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

% ***Judgement reserved on: 02.09.2025***
Judgement delivered on: 24.09.2025

\+ MAT.APP.(F.C.) 136/2025 & CM APPL. 76632/2024

UKM .....Appellant

Through: Ms. Nandini Sen & Mr. Basab Sengupta, Advs.

versus

CTSM

.....Respondents

Through: Ms. Gauri Gupta & Mr. Rishabh Kumar Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G E M E N T

HARISH VAIDYANATHAN SHANKAR J.

1. The present matrimonial appeal impugns the **Judgment and Decree dated 18.07.2024**[1] passed by the learned **Family Court, Patiala House Courts, New Delhi**[2], in HMA No. 211/2019 (*filed by Respondent No. 1 - the Husband*) and HMA No. 596/2019 (*filed by the Appellant - the Wife*). By the Impugned Judgment, the learned Family Court, instead of adjudicating the respective petitions on their merits, proceeded to dissolve the marriage between the parties by pronouncing a decree of divorce *suo motu* under Section 13B of the

[1] Impugned Judgement
[2] Family Court

Hindu Marriage Act, 1955[3].

2. ***HMA No. 211/2019*** was filed by Respondent No. 1 seeking divorce on the ground of cruelty under Section 13(1)(ia) of the HMA. ***HMA No. 596/2019*** was filed by the Appellant seeking divorce on the grounds of adultery and cruelty under Sections 13(1)(i) and 13(1)(ia) of the HMA.

BRIEF FACTS:

3. Shorn of unnecessary details, the material facts germane to the present appeal are as follows:

(a) The marriage between the Appellant and Respondent No. 1 was solemnized on 06.06.1992 in accordance with Hindu rites and ceremonies.

(b) Out of wedlock, the couple was blessed with two children - a son, born on 10.09.1994, and a daughter, born on 29.10.1996.

(c) For a considerable period, the couple shared a cordial and harmonious married life. However, around 2015-2016, their relationship began to deteriorate.

(d) The Appellant alleges that Respondent No. 1, employed as a pilot with Saudi Arabian Airlines, entered into an adulterous relationship with Respondent No. 2, an air hostess in the same airline. This alleged adulterous liaison is asserted to be the root cause of estrangement between the parties, resulting in Respondent No. 1 distancing himself from the Appellant physically, mentally, and emotionally.

(e) The marital discord culminated in 2018 when Respondent No. 1 caused a legal notice to be issued, proposing divorce by mutual

[3] HMA

consent. The Appellant, however, rejected such proposal in her reply.

(f) In February 2019, Respondent No. 1 instituted HMA No. 211/2019 under Section 13(1)(ia) of the HMA, seeking divorce on the ground of cruelty against the Appellant.

(g) In June 2019, the Appellant, in turn, filed HMA No. 596/2019 under Sections 13(1)(i) and 13(1)(ia) of the HMA, seeking divorce on the grounds of adultery and cruelty, while also impleading Respondent No. 2 here as a co-respondent/ alleged adulterer.

(h) *Vide* separate orders dated 08.12.2022, the learned Family Court framed issues in both petitions.

(i) After framing of issues, both divorce petitions were clubbed for the purpose of recording evidence.

(j) Upon the conclusion of the evidence, both petitions were heard together. However, instead of adjudicating the issues on merits, and in the absence of any joint petition or motion under Section 13B of the HMA, the learned Family Court, by the Impugned Judgment dated 18.07.2024, *suo motu* dissolved the marriage between the Appellant and Respondent No. 1 under Section 13B.

(k) Aggrieved by the Impugned Judgment, the Appellant initially sought to file an appeal before this Court. During scrutiny, however, the Registry pointed out that such an appeal, assailing a decree passed under Section 13B of the HMA, was not maintainable in view of Section 19(2) of the **Family Courts**

Act, 1984[4].

(l) The Appellant thereafter invoked the supervisory jurisdiction of this Court under Article 227 of the **Constitution of India**[5]. A learned Single Judge, by order dated 27.03.2025, after noting the unusual circumstances of the case, directed that the said petition be treated and registered as a matrimonial appeal. The relevant portion of the order reads as under: :

> "**11.** Appeal under Section 19 of Family Courts Act, 1984 would be barred if the decree or order has been passed by a Family Court with the consent of the parties.
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> **12.** Admittedly, in the case in hand, there is no express or direct or even implied consent from any of the parties whereby they both had expressed dissolution of their marriage by way of mutual consent under Section 13B of Hindu Marriage Act.
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> **13.** In such a situation, it cannot be said that filing of Matrimonial Appeal was prohibited in any manner whatsoever.
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> **14.** Learned counsel for petitioner, however, submits that the petitioner had, earlier, sought to prefer a matrimonial appeal under Section 28 of Hindu Marriage Act, which was even given diary No. as 4395539/2024 but since he was apprised by the Registry that qua decree passed under Section 13B of Hindu Marriage Act, the appeal was not maintainable, the present petition has been filed under Article 227 of Constitution of India.
>
> **15.** Clearly, since there is no decree based on any express and mutual consent of the parties, the present petition is directed to be registered as a Matrimonial Appeal and subject to the order of Hon'ble the Chief Justice, such appeal be placed for consideration before the learned Roster Bench on 07.04.2025."

