



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2638 OF 2022

.....Petitioner

Vs.

1. The State of Maharashtra,
(At the instance of Kalachowki Police Station).
- 2.

.....Respondents

Mr. Prabhjit Jauhar a/w Ms. Pooja Jalan i/b Mr. Bhomesh Bellam for the Petitioner.

Smt. Chhavi Goel, Respondent No. 2/Party in-person present.

Smt. Madhavi H. Mhatre, A.P.P. for Respondent No. 1-State.

PS.I. Mr. R. K. Pawar attached to Kalachowki Police Station, Mumbai present.

**CORAM : A. S. GADKARI AND
DR. NEELA GOKHALE, JJ.**

RESERVED ON : 30th SEPTEMBER 2024.

PRONOUNCED ON : 19th NOVEMBER 2024.

JUDGMENT (Per Dr. Neela Gokhale, J.) :-

- 1) The Petitioner seeks quashing of criminal proceedings bearing C.C. No. 1336/PW/2018 pending before the Metropolitan Magistrate, 15th Court at Sewree, Mumbai, arising out of C. R. No. 63 of 2018 dated 19th

April 2018 registered with the Kalachowki Police Station, Mumbai for the offences punishable under Sections 498-A & 406 read with 34 of the Indian Penal Code, 1860 (“IPC”).

2) The issue for determination in the present proceedings is, whether withdrawing consent to a mutual divorce as contemplated under the provision of Section 13B(2) of the Hindu Marriage Act, 1955 (“HMA”), amounts to abuse of process of law, sufficient to justify quashing of the criminal proceedings impugned herein.

3) The proceedings between the parties have a checkered history. It began with a Petition for divorce bearing HMA No. 669 of 2022, filed by the Petitioner herein against the Respondent No. 2 in the Family Court, Saket, New Delhi. Pursuant to a reference to mediation, a Settlement Agreement was executed. In terms of the Settlement Agreement, the parties had filed a First Motion under Section 13B(1) of the HMA before the Family Court, Saket, New Delhi and the Court recorded the statements of the parties. By an Order dated 14th September 2022, the Family Court allowed the First Motion and also recorded an advise to the parties to reflect on their motion and make efforts to save their marriage as per the intent of Section 13B provision. Liberty was given to the parties to approach the Court with the Second Motion as contemplated under Section 13B(2) of the HMA, if they were determined to dissolve their marriage by a Decree of Divorce.

4) The Settlement Agreement recorded certain terms and conditions to be complied with by the parties prior to filing of the Second Motion. It is the contention of Respondent No. 2 that, some conditions in the Settlement Agreement reproduced in the Affidavit-cum-Undertaking supporting the First Motion, were not complied with by the Petitioner. Moreover she claims that, her consent to the Settlement Agreement and the Affidavit supporting the First Motion were not free and she was coerced into agreeing for the same on account of certain circumstances etc. Hence, she decided not to proceed with the Second Motion under Section 13B(2) of the HMA, as she was allowed so to do under the provision itself.

5) The Petitioner filed a Contempt Petition No. 1342 of 2022 before the Delhi High Court. The learned Single Judge of the Delhi High Court vide its Judgment and Order dated 9th August 2023, held the Respondent No. 2-wife to have willfully violated the Settlement Agreement and acted in breach of the undertaking submitted before the Family Court in the 13B(1) motion. Thus the learned Single Judge held the Respondent No. 2 guilty of civil contempt under Section 2(b) of the Contempt of Courts Act, 1971. The Court also imposed a fine of Rs. 2,000/- on the Respondent No. 2 and sentenced her to undergo simple imprisonment for a term of one month and a further period of 15 days in default of payment of fine. The said Court further directed that, in case the Respondent No. 2 expressed any apology by complying with the terms and conditions of the Settlement

Agreement within a period of two weeks from the date of Order and further undertakes not to proceed with the legal proceedings already initiated by her against her husband and also furnishes an unconditional apology with the Court, the sentence of simple imprisonment shall stand recalled. It further directed that in the event she fails to comply with the apology etc. in terms of complying the terms and conditions of the Settlement Agreement, she shall appear before the Registrar General of the Delhi High Court for surrender. The Registrar General was directed to take all necessary steps to have the convicted Respondent No. 2-wife to be taken in custody and sent to the Tihar Central Jail under an appropriate warrant of commitment.

