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

% Date of decision: 3rd June, 2020

\+ **MAT.APP. (F.C.) 86/2020**

ANSHU MALHOTRA .....Appellant

Through: Mr. Amar Nath, Advocate

versus

MUKESH MALHOTRA .....Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

%

[VIA VIDEO CONFERENCING]

JUSTICE RAJIV SAHAI ENDLAW

CM Nos. 11774/2020 & 11775/2020 (both for exemption)

1. Allowed, subject to just exceptions and as per extant rules.
2. The applications are disposed of.

MAT.APP. (F.C.) 86/2020 & CM No.11776/2020 (for condonation of delay of 25 days in filing the appeal)

3. This appeal under Section 28 of the Hindu Marriage Act, 1955 (HMA) read with Section 19 of the Family Courts Act, 1984 impugns the order and decree dated 19th November, 2019 of the Judge, Family Court, Shahdra District, of dissolution of marriage of the appellant with the

respondent under Section 13B of the HMA.

4. It is the contention of the appellant that the said order and decree is vitiated inasmuch as the consent of the appellant to dissolution of her marriage with the respondent was obtained during the illness of the appellant and is thus not of the own volition of the appellant and in fact there was no consent of the appellant or mutual consent for dissolution of marriage with the respondent. It is further contended that the parties, before filing the petition under Section 13B(1) of the HMA, were not even living separately for the statutory mandatory period of one year.

5. The appeal being against a decree of dissolution of marriage by mutual consent, we have straightaway enquired from the counsel for the appellant, how the appeal is maintainable inasmuch as an appeal against a consent decree is not available in law. Attention in this regard is drawn to Section 96(3) of the Code of Civil Procedure, 1908 (CPC) providing that no appeal shall lie from a decree passed by the court with the consent of the parties.

6. The counsel for the appellant states that in ***Krishna Khetarpal Vs. Satish Lal*** AIR 1987 P&H 191 and ***Charanjit Singh Vs. Neelam Maan*** AIR 2006 P&H 201, it has been held that an appeal under Section 28 of the HMA is maintainable against a decree of dissolution of marriage by mutual consent.

7. We have however drawn attention of counsel for the appellant to Section 19(2) of the Family Courts Act, which bars any appeal from a decree or order passed by the Family Court with the consent of the parties,

and enquired, whether not the appeal is barred by the said provision. We have further enquired, whether the judgments aforesaid of the Punjab and Haryana High Court have dealt with the said provision of the Family Courts Act.

8. The counsel for the appellant states that he has filed this appeal without studying the full text of the judgments of the Punjab and Haryana High Court aforesaid and is thus unable to state whether Section 19(2) of the Family Courts Act is dealt with therein or not. He however states that from the headnotes available with him it appears that Section 96 was noticed in ***Krishna Khetrapal*** supra.

9. We have perused the judgments cited by the counsel for the appellants. As far as ***Krishna Khetrapal*** supra is concerned, the Division Bench of the P&H High Court therein was answering a reference for determination of the question, whether an appeal under Section 28 of the HMA is competent against a consent decree in the face of provisions of Section 96(3) of the CPC. It was held, (i) a right of appeal is creature of a statute and is a substantive right; (ii) section 28(1) of the HMA provides the right of appeal against all decrees made by the court in any proceedings under the Act – these decrees may be consent decrees or otherwise; (iii) decree of divorce by mutual consent under Section 13B is also appealable under Section 28 – the scheme of the HMA is not averse to passing of consent decrees (considerations under Section 23 apart) and the appeal against the said decree is maintainable by either party, as a matter of right; (iv) in contrast, the appeal under Section 96 of the CPC is on a different footing; (v) the bar to an appeal against a consent decree is based on the

broad principle of estopple; (vi) in passing of consent decree under Order 23 CPC, the court plays no role of justicing and it is the parties themselves who do justice to themselves by consent and the court puts a seal thereon as a decision of its own; (vii) it is for this reason that the Legislature in its wisdom considered it advisable not to provide a re-hearing of the matter in appeal; (viii) an appeal against the decree of divorce by mutual consent, distinctively, is not merely on consent of the parties, for the matrimonial court is involved in the decision making so that it accords not only with the provisions of Section 13B of the HMA but also Section 23 of the said Act; (ix) thus a decree of divorce by mutual consent is not merely on mutuality of the consenting parties but the courts involvement in the decision making is inextricably a part of the decree and since the possibility of an error, legal or factual, entering in the decision making cannot be ruled out, an appeal under Section 28 of the Act has been provided; and, (x) the matrimonial court under Section 23(1)(bb) of the HMA, before granting a decree for divorce on mutual consent, has to ensure that consent has not been obtained by force, fraud or undue influence. ***Charanjeet Singh*** supra is also a judgment of the Division Bench and merely follows ***Krishna Khetrapal*** supra and does not add anything.

