HIGH COURT OF GUJARAT (*D.B.*)

JYOTI
Versus
DARSHAN NIRMAL JAIN

Date of Decision: 16 April 2012

Citation: 2012 LawSuit(Guj) 1393

Hon'ble Judges: Akil Kureshi, C L Soni

Eq. Citations: 2013 AIR(Guj) 218, 2012 2 GLH 206

Case Type: First Appeal; Civil Application

Case No: 645 of 2012; 2480 of 2012

Subject: Civil, Family

Acts Referred:
Code Of Civil Procedure, 1908 Sec 96, Or 23R 3
Hindu Marriage Act, 1955 Sec 13B, Sec 23(2), Sec 13B(2), Sec 23, Sec 13B(1)
Family Courts Act, 1984 Sec 9(1), Sec 19, Sec 20, Sec 9, Sec 10, Sec 19(2), Sec 3

Final Decision: Appeal allowed

Advocates: Devang Nanavati, Nanavati Associates, P K Nanavati, R S Sanjanwala, V D Nanavati

Cases Cited in (+): 1
Cases Referred in (+): 22

Akil Kureshi, J.

[1] A short, but complex and interesting question has arisen in this First appeal. As it is interesting, it is also of considerable importance. Being a matrimonial dispute involving two young people, we decided to hear this appeal finally at an early date instead of admitting it and allowing to come up for final hearing in due course. We have heard the learned Counsel for both sides at considerable strength. For the purpose of disposal of the appeal, however, this appeal is formally admitted. Learned Advocate Shri Devang Nanavati waived notice of appeal. Necessary documents are already on record. Filing of paper book is therefore dispensed with.

[2] We may notice the facts at the outset.

> Appellant, Jyoti and respondent Darshan Nirmal Jain belong to different castes. They had an affair which resulted into their getting married on 12.10.09 according to Hindu rites. Anticipating stiff resistance from their parents and other relatives, the couple had got married without informing them. The marriage was performed at Ahmedabad in Arya Samaj temple in presence of a few close friends. The marriage was also duly registered.

[3] It appears that after the marriage also, the couple continued to live with their respective parents and kept their marriage under wraps for a while. Eventually, after a couple of months when the news was broken to the parents and other relatives, as anticipated, there was considerable resentment and opposition. All efforts to convince them to accept the marriage failed.

[4] On 28.10.10, Darshan Nirmal Jain and Jyoti filed a joint petition being Family Suit No. 1291 of 2010 before the Family Court, Ahmedabad under Section 13-B of the Hindu Marriage Act, 1955, praying for a decree of dissolution of marriage by mutual consent. In such petition, they stated that the marriage had taken place on 12.10.09 at Kankaria in presence of friends and well-wishers. The marriage was not within the knowledge of elders. Therefore, from the date of the marriage itself, both the petitioners went back to their respective parents and since then they had not been able to enjoy cohabitation and married life as husband and wife. After two months of the marriage, when the families learnt about such marriage, there was a great deal of ill-will and dispute between both the families, since both of them belong to different castes. Since both the families belong to different communities, it has not been possible to resolve the dispute till date. Despite repeated efforts by the relatives and members of the community of both sides, since the families of both sides were not happy about the marriage, question of ostracizing them had arisen. They had, therefore, decided to bring an end to the marriage. The petition was presented in Gujarati. Certain relevant portions, when translated read as under :--

> 2. We, petitioners were adult at the time of marriage and we could understand our good and bad. We, petitioners had done love marriage on date 12/10/2009. That it was not known to our elders. Therefore, I, petitioner No. 2 had gone to my parents' house on the same day we married. Since that we, the petitioners have not enjoyed married life as wife husband along with till day. As we, both the petitioners are being of different caste and as the customs of society are being different, as our family come to know about the said marriage after two months, indifference and quarrels started in families of our both due to being different customs and as both bare being of different caste stern opposition was done in regard to the

marriage. I, petitioner No. 1 being of Digambar caste and petitioner No. 2 being of Brahmin caste, people of both society had very much difference of opinion in relation to this marriage. That as there being difference of opinion and discrimination in both the families, solution of that matter could not come to proper conclusion till day.

3. Though many efforts have been made by the relatives of both the petitioners and by the people of the society during the aforesaid time, as the said marriage was not admissible to the families of the both sides parties, question of putting them out of society was arisen. Under the circumstances, as it is impossible for us both petitioners to spend married life by staying with each other and the same it has become impossible to maintain married life, we both petitioners have decided to obtain divorce by having done mutual explanation by having understood.

4. No other harassment or scuffle or threats or any demand of dowry is not made. We both have decided to end the aforesaid married life by having thought mutually.

I, petitioner No. 2 have not stayed with the petitioner No. 1 from the beginning of marriage therefore, 1 have not become pregnant by him and at present I am not pregnant I hereby declare it.

X X X X

X X X X

II. We petitioners have been constrained to file the aforesaid application willfully for obtaining divorce by mutual consent under Section-13(B) of Hindu Marriage Act as the marriage has been solemnized in the jurisdiction of your Honour by having decided of bright future and long life.

[5] Before the Family Court, the parties also filed a joint affidavit dated 28.10.10, in support of the petition for divorce. The affidavit contained very similar statements as were made in the petition. It is, therefore, not necessary to record the contents thereof separately.

[6] The Family Court recorded the depositions of the appellant as well as the respondent. Both of them, tendered their examination-in-chief in form of affidavits. Both sides filed similarly worded affidavits dated 29.4.2011 in which also, very similar statements as those made in the petition for divorce were made.