6) The Respondent No. 2 assailed the Order of learned Single Judge before the Division Bench of the Delhi High Court and by an Order dated 18th August 2023, the Division Bench suspended her sentence. The Petitioner assailed the Order dated 18th August 2023 passed by the Division Bench before the Supreme Court by way of an SLP (C) bearing No. 19519 of 2023. The Supreme Court refused to interfere with the Judgment and Order passed by the Division Bench of the Delhi High Court, suspending her sentence and by its Order dated 22nd September 2023 dismissed the SLP

7) The other limb of acrimony between the parties are the aforesaid criminal proceedings before us. The Respondent No. 2-wife filed F.I.R. under Section 498-A and other related Sections of IPC in the

Kalachowki Police Station, Mumbai. The present proceedings are challenge to the criminal proceedings arising out of the impugned F.I.R. The sole ground espoused is that, the act of the Respondent No. 2 in failing to join in filing the Second Motion under Section 13B(2) of the HMA and not complying with the terms and conditions of the settlement terms reproduced in the Affidavit supporting the First Motion, is an abuse of the process of law justifying quashing of the criminal proceedings. According to him, the Single Judge of the Delhi High Court having held non-compliance of the settlement terms/Affidavit by the Respondent No. 2 as contempt of Court, also justifies his contention. Hence the issue as framed in Paragraph No. 2 above arises for determination.

8) By an Order dated 11th January 2024, the Petition was admitted and further proceedings of C.C. No. 1336/PW/2018 pending on the file of the Metropolitan Magistrate, 15th Court at Sewree, Mumbai were stayed during the pendency of the present Petition. The Respondent No. 2 was served and she was granted permission by the Committee constituted under Rule 7 of Chapter IV-A of the Bombay High Court Appellate Side Rules, 1960, to appear in the Petition as party in-person and conduct the proceedings herself. Thus she appeared and argued the proceedings before us in-person. Mr. Prabhajit Jauhar, learned Counsel appeared for the Petitioner and Smt. Madhavi Mhatre, learned APP represented the State.

9) The case of the Respondent No. 2 as discerned from the F.I.R. is

as under:

9.1) The Respondent No. 2 resides alone at Parel, Mumbai from last 3 years. Prior to that and until 2017, both the parties were residing there. Till 2015 she was working in ICICI Bank and later was transferred to Mumbai. The Petitioner was serving as Director in the City Bank.

9.2) The Petitioner and Respondent No. 2 were married on 25th July 2015 as per the rites and ceremonies of Arya Samaj in a temple. This was the second marriage of both of them. The Petitioner has a son, Amogh, from his first marriage who was about 9 years of age at the time of their marriage. He is a challenged child and presently resides at Faridabad.

9.3) According to the Respondent No. 2 on the very first day after the marriage, her mother-in-law took away her jewelry worth Rs. 35,00,000/- weighing about 30 tolas from her. Although she was told that, she will get the ornaments if she wanted to wear the same for any occasion, however she has not been given the same till date. The Respondent No. 2 did not share the first night after the marriage with the Petitioner, but her mother-in-law only permitted Petitioner's minor son, Amogh, to sleep with her in the room. The next day when she offered to make Halwa for everybody, her mother-in-law taunted that, since she had not brought any substantial dowry, the Respondent No. 2 must make only onion parathas, and the family will feel as if they were compensated for having married their son to a pauper and they also said that, the Respondent No. 2 was

garbage. The Petitioner's parents physically abused Respondent No. 2 by pushing her on the ground and she hurt her forehead badly.

9.4) The Respondent No. 2 complained to the Petitioner however, he refused to intervene and said that, his family held patriarchal beliefs and she should adjust to their ways and not complain. Later when the parties went for their honeymoon, the Petitioner was extremely unkind to her and in fact told her that, on their return, the Respondent No. 2 should stay in Faridabad to look after his son, Amogh and the Petitioner would proceed to Mumbai to join his job. The Petitioner and his parents harassed her and told her that she should not conceive as only Amogh was the legal heir of their family and that, she was brought as a wife for the Petitioner only to look after the minor child as domestic help.

