IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 3568 of 2016 (O & M)
Date of decision: 30.05.2017

Daljit Kaur Sabbharwal ....Appellant(s)

Versus

Desinderpreet Singh ...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Ranjit S. Dhiman, Advocate,
for the petitioner.

G.S.SANDHAWALIA, J. (Oral)

The present appeal by the wife is directed against the order dated 06.01.2016 whereby, the application under Order 9 Rule 13 CPC of the appellant for setting aside the ex parte order dated 21.04.2012 and the ex parte judgment and decree dated 10.05.2012 has been dismissed whereby, divorce was granted to the respondent-husband on the grounds of cruelty.

The reason which weighed with the Court while dismissing the application is that the application was filed through the Power of Attorney Joginder Singh, the father of the appellant, who was unaware as to for what purpose he has been authorized to appear. The applicant-appellant was residing in Canada and had not appeared in the witness box to prove the contents of the application and, therefore, it was held that in her absence he could not allege that the service was not effected upon her. It was accordingly held that the ex parte judgment and decree had been rightly passed in view of the report received dated 02.04.2012 sent by the Senior Post Master, Head Office, Patiala. Another factor which weighed with the Court was that the appellant herself had filed a divorce petition in the Court of the Additional District Judge, Chandigarh wherein, the respondent had then disclosed that already a judgment and decree dated 10.05.2012 had been passed and resultantly, she had withdrawn the divorce petition on 21.03.2014. It was noticed that the appellant had withdrawn the sponsorship of the respondent when he had arrived at Canada and which had led to his arrest by the authorities, therefore, she herself did not want to live with him. Now, she was challenging the ex parte divorce which had been granted and, therefore, it was only to exploit the legal process and justice delivery system in India with a view to harass and victimize the husband as she herself was living in Canada. Once the marriage had irretrievably broken down and she had not filed any petition under Section 9 of the Hindu Marriage Act, 1955 (in short 'the Act') and she had not made any effort to live in the matrimonial home were the factors which weighed with the Court while dismissing the application.

Counsel has vehemently argued that the service was not properly effected and the summons had been sent to the Ministry of Home Affairs. Accordingly, reference is made to the communication dated 28.12.2011 wherein, the Ministry of Home Affairs had sent the summons back to the Trial Court on the ground that it was a civil litigation. It is the contention of the counsel that the summons had not been served and, therefore, the order dated 21.04.2012 whereby, ex parte proceedings were initiated, were not justified.

The said argument is not liable to be accepted in view of the fact that admittedly as per the application filed under Order 9 rule 13 CPC, the same averments had been made in support of the said application. The appellant was required to appear and depose about the said facts before the Court. The following issues had been framed by the Court:-

> *"1. Whether the valid service of summons was effected upon the applicant/respondent before passing the exparte judgment and decree dated 10.5.2012 by the court of Mrs. Jatinder kaur, and the then learned ADJ, Patiala? OPA*
>
> *2. Whether the present applicant/respondent Daljit Kaur has not willfully appeared before the learned trial court before she was proceeded against exparte vide order date 21.4.2012 passed by the court of Mrs. Jatinder Kaur, the then ld. ADJ, Patiala? OPR*
>
> *3. Whether the present applicant is not maintainable as the same is barred by limitation? OPR*
>
> *4. Relief."*

The onus of issue no. 1 was, thus, upon her. As noticed, only her father as such had appeared in the witness box and deposed regarding the said fact. The Court has already noticed that he did not know the contents and the purpose of the aforesaid Power of Attorney (Ex.A-1) which has been executed on 22.11.2013. The application was instituted on 26.03.2014 on the strength of the attorney dated 22.11.2013. A perusal of the Power of Attorney would go on to show that it did not mention whether any divorce decree had been passed and whether any application under Order 9 Rue 13 CPC was to be instituted for setting aside the same. In such circumstances, the Attorney himself did not have any authority to depose about the said facts and they were not in his personal knowledge. His evidence has, thus, been rightly discarded by the Court below by holding that the witness had himself stated that it had been cancelled as another attorney had been given on 24.09.2014, in which the said factor was mentioned in Clause 6. A perusal of the same would also go on to show that it also does not talk about the exparte order passed earlier and any authority or the factum of the same having been obtained by fraud. The said knowledge being specific and personal could not be pleaded by the father. Reference can be made to the Apex Court judgment in ***Man Kaur (dead) by LRs vs. Hartar Singh Sangha, 2010 (10) SCC 512*** wherein, the Apex Court has laid down the principles in cases of close relations and held that the Attorney of a close relative is in a position to depose about the principal and the same should be accepted in such circumstances. The principles in *Man Kaur's case (supra)* read as under:-

> *"12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:*
>
> *(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.*
>
> *(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.*
>
> *(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.*
>
> *(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the*

transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his `state of mind' or `conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his `bona fide' need and a purchaser seeking specific performance who has to show his `readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or `readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm

parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

Another valid factor which heavily and correctly weighed with the Court was that the petitioner herself preferred a divorce petition against the husband which was withdrawn on 21.03.2014 since the relief had already been granted. Admittedly, the appellant is already residing abroad and as noticed had made no effort as such to live with her husband and neither filed any petition under Section 9 of the Act and rather had cancelled the sponsorship of immigration to Canada. The divorce having been granted, the relief sought by the appellant has already been arrived at from a different prospective by another Court, at the instance of respondent-husband.

Counsel further submits that since criminal proceedings are also pending inter se the parties, the present order can adversely effect those proceedings.

Needless to say that divorce has been granted on the basis of allegations of cruelty inter se and, therefore, it would have no effect as such on the criminal litigation which is on different account of cheating etc. and, therefore, the argument as such raised that it would have an effect on the criminal case is also without any basis.

In such circumstances, it would be a futile exercise as such to set aside the ex parte divorce granted. Resultantly, finding no merit in the present appeal, the same is accordingly dismissed in limine.

30.05.2017 (G.S. SANDHAWALIA)
shivani JUDGE

Whether reasoned/speaking Yes/No

Whether reportable Yes/No