[7] On the basis of such material on record, the Family Court, Ahmedabad passed the impugned judgment and decree dated 5th May 2011. The learned Judge was pleased to allow the petition. He was pleased to declare that the marriage between the

appellant and the respondent stands dissolved under Section 13-B of the Hindu Marriage Act, 1955. In the judgment, the learned Judge, however, made a few interesting observations. He noted that it is the common say of the petitioners that immediately after the marriage, they went to their respective residences and they never lived together as husband and wife. The learned Judge further noted that "serious disputes and differences cropped up between them and their relations worsened to such an extent that it became impossible for them to live together as husband and wife. That their family members and relatives have made efforts for reconciliation, but all went in vain". The learned Judge further observed as under:--

> 4. After the lapse of six months, petitioners appeared before this Court and have made request to dissolve their marriage by mutual consent. None of the petitioners has withdrawn the consent given for obtaining decree of divorce by mutual consent. This Court has made efforts for reconciliation between the parties to this petition under Section 9 of the Family Courts Act, but all efforts went in vain. It appears that petitioners have serious disputes and differences and it is not possible for them to live together as husband and wife. It also appears that there is no scope of their reunion as their marriage has been irretrievably broken down."
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> Resultantly, the learned Judge concluded that he was satisfied that the marriage of the parties was solemnized and that the averments made in the petition were true and therefore the dissolution of marriage by a decree of divorce was required to be passed. He also recorded that "it is also established that the consent of each petitioner for the dissolution of their marriage by a decree of divorce has not been obtained by force, fraud or undue influence. In the opinion of this Court the wedlock has become deadlock and therefore, there is no sense in telling them to continue their relationship as husband and wife. It would be in their interest to reside separately and to live their own life according to their choice after the dissolution of marriage.

[8] On such basis, the Family Court was pleased to grant the decree of dissolution of marriage under Section 13-B of the Hindu Marriage Act, 1955.

[9] It is this judgment and decree that Jyoti, wife of the respondent, has challenged in this appeal primarily on two grounds. Firstly, that her consent was obtained through deceit and fraud and that she never desired to annul the marriage. She was made to believe that such dissolution is only for cosmetic purpose. She does not understand Gujarati language. The husband had proposed a plan to move to Dubai where they could live together without the pressure of the family members. On such representation her consent was obtained. The second ground is that the Family Court ignored the requirements of Section 13-B of the Act. Husband and wife had not

separated for a minimum period of one year before presenting the divorce petition and therefore, even on consent of the parties, dissolution could not have been granted.

[10] This appeal is opposed by the respondent on various grounds, principally on the ground that the appeal is not maintainable since the judgment is rendered on consent. It is also the case of the respondent that wife had given a free consent and there was no coercion, fraud or undue influence. In any case, such disputed questions cannot be examined in the present appeal.

[11] The learned Senior Counsel Shri Sanjawala appearing for M/s. Nanavati Associates for the appellant submitted that the consent of the appellant-wife was obtained through deceit and fraud. It was conveyed to her by the husband that applying for divorce was only in order to pacify his family members and there was no real intention of obtaining dissolution of marriage. Counsel further submitted that the couple had maintained relation long after the divorce petition was presented and was pending before the Family Court. He relied on certain affidavits of third parties filed along with the First Appeal to contend that the couple never desired to separate or seek dissolution of the marriage and in fact, long after the presentation of the petition for divorce, the couple continued to meet regularly.

11.1 The Counsel submitted that in any case, the decree for dissolution of marriage could not have been passed on the basis of disclosures made in the petition and depositions of the parties. He submitted that the essential ingredients of Section 13-B were not satisfied. On admitted facts, separation of one year was not over before the petition was filed. The Family Court, therefore, committed a grave error in passing the impugned order. Counsel submitted that the Family Court completely misunderstood the situation which is apparent from the judgment itself where the Family Court recorded that there were serious disputes between the parties and the relatives of the couple tried to resolve such disputes.

11.2 With respect to maintainability of the appeal, Counsel submitted that Section 19(2) of the Family Courts Act, 1984 only bars an appeal from a decree or order passed with the consent of the parties. In the present case, the judgment cannot be stated to be based on consent alone and that therefore, the appeal would be maintainable. Counsel also referred to and relied upon certain provisions of the Civil Procedure Code to contend that the present appeal would be maintainable as the provisions contained in Civil Procedure Code are applicable to the Family Courts in so far as they are not inconsistent with the provisions made in the said Act.

11.3 Counsel relied on following decisions in support of his contentions :--

(i) In the case of Smt. Sureshta Devi v. Om Prakash, 1992 AIR(SC) 1904 wherein the Apex Court interpreted the expression 'living separately' appeared in sub-Section (1) of Section 13(B) of the Act and observed as under :-

9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third (requirement is that they have mutually agreed that the marriage should be dissolved.

(ii) In the case of Smruti Pahariya v. Sanjay Pahariya, 2009 AIR(SC) 2840 which was a case wherein the Family Court had granted decree of dissolution of marriage under Section 13-B of the Hindu Marriage Act, 1955 in absence of the husband. The summons issued by the Family Court was not properly served on the husband. The Court granted substituted service of summons. On the date of hearing of the petition, the Court adjourned the hearing to the next date, since the husband was absent. Later on, however, the Family Court advanced the hearing on an ex parte prayer made by the wife and eventually, an ex parte decree of dissolution of marriage was passed. The Apex Court considered the question whether on proper construction of Section 13-B(2) of the Hindu Marriage Act, 1955, which speaks of the motion of both parties, can it be held that the Family Court can dissolve a marriage and grant a decree of divorce in absence of one of the parties without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with other party. In this respect, the Apex Court held as under :--

"13. In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her Advocate's clerk that

respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5, Rule 20 of the Code."

(iii) Reliance was also placed on the decision in the case of Balwinder Kaur v. Hardeep Singh, 1997 11 SCC 701. In the said decision, the Family Court had passed an ex-parte decree, which decree was challenged by the wife before the High Court alleging fraud by the husband in getting her signature on the petition for divorce and then bringing her to Court to record her statement while she was unaware about such proceedings. The High Court dismissed her appeal summarily.

In further appeal the Apex Court highlight1ed that the petition for divorce is not like any other commercial suit. It was observed that a divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. The Apex Court noted the objects and reasons which led to setting up of Family Courts under the Family Courts Act, 1984 and observed that it is now obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or settlement between the parties to a family dispute. It was further observed that even where the Family Courts are not functioning, the objects and principles underlying the constitution of these Courts can be kept in view by the civil Courts trying matrimonial causes. The Apex Court reversed the order passed by the Family Court and confirmed by the High Court making following observations :-

"15. Section 23 of the Hindu Marriage Act mandates the Court before granting decree for divorce, whether defended or not to satisfy itself (1) if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief, and (2) the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty. A duty is also caste on the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-sec. (3) of S. 23 of the Act, the Court can even refer the matter to any person named by the parties for the purposes of reconciliation and to adjourn the matter for that purpose. These objectives and principles govern all Courts trying matrimonial matters. The judgment of the District Judge is silent if the learned Judge took into consideration all what is

mentioned in S. 23 of the Act. A question also arises can a party defeat the provisions of sub-Section (2) and sub-Section (3) of S. 23 of the Act by remaining ex-parte and the Court is helpless in requiring the presence of that party even if the circumstances of the case so required. We are of the opinion that Court can in such a situation require the personal presence of the parties. Though the proceedings were ex parte in the case like this the Court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them."

