

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

Crl. Revision (F) 503 of 2017 (O&M)
Date of decision: August 10, 2018

Rishabh Jain

...Petitioner

Versus

Neha Jain

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. A.K. Jindal, Advocate,
for the petitioner.
Mr. Kunal Dawar, Advocate,
for respondent.

JAISHREE THAKUR, J.

1. The petitioner herein seeks to challenge the impugned order dated 30.11.2017 passed by the Additional Principal Judge, Family Court, Gurugram, in Petition No. 84/9.3.2017 titled Mrs. Neha Jain Versus Shri Rishab Jain, whereby the application filed by the petitioner seeking permission to be represented through counsel has been rejected.

2. In brief, the facts are that a marriage between the petitioner and the respondent was solemnized as per Hindu/Jain rites and ceremonies on 9.3.2015 at Ghaziabad. As the petitioner was working in the United States of America (USA), the respondent joined his company in March, 2015. However, the marriage did not survive and the petitioner filed a divorce petition before the court at San Mateo County, California, USA. During

the proceedings before the said Court, the respondent moved back to India and filed criminal and civil cases against the petitioner and his family members. The petitioner, who was residing and working in the USA, came to know about the proceedings initiated against him and contacted his counsel to present a Memo of Appearance on his behalf in the petition filed under Section 125 of the Code of Criminal Procedure. However, the counsel came to know that the petitioner had been proceeded ex-parte and that the respondent's evidence is underway. Immediately an application was moved on behalf of the petitioner seeking adjournment to file an application to set aside the ex-parte order 8.8.2017 as well as an application was moved under Section 13 of the Family Courts Act, 1984 seeking permission to be represented through a counsel. The application seeking representation through counsel came to be rejected by impugned order dated 30.11.2017, which led to the filing of the instant revision.

3. Mr. A.K. Jindal, learned counsel appearing on behalf of the petitioner, contends that the petitioner is a resident of the USA and it is not possible for him to be present in the Court on each and every date of hearing and, therefore, he should be permitted to appear in the Court below through his power of attorney. It is further argued that the marriage already stand dissolved by a Court decree granted by the Superior Court of San Mateo County, California, USA as far back as on 4.8.2016. It is further argued that the respondent herein was aware of the said court proceedings, however, she chose not to contest it, while further submitting that division of the property has already taken place by the said decree and the respondent has been

directed to pay a sum \$2526 within a period of 90 days of entry of judgment. Learned counsel relies upon the judgment rendered by a Division Bench of the Bombay High Court in **Leela Mahadeo Joshi Versus Dr. Mahadeo Sitaram Joshi 1991 AIR (Bombay) 105** to contend that the Family Courts have the power to permit representation by a lawyer, if there are sufficient reasons available. It is further argued that Section 13 of the Family Courts Act, 1984 does not prescribe total bar to representation by a legal practitioner. He further relies on the judgment rendered by a Division Bench of Rajasthan High Court in **Laxmi Kanwar Versus Laxman Singh 2004 SCC Online Rajasthan 182**, wherein the parties were permitted to appear through a legal practitioner.

4. Per contra, Mr. Kunal Dawar, learned counsel appearing on behalf of the respondent submits that the petitioner herein is evading the process of law. In fact, the decree of divorce that was obtained in the USA is an ex-parte one, since the respondent neither had the resources nor extension in her visa for stay in the USA to contest the proceedings. It is on this account that she had to return to India and suffer ex-parte decree. It is further contended that the respondent has already filed a civil suit for setting aside the ex-parte decree of divorce obtained by the petitioner in the USA. It is further submitted that the petitioner herein has not put in an appearance either in the proceedings initiated under the FIR or in the proceedings that have been initiated under the provisions of the Domestic Violence Act. In support of his submissions, learned counsel relies upon the judgments rendered in **Pavithra Versus Rahul Raj 2003 (3) R.C.R. (Civil) 456, Rajiv**

Dinesh Gadkari Versus Smt. Nilangi Rajiv Gadkari 2009 (4) R.C.R. (Civil) 835, and Smt. Madhulika Sameer Azad Versus Sameer Mohan Azad 2012 (42) R.C.R. (Civil) 917.

5. I have heard learned counsel for the parties and with their able assistance gone through the pleadings as well as the case laws cited.

6. The moot question that falls for determination by this Court is, whether the impugned order declining the request of the petitioner to be represented through his counsel is justifiable?

7. Section 13 of the Family Courts Act, 1984 reads as under:-

“13. Right to legal representation.-Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae.”

