

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K. NARENDRAN

&

THE HONOURABLE MR. JUSTICE P.G. AJITHKUMAR

THURSDAY, THE 13TH DAY OF APRIL 2023 / 23RD CHAITHRA, 1945

MAT.APPEAL NO. 444 OF 2022

AGAINST THE JUDGMENT DATED 22.04.2021 IN O.P.NO.2351 OF
2019 OF FAMILY COURT, TRIVANDRUM

APPELLANT/S:

JAYARAJ R., AGED 39 YEARS,
S/O. N.RASEKHARAN PILLAI, HAVING PERMANENT
ADDRESS AT REVATHY, CHERAVALLY, KAYAMKULAM,
ALAPPUZHA, KERALA

BY ADVS.
K.KUSUMAM
K.KALESH
R.S.REJITHA
P.T.MARY
ACHUTHAN K.

RESPONDENT/S:

KAVYA G NAIR, AGED 34 YEARS,
D/O. R.SUKUMARAN NAIR, HAVING PERMANENT ADDRESS
AT GOWRISANKARAM (CHIRAKAROTTU), KALANJOOR P.O.,
PATHANAMTHITTA, KERALA, NOW RESIDING AT
TC 5/192 (10), PNRA/D-56, SREEKRISHNA LANE,
KOWDIYAR VILLAGE, THIRUVANATHAPURAM-695 003

BY ADVS.
Adv. Sabu S. (Kallaramoola)
LEEJOY MATHEW.V.(K/1005/2003)

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
06.03.2023, THE COURT ON 13.04.2023 DELIVERED THE FOLLOWING:

“CR”

JUDGMENT

Anil K. Narendran, J.

The appellant is the 1st petitioner in O.P.No.2351 of 2019 on the file of the Family Court, Thiruvananthapuram, a joint petition filed by the appellant-husband along with the respondent herein-wife, under Section 13B of the Hindu Marriage Act, 1955, seeking a decree of divorce by mutual consent to dissolve the marriage solemnised between them on 26.05.2010 at Crown Auditorium, Kallumkadavu, Pathanapuram, in accordance with the customary rites and ceremonies. When that original petition came up for consideration, the respondent herein filed a memo dated 12.04.2021, withdrawing her consent for a decree of divorce by mutual consent. On 22.04.2021, the Family Court noticed that the 2nd petitioner, i.e., the respondent herein, has withdrawn her consent and filed a memo. The 1st petitioner-husband was absent. Further, the parties were continuously absent. Therefore, the Family Court dismissed O.P.No.2351 of 2019 by the judgment and decree dated 22.04.2021. Feeling aggrieved, the appellant is before this Court in this appeal, invoking the provisions under Section 19(1) of the Family Courts Act, 1984.

2. On 28.06.2022, when this appeal came up for admission, this Court issued urgent notice to the respondent by speed post. On 06.10.2022 when the appeal came up for consideration, lower court records were called for.

3. Heard the learned counsel for the appellant-husband and the learned counsel for the respondent-wife.

4. The learned counsel for the appellant relied on the decision of the Apex Court in **Anil Kumar Jain v. Maya Jain [(2009) 10 SCC 415]**, the judgment of a Division Bench of this Court in **Benny v. Mini [2021 (1) KHC 723]** and the judgment of a learned Single Judge of the Bombay High Court in **Prakash Alumal Kalandari v. Jahnavi Prakash Kalandari [AIR 2011 Bom. 119]**. On the other hand, the learned counsel for the respondent-wife relied on the judgment of a Division Bench of this Court in **Rajesh R. Nair v. Meera Babu [2014 (1) KHC 83]** and referred to paragraph 9 of the Division Bench decision in **Benny [2021 (1) KHC 723]**.

5. The marriage between the appellant and the respondent was solemnised on 26.05.2010, in accordance with the customary rites and ceremonies, and out of the wedlock, a male child was born to them on 15.04.2011, who is presently

aged 12 years. Both parties are living separately from 20.06.2017 onwards. According to the appellant, since the marital relationship between the parties has been irretrievably broken down, at the intervention of senior members of the family, well-wishers and mediators, the parties have mutually decided to dissolve their marriage, after settling all the disputes between them. They decided to file a joint petition under Section 13B of the Hindu Marriage Act seeking a decree of divorce by mutual consent. Accordingly, a compromise agreement dated 11.10.2019 was entered into between the parties, which is produced along with this appeal as an additional document, in which the father of the appellant signed as the first witness and the father of the respondent as the second witness.

6. In clause (1) of the agreement dated 11.10.2019, it is stated that the marriage between the appellant and the respondent was solemnised on 26.05.2010 at Crown Auditorium, Pathanapuram in Kollam District, as per Hindu religious custom and practices. Out of that wedlock, a male child named Nishal Jayaraj, who is presently aged 12 years, was born. In clause (2) of the agreement, it is stated that the appellant and the respondent have filed O.P.No.2351 of 2019 before the Family

Court, Thiruvananthapuram, on 11.10.2019, for dissolving their marriage by mutual consent. As per clause (3) of the agreement, gold ornaments worn by the respondent at the time of marriage have been returned to her, which she had acknowledged. As per clause (4) of the agreement, the custody of the minor child shall be with the respondent and the appellant shall have the right to meet the child at any time and also to contact him over phone, to interfere with his educational matters, and to give all that are necessary for his welfare and proper upbringing. The parents of the appellant and also his sister are entitled to similar rights. As per clause (5) of the agreement, the ownership of a Honda City car bearing registration No.KL-29/B-8562, which is in the name of the appellant, shall be transferred to the name of the respondent within one month from the date of execution of the agreement. As per clause (6) of the agreement, the appellant has agreed to deposit in a fixed deposit in the name of the minor child, an amount of Rs.20,00,000/-, before 31.12.2019. As per clause (7) of the agreement, the respondent was permitted to continue in UAE, on the strength of the Family Visa of the appellant, for a period of six months from the date of execution of the agreement. After the expiry of the said period, the appellant is at liberty to

take necessary steps to remove the name of the respondent from the Family Visa. In clause (8) of the agreement, the respondent has agreed to vacate the apartment in Abu Dhabi, which is in the name of the appellant, within a period of ten days from the date of execution of the agreement. In clause (9) of the agreement, both parties have agreed that both of them shall not make any comments, either directly or through the phone, causing mental agony to the other spouse. In clause (10) of the agreement, both of them have agreed to abide by the conditions stipulated in that agreement.

7. In paragraph 6 of O.P.No.2351 of 2013 filed before the Family Court on 11.10.2019, a joint petition filed under Section 13B of the Hindu Marriage Act, it is stated that the parties have agreed to dissolve the marriage by mutual consent. The entire financial claims between the parties are settled in terms of the conditions in clauses (i) to (iii) of the said paragraph. Paragraph 6 of the original petition reads thus;

“6. Now the petitioners have agreed to dissolve the marriage by mutual consent. Entire financial claims between the petitioners are settled between themselves in terms of the following conditions;

(i) Presently the child is in the custody of the 2nd petitioner. Both the petitioners have agreed that the present custody

of the child will be continued with the 2nd petitioner. It is also agreed mutually that the 1st petitioner can visit the child whenever he requires, without affecting his studies.

(ii) The above conditions are mutually agreed and accepted by the petitioners.

(iii) All other disputes between the parties have been settled. The petitioners shall not file any legal proceedings or raise any disputes against each other.”

(underline supplied)

8. In paragraphs 4 and 5 of the memo dated 12.04.2021, [para.5 wrongly numbered as para.6], the respondent-wife has stated the reasons for withdrawing the consent. Paragraphs 4 and 5 of the said memo reads thus;

“4. ഞാനും ഒന്നാം ഹർജിക്കാരനും ഭാര്യഭർത്താക്കൻമാരായി താമസിച്ചിരുന്നതും എന്നാൽ ഒന്നാം ഹർജിക്കാരൻ കുടുംബ കാര്യദികൾ അന്വേഷിക്കാതെ വരുകയും, മദ്യലഹരിയിൽ എന്നെ ക്രൂരമായി ഉപദ്രവിക്കുകയും, അകാരണമായി എന്നെ സംശയിക്കുകയും ചെയ്തിട്ടുള്ളതുമാകുന്നു. ഒന്നാം ഹർജിക്കാരൻ ഞാനുമായുള്ള വിവാഹബന്ധം വേർപെടുത്തണമെന്ന് പറഞ്ഞ് നിരന്തരം എന്നെ ക്രൂരമായി മാനസീകമായും ശാരീരികമായും ഉപദ്രവിക്കുകയും തുടർന്ന് ടിയാന്റെ നിർബന്ധത്തിനു വഴങ്ങി ഞാൻ വിവാഹ സമ്മതം ഉഭയസമ്മതപ്രകാരം വേർപെടുത്താനുള്ള ഹർജി ഒപ്പിടുന്നൽകിയിട്ടുള്ളതുമാകുന്നു. ഞാൻ ഇപ്രകാരം വിവാഹബന്ധം ഉഭയസമ്മതപ്രകാരം വേർപെടുത്താനുള്ള ഹർജിയിൽ ഒപ്പിട്ടതിന്റെ യഥാർത്ഥ വസ്തുതകൾ എന്റെ മാതാപിതാക്കളേയും ബന്ധുക്കളേയും ബോധ്യപ്പെടുത്താൻ സാധിക്കാതെ വന്നിട്ടുള്ളതുമാകുന്നു.