(iv) In the case of Leela Mahadeo Joshi v. Mahadeo Sitaram Joshi, 1991 AIR(Bom) 105 a Division Bench of the Bombay High Court observed as under :-

"12. The term "having been living separately" will have to be read in conjunction with "not having been able to live together". It is undoubtedly clear that if out of economic necessity or for reasons of employment, the spouses have been living separately and conversely, have not been able to live together, the Court will have to find out from the averments in the petition or from the oral evidence as to whether it is because of a break down of the matrimonial relations or for any other reason. S.13B presupposes only those cases where cohabitation, which is the essential ingredient of a valid and subsisting marriage, has come to an end because of a total break-down of the matrimonial relationship Again, the Legislature has provided a further safeguard, namely that the period of such separation should be at least one year prior to the date when the petition is presented. Obviously, the reason for prescribing this period is that in cases of estrangement or separation on flimsy or frivolous grounds, the Court would be justified in not passing a decree unless the facts disclose that the breach has not only been serious but such as to have lasted at least for one year. In fact, this period would effectively be extended to at least 18 months or more, having regard to the procedural delay, taking into account the waiting period of six months from the presentation of the petition.

[12] On the other hand, learned Counsel Shri Devang Nanavati appearing for the respondent vehemently contended that the appeal is not maintainable. He drew our attention to Section 19 of the Family Court Act, 1984 to submit that the decree having been passed on consent, appeal is not competent. Counsel further submitted that the appellant had joined the respondent in filing the family suit. She had also sworn the affidavit as also her deposition was recorded before the Family Court. At no stage, she complained of any force, fraud or coercion. It was, therefore, not open for her to raise such issue before this Court in appeal.

12.1 In support of his contentions, the Counsel relied on the following decisions :-

i. In the case of Raj Kumar Shivhare v. Director of Enforcement, 2010 4 SCC 772 wherein it was observed that when a statutory forum is created for redressel of grievance, writ petition should not be maintained ignoring the statutory scheme.

ii. In the case of R. Varadaraj v. Smt. V. Nirmala, 2002 AIR(Kar) 241 wherein the learned Single Judge of the High Court has observed as under :-

"7. The provisions of Section 19(1) of the Family Courts Act have been given overriding effect over the provisions of the C.P.C. In this view of the matter, the revision petition u/S.115 or even in appeal under the provisions of Order 43 Rule 1 C.P.C. cannot be entertained."

iii. In the case of Ajay Kapoor v. Smt. Pramila Kapoor, 1992 AIR(All) 283 wherein Division Bench of the High Court has observed as under :--

"8. The whole purpose of S.19(2) of the Act was that if, conciliation between the parties has been arrived at, the parties are bound by it and cannot wriggle out of it. This is the reason why it has been provided against a decree passed on the basis of compromise. If the arguments of the learned Counsel for the appellant were to prevail it would mean that the object of the Act, i.e. conciliation and early settlement of disputes between the wife and husband would be fraught with danger and would be completely outside the aims and objects of the Act. We are accordingly of the considered opinion that in view of the provisions of S.19(2) of the Act, no appeal would be maintainable against the judgment and decree of divorce based on conciliation between the parties. As the appeal itself is not maintainable the other submissions need not be considered."

iv. In the case of Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corpn. Ltd., 2005 7 SCC 764 wherein the Apex Court observed that a provision which is otherwise legal and valid cannot be declared as unconstitutional or ultra vires merely on the ground of possibility of abuse or misuse of such power. This judgment is probably cited to suggest that if otherwise Section 19(2) of the Act is meant to achieve a laudable purpose, the fact that in isolated case, it may seem to be resulting into injustice would not render the provisions bad. However, such a question would not arise since vires of Section 19(2) of the Act is not in challenge before us.

v. In case of Union of India v. G.M. Kokil, 1984 Supp1 SCC 196 was pressed in service to highlight1 that Section 19 of the Act contains a non-obstante clause and would have effect notwithstanding anything contained in any other law.

vi. In the case of Pushpa Devi Bhagat v. Rajinder Singh, 2006 5 SCC 566 wherein the Apex Court held that as per the amended provisions of Order 23 of Code of Civil Procedure, no independent suit can be filed for setting aside the compromise decree on the ground that the compromise was not lawful in view of the bar contained in rule 3-A.

vii. In the case of Ashutosh Kumar v. Anjali Srivastava, 2009 AIR(All) 100 wherein, a Division Bench of the High Court held that where the Family Courts have been established, the judgment and order passed by it would be appealable only under Section 19 of the Family Courts Act and the provisions of Section 28 of the Hindu Marriage Act providing for appeal would not apply.

viii. In the case of Smt. Sunita Agarwal v. Rahul Agarwal, 1992 AIR(All) 157 wherein in an appeal challenging the consent order on the ground that the same was obtained under duress and coercion, the High Court observed that it cannot enter into any inquiry as to under what circumstances the order was passed. We may, however, notice that this is a case wherein, the litigant had complained of duress and coercion by the Presiding Officer of the Family Court and not by the opponent. It was in this background, the Division Bench observed that judicial propriety also dictates that the appellate Court must accept as correct what the lower Court recorded as facts which transpired before it.

ix. In the case of Smt. Neera Saxena v. Sanjiv Kumar Saxena, 2000 AIR(All) 277 wherein a Division Bench opined that question whether fraud was practiced by the husband on Court in filing the application in the name of the wife is a fact which can be gone into by the Family Court after appreciation of evidence by both sides and not by the appellate Court.

x. Unreported decision of a Division Bench of Allahabad High Court dated 29th February 2000 in Appeal No. 157/2000. It was, however, a case wherein after filing the appeal assailing the validity of the order of the Family Court on compromise on the ground that the husband had played fraud on the Court, wife had also approached the Family Court. Because of this reason, the High Court dismissed the appeal leaving it open to the Family Court to adjudicate on all issues. This judgment does not lay down any ratio which can be applied in the present case.

xi. In the case of Ramratanbhai Badriprasad Agrawal v. Kankuben Wd/o Parshottamdas Jordas, 2011 2 GCD 1472, wherein the provisions of Order 23 Rule 3 and 3A and Section 96(3) of the Code of Civil Procedure came up for consideration before a Division of this Court in the background of maintainability of appeal against the decree based on compromise.

