IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION ST. NO.1788 of 2018

Harshada Bharat Deshmukh .. Petitioner
Versus
Bharat Appasaheb Deshmukh .. Respondent

...

Mr.Samir A. Vaidya with Mr.Abhilesh Chitre for the petitioner.
Mr.Kaustubh N. Marathe with Ms.Madhavi Tavanandi for the respondent.

CORAM: SMT.BHARATI H. DANGRE, J

RESERVED ON: 23rd MARCH 2018

PRONOUNCED ON: 6th APRIL 2018

JUDGMENT:-

1 The petitioner has approached this Court for quashing and setting aside the order passed by the Principal Judge, Family Court No.9, Pune on 1st January 2018 thereby rejecting the prayer made by petitioner no.2 before the Court to file a petition, on mutual divorce under Section 13B of the Hindu Marriage Act through the Power of Attorney holder.

The petitioner is an Indian citizen and she filed a petition seeking dissolution of marriage by mutual consent and the said petition presented before the Family Court is filed by the

husband of the petitioner Mr.Bharat Appasaheb Deshmukh and the petitioner Ms.Harsha Bharat Deshmukh jointly. The said petition sets out the terms and conditions on which the marriage solemnized between the parties on 1st May 2002 as per Hindu Vedic Rites and Ceremonies at Jalgaon, would be dissolved. The petition states that the petitioner nos.1 and 2 are residing separately from 8th May 2016 and there is no cohabitation between the parties since 8th May 2016 and inspite of reconciliation between the parties, the marriage has failed, and there are no further chances of reconciliation between the parties any more. The petition also states that in the wake of the aforesaid development, the parties have decided to dissolve the marriage legally through the deed of divorce by mutual consent.

After setting out the terms and conditions in detail, the petition presented before the Family Court at Pune on 22nd December 2017 is signed by the petitioner no.1 husband and on behalf of petitioner no.2 wife, it is signed by the father and Power of Attorney holder Mr.Sahmant Laxman Patil. The verification clause of the said petition reveals that the husband Bharat Appasaheb Deshmukh has verified the said petition along with the father and Power of Attorney holder holder of the petitioner no.2.

An affidavit accompanying the said petition is also sworn by Mr.Bharat Appasaheb Deshmukh, petitioner no.1 in person, and on behalf of petitioner no.2, the said affidavit is sworn by the father and Power of Attorney of petitioner no.2.

2 It is on this petition the Principal Judge, Family Court passed the order which reads below:

> **"ORDER BELOW CIVIL STAMP NO.3028/2017 dtd.22/12/2017**
>
> Mr.Bharat Appasaheb Deshmukh
> And
> Mrs.Harshada Bharat Deshmukh
>
> Perused application and authority relied by the Petitioners.
>
> Heard Learned Advocate for Petitioners. Petitioner No.2 is not present before the Court for presentation. Petitioner No.2 wants to file petition through Power of Attorney Holder. Petitioners relied on III (2016) DMC 257 ALLAHABAD HIGH COURT. The facts of this authority and present case are different. This authority is of Hon'ble Allahabad High Court. In my opinion, both the petitioners should remain present before the Court for presentation of the petition. Hence, petition cannot be registered.
>
> Pune (Smt.S.S.Sawant)
> Dt. 01/01/2018 Principal Judge,
> Family Court No.1, Pune "