(m) Pursuant to the aforesaid order of the learned Single Judge, the present matrimonial appeal has been duly registered for adjudication.

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[4] FC Act
[5] Constitution

CONTENTION OF THE PARTIES:

4. Learned Counsel for the Appellant would contend that the learned Family Court committed a grave and manifest illegality, in *suo motu* converting the divorce petitions filed under Section 13 of the HMA, into a Petition for divorce under Section 13B, and such action was wholly impermissible in law.

5. It would be submitted by the learned Counsel for the Appellant that the very foundation of a decree under Section 13B of the Act is the explicit, conscious, and simultaneous consent of both parties, which is demonstrated through a joint petition and a subsequent motion affirming such consent, but in the present case, the parties had filed separate and adversarial petitions under Section 13 of the HMA containing serious allegations of cruelty and adultery, and hence the requirement of mutuality was absent.

6. Learned Counsel for the Appellant would argue that there was never any joint petition, nor was any application ever made by either party to convert the proceedings into one under Section 13B, and therefore such a conversion into a Petition under Section 13B of the HMA by the learned Family Court lacked jurisdictional basis and stood as a nullity in law.

7. Learned Counsel for the Appellant would further contend that although specific issues had been framed on the basis of the pleadings and evidence, the learned Family Court returned no findings on any of the issues raised therein, and instead decided the matter invoking Section 13B, and such a procedure was unsanctioned by the law and on grounds that were neither pleaded or argued, nor framed as an issue, and such omission to decide the framed issues constituted a

serious legal error.

8. Learned Counsel for the Appellant would also submit that the reliance placed by the learned Family Court on Sections 9 and 10 of the FC Act, was wholly misplaced. It would further be submitted that Section 9 merely obliges the Court to attempt reconciliation and the learned Family Court itself had recorded that reconciliation was impossible, and while Section 10(3) grants procedural flexibility, it cannot be construed as a license to override the substantive provisions of the HMA, for the power to frame procedure cannot be construed as a power to bypass mandatory statutory requirements.

9. *Per contra*, learned Counsel for Respondent No. 1 would contend that the learned Family Court rightly identified that all substantive ingredients of Section 13B of the HMA were satisfied, and though no joint petition was filed, the long-standing conduct of the parties in persistently seeking divorce clearly established their mutual agreement, and the requirement of a joint petition was merely procedural, which the learned Family Court could overlook to do substantial justice.

10. It would further be contended by the learned Counsel for Respondent No. 1 that Sections 10(3) and 20 of the FC Act conferred wide discretionary powers on the Court to lay down its own procedure, and since these provisions are intended to free Family Courts from the technical rigours of the Code of Civil Procedure, 1908, the Court was empowered to adopt a flexible and non-adversarial approach, as emphasized by the Statement of Objects and Reasons of the FC Act.

11. Learned Counsel for Respondent No. 1 would submit that, in the peculiar facts where two cross-petitions for divorce had remained

pending for over five years and where both parties consistently expressed their desire to end the marriage, the learned Family Court rightly exercised its discretion to grant a decree under Section 13B of the HMA, and in doing so, it advanced the true spirit and purpose of the HMA and the FC Act.

ANALYSIS:

12. We have, with the valuable assistance of the learned counsel for both parties, carefully examined the pleadings along with the documents placed on record and considered in detail the reasoning contained in the Impugned Judgment.

13. At the very outset, it is pertinent to note that both learned counsel for the parties are *ad idem* that the present matter involves the determination of a pure question of law. We concur with the same.

14. At this stage, it would be appropriate to reproduce the reasoning adopted by the learned Family Court in the Impugned Judgment, since it forms the very foundation of the present challenge. The relevant portion reads as follows:

> **"11.** After hearing final arguments, both files perused. Wife's willingness to come out of the marriage by dissolution of marriage is pending since 06.06.2019 when she filed her petition. Husband's willingness to dissolve the marriage is also continuously pending since 21.02.2019 when he filed his petition. Yet both parties are unable to get off the marriage because neither party agreed to act in accordance with provision of Section 13B of the HMA nor court attempted to explore the probability of application of Section 13B of the HMA on its own in the facts and circumstances existing between the parties. Though both are willing to break their matrimonial ties permanently at least since 06.06.2019 but even at the fag end of the trial/case, they could not agree till date for divorce by mutual consent for reasons best known to them.
>
> **12.** This has prompted this Court to wonder if the respective willingness of the parties or prayer of the parties to dissolve their marriage would not amount to mutual consent to dissolve their

marriage and if their marriage could be dissolved without going into merits of the respective allegations of the parties.

13. After perusing Section 13-B of the HMA, this court finds that except for the form all other ingredients required under Section 13-B of the HMA for grant of decree of divorce by mutual consent are present in the present matter. The elements/ingredients required under Section 13-B are separate living of the parties to the marriage for one year or more, have not been able to live together and there is consensus for dissolving the marriage.

14. In the present case both are respectively praying by way of their respective petitions claim to dissolve their marriage, hence there is consent to dissolve their marriage. Since last almost 5 year or more they have not been able to live together and are living separately with no intention/desire/wish to live together at all, so there is separation of more than one year and there is their incapacity of living together. Thus, all three ingredients of Section 13-B are present there except the form.