[13] Having thus heard the learned Counsel for the parties and having perused the material on record, two questions call for consideration, viz. (i) whether the present appeal is maintainable and if so, what would be the scope of such appeal and (ii) if the answer to the first question is in affirmative, whether the Family Court erred in passing decree of dissolution of marriage ?

[14] In so far as the first question is concerned, the same has two parameters. First aspect is whether the appeal would be maintainable in view of the provisions contained in Section 19(2) of the Family Courts Act, 1984 in so far as the appellant alleges fraud or deceit on the part of the husband in obtaining her consent for dissolution of marriage. The second aspect of maintainability of appeal would be in relation to challenge of the appellant on the ground that even if the wife's consent was validly obtained, the Family Court could not have annulled the marriage in view of the provisions contained in Section 13B of the Hindu Marriage Act, 1955.

[15] We deal with first aspect of maintainability of appeal first. Before doing so, a few statutory provisions would have to be noted. The Family Courts Act, 1984 was enacted by the Parliament with certain purpose in mind. Statement of objects and reasons for enactment of the said statute records that the Law Commission in its 59th Report had stressed that in dealing with the disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before commencement of the trial. It was noted that the Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt in the public interest to establish Family Courts for speedy settlement of family disputes. With these objects in mind, the Family Courts Act, 1984 was enacted. Section 3 of the Family Courts Act pertains to establishment of family Courts. Section 7 thereof lays down the jurisdiction of the Family Court. Section 8, inter alia, provides that where a Family Court has been established for any area, no district Court or any subordinate civil Court referred to in sub-Section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in sub-Section (1) of Section 7. Thus, Family Courts have exclusive jurisdiction over matters specified in sub-Section (1) of Section 7 of the said Act.

[16] Section 9 of the Family Courts Act enjoins a duty on the Family Court to make efforts for settlement and provides, inter alia, that in every suit or proceedings, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the suit or proceedings and for this purpose, Family Court may, follow such procedure as it may deem fit.

Section 10 of the Act pertains to procedure that the Family Court may follow and reads as under :--

10. Procedure generally - (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-Section (1) or sub-Section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by the other."

Section 19 pertains to appeal and reads as under :-

"19. Appeal. -(1) Save as provided in sub-Section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908(5 of 1908), or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) :-

Provided that nothing in this sub-Section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this Section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of

1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, order or decree of a Family Court.

(6) An appeal referred under sub-Section (1) shall be heard by a Bench consisting of two or more Judges.

[17] At this stage, we may also briefly touch on certain provisions contained in the Civil Procedure Code 1908 since it was the contention of the learned Counsel for the appellant that applicability of the Civil Procedure Code is not completely barred under the Family Courts Act, 1984 and therefore, despite the provisions made in Section 19 of the Family Courts Act, if appeal can be maintained in terms of the provisions contained in Code of Civil Procedure, the same would still be filed.

17.1 Section 96 of the Code of Civil Procedure, as is well known, pertains to appeals from original decrees. Sub-Section (3) thereof, however, provides that no appeal shall lie from a decree passed by the Court with the consent of the parties. Order XXIII, rule 3 of the Code of Civil Procedure pertains to compromise of suit. The same was substantially amended in the year 1976 and in the current form, rule 3 order XXIII, reads as under :-

3. Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pas a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment."

Correspondingly, the Legislature has also introduced rule 3-A by amendment in the year 1976 which reads as under :-

"3-A. Bar to suit. No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

Order XLIII rule 1(m) was deleted by the amendment Act 1976. However, by the same amendment, Rule 1A was added in order XVIII which pertains to right to challenge non-appealable orders in appeal against decrees and which reads as under :--

"1 A. Right to challenge nonappealable orders in appeal against decrees. (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

[18] It may be that by virtue of the provisions made in the Code of Civil Procedure, particularly post amendment Act 1976, it would be open for a litigant to contend that even if a decree is passed on consent, on the ground that such consent was not a free consent or that the same was based on coercion, fraud or undue influence, appeal would be maintainable. We may notice that in the 2002 Edition of the Code of Civil Procedure by Justice C.K. Thakker in Vol.2, the learned author observed that the principle that on compromise or adjustment of the suit, a decree is passed which would bind the parties, and would not be appealable would apply to cases of admitted and undisputed compromise or adjustment and where the factum of compromise itself is in dispute or compromise decree is challenged on the ground that such compromise has been arrived at or there was no valid consent, the bar of Section 96(3) will not operate. Two classes of cases were envisaged. In the former class of cases, where there is no dispute as to the factum of compromise, bar under sub-Section (3) of Section 96 was held applicable. However, in the latter class of cases, where there is serious dispute of compromise or agreement, the doctrine would have no application. This is also the view of the Division Bench of this Court in the case of Ramratanbhai Badriprasad Agrawal . In the said decision, the Division Bench observed as under :-

10. In our view, the aforesaid observations and the decision of the Apex Court in case of Kishun makes it clear that when there is contest on the question as to whether there was a valid compromise or not and a decree by accepting the compromise has been passed upon the decision of any controversy raised, it cannot

be said to be a decree passed with the consent of the parties and, therefore, the bar u/ S.96(3) of the CPC could have no application and consequently the appeal u/S.96(1) of CPC would be maintainable.

In the present case, however, the question is whether the provisions of Code of Civil Procedure in so far as they pertain to appeal against original decree would apply or not.