3 The present petition assails the above mentioned order of the Judge, Family Court. Mr. Samir Vaidya, learned counsel for the petitioner in support of the petition would submit

that the Family Court has erred in refusing the registration of the petition under Section 13-B of the Hindu Marriage Act on the ground that the petitioner no.2 is not present before the Court at the time of filing of present petition. Learned counsel would submit that the petitioner is employed in United States of America and she is not in a position to attend the Court proceedings and she was not able to remain present at the time of filing of the petition due to employment rules and regulations prevailing in the United States of America and according to the learned counsel, this fact has been ignored by the Judge, Family Court. The learned counsel would also submit that the refusal of registration of the petition merely on the ground that the petition was presented and/or sought to be filed by the petitioner's Power of Attorney holder in itself does not empower the learned Judge to reject the petition and therefore, he would submit that the said order is per-se illegal. Learned counsel for the petitioner would place reliance on the judgment delivered by the learned Single Judge of this Court in the case of ***Mukesh Narayan Shinde Vs. Palak Mukesh Shinde*** [1] to submit that it is permissible for the Family Court in the light of technological development to arrange for E-counselling and E-verification by video conference. He would also rely upon the judgment in the case of ***NavdeepKaur Vs. Mahinder Singh***

1 2012(3) ALL MR 521

Ahluwalia (Punjab & Haryana High Court)[2] to submit that Personal appearance of the parties at the time of presentation of petition for divorce by mutual consent is not mandatory and the parties may be represented through duly constituted attorney. However, in such a case, the Court will have to be cautious and vigilant in recording its satisfaction about consent. Another authority on which the learned counsel has placed reliance is of the Lucknow bench in the case of ***Kanwalijeet Sachdev Vs. State of U.P & anr*** [3] which lays down a similar position of law and deal with a situation, where one of the parties before the Court seeking divorce by mutual consent has been residing abroad and when both the parties with consent have arrived at settlement agreement, that has been brought to the notice of the Court.

4 On perusal of the impugned order passed by the Judge, Family Court, it appears that the learned Judge, Family Court has failed to apply any legal provision to the facts in hand. The Judge, Family Court, did not bother to refer to the judgments cited before it and even did not bother to peruse the procedure which is required to be complied by the parties at the time of filing of such petition before the Family Court seeking divorce by mutual

2 2010(4) ALL MR (JOURNAL) 49
3 2016(6) ALJ 589

consent. The Judge, Family Court has merely observed that the authority cited is of Allahabad High Court and in her opinion both the parties should remain present before the Court for presentation of the petition. It is unfortunate that the learned Judge of the Family Court also did not refer to any law on the said aspect.

5 The Family Court, 1984 which provides for establishment of Family Court with a view to permit conciliation and to secure speedy settlement disputes relating to marriage and family affairs, confers jurisdiction of the Family Court to try the suits and proceedings between the parties to a marriage claiming dissolution of marriage by mutual consent as contemplated under Section 13B of the Hindu Marriage Act.

Section 10 of the Family Courts Act provides that the provisions of Code of Civil Procedure shall apply to the suits and proceedings before a Family Court and for the purposes of the said provisions of the Court, the Family Court shall be deemed to be a Civil Court and shall have all the powers to such Court. Exception is only carved out in case of the provisions of Code of Civil Procedure being made applicable to proceedings under Chapter IX

to that Code before the Family Court. Thus, it is amply clear that the Family Court is duty bound to follow the Code of Civil Procedure and it is deemed to be a Civil Court for the purposes of the provisions of the Act and possesses the powers of a Civil Court.

6 The Code of Civil Procedure deals with the pleadings and verification of pleadings. Order 3 of the Code of Civil Procedure deals with recognized agents and pleaders. Rule 1 of Order 3 provides for appearance and it is reproduced below :-

> **Order III Rule 1 :- Appearances, etc., may be In person, by recognized agent or by pleader.-** Any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf:
>
> Provided that any such appearance shall, if the court so directs, be made by the party in person.

Order III Rule 2 specifically mentions about recognized agents of parties by whom such appearances, applications and acts may be made or done which includes person holding Power of Attorney authorizing them to make such appearances, application and acts on behalf of such parties. Rule 2 of Order III reads thus :

> **2 Recognized agents.-** The recognized agents of parties by whom such appearance, applications and acts may be made or done are –
>
> (a) persons holding powers of attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;
>
> (b) persons carrying on trade or business for and in the names of parties not resident 'within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Further, Order VI of the Code provides for pleadings generally and pleadings is construed to mean plaint or written statement.