9.5) Eventually both the parties returned to Mumbai to join their respective jobs. The Respondent No. 2 got a transfer to Mumbai. During their stay in Mumbai, the Petitioner treated the Respondent No. 2 with utmost physical and mental cruelty. He used to insult and abuse her in front of the domestic help. He refused to give her any money for household expenses by saying that, she should spend her own money being a working woman. Even when the Respondent No. 2 was suffering from a slip disc ailment, the Petitioner left her alone in Mumbai and went away to his family at Faridabad. On 28th March 2017, the Petitioner returned from his gym and started abusing the Respondent No. 2 without any reason. He

accused her that, she was taking money from his bag and searched her cupboard and handbag. When he did not find anything, he shouted at her and thrashed her. This was a regular feature in her life. The Petitioner was accustomed to drinking alcohol and could not handle the drink. Many times, in an inebriated condition, he abused and beat Respondent No. 2 badly.

9.6) On 6th April 2017, the Petitioner left for Faridabad on the pretext that, his father and his minor son, Amogh, were unwell. However, when he failed to return, the Respondent No. 2 contacted him and asked him when he was likely to return. The Petitioner replied that he had no intention to return and alleged that, the Respondent No. 2 was suffering from Schizophrenia and he was afraid that she would kill his minor son, Amogh and suspected that she was already trying to kill him by poisoning his meals.

9.7) Thereafter, the Petitioner directed his driver to bring back both his BMW and Corolla cars to Faridabad and Delhi respectively from Mumbai. He refused to pay any expenses to the Respondent No. 2. In fact, he and his family members made demands of cash of Rs. 2 crores from the Respondent No. 2 and her father also received threats that, the Respondent No. 2 would be killed if she failed to vacate the flat at Parel. The Petitioner and his family have made innumerable efforts to drive the Respondent No. 2 out of the matrimonial home. There are various proceedings pending

between the parties pertaining to their matrimony including under the Domestic Violence Act, 2005 (DV Act), etc.

9.8) The gist of the F.I.R. is that, the Petitioner and his family members treated the Respondent No. 2 with utmost amount of physical and mental cruelty. She has narrated specific instances of cruelty in the F.I.R. She has also given a detailed description of the valuable ornaments taken from her by the Petitioner and his family and has claimed that the same were worth approx. Rs. 45,00,000/- as on the date of the F.I.R. She has thus alleged that, she has been beaten and abused by the Petitioner and his family members and repeated demands of dowry and cash were made from her and the Petitioner and his family members have committed acts defined in Section 498-A of the IPC. It is in these circumstances, that she has lodged the impugned F.I.R.

10) *Per contra*, the Petitioner has raised various grounds in the Petition supporting his prayer of quashing of the criminal proceedings arising from the impugned F.I.R. These grounds include the contentions that there are contrary statements of witnesses in the chargesheet; the prosecution is vitiated by malice on the part of the Respondent No. 2; the Respondent No. 2 has stated certain incorrect facts in her complaint under the DV Act; there is no consistency in the statements of the Respondent No. 2 in various proceedings initiated by her and the investigation carried out by the police is botched up. Notwithstanding the grounds raised by the

Petitioner in the Petition, while advancing arguments before us, learned counsel Mr. Jauhar canvassed the sole ground that, the Respondent No. 2-wife having filed the First Motion under Section 13B(1) of the HMA and now refusing to proceed with the Second Motion under Section 13B(2) of the HMA is nothing but an abuse of the process of law. He argued that such conduct of the Respondent No. 2, having been held as contumacious by the learned Single Judge of the Delhi High Court justifies quashing of the criminal proceedings against him. Withdrawing criminal proceedings was one of the terms of the Settlement Agreement and having failed to comply with the same, the Respondent No. 2 has abused the process of law.

