

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.09.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
CMA.No.1880 of 2018
and
CMA.No.1881 of 2018

CMA.Nos.1880 and 1881 of 2018

V.S.Sundara Raman,
represented by his mother and Power Agent
Mrs.Kamala Vidhyashankar ... Appellant/Respondent

-vs-

V.Vaishnavi ... Respondent/Petitioner

Prayer in CMA No.1880 of 2016: filed under Section 173 of Motor Vehicles Act, 1988 against the fair and decretal order datel 12.06.2018 passed in I.A.No.1770 of 2017 in O.P.No.4131 of 2015 on the file of the Learned IV Additional Principal Judge, Family Court at Chennai.

Prayer in CMA No.1881 of 2016: filed under Section 173 of Motor Vehicles Act, 1988 against the fair and decretal order datel 12.06.2018 passed in I.A.No.1769 of 2017 in O.P.No.4131 of 2015 on the file of the Learned IV Additional Principal Judge, Family Court at Chennai.

For Appellant in both CMA's : Mr.Arun Anbumani

For Respondent in both CMA's : Mr.Balaji Sankara Moorthy

J U D G M E N T

[Judgment of the Court was delivered by R.SUBRAMANIAN,J.]

These two appeals have been filed by the husband who is respondent in proceedings for divorce launched by the wife in O.P.No.4131 of 2015 on the file of the IV Additional principal Judge, Family Court, Chennai.

2. The main OP was filed by the respondent seeking divorce on the ground of cruelty. The appellant/husband is admittedly working in the "United States of America". The husband filed an application seeking permission to appear through power agent in IA No.2672 of 2017. He had also executed

a Power of Attorney before a Notary in United States of America. The family court passed an order dated 07.02.2018 in IA No.2672 of 2017 permitting the agent Mrs.Kamala Vidhyasankar, mother of the appellant herein, to represent him in the proceedings. The said order was made with the following qualification that "This petition is allowed in part. The petitioner is permitted to act on behalf of the respondent on all normal hearing and the respondent is directed to appear for the cross-examination of the petitioner and also filing his chief examination and also to be subjected to the cross-examination by himself".

3. After the IA No.2672 of 2017 was allowed as aforesaid. The wife/respondent herein filed two applications in IA Nos.1769 and 1770 of 2017 seeking payment of interim maintenance at Rs.3,00,000/- per annum to herself and the female child, and for Rs.50,000/- towards litigation expenses. A counter affidavit was filed by the husband through his power agent on 26.04.2018. On 12.06.2018 the family court returned the counter affidavit filed by the power agent observing that the directions of the court made while allowing IA No.2672 of 2017 were not complied with. The family court has also pointed out that the power agent cannot file a counter affidavit and further directed the appellant husband to file a counter affidavit sworn to by himself and adjourned the matter to 11.07.2018. While doing so, the family court awarded interim maintenance at Rs.40,000/- per moth. It is this order of the family court dated 12.06.2018 that is under challenged in these appeals.

4. We have heard Mr.Arun Anbumani learned counsel appearing for the appellant and Mrs.Balaji Sankaramoorthy learned counsel appearing for the respondent in both the appeals.

5. Mr.Arun Anbumani learned counsel appearing for the appellant would contend that the family court was not justified in returning the counter affidavit filed by the power agent. Relying upon the order passed by the family court in IA NO.2672 of 2017, he would contend that all that is required of the appellant was to appear for cross-examination of the respondent in the main OP, to file a proof affidavit of chief examination and to subject himself to cross-examination. The learned counsel also invited our attention to Order 3 Rule 1 and 2 of the Civil Procedure which enables the representation of parties through power agents. Order 3 Rule 1 and 2 of the Code of Civil Procedure reads as follows:

1. Appearances, etc., may be in person, by recognised 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 recognised agent, or by a made or done by the party in person, or by his recognised 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.

2. Recognised agents. - The recognised agents of parties by whom such appearances, 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 the 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.

6. A combined reading of the above provisions would show that recognized agents of parties who are holding powers of attorney are authorized to make appearances, file applications. It is thus clear that appearance or application or act in any court can be made by a party or his recognized agent on his behalf. Persons holding power of attorney are considered as recognized agents of the parties. Of course, the provision to Rule 1 Order 3 of the Code of Civil Procedure Code requires such appearance shall be made by the party himself, if the court so directs. It is, therefore, clear that unless there is a specific direction by the court, recognized agent of a party can appear and do acts required by the court. A perusal of the order of the family court dated 07.02.2018 made in IA No.2672 of 2017 makes it clear that the power agent is permitted to act as an agent for a limited purpose. The court also made it clear that the respondent should appear for Cross-Examination of the petitioner and also filing his affidavit of chief examination and also to be subject himself to cross-examination. Evidently, the order does not require that filing of counter affidavits must be done by the appellant himself.

7. Mr.Arun Anbumani would also invite our attention to the judgment of the Division Bench of this court in R.R.Pauvya Vs Gandhimathi (2014(5) CTC 177) wherein this court had held as follows:

"Absolutely, the role of the Power of Attorney to

assist the principal, will be not in a position to appear in person to prosecute the proceedings before the Court, acquires significance for consideration. On analyzing the rulings on this issue, we gather and sum up the following regarding role of the Power of Attorney.

i) Power of Attorney can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A General Power of Attorney holder cannot be allowed to Appeal as a witness on behalf of the principal in the capacity of the principal.

ii) The Power of Attorney holder does not have the personal knowledge of the matter of the Appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are exclusively to the personal knowledge of the principal.

iii) In the Family matters, it is not possible for the spouse to engage a power and act on his/her behalf to give evidence before the Family Court which she/he alone has personal knowledge.

iv) There is no legal impediment under the Family Courts Act, for a Power of Attorney to appear on behalf of the Principal and the only legal embargo is that the recognised agent should not be a legal practitioner. Any person, not being a legal practitioner, can be nominated as an agent under Order 3, Rule 2, C.P.C., to prosecute or defend the parties and until the Family Court passes any specific order, directing appearance of the party, depending upon the facts and circumstances of the case. The persons, who are exempted from the term 'legal practitioner' are the Parents, brothers and sisters. Even then for deposing the facts that are within the personal knowledge of the principal, they should refrain themselves, but the principal should appear before the Court and depose.

8. The family court, however, thought it fit to return the counter affidavit on the assumption that it had prohibited filing of affidavits by the agent. The family court has also referred to a judgment of this court in S.M.Syed Amina Beevi Vs. Thaika Sahib Alim reported in 1993(2) Page 604. The said judgment only lays down that a recognized agent can file pleadings but at the same time, the party to proceeding before the family court cannot take advantage of the provisions Order 3 Rule 1 and avoid personal appearance before the family court and claim to have adjudication through the recognized agent alone.

In view of the recent pronouncement of Division Bench in R.R.Pauvya's case cited supra, we are unable to concur with the family court. -The earlier order of the family court made IA No.2672 of 2017 does not prohibit filing of counter affidavits by the power agent. Therefore, we are of the considered opinion that the family court was not right in returning the counter affidavits filed by the power agent. This action of the family court has in fact prejudiced the respondent, inasmuch as the determination of the interim maintenance that she would be entitled has been unnecessarily delay. The application in IA Nos. 1769, 1770 of 2017 are only miscellaneous proceedings filed by the wife seeking interim maintenance. Those applications can be disposed off based on the counter affidavit filed by the power agent. Any determination in these applications will not have any bearing on the main proceedings which has been initiated by the wife for divorce on the ground of cruelty. We are, therefore of the considered opinion that the family court had unnecessarily adopted a hyper-technical approach by directing return of the counter affidavit filed by the power agent also directing payment on interim maintenance, pending adjudication of the applications filed under section 24 of the Hindu Marriage Act. We, therefore, set aside the order of the family court dated 12-06-2018.

9. At this juncture, it is pointed out by Mr.Arun Anbumani learned counsel appearing for the appellant that the appellant was set ex-parte on 02.08.2018 for not filing the counter in IA Nos.1769 and 1770 of 2017 and application by the power agent seeking to set aside the Ex-parte order has been returned by the family court with the following endorsement. "How the power agent can sign the affidavit power petition is ordered". This return is in violation of the very order of the family court dated 07-02-2018 made in IA No.2672 of 2017.

10. The learned counsel for the respondent would submit that the respondent sign has no objection for the Ex-parte order being set aside. The respondent who is present in court has also made an endorsement which reads as follows "No objection set aside the order that set the appellant Ex-parte". In view of the above endorsement, we direct the family court to number the application filed by the appellant in IA.SR.No.14125 of 2018 seeking to set aside the Ex-parte order dated 02.08.2018 and allow the same, inasmuch as the respondent has expressed her no objection for the same being allowed. The family court is also directed to receive the counter affidavit filed by the power agent in IA No.1769, 1770 of 2017 and dispose all the applications for interim maintenance and litigation expenses as per law within a period of 8 weeks from the date of receipt of copy of this order. It will be in the interest of justice, if the family court disposes of applications for interim maintenance on merits without adopting a hyper-technical has

been done in this case atleast in future.

11. In fine, both the appeals are allowed the orders dated 12.06.2018 are set aside and the family court is directed to dispose of the applications on merits as per the directions supra. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kkn

To

The Learned IV Additional Principal Judge,
Family Court,
Chennai.

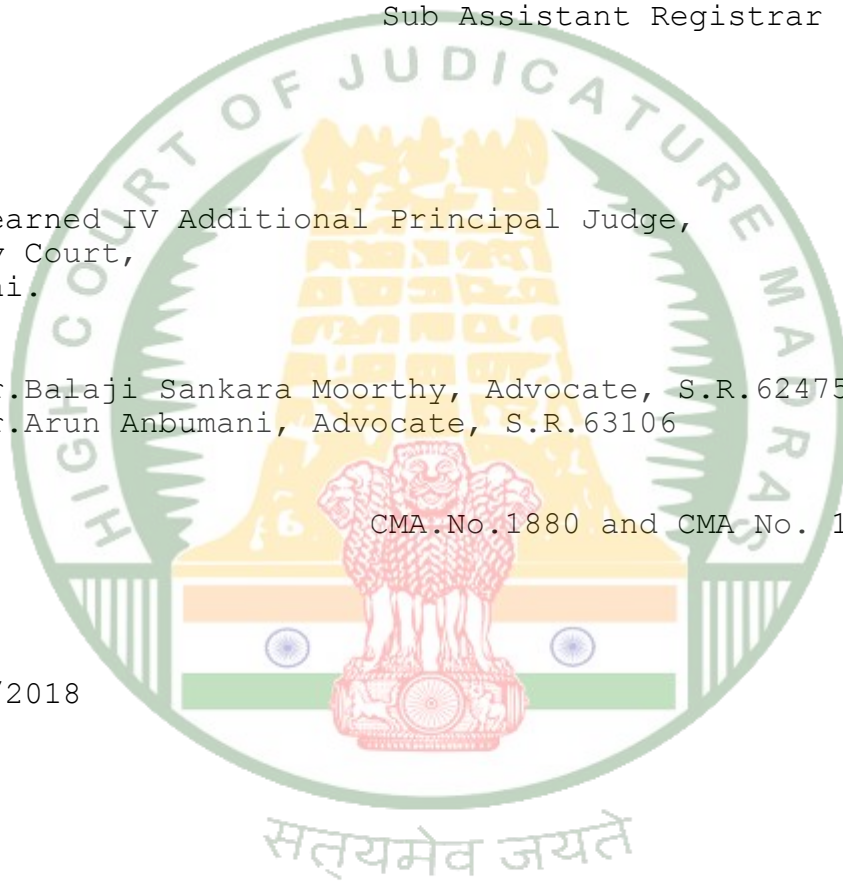
+1cc to Mr.Balaji Sankara Moorthy, Advocate, S.R.62475

+1cc to Mr.Arun Anbumani, Advocate, S.R.63106

CMA.No.1880 and CMA No. 1881 of 2018

NM(CO)

rrs 31/10/2018



WEB COPY