

*Before S.S. Saron & S.P. Bangarh, JJ.*

**SANJIV KUMAR—Petitioner No.1**

*versus*

**SMT. MEENA—Petitioner No.2**

**FAO No. 9-M of 2004**

March 01, 2013

*Hindu Marriage Act, 1955 - Ss. 13,13-B - Code of Civil Procedure, 1908 - S.24 - Parties were married and had a son within a year of their marriage - Husband filed for divorce on ground of cruelty - Petition dismissed and appeal filed - During pendency, parties reached compromise and were allowed to amend petition and file a petition under section 13-B of the Act - whether amendment would relate back to filing of divorce petition or if amendment is to be taken as it is- if amendment is to be from date of presentation*

*of application, petition may not be maintainable as period of one year or more, necessary for divorce with mutual consent under section 13-B of the Act had not lapsed- held that-,the amended joint petition seeking divorce by mutual consent filed at appellate stage is to be taken to have been filed on the date it is presented- period for the litigating parties of living separately for a period of one year or more is to be reckoned from said date of filing the joint petition for divorce by mutual consent.*

*Held*, that therefore, the amended joint petition seeking divorce by mutual consent that is filed at the appellate stage is to be taken to have been filed on the date it is presented and the period for the litigating parties of living separately for a period of one year or more is to be reckoned from the said date of filing the joint petition for divorce by mutual consent. The counting of period for the parties living separately for a period of one year more being taken from the date of filing the amended petition would even be necessary to maintain the sanctity of the judgment and decree that is ultimately passed in a matrimonial proceeding so that it not got invalidated on the technical ground that there was an initial defect in the presentation of the petition of the parties not living separately for a period of one year or more.

(Para 7)

Rakesh Chopra, Advocate and J.S. Toor, Advocate, *for the petitioners.*

**S.S. SARON, J.**

(1) The marriage between the parties was solemnized on 07.12.1996 at Amloh. From the marriage, the parties had a son namely Prince Kumar, who was born on 04.09.1997. Sandeep Kumar (appellant) filed a petition in the Court of District Judge, Patiala under Section 13 of the Hindu Marriage Act, 1955 ("Act" - for short) seeking dissolution of his marriage with the respondent Smt. Meena Devi on the ground of cruelty. The said petition was dismissed by the learned Additional District Judge (Ad hoc), Patiala on 03.12.2003. Aggrieved against the same, the present appeal (FAO No. 9-M of 2004) has been filed in this Court.

(2) During the pendency of the appeal, the parties reached at a compromise and in terms of order dated 24.8.2012 passed by this Court, CM No.20850-CII of 2012 for altering the original petition filed under Section 13 of the Act to a petition under Section 13-B of the Act was allowed. The parties were directed to file a petition under Section 13-B of the Act along with their affidavits on or before the next date of hearing.

(3) CM No.21158-CII of 2012 was filed for placing on record the amended joint petition along with affidavits for dissolution of the marriage between the parties by a decree of divorce under Section 13-B of the Act. The Civil Misc. application was allowed by this Court on 28.8.2012 and the amended petition (CM No.21159-CII of 2012) was taken on record.

(4) CM No. 21159-CII of 2012 is a joint petition of the parties for grant of divorce by mutual consent, which was taken on record and the statements of both the parties by way of affidavits were tendered as statements in first motion on 28.8.2012. The case was adjourned for today for recording the statements of the parties in the second motion.

(5) The parties are present. Their separate statements on oath have been recorded. They have tendered in evidence their affidavits Ex.C1 and Ex.C2. They have prayed for grant of divorce by mutual consent.