15. Section 13-B of the HIMA requires that a petition for dissolution of marriage by a decree of divorce by mutual consent be presented by both parties together. So the form required under Section 13-B is that parties are required to file one petition together for decree of divorce. Thereafter, both parties are required to make another motion not earlier than six month and later than eighteen months after the date of presentation of the petition and if the petition is not withdrawn in the meantime, the court after hearing the parties and after making such enquiry as it thinks fit and after being satisfied pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. So the second formal requirement before accepting their request for divorce is to allow the parties to have cooling off period of about six to eighteen months from the date of the petition to reconsider their decision of dissolving their marriage and if they remain firm in their decision court would accept their prayer.

16. In the present case wife's decisive willingness to dissolve her marriage is continuously present for the last 5 years whereas that of the husband also is continuously present for little more than 5 years but simply because willingness/consent were not in the particular form required under Section 13B of the HMA both have been suffering.

17. Section 13-B of the HMA, 1955 was introduced in India to provide a legal framework for divorce by mutual consent. This was introduced to simplify and expedite the divorce process for couples who wish to part ways amicably, reducing the time, expense and emotional stress associated with traditional divorce proceedings. It aimed to promote a more civilized and less contentious approach to divorce, recognizing the changing dynamics of modern relationship

and the need for a more practical and less adversarial way to dissolve marriages.

18. Thus, the objective of introducing Section 13B of the HMA was to provide quick relief to the parties to the failed marriage and to ameliorate their sufferings springing off their matrimonial ties. If all the ingredients as required under Section 13B of the HMA are otherwise available in the matter, it would be in the interest of the parties in particular and of the society in general to extend the relief of Section 13B of the HMA to those who for any reason are unable to follow or observe the particular form required under Section 13B. It would amount to recognizing the further changing dynamics of modern relationship and going about more practical to ameliorate the suffering of person in unfortunate matrimonial tie.

19. Hon'ble Supreme Court in **Samar Ghosh v. Jaya Ghosh MANU/SC/1386/2007** while enumerating some instances of human behavior which may be relevant in dealing with the cases of "mental cruelty" held that long period of separation may be concluded that the matrimonial bond was beyond repair. The marriage had become a fiction though supported by a legal tie and by refusing to sever that tie, the law in such case would not serve the sanctity of marriage; on the contrary, it would show scant regard for the feelings and emotions of the parties. In such like situation it may lead to mental cruelty.

20. In the opinion of this Court if parties to a marriage are found to be involved in acrimonious matrimonial discord with grave allegations and with no hope of living together, refusing to dissolve their marriage simply because one party approaching the court has not been able to prove the fault of the other, would amount to forcing parties to suffer further irrespective of there being fault or no fault of the party. Refusal of divorce would lead the parties to face law induced mental cruelty, particularly where both in their respective petition are seeking same relief i.e. dissolution of their marriage. No fruitful purpose would be served in finding who is at fault and whose petition be allowed and whose petition be dismissed.

21. Section 9 of the Family Court Act, 1984 mandates Family Court to endeavor for settlement between the parties to marriage. Section 10 of the Family Court Act, 1984 empowers the Family Court for laying down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by other party. Settlement could be arrived at between the parties either in respect of entire dispute or in respect of the part of the dispute involved. Further settlement could be arrived at between the parties or Court could put their issue settled by deciding in a way leaving no one aggrieved by the adjudication.

22. This court under Section 10 of the Family Court which is a Special Legislation feels empowered to do away with the form required under Section 13B of the HMA for dissolution of marriage of the parties in a matter as the present one where parties are living separately for more than a year, have not been able to live together since separation, are not willing to live together anymore and there is consent in the form of respective separate prayer for dissolution of their marriage (albeit for the fault of other).

23. This Court, therefore, in the present case in the facts and circumstances as noted above, without going into question as to who is at fault so as to allow husband's or wife's prayer for dissolution of their marriage on fault theory, hereby, dissolve their marriage under Section 13B of the Hindu Marriage Act, 1955 from the date of decree to be drawn up following this judgement, taking their respective prayer to dissolve their marriage (based on the faults of other) as their respective consent to dissolve their marriage.

24. Spirit of the Family Court Act is also to bring out settlement between the parties, which means putting quietus to their dispute. In the present case if prayer of husband or wife is accepted holding the other spouse guilty of matrimonial offense, the person against whom findings would go will take the matter to higher forum thus drag the other into rigmarole of further round of litigation with added agony and harassment. Similarly, refusal of their respective prayer, if they failed to prove their respective allegations, would also lead to law induced mental cruelty. Hence, in the peculiar facts of parties to the present marriage, dissolving their marriage under Section 13B of the HMA in the aforesaid manner is the only best way out to provide quietus to their unending matrimonial acrimony and bitterness. To have quietus in life it always good to not look for answer as to what went wrong but to accept as it is what has come.

25. In view of the above discussion, reasoning and consequent passing of decree of divorce under Section 13B of the HMA for the reason discussed herein before, the marriage between the parties held on 06.06.1992 stands dissolved.