[19] In this context, we would like to revisit the statutory provisions made in the Family Courts Act, 1984. We have noticed that it is a special statute enacted with special objects in mind. It excludes the jurisdiction of the civil Courts and also the Magisterial Courts in respect of matters which the Family Court can entertain under Section 7 of the Act. Section 20 of the said Act gives overriding effect to the provisions made in the Act. It provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

[20] Bearing these provisions in mind, we recall that Section 10 provides, inter alia, that subject to the other provisions of the Act and the rules, the provisions of the Code of Civil Procedure and of any other law for the time being in force shall apply to the suits and proceedings before a Family Court and for the purpose of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.

[21] Combined reading of Section 20 and Section 10 of the Family Courts Act would bring about a situation by which if a provision of CPC is inconsistent with the provisions contained in Family Courts Act, it would have no effect since the provisions contained in the Family Courts Act would have overriding effect. At the same time, if there is no inconsistency with the procedure provided in the Family Courts Act, the provisions contained in the Code of Civil Procedure would apply. It is, therefore, essential to ascertain whether the provisions contained in the Code of Civil Procedure providing for appeal from original decree would continue to have applicability to the proceedings under the Family Courts Act in view of the provisions contained in Section 19 of the said Act.

21.1 Section 19 of the Act pertains to appeals. Sub-Section (1) of Section 19 provides that save as provided in sub-Section (2) and notwithstanding anything contained in the Code of Civil Procedure or in the Code of Criminal Procedure or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law. Sub-Section (2) of Section 19 in terms provides that no appeal shall lie from a

decree or order passed by the Family Court with the consent of the parties. Proviso to sub-Section (2), however, saves those appeals which were filed and pending before the High Court before the commencement of the Family Court (Amendment) Act, 1991. Sub-Section (3) of Section 19 provides for a period of limitation for presenting such appeals. Sub-Section (4) of Section 19 permits the High Court on its own motion to call for and examine the record of any proceeding of the Family Court for the purpose of satisfying itself as to the correctness, legality or propriety of the order, other than the interlocutory orders. Sub-Section (5) of Section 19 provides that except as aforesaid, no appeal shall lie to any Court from any judgment, order or decree of a Family Court. Sub-Section (6) of Section 19 provides that an appeal preferred under sub-Section (1) shall be heard by a Bench consisting of two or more judges. It can, thus, be seen that Section 19 provides for a complete code for filing appeal against the final order passed by the Family Court. Not only the terms of appeal, the period of limitation, the strength of the Bench of the High Court which should hear the appeal and ail other incidental provisions have been made in Section 19 itself. Thus, appeals arising out of orders that may be passed by the Family Court would be governed by the provisions of Section 19. When the Act itself provides for such detailed provisions for presenting and hearing appeals from the final orders of the Family Court, it would not be possible to import provisions of Code of Civil Procedure and make appeal maintainable, if otherwise the same is not in terms of the provisions of Section 19 of the Act. In this context, sub-Section (1) of Section 10 which provides that subject to the other provisions of the Act and the Rules, the provisions of the Code of Civil Procedure shall apply must be appreciated. When detailed provisions are made in Section 19 for appeals arising out of orders passed by the Family Court, necessarily, the Legislature intended to oust the appeal mechanism provided in the Code of Civil Procedure for ordinary suits. Particularly when Section 20 of the Family Courts Act gives overriding effect to the provisions contained in the Act and when Section 19 makes provisions for maintainability and for hearing of appeals arising out of orders passed by the Family Court, the provisions contained in Section 96 or any other provisions under the Code of Civil Procedure cannot be resorted to for filing appeal against the final orders passed by Family Court.

[22] By virtue of sub-Section (2) of Section 19, no appeal is maintainable from a decree or order passed by the Family Court with the consent of the parties. In that view of the matter, the distinction sought to be drawn on the basis of such consent being either undisputed or being highly disputed would not be valid in so far as the provisions of sub-Section (2) of Section 19 are concerned. In the context of the Family Courts Act, a Division Bench of the Allahabad High Court had in the case of Sm. Neera Saxena occasion to consider the maintainability of appeal under Section 19(2) of the

Act which was presented on the ground that the wife had not filed any compromise before the Court and that her husband played a fraud on the Court. In view of such position, the Bench opined that whether in fact fraud was practiced by the husband on Court in filing application in the name of his wife is a question of fact which can be conveniently and appropriately gone into by the original Court itself which is expected to now the dictum. Similarly, in the case of Smt. Sunita Agrawal , a Division Bench of Allahabad High Court relegated the appellant to the Family Court when she had filed an appeal challenging the consent order on the ground that such consent was obtained under coercion. The Court observed that High Court cannot enter into and inquiry as to under what circumstances the order has been passed. This judgment, of course, was rendered in the background of the allegation that it was the Presiding Officer of the Family Court who had pressurized the wife into agreeing certain compromise.

[23] Whatever be the position, under the Code of Civil Procedure, in our opinion, in view of the language used in sub-Section (2) of Section 19, no appeal would be maintainable against a decree and/or order passed by the Family Court with the consent of the parties. Even if the party to such consent were to contend that such consent was either obtained through force or fraud, collusion or deceit, nonetheless, the appeal cannot be held to be maintainable. The party may have other remedy under the law with respect to which we are neither called upon nor would like to draw any conclusion.

[24] Second aspect of maintainability of appeal is with respect to the appellant's contention that even on facts disclosed in the divorce petition, the Family Court could not have allowed the suit. This aspect overlaps with the second question namely, whether the Family Court was correct in passing the decree of dissolution of marriage. We would first look at the maintainability of appeal in this respect. Section 19(2) of the Act, as noted, bars any appeal against decree or order passed by the Family Court with the consent of the parties. If, therefore, a decree or order is passed by the Family Court on consent, without much ado, appeal would not be maintainable. However, if the judgment and decree is rendered by the Family Court not solely on consent, but on its satisfaction of the required ingredients for passing such judgment and decree, in our opinion, such judgment cannot be stated to be one based on consent of the parties. Question in such a situation would arise whether appeal against such order of Family Court would be barred under Section 19(2) of the Family Courts Act.

[25] We may note certain decisions of different Courts on the point.