Order VI of the Code of Civil Procedure deals with the contents of pleadings and Order VI Rule 14 provides for signing of the pleadings which reads thus :

> **14. Pleading to be signed –** Every pleading shall be signed by the party and his pleader (if any)
>
> Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Rule 15 provides for verification of pleadings. It reads thus :

> **Order VI Rule 15 :- Verification of pleadings –**
> **(1)** Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.
>
> (3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.
>
> (4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.

7 Thus, it can be seen that verification to a plaint must be by a party pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts to which a person is verifying. Sub-rule (2) of Rule 15 mandates a person who verifies such pleadings specifically by making reference to the specific number of paragraphs in the pleadings as to what he verifies on his own knowledge and what he verifies on information receipt and believe to be true. It can thus be seen that the pleadings can be verified by either the person pleading it or by some other person who is acquainted with the facts of the case. Further, by virtue of Order III of CPC, any appearance, application or act in or to any Court required or authorized by law, if made or

done by a party in such a Court, may be done by a party in person himself or by his recognized agent or by a pleader appearing or acting in his behalf. This, however, is subject to an exception where any law expressly forbids this to be done. Thus, an appearance, application or act in any or to any Court, can be effectively made or done by a party, either he himself or by his recognized agent.

A recognized agent would cover a person who is a Power of Attorney holder specifically authorized to act on behalf of the original party. This is a specific application as it were under the provisions contained in Section 1A and two of the Power of Attorneys Act 1882. The Power of Attorney has a definite connotation and the Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Basant Nahata,***[4] in paragraph no.13 has referred to the scope of Power of Attorney in the following words :

> A grant of power of attorney is essentially governed by Chapter X of the Indian Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him

4 AIR 2005(12) SCC 340

> and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well-known, a document of convenience".

Thus, a Power of Attorney is an authorized person through whom the pleadings can be duly made and verified under the procedure contained in the Code of Civil Procedure and since it is obligatory on the Family Court to follow the Code, such a mode of presenting an application before the Court and its verification is duly permissible.

8 The Hon'ble Apex Court in case of ***Janki Vashdeo Bhojwani Vs. IndusInd Bank Ltd,*** [1]***,*** has held that the word 'acts' employed in Order 3, Rule 1 and 2 confines only in respect of 'acts' done by Power of Attorney holder in exercise of power granted by the instrument and it would not include deposing in place and instead of principal. It was also held that he cannot depose for the principal in respect of the matter which only the principal can have the personal knowledge and in respect of which the principal is entitled to be cross-examined.

Further, a larger Bench of The Hon'ble Apex Court in the case of ***A.C. Narayanan vs. State of Maharastra & ors***[2]***,*** while dealing with the issue as to whether a complaint under the

1 AIR 2005 SC 439
2 (2014) 11 SCC 790

Negotiable Instruments Act can be signed and filed through a Power of Attorney holder on behalf of the complainant held that though the case of ***Janki Bhojwani*** (supra), was related of Power of Attorney holder under Code of Civil Procedure, but it was concluded that a plaint by a Power of Attorney holder on behalf of the original plaintiff is maintainable provided he has personal knowledge about the transaction in question. The larger Bench applied the said principle to a criminal law by making it as an exception to well settled position that criminal law can be put in motion by anyone and strangers to the transaction in question i.e. legal heirs etc, can also carry forward the pending criminal complaint or initiate criminal action if the original complainant dies. The Hon'ble Apex Court, however, clarified that such Power of Attorney holder should have knowledge about the transaction in question so as to able to bring on record the truth of the grievance/offence, otherwise, no criminal justice could be achieved. In a case, a payee or holder in due course, is expected to sign or appear or depose. The Court has thus held that a complaint filed for on behalf of the petitioner or a holder in due course is good enough compliance which Section 142 of the Negotiable Instruments Act. The Hon'ble Apex Court in the aforesaid judgment observed thus :

> "The power of attorney holder is the agent of the grantor. When the grantor authorises holder to initiate legal proceedings and the attorney holder to initiate legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, describing itself as a sole proprietary concern represented by its own proprietor, and the proprietor or the proprietary concern by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant".