5. ടി ഹർജി ഫയൽ ചെയ്ത് പുനർചിന്തയ്ക്കായുള്ള കാലയളവിൽ ഞാൻ ആലോചിച്ചപ്പോൾ മൈനർ സന്താനത്തിന്റെ ഭാവിക്ഷേമത്തിന് ഞാനും എതിർകക്ഷിയും തമ്മിലുള്ള കുടുംബജീവിതം ഒരുമിച്ച് നയിക്കുന്നതാണ് നല്ലതെന്ന് എനിക്ക് പൂർണ്ണമായി ബോധ്യപ്പെടുകയും തുടർന്ന് ടി നമ്പർ ഹർജി ഫയൽ ചെയ്ത സമയം നൽകിയ സമ്മതം ഞാൻ പിൻവലിക്കാൻ തീരുമാനിക്കുകയും ആയതിന് ടി മെമ്മോ ഞാൻ ബഹുമാനപ്പെട്ട കോടതി മുമ്പാകെ ഹാജരാക്കിയിട്ടുള്ളതുമാകുന്നു.”

9. Section 13B of the Hindu Marriage Act deals with divorce by mutual consent. As per sub-section (1) of Section 13B,

subject to the provisions of the 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 solemnised 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. As per sub-section (2) of Section 13B, 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 solemnised 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.

10. In **Sureshta Devi v. Om Prakash [(1991) 2 SCC 25]** a Two-Judge Bench of the Apex Court held that Section 13B of the Hindu Marriage Act, 1955 is in *pari materia* with Section

28 of the Special Marriage Act, 1954. Sub-section (1) of Section 13B requires that the petition for divorce by mutual consent must be presented to the court jointly by both parties. Similarly, the motion before the court provided under sub-section (2) of Section 13B for hearing of the petition should also be by both parties. There are three other requirements in sub-section (1) of Section 13B, that they have been living separately for a period of one year, that they have not been able to live together, and that they have mutually agreed that marriage should be dissolved. 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 the petition, the parties must have been living separately. The expression 'living separately', connotes '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. Under sub-section (2) of Section 13B, the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.

11. In **Sureshta Devi [(1991) 2 SCC 25]** the question before the Apex Court was whether it is open to one of the parties at any time till the decree of divorce is passed to withdraw the

consent given to the petition. The Apex Court noticed that the need for a detailed study on the question has arisen because the High Courts do not speak with one voice on this aspect. The Bombay High Court in **Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe [AIR 1982 Bom 302]** has expressed the view that the crucial time for the consent for divorce under Section 13B of the Act was the time when the petition was filed. If the consent was voluntarily given it would not be possible for any party to nullify the petition by withdrawing the consent. The court has drawn support to this conclusion from the principle underlying Order XXIII Rule 1 of the Code of Civil Procedure, 1908 which provides that if a suit is filed jointly by one or more plaintiffs, such a suit or a part of a claim cannot be abandoned or withdrawn by one of the plaintiffs or one of the parties to the suit. The High Court of Delhi adopted a similar line of reasoning in **Chander Kanta v. Hans Kumar [AIR 1989 Del 73]** and the Madhya Pradesh High Court in **Meena Dutta v. Anirudh Dutta [(1984) 2 DMC 388 (MP)]** also took a similar view. But the Kerala High Court in **K.I. Mohanan v. Jeejabai [AIR 1988 Ker 28 : 1986 KLT 990]** the Punjab and Haryana High Court in **Harcharan Kaur v. Nachhattar Singh [AIR 1988 P&H 27]**

and the Rajasthan High Court in **Santosh Kumari v. Virendra Kumar [AIR 1986 Raj 128]** have taken a contrary view. It has been *inter alia*, 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 for divorce. The satisfaction of the court after holding an inquiry about the genuineness of the consent necessarily contemplates an opportunity for either of the spouses to withdraw the consent. The Kerala High Court, in particular, has ruled out the application of analogy under Order XXIII Rule 1 of the Code of Civil Procedure, since it is dissimilar to the situation arising under Section 13B of the Act.

12. In **Sureshta Devi [(1991) 2 SCC 25]** the Apex Court noticed that, from the analysis of Section 13B of the Act, 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 of mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section

(2). There is nothing in the section which prevents such a 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 a decree of divorce. The Apex Court noticed that the above 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 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 decree of divorce even at the instance of

one of the parties and against the consent of the other. Such a decree cannot be regarded as a decree by mutual consent. Sub-section (2) of Section 13B requires the court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the court cannot pass a decree of divorce by mutual consent. If the court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a *sine qua non* for passing a decree for divorce under Section 13B. Mutual consent should continue till the decree of divorce is passed. It is a positive requirement for the court to pass a decree of divorce. "The consent must continue to decree nisi and must be valid subsisting consent when the case is heard". See: (i) Halsbury's Laws of England, 4th Edn., Vol. 13 Para 645; (ii) Rayden on Divorce, 12th Edn., Vol. 1, Page 291; and (iii) **Beales v. Beales [(1972) 2 All ER 667, 674]**. Therefore, the Apex Court found that the interpretation given to Section 13B by the Kerala High Court in **K.I. Mohanan [AIR 1988 Ker 28 : 1986 KLT 990]**, the Punjab and Haryana High Court in **Harcharan Kaur [AIR 1988 P&H 27]** and the

Rajasthan High Court in **Santosh Kumari v. Virendra Kumar [AIR 1986 Raj 128]** appears to be correct and affirmed that view. The decisions of the Bombay High Court in **Jayashree Ramesh Londhe [AIR 1982 Bom 302]**, High Court of Delhi in **Chander Kanta [AIR 1989 Del 73]** and Madhya Pradesh High Court in **Meena Dutta v. Anirudh Dutta [(1984) 2 DMC 388 (MP)]** cannot be said to have laid down the law correctly and they stand overruled.

13. In **Ashok Hurra v. Rupa Bipin Zaveri [(1997) 4 SCC 226]**, before a Two-Judge Bench of the Apex Court, the learned counsel for the respondent heavily relied on the decision of the Apex Court in **Sureshta Devi [(1991) 2 SCC 25]** and contended that it is open to one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition, and mutual consent to the divorce is a *sine qua non* for passing a decree for divorce under Section 13B of the Hindu Marriage Act. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce. Since this crucial or vital aspect is absent in the case on hand, the matter is concluded and it is unnecessary to consider the other aspects urged regarding Section 13B of the

Act or to focus attention on the totality of the circumstances to consider whether any other appropriate orders should be passed by the Apex Court at that juncture. On the other hand, the learned counsel for the appellant contended that the actual issue involved in **Sureshta Devi [(1991) 2 SCC 25]** was in a narrow compass, namely, whether the consent given can be unilaterally withdrawn. In that case, the consent was withdrawn within the period of 18 months and no question arose as to whether the consent can be withdrawn 18 months after the filing of the joint petition and so the decision is distinguishable. But the court considered the larger question as to whether it is open to one of the parties till the decree of divorce is passed, to withdraw the consent given to the petition. The decision on the larger question is only obiter and the decision requires reconsideration. That apart, the Apex Court has got the power to consider the totality of the circumstances, including the subsequent events, in order to do complete justice in the matter.

14. In **Ashok Hurra [(1997) 4 SCC 226]** the Apex Court opined that, in the light of the fact-situation of the case on hand, the conduct of the parties, the admissions made by the parties in the joint petition filed in court, and the offer made by appellant's

counsel for settlement, which appears to be bona fide, and the conclusion reached on an overall view of the matter, it may not be necessary to deal with the rival pleas urged by the parties regarding the scope of Section 13B of the Act and the correctness or otherwise of the earlier decision in **Sureshta Devi [(1991) 2 SCC 25]** or the various decisions of High Courts brought to the notice of the Court, in detail. However, the Apex Court observed that certain observations in **Sureshta Devi [(1991) 2 SCC 25]** seem to be very wide and may require reconsideration in an appropriate case. Paragraph 16 of the decision in **Ashok Hurra [(1997) 4 SCC 226]** reads thus;

“16. We are of the opinion that in the light of the fact situation present in this case, the conduct of the parties, the admissions made by the parties in the joint petition filed in Court, and the offer made by the appellant's counsel for settlement, which appears to be bona fide, and the conclusion reached by us on an overall view of the matter, it may not be necessary to deal with the rival pleas urged by the parties regarding the scope of Section 13B of the Act and the correctness or otherwise of the earlier decision of this Court in **Sureshta Devi [(1991) 2 SCC 25]** or the various High Court decisions brought to our notice, in detail. However, with great respect to the learned Judges who rendered the decision in **Sureshta Devi [(1991) 2 SCC 25]**, certain observations therein

seem to be very wide and may require reconsideration in an appropriate case. In the said case, the facts were:

The appellant (wife) before this Court married the respondent therein on 21.11.1968. They did not stay together from 09.12.1984 onwards. On 09.01.1985, the husband and wife together moved a petition under Section 13B of the Act for divorce by mutual consent. The Court recorded statements of the parties. On 15.01.1985, the wife filed an application in the Court stating that her statement dated 09.01.1985 was obtained under pressure and threat. She prayed for the withdrawal of her consent for the petition filed under Section 13B and also prayed for dismissal of the petition. The District Judge dismissed the petition filed under Section 13B of the Act. In appeal, the High Court observed that the spouse who has given consent to a petition for divorce cannot unilaterally withdraw the consent and such withdrawal, however, would not take away the jurisdiction of the court to dissolve the marriage by mutual consent, if the consent was otherwise free. It was found that the appellant (wife) gave her consent to the petition without any force, fraud or undue influence and so she was bound by that consent. The issue that came up for consideration before this Court was, whether a party to a petition for divorce by mutual consent under Section 13B of the Act, can unilaterally withdraw the consent and whether the consent once given is irrevocable. It was undisputed that the consent was withdrawn

within a week from the date of filing of the joint petition under Section 13B. It was within the time limit prescribed under Section 13B(2) of the Act. On the above premises, the crucial question was whether the consent given could be unilaterally withdrawn. The question as to whether a party to a joint application filed under Section 13B of the Act can withdraw the consent beyond the time limit provided under Section 13B(2) of the Act did not arise for consideration. It was not in issue at all. Even so, the Court considered the larger question as to whether it is open to one of the parties at any time till a decree of divorce is passed to withdraw the consent given to the petition. In considering the larger issue, conflicting views of the High Courts were adverted to and finally, the Court held that the mutual consent should continue till the divorce decree is passed. In the light of the clear import of the language employed in Section 13B(2) of the Act, it appears that in a joint petition duly filed under Section 13B(1) of the Act, the motion of both parties should be made six months after the date of filing of the petition and not later than 18 months, if the petition is not withdrawn in the meantime. In other words, the period of interregnum of 6 to 18 months was intended to give time and opportunity to the parties to have a second thought and change the mind. If it is not so done within the outer limit of 18 months, the petition duly filed under Section 13B(1) and still pending shall be adjudicated by the Court

as provided in Section 13B(2) of the Act. It appears to us, the observations of this Court to the effect that mutual consent should continue till the divorce decree is passed, even if the petition is not withdrawn by one of the parties within the period of 18 months, appears to be too wide and does not logically accord with Section 13B(2) of the Act. However, it is unnecessary to decide this vexed issue in this case, since we have reached the conclusion on the fact situation herein. The decision in **Sureshta Devi [(1991) 2 SCC 25]** may require reconsideration in an appropriate case. We leave it there.” (underline supplied)

15. In **Anil Kumar Jain v. Maya Jain [(2009) 10 SCC 415]**, a decision relied on by the learned counsel for the appellant, a Two-Judge Bench of the Apex Court was dealing with a case in which the Additional District Court, Chhindwara, dismissed the joint petition under Section 13B of the Hindu Marriage Act, on account of withdrawal of consent by the respondent-wife. Aggrieved by the said order, the appellant filed an appeal before the High Court of Madhya Pradesh. Even before the High Court, the respondent-wife expressed her desire to live separately from the appellant, but she did not want that a decree of dissolution of marriage be passed. In that view of the matter, the learned Single Judge dismissed the first appeal. While

dismissing the appeal, the learned Single Judge took note of the decision of the Apex Court in similar circumstances in **Ashok Hurra [(1997) 4 SCC 226]** wherein the Apex Court granted a decree of divorce by mutual consent, exercising its extraordinary powers under Article 142 of the Constitution of India. It was indicated that the High Court did not have such powers and Section 13B of the Act required that the consent of the spouses on the basis of which the petition under Section 13B was presented, had to continue till a decree of divorce was passed by mutual consent. On that basis, the learned Single Judge of the High Court, while dismissing the appeal, observed that the appellant would be free to file a petition for divorce in accordance with law, which would be decided on its own merits by keeping in mind the special fact that the parties were living separately for about five years and the respondent-wife was adamant about living apart from her husband. It is against the said order passed by the High Court, rejecting the appellant's prayer for the grant of divorce by mutual consent, that the appeal was filed before the Apex Court.

16. In **Anil Kumar Jain [(2009) 10 SCC 415]**, before the Apex Court, the learned counsel for the appellant contended

that, prior to the filing of the petition for divorce by mutual consent, the parties had entered into a settlement, which had been fully acted upon by the appellant and that under the said agreement valuable property rights had been transferred to the respondent-wife, which she was and is still enjoying. Apart from the above, the attitude of the respondent-wife in openly declaring that she had no intention to remain with the appellant, was sufficient to indicate that the marriage had broken down irretrievably and in similar circumstances the Apex Court had invoked its extraordinary powers under Article 142 of the Constitution of India to grant a decree of divorce under Section 13B, even though one of the parties had withdrawn consent before the passing of the final decree. Reference was made to the decision in **Ashok Hurra [(1997) 4 SCC 226]**, which also involved a petition under Section 13B of the Act.

17. In **Anil Kumar Jain [(2009) 10 SCC 415]**, the Apex Court noticed that the facts of **Ashok Hurra [(1997) 4 SCC 226]** were a little different from those in the case on hand. In **Ashok Hurra [(1997) 4 SCC 226]**, after six months from the date of filing of the petition under Section 13B, an application was filed by the husband alone for a decree of divorce on the petition under

Section 13B of the Act. The wife did not join in the said application. She made a separate application for withdrawal of consent given by her for mutual divorce after the expiry of eighteen months from the date of presentation of the divorce petition. Sub-section (1) of Section 13B is the enabling section for presenting a petition for the dissolution of a marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties have been living separately for a period of one year or more and that they have not been able to live together, which is also the factual reality in the case on hand. Sub-section (2) of Section 13B, however, provides the procedural steps that are required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the court. The language in sub-section (2) is very specific that it intends that on a motion of both the parties made not earlier than six months after the date of 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, pass a decree of divorce declaring the marriage to

be dissolved with effect from the date of the decree. The question whether the consent of both the parties given at the time of presentation of the petition for mutual divorce under Section 13B of the Act must continue till the decree is finally passed, has been the subject-matter of several decisions of the Apex Court. The issue was raised in **Sureshta Devi [(1991) 2 SCC 25]** wherein it was held that the consent given by the parties to the filing of a petition for mutual divorce had to subsist till a decree was passed on the petition and that in the event, either of the parties withdrew the consent, before passing of the final decree, the petition under Section 13B of the Act would not survive and would have to be dismissed. However, in **Ashok Hurra [(1997) 4 SCC 226]** doubts were expressed by the Apex Court with regard to certain observations made in **Sureshta Devi [(1991) 2 SCC 25]** and it was felt that the same might require reconsideration in an appropriate case. Basing their decision on the doctrine of irretrievable breakdown of marriage, the Hon'ble Judges were of the view that no useful purpose would be served in prolonging the agony of the parties to a marriage, which had broken down irretrievably, and that the curtain had to be rung down at some stage. It was further observed in **Ashok Hurra [(1997) 4 SCC**

226] that the Court had to take a total and broad view of the ground realities of the situation, while dealing with the adjustment of human relationships, placing reliance on the decision in **Chandrakala Menon v. Capt. Vipin Menon [(1993) 2 SCC 6]**. In **Sureshta Devi [(1991) 2 SCC 25]**, although, indisputably consent for the petition under Section 13B of the Act was withdrawn within a week from the date of the filing of the joint petition, the Apex Court, in the exercise of its powers under Article 142 of the Constitution, granted a decree of divorce by mutual consent under Section 13B of the Act and dissolved the marriage between the parties in order to meet the ends of justice, subject to certain conditions. It was also made clear that the decree would take effect only upon satisfaction of the conditions indicated therein. The decision in **Ashok Hurra [(1997) 4 SCC 226]** invoking the power under Article 142 of the Constitution was followed in several cases, based upon the doctrine of irretrievable breakdown of marriage. Although the decision in **Sureshta Devi [(1991) 2 SCC 25]** was referred to in the decision rendered in **Ashok Hurra [(1997) 4 SCC 226]** and it was observed therein that the said decision possibly required reconsideration in an appropriate case, none of the other cases

has dealt with the question which arose in **Sureshta Devi [(1991) 2 SCC 25]**, namely, whether in a proceeding under Section 13B of the Hindu Marriage Act, consent of the parties was required to subsist till a final decree was passed on the petition. Various decisions, which are referred to in **Anil Kumar Jain [(2009) 10 SCC 415]**, merely indicate that the Apex Court can in special circumstances pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances, the provisions of the statute have to be given effect to. In **Anil Kumar Jain [(2009) 10 SCC 415]** the Apex Court held that the law as explained in Sureshta Devi [(1991) 2 SCC 25] still holds good, though with certain variations as far as the Apex Court is concerned and that too in the light of Article 142 of the Constitution.