(6) The petition under Section 13 of the Act was initially filed in the Court of learned District Judge, Patiala on 12.5.1998. It is alleged therein that the parties had been living separately since 21.1.1998. Therefore, a period of one year or more of living separately for filing the petition on the ground of mutual consent had not lapsed on 12.5.1998 when the petition was initially filed before the learned District Judge, Patiala. For filing a petition for grant divorce by mutual consent in terms of Section 13-B of the Act, one of the requirements is that the parties have been living separately for a period of one year or more before presentation of the petition. An amendment normally relates back to the date of the suit and if the amendment is to be taken as it is the petition may not be maintainable as the period of one year or more had not lapsed on 12.5.1998 when the petition was initially filed. The Hon'ble Supreme

Court in *Sampath Kumar versus Ayyakannu and another (1)*, has, however, observed as follows:-

“An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed (See observations in *Siddalingamma and another v. Mamtha Shenoy*, (2001) 8 SCC 561)”

(7) It is quite common that parties to a matrimonial dispute after contest at the initial trial Court stage enter into a settlement at the appellate stage. Very often a joint petition in terms of Section 13-B of the Act for seeking divorce by mutual consent is filed at the appellate stage by amending the original/initial petition. At times a period of one year or more of the parties living separately before presentation of the initial petition for divorce does not lapse when the said initial petition had been filed. If the doctrine of relation back of the amended petition is applied in such cases and it is taken that the amendment will relate back to the date of filing the original/initial petition, the joint petition for divorce by mutual consent would not be maintainable in view of the bar created in Section 13-B of the Act. To obviate such an eventuality, the amended joint petition for divorce by mutual consent should be taken to be filed and effective from the date it is filed and the doctrine of relation back to the date of filing the original/initial petition would not apply. This is necessary so as to enable the litigating parties to settle and put a *quies* to their matrimonial dispute to which they may have been litigating for a long period of time and not be non-suited by a technical defect of the parties not living separately for a period of one year or more before presentation of the petition for divorce. During the trial of the case at the initial trial Court stage and at the appellate stage, the parties are normally living separately and a period of one year or more lapses in the litigation. Therefore, the amended joint petition seeking divorce by mutual consent that is filed at the appellate stage is to be taken to have been filed

(1) AIR 2002 SC 3369

on the date it is presented and the period for the litigating parties of living separately for a period of one year or more is to be reckoned from the said date of filing the joint petition for divorce by mutual consent. The counting of period for the parties living separately for a period of one year more being taken from the date of filing the amended petition would even be necessary to maintain the sanctity of the judgment and decree that is ultimately passed in a matrimonial proceeding so that it not got invalidated on the technical ground that there was an initial defect in the presentation of the petition of the parties not living separately for a period of one year or more.

(8) Therefore, it is taken that the amendment which was allowed on 24.8.2012 and the amended petition taken on record on 28.8.2012 shall be deemed to be effective from the date the joint petition was filed i.e. 14.8.2012. By the said date i.e. 14.8.2012, the parties had admittedly been living separately for a period of more than one year. Besides, Section 24 of the Code of Civil Procedure confers general power of transfer and withdrawal of proceedings from the District Court to this Court. The joint petition under Section 13-B of the Act which was taken on record on 28.8.2012 is, therefore, treated as an initial petition filed in this Court under Section 13-B of the Act seeking dissolution of the marriage between the parties by a decree of divorce with mutual consent. As on 14.8.2012 the parties had been living separately for about 14 years as it is stated that they have been living separately since 21.1.1998. The respondent Smt. Meena has deposed that she and her husband have been living separately for the last 15 years. Therefore, a period of more than one year from the date of filing the petition had lapsed on the date of presentation of the petition under Section 13-B of the Act as the said petition has been treated to have been filed on 14.8.2012.

(9) The parties at both the motions stated that their marriage be dissolved by decree of divorce by mutual consent. The respondent has received in Court a bank draft for an amount of Rs. 7 lacs for herself and another bank draft of Rs. 2 lacs for the minor son of the parties namely Prince Kumar which it is stated in the lumpsum maintenance that has been received. The compromise that has been entered into by the parties has been placed on record and is part of the petition.

(10) In the aforesaid facts and circumstances, the appeal filed by the appellant is accordingly dismissed as infructuous. The joint petition filed by the parties under Section 13-B of the Act is allowed and the marriage between the parties is dissolved by a decree of divorce by mutual consent. The parties shall remain bound by the terms and conditions of the compromise. Decree-sheet be prepared accordingly.

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*S. Sandhu*