act, 1955.

In the case of **Sushama**³ a single Judge of the Bombay High Court (Nagpur Bench) in context with Section 28 of the Hindu Marriage Act has held as under:

“11. Legislature has cast obligations upon Court entertaining the proceedings under section 13-B to record a finding that consent for divorce has not been obtained by force, fraud or undue influence. Thus legislature has visualised that there may be a case in which consent for divorce may be obtained and decided to provide a safeguard against abuse of this provision. Hence, obligation has been cast upon the Court to verify the same, and to record a satisfaction that the consent given by the parties is free and voluntary. Thus having visualized abuse of such provision for grant of divorce by mutual consent by use of force, fraud etc., it cannot be accepted that legislature did not provide for a remedy to the spouse aggrieved in such matters. To hold that remedy of appeal is not available to such aggrieved spouse, will be rendering nugatory the exercise of obligation cast upon the Trial Court by the Legislature. I therefore find that the arguments of Advocate Shri De about tenability of appeal against such consent divorce decree are liable to be rejected.”

In view of the above, normally a consent decree or order cannot be assailed by way of appeal but where the consent itself is disputed and is not said to be genuine, bonafide or free the things would be quite different as has been pointed out in the decision of **Sushama (supra)** by the Bombay High Court and it becomes the solemn duty of the Court to hold an inquiry in this respect before proceeding to

³ **Sushama Vs. Pramod 2009 (81) AIC 599 (Bom.,High-N.B.)**

pass a decree of divorce. This has not been done by the court below in the present case and it has recorded its satisfaction without conducting any such inquiry..

In view of the aforesaid facts and circumstances, we are of the opinion that the appeal even against a consent decree under such facts and circumstances of the case, where the consent itself is disputed and no inquiry has been conducted by the court below is maintainable, subject to objection on appearance by the other side.

Therefore, we admit the appeal and direct for issuing notice to the respondent by registered post/speed post.

Issue notice to the respondent by registered/speed post.

List on return/service of notice.

Order Date :- 6.4.2018
Brijesh