26. Wife's petition bearing HAMA No. 6/2019 for grant of maintenance under Hindu Adoption and Maintenance Act is pending where all claim of the wife qua maintenance shall be adjudicated on merits. The common order dt 05.08.2022 passed in all three petitions granting interim maintenance to the wife shall remain in operation till petition bearing HAMA No. 6/2019 is decided on merits.

27. Both petition bearing HMA No. 596/2019 and HMA No. 211/2019 stand disposed off in accordance with the reasoning and

discussion contained in this judgement.

28. Common decree sheet be drawn in accordance with paragraph No. 23 of this judgment and be placed in each files.

29. Signed judgement be placed in both files."

15. The relevant statutory provision under which the original petitions were filed is Section 13 of the HMA, which provides for dissolution of marriage by a decree of divorce at the instance of either spouse on specified fault-based grounds. The provision, insofar as relevant, reads as follows:

"**13. Divorce. —** (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

[1][(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

……."

16. By contrast, the provision invoked by the learned Family Court while passing the Impugned Judgment is Section 13B of the HMA, which deals exclusively with divorce by mutual consent and stipulates the conditions and procedure for granting such relief. The said provision is reproduced below for ready reference:

"**13B. Divorce by mutual consent.—** (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the

marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

17. The express language of Section 13B of the HMA demonstrates that divorce by mutual consent is founded on a voluntary agreement of *both* parties reached *prior* to the presentation of the petition. Although the course adopted by the learned Family Court may, on a practical level, appear to expedite relief, we are of the clear view that judgment conflicts with the express statutory mandate and subverts the legislative scheme embodied in Section 13B of the HMA.

18. We reach this conclusion because the manner in which two independent, fault-based petitions under Section 13 were clubbed together and thereafter treated as a single petition under Section 13B is legally impermissible. The adopted course of action effects a substantive change in the nature and character of the original proceedings and disregards the separate and distinct fields in which Sections 13 and 13B of the HMA operate.

19. The mere fact that both spouses have, independently and separately, sought dissolution of the marriage does not convert their respective petitions into a petition under Section 13B. The foundational requirement of Section 13B is a prefatory, pre-existing, mutual agreement i.e., a meeting of minds, reached before institution of proceedings. In the absence of that consensus at the inception, later-filed parallel petitions cannot be retroactively re-cast as a petition for

divorce by mutual consent.

20. The learned Family Court proceeded on the view that Section 13B imposes only a procedural "*form*" and that, because the factual ingredients, in the learned Family Court's assessment, were present, it could dispense with the formal requirement of a joint petition and move directly to grant relief.

21. This court is of the considered view that such approach of the learned Family Court undermines a substantive statutory requirement as a mere procedural formality. Section 13B of the HMA embodies not only a form but also essential substantive safeguards, including the prefatory consensus and the statutory cooling-off and inquiry mechanisms, which cannot be disregarded.

22. The learned Family Court, in the Impugned Judgement, identified three elements as satisfying Section 13B of the HMA, which are:

(a). that the parties have been living separately for one year or more;

(b). that they have been unable to live together; and

(c). that there is a consensus to dissolve the marriage, inferred from each party's separate prayers for dissolution.

23. We are of the firm view that the learned Family Court overlooked the most fundamental requirement of Section 13B, the element of "*mutual consent*". That consent cannot be inferred solely from the three factors listed above; it must be established as an unequivocal meeting of minds between the spouses while instituting the divorce petition.

24. The element of consent is pivotal in relation to any petition presented under Section 13B of the HMA. The three factors identified

by the learned Family Court are merely concomitants which may indicate circumstances conducive to the dissolution of marriage; however, they cannot by themselves constitute the statutory foundation for granting a decree. Those circumstances acquire legal effect under Section 13B only when accompanied by the free and mutual consent of both spouses expressed in the joint manner required by the statute.

25. The learned Family Court has no statutory authority to alter or expand the substantive scheme of the HMA so as to dispense with requirements that the Legislature has imposed. The express requirement that a petition for divorce by mutual consent be presented "*together*" by both parties is deliberate, as it reflects legislative recognition that the momentous step of dissolving a marriage should be taken only where there is a genuine, contemporaneous agreement between the spouses.

26. We must also emphasise the significance of the phrase "*mutually agreed*" used in Section 13B(1) of the HMA. It is not satisfied by the mere filing of separate petitions by the parties. The learned Family Court's characterization of the words "*together*" and "*mutually agreed*" as merely matters of form is completely erroneous and strikes at the core of Section 13B. Re-characterising parallel, independent fault-based petitions as a mutual-consent petition without a clear, prior, joint agreement would circumvent the statutory safeguards and would therefore be contrary to law.

27. The legislative intent underlying Section 13B of the HMA makes it evident that "*mutual consent*" is not a mere procedural formality but a substantive statutory requirement for the grant of divorce. A three-Judge Bench of the Hon'ble Supreme Court in

Smruti Pahariya v. Sanjay Pahariya [6] , while discussing and reaffirming the ratio of ***Sureshta Devi v. Om Prakash***[7], categorically held that the element of consent must exist both at the time of presentation of the petition and continue until the decree is finally granted. In this regard, the Apex Court also referred to the 71st Report of the Law Commission of India (1978) under the Chairmanship of Justice H.R. Khanna, titled *"**The Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce**"*.