18. In **Anil Kumar Jain [(2009) 10 SCC 415]**, on the facts of the case on hand, the Apex Court noticed that the respondent-wife has made it very clear that she will not live with the petitioner, but, on the other hand, she is also not agreeable to a mutual divorce. In ordinary circumstances, the petitioner's remedy would lie in filing a separate petition before the Family

Court under Section 13 of the Act, on the grounds available, but in the case on hand, there are certain admitted facts which attract the provisions of Section 13B thereof. One of the grounds available under Section 13B is that the couple have been living separately for one year or more and that, they have not been able to live together. The parties are living separately for more than seven years. As part of the agreement between the parties, the appellant had transferred valuable property rights in favour of the respondent and it was after registration of such transfer of property that she withdrew her consent for divorce. She still continues to enjoy the property and insists on living separately from her husband. Therefore, following the decision in **Sureshta Devi [(1991) 2 SCC 25]**, it is a fit case where the Court may exercise the powers vested in it under Article 142 of the Constitution. The stand of the respondent-wife that she wants to live separately from her husband but is not agreeable to a mutual divorce is not acceptable, since living separately is one of the grounds for grant of a mutual divorce and admittedly the parties are living separately for more than seven years. The appeal was, therefore, allowed, and the impugned judgment and order of the High Court were set aside and the petition for grant of mutual

divorce under Section 13B of the Hindu Marriage Act, 1955, was accepted.

19. In **Smruti Pahariya v. Sanjay Pahariya [(2009) 13 SCC 338]** a Three-Judge Bench was dealing with a case in which the appellant-wife and respondent-husband married on 05.03.1993, as per Hindu rites and ceremonies. They had two children. They started living separately since January 2005, about 12 years after the marriage. On 19.05.2007, they filed a joint application under Section 13B of the Hindu Marriage Act for the dissolution of their marriage by mutual consent. The husband remained absent on 19.11.2007, the hearing date fixed as per the requirements of Section 13B(2) of the Act. The matter was adjourned to 01.12.2007 and the Family Court asked the advocate to inform the husband in this regard. But the wife on the same day, i.e., 19.11.2007, made an application to summon the husband. The summon was not properly served and endorsed and it returned. The Family Court, on the affidavit of the wife, ordered substituted service of summons under Order V Rule 20 of the Code of Civil Procedure, 1908. 03.12.2007, the summons was pasted on the door of his residence. On 04.12.2007, the husband was absent and therefore, the Family Court adjourned

the matter to 10.12.2007. However, the Family Court advanced the matter to 05.12.2007, when the wife made an *ex parte* application, and passed an *ex parte* order of divorce on the very same day. The order of the Family Court was set aside by the High Court of Judicature at Bombay, which was challenged before the Apex Court. In the factual background of the case on hand, the Apex Court formulated the following questions for its consideration;

(i) Whether impugned decree of divorce passed by the Family Court on 05.12.2007 is vitiated by procedural irregularity?

(ii) Whether by conducting the proceeding, in the manner it did, the Family Court acted contrary to the avowed object of the Family Courts Act, 1984?

(iii) Whether from the absence of the husband before the Family Court on 19.11.2007, 01.12.2007 and 04.12.2007 it can be inferred that his consent for grant of divorce on a petition on mutual consent subsists, even though he has not withdrawn the petition for divorce on mutual consent?

(iv) Whether on a proper construction of Section 13B(2) of the said Act, which speaks of "the motion of both the parties", this Court can hold that the Family Court can dissolve a marriage and grant a decree of divorce in the absence of one of the parties and without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

(underline supplied)

20. In **Smruti Pahariya [(2009) 13 SCC 338]** the Three-Judge Bench noticed that on the question, how to ascertain continuing consent in a proceeding under Section 13B of the Hindu Marriage Act, the decision in **Sureshta Devi [(1991) 2 SCC 25]** gives considerable guidance. In paras 13 and 14, the learned Judges gave an interpretation to Section 13B(2) and in doing so the learned Judges made it clear that the reasons given by the High Courts of Bombay and Delhi are untenable inasmuch as both the High Courts held that once the consent is given by the parties at the time of filing the petition, it is impossible for them to withdraw the same to nullify the petition. It was made clear in **Sureshta Devi [(1991) 2 SCC 25]** that under Section 13B(2), the requirement is the “motion of both the parties” and interpreting the same, the learned Judges made it clear that there should be mutual consent when they move the court with a request to pass a decree of divorce and there should be consent also at the time when the court is called upon to make an enquiry, if the petition is not withdrawn, and then pass the final decree. Interpreting the said section, it was held in **Sureshta Devi [(1991) 2 SCC 25]** that, if the petition is not withdrawn in the meantime, the court, at the time of making the enquiry,

does not have any jurisdiction to pass a decree, unless there is mutual consent. The learned Judges made it further clear that if the court makes an enquiry and passes 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 a decree by mutual consent. In **Smruti Pahariya [(2009) 13 SCC 338]** the Three-Judge Bench endorsed the views taken in **Sureshta Devi [(1991) 2 SCC 25]**, holding that, on a proper construction of the provision in Sections 13B(1) and 13B(2), there is no scope of doubting the views taken in Sureshta Devi [(1991) 2 SCC 25] and that, the decision which was rendered by the Two-Judge Bench in **Ashok Hurra [(1997) 4 SCC 226]** has to be treated to be one rendered in the facts of that case. In **Smruti Pahariya [(2009) 13 SCC 338]**, the Three-Judge Bench concluded that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13B of the said Act can be passed by the court. If the 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. Paragraphs 32 to 42 of the said decision read thus;

“32. On the question of how to ascertain continuing consent in a proceeding under Section 13B of the said Act, the decision in **Sureshta Devi v. Om Prakash [(1991) 2 SCC 25]** gives considerable guidance. In para 8 of the said judgment, this Court summed up the requirement of Section 13B(1) as follows: **Sureshta Devi case [(1991) 2 SCC 25]**, SCC p.29, para.8

“8. There are three other requirements in sub-section (1). They are:

- (i) They have been living separately for a period of one year,
- (ii) They have not been able to live together, and
- (iii) They have mutually agreed that marriage should be dissolved.”

34. In paras 13 and 14 of **Sureshta Devi [(1991) 2 SCC 25]** the learned Judges gave an interpretation to Section 13B(2) and in doing so the learned Judges made it clear that the reasons given by the High Courts of Bombay and Delhi are untenable inasmuch as both the High Courts held that once the consent is given by the parties at the time of filing the petition, it is impossible for them to withdraw the same to nullify the petition. We also find that the interpretation given by the Delhi and Bombay High Courts is contrary to the very wording of Section 13B(2) which recognises the possibility of withdrawing the petition filed on consent during the time when such petition has to be kept pending.

35. In para 13 of **Sureshta Devi [(1991) 2 SCC 25]** the learned Judges made the position clear by holding as follows: (SCC p. 31)

“13. ... 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 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.”

36. Therefore, it was made clear in **Sureshta Devi [(1991) 2 SCC 25]** that under Section 13B(2), the requirement is the “motion of both the parties” and interpreting the same, the learned Judges made it clear that there should be mutual consent when they move the

court with a request to pass a decree of divorce and there should be consent also at the time when the court is called upon to make an enquiry, if the petition is not withdrawn, and then pass the final decree. Interpreting the said section, it was held in **Sureshta Devi [(1991) 2 SCC 25]** that if the petition is not withdrawn in the meantime, the court, at the time of making the enquiry, does not have any jurisdiction to pass a decree, unless there is mutual consent.

37. The learned Judges made it further clear that if the court makes an enquiry and passes 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 a decree by mutual consent. In para 14 of the said judgment in **Sureshta Devi [(1991) 2 SCC 25]**, the learned Judges made it further clear as follows: (SCC p.31)

“14. ... If the court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce. ‘The consent must continue to decree nisi and must be valid subsisting consent when the case is heard.’ [See (i) Halsbury's Laws of England, 4th Edn., Vol.13, Para 645; (ii) Rayden on Divorce, 12th

Edn., Vol.1, p.291; and (iii) Beales v. Beales - (1972) 2 All ER 667]"

In para 15 of the judgment, this Court held that the decisions of the High Courts of Bombay, Delhi and Madhya Pradesh cannot be said to have laid down the law correctly and those judgments were overruled. We also hold accordingly.

38. The decision in **Sureshta Devi [(1991) 2 SCC 25]** was rendered by a Bench of two learned Judges of this Court. In a subsequent decision of two learned Judges of this Court in **Ashok Hurra v. Rupa Bipin Zaveri [(1997) 4 SCC 226]** the judgment in **Sureshta Devi [(1991) 2 SCC 25]** was doubted as according to the learned Judges some of the observations in **Sureshta Devi [(1991) 2 SCC 25]** appear to be too wide and require reconsideration in an appropriate case. The learned Judges in **Ashok Hurra [(1997) 4 SCC 226]** made it clear that they were passing the order in that case on the peculiar fact situation. This Court also held that in the exercise of its jurisdiction under Article 142 of the Constitution, a decree of divorce by mutual consent under Section 13B of the Act was granted between the parties. [See paras 16 and 22 of the Report]. It appears that those observations were made by the learned Judges without considering the provisions of the Family Courts Act. In any event, the decision in **Ashok Hurra [(1997) 4 SCC 226]** was considered by a larger Bench of this Court in **Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 388]**. No doubt was expressed by the larger Bench on the principles laid down in **Sureshta Devi [(1991) 2 SCC 25]**.