9 It would also be necessary to refer to Section 13-B of the Hindu Marriage Act which reads thus :

> ***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 solemnised 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.

It is thus apparent that the Court by mutual consent would dissolve a marriage when the parties mutually agree amongst themselves for dissolution of the said marriage. The manner in which the proceedings are to be dealt, is set out in Section 13B of the Hindu Marriage Act.

10 Section 13B of the Hindu Marriage Act do not contain any provision abrogating the power of power of attorney holder under the Code of Civil Procedure, and therefore, the procedure governing the proceedings filed under Section 13B of the Hindu Marriage Act would be governed by Order III as well as Order VI of the Code of Civil Procedure. The Judge, Family Court has not given any consideration to the provisions governing the procedure in relation to the proceedings of mutual divorce filed under Section 13B of the Hindu Marriage Act. It is imperative on the part of the Family Court to entertain the application for divorce by filing mutual consent presented to it on the ground that the parties have been residing separately for more than a year and they have not been able to live together and they have mutually agreed to

dissolve the marriage. The procedure for dissolving the marriage is set out in sub-section(2) of Section 13B which mandates the Court on being satisfied that a marriage has been solemnized and that the averments in the petition for mutual consent filed by the parties is true, to pass a decree of divorce dissolving the marriage, after affording an opportunity to the parties and after making such enquiry as it thinks fit. The Court has to thus ascertain the expenses of a marriage and irrevocable break down of the marriage with no possibility of any reconciliation.

11 Perusal of the authorities on which the learned counsel has placed reliance would clearly reveal that there can be no dispute that the attorney of the party can appear in the Court on behalf of the party and do the act as specified in the Power of Attorney. The authorities have gone to the extent of observing that an Attorney is not incompetent witness and he can appear in the Court and depose in the Court as a witness in respect of the facts which are in his knowledge. However, the learned Single Judge of this Court in the case of ***Mukesh Narayan Shinde Vs. Palak Mukesh Shinde*** (supra) has specifically concluded that in the light of advanced technological development, physical presence of the parties even at the time of allowing the petition by mutual

consent, is not mandatory. The Court has observed in paragraph 6 of the said judgment that the physical presence of both the parties is generally asked and necessary to verify the authenticity of the identity of the parties to confirm their consent. However, in peculiar circumstances, like where one of the parties cannot remain present due to certain practical difficulties i.e. job, leave, visa etc. Due to globalization and since noticeable educated young persons are crossing the borders of India and it is not possible to remain present. This Court had observed that there is no illegality to solve such difficulty by adopting novel and available ways by use of advanced technology of communication and new scientific method. In the peculiar circumstances of the case, the Court had directed online counselling to be done with the help of web-cam and online consent through the web-cam and laptop/computer.

12 In view of the aforesaid circumstances, whether the issue involved in the present case was at a more preliminary level i.e. at the stage of filing of the petition through a Power of Attorney holder, it can be seen that there is no legal lacunae in filing of the petition through a registered Power of Attorney, and the said petition needs to be accepted by setting aside the impugned order by the Family Court. Further, in the light of the

said legal position, Family Court will not insist upon the presence of the parties before the Court and would arrange for the consent terms to be recorded either through skype or adopting any other technology and the proceedings contemplated under Section 13-B of the Hindu Marriage Act in the time schedule specified therein.

13 The impugned order passed by the Family Court is quashed and set aside.

Writ Petition is allowed in terms of prayer clause (a).

(BHARATI H. DANGRE, J)