10. With respect to the aforesaid dicta of the Division Benches of the Punjab & Haryana High Court, we may respectfully state that it is not as if the court, in a civil suit, when presented with compromise terms under Order 23 Rule 3 CPC seeking a decree to be passed in terms thereof, is bound to pass a decree as sought. Order 23 Rule 3 CPC also provides that "where it is proved to the satisfaction of the court that a suit has been adjusted wholly or

in part by a lawful agreement or compromise in writing and signed by the parties…." shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. For the court to be satisfied that a suit had been adjusted wholly or in part by a lawful agreement, the court has to necessarily satisfy itself that the compromise or agreement is of the own volition of the parties and the consent of either of the parties thereto is not under coercion or misrepresentation and the said agreement or compromise is not unlawful within the meaning of Section 23 of the Contracts Act, 1872. It is thus not as if the position under Order 23 Rule 3 CPC is any different from that under Section 13B or Section 23 of the HMA. However once the court is satisfied that the compromise arrived at is lawful and has passed a decree, against such decree, Section 96(3) of the CPC bars an appeal. We are therefore, with due respect to the Division Benches of the High Court of Punjab and Haryana, of the opinion that the distinction as carved out by the Punjab & Haryana High Court qua a decree of dissolution of marriage by mutual consent vis-a-vis a suit before the civil court, does not exist.

11. Though we have hereinabove stated our reasons for respectfully disagreeing with the aforesaid judgments of the Division Benches of the Punjab & Haryana High Court cited by the counsel for the appellant, but would be failing in our duty if do not refer to:

A) ***Sushama Vs. Pramod*** AIR 2009 Bom 111. It was the contention of the wife therein that her signatures on the petition for mutual consent and accompanying affidavits were obtained under false pretext and she was compelled to place her

signatures upon it. It was also her contention that both the parties were residing together and there was no separation for a period of one year which is a mandatory requirement and the same was evident from the documents on record. It was held that the matrimonial court, from the said documents on record which prima facie showed that the husband and wife were residing at the same place, ought to have been put to an inquiry and verified the said fact but had failed to do so and had mechanically passed the order of dissolution of marriage. The contention of the husband that the appeal was not maintainable was negatived relying on ***Krishna Khetrapal*** supra and ***Charanjeet Singh*** supra. However, Section 19(2) of the Family Courts Act was not under consideration.

B) ***Jyoti Vs. Darshan Nirmal Jain*** AIR 2013 Guj 218 (DB), holding that, (i) per Section 10 of the Family Courts Act, the provisions of CPC apply to proceedings before a Family Court but Section 20 thereof gives overriding effect to the provisions of the Family Courts Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force; (ii) thus, if a provision in CPC is inconsistent with the provisions of the Family Courts Act, it will have no effect; (iii) section 19 of the Family Courts Act is a complete code for hearing of appeals from the final orders of the Family Courts and it would not be possible to import provisions of CPC and make the appeal maintainable if otherwise the same is not in

terms of Section 19; (iv) in ***Neera Saxena Vs. Sanjeev Kumar Saxena*** AIR 2000 All 277, a Division Bench of the Allahabad High Court held that whether in fact fraud was practiced by the husband on court in filing application in the name of the wife was a question of fact which could be conveniently and appropriately gone into by the original court itself and relegated the appellant to the Family Court; (v) whatever the position under the CPC, in view of the language used in Section 19(2) of the Family Courts Act, no appeal would be maintainable against a decree or order passed by the Family Courts with the consent of the parties even if the party to such consent were to contend that consent was obtained through force or fraud; (vi) however if there was an error apparent on the record of the Family Court and on the basis of the material before the Family Court, no consent decree could have been passed and the Family Court passed a consent decree solely on consent but not on its own satisfaction of the required ingredients for passing such judgment and decree, the appeal under Section 19(2) would not be barred; and, (vii) a decree for mutual consent under the provisions of the HMA is based not merely on consent but also on the satisfaction accorded of the Judge, Family Court and thus appeal under Section 19(2) is not barred. It may be mentioned that in the facts of the case it was found to be borne out from the record itself that the petition for divorce by mutual consent was filed before the expiry of one year of separation.