[26] The question of maintainability of appeal in view of Section 28 of the Hindu Marriage Act came up for consideration before the Division Bench of Punjab and Haryana High Court in the case of Krishna v. Satish Lal, 1987 AIR(P&H) 191 In the said

decision, the Bench was of the opinion that consent decree passed under Section 13-B of the Hindu Marriage Act or any other consent decree is appealable under Section 28 of the Act and bar under Section 96(3) of the Code of Civil Procedure would not apply. We may, however, record that the said decision was rendered not in the background of the Family Courts Act and therefore, the provisions of Section 19(2) of the said Act were not in consideration before the Bench. Similar view was also taken by a Division Bench of the Jharkhand High Court in the case of Hina Singh v. Satya Kumar Singh, 2007 AIR(Jhar) 34. Learned Single Judge of the Bombay High Court in the case of Sushama Pramod Taksande v. Pramod Ramaji Taksande, 2009 AIR(Bom) 111 also followed the decision of the Jharkhand High Court in the case of Hina Singh .16.04.2012

[27] Question here is regarding maintainability of appeal in view of provisions of Family Courts Act. In that context, we may look at the provisions of Section 13-B of the Hindu Marriage Act more closely. Section 13-B of the Hindu Marriage Act, provides for divorce by mutual consent and reads as under :-

> 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 Laws (Amendment) Act, 1976, (68 of 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.
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> (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.
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> If we analyze the provisions of sub-Section (1) of Section 13-B, it is evident that a petition for dissolution of marriage can be presented by the parties to such marriage before the competent Court 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. Sub-Section (2) thereof, provides that on the motion of both sides, made not earlier than six months, but not later than eighteen months of the presentation of the petition under sub-Section (1) and if such petition is not withdrawn in the

meantime, the Court on being satisfied after hearing the parties and after making such inquiry as it thinks fit, that the marriage has been solemnized and that the averments made in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

[28] What emerges from the said statutory provisions is that under sub-Section (1) of Section 13-B of the Hindu Marriage Act, the parties may apply to a competent Court for dissolution of marriage on the ground that (i) they have been living separately for a period of one year or more, (ii) that they have not been able to live together and (iii) that they have mutually agreed that the marriage should be dissolved. All these three conditions are required to be fulfilled simultaneously and not individually. On the other hand, under sub-Section (2) of Section 13-B, when a: motion is made by such consent parties, after six months of the presentation of the motion but before eighteen months, provided such petition is not withdrawn in the meantime, the Court has power to: declare the marriage as dissolved on being satisfied that the averments made in the petition are true. Such satisfaction has to be arrived at after hearing the parties and after making such inquiry as the Court thinks fit.

28.1 We may also notice that under sub-Section (2) of Section 23 of the Hindu Marriage Act, a duty is enjoined' on the Court hearing the divorce proceedings that in the first instance in every case where it is possible so to do consistently with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties.

28.2 Sub-Section (1) of Section 9 of the Family Courts Act also similarly enjoins a duty on the Family Court to endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding. Sub-Section (2) of Section 9 further provides that if in suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

[29] From the above provisions, it can be seen that sub-Section (1) of Section 13-B of the Hindu Marriage Act enables the husband and wife to present a petition for divorce on mutual consent provided three conditions contained therein are cumulatively satisfied. Sub-Section (2) of Section 13-B, enjoins a duty on the Court to be satisfied after hearing the parties and after making such inquiries as it thinks fit that the averments made in the petition are true before passing the decree of divorce declaring the marriage to be dissolved. Read in conjunction with sub-Section (2) of Section 23 of the Hindu Marriage Act, much responsibility has been placed on the Court first in trying

to bring about a reconciliation between the parties, if possible and if not, to be satisfied that the conditions for grant of decree of divorce on mutual consent are satisfied. The Court, be it Family Court or ordinary Civil Court cannot mechanically accept the statements made by the husband and wife either in the petition or in the depositions before the Court and hold without any application of mind that the conditions contained in sub-Section (1) of Section 13-B are satisfied merely because the couple may have declared so in the petition. Sub-Section (2) of Section 13-B casts a duty on the Court to satisfy itself that such conditions are satisfied. To enable the Court to do so, it also permits the Court to hear the parties and makes such inquiry as it thinks fit. Only upon being satisfied that such conditions are cumulatively fulfilled, it can pass a decree of divorce. In other words, it is only satisfaction of three conditions jointly which would give jurisdiction to a Court to grant a decree of divorce on mutual consent. Even if the parties to a marriage were to jointly come before the Court and declare that such conditions are satisfied, such mere statement, in our opinion, would not be sufficient to clothe the Court with jurisdiction to pass a decree of divorce by dissolving marriage on mutual consent. Only upon the Court being satisfied that such conditions are fulfilled that such decree could be passed.

> 29.1 It can thus been seen that a decree of divorce under Section 13-B of the Hindu Marriage Act is not based merely on consent between the parties. It is a decree passed upon presentation of petition for dissolution of marriage where three conditions mentioned above are required to be satisfied and such decree of dissolution is passed only upon satisfaction of the Court that such conditions are fulfilled. Therefore, presentation of a petition for dissolution of marriage may be on consent, the decree of dissolution of marriage is not merely on consent, but on the satisfaction of the Family Court or, as the case may be, civil Court that such conditions are satisfied. In that view of the matter, when a question arises whether such satisfaction was validly arrived at or not, an appeal would be maintainable. We may recall that what sub-Section (2) of Section 19 of the Family Courts Act bars is an appeal from a decree or order passed by the Family Court with the consent of the parties. Decree under Section 13-B of the Hindu Marriage Act is passed on satisfaction of the Family Court that certain set of circumstances exist or certain conditions are fulfilled. Thus such a decree is not merely on consent but on the Court being satisfied that those conditions are satisfied. If therefore appeal is filed questioning very satisfaction of the Family Court, in our view, bar under Section 19(2) of the Family Courts Act would not apply and resultantly, appeal under Section 19(1) would be maintainable.

[30] In this context, we may refer to some of the decisions highlight1ing the role of the Family Court. In the case of Sushama Pramod Taksande v. Pramod Ramaji

Taksande, , learned Single Judge of the Bombay High Court observed that the Family Court while passing the decree of divorce on mutual consent has to satisfy that consent for divorce under Section 13-B has not been obtained by force, fraud or undue influence. On the ground that the judgment delivered by the Trial Court did not show that any such satisfaction was arrived at or recorded by the Trial Court before passing the final order, the judgment was set aside. It was observed that the judgment of the Civil Judge, Senior Division reveals that even the date from which the parties were staying separately has not been mentioned anywhere in the judgment.

