

SETTLEMENT OF HINDU DIVORCE PETITION BY COMPROMISE: NEED OF AN AMENDMENT

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Law is not something static. It is ever growing process and so is administration of justice. The dynamics of law is altered by many things. This, amongst many other things, includes a natural right to get a remedy and the procedure for securing the remedy. By this note I propose to share my views on the right to get remedy of divorce by way of a compromise which does not exactly fall within existing statutory frame work of Section 13B of Hindu Marriage Act and on the need for amendment in the law on this aspect.

Marriage between two Hindus is a subject of personal law but at present it is being governed by the codified law enacted by the Indian Parliament i.e. Hindu marriage Act 1955.

Hindu Marriage was considered as sacrament rather than a contract and there was no concept of Divorce under the customary Hindu Law. However, when the Hindu Marriage Act was enacted, provisions for the matrimonial relief of divorce were incorporated in the statute. Even in the Hindu Marriage Act, as originally enforced, there was no provision for divorce by mutual consent and the dynamics of law brought it into Hindu Marriage Act by way of amendment in the shape of Section 13B of Hindu Marriage Act 1955.

If we go into legislative history it will be revealed that Section 13 B was incorporated in the Hindu marriage Act by way of an amendment by Section 8 of Act No 68 of 1976. The need for amendment in the law was felt to give parties to the marriage an alternative to get rid of a state of unwanted and unwarranted relationship.

During earlier years of development of family laws the matrimonial dispute were rarely brought to the court, but with the pace of development,

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matrimonial disputes have also increased many fold with a need for their speedy adjudication. Due to the increase in the matrimonial disputes, it was felt that special courts, with specialized skills and tools, for dealing with Family matters be created so that the matrimonial disputes be handled properly and distinctly from ordinary civil disputes.

Distinction between a matrimonial dispute and ordinary civil litigation can be very clearly appreciated by considering their impact. In the first case the entire life of a human being is at stake. These kinds of disputes can disturb the social fabric and can cause irreparable loss and injury not only to the parties to matrimony but also to their offspring; whereas in the other case only property or some other right is at stake.

My little experience as Judge Family Court in different and major districts of this small state, a student of law and as a human being, living in this developing society, has taught me that at times distinction between matrimonial litigation and any other litigation is not properly appreciated. Many tools for dealing matrimonial litigations have either not been invented as yet or these are not very well crafted.

Hindu Marriage Act 1955 as it stands today makes provision for the dissolution of the marriage (I am not discussing the nullity of marriage here) under two different provisions. One contains fault ground and the rests upon no fault ground. I am talking about section 13 and 13B of Hindu Marriage Act.

The procedural law for dealing with these cases is contained in Family Court Act or the Civil Procedure Code (where Family Courts have not been constituted). Even the Family Court Act provides for applicability of Civil Procedure Code. In this background the provisions of Section 89 of the C.P.C. Order XII C.P.C., Order XXIII C.P.C. attain importance. The process of Alternative Dispute Redressal can be most usefully resorted to in matrimonial disputes. (*Refer Hon'ble Supreme Court in Afcons Infrastructure Ltd. v/s Cherian Varkey Construction Co (P) Ltd (2010) 8 SCC 24*). Provision contained in Section 23(2) of Hindu marriage Act mandates that it shall be the duty of 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 endeavor for amicable settlement. Section 9 of Family Court Act provides that every court will make an attempt to see that an amicable solution is found out.

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A problem of the nature that we are considering, in adjudication of a divorce petition, arises when parties to a divorce petition U/s 13 of Hindu Marriage Act, on an effort as contemplated by Section 23(2) of Hindu Marriage Act or Section 9 of Family Courts Act or otherwise, want to enter into some kind of settlement entailing to dissolution of marriage. The available procedural tools are

- (1) Admitting the contents of divorce petition resulting into decree under Order XII of C.P.C. Or
- (2) Applying to the Court to record a compromise and decree the suit/petition in terms of compromise under the provisions of Order 23 CPC.
- (3) To file a petition for divorce by mutual consent within the statutory framework and restrictions of Section 13B of Hindu Marriage Act.

In view of specific provisions of Section 13 and 13 B of Hindu Marriage Act, the vexed question is whether decree of divorce can be passed / secured by admitting the contents of divorce petition under Order XII of C.P.C. or applying to the Court to record a compromise and consequently decree the suit/petition in terms of compromise under the provisions of Order 23 CPC, or by withdrawing the petition filed Under Section 13 of the Hindu Marriage Act and then seek divorce within framework, statutory restrictions and guidelines contemplated in Section 13 B of Hindu Marriage Act

Once the parties to a divorce proceeding agree to settle their dispute, through mediation or any other ADR process, it is but obvious that they may decide to live together or part ways by dissolution of marriage. If the parties agree for a divorce the question arise whether they can do so by filing a compromise to this effect into the Court for getting a divorce in terms of the compromise in the pending petition originally filed U/s 13 of Hindu Marriage Act. The answer is a surprising NO. The reason is that a civil dispute between two litigants can be decided by compromise between the parties in terms of Order 23 of CPC. A plain reading of Order XXIII CPC makes it is amply clear that a civil suit can be decided in terms of compromise when the court is satisfied that the suit has been adjusted by any **lawful** agreement or compromise. Therefore the compromise field in

the court must be a lawful compromise i.e. compromise with lawful object and not against public policy. Answer to the question “what is a lawful agreement” lies in Section 23 of Indian Contract Act which provides for lawful agreements and says that the consideration or object of an agreement is lawful, unless -

It is forbidden by law; or

Is of such a nature that, if permitted, it would defeat the provisions of any law; or

Is fraudulent; or

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.