C) In ***Sumesh Kumar Gupta Vs. Sapna Gupta*** 2013 SCC Online P&H 26608 (DB) the appeal was preferred against the dismissal of the petition for dissolution of marriage by mutual consent. The appeal was held to be maintainable though on merits was dismissed.

D) ***Pooja Vs. Vijay Chaitanya*** AIR 2018 All 207 (DB) again holding Section 19(2) to be not a bar to an appeal against the decree of dissolution of marriage by mutual consent.

E) ***Tiji Daniel Vs. Roy Panamkoodan*** 2018 SCC Online Ker 4145 (DB) also holding Section 19(2) of the Family Courts Act to be not a bar to the maintainability of the appeal against a decree of divorce by mutual consent. The dissolution of marriage by mutual consent in this case was under Section 10A of the Divorce Act, 1869 and it was found in the facts of the case that decree for divorce by mutual consent was granted on first motion itself and thus suffered from error of procedure.

F) ***S. Rajkannu vs. R. Shanmugapriya*** AIR 2016 Mad. 42, relying on ***Sureshta Devi vs. Om Prakash*** AIR 1992 SC 1904 laying down that mere filing of the petition for dissolution of marriage by mutual consent does not authorize the court to make a decree for divorce and holding that the provisions of Order 23 Rule 3 CPC are not applicable to a decree passed under Section 13B HMA and thus a decree of dissolution under Section 13B is appealable under Section 28 of the HMA. In this

case also dissolution of marriage was ordered by the Family Court without even the wife appearing in support of the petition for dissolution of marriage by mutual consent.

12. It would thus appear that the view of the High Courts of Bombay, Gujarat, Allahabad, Kerala and Madras is the same as that of the High Court of Punjab & Haryana whose judgments are referred to by the counsel for the appellant i.e. to the effect that an appeal under Section 19(1) of the Family Courts Act lies against a decree for dissolution of marriage by mutual consent and Section 19(2) does not bar such appeal. However it is also obvious from the narrative of the various judgments aforesaid that in each of the cases, decree for divorce by mutual consent had been passed in violation of the procedure provided by law and which violation was evident from the record before the Family Court and qua which no proper inquiry had been done by the Family Court.

13. However the reason which has prevailed with the other High Courts for holding the appeal to be maintainable i.e. of the Family Court passing a decree for dissolution of marriage by mutual consent not merely on the basis of consent of the parties but also on the basis of its satisfaction, we state with all due respect, does not satisfy us. We say so because the same requirement is to be found in Rule 3 of Order 23 CPC also as aforesaid and qua which the law, as discussed hereinbelow, is clear, that no appeal lies against a consent decree. We are therefore unable to hold a decree for divorce by mutual consent of a Family Court to be standing on any different footing then a consent decree of a Civil Court under Order 23 Rule 3 of the CPC. We may in this context mention that the Rent Acts of various States

also do not permit the Rent Controller to pass an order of eviction without satisfying itself, of a ground for eviction as provided under the Act being made out. However, under the said Acts also, it has been held that if from the order of eviction, though with consent, it is obvious that the Controller has satisfied himself/herself of a ground of eviction being made out, even if on the basis of admission of the tenant, such consensual order of eviction cannot be challenged. Reference in this regard may be made to ***K.K. Chari Vs. R.M. Seshadri*** (1973) 1 SCC 761, ***Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram*** (1974) 1 SCC 242, ***Roshan Lal Vs. Madanlal*** (1975) 2 SCC 785, ***Nai Bahu Vs. Lala Ramnarayan*** (1978) 1 SCC 58 and, ***Shivshankar Gurgar Vs. Dilip*** (2014) 2 SCC 465. It was held (i) an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact viz. a ground of eviction provided under the Act is shown to have existed when the Controller made the order; (ii) satisfaction of the Controller, which no doubt is a prerequisite for the order of eviction, need not be by the manifestation borne out by a judicial finding; (iii) if at some stage the court was called upon to apply its mind to the question and there was sufficient material before it, before the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the court was satisfied about the grounds on which the order of eviction was based; (iv) if the tenant admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the court to act on that admission and make an order for possession in favour of the landlord without further inquiry; (v) if there was material before the court when it passed the order of eviction by consent, from which it can be shown that the court was satisfied about the requirement of the landlord being *bona fide*,