10.1) Mr. Jauhar placed reliance on a decision of the Supreme Court in the matter of *Mohd. Shamim and Others Vs. Nahid Begum and Another*¹, to buttress his contention that once having agreed to the settlement terms executed between the parties, continuance of criminal proceedings against the Petitioner is an abuse of the process of the Court. He also placed reliance on another decision of the Supreme Court in the matter of *Ruchi Agrawal Vs. Amit Agrawal*² in which the Supreme Court opined that, a wife having received the relief she wanted without contest on the basis of the terms of the compromise, then failing to comply with the rest of the terms will be an abuse of process of law. It was thus urged that, the criminal proceedings be quashed and the Petition be allowed.

1. (2005)3 SCC 302.

2. (2005)3 SCC 299.

11) At the very outset, the Respondent No. 2 in a pointed reply to the above arguments of the Petitioner drew our attention to the view of the Supreme Court in the cited precedents. It is in fact held that, non-compliance of Settlement Agreement will reflect on the conduct of the party only if that party has received any benefit of any of the settlement terms. The Respondent No. 2 submits that, in fact she has paid an amount of Rs. 10,00,000/- to the Petitioner towards maintenance charges of the society. Furthermore, there are huge arrears towards interim alimony directed by the DV Court to be paid by the Petitioner to her. She contends that, she has no place of shelter save and except the flat at Parel where she currently resides and the Petitioner on the other hand, is a wealthy and affluent person having various house properties and also drawing a handsome salary. Apart from the above, she reiterates the contents of the F.I.R. to demonstrate the utmost cruelty and ill-treatment meted out to her by the Petitioner and his relatives. She argues that the Petitioner called her a mentally unstable person and went to the extent of telling friends and relatives that she suffered from Schizophrenia. She was beaten up mercilessly and abused in filthy language. Her valuable ornaments comprising her Streedhan are yet retained by the Petitioner and his relatives. She also placed reliance on various decisions of the Supreme Court and the Delhi High Court to canvass that, the very object of Section 13B(2) of the HMA is to facilitate a cooling off period for the parties and to

rethink their decision to proceed with the divorce proceedings. Thus she contended that merely refusing to proceed with the 13B(2) motion in the Family Court does not amount to abuse of the process of law since the statute itself has provided for such eventuality. She also contended that she was coerced, pressured and railroaded in agreeing for divorce by mutual consent on the terms in the Settlement Agreement. At that time, her father was diagnosed with cancer and she was being harassed on a daily basis by the Petitioner and his family to agree to the Consent Terms. It was in these circumstances that she agreed and on rethinking the circumstances, she is not inclined to proceed with the Second Motion. Without prejudice to this contention, she also points out that in fact it is the Petitioner who was to return Rs. 10,00,000/- paid by her towards the society maintenance charges as well as transfer the flat to her by way of executing a Gift Deed. The Respondent No. 2 also brought to our notice certain emails of the Petitioner and the society communicating that it is the Respondent No. 2, who will have to make efforts to get some documents from the society office and the Petitioner will not be inconvenienced for the same. Thus the Petitioner himself having reneged from acting upon the conditions of the Settlement Agreement, he cannot take advantage of his own wrong. She thus submits that even independent of the 13B proceedings, the Petitioner and his relatives are guilty of committing the offences as alleged and urges us to dismiss the Petition.

12) Smt. Mhatre, learned APP strongly refuted the arguments advanced on behalf of the Petitioner and supported the prosecution. She relied on the statements of witnesses in the chargesheet, who have corroborated the story of the Respondent No. 2. She also opposed the contention of the Petitioner that the investigation was botched up and was biased. She thus prayed that, the Petition be dismissed and the interim stay on the proceedings before the trial Court to be vacated.

13) We have heard Mr. Jauhar representing the Petitioner and the Respondent No. 2 in-person. We have also heard Smt. Mhatre for the State.