30.1 In the case of Hina Singh v. Satya Kumar Singh, , a Division Bench of the Jharkhand High Court examined the case wherein a petition for restitution of conjugal rights filed by the husband was later on converted into dissolution of marriage under Section 13-B of the Hindu Marriage Act and ultimately a decree for divorce was passed by the Court. The Division Bench set aside the order passed by the Family Court observing that although the order speaks about personal examination of the parties, there is nothing on the record either deposition of parties or any order to the effect that the parties were examined. The Division Bench opined that the Court below committed serious illegality in passing the decree of dissolution of marriage by mutual consent.

30.2 In the case of Balwinder Kaur , we may recall, the Apex Court observed that a petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. The Apex Court noted that it is obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or settlement between the parties to a family dispute. The Court further observed that even where the Family Courts are not functioning, the objects and principles underlying the constitution of these Courts can be kept in view by the civil Courts trying matrimonial causes. The Apex Court further observed that though the proceedings were ex parte, the Court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them.

[31] In the above background, we may appreciate the facts more closely. We may recall that the appellant and respondent got married on 12.10.09. As per the petition for dissolution of marriage filed before the Family Court and the affidavits filed in support of such petition by the husband and wife and their depositions, it emerges that immediately after the marriage, they went back to their respective parents instead of residing together as husband and wife. This was so because both belong to different castes. Their marriage was kept secret from the parents since the couple expected a backlash from them. They, therefore, decided to lie low waiting for a better opportune

moment to disclose such fact to their parents. After about two months of marriage, the news was broken to their parents which led to a great deal of bitterness and friction. The parents and other relatives disapproved such marriage. Since their backgrounds were different, no reconciliation could be brought about between the relatives despite best efforts and a stage came when they realized that it was not possible to reside together as husband and wife. They, therefore decided to opt for divorce by mutual consent. The petition for dissolution of marriage was filed before the Family Court on 28.10.10.

[32] From the above basic facts, it can be seen that after 12.10.09 when the appellant and the respondent got married, there were no disputes or any discord either between the couple or between their respective parents and relatives for a period of at least two months till the news of their marriage reached the parents and relatives. At the earliest possible stage when such disputes could be stated to have surfaced was at the time when the information about the marriage of the couple reached their parents and other relatives. Till then the couple was residing separately voluntarily with no intention whatsoever to end the marriage or with an awareness that it was not possible to live together as husband and wife. May be because of certain circumstances, compelling reasons and better discretion at their command, the couple decided not to confront their parents and precipitate the issue immediately. Therefore, after getting married on 12.10.09 they actually went back to the respective families without disclosing the factum of such marriage. However, the real issues and problems started surfacing only when the news of their marriage was broken to the parents and other relatives. Till then the appellant and the respondent, as is clear from the record, did not even have an iota of intention of not continuing their marriage. It was only after the news of the marriage was met with strong disapproval by the relatives and all attempts of reconciliation failed that any question of intention of not leading a life as husband and wife had arisen. The divorce petition as well as the depositions made by the parties clearly reveal that only when all such attempts failed that the couple decided to separate peacefully and to agree for dissolution of marriage. The crucial question, therefore is, was the period of one year of separation as envisaged under Section 13-B of the Act over by the time the petition for dissolution of marriage was presented before the Family Court ? The answer is in the negative. What sub-Section (1) of Section 13-B of the Hindu Marriage Act requires, inter alia, is that the parties have been living separately for a period of one year or more before a petition for dissolution of marriage on mutual consent can be presented. The term "living separately" is crucial. It does not refer to physical separation. As held by the Apex Court in case of Smt. Sureshta Devi , the expression 'living separately' connotes not living like husband and wife. It has no reference to the place of living. The parties may be living under the same roof by force of circumstances, and yet they may not be living as husband and

wife. The parties may be living in different houses and yet they could live as husband and wife. What is necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. It could be easily envisaged that the husband and wife either under mutual understanding or under compulsion of Court order may share a same accommodation, but still may be living separately in so far as their married life is concerned. Equally, there may be cases, where the husband and wife may be living separately for reasons completely unconnected with any matrimonial discord, such as, higher education or employment. Despite physical distance, couple may be happily married. Such later cases, certainly would not fall within the requirement of separation under sub-Section (1) of Section 13-B of the Hindu Marriage Act.

[33] In the present case, husband and wife had no intention of not performing the matrimonial obligations at least for the first period of two months after the date of marriage when due to compulsions they decided not to live together. If we deduct such period of two months from the date of presentation of the petition for dissolution of marriage, it can be seen that the marriage having been performed on 12.10.09 and the petition for dissolution of marriage having been filed on 28.10.10, the mandatory period of separation of one year before the presentation of petition was not over.

[34] It was on this background that the Family Court had a responsibility under sub-Section (2) of Section 13-B of the Hindu Marriage Act to verify whether the conditions stipulated under sub-Section (1) of Section 13-B were satisfied or not. On the face of it, even if the averments and statements made in the divorce petition were to be believed, such conditions could not be stated to have been satisfied. In our opinion, the Family Court seriously erred in proceeding to draw a decree of dissolution of marriage on the basis of disclosures made in the petition for dissolution of marriage and the evidence presented before the Family Court by the husband and wife. In fact, the Family Court completely misdirected itself and passed a decree of dissolution of marriage without proper application of mind. In the judgment itself, the Family Court recorded that there was a common say of both the petitioners that immediately after the marriage, serious disputes and differences cropped up between them and their relations worsened to such an extent that it became impossible for them to live together as husband and wife. The Family Court, thereafter, recorded that the family members and relatives had made efforts for reconciliation, but all went in vain. The Family Court also recorded that there is no scope for their reunion as marriage has been irretrievably broken down. The Family Court, therefore, proceeded to pass the decree of dissolution of marriage recording that the averments made in the petition are

true and therefore the dissolution of marriage by a decree of divorce is required to be passed.