39. It appears that a petition for review was filed against the Two-Judge decision in **Ashok Hurra [(1997) 4 SCC 226]** and the same was dismissed. Thereafter, the question before the Constitution Bench in **Rupa Ashok Hurra [(2002) 4 SCC 388]** was as follows: (SCC p.396, para 1)

“1. ... ‘Whether the judgment of this Court dated 10.03.1997 **Ashok Hurra [(1997) 4 SCC 226]** can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgment of this Court after the petition for review of the said judgment has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court.’ ”

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 [(1991) 2 SCC 25]** as we find that on a proper construction of the provision in Sections 13B(1) and 13B(2), there is no scope of doubting the views taken in **Sureshta Devi [(1991) 2 SCC 25]**. In fact, the decision which was rendered by the two learned Judges of this Court in **Ashok Hurra [(1997) 4 SCC 226]** 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 [(1991) 2 SCC 25]**.

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 13B of the said Act can be passed by the court. If the 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.” (underline supplied)

21. In **Hitesh Bhatnagar v. Deepa Bhatnagar [(2011) 5 SCC 234]**, a Two-Judge Bench of the Apex Court was dealing with a case in which the appellant-husband and the respondent-wife filed a petition before the District Court, Gurgaon, under Section 13B of the Hindu Marriage Act, for dissolution of the marriage seeking a decree of divorce by mutual consent. However, before the stage of the second motion and passing of the decree of divorce, the respondent-wife withdrew her consent, and in view of this, the petition came to be dismissed by the Additional District Judge, Gurgaon, though the appellant-husband insisted for passing of the decree. The appellant, being

aggrieved, filed an appeal before the High Court of Punjab and Haryana, which ended in dismissal. Being aggrieved, he approached the Apex Court. The issues considered by the Apex Court were as under;

“(a) Whether the consent once given in a petition for divorce by mutual consent can be subsequently withdrawn by one of the parties after the expiry of 18 months from the date of the filing of the petition in accordance with Section 13B(1) of the Act?

(b) Whether the court can grant a decree of divorce by mutual consent when the consent has been withdrawn by one of the parties, and if so, under what circumstances?

(underline supplied)

22. In **Hitesh Bhatnagar [(2011) 5 SCC 234]** the Apex Court noticed that the parties have filed a petition for divorce by mutual consent on 17.08.2001 expressing their desire to dissolve their marriage due to temperamental incompatibility. However, before the stage of the second motion, the respondent-wife withdrew her consent by filing an application dated 22.03.2003. The withdrawal of consent was after a period of eighteen months of filing the petition. The respondent-wife, who appeared before the Apex Court in person submitted that she was taken by surprise when she was asked by the appellant-husband for divorce, and had given the initial consent under mental stress

and duress. She stated that she never wanted a divorce and is even now willing to live with the appellant as his wife. On the other hand, the appellant, who also appeared before the Apex Court in person, submitted that at the time of filing of the petition, a settlement was reached between the parties, wherein it was agreed that he would pay her Rs.3.5 Lakhs, of which he has already paid Rs.1.5 lakhs in three instalments. He is willing to take care of the respondent's and their daughter's future interest, by making a substantial financial payment, in order to amicably settle the matter. However, despite repeated efforts for a settlement, the respondent is not agreeable to a decree of divorce. She says that she wants to live with the appellant as his wife, especially for the future of their only child. The Apex Court noticed that the question as to whether consent once given can be withdrawn in a proceeding for divorce by mutual consent is no more *res integra*. A Two-Judge Bench of the Apex Court in **Sureshta Devi [(1991) 2 SCC 25]** has concluded this issue and the view expressed in the said decision as of now holds the field. On the question as to whether one of the parties may withdraw the consent at any time before the actual decree of divorce is passed, it was held in the said decision that, what is

significant in Section 13B of the Act 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 a decree by mutual consent. The observations in **Ashok Hurra [(1997) 4 SCC 226]** cannot be considered to be *ratio decidendi* for all purposes and is limited to the facts of that case. In other words, the ratio laid down by this Court in Sureshta Devi [(1991) 2 SCC 25] still holds the field.

23. In **Hitesh Bhatnagar [(2011) 5 SCC 234]** the Apex Court noticed that in **Smruti Pahariya v. Sanjay Pahariya [(2009) 13 SCC 338]** a Three-Judge Bench, while approving the ratio laid down in **Sureshta Devi [(1991) 2 SCC 25]**, has taken the view that, in the Constitution Bench decision in **Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 388]** the Court did not express any view contrary to the views in **Sureshta**

Devi [(1991) 2 SCC 25]. In **Hitesh Bhatnagar [(2011) 5 SCC 234]**, the Apex Court endorsed the view taken in **Sureshta Devi [(1991) 2 SCC 25]** as the Court found that on a proper construction of the provision in Section 13B(1) and Section 13B(2), there is no scope of doubting the views taken in **Sureshta Devi [(1991) 2 SCC 25]**. In fact, the decision which was rendered by the Two-Judge Bench in **Ashok Hurra [(1997) 4 SCC 226]** 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.

24. In **Hitesh Bhatnagar [(2011) 5 SCC 234]** the appellant-husband contended that the Additional District Judge, Gurgaon was bound to grant divorce if the consent was not withdrawn within a period of 18 months in view of the language employed in Section 13B(2) of the Act. The Apex Court found no merit in the said contention, in the light of the law laid down in **Sureshta Devi [(1991) 2 SCC 25]**.

25. In **Hitesh Bhatnagar [(2011) 5 SCC 234]** the Apex Court noticed that the language employed in Section 13B(2) of the Act is clear. The court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved

with effect from the date of the decree, if the following conditions are met:

- “(a) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;
- (b) After hearing the parties and making such inquiry as it thinks fit, the court is satisfied that the averments in the petition are true; and
- (c) The petition is not withdrawn by either party at any time before passing the decree.

In other words, if the second motion is not made within the period of 18 months, then the court is not bound to pass a decree of divorce by mutual consent. Besides, 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 the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is the free consent of both 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, the expression ‘divorce by mutual consent’ would be otiose. The Apex Court noticed that, in the case on hand, the second motion was never made by both parties, as it is a mandatory requirement of the law. As already

stated, no court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. The eighteen-month period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant.

26. In **Rajesh R. Nair v. Meera Babu [2014 (1) KHC 83]**, a decision relied on by the learned counsel for the respondent, a Division Bench of this Court noticed that, a married couple living separately for a period of one year or more, are entitled to present a petition under Section 13B of the Act for dissolving their marriage by mutual consent, provided they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Therefore, for the presentation of the petition, there should be an agreement between a separated couple that they have not been able to live together and also that they had agreed that the marriage should be dissolved. Based on such agreement, once the petition is presented, further action to be taken by the court is as provided under sub-section (2) of Section 13B. That sub-section provides that on the motion of both the parties made not earlier than six

months after the presentation of the petition and not later than eighteen months, if the petition is not withdrawn in the meantime, the court shall, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree under Section 13B. Therefore, the question of conducting the enquiry as provided under sub-section (2) of Section 13B(2) arises only if the petition is not withdrawn within the period specified at the opening part of the said sub-section. In other words, at the stage of enquiry also, the parties are at liberty to withdraw a petition and once the petition is withdrawn by either of the parties, the Court loses its jurisdiction to pass a decree of divorce by mutual consent.

27. In **Rajesh R. Nair [2014 (1) KHC 83]**, on the facts of the case on hand, the Division Bench noticed that, admittedly, the petition was presented under Section 13B(1) of the Act, on the basis of Annexure A2 compromise between the parties, and the respondent withdrew her consent at the stage when the enquiry was to be held under Section 13B(2). Evidently, the withdrawal of the consent was a unilateral one and on facts, it was clear that such withdrawal of the consent was after availing

of the advantages of some of the beneficial provisions of the compromise between the parties. In that back drop, the question considered by the Division Bench was as to whether the unilateral withdrawal of consent by one of the parties is permissible and whether the court can enquire into the bona fides of such withdrawal and if it is found that it is not bona fide, whether a decree can be passed.