13.1) A plain but careful reading of the F.I.R. clearly reveals instances of cruelty inflicted by the Petitioner against the Respondent No. 2 to such an extent that she appears to be justified in harboring an apprehension that there will be danger to her life and limb at the hands of the Petitioner. In these circumstances, the Respondent No. 2 initiated legal proceedings against the Petitioner and his relatives. Firstly, she filed a complaint under the provisions of the DV Act seeking relief thereunder, including maintenance. A Divorce Petition was also filed in the Family Court, Saket, New Delhi. Mediation proceedings ensued therefrom resulting in execution of the Consent Terms. A Settlement Agreement dated 1st September 2022 provided for transfer of property namely the flat at Parel where the Respondent No. 2 currently resides, in her name by way of execution of a Gift Deed. All the documents related to the flat were agreed to be handed

over by the Petitioner to the Respondent No. 2, including the Bank loan documents.

14) Pursuant to the above, the Second Motion was to be proceeded with before the Family Court. Paragraph No. 27 of the Settlement Agreement provides that, the parties shall withdraw all the cases filed by them against each other within 10 days from the finalization of Gift Deed. The details of the cases to be withdrawn by the respective party is detailed in a tabular statement in Paragraph No. 30 of the Settlement Agreement. Paragraph No. 31 of the said Agreement provides that the subject F.I.R. shall be withdrawn by the Respondent No. 2 after passing of the final Decree of Divorce in Second Motion and obtaining the Gift Deed in respect of the said flat from the Sub-Registrar's office in Mumbai.

15) Admittedly, the Gift Deed is not executed till date by the Petitioner. On this ground alone, his argument regarding the Respondent No. 2 not complying with the terms of the Settlement Agreement fails. We have perused the emails exchanged *inter se* between the parties and their counsels. Some of the emails demonstrate that the Respondent No. 2 has time and again requested the Petitioner to hand over certain documents regarding the flat to her but he failed to do so. It is also indicated in the said emails that the society management informed the Respondent No. 2 that they were instructed by the Petitioner not to cooperate with her in procuring the necessary documents directly from the society. It is also

admitted that the Respondent No. 2 in fact has paid an amount of Rs. 10,00,000/- to the Petitioner towards society maintenance charges. There are arrears of interim alimony to be paid by the Petitioner to the Respondent No. 2 as directed by the learned Magistrate in the DV proceedings. The admitted facts themselves *prima facie* indicate that it is the Petitioner and not the Respondent No. 2 who has failed to act in aid of the Settlement Agreement. The Respondent-wife is well within her rights to withdraw her consent to the Second Motion since the Petitioner himself failed to act on the agreed terms. Thus, on facts, the conduct of the Respondent-wife is not established to be an abuse of the process of law.

16) On the legal aspect the provision of 13B of the HMA needs to be examined. Section 13B of the HMA provides for divorce by mutual consent. Section 13B reads thus :

“13B. 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) Commencement date 27-5-1976, 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.”

17) Section 13B was introduced in the HMA (w.e.f. 27/05/1976) by the Amending Act of 1976. Section 13B of HMA contemplates two stages. The first stage is of Section 13B(1) that lays down the essential requirements to be fulfilled by the parties as follows:

- (i) The Petition for divorce must be presented to the District Court;
- (ii) The said Petition must be presented jointly, by both the parties to a marriage whether such a marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976;
- (iii) The parties have been living separately for a period of one year;
- (iv) The parties have not been able to live together and
- (v) The parties mutually agreed that the marriage should be dissolved.

18) The second stage is of Section 13B(2) that relates to the manner in which the court exercises its jurisdiction, provides that both the parties must again appear in the Second Motion before the Court. The parties are required to make a joint motion not less than six months after the date of presentation of the First Motion and not later than 18 months after the said date.

19) The period of waiting ranging from six to eighteen months is intended to give an opportunity to the parties to reflect/renege and if one of the parties does not wish to proceed ahead with the divorce during this period, then divorce cannot be granted. In fact the Court itself loses jurisdiction to pass such an *ex parte* decree dissolving the marriage on application of only one party. The very object of providing of a six months period is an appreciation by the legislators of the fact that a marital discord creates upheaval in the lives of the affected persons. In a bid to end acrimony and trauma that follows, the parties may decide to file a consent Petition. Once the reality of ending the marriage sinks in, one of the parties may have second thoughts about ending the marital tie and may wish to save the relationship or simply not desire a divorce. Considering these circumstances, Section 13B(2) makes it mandatory for the continued consent of both parties till the Decree of Divorce by mutual consent is passed by the Court. Thus, any party is entitled under the Statute itself to renege his/her decision to proceed with the Mutual Consent Petition and

may withdraw from the proceedings. The Court then has no jurisdiction to proceed to grant a Decree of Divorce on an application of only one party and neither does it have any powers to compel the said party to proceed with a Second Motion. If the parties fail to approach the Court with the Second Motion under Section 13B(2), the Petition lapses on expiry of 18 months from the date on which the First Motion was filed.

