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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of hearing and order: 19th January 2015.

+ MAT.APP.(F.C.) 5/2015

CHANDAN

..... Appellant

Through: Ms. Mukti Singh and Mr. Sunil

Kumar Sinha, Advocates

versus

DIPTI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

ORDER

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KAILASH GAMBHIR, J. (ORAL)

C.M. Appl. No. 977/2015 & 979/2015 (Exemptions)

Exemption allowed subject to just exceptions.

Applications stand disposed of.

C.M. Appl. No. 976/2015 (condonation of delay)

By this application filed under Section 5 of the Limitation Act read with Section 151, CPC, the appellant seeks condonation of delay of 35 days in filing the accompanying appeal under Section 19(1) of the Family Courts Act. For the reason stated in the application, the same is allowed and the delay of 35 days in filing the accompanying appeal is condoned.

Application stands disposed of.

MAT. APP. (F.C.) No. 5/2015 & C.M. Appl. No. 978/2015 (Directions)

1. This is an appeal by the appellant-husband under section 19 (1) of the Family Courts Act, 1984 calling in question the tenability of the judgment dated 05.11.2014 passed by the learned District and Principal Judge, South-West District, Family Court, Dwarka, New Delhi, whereby a joint petition filed by the parties under Section 13- B of the Hindu Marriage Act, 1955 seeking dissolution of marriage by decree of divorce by mutual consent has been dismissed.

2. The grievance raised by the appellant in the instant appeal is that the respondent wife had agreed to file the joint divorce petition after having fully gone through the contents of the same and only after prolonged and detailed talks between the parties but thereafter failed to present herself before the Family Court to give her statement. The learned counsel for the appellant also submits that the disputes between the parties were settled with the intervention of the Vasant Vihar Police Station, where the appellant – husband had returned all the gift items to the respondent – wife and besides that, he had paid a sum of Rs.5.5 lacs to the respondent. The learned counsel for the appellant thus submits that having received the settled amount and the gift items, the respondent took a somersault in not causing appearance

before the learned Family Court to give her statement in support of the joint motion petition for oblique motives. Counsel further submits that in this manner, the respondent is trying to subvert and misuse the law with malafide intention to extort more money from the petitioner.

3. We have heard the submissions made by the learned counsel for the appellant and have gone through the material on record.

4. Indisputably, the respondent – wife did not come forward to record her statement before the learned Family Court after the joint divorce petition was presented by them, at the stage of first motion. It is an admitted position that no formal MOU or settlement was arrived at between the parties and therefore, we find that the Family Court was correct in observing that it can't give any finding as to under what circumstances the respondent had backed out and not presented herself before the court. The learned Family Court is also correct in observing that the court cannot force the respondent – wife to give her statement in support of the petition. Section 13-B of the Hindu Marriage Act, 1955 is a special provision where under the parties can seek divorce by mutual consent. The expression 'mutual' cannot be diluted and if any of the parties to the marriage fail to present herself or himself before the court, after the presentation of the 1st and the 2nd motion petitions,

then there will not be any mutuality in the act of the parties. Mere signing and filing of the present petition by both the parties does not mean that the parties need not present themselves before the court after filing the divorce petition. The parties are necessarily required to appear before the court to give their statements and then based on the statements and upon satisfaction of the Court, first motion petition will be allowed. Thereafter, it is also envisaged under the Act that after the expiry of six months, the second motion petition for mutual consent divorce should be filed by the parties and they are required to reappear before the Court. A gap of six months is given between the two motions to afford the estranged couple adequate time to reconsider their decision of dissolving their marriage. After hearing the husband and wife, if the Court is satisfied that all the grounds and requirements for the divorce have been met, the couple is granted a decree of divorce by mutual consent. It is not the case of the appellant here that under some agreement or MOU, the respondent had derived the benefits and later turned around and resiled from the settlement. The learned Family Court is correct in observing that it may not be in a position to find out the circumstances due to which the respondent – wife did not come forward to present herself to give her statement before the court. It is a settled legal

position that either of the parties to the petition may withdraw their consent, at any time before a decree of divorce by mutual consent is passed. For a decree of divorce by mutual consent to be passed, there needs to be a complete agreement between the estranged couple for the dissolution of marriage and the Court needs to be convinced about the same. Otherwise the essence of the words “divorce by mutual consent” would be lost. [**Ref : *Hitesh Bhatnagar v. Deepa Bhatnagar (2011) 5 SCC 234***].

5. The judgments in the case of ***Jayshree Ramesh Londhe vs. Ramesh Bhikhaji Londhe, AIR 1984 Bom. 302*** passed by the High Court of Judicature at Bombay and in the case of ***Chandra Kanta v. Hans Kumar, AIR 1989 Del. 73***, passed by this Court, as relied upon by the counsel for the appellant have no relevance to the facts of the present appeal. However, the Hon’ble Supreme Court in the case of ***Smt. Sureshta Devi vs. Om Prakash, (1991) 2 SCC 25***, held that the Court has no jurisdiction to pass a decree of divorce by mutual consent, if there is no mutual consent at the time of the inquiry. The Court needs to be satisfied about the bona fides and the consent of the parties. The Court further went on to observe that the mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B and the mutual consent should persist till the

divorce decree is passed. The consent must continue to decree nisi and must be valid and subsisting when the case is heard.

6. In the case at hand, though the parties had filed their joint petition under Section 13-B of the Hindu Marriage Act, 1955, the respondent chose not to appear before the Family Court during the first motion petition, therefore, the learned Family Court was right in dismissing the joint petition filed by the parties.

7. In view of the aforesaid discussion, we find no illegality or infirmity in the impugned judgment dated 5.11.2014 passed by the learned District and Principal Judge, South-West District, Family Court, Dwarka, New Delhi. Finding no merit in the present appeal, the same is hereby dismissed. Consequentially, the pending applications are also disposed of.

KAILASH GAMBHIR, J

I.S.MEHTA, J

JANUARY 19, 2015

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