28. In **Rajesh R. Nair [2014 (1) KHC 83]** the Division Bench noticed that the right of a party to the proceedings under Section 13B of the Act to withdraw the consent, has been considered in several judgments. **K.I. Mohanan v. Jeejabai [1986 KLT 990]** was a case where after the presentation of the petition under Section 13B of the Act, the case was posted for reporting reconciliation. At that stage, the wife filed an interlocutory application stating that she has not consented to the divorce and requested that she be allowed to withdraw the petition. That petition was allowed and accordingly, the original petition was dismissed. In **K.I. Mohanan [1986 KLT 990]** the Division Bench noticed that the withdrawal of consent by the respondent-wife for divorce by mutual consent has been unequivocally expressed by her and it seems to be permissible

on a reading of sub-section (2) of Section 13B of the Act. Therefore, the matter need not be remanded for reconsideration by the trial court in view of the unequivocal stand taken by the respondent-wife. It will militate against the letter and spirit of Section 13B of the Act, which contemplates an opportunity for reconciliation within a period of six months, or an extended period of eighteen months, to say that once an application is signed, reconciliation or a withdrawal must be completely ruled out. On the scope of Section 13B of the Act, different High Courts had taken different views and the Apex Court in its decision in **Sureshta Devi [(1991) 2 SCC 25]** upheld the view taken by this Court in **K.I. Mohanan [1986 KLT 990]**. A similar situation was dealt with by the Apex Court in **Smruti Pahariya [(2009) 13 SCC 338]**. In that case, approving the principles laid down in **Sureshta Devi [(1991) 2 SCC 25]**, the Apex Court held that the decision in **Ashok Hurra [(1997) 4 SCC 226]** has to be treated as one rendered in the facts of that case. Once again in **Hitesh Bhatnagar [(2011) 5 SCC 234]**, approving the principles in **Sureshta Devi [(1991) 2 SCC 25]** and after referring to the principles in **Ashok Hurra [(1997) 4 SCC 226]**, the Apex Court reiterated the principles laid down in **Sureshta**

Devi [(1991) 2 SCC 25]. The above decisions would clearly show that at the stage when enquiry is to be held under Section 13B(2) of the Act also a free consent of both parties is required and that, if consent is withdrawn by either of them, the court will have no jurisdiction to entertain the petition or pass a decree of divorce on mutual consent.

29. In **Rajesh R. Nair [2014 (1) KHC 83]**, the further question considered by the Division Bench was as to whether once consent is given and is later withdrawn by one of the parties, the court can enquire into the bona fides or otherwise of the withdrawal of the consent. The Division Bench noticed that, by providing that the enquiry under Section 13B(2) of the Act shall be only if consent is not withdrawn, the statute specifically recognises the right of the parties to withdraw the consent even at the stage of the enquiry contemplated under Section 13B(2). That right available to the parties is an unqualified right and for any reason whatsoever, if the parties or one of them, choose to withdraw their consent, such withdrawal of consent is in exercise of the right available under Section 13B(2) of the Act. If that be so, it is not for the court to probe into the bona fides or reasonableness of withdrawal of consent and once consent is

withdrawn, the only option available to the court is to close the matter at that stage. If that be the legal position, the Family Court cannot be found fault with in having dismissed the petition on the ground of non-compliance of the requirement of Section 13B(2) of the Act.

30. In **Rajesh R. Nair [2014 (1) KHC 83]**, before the Division Bench, the learned counsel for the appellant-husband relied on the decision of the Rajasthan High Court in **Anil Khatwani v. Nisha Khatwant** [SB Civil Misc. Appeal No.1250 of 2008], wherein the High Court had taken the view that the genuineness of withdrawal of consent can be enquired into. The Division Bench found that the view taken by the Rajasthan High Court is plainly against the terms of Section 13B(2) of the Act and is also the principles laid down by the Apex Court in the decisions referred to supra. The Division Bench noticed that the decision in Contempt Case (C)No.559 of 2011 of the Delhi High Court, another decision relied on by the learned counsel for the appellant-husband, was a case where a petition under Section 13B of the Act was filed based on a memorandum of understanding between the parties. On the filing of the petition, the statement of the parties was recorded. In the statement

given to the Delhi High Court both parties agreed to abide by the agreement and the Court directed them to honour the terms of the agreement. Despite the above, the wife withdrew from the agreement and thereupon the husband initiated proceedings under the Contempt of Courts Act. While considering that issue, the Delhi High Court took the view that there was a failure on the part of the wife to honour the terms of the undertaking to the Court and it was on that basis contempt proceedings were ordered to be initiated against the wife. The Division Bench found that the factual situation in **Rajesh R. Nair [2014 (1) KHC 83]** is totally incomparable with the facts of the proceedings before the Delhi High Court.

31. In **Rajesh R. Nair [2014 (1) KHC 83]**, the Division Bench noticed that in **Rachna Jain v. Neeraj Jain [2005 (120) DLT 365]**, another decision relied on by the learned counsel for the appellant-husband, as against the decision in **Sureshta Devi [(1991) 2 SCC 25]** the Delhi High Court chose to follow the decision in **Ashok Hurra [(1997) 4 SCC 226]**. The Apex Court in its decision in **Smruti Pahariya [(2009) 13 SCC 338]** held that the decision in **Ashok Hurra [(1997) 4 SCC 226]** has to be treated as one rendered in the facts of that case only. If

that be so, the decision of the Delhi High Court in **Rachna Jain [2005 (120) DLT 365]** does not reflect the correct legal position and therefore cannot be followed.

32. In **Rajesh R. Nair [2014 (1) KHC 83]**, before the Division Bench, the learned counsel for the appellant-husband relied on the decision of the Bombay High Court in Family Court Appeal No.61 of 2010 - **Prakash Alumal Kalandari v. Jahnvi Prakash Kalandari [AIR 2011 Bom. 119]** – the High Court held that, if the petition is filed "simpliciter under Section 13B of the Act" for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continues till the date of granting the decree of divorce. Even if one party unilaterally withdraws his/her consent, the court does not get jurisdiction to grant a decree of divorce by mutual consent in view of the mandate of Section 13B of the Act. However, the situation would be different if the parties in the first instance resort to a petition for relief under Section 9 or Section 13 of the Act and during the pendency of such a petition, they decide to invite a decree for divorce by mutual consent. On the basis of the agreed arrangement, if the parties were to execute 'consent terms' and then file a formal petition/application to convert the pending

petition to be treated as having been filed under Section 13B of the Act to grant a decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the consent terms either wholly or in part to his/her detriment. In other words, the court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent. The Division Bench noticed that the facts of the case in **Rajesh R. Nair [2014 (1) KHC 83]** are totally incomparable with the facts of the case decided by the Bombay High Court in **Prakash Alumal Kalandari [AIR 2011 Bom. 119].**

33. In **Benny v. Mini [2021 (1) KHC 723]**, a decision relied on by the learned counsel for the appellant-husband, the

question that came up for consideration before a Division Bench of this Court was as follows;

“Is it permissible to withdraw one's consent in a petition filed for dissolution of marriage by mutual consent, filed pursuant to a compromise, is the point that emanates for consideration in the appeal?” (underline supplied)

34. In **Benny [2021 (1) KHC 723]** the Division Bench of this Court was dealing with a case in which the marriage of the appellant-husband and the respondent-wife was solemnised on 10.09.2003. Two children were born in the wedlock. The marriage ran into rough weather, forcing the wife to file O.P.No.1133 of 2010, seeking a decree for the return of money and gold ornaments, and M.C.No.349 of 2010, seeking an order for maintenance, before the Family Court, Thrissur. The husband filed O.P.No.433 of 2010 before the same court, seeking a decree of divorce. The cases were later transferred to the Family Court, Irinjalakuda. The parties were referred to mediation and they settled all the disputes arising out of the marriage, by executing a memorandum of settlement. They, *inter alia*, agreed that custody of the children would be with the respondent; that the appellant would pay a compensation of Rs.10,00,000/- to the respondent; that all the pending cases would be withdrawn and

that they would file a joint petition under Section 10A of the Divorce Act, 1869, to dissolve their marriage by mutual consent. The memorandum of settlement was recorded by the court and all the cases were dismissed as withdrawn. The parties filed O.P.No.669 of 2016 to dissolve their marriage by mutual consent. As a condition precedent, on the date of filing of the joint petition, the appellant paid an amount of Rs.2,00,000/- to the respondent. The balance amount of Rs.8,00,000/- was agreed to be paid on the date the joint petition was posted for inquiry after the statutory waiting period of six months. On 20.02.2017, the date of the second motion, the appellant and the respondent filed their respective proof affidavits in lieu of chief-examination. The appellant paid the respondent the balance amount of Rs.8,00,000/-, which was acknowledged by the respondent. The Family Court referred the parties for counselling, and thereafter, conducted the inquiry. Both parties expressed their consent for divorce in unequivocal terms. The case was posted for judgment on 20.04.2017. On 09.03.2017, the respondent filed I.A.Nos.573 of 2017 and 574 of 2017, seeking to withdraw the proof affidavit and to withdraw her consent. In the affidavits filed in support of the said interlocutory applications, it is stated that she is

withdrawing her consent considering the welfare and future of the children. The appellant filed counter affidavits to the said interlocutory applications. The applications were taken up for consideration on 11.07.2017. The parties were again referred for counselling. The respondent stuck to her stand. Consequently, the Family Court, by the impugned common order, allowed the applications and dismissed the original petition filed under Section 10A of the Divorce Act, to dissolve the marriage by mutual consent, following the decision of the Apex Court in **Hitesh Bhatnagar [(2011) 5 SCC 234]**, holding that the respondent was free to withdraw her consent at any time before the passing of the decree. The said order of the Family Court was under challenge before the Division Bench of this Court.