such an order will not be a nullity even without the Rent Controller's decision in favour of the landlord; (vi) admissions are by far the best proof of judicial facts and can be made the foundation of the rights of the parties; and (vii) it cannot be contended that the provisions of Order 23 Rule 3 of the CPC cannot apply to eviction suits governed by the special statutes; undoubtedly, a compromise of such suit is permissible under the provision of law; if the court is satisfied on consideration of the terms of the compromise that the agreement is lawful, as in any other suit, so in an eviction suit, the court is bound to record the compromise and pass a decree in accordance therewith, passing a decree for eviction on admission of the requisite facts in a compromise. Once it is so, Section 96(3) of the CPC would apply and appeal against such consent order would not be maintainable. Thus, having considered the persuasive value of the judgments aforesaid of the other High Courts, we are, with respect, unable to agree with the judgments aforesaid of the other High Courts and do not consider ourselves bound thereby.

14. Moreover, the impugned order in the present case does not on the face of it contain anything wherefrom it can be said in appeal that the Family Court erred in passing a decree for divorce by mutual consent on the material before it on record. The impugned order comprises of two parts, which are as under: -

Order dated 19.11.2019:

"Fresh petition received by assignment. It be checked and registered.

This is a petition of second motion for seeking divorce by mutual consent u/s 13-B (2) of HMA.

The certified copies of the 1st motion and MOU has already been filed. An application for waiver of cooling period of 6 months already moved which is allowed in view of the facts and circumstances mentioned in the application.

The joint statement of both the petitioners is recorded. Today, petitioner no.1 has given two DDs of Rs.27,17,000/- to the petitioner no.2.

Vide separate order, this petition is allowed and the marriage taken place between the parties on 30.01.2005 is ordered to be dissolved with effect from today. Decree be drawn accordingly and copy of the same be given to both the parties. File be consigned to record room."

Detailed judgment dated 19.11.2019:

"1. This is a petition under Section 13-B (2) of the Hindu Marriage Act for dissolution of marriage by mutual consent filed by above mentioned parties being husband and wife. The certified copies of the first motion proceedings including statement, order of the court and MOU deed dated 27.08.2019 are placed on record which reflect that parties have fixed certain terms and conditions of compromise.

2. The certified copies reveals that first motion under Section 13-B (1) of the Hindu Marriage Act has already been allowed by this court on 26.09.2019. Today, petitioner no.1 has given Rs.27,17,000/- through two DDs to petitioner no.2 in terms of MOU deed

against all her claims of maintenance, alimony and Istridhan etc.

3. The joint statement of the parties was recorded who are identified by their respective counsel and their identity is also ascertained from the photographs pasted on the petition. I have also compared the signatures of the parties on their joint statement with the signatures appearing on the petition and found both are same. Thus, there is no dispute of any identity of the parties. An application for waiver of cooling period of six months already moved which is allowed in view of the facts and circumstances mentioned in the application.

4. The record and statement of the parties point out that they are Hindu by religion and their marriage took place on 30.01.2005 as per Hindu rites and ceremonies beyond the jurisdiction of this court but both the petitioners resided within the jurisdiction of this court after marriage till their separation. The marriage could not be continued and they started residing separately since June, 2017.

5. Both the parties have clearly stated that they are not interested for any patch up and there is no hope for the same. The marriage between the parties is broken down irretrievably and they cannot live together any more.

6. Keeping in view the facts and circumstances of the case, especially that due to temperamental differences and attitudes, parties are not living together for the last more than 2 years and have already settled their claims full and final. Since, there is no hope for saving of the marriage in any situation so the present

petition u/s 13-B (2) of HMA is allowed and the marriage between petition Sh. Mukesh Malhotra and Smt. Anshu Malhotra taken place on 30.01.2005 is ordered to be dissolved with effect from today through a decree of divorce by mutual consent. Decree sheet be prepared accordingly. File be consigned to Record Room."

15. The statements recorded of the parties by the Family Court was as under:

Statement recorded on 19.11.2019 at second motion

"HMA No.1043/19

19.11.2019

Second Motion

Joint statement u/s 13-B (2) HMA of

Sh. Mukesh Malhotra (aged about 43 years) S/o Sh. Gulshan Malhotra, R/o H.No.1/3223, Krishna Marg, Ram Nagar Extension, Shahdara, Delhi-32.

AND

Smt. Anshu Malhotra (aged about 35 years) W/o Sh. Gulshan Malhotra, D/o Late Sh. Brijesh @ Rakesh Chadha, R/o H.No.G-23, UGF-2, Keshav Kun, Kailash Puram, Ghaziabad, U.P.

On SA

We both are Hindu by religion and our marriage took place on 30.01.2005 at Mukherjee Nagar, Delhi as per Hindu rites and ceremonies. We had applied for divorce by mutual consent through first motion petition which was allowed by this court vide order dated

26.09.2019. Certified copy of the proceedings of the first motion including statements, order of the court, MOU deed dated 27.08.2019 are annexed as Ex.P1 (collectively).

We have also placed on record marriage card, copy of marriage photographs, identity documents also which were already exhibited during first motion proceedings.

We are residing separately since June, 2017 due to temperamental difference and have not cohabited after the decision of the first motion.

The MOU deed executed on 27.08.2019 between us is contained terms and conditions which is already exhibited during the first motion proceedings.

We have two children Harshita @ Ananya @ Ridhi (DOB 09.01.2006) and Aarna @ Mithu (DOB 24.09.2011) out of the said wedlock, who shall remain in the care and custody of petitioner no.2 and petitioner no.1 shall have no visitation rights.

We further declare that the marriage between us is irretrievably broken down and we have decided not to live together anymore. Various efforts were made by the relatives, friends and even by court for patch up but of no use.

We further declare that there has been no inducement, threat or coercion by anybody and we are giving statement voluntarily.

We further declare that there is no other proceedings pending in the court between us.

Today, I, Anshu Malhotra, petitioner no.2 has received two DDs for sum of Rs.27,17,000/- (i.e. Rs.26,00,000 through DD No.017849 dated 18.11.2019 drawn on HDFC Bank, Krishna Nagar branch, Delhi and Rs.1,17,000/- through DD No.712775 dated 13.11.2019 drawn on UCO Bank, Krishna Nagar branch, Delhi) in the name of Baby Ridhi Malhotra payable by my husband, petitioner no.1 according to the terms and conditions of MOU deed towards all claim of maintenance, alimony and Istridhan etc. pertaining to past, present or future for me and my both children. I have already withdrawn all the cases and complaints instituted by me, if any.

I, Mukesh Malhotra, petitioner no.1 undertake that I will not have any visiting right qua the children and is giving no objection for custody with petitioner no.2.

We are showing again our original identity documents.

RO&AC

Sd-

(Signature & thumb impression of petitioner no.1)

Identified By Sh.K.K.Sharma, Ld. Counsel for petitioner no.1.

Sd-

(Signature & thumb impression of petitioner no.2)

Identified By Sh.Mohd. Danish, Ld. Counsel for petitioner no.2."

16. The counsel for the appellant also has not shown any error in the aforesaid record and has not chosen to annex to this appeal the petition

under Section 13B(2) of the HMA on which the aforesaid statements were recorded and order/judgment made. Therefrom also adverse inference has to be drawn, that there is nothing therein, on the basis of which the Family Court should have refused to pass a decree for dissolution of marriage by mutual consent.

17. On the contrary, the case of the appellant in the memorandum of appeal is, (i) that the parties were married on 30th January 2005 and a daughter was born to the parties on 9th January 2006 and another daughter was born on 24th September 2011; (ii) that everything was going well in the family of the parties till the second child was born; (iii) thereafter, the members of the family of the respondent started misbehaving with the appellant on the pretext that they wanted a male child, though the respondent had no grievance in this regard; (iv) owing to the said behavior of the family members, the appellant in the month of March 2016 started suffering from depression, mental and anxiety disorder; (v) the respondent who runs a medical shop, instead of taking his wife i.e. the appellant to hospital, started treating her with his own knowledge but when there was no sign of improvement, the respondent took the appellant first to a psychiatrist in Jain Hospital and when there was still no improvement, to the Neurology Clinic at Surajmal Vihar and thereafter to Sir Ganga Ram Hospital and to various other hospitals in Delhi; (vi) the appellant and the respondent were residing together in the matrimonial home till November 2019 without separation of a single day; (vii) the appellant underwent neck surgery on 17th July 2019 and during that time also, the respondent took care of the appellant and the children; (viii) thereafter also the hospital attendant visited

the appellant at her matrimonial home on several occasions; (ix) both the children were also studying in the same school till the academic year 2019-2020; (x) that the appellant and the respondent were never separated as recorded in the Memorandum of Settlement Deed signed by the parties; (xi) during the period when the appellant was not living a normal life and was not in a position to take any decision, she was fraudulently made to sign the Memorandum of Settlement Deed; and (xii) the appellant, after recovered from her illness in the month of February 2020, tried to meet the respondent and visit her matrimonial home, but was not allowed.

18. The appellant, alongwith the appeal has filed her medical prescriptions including discharge slips from the hospitals to show that she was suffering as claimed and that on most occasions she was accompanied by her husband.

19. However, the aforesaid grounds or any of the facts were not available before the Family Court, neither at the stage of petition under Section 13B(1) nor at the stage of the petition under Section 13B(2). Rather the petitions were accompanied with a Memorandum of Settlement dated 27th August, 2019 between the respondent and the appellant, recording that they had been residing separately since June 2017 and had decided to dissolve their marriage by filing a divorce petition through mutual consent and containing the terms and conditions with respect to alimony, guardianship, visitation rights, etc. In terms of the said Memorandum of Settlement, the respondent paid to the appellant Rs.54 lakhs, approximately half at the time of first motion of the petition for dissolution of marriage by mutual consent and the balance at the time of recording the statements of the parties at the

time of second motion. It is also worth mentioning that witness to the signatures of the appellant on the Memorandum of Settlement is Deepak Chaddha i.e. the brother of the appellant. It is nowhere pleaded that he was not a witness and no other reason given as to how and in what circumstances his signatures were obtained.

20. The other High Courts in the judgments referred by us hereinabove, appeared to have held the appeal against a decree for divorce by mutual consent to be maintainable, guided by the reason of making available a remedy to a spouse there against, if such a decree could not have been passed on the material available on record or had been passed in violation of the procedure prescribed by law for passing thereof or if had been obtained by misrepresentation or fraud. However in none of the said judgments save the judgment of the Division Bench of the Gujarat High Court, we find any reference to the proviso to Rule 3 of Order 23 CPC and with respect whereto Supreme Court in ***Pushpa Devi Bhagat vs. Rajinder Singh*** (2006) 5 SCC 566 held as under:

> *"17. The position that emerges from the amended provisions of Order 23, can be summed up thus:*
>
> *(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.*
>
> *(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.*

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code."

21. The aforesaid view has been reiterated in ***R. Rajanna Vs. S.R. Venkataswamy*** (2014) 15 SCC 471, ***Ved Pal (Dead) Through LRs Vs.***

Prem Devi (Dead) Through LRs (2018) 9 SCC 496 and ***Triloki Nath Singh Vs. Anirudh Singh (Dead) Through LRs*** 2020 SCC OnLine SC 444. Mention though may also be made of ***Daljit Kaur Vs. Muktar Steels Private Limited*** (2013) 16 SCC 607, but which was a case where, before the court in which compromise was arrived at itself, while it was contention of one of the parties that compromise has been arrived at and of the other that there was no compromise; the court, on making inquiry found that there was a compromise and passed a decree in terms thereof. It was held that such a decree would not fall in the genre of a consent decree and appeal there against would be maintainable.

22. As would immediately become obvious, the law with respect to consent decree is, that though appeal is not maintainable there against but the remedy for a eventuality of consent having been obtained forcefully or fraudulently or having been obtained by misrepresentation is, by applying to the same court. We do not find any reason why the said principle of law of general application should not follow qua decree of divorce by mutual consent when the grounds of appeal are on the basis of facts, which were not before the court which passed the consent decree. It is only the court which passed the consent decree which is capable of going into the said facts and if finds any prima facie merit therein, make inquiry by recording evidence with respect thereto and to thereafter take a final decision. Against such an order, an appeal may lie. We however do not deem it necessary to give a final opinion in this regard. However when the facts on which setting aside of a decree for divorce by mutual consent are pleaded in the appeal for the first time, it is not in the domain of the appellate court to enter into the

inquiry into the said facts and if the same is done, would also deprive the parties of an important right of appeal, by converting the appellate court into a fact finding court.

23. We therefore do not find the appeal to be maintainable and dismiss the same with liberty to the appellant to take steps in accordance with law, if entitled thereto.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

JUNE 03, 2020
pkb