8. The object and scope of the Family Courts as set up was primarily to promote conciliation and to ensure that there is a speedy redressal to the family disputes which arise. The Law Commission in its 59th report (1974) had also stressed that in dealing with the disputes concerning family, the Courts should not be bound down by technicality and should make every effort to ensure a settlement. Section 9 of the Family Courts Act, 1984 also casts a duty on the Family Courts to make every effort for settlement. It is in this back ground that Section 13 of the Family Courts Act, 1984 was incorporated to ensure that parties would put in appearance and efforts could be made to mediate and conciliate between them.

9. In **Leela's case (Supra)**, a Division Bench of the Bombay High Court was seized of a matter and it had an occasion to deal with Section 13 of the Family Courts Act, 1984 (for short '**the Act**'). Before delivering the judgment, a mention was made regarding Section 13 of the Act and note was taken that the Family Courts were not inclined to allow the parties to be represented by a legal practitioner. It was held that *“A perusal of Section 13 of the Act indicates that a party to a proceeding before the Family Court shall not be entitled as of right to be represented by a legal practitioner. It is necessary to clarify that Section 13 does not prescribe a total bar to representation by a legal practitioner which bar would itself be unconstitutional. The intentment of the Legislature obviously was that the problems or grounds for matrimonial break-down or dispute being essentially of a personal nature, that it may be advisable to adjudicate these issues as far as possible by hearing the parties themselves and seeking assistance from Counsellors. The Section also makes provision for a situation whereby the Court may seek the assistance of a legal expert as amicus curiae. It is a well-known fact that the adjudication of a complicated or highly contested matrimonial dispute in the light of the law and interpretation of provisions by different Courts over a period of time, would require in given cases assistance from a legally trained mind and for this purpose, the Court has been empowered to seek the assistance of a legal expert.*

It was further held as under:-

“We are fortified in this view by another aspect which is peculiar to matrimonial proceedings, namely, the fact that as

far as issues such as custody of children, visiting rights, maintenance, alimony, apportionment of property etc., are concerned that the parties may not be in a position to protect their own interest or that they may not be in a position to visualise future problems of requirements and would, therefore, either give up their rights or not be in a position to agitate or safeguard them. The inevitable consequences would be either undue hardship or future litigation, both of which deserve to be avoided. We are, therefore, inclined to agree with the grievance made before us that the Family Court ought to give due credence to the desire of litigants where legal representation is concerned. In fact, Rule 37 of the Family Courts (Court) Rules, 1988 reads as follows :

"37. Permission for Representation by a Lawyer : The Court may permit the parties to be represented by a lawyer in Court. Such permission may be granted if the case involves complicated questions of law or fact, if the Court is of the view that the party in person will not be in a position to conduct his or her case adequately or for any other reasons. The reason for granting permission shall be recorded in the order. Permission so granted may be revoked by the Court at any stage of the proceedings if the Court considers it just and necessary".

It is, therefore, patently clear that reading Section 13 with Rule 37 that adequate provision has been made for legal representation and in the absence of convincing reasons, such permission ought not to be turned down."

10. Somewhat similar view has been expressed in the judgment rendered in **Laxmi Kanwar's case (Supra)**.

11. Per contra, learned counsel appearing on behalf of the respondent, as already noticed, relied on **Pavithra, Rajiv Dinesh Gadkari**

and Smt. Madhulika Sameer Azad's cases (Supra) to contend that Section

13 of the Family Courts Act does not permit a person to be represented through a legal practitioner.

12. The judgment in **Pavithra's case (Supra)**, was primarily on the question whether an authorised agent could prosecute or defend a case. In this case, proceedings had been initiated under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 by the husband and during the pendency of the said proceedings, the wife left for the USA to pursue her studies executing a power of attorney in favour of her father to represent her case. The father filed an application under Order 3 Rule 2 of the Code of Civil Procedure seeking permission of the Court to defend the proceedings before the Family Court, which was returned. The matter was taken up before the Madras High Court, wherein it was submitted that the wife had executed a registered power of attorney in favour of his father to defend all court proceedings and that the Family Court ought to have granted the permission to defend her case by virtue of the power of attorney. The High Court, while dealing with Sections 9 and 10 of the Family Courts Act, also dealt with Section 13 of the Act pertaining to right of legal practitioner, held as under:-

