

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

% **Date of decision: 11th September, 2018.**

+ **CM(M) 1077/2018**

RAJA BANERJI

..... Petitioner

Through: Mr. R.P. Luthra and Mr. Saurabh
Luthra, Advs.

Versus

ALKA BANERJI

..... Respondent

Through: Mr. Ravi Kumar, Adv. for Mr. C.M.
Grover, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.36938/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

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3. This petition under Article 227 of the Constitution of India impugns the order dated 25th April, 2018 in HMA No.704/2017 of the Court of Principal Judge, Family Courts (South), Saket, New Delhi.

4. The petitioner and his wife, the respondent herein, both resident of United States of America (USA), acting through their respective attorneys, applied to the Family Court for dissolution of their marriage, by mutual consent, by a decree of divorce. The Family Court, though entertained the petition under Section 13B(1) of the Hindu Marriage Act, 1955 filed through attorneys and also allowed the first motion under Section 13B(1) after interacting with the parties through video conferencing on 'Skype', has in the impugned order observed (i) that though the parties were stated to be residing separately for ten years, but were noticed to be living under the

same roof; and, (ii) that the respondent wife did not seem very comfortable with the proceedings. The Family Court has thus directed the parties to be present in person for the second motion under Section 13B(2), so that the Court could record satisfaction of their respective statements having been made independently and without any undue influence.

5. The counsel for the petitioner has contended that since Supreme Court in *Amardeep Singh Vs. Harveen Kaur* (2017) 8 SCC 746 has permitted the proceeding through attorney, the direction of the Family Court, for personal presence at the time of proceedings under Section 13B(2), will cause prejudice to the parties.

6. This Court, as far back as in *Neelima Chopra Vs. Anil Chopra* 1986 (11) DRJ 188, held that for arriving at satisfaction under Section 13B(2) of the Hindu Marriage Act, the need for the parties to appear in person does not exist and the Matrimonial Court can arrive at the said satisfaction on the basis of affidavits or on the basis of statements of authorised persons as to the correctness of the petition. It was held, that if both the parties by way of affidavits or through counsel state that they were married and are able to produce proof of the marriage and that they have been living separately and have not been able to live together for the prescribed period, then there is no reason as to why the Court should not record its satisfaction as envisaged by Section 13B(2) and pass a decree for divorce thereon. The same was the view of the High Court of Punjab and Haryana in *Navdeep Kaur Vs. Maninder Singh Ahluwalia* AIR 2010 P&H 90; it was held that once the Court is not doubting the genuineness of the contents stated in the petition for divorce by mutual consent and one of the parties is represented

by an attorney who is none else than the father of the husband, who has fiduciary relations with the husband and could not be said to be acting against the interest of his son, the petition cannot be rejected merely on the ground that the husband did not appear in person; the provisions of Section 13B were held to be not required to be read to mean that personal appearance of the parties is mandatory; the parties are not required to be called in Court only to see their faces. This Court again in ***Vinay Jude Dias Vs. Renajeet Kaur*** AIR 2009 Delhi 70 held that where the parties are living far away from the jurisdiction of the Court competent to dissolve the marriage, the parties, after filing their affidavits, can appoint attorneys to act on their behalf and the attorney is competent to act on behalf of the principal on the basis of power of attorney executed by the principal and the attorney can also act in matrimonial cases as per instructions of the principal; however necessary precaution to prevent fraud being perpetuated should be taken and unless the Court “smells some kind of fraud being played with it, the Court should normally recognize the act of the attorneys”. The Division Bench of the High Court of Allahabad also, in ***Kanwalijeet Sachdev Vs. State of U.P.*** 2016 SCC OnLine All 1183 took the same view but clarified that if at any stage of the proceedings, the Matrimonial Court finds any doubt about the averments made in the petition, it would be lawful for the Court to summon personal appearance.

7. However the High Court of