20) It is at the stage of the Second Motion that the Court must conduct an enquiry as it may consider necessary, to satisfy itself as to the genuineness of the averments made in the Petition and also to verify as to whether the said consent was not obtained by force, fraud or undue influence, as contemplated under Section 23(1)(bb) of the HMA. The enquiry that the Court is required to undertake, may include a hearing or the examination of the parties. Only when the Court is satisfied after conducting an enquiry that the consent of the parties was not obtained by fraud, force or undue influence and that they had mutually agreed to dissolve the marriage, should a Decree of Divorce be passed.

21) This question arose before the Supreme Court in the case of *Sureshta Devi Vs. Om Prakash*³ as to whether it is open to one of the spouses at any time till a Decree of Divorce is passed, to withdraw the consent given to the Petition filed under Section 13B of the HMA. The Supreme Court noticed divergent views expressed by different High Courts.

3. (1991)2 SCC 25.

Earlier this High Court, the Delhi High Court and Madhya Pradesh High Court had taken a view that the critical time for the consent for divorce under Section 13B was when the First Petition was filed and if the consent was given voluntarily, it was not possible for any party to withdraw the said consent. On the other hand, the Kerala High Court, Punjab and Haryana High Court and Rajasthan High Court held that it is open to one of the spouses to withdraw the consent given to the Petition at any time before the Court passes a Decree of Divorce. On interpreting Section 13B of the HMA and analyzing the divergent views expressed by different High Courts, the Supreme Court approved the view expressed by the High Courts of Kerala, Punjab & Haryana High Court and Rajasthan on the interpretation of Section 13B(2) and held that:

“13. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the

crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. 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 13B 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 bonafides 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 added)”

22) The decision in the case of *Sureshta Devi (supra)* was endorsed by a three Judge Bench of the Supreme Court in the case of *Smruti Pahariya Vs. Sanjay Pahariya*⁴ in the following words:

“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

4. (2009)13 SCC 338.

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 added)"

23) Following the decision in the case of *Sureshta Devi (supra)*, in the case of *Anil Kumar Jain Vs. Maya Jain*⁵ the Supreme Court clarified that the doctrine of irretrievable breakdown of marriage is not available either to the High Court or the Civil Courts and only the Supreme Court can invoke its extraordinary jurisdiction under Article 142 of the Constitution of India to do complete justice to the parties, when faced with a situation where the marriage tie is completely broken and there is no possibility whatsoever of the spouses coming together again. It was further declared

5. (2009)10 SCC 415.

that under the existing laws, the consent given by the parties at the time of filing of the joint Petition for divorce by mutual consent, must subsist till the second stage when the Petition comes up for Orders and a Decree of Divorce is finally passed.

24) Similarly, in the case of *Hitesh Bhatnagar Vs. Deepa Bhatnagar*⁶ going by the language used in Section 13B of the HMA, the Supreme Court clarified that one of the parties may withdraw their consent at any time before passing of the Decree of Divorce and unless there is a complete agreement between the husband and wife for dissolution of the marriage and unless the Court is completely satisfied that a free consent has been given by both the parties, a Decree of Divorce by mutual consent cannot be granted.

25) From the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before passing of the Decree. The most important requirement for grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a Decree for divorce by mutual consent. Otherwise, in our view, the expression 'divorce by mutual consent' would be otiose.