“14. Order 3 Rule 1 of CPC empowers a party in a suit or proceedings to be represented by a pleader, but so far as the proceedings in the Family Courts are concerned, the right of representation by the pleader does not exist. The operation of Order 3 Rule 1 is subject to any law for the time being in force. In addition to the said exclusion in the code, Section 13 of Family Courts Act prohibits the operation of Order 3 Rule 1 to the extent that the case being represented by the legal practitioner. The recognised agent appointed under Order 3 Rule 2 stands on a different footing from pleader. However,

recognised agent cannot be a legal practitioner. The embargo on the appearance of legal practitioners should not be extended to recognised agent. There is no prohibition in the Act or Rules a petition being filed by an authorised agent who is not legal practitioner. The recognised agent can prosecute or defend or represent until Family Court passes specific order directing the party to appear in person, depending upon the facts and stage of the case. Personal appearance of the parties is inevitable to comply with mandatory provisions of the Act. In this case, the authorised agent has filed a petition seeking permission to defend the case on the ground that she is not able to come to India and contest the case. Such a permission cannot be granted. Hence, the said petition is liable to be rejected and rejected accordingly.”

13. In **Madhulika Sameer Azad's case (Supra)**, a Single Judge of Allahabad High Court, while taking note of the fact that the husband was living in the United States of America and it was not possible for him to attend the proceedings (initiated by the wife in India) at Agra, refused to entertain the appeal filed by the wife against the order of the Family Court permitting him to engage a lawyer.

14. The facts in **Rajiv Dinesh Gadkari's case (Supra)** are slightly different and would not be applicable to the facts of the case in hand. In the said case, an appeal was filed against the judgment and order passed by the Family Court, Bandra, Mumbai, allowing the decree of divorce granted under Section 13 (1) (ia) of the Hindu Marriage Act by the respondent-wife. In the divorce proceedings, the husband filed a written statement denying all the allegations made in the petition. Since the husband did not put in appearance personally, a dispute had been raised regarding validity of the

signatures. A decree of divorce was allowed and in the appeal before the High Court, the said decree was confirmed since a categorical statement had been given by the counsel appearing on behalf of the appellant—husband, that the appellant was not willing to come to India to make statement as has been stated above.

15. The Family Courts were constituted with a view to promoting conciliation and secure speedy settlement of disputes relating to matrimonial and family affairs and the very purpose and object of it would be frustrated in case parties do not participate in any of the proceedings before the Family Courts and are permitted to appear through counsel. Section 9 of the Family Courts Act mandates that in the first instance, an effort has to be made for a settlement between the parties and that settlement can arrive at, only if there is mediation and conciliation process between the litigating parties. A power of attorney holder may be able to negotiate a settlement in terms of compensation i.e. monetary terms, but would not be in a position to address any grievance which is personal to the parties. In case a party is not present, the very mandate of Section 9 of the Family Courts Act would be made redundant and, therefore, it is incumbent upon a party to put in appearance in the Family Court at least in the first instance and thereafter in case no settlement is possible, seek permission of the Court to engage a legal practitioner. This Court is of the firm view that to settle matrimonial disputes efforts for rehabilitation and conciliation between the parties would be necessary. It is an opportunity for both the parties to express their grievances in an effort to sort out their differences, if possible, which again,

as already stated, cannot be done by a power of attorney holder or a legal practitioner. Communication between the parties is an essential step towards conciliation. In fact, any undertaking or assurances given would have no meaning until and unless the same are given by the parties themselves instead of their respective counsels.

16. Otherwise also, Section 13 of the Family Courts Act clearly raises an embargo, which states that no party to a suit or proceedings before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. However, this embargo is not absolute and courts have recognised the difficulty of a person, who is a resident of a far off place to attend proceedings on routine basis, like in the case of **Smt. Madhulika Sameer Azad's case (supra)**, where the husband was residing in the USA. In such a situation, though there is no hard and fast rule that a legal practitioner cannot appear on behalf of the parties, but it is desirable that in the first instance the parties should appear before the Family Courts so that effect can be given to the mandate of Section 9 of the Act, and if no settlement is possible, then the parties could be permitted to appear through their respective counsels so as to enable the Family Courts to proceed with the case on its own merit.

17. In the instant case, the petitioner has already obtained an ex-parte decree of divorce. However, as stated by the counsel for the respondent, there were valid reasons for not contesting the same as her Visa had expired and she did not have much funds. Being a divorced wife, the respondent is still entitled to maintain a petition under Section 125 of the

Code of Criminal Procedure.

18. For the reasons afore-stated, the instant revision is dismissed. Should the petitioner choose to put in an appearance in Court and then file an application for legal assistance, the same be considered in the facts and circumstances of the case.

August 10, 2018
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes

