AFR

Neutral Citation No. - 2024:AHC:145278-DB

Court No. - 39

Case :- FIRST APPEAL No. - 155 of 2011

Counsel for Appellant :- Uma Nath Pandey,Vinod Sinha
Counsel for Respondent :- A.N.Pandey, D.R.Kushwaha, Manish C.Tiwari, Rajesh Kumar Dubey

Hon'ble Saumitra Dayal Singh,J.
Hon'ble Donadi Ramesh,J.

1. This is an old appeal. It has remained pending for 13 years. List revised. None appears for the respondent in either call. On the last date as well, none had appeared for the respondent. The appeal is listed peremptorily today. Heard Shri Mahesh Sharma, learned counsel for the appellant and perused the record.

2. Present appeal has been filed by the appellant/wife under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act') arising from the judgement and order dated 30.3.2011 passed by the learned Additional District Judge, Court no.8, Bulandshahar, in Original Suit No. 192 of 2008 (Pushpendra Kumar vs Smt. Pinki) whereby the learned Court below has dissolved the marriage between the parties under Section 13 of the Act, at the instance of the respondent/husband.

3. The parties were married on 2.2.2006 in accordance with the Act. At that time, the respondent was employed with the Indian Army. According to the plaint allegations, the appellant deserted her husband on 31.12.2007. On 11.02.2008, the respondent/husband instituted the

divorce suit, primarily on the ground of infertility suffered by the appellant. On such suit being filed, a Written Statement was filed by the appellant, on 01.04.2008. Though it is disputed to the appellant, that document - described as the first Written Statement, reads as below:

"प्रतिवाद पत्र द्वारा प्रतिवादी पिंकी उत्तरदाता निम्न प्रकार है:-

1- यह कि याचिका की धारा-1, 2, 3, 4, 5, 6, 7, 8, 9, 10 का कथन स्वीकार है।

2- यह कि वादपत्र की धारा-9 का कथन कानूनी है।

विशेष-कथन

3- यह कि मैं अपनी स्वेच्छा से अपने पिता के पास रह रही हूं।

4- यह कि यह सत्य है कि मेरे अभी तक कोई संतान नहीं है।

5- यह कि मैं पति की पाबन्दी में उसके पास रहना नहीं चाहती हूं।

6- यह कि तलाक की बाबत दावा डिग्री होने में मुझे भी कोई आपत्ति नहीं है।

सत्यापन :

मैं सत्यापित करती हूं कि
प्रतिवाद पत्र का समस्त कथन
मेरे ज्ञान में सच व सही है।
स्थान – बुलन्दशहर

प्रतिवादी / उत्तरदाता
श्रीमती पिंकी द्वारा
अधिवक्ता ।
ह०-अपठनीय
1-4-08
जगवीर सिंह, एडवोकेट
कलेक्ट्रेट एडवोकेट्स सभागार
बुलन्दशहर"

दिनांक- 1-4-08

4. The matter was referred to mediation by the learned Court below. On that, first mediation was attempted by Ms. Anupama Raghuvanshi. It concluded on 25.4.2008. Paper no. 8C-2 which is the mediation report, reads as below:

"परामर्श एवं सुलह समझौता केन्द्र बुलन्दशहर ।

न्यायालय अपर जिला जज कोर्ट नं0-2 बुलन्दशहर ।

ओ०स्त० 92/08

पुष्पेन्द्र कुमार बनाम श्रीमती पिंकी

श्रीमान जी,

दोनों पक्षकार उपस्थित आये। दोनों पक्षकारों के मध्य समझौता करवाने का प्रयास किया गया किन्तु दोनों ही आपसी सहमती से एक दूसरे से तलाक चाहते हैं ।

अतः पत्रावली पुनः न्यायालय प्रेषित की जाती है ।

परामर्शका
अनुपमा रघुवंशी, एडवोकेट
ह०/- अस्पष्ट

ह०/- पी. कुमार
ह०/- पिंकी

दिनांक *25-4-08*

ह० अस्पष्ट
अपर जिला एवं सत्र न्यायाधीश
न्याय कक्ष सं०-*2* बुलन्दशहर ।
25-4-08"

5. The matter remained pending for two years, thereafter. On 30.7.2010, the appellant/wife appears to have filed another/second Written Statement. It is Paper no.40A-1. It runs into eleven paragraphs. It reads as below:

"प्रतिवाद पत्र रेस्पोन्डेन्ट की ओर से

1- यह कि धारा-*1* पेटीशन से इन्कार नहीं है।

2- यह कि धारा-*2* पेटीशन स्वीकार है।

3- यह कि पेटीशन की धारा-*3* का कथन मिथ्या व मनगढ़न्त है तथा स्वीकार नहीं है। रेस्पान्डेन्ट माह जून सन् *2008* तक पेटीशनर के घर उसके परिजनों के साथ अपने पत्नी धर्म का पालन करते हुए रही है। पेटीशनर के सम्पर्क व सहवास से रेस्पान्डेन्ट ने माह नवम्बर *2007* में गर्भ धारण किया है। पेटीशनर का यह कथन कि रेस्पान्डेन्ट का चिकित्सकों द्वारा गर्भधारण संबंधी ईलाज कराया, मनगढ़न्त निराधार तथा असत्य है। रेस्पान्डेन्ट का गर्भवती होने मात्र से यह निर्विवाद है कि रेस्पान्डेन्ट मां बनने के अयोग्य संबंधी तथ्य कभी सामने नहीं आया।

4- यह कि धारा-*4* पेटीशन निराधार, असत्य एवं मनगढ़न्त है। रेस्पान्डेन्ट ने कभी पेटीशनर या अन्य परिजन के साथ अभद्र व्यवहार नहीं किया बल्कि सदैव अपने पत्नी के धर्म का पालन किया है। रेस्पान्डेन्ट की गर्भावस्था इस बात स्वमेव प्रमाण है कि रेस्पान्डेन्ट मां बनने के योग्य है।

5- यह कि पेटीशन की धारा-*5* असत्य है तथा स्वीकार नहीं है। रेस्पान्डेन्ट के आचरण की कभी कोई शिकायत नहीं की गयी।

6- यह कि धारा-*6* पेटीशन असत्य तथा मनगढ़न्त है एवं स्वीकार नहीं है। रेस्पान्डेन्ट कभी अपने पत्नी धर्म के विरुद्ध घर से बाहर नहीं निकली।

7- यह कि धारा-*7* पेटीशन असत्य है तथा स्वीकार नहीं है। रेस्पान्डेन्ट माह जून सन् *2008* के मध्य तक पेटीशनर के घर उसके परिजनों के साथ रही है। माह जून में गर्भावस्था के सातवें माह में माता पिता के घर कुछ दिन रहने के लिए पेटीशनर का भाई छोड़कर गया था तथा प्रसव से पूर्व वापिस ले जाने का वायदा किया था किन्तु अब रेस्पान्डेन्ट को पेटीशनर के परिजनों के साथ रहने में स्वयं अपना तथा बच्चे के जीवन को खतरा महसूस हो रहा है।

8- यह कि धारा-*8* पेटीशन स्वीकार नहीं है। पेटीशन का कोई कारण नहीं है।

9- यह कि धारा-*9* पेटीशन स्वीकार व अस्वीकार की आवश्यकता नहीं है।

10- यह कि धारा-*10* पेटीशन स्वीकार नहीं है। विवाह विच्छेद की आज्ञप्ति पारित किये जाने का कोई कारण या आधार नहीं है। पेटीशनर को विवाह विच्छेद की आज्ञप्ति पारित करके जीवन के मूल्यों को नकारते हुए रेस्पान्डेन्ट व होनेवाले बच्चों के जीवन से खिलवाड़ करने की स्वतंत्रता प्रदान नहीं की जा सकती। पेटीशन व्यय सहित निरस्त होने योग्य है।
विशेष-कथन

11- यह कि पेटीशन आधारहीन, तुच्छ, तंग करनेवाला तथा अनिश्चित है तथा विचारण से पूर्व खण्डित होने योग्य है।

मैं रेस्पान्डेन्ट सत्यापन करती हूं कि

प्रतिवाद पत्र की धारा *1* से *11* का

कथन मेरे ज्ञान में सत्य है।

सत्यापन स्थान-बुलन्दशहर

दिनांक – *30-7-2010*

रेस्पान्डेन्ट

द्वारा

मदन मोहन गर्ग, एडवोकेट

जजी, बुलन्दशहर

दिनांक"

6. Thereafter, further mediation appears to have been conducted. It is dated 20.08.2010. That second mediation was attempted by Mr. Ram Das Sharma. Its report is Paper No. 44C-2. It reads as below:

"श्रीमान जी,

विपक्षी श्रीमती पिंकी प्रार्थी पुष्पेंद्र के साथ बतौर पत्नी रहना चाहती है। परन्तु प्रार्थी पुष्पेंद्र विपक्षी को शारीरिक दोष बताकर साथ नहीं रखना चाहता। समझौता वार्ता सफल नही हो सका।

रिपोर्ट प्रेषित है।

दिनांक *20/8/2010*

संधिकरता
राम दास शर्मा
एडवोकेट "

7. In such status of pleading and proceeding, it is also borne out from the record - the oral statement of the appellant was recorded on 03.02.2011. She was also cross-examined. That statement reads as below:

"साक्षी विपक्षी पिंकी वाइफ आफ पुष्पेन्द्र उम्र *24* वर्ष पेशा-गृहणी निवासी ग्राम बबनपुरी डा० खास जिला बुलन्दशाहर ।

सशपथ बयान किया कि :-

xx xx xx xx द्वारा वादी पुष्पेन्द्र के साथ मेरी शादी के करीब *5* वर्ष हो गये है। मैं *2 1/2* वर्ष से अपने मायके में रह रही हूँ। मैं हाई स्कूल पास हूँ। मेरा बेटा व बेटी दोनों मायके में ही पैदा हुए था। बेटी रिया शादी के *2* साल बाद पैदा हुई थी उसकी जन्म तिथि *7-8-08* है । लड़के की जन्म तिथि *12-10-10* है । मुझे अपने पति पुष्पेन्द्र से कोई शिकायत नहीं है ।

संबंध खराब होने की कोई वजह नहीं है लड़की पैदा होने से पहले मेरा कही कोई इलाज नहीं हुआ। डा। निधि शर्मा के यहाँ पर मेरा कोई इलाज नहीं हुआ । मुझे इस दावे का पता जून वर्ष *2008* में चल गया था। मुझे नहीं पता कि मैं इस दावे में कोई जवाब दाखिल किया गया हो ।

कागज संख्या *9* ए पर लगा फोटो मेरा है। इस पर दस्तखत मेरे है जो कोरे कागज पर कराए गये थे ये दस्तखत मेरे कोई कागज़ पर वकील साहब ने करार थे। मैंने इस को नहीं पढ़ा था क्योंकि दस्तखत तो कोरे कागज पर कराए थे ।

यह कहना गलत है कि मैंने कोई सहमति तलाक के लिए दी हो ।

यह कहना सही है कि इस मुक्दमें में हम पक्षकार दिनांक *25-4-08* को तुबह समझौता केन्द्र पर उपस्थित हुए थे। कागज संख्या *8* सी *2* पर मेरे हस्ताक्षर है मैंने तलाक की सहमति नहीं दी।

मेरे दोनों बार हुए प्रसव का खर्चा मेरे मायके वालों ने उठाया था। वह क्योंकि खर्चा नहीं दे रहे थे इसलिए अपने पति से प्रसव के लिए खर्चा नहीं माँगा ।

सेना के अधिकारियों के सम्मुख समझौते की लिखत पढ़त *17-11-09* को हुई थी। यह समझौता सेना के अधिकारियों ने लिखा था । तब तक की मेरे सम्बन्ध खराब नहीं थे।

मुझे पुष्पेन्द्र के अलावा उसके घर वालों से भी कभी कोई शिकायत नहीं रही । सेना के अधिकारियों के सामने यह समझौता हुआ था कि पृष्पेन्द्र अपना केस वापस ले लेगा और हम साथ साथ रहेंगे। उसके बाद उन्होंने केस वापस नहीं लिया ।

मेरे डब्लू.एस. पेपर संख्या *40* ए। के पैरा *7* में जो लिखा है वह सच है क्योंकि उस समय की परिस्थितियों के अनुसार मुझे डर था । अब मुझे कोई खतरा नहीं है ।

यह कहना गलत है कि हमारे वैवाहिक सम्बन्ध *3-4* साल से बिल्कुल खत्म हो रहे हो । यह कहना भी गलत है कि मैं पुष्पेन्द्र के परिवार में अपनी मनमानी चलाती हूँ इसी वजह से हमारे सम्बन्ध खराब हुए हो ।

सुनकर तसदीक किया ।

उपरोक्त कथन मेरे बोलने पर
मेरे पेशकार द्वारा लिखा गया ।

ह० अस्पष्ट
अपर जनपद न्यायाधीश
कोर्ट नं*05,* बुलन्दशहर ।
3-2-11

ह०/- पिंकी"

8. As extracted above, in her oral statement, the appellant referred to another/third mediation conducted between her and the respondent, before the army authorities, on 17.11.2009. That document is paper no. 56 C-1/6. We consider it appropriate to extract the same as well. It reads:

"JOINT STATEMENT - BY EFFECTED PARTY AND WITNESSES ON CASE CONSIDERING ON PUSHPENDRA KUMAR AND HIS WIFE SMT. PINKI ON 17 NOV. 2009.

हम *NO 1466 3289 w cfn/Vm (Apv)* पुष्पेन्द्र कुमार पिंकी देवी *{*पुस्पेन्द्र की पत्नी*}* श्री उदयबीर सिंह पिंकी देवी के पिताजी और पुष्पेन्द्र के पिताजी श्री सतपाल सिंह हम सब ने मिलकर तारीख *16-11-2009* और *17-11-2009* को क्मान अधिकारी *23* फील्ड वर्कशाप मार्फत *56 APO* के समक्ष दफ्तर में परामर्श के बाद हम सब मिलकर इस निर्णय पहुंचे है ।

{क} कि हम दोनों पक्ष वाले जितने भी अदालत में केस चल रहे वो सभी वापिस लेने को तैयार है। इस तलाक के उपर अभी तक ।

*{ख}*फौज में भी हमने जो दरखास्त दिया है। वो तभी हमने वापिस लेने का निर्णय लिया है ।

{ग} श्रीमती पिंकी देवी और *cfn* - पुष्पेन्द्र कुमार की प्रार्थना है की हमें एक साथ रहने के लिए घर दिया जाये।

{घ} श्रीमती पिंकी देवी के परिवार की तरफ से और पुष्पेन्द्र के परिवार की तरफ से इनके निजी पारिवारिक जीवन में कोई दखलंदाजी नहीं करेंगे।

{ण} cfn पुष्पेन्द्र कुमार और श्रीमती पिंकी देवी की शादी तारीख *02* फरवरी *2006* में हुआ था। उस शादी में ना ही *cfn* पुष्पेन्द्र कुमार के परिवार ने दहेज लिया है और ना ही श्रीमती पिंकी देवी के परिवार ने दहेज दिया है। और नाही *cfn* - पृष्पेन्द्र के परिवार ने दहेज मांगा है ।

{च} आज तक जो भी समस्याएँ इस तलाक के विषय पर हुआ है। उसको हम इधर ही खत्म करके एक नया शरुआत करना चाहते हैं। जिसमें *cfn* पुष्पेन्द्र और उनकी पत्नी श्रीमती पिंकी देवी अपने शादीशुदा जिन्दगी को बरकरार रखे ।

{छ} अब से कुछ महीनों तक जब तक इस तलाक के उपर जो अदालत में केस खत्म नहीं होता है और पिंकी देवी के ससुराल पक्ष और उसके मायके पक्षधर परिवार सब सामाजिक परिस्थियाँ सामान्य नहीं हो जाती तब तक वो ना ससुराल जायेगी । और ना मायके जायेगी ।

{ज} यदि साथसाथ रहते समय *cfn* पुष्पेन्द्र कुमार और श्रीमती पिंकी देवी कोई गलती करता है तो उसका पूर्ण रूप से उत्तरदायित्व पति पत्नी ही होंगे । और विभागीय कार्यवाही इनको मान्य होगी ।

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सीएफएन पुष्पेन्द्र कुमार पुनिया

ह०/- अस्पष्ट

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9. Besides the above, the appellant had further filed certain documents to establish - neither she suffered from infertility nor it was true that no children were born to the parties. Her oral statement and documents on record indicate – she twice conceived and two children were born to her - on 7.2.2008 and 12.10.2010.

10. Thus, the appellant sought to contest the divorce proceedings - on the strength of her second Written Statement filed on 30.7.2010 and on the strength of evidence led by her.

11. The respondent raised objection that the second Written Statement filed by the appellant was not maintainable. He relied on Order VIII Rule 9, Code of Civil Procedure, 1908. In that status of the proceedings, the below quoted order dated 23.03.2011 was passed by the learned Court below:

> *"22-3-2011* आज पेश हुआ। पुकार पर पक्षकार हाजिर है। बहस विद्वान अधिवक्तागण पक्षकार सुनी गयी। वास्ते निर्णय दिनांक *29-3-11* को पेश हो।*"*

12. On the next date - on 28.3.2011, instead of delivering the order, the learned Court below passed the following order:

> *"*आज निर्णय लिखाते समय पत्रावली के अवलोकन से यह तथ्य संज्ञान में आया कि विपक्षी पिंकी द्वारा तामील के उपरान्त प्रतिवाद पत्र *9A* न्यायालय में दाखिल किया गया था तथा समझौता केन्द्र की रिपोर्ट भी दाखिल हुई लेकिन पेशकार द्वारा आदेश पत्र लिखा गया तथा पत्रावली को बाद विन्दु हेतु नियत किया गया।
>
> तत्पश्चात पुनः प्रतिवाद पत्र विपक्षी पिंकी की ओर से उनके दूसरे अधिवक्ता द्वारा *40A* दाखिल किया गया। अतः परिस्थितियों में न्यायालय के समक्ष यह विधिक प्रश्न है कि क्या पुनः दाखिल किया गया प्रतिवाद पत्र *40A* पोषणीय है*?"*
>
> क्या उक्त प्रतिवाद पत्र न्यायालय की अनुमति से दाखिल किया गया है*?* अतः दि० *29-3-11* को पक्षकार उक्त विधिक विन्दु पर अपने तर्क न्यायालय के समक्ष प्रस्तुत करें।*"*

13. Clearly, the date 29.03.2011 was fixed for hearing on the objection raised as to the maintainability of the second Written Statement filed by the appellant (on 30.07.2010). However, on that date fixed, the learned court below not only proceeded to sustain the objection raised by the respondent and thus rejected the second Written Statement filed

by the appellant (dated 30.7.2010), but it also proceeded to hear the divorce suit on merits. It has decreed the same.

14. In such circumstances, learned counsel for the appellant would submit, in the first place, the learned court below has committed an error in sustaining the objection raised by the respondent, as to the maintainability of the second Written Statement. Second, the learned court below has erred in proceeding to deal with the divorce suit proceedings on merits, on 30.03.2011, without fixing another date for hearing the divorce suit proceedings, on merits. Third, in any case, the learned court below has completely erred in decreeing the divorce suit proceeding.

15. Having heard learned counsel for the appellant and having perused the record, it is true - a Written Statement was first filed by the appellant on 01.04.2008. In that, consent was expressed by the appellant to the divorce being granted. However, it must be maintained that the instant divorce case proceeding had not arisen under Section 13-B of the Act. Rather, the divorce case was instituted by the respondent - husband under Section 13 of the Act. It may have been decided/decreed, after evidence. Allegations made were of impotency and that the appellant was a free willed person who used to go out of her home, on her own. No other fact was pleaded to assert either that the appellant had deserted her matrimonial home and/or that she had formed any immoral or adulterous relationship or that she had offered cruel behaviour.

16. Perusal of the record (as has been referred to above), clearly indicates, not once but twice mediation took place during the pendency of the divorce case. While the first mediation proceeding has been referred to by the learned court below, it has completely

escaped the attention of the learned court below that on the second occasion, vide report dated 20.08.2010 (as extracted above), mediation failed. Then, the learned Court below completely erred in overlooking the oral statement recorded by the appellant and the documents that were on record - to establish that mediation had also been attempted before the army authorities (employer of the respondent). In that, a clear joint-statement appears to have been recorded by the parties on 27.11.2009 - to cohabit and revive their matrimonial relationship, well after filing the first Written Statement and well after conclusion of the first mediation, on 25.04.2008.

17. Learned court below has also completely erred in overlooking the fact that after filing of the first Written Statement dated 01.04.2008 and the alleged settlement reached between the parties - to dissolve their marriage apart, not only another/contrary settlement was also reached, but two children were born to the parties, one just after the institution of the divorce suit proceedings and the other, two years thereafter, on 12.10.2010 i.e. well after the alleged settlement reached between them. That status of the pleadings and evidence clearly contradicted the stand that may have existed with the parties at the time of filing of the first Written Statement on 01.04.2008.

18. Seen in that light, first, Order VIII Rule 9 of the CPC reads as below:

> ***9. Subsequent pleadings.-*** *No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties cut and fix a time of not more than thirty days for presenting the same."*
>
> *(emphasis supplied)*

19. Thus, it is true that after filing of a Written Statement, no further Written Statement may arise (at the instance of the defendant), by way of a procedural right - except with the leave of the Court and upon such terms as the Court may provide. At the same time, that fetter placed on the procedural right of the parties, did not prevent the learned Court below from itself requiring additional Written Statement to be filed - if that appeared necessary to it to dispense true justice.

20. In the present facts, the learned Court below may not have proceeded to dissolve the (Hindu) marriage between the parties by solely considering the fact situation that existed up to the stage of filing of the first Written Statement on 01.04.2008 and the first mediation proceeding concluded on 28.04.2008. Subsequent conduct of the parties and their marital relationship as existed over the next three years could not have been ignored. To the extent it had material bearing on the relief sought by the respondent, demands of justice merited another course to be adopted by the learned Court below.

21. Being obligated to dispense justice, the learned court below could not have turned a blind eye to the fact assertion (made by the appellant) of revival of the marriage between the parties. It ought to have exercised its discretion - to call for Additional Written Statement of the appellant, to explain the subsequent developments. Unless that power had been exercised, the learned Court below may have felt disabled from delivering justice, in the status of pleadings and evidence existing.

22. The nature of power of the trial Court (under Order VIII Rule 9) was considered by Justice Mohan M. Shantanagoudar in his separate (partly dissenting) opinion expressed in **Ashok Kumar Kalra Vs. Wing CDR Surendra Agnihotri and Others (2020) 2 SCC 394**,

wherein with reference to Order VIII Rule 9 CPC, it was observed as below:

> *"33. A plain reading of Order 8 Rule 9 makes it clear that the court has the discretion to allow any subsequent pleading upon such terms as it thinks fit. It is important to appreciate here that such subsequent pleading or additional written statement may include a counterclaim. This is because Rule 9 does not create a bar on the nature of claims that can be raised as subsequent pleadings. As long as the court considers that it would be proper to allow a counterclaim by way of a subsequent pleading, it is possible to file a counterclaim after filing the written statement."*

23. In **River Valley Tea Co. Pvt. Ltd. v. Assam Gas Co. Ltd, 2018 SCC OnLine Gau 1168**, the Gauhati High Court had the occasion to consider the same provision wherein it observed as below:

> *"18. Having perused the judgments cited by the learned counsel for the petitioner, it leaves this court with no doubt that the trial court must record its satisfaction to the nature of subsequent pleading which is sought to be introduced. If the court is satisfied that the subsequent pleadings are required for the just and fair decision of the case, in such an event, the trial court even has suo motu inherent powers under order VIII, rule 9, CPC to direct that a rejoinder/replication be filed. However, if the rejoinder/replication is sought to be filed at the instance of the party, in that event the proposed replication is required to accompany the leave petition envisaged under rule 9, order VIII, CPC."*

24. Also, in **Kantipudi Adinarayana v. Putta Venkata Satya Subba Rao and Others 2024, SCC OnLine AP 1503**, the Andhra Pradesh High Court also had the occasion to consider the same provision. It specifically dealt with the *suo motu* nature of power vested in Courts, to call for additional Written Statement. In that, it has been observed as below:

> *"5. The situation contemplated under the first limb of the provisions of Rule 9 of CPC, is not attracted in the present case; the second limb of the provisions of Rule 9 of CPC, deals with the Suo moto discretion of the court alone, to call for an additional written statement, and not otherwise. In other words, the same is not allowable on an application filed by a party to the suit."*

25. Second, it also merits acceptance, once the learned court below had fixed the date 30.3.2011 to deal with the objections to the filing of

the second Written Statement (by the appellant), it may not have proceeded to pass the order on merits on the divorce petition, on the same date, without the consent of the appellant to thus proceed in the matter. In view of the earlier order dated 28.03.2011, in normal course, another date for hearing may have been fixed (on 30.03.2011), after the learned court below sustained the objection raised by the respondent to the second Written Statement filed by the appellant.

26. Last, even technically, in deciding any proceedings under Section 13 of the Act, the learned Court below may only have acted on proven facts. No ground of divorce pressed by the respondent was proven. The respondent did not prove the plaint pleadings, and the appellant did not support her first Written Statement, in her oral evidence. Rather, she disproved it. Hence, there was no proven fact before the learned Court below to dissolve the marriage between the parties, strictly in terms of section 13 (1) of the Act.

27. To the extent, the learned court below has dissolved the marriage solely on the strength of the alleged consent given by the appellant, after three years of it being recorded, clearly, a grave error of law has crept in the impugned order. In that the learned court below has failed to take note of the changed circumstances; of settlement reached between the parties before the army authorities; the consequential revival of their marriage and birth of their second child. In view of passage of time-more than eighteen months and subsequent events seen to exist, the learned Court below has erred in blindly acting on the consent recorded on 28.4.2008.

28. Though Section 13 of the Act contemplates divorce/dissolution of Hindu marriage after full-fledged contested proceedings, at times those proceeding may be concluded on the strength of mutual consent/

settlement/mediation, as well. Yet, Courts may remain reminded of the statutory principle contained in Section 13-B of the Act. For ready reference, it reads as below:

> *"(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 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.]"*
>
> *(emphasis supplied)*

29. In **Sureshta Devi Vs. Om Prakash, (1991) 2 SCC 25**, it was observed as below :

> *"At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that 'on the motion of both the parties ... if the petition is not withdrawn in the meantime, the court shall ... pass a decree of divorce ...'. What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."*
>
> *(emphasis supplied)*

30. Then, in **Smruti Pahariya Vs. Sanjay Pahariya, (2009) 13 SCC 338**, the principle discussed in **Sureshta Devi (supra)** was further

considered by a three-judge bench of the Supreme Court. It was further observed as below:

> *"40. In the Constitution Bench decision of this Court in Rupa Ashok Hurra, (2002) 4 SCC 388 this Court did not express any view contrary to the views of this Court in Sureshta Devi, (1991) 2 SCC 25. We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Sections 13-B(1) and 13-B(2), there is no scope of doubting the views taken in Sureshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.*
>
> *41. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).*
>
> *42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.*
>
> *43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."*
>
> *(emphasis supplied)*

31. Last, the above principle was again reiterated in **Hitesh Bhatnagar Vs. Deepa Bhatnagar, (2011) 5 SCC 234**. After, considering its own power under Article 142 of the Constitution of India, the Supreme Court made the following pertinent observation:

> *"23. It is settled law that this Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair. Even if the chances are infinitesimal for the marriage to*

survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably. We may make it clear that we have not finally expressed any opinion on this issue.

24. In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In the light of these facts and circumstances, it would be travesty of justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, we hope that they will give this union another chance, if not for themselves, for the future of their daughter. We conclude by quoting the great poet George Eliot.

"What greater thing is there for two human souls than to feel that they are joined for life -- to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting.""

32. Thus, by way of a guiding principle, the learned Court below should have examined and verified, on 30.03.2011, if the consent of the appellant (as noted by it on the strength of the first Written Statement filed on 01.04.2008 and as recorded before the Mediator on 25.04.2008), continued to exist without any change of mind made by the parties.

33. In granting the divorce on the strength of mutual consent, the learned Court below may have dissolved the marriage between the parties only in the event of that consent continuing to exist on the date of the order being passed. Once the appellant claimed to have withdrawn her consent and that fact was on the record, it never became open to the learned court below to act on that (withdrawn) consent, belatedly. In any case, it never became open to the learned court below to force the appellant to abide by the original consent given by her that too almost three years later. To do that would be

travesty of justice. Here, it may be noted, no money was paid to the appellant by way of permanent alimony etc., in lieu of her consent.

34. Thus, even if these were Section 13-B proceedings, the learned court below could not have ignored the statutory principle enshrined therein – that other thing apart, free consent to dissolve the marriage must not only arise at the stage of first motion of a proceeding under Section 13-B of the Act but it must survive and sustain at the stage of second motion. In that, the learned court below may presume that the consent may not continue to exist after expiry of 18 months from the date of it being given, unless the party giving such consent specifically maintains it, after expiry of eighteen months period.

35. Here, the appellant gave consent on 01.04.2008 and 25.04.2008. Eighteen months therefrom elapsed in the October 2009. She certainly withdrew from her consent in February 2011, at the stage of oral evidence. Therefore, no consent (to dissolve the marriage between the parties) existed on 30.03.2011 - when the learned court below first relied on the same to dissolve the marriage between the parties.

36. It requires no elaboration that a Hindu marriage is not to be dissolved or terminated as a contract. The sacrament based Hindu marriage may be dissolved (in law), in limited circumstances. In the first place, a Hindu marriage may be declared void on an allegation of impotency suffered by either spouse only on the strength of evidence led. To that extent the learned court below has completely ignored that such ground pressed in the plaint, was not proven.

37. As to the other ground if any, the learned court below ought to have examined the matter holistically. The divorce suit having been instituted in the year 2008 and it having remained pending for three years, an over simplistic approach has been adopted-in relying only on

the bald (first) Written Statement filed by the appellant, and the consent dated 28.04.2008, as recorded in the proceedings before the mediation centre attached to the learned court below while ignoring subsequent developments brought on record. We may have attempted to help the parties to resolve their dispute at this stage. However, since respondent had not appeared, that course is not available to us.

38. Seen in that light, the impugned judgement and order dated 30.03.2011 and the consequential decree cannot stand. Those are set aside. Matter is remitted to the learned court below to proceed in accordance with law. If no mediation may arise or be successful, necessarily the appellant may be allowed to rely on the second Written Statement in terms of later part of Order VIII Rule 9 of the C.P.C., with corresponding right to the respondent to file Replication Statement. Thus, the present appeal is **allowed**. No order as to costs.

Order Date :- 6.9.2024
Prakhar

(Donadi Ramesh, J.) **(S.D. Singh, J.)**