26) The cooling off period though discretionary is meant to
6. (2011)6 S.C.R. 118.

facilitate the parties to think over their decision of getting a divorce and it helps them to reflect on their actions. The distinguishing feature of Section 13B of the HMA is that it recognizes the unqualified and unfettered right of a party to unilaterally withdraw the consent or reconsider/renege from a decision to apply for divorce by mutual consent, notwithstanding any undertaking given in any legal proceeding or recorded in any settlement/joint statement, in or outside the Court, resulting in a consent Order/Decree, to cooperate with the other spouse to file a Petition under Section 13B(1) of the HMA or a Second Motion under Section 13B(2) of the HMA or both. Withdrawal of the consent even at the stage of the enquiry, as contemplated under Section 13B(2) of the HMA, is also in exercise of the right available to a party under the very same provision. In other words, the mutuality of the consent to divorce should commence from the stage of filing the First Motion under Section 13B(1) of the HMA and it should continue at the time of moving the Second Motion under Section 13B(2) of the HMA, till such time that the Court completes the enquiry and a Decree of Divorce is finally passed. The said element of mutual consent is a *sine-qua-non* for passing a Decree of Divorce. This being the legal position, the defaulting party cannot be compelled to file or appear in the Petition or Motion or both, to seek divorce by mutual consent. Any other view will not only impinge on the jurisdiction of the court which has an obligation under the statute to undertake an independent enquiry before

passing a Decree of Divorce by mutual consent, it will also encroach upon or frustrate a statutory right vested in a party under Section 13B(2) of the HMA and go against the very spirit of the provision, at the heart of which lies the right of a party to reflect/revisit and retract from his/her decision of going ahead for grant of divorce by mutual consent, during the cooling off period.

27) This being the settled legal position of Section 13B of the HMA, we have no hesitation in holding that the act of the Respondent No. 2 in reneging from the Settlement Agreement cannot be said to be an abuse of the process of law to justify quashing of the criminal proceedings pending against the Petitioner. The mere fact that, the learned Single Judge of the Delhi High Court held the Respondent No. 2 in contempt for failing to join the Petitioner in filing a Second Motion need not deter us from endorsing the statutory right of the Respondent No. 2. Admittedly, an appeal against the said Order is pending before the Division Bench of that Court. The Division Bench has stayed the sentence imposed by the Single Judge and the stay is further ratified by the Supreme Court. It is also settled law that non-compliance of terms enumerated in an Affidavit/Undertaking supporting the First Motion under Section 13B(1) of the HMA will reflect on the conduct of the party only if the said party has benefited from such consent. As we have observed hereinabove, in fact it is the Petitioner who received about Rs. 10,00,000/- from the Respondent No. 2 towards society

charges but on the contrary failed to transfer the flat as agreed, in favor of the Respondent No. 2. It is the Petitioner and not the Respondent No. 2 who benefited from the consent terms in the First Motion. Hence failing to give consent for quashing of the present F.I.R. pursuant to the terms of the First Motion, in our considered view is not an abuse of the process of law. She is permitted by the very statute on which the Petitioner canvasses his argument, to renege her consent without adverse consequence.

28) Notwithstanding the fact that Mr. Jauhar, on behalf of the Petitioner limits his arguments to the aforesaid ground to assail the criminal proceedings, we have also perused the grounds set out in the Petition. The Petitioner's contention regarding contradictory statements of witnesses given to the police need to be tested in a trial. The accusation that the police botched up the investigation does not appeal us. At this stage, the High Court is not bound to hold a mini trial to determine the veracity of the allegations in the F.I.R./Chargesheet. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/Investigating Agency. A plain reading of the F.I.R. clearly reveals availability of sufficient material to proceed further against the Petitioner and clearly discloses commission of a cognizable offence. Furthermore, we are also informed that the Petitioner has already made an application seeking discharge from the criminal case under the relevant provision of the Cr.P.C., before the trial Court.

29) In view of the above deliberation, we are of the considered opinion that, criminal proceedings arising from the impugned F.I.R. does not deserve to be quashed

29.1) The Petition is accordingly dismissed.

29.2) Rule is discharged.

30) Interim Order dated 11th January 2024 staying the proceedings before the trial Court is vacated.

(DR. NEELA GOKHALE, J.)

(A. S. GADKARI, J.)

GITALAXMI
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