35. Section 10A of the Divorce Act deals with dissolution of marriage by mutual consent. As per sub-section (1) of Section 10A, subject to the provisions of the Act and the Rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Indian Divorce (Amendment) Act, 2001 on the ground that they have been living separately for a

period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved. As per sub-section (2) of Section 10A, on the motion of both the parties made not earlier than six months after the date of 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 by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

36. In **Benny [2021 (1) KHC 723]**, on a close scrutiny of sub-section (2) of Section 10A of the Divorce Act, the Division Bench noticed that, either of the parties can withdraw the petition before the expiry of eighteen months from the date of its presentation. However, the Court on being satisfied, after hearing the parties and making such inquiry and that the averments in the petition to be true, pass a decree declaring the marriage to be dissolved from the date of decree. In **Hitesh Bhatnagar [(2011) 5 SCC 234]** the Apex Court held that

mutual consent to the divorce is a sine quo non for passing a decree for divorce, which should continue till the passing of the decree and is a positive requirement for the Court to pass a decree of divorce. The consent must continue to decree nisi and must be valid subsisting consent when the case is heard. In **Rajesh R. Nair [2014 (1) KHC 83]** a Division Bench of this Court held that the right to withdraw consent is a qualified right and it is not for the court to probe into the bona fides or reasonableness of withdrawal of consent. Once the consent is withdrawn, the only option available to the court is to close the matter at that stage.

37. In **Benny [2021 (1) KHC 723]** the Division Bench noticed that in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]**, in a case of an almost identical nature, the High Court of Judicature at Bombay, interpreting an analogous provision under Section 13B of the Hindu Marriage Act, held that when the parties agree to convert a pending petition for divorce to a petition for divorce by mutual consent, on the basis of a compromise, and on one of the parties fulfilling the terms of the compromise, the other party cannot unilaterally withdraw consent in view of Order XXIII of the Code of Civil Procedure, 1908.

38. In **Prakash Aluma Kalandari [AIR 2011 Bom. 119]**, a decision relied on by the Division Bench of this Court in **Benny [2021 (1) KHC 723]**, the High Court of Judicature at Bombay, was dealing with a case in which, during the pendency of a petition for a decree of divorce on the ground of cruelty, the parties decided to seek decree of divorce by mutual consent. Accordingly, 'consent terms' were executed and both of them signed it on 06.10.2008, which was placed on record before the Family Court No.3, Pune. The parties, thereafter, filed an application to convert the petition for divorce into a joint petition for divorce by mutual consent. As per the 'consent terms', the husband had agreed that the custody of both the children would remain with the wife. The wife on the other hand had agreed to give access of both the children to the husband during the week end, on every Sunday, at the designated place and time and during Diwali and Christmas vacations, every day at the same venue and time. In addition to custody, the 'consent terms' contained various provisions in respect of education and other activities of the children, payment of maintenance, etc. After the filing of the 'consent terms' recording the above agreement, the hearing was deferred for some time. The counsel for the husband

thereafter withdrew his vakalathnama. On 16.02.2009, the husband filed an application to withdraw his consent given on the application to grant divorce by mutual consent. The sole reason mentioned in that application was that, the wife failed to comply with her obligation to provide access of the children to the husband. The Family Court took the view that the husband cannot be allowed to withdraw his consent in the fact situation of that case. The court held that the only ground pressed into service by the husband justifying withdrawal of consent for passing decree of divorce by mutual consent was untenable and devoid of merits and therefore, a decree of divorce by mutual consent on the basis of the said 'consent terms' was inevitable. The said view taken by the Family Court was assailed before the High Court of Judicature at Bombay in the appeal filed under Section 19(1) of the Family Courts Act, 1984. After referring to the law laid down by the Apex Court in **Sureshta Devi [(1991) 2 SCC 25]**, the High Court of Judicature at Bombay observed that, applying the abovesaid exposition, coupled with the fact that the husband had withdrawn his consent, it may appear as if the Family Court exceeded its jurisdiction in passing a decree of divorce by mutual consent. However, what is significant to bear

in mind is that in the case on hand the parties had not in the first instance resorted to a petition under Section 13B of the Hindu Marriage Act. The wife had filed a petition for a decree of divorce on the ground of cruelty, against the husband on 07.09.2007. Even the husband in the written statement and counter claim filed on 09.04.2008 prayed for dissolution of the marriage. The parties during the pendency of the said proceedings decided to compromise the matter. Accordingly, they entered into 'consent terms', which was duly executed on 06.10.2008. Amongst the several terms agreed upon between the parties to bring quietus to the entire disputes, they chose to convert the pending proceedings for divorce on the ground of cruelty into joint petition for divorce by mutual consent and acted upon the said 'consent terms'. The wife, as per the terms of 'consent terms', offered access of both the children to the husband. It is a different matter that the access did not fructified for reasons stated by the wife. That plea of the wife has been accepted by the Family Court. On this finding, the sole ground stated by the appellant as justification to withdraw the consent given for a decree of divorce by mutual consent becomes unavailable. In any case, the said justification, even if it were to be accepted, would, at best, be a

case bordering on non-compliance of the terms and conditions of the 'consent terms'. Moreover, in the application filed by the husband for withdrawing his consent, no material facts have been pleaded to even remotely suggest that he had signed the 'consent terms' due to force, fraud or undue influence. In other words, the parties having acted upon the 'consent terms' in part, and more particularly, the wife having acted to her detriment, including having withdrawn the criminal cases filed against the husband, the husband cannot be allowed to extricate himself from his commitment. In such a situation, in the absence of an assertion that the consent was obtained by force, fraud or undue influence, by virtue of Section 23(1)(bb) read with Section 23(1)(e) of the Hindu Marriage Act, the court would assume jurisdiction to pass a decree under Section 13B, on being satisfied that a marriage was solemnised between the parties and that the averments in the petition are true. As regards the grievance of the husband regarding non-observance of the terms and conditions of the 'consent terms', the court can always grant liberty to the parties to pursue the remedy in that regard, which will have to be decided on its own merits. In that context, the Bombay High Court held that, if the petition is filed "simpliciter

under Section 13B of the Act" for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continue till the date of granting the decree of divorce. Even if one party unilaterally withdraws his/her consent, the court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate of Section 13B of the Act. However, the situation would be different if the parties in the first instance resort to petition for relief under Section 9 or 13 of the Act and during the pendency of such petition, they decide to invite decree for divorce by mutual consent. On the basis of agreed arrangement, if the parties were to execute 'consent terms' and then file a formal petition/application to convert the pending petition to be treated as having been filed under Section 13B of the Act to grant decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the 'consent terms' either wholly or in part to his/her detriment. In other words, the court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the

other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.

39. In **Benny [2021 (1) KHC 723]** the Division Bench held that the principles laid down in the decision of the High Court of Judicature at Bombay in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]** are applicable to the facts of the case on hand, wherein the High Court of Judicature at Bombay held that consent given on the basis of a compromise to convert a petition for divorce to a petition for divorce by mutual consent cannot be resiled. The Division Bench noticed that, in the case on hand, the only difference is that the litigations were withdrawn, on the basis of a compromise agreement, and a fresh petition for divorce by mutual consent was filed. The appellant and the respondent executed a memorandum of settlement agreeing that all disputes between them arising out of the marriage were harmoniously settled. On the strength of reciprocal promises, both parties withdrew the pending litigations and the custody of the children was entrusted to the respondent, who also received an amount of Rs.10,00,000/- as compensation. As per Section 2(e) of the

Contract Act, 1872 every promise and every set of promises, forming the consideration for each other, is an agreement. There were reciprocal promises agreed by the parties, falling within the ambit of Section 51 of the Contract Act, which was duly performed by the appellant. The respondent on getting the custody of the children and receiving the compensation was obliged to perform her part of the agreement, i.e., to give her consent for the dissolution of the marriage. As held by this Court in **Gopakumar v. Sunithakumar [2020 (3) KHC 147]**, when the terms of an agreement are independent and self-working, the parties cannot refuse to perform their obligations.

40. In **Benny [2021 (1) KHC 723]**, the Division Bench pin-pointedly asked the learned counsel for the respondent-wife whether the respondent was willing to return the compensation amount received by her from the appellant-husband. The answer was an empathetic "no". Therefore, the Division Bench held that the respondent has taken advantage of her own wrong and is attempting to unlawfully enrich herself. The submission of the learned counsel that the respondent found a few thousand rupees short in the compensation paid, is a hollow and untenable plea, which was never raised before the court of first instance.

Moreover, the defence that the respondent was withdrawing her consent for the welfare of the children is unfounded because she should have thought about the same at the time of executing the agreement. Further, the custody of the children was entrusted to her. In the above factual and legal background, the Division Bench held that the respondent was precluded from withdrawing her consent by the principles of promissory estoppel.