[35] To begin with it was not even the case of the petitioners before the Family Court that there was serious dispute between them which cropped up leading to the relation worsening to such an extent that it became impossible for them to live together. In fact, even according to the petitioners, disputes were between their relatives and not between the husband and wife. The Family Court also erroneously recorded that the family members and relatives made efforts for reconciliation which failed. The Family Court's recording that the marriage was irretrievably broken down was another pure factual error flowing from the fact that the Family Court failed to closely examine the facts on record and to satisfy itself whether the conditions specified under sub-Section (1) of Section 13-B were satisfied or not. The conclusion of the Family Court that the averments made in the petition are true and that therefore, dissolution of marriage by a decree of divorce is required to be passed only confirms our view, namely, that the Family Court passed the decree on the basis that the averments made in the petition are true, and not upon its satisfaction on the basis of such averments whether the conditions of sub-Section (1) of Section 13-B were satisfied or not.

[36] We are of the opinion that such conditions are statutorily provided before a petition for dissolution for divorce on mutual consent can be presented. It was not even open for the parties to waive such conditions. It is not even the case of the parties that such conditions were waived in any case. Any other view would permit the parties to marriage to present a petition for dissolution of marriage within days of marriage urging the Court to accept a consent petition and dissolve the marriage merely on the ground that the parties have agreed to dissolve such a marriage. Such a view would be opposed to the very basic philosophy and principle that as far as possible, the society and the Courts make all attempts to ensure that the institution of marriage sustains and is not lightly broken. It is because of these reasons that invariably provisions are made in the statute providing for a cooling-off period before which, no petition for dissolution of marriage can be presented, not only on mutual consent but on any other grounds as well. It is because of this reason that Section 23 of the Hindu Marriage Act as well as Section 9 of the Family Courts Act make detailed provisions enjoining upon the Courts to make all efforts to bring about a settlement and reconciliation between the parties to such divorce petition.

[37] Bur against appeal provided under Section 96(3) of the Civil Procedure Code or Section 19(2) of the Family Courts Act flows from the principle that parties to a dispute can out of free choice waive their rights and come to a valid agreement which the Court will accept. Rule 3 of Order 23 however requires that such agreement or compromise should be lawful. This concept of the consent being based on an

agreement or compromise being lawful is not given a go-by in Section 19(2) of the Family Courts Act. The Apex Court in the case of Lachoo Mal v. Radhey Shyam, 1971 1 SCC 619 observed as under :-

> 6. The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the nonobservance of the statutory provision is cuilibet licet renuntiare juri pro se introducto. (See Maxwell on Interpretation of Statutes, Eleventh Edition, pages 375 and 376.) If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where, there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Laws of England, Volume 8, Third Edition, it is stated in paragraph 248 at page 143 :-
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> "As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void."
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> In the footnote it is pointed out that there are many statutory provisions expressed to apply "notwithstanding any agreement to the contrary", and also a stipulation by which a lessee is deprived of his right to apply for relief against forfeiture for breach of covenant (Law of Property Act. 1925). Section 23 of the Indian Contract Act provides :-
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> "The consideration or object of an agreement is lawful, unless - it is forbidden by law; or is of such a nature trial, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or the Court regards it as immoral. Or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[38] It was thus not open to the parties to agree to dissolve the marriage without satisfying requirements of Section 13-B of the Hindu Marriage Act. If it was not possible for the parties to consent to dissolve the marriage unless statutory

requirements were satisfied, it was not lawful for the Court to dissolve the marriage even on consent of the parties.

[39] In the case of Union Carbide Corporation v. Union of India, 1992 AIR(SC) 248, referring to question of estoppel against the statute, the Apex Court held and observed as under :--

> 52. At the outset, learned Attorney General sought to clear any possible objections based on estoppel to the Union of India, which was a consenting party to the settlement raising this plea. Learned Attorney General urged that where the plea is one of invalidity the conduct of parties becomes irrelevant and that the plea of illegality is a good answer to the objection of consent. The invalidity urged is one based on public policy. We think that having regard to the nature of plea - one of nullity - no preclusive effect of the earlier consent should come in the way of the Union of India from raising the plea, Illegalities, it is said, are incurable. This position is fairly well established. In re A Bankruptcy Notice, 1924 2 Ch 76 at p. 97, Atkin L.J. Said :-
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> It is well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid,
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> In Maritime Electric Co. Ltd. v. General Dairies Ltd., 1937 AIR(PC) 114 at 116-117 a similar view finds expression :--
>
> ...an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.
>
> ...The Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.
>
> ...there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character."
>
> The case of this Court in point is of the State of Kerala v. The Gwalior Rayon Silk Manufacturing(Wvg) Co. Ltd., 1973 AIR(SC) 2734 at P. 2745) where this Court repelled the contention that an agreement on the part of the Government not to

acquire, for a period of 60 years the lands of the Company did not prevent the State from enacting or giving effect to a legislation for acquisition and that the surrender by the Government of its legislative powers which are intended to be used for public good cannot avail the Company or operate against the Government as equitable estoppel. It is unnecessary to expand the discussion and enlarge Authorities.

We do not think that the Union of India should be precluded from urging the contention as to invalidity in the present case.

[40] Under the circumstances, we are of the opinion that the Family Court passed the decree of dissolution of marriage without the basic ingredients required under sub-Section (1) of Section 13-B of the Hindu Marriage Act having been satisfied and without satisfying itself that such conditions were fulfilled, merely on a declaration made by the parties which, on the face of it, did not disclose satisfaction of such conditions and with non-application of mind recording facts which are contrary to the evidence on record. The Family Court recording grossly inaccurate facts which were material leaves us wondering if any genuine and sincere attempt was made to bring about reconciliation between the parties before the Court proceeded to pass a decree of dissolution or marriage.

[41] In the result, the appeal is allowed. Judgment and decree dated 5th May 2011 passed by the Family Court in Family Suit No. 1291 of 2010 is quashed and set aside. Decree of dissolution of marriage is reversed. First Appeal stands disposed of accordingly.

[42] In view of disposal of First Appeal, Civil Application does not survive and stands disposed of as infructuous. At this stage, learned Counsel for the respondent prayed that this judgment be stayed for a period of four weeks to enable the respondent to prefer further proceedings. Counsel for the appellant stated under instructions that the appellant shall not for the said period of four weeks, bring any proceedings before any Court on the basis of this judgment. On such statement, we do not find it necessary to grant stay as prayed for.