Keeping in mind the provisions of section 23 of Indian Contract Act, a compromise/agreement filed in a divorce proceedings will not be for a lawful object and thus void as it would be against mandate of Section 13 and 13 B of Hindu Marriage Act. The Hindu Marriage Act specifically provides that divorce can be granted either on some fault grounds enumerated under Section 13 of the Act or on the ground of mutual consent of the parties under Section 13 B of the Act provided certain preconditions are fulfilled.

This leads us to a stage of futility of exercise which are to be undertaken in compliance of statutory provisions of Section 23(2) of Hindu Marriage Act and Section 9 of Family Courts Act and thus there is need for an amendment permitting such compromises so that entire exercise may not go in vain and at least a hostility, if not the war, in the family, the smallest unit of our social fabric, may be put to rest.

An argument may be advanced that after the introduction of Section 13 B in the Hindu Marriage Act parties to the marriage have been given a choice to get the marriage dissolved by withdrawing the petition filed U/s 13 of Hindu Marriage Act and by filing a fresh petition for Divorce by mutual consent. But the answer shall again be the same as even after the introduction of Section 13B in the Hindu Marriage Act the position of the compromise shall be the same. Reason behind this is that the compromise

cannot fulfill the precondition prescribed by the Section 13 B of Hindu Marriage Act are as under -

- (i) parties to marriage are living separately;
- (ii) one year or more have passed since living separately;
- (iii) both of them have mutually agreed that their marriage should be dissolved;
- (iv) petition for divorce should be made by both the parties to the marriage; and
- (v) the consent should not be withdrawn by either of the parties on the motion made no earlier than six months after the date of presentation and not later than eighteen month after the date of presentation.

The Hon'ble Supreme Court in Sanjeeta Das v/s Tapan Kumar Mohanti (2010) 10 SCC 222 has observed that:

“No Court can assume jurisdiction to dissolve a Hindu Marriage simply on the basis of the consent of the parties dehors the grounds enumerated under Section 13 of the Act, unless of course the consenting parties proceed under Section 13B of the Act.”

In Anil Kumar Jain v/s Maya Jain (2009) 10 SCC 415, Hon'ble apex court has held-

“Supreme court can, in exercise of its extraordinary power under article 142 of the constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13B and pass a decree for mutual divorce, without waiting for the statutory period of six months; none of the other court can exercise such powers.”

Even the statutory waiting period of six months under Section 13B of Hindu Marriage Act cannot be waived in the light of the decisions passed by Hon'ble Supreme Court in Anil Jain's case (Supra). This view has been reiterated by the Hon'ble Supreme Court in a subsequent decision in Neeti Malviya v/s Rakesh Malviya (2010) 6 SCC 413 while referring to the decision of Anil Jain's case (Supra). The apex court has even gone further to refer the matter to a larger bench of three Hon'ble Judges for consideration of the following Question.

“Whether the period prescribed in sub section (2) of Section 13B of the Hindu Marriage Act, 1955 can be waived or reduced by this court in exercise of its jurisdiction under Art.142 of the constitution?”

Therefore the legal position, which emerge by the foregoing discussion, is that if a parties to a divorce proceeding enter into an agreement/compromise in which they agree to get their marriage dissolved by mutual consent they have to apply under Section 13B of the Hindu Marriage Act otherwise their compromise will be of such a nature that, if permitted would defeat the provisions of law i.e. Hindu Marriage Act and in that circumstances it will be an unlawful agreement/compromise and court cannot act upon it under order 23 Rule 3 of CPC.

In the absence of any specific provision there are practical difficulties in settlement of dispute between the parties of a divorce petition. For example in the existing legal frame work if a suit/petition is filed by one party to a marriage on fault ground under Section 13 of Hindu Marriage Act and the parties agree for settlement with the help of counselor or mediator or otherwise and they decide to part ways, with or without a condition of alimony by the husband to wife, the pending petition u/s 13 of Hindu Marriage Act is required to be withdrawn for filing a petition U/s 13B of Hindu Marriage Act. In such a situation not only a further lengthy process as contemplated in Section 13 B is to be adopted but it also acts counterproductively as the parties who have already lost trust on each other are always in doubt about intention of other party. Any such agreement will not be enforceable in a court of law at the instance of one party only, as in the present frame work a petition U/s 13B can be filed by both parties and by mutual consent only. There is always a doubt that in case, in furtherance of the compromise the plaintiff withdraws his/her petition for divorce filed under Section 13 of Hindu marriage Act, after paying the part or full amount of alimony or otherwise, the other party will not withdraw from its promise and will take the petition for divorce by mutual consent to its logical conclusion. The law rather permits a party to petition by mutual consent to withdraw the joint petition filed under Section 13B of Hindu Marriage Act, making the whole exercise futile and leaving the plaintiff/ the another party in a situation where its petition on the ground of fault, filed under Section 13 of Hindu Marriage Act, has been withdrawn with the bar created under order 23 R 1 (4) CPC, which precludes it from

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instituting a fresh suit in respect of such subject matter and thus leaving it without a remedy.

To my view the legislature cannot continue to be in a state of oblivion, apathetic to a situation where efforts are to be made for faster resolution of family disputes and then parties are to be left to lurch in state of confusion and despair.

In this background and from the aforesaid legal position dynamics of law has brought us to a point where, I feel there is a need to make amendment in law relating to divorce under Hindu Marriage Act so that parties who arrive at settlement during process of Mediation or A.D.R. or as result of efforts u/s 23(2) of Hindu Marriage Act or under Section 9 of Family Courts Act or otherwise during pendency of a divorce petition U/s 13 of Hindu Marriage Act, may not be required to abandon or withdraw the petition U/s 13 of Hindu Marriage Act for following the lengthy and tardy process of 13B of Hindu Marriage Act besides danger of dragging itself into a remedy less situation.