41. In **Benny [2021 (1) KHC 723]**, following the principles laid down in the decision of the High Court of Judicature at Bombay in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]**, the Division Bench held that once the parties agree to file a joint petition, pursuant to an agreement/compromise in pending proceedings, then the parties are estopped from resiling from the agreement. Therefore, the unilateral withdrawal of consent by the respondent, especially after the appellant has performed his part of the terms in the memorandum of agreement, is only a sharp practice which cannot be permitted or tolerated for a moment, as it would shatter the faith of the litigants in the justice delivery system and make a mockery of alternative dispute resolution mechanism. The Division Bench concluded that the unilateral withdrawal of consent by the

respondent is unsustainable in law and the Family Court erred by allowing the applications filed by the respondent and dismissing the original petition.

42. As already noticed hereinbefore at paragraph 38 in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]**, the High Court of Judicature of Bombay was dealing with a case in which, during the pendency for a petition for a decree of divorce on the ground of cruelty, the parties decided to seek a decree of divorce by mutual consent. Accordingly, 'consent terms' were executed, which was placed on record before the Family Court. Later, the husband filed an application to withdraw his consent given to the application to grant divorce by mutual consent, on the sole reason that the wife failed to comply with her obligation to provide access of the children to the husband. The Family Court granted a decree of divorce on a reasoning that the only ground pressed into service by the husband justifying withdrawal of consent for passing a decree of divorce by mutual consent was untenable. The view taken by the Family Court was assailed before the High Court of Judicature at Bombay. After referring to the law laid down by the Apex Court in **Sureshta Devi [(1991) 2 SCC 25]** the High Court held that the wife having acted to her

detriment, including having withdrawn the criminal cases filed against the husband, in terms of the 'consent terms', the husband cannot be allowed to extricate himself from his commitment. The sole ground stated by the husband as justification to withdraw the consent given for a decree of divorce by mutual consent is non-compliance of the terms and conditions of the 'consent terms'. Moreover, in the application filed by the husband for withdrawing his consent, no material facts have been pleaded to even remotely suggest that he signed the 'consent terms' due to force, fraud or undue influence. The High Court held that, during the pendency of proceedings under Section 13 of the Act, if the parties were to execute 'consent terms' and then a formal petition/application to convert the pending petition to be treated as having been filed under Section 13B of the Act to grant a decree of divorce by mutual consent, in the latter proceedings, before the decree is passed, one party cannot be allowed unilaterally to withdraw the consent, if the other party had already acted upon the 'consent terms' either wholly or in part to his or her detriment. On the other hand, if the petition is filed "simpliciter under Section 13B of the Act" for divorce by mutual consent, the court must satisfy itself that the consent given by

the parties continue till the date of granting the decree of divorce.

Even if one of the party unilaterally withdraws his/her consent, the court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate under Section 13B of the Act.

43. The principle laid down **Prakash Alumal Kalandari [AIR 2011 Bom. 119]** was followed by a Division Bench of this Court in **Benny [2021 (1) KHC 723]**, which was also a case in which, during the pendency of an original petition filed by the husband seeking a decree of divorce the parties were referred for mediation before the Family Court, Thrissur, where O.P.No.1133 of 2010 filed by the wife seeking a decree for return of money and gold ornaments and M.C.No.349 of 2010 seeking an order for maintenance, were also pending consideration. In mediation the parties settled all the disputes arising out of the marriage, by executing a memorandum of settlement regarding custody of minor children, payment of compensation to the wife and withdrawal of the pending cases. They also agreed to file a joint petition under Section 10A of the Divorce Act, 1869 to dissolve their marriage by mutual consent. The memorandum of settlement was recorded by the Family Court and all the cases

were dismissed as withdrawn. Then the parties filed O.P.No.669 of 2016 to dissolve their marriage by mutual consent. When that original petition was posted for judgment, the wife filed interlocutory applications seeking permission to withdraw the proof affidavit and also to withdraw her consent for a decree of divorce by mutual consent. The only statement made in the affidavits filed in support of those applications was that she is withdrawing her consent considering the welfare and future of the children. The Family Court allowed those applications and dismissed O.P.No.669 of 2016, relying on the decision of the Apex Court in **Hitesh Bhatnagar [(2011) 5 SCC 234]**, holding that the wife was free to withdraw her consent at any time before the passing of the decree. In **Benny [2021 (1) KHC 723]**, relying on the law laid down in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]** held that when, on the strength of reciprocal promises, both parties withdraw the pending litigations and the custody of children was entrusted to the wife, who received an amount of Rs.10 lakhs as compensation, the wife is precluded from withdrawing her consent by the principles of promissory estoppel. The Division Bench noticed that the wife has taken advantage of her wrong and is attempting to unlawfully enrich

herself. The submission of the learned counsel that the wife found a few thousand rupees short in the compensation paid is a hollow and untenable plea which was never raised before the court at first instance. The Division Bench concluded that the unilateral withdrawal of consent by the wife is unsustainable in law, which is only a sharp practice, which cannot be permitted or tolerated for a moment, as it would shatter the faith of the litigants in the justice delivery system and make a mockery of alternative disputes resolution mechanism.

44. The law laid down by the Division Bench of the High Court of Judicature at Bombay in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]** and that laid down by the Division Bench of this Court in **Benny [2021 (1) KHC 723]**, have no application to the facts of the case on hand. In the above two cases the courts were dealing with, either an application filed during the pendency of an original petition for decree of divorce under Section 13 of the Hindu Marriage Act, to convert the pending proceedings to a petition for divorce by mutual consent under Section 13B of the Act, as per the 'consent terms' executed between the parties, which was acted upon in part, or an original petition filed under Section 13B of the Act for a decree of divorce

by mutual consent, after the withdrawal of pending litigations for decree of divorce under Section 13B of the Act, for return of money and gold ornaments and also for maintenance, and the wife has taken advantage on the basis of the compromise agreement. After referring to the law laid down by the Apex Court in **Sureshta Devi [(1991) 2 SCC 25]**, the Bombay High Court in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]** found that, if the petition is filed "simpliciter under Section 13B of the Act" for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continue till the date of granting the decree of divorce. Even if one of the party unilaterally withdraws his/her consent, the court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate under Section 13B of the Act.

45. In the instant case, the original petition, i.e., O.P.No.2351 of 2019, is one filed under Section 13B of the Act for divorce by mutual consent. Therefore, the court must satisfy itself that the consent given by the parties continue till the date of granting the decree of divorce, as held by the Apex Court in **Sureshta Devi [(1991) 2 SCC 25]**, which was endorsed by a Three-Judge Bench of the Apex Court in **Smruti**

Pahariya [(2009) 13 SCC 338]. The requirement under Section 13B(2) of the Act is the "motion of both the parties". There should be mutual consent when they move the court with a request to pass a decree of divorce and there should be consent also at the time when the court is called upon to make an enquiry, if the petition is not withdrawn, and then pass the final decree. If the petition is not withdrawn in the meantime, the court, at the time of making the enquiry, does not have any jurisdiction to pass a decree, unless there is mutual consent. If the court makes an enquiry and passes 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 a decree by mutual consent. As held by the Three-Judge Bench in **Smruti Pahariya [(2009) 13 SCC 338]**, it is only on the continued mutual consent of the parties that a decree for divorce under Section 13B of the said Act can be passed by the court. If the 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.

46. We notice that the compromise agreement entered into between the parties on 11.10.2019 is produced along with this Appeal without filing a proper application under Order XLI Rule 27 of the Code of Civil Procedure, 1908. The appellant has not sworn to an affidavit, with proper pleadings, to satisfy the mandatory requirements of Order XLI Rule 27 of the Code in order to make out a case for accepting additional documents in the appellate stage. I.A.No.1 of 2022 filed for accepting additional documents is only a petition, wherein it is stated that, for the reasons stated in the accompanying Mat. Appeal the additional documents may be accepted on file. Therefore, we find no reason to entertain that interlocutory application and the same is accordingly dismissed.

47. In view of the law laid down by the Three-Judge Bench of the Apex Court in **Smruti Pahariya [(2009) 13 SCC 338]**, we find absolutely no merits in the contentions advanced by the learned counsel for the appellant-husband, relying on the decision of the High Court of Judicature at Bombay in **Prakash Alumal Kalandari [AIR 2011 Bom. 119]** and also the decision of this Court in **Benny [2021 (1) KHC 723]**. Since the respondent-wife has already withdrawn her consent for a decree

of divorce by mutual consent on 12.04.2021 by filing a memo, which is in the form of an affidavit sworn to by her, the only option available to the Family Court on 22.04.2021 was to dismiss that original petition, in view of the law laid down by a Three-Judge Bench of the Apex Court in **Smruti Pahariya [(2009) 13 SCC 338]**. Therefore, no interference is warranted in the judgment and decree dated 22.04.2021 of the Family Court, Thiruvananthapuram in O.P.No.2351 of 2019.

In the result, this Appeal fails and the same is accordingly dismissed.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

AV