28. The said Report emphasized that just as marriage is founded on the consent of the parties, its dissolution by way of mutual consent must equally rest on the conscious and continuing agreement of both spouses. The Apex Court stressed that such consent cannot be presumed or inferred, and in the absence of clear and continuing mutual agreement, the jurisdiction to grant divorce under Section 13B simply does not arise. The relevant portion of ***Smruti Pahariya*** *(supra)* is extracted hereinbelow:

> "**31.** After the said amendment in 1976 by way of insertion of Section 13-B in the said Act in the 74th Report of the Law Commission of India (April 1978), Justice H.R. Khanna, as its Chairman, expressed the following views on the newly amended Section 13-B:
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> > "Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals.
> > A modified version of the basis of consent is to be found in the theory of divorce by mutual consent.
> > The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognises this theory in Section 13-B."
>
> (emphasis supplied)

[6] (2009) 13 SCC 338
[7] (1991) 2 SCC 25

32. On the question of how to ascertain continuing consent in a proceeding under Section 13-B of the said Act, the decision in ***Sureshta Devi v. Om Prakash [(1991) 2 SCC 25 : 1991 SCC (Cri) 292]*** gives considerable guidance. In para 8 of the said judgment, this Court summed up the requirement of Section 13-B(1) as follows:

> "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."

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35. In para 13 of ***Sureshta Devi [(1991) 2 SCC 25 : 1991 SCC (Cri) 292]*** 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 13-B is clear on this point. It provides that 'on the motion of both the parties, … if the petition is not withdrawn in the meantime, the court shall … pass a decree of divorce…'. What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."

36. Therefore, it was made clear ***in Sureshta Devi [(1991) 2 SCC 25 : 1991 SCC (Cri) 292]*** that under Section 13-B(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 : 1991 SCC (Cri) 292]*** 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 : 1991 SCC (Cri) 292]***, 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 13-B. 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 Fam 210 : (1972) 2 WLR 972 : (1972) 2 All ER 667] .]"
> (emphasis supplied)

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.

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42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.

43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose

such consent."

(emphasis supplied)

29. Although the Hon'ble Supreme Court, in the aforesaid judgment, examined the concept of consent primarily with reference to the state of mind of the parties and its continuance throughout the statutory period contemplated under Section 13B, we are of the view that the ratio of that case can be imported into the present set of facts with due qualification, since the nature of consent in different circumstances may not be identical.

30. Marital relations, by their very nature, are unique, and there can be no standardized or universal approach to any marriage. Just as the union of two parties culminating in marriage is ordinarily based on mutual agreement and shared expectations, the process of separation is equally shaped by diverse and individual considerations, preferences, and conditions.

31. Each party is entitled to determine the terms and manner of separation. While the ultimate object may be the dissolution of marriage, the path toward such dissolution may differ in accordance with the personal expectations and priorities of the parties. Since marriage itself is not a mere ministerial act, its dissolution too cannot be reduced to the fulfillment of certain statutory ingredients without the presence of genuine and continuing mutual consent as envisaged under Section 13B of the HMA.

32. In the present case, the very fact that the parties have filed separate petitions for divorce demonstrates the absence of consensus on the manner and terms of dissolution. This in itself undermines the essential requirement of "*mutual consent*", which constitutes the foundational basis of Section 13B of the HMA. Mutual consent cannot

be inferred from the mere filing of separate divorce petitions, nor can it be substituted by the independent desire of each party to end the marriage in their individual way. It is only when both parties consciously and jointly agree to dissolve the marriage that the jurisdiction of the court under Section 13B of the HMA is validly invoked.

33. At this stage, it is necessary to take note of the genesis of Section 13B of the HMA, which came to be introduced into the statute book pursuant to the recommendations of the *"**Report of the Committee on the Status of Women in India, 1974**"*. For a proper appreciation, it would be apposite to reproduce the relevant portions of the said Report, which read as under:

> "**Hindu Law**
>
> **4.86** According to traditionalists, divorce was unknown in Hindu Law[5]. Even today divorce is not a socially accepted norm among many sections.
>
> "We can take judicial notice of the fact that even today considerable sections of the Hindu society look with disfavour on the idea of dissolving a marriage[6]."
>
> Polygamy, without the right of divorce, caused, in many cases, tremendous hardship.
>
> *Customary Divorce*:— Contrary to the general notion regarding the indissolubility of Hindu marriages, a large section of Hindus among the lower castes have traditionally practised divorce. These customary forms of divorce were recognised, both socially and judicially[7]. The usual customary forms are:
>
> (a) by mutual consent;
> (b) unilaterally—at the pleasure of the husband or by the abandonment of the wife;
> (c) by deed of divorce (Char—chitti);
>
> (a) *by mutual consent:* The custom of obtaining divorce by mutual consent is prevalent among certain castes in Bombay[8], Madras[9], Mysore[10] and Kerala.[11] In Madhya Pradesh[12] it has been held that divorce by mutual consent is a valid custom among the Patwas of that State. A customary form of divorce by agreement

(chuttam-chutta) amongst the Barai chaurasiyas of U.P. has been declared valid by the Allahabad High Court.[13] These are only a few illustrations to indicate the existence of divorce by mutual consent.

(b) *unilateral divorce*: According to the custom prevailing in Manipur (Khaniaba), it has been stated that a husband can dissolve the marriage without any reason or at his pleasure[14]. Among the Rajput Gujaratis in Khandesh, and in the Pakhali Community marriage is dissolved if the husband abandons or deserts the wife. Among the Vaishyas of Gorakhpur in Uttar Pradesh a husband may abandon or desert his wife, and dissolution takes place even without reference to the caste tribunal[15].

(c) *Divorce by Deed*: This form is prevalent among certain castes in South India, also in Himachal Pradesh and the Jat community. Recently the Supreme Court has upheld a deed executed by the husband divorcing his wife.[16]

4.87 Usually customary divorces are through the intervention of the traditional Panchayats or caste tribunals. Therefore, in States where this has not been customary, the courts have not permitted Panchayats to take upon themselves the right to dissolve a marriage. Once the custom is proved, however, the courts will not interfere.

4.88 The courts have exercised a lot of judicial scrutiny and discretion in upholding or rejecting such customary divorce practices. In doing so they have applied the strict test for the validity of such customs. When the existence of a custom was not proved, or where the custom could be regarded as running counter to the spirit of Hindu Law, or was against public policy or morality, courts have declared such customary forms of divorce as invalid[17].

4.89 Under customary law there is no waiting period after divorce to remarry. But if divorce is obtained under the Hindu Marriage Act, then either party to the marriage can lawfully remarry only after a lapse of one year after the decree of divorce (sec. 15). Retention of customary forms of divorce under the Hindu Marriage Act is advantageous because this process of dissolving the marriage saves time and money in litigations. The only difficulty that may arise is if the divorce according to customary law is brought at some stage to the notice of the court and the latter decrees that particular form of divorce to be against public policy or morality. If one or both parties have remarried, such a marriage will be void and the status of the children will be affected. To minimise this, it has been suggested that the Ministry of Law should prepare an exhaustive record of customs relating to divorce found in different States and set up a panel of socio-legal experts to determine if any of these customs are invalid. Copies of the record should be made freely and easily available to the people and the

Panchayats[18].

4.90 With the enactment of the Hindu Marriage Act of 1955, divorce became a part of the law governing all Hindus. The ground for this had been already prepared by the passing of the Hindu Women's Right to Separate Residence and Maintenance Act in 1946, which inter alia, permitted the wife to separate from her husband on the ground that he had married again. Following this, some of the States took the initiative and as with monogamy, legislated to permit divorce for Hindus[19].

Divorce Under the Hindu Marriage Act, 1955 [20]

4.91 The various grounds on which a husband or a wife can obtain divorce are (a) living in adultery, (b) conversion to other religion, (c) insanity, (d) incurable form of leprosy, (e) venereal disease, (f) renunciation, (g) where the respondent has not been heard of as being alive for a period of seven years or more by persons who would naturally have heard of it, (h) failure to resume cohabitation for a period of 2 years after the decree of judicial separation, and (i) failure to comply with a decree for restitution of conjugal rights. Two additional grounds have been given to the wife: i) to obtain a divorce if the husband has more than one wife living, and ii) if he has been guilty of rape, sodomy or bestiality[21]. The former has a retrospective effect in the sense that when the marriages took place (i.e. before the Act), polygamy was legally permissible. This right can be exercised by either of the wives, and has obviously been provided to strengthen the social policy of monogamy. From the cases reported, it appears that many women have benefited from this provision.

Adultery: Since adultery is a very grave matrimonial offence, a very high degree or standard of proof is required. The Courts have insisted that the offence of adultery should be proved beyond reasonable doubt. A husband or wife can ask for divorce only if at the time of filing the suit, the other party 'is living in adultery'. A single act of extra marital intercourse is not sufficient to dissolve the marriage, though it is sufficient for a decree of judicial separation. The Bombay High Court, therefore, rejected the petition of a husband as at the time of the petition there was no evidence that the wife was leading an adulterous life, though there was evidence that she had done so earlier[22].

4.92 *Refusal to resume cohabitation* : – Another provision of the Act which is often taken advantage of is non-compliance with a decree restituting conjugal rights for two years or the lapse of the same period after a decree of judicial separation. One of the grounds for judicial separation is desertion provided it is 'without reasonable cause[23].' In interpreting 'reasonable cause', the

judiciary has often exhibited their inability to appreciate the socio-economic changes and the Constitutional right to equality.

4.93 Whenever conjugal rights have come into open conflict with the woman's right of equal opportunity in education or employment, the attitude of the judiciary has often been rather ambiguous. Instead of guiding the conflicting parties towards a rational adjustment to the process of social change, the judiciary has either evaded the issue or thrown its weight on the side of the traditional view of the husband's authority. Two illustrations will suffice to demonstrate this tendency : –

(a) A husband's demand for his wife to resign her job as a teacher in a city away from his place of employment, to join him, was upheld by the Punjab High Court, which ruled that it was the duty of the wife to remain under the 'roof and protection and submit obediently' to the authority of the husband[24].

(b) In a similar case, the Allahabad High Court took a step forward by opining that the concepts of protection and society are "inelastic and rigid rules which cannot be interpreted in the context of present day conditions and needs of society... In view of the altered social and economic conditions both husband and wife may think it necessary to work and contribute to the family chest." The Court, therefore, conceded the right of deciding the question to the wife where "in cases of economic stress... for the sake of the family and children" the wife genuinely thinks it is necessary for her to work[25]. The judgement, while conceding the right in cases of genuine economic necessity, totally evades the issue of the individual woman's right to decide whether to work or not.

4.94 *We are of the opinion that difference in the place of work should not be regarded as a ground for a case of desertion or restitution of conjugal rights.*

4.95 Cruelty and desertion: Cruelty and desertion have not been made grounds for divorce though they are recognised as grounds for a judicial separation[26]. It, therefore, follows that in these cases the innocent party to the marriage, against whom there has been cruelty, or who has been deserted, has to wait for two years'before he or she can get a divorce[27]. Uttar Pradesh has given the lead in this and amended their law to make these grounds for divorce.28 In our opinion these should he added as grounds for divorce in the Hindu Marriage Act so that persons are not compelled to follow the present circuitous route and undergo the expense of going to court twice.

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4.112 <u>*Divorce by mutual consent*</u>**:** <u>Our review of the different laws</u>

> governing divorce indicates that both customary laws and the secular law, i.e. the Special Marriage Act, 1954 recognise mutual consent as a ground for divorce, but this is conspicuous by its absence in any of the statutory laws governing different communities. On the other hand, the religious laws and judicial interpretations of them have generally tended to emphasise the fault theory, being particular to prevent the party guilty of a matrimonial wrong from obtaining a dissolu- tion of the marriage. This leads often to the use of perjured evidence. As there is even today an indirect way of getting divorce by mutual consent, by registering one's marriage under the Special Marriage Act, after celebration according to religious rites, we recommend that this ground should be recognised in all the personal laws so that two adults whose marriage has, in fact, broken down can get it dissolved honourably."
>
> ***(emphasis supplied)***

34. This Court takes note of the fact that the Committee Report, which recommended the incorporation of divorce by mutual consent as one of the forms of divorce, was premised upon the recognition of customary law as prevalent among various castes and communities in India. Such recognition was founded upon the clear and express consent of both parties to the marriage.

35. The further fact that divorce by "*mutual consent*" is recognised as a separate and independent manner of extinguishing a marital relation, and which recognition led to a fundamental change in the manner in which divorce could be granted, makes it apparent that the concept of a "*mutual consent*" divorce cannot be conflated with the separate and independent other forms recognised by the Legislature.

36. It is, therefore, implicit that the very foundation of Section 13B of the HMA rests upon the mutuality of consent of the spouses to the act of separation. Such consent must be express and unequivocal and cannot be inferred by implication. The consent envisaged under the provision is one emanating from the volition and free will of both parties, and cannot be substituted by the subjective satisfaction of the

Court upon a mere assessment of the statutory ingredients.

37. In any event, as earlier adverted to, the existence of a pre-determined and continuing state of mind on the part of both spouses to bring the marriage to an end is a *sine qua non* for invoking Section 13B of the HMA. Without such mutuality of intention, the jurisdiction of the Court to grant divorce under this provision does not arise.

38. A cumulative reading of the above extracts, particularly those concerning divorce by mutual consent, makes it evident that the legislative recommendation was inspired by, and reflective of, certain customary forms of divorce that were grounded in the clear and continuing consent of both spouses. The provision, therefore, embodies a conscious legislative recognition that dissolution of marriage by mutual consent is permissible only where both parties jointly and unequivocally desire such separation.

39. In the Impugned Judgement, the learned Family Court also reasoned that a decree of divorce could be sustained having regard to Sections 9 and 10 of the FC Act. The said provisions read as follows:

> "**9. Duty of Family Court to make efforts for settlement.-** (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit of proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.
>
> (2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.
>
> (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings."

> "**10. Procedure generally.**-(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such court.
>
> (2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX ofthat Code before a Family Court.
>
> (3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one Party and denied by the other."

40. The learned Family Court has reasoned that under Section 9 of the FC Act, the Court is empowered to persuade the parties to arrive at a settlement in respect of the subject matter of the proceedings, and that the "*Court could put their issues settled by deciding in a way leaving no one aggrieved by the adjudication*".

41. The learned Family Court went on to hold that, by virtue of Section 10, the Court could dispense with what it treated as merely a "form" prescribed by Section 13B of the HMA for dissolution by mutual consent. According to the learned Family Court, since the parties were living separately for more than a year, had not been able to live together, had no intention of resuming cohabitation, and there is a consent in the form of respective separate prayer for dissolution of their marriage, *albeit* on allegations against the other, these circumstances were sufficient to satisfy the requirement of mutual consent.

42. To our mind, the understanding of the learned Family Court,

and as underlined in preceding paragraph, is legally flawed. The mere fact that two parties have independently filed petitions seeking dissolution of the marriage cannot, by itself, establish the essential element of the "*coming together*" that Section 13B requires. Separate petitions do not equate to a meeting of minds.

43. We reiterate that a prior meeting of minds, a genuine and common intention between the spouses to dissolve the marriage on agreed terms, is the fundamental requirement of Section 13B. Failure to appreciate this indispensable element vitiates the reasoning adopted by the learned Family Court.

44. We cannot accept the interpretation placed upon Sections 9 and 10 of the FC Act by the learned Family Court for two distinct reasons. *First*, the meeting of minds that Section 13B of the HMA contemplates is not a procedural formality which the Court may dispense with. *Second*, Section 10 of the FC Act deals with procedure, while it permits the learned Family Court to adopt procedures suited to effecting settlements, it does not empower the Court to alter, dilute or substitute the substantive requirements of other enactments, including the HMA.

45. Section 10 of the FC Act, therefore, cannot be interpreted to mean that the substantive law under Section 13B of the HMA can be transformed into a mere procedural requirement, to be satisfied only by demonstrating that certain ingredients stand established.

46. We have already emphasized that the prior meeting of minds between the spouses is the very foundation of Section 13B. Its absence in the present case is conspicuous, and this crucial requirement has been completely ignored by the learned Family Court. The subject matter of a petition under Section 13B is not limited to an abstract

request for divorce simpliciter. It necessarily involves the parties having settled, before approaching the Court, the principal terms and modalities of separation, in short, a consensus as to how the *inter-se* separation should be effected.

47. A Court, by merely looking at the separate prayers made by the parties, cannot presume such consensus or foist upon them a decree of divorce on terms and conditions which they have neither envisaged nor agreed to. To do so would amount to the Court imposing upon the parties a separation on conditions that do not emanate from their mutual consent. Such approach is clearly contrary to the express language of Section 13B, and thus, legally unsustainable.

48. We also find that the reliance placed by the learned Family Court on the decision of the Hon'ble Supreme Court in ***Samar Ghosh v. Jaya Ghosh***[8] is clearly misplaced. The said judgment did not pertain to proceedings under Section 13B of the HMA at all.

49. ***Samar Ghosh*** *(supra)* dealt with the concept of mental cruelty as a ground for divorce under Section 13(1)(ia) of the HMA and delineated illustrative instances of cruelty. The principles articulated in that decision arise in a different statutory and factual context and cannot be mechanically imported into proceedings under Section 13B, which are founded upon the existence of prefatory and continuing mutual consent.

50. We are further of the considered view that, by the Impugned Judgment, the learned Family Court has, in effect, assumed to itself powers which are not vested even in the High Courts. Such plenary powers, by constitutional design, are implicit only under Article 142

[8] (2007) 4 SCC 511

of the Constitution and are conferred exclusively upon the Hon'ble Supreme Court. The manner in which the learned Family Court proceeded to grant a decree of divorce in the present case runs contrary to the statutory framework and judicial discipline.

51. In this regard, reliance may be placed on ***Anil Kumar Jain v Maya Jain***[9], wherein the Hon'ble Supreme Court categorically held:

> **30.** The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other courts can exercise such powers. The other courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.
>
> **31.** The various decisions referred to above merely indicate that the Supreme 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. The law as explained in ***Sureshta Devi case [(1991) 2 SCC 25 : 1991 SCC (Cri) 292]*** still holds good, though with certain variations as far as the Supreme Court is concerned and that too in the light of Article 142 of the Constitution.
>
> **32.** In the instant case, 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 Hindu Marriage Act, 1955, on the grounds available, but in the present case there are certain admitted facts which attract the provisions of Section 13-B thereof.
>
> **33.** One of the grounds available under Section 13-B is that the couple have been living separately for one year or more and that

[9] 2009 (10) SCC 415

> they have not been able to live together, which is, in fact, the case as far as the parties to these proceedings are concerned. In this case, the parties are living separately for more than seven years.
>
> **34.** 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 the husband.
>
> **35.** While, therefore, following the decision in ***Sureshta Devi case [(1991) 2 SCC 25: 1991 SCC (Cri) 292]*** we are of the view that this is a fit case where we may exercise the powers vested in us 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.
>
> **36.** The appeal is, therefore, allowed. The impugned judgment and order of the High Court is set aside and the petition for grant of mutual divorce under Section 13-B of the Hindu Marriage Act, 1955, is accepted.
>
> ***(emphasis supplied)***

52. In our view, the principle laid down in ***Anil Kumar Jain*** *(supra)* is unambiguous. While the Hon'ble Supreme Court may, in exercise of Article 142, mould reliefs and even convert contested proceedings into a mutual consent divorce in order to do complete justice, no other court, not even the High Courts, can arrogate to itself such extraordinary jurisdiction. Therefore, the learned Family Court's assumption of such plenary powers in the present case is wholly without authority and legally unsustainable.

CONCLUSION:

53. For the reasons discussed hereinabove, the present appeal is allowed, and the Judgment and Decree dated 18.07.2024 passed by the learned Family Court are hereby set aside.

54. As a necessary corollary, both divorce petitions, i.e., ***HMA No.***

211/2019 and ***HMA No. 596/2019***, shall stand restored to the file of the learned Family Court for fresh adjudication in accordance with law.

55. The present appeal, along with pending application(s), if any, stands disposed of in the above terms.

56. No order as to costs.

ANIL KSHETARPAL, J.

HARISH VAIDYANATHAN SHANKAR, J.

SEPTEMBER 24, 2025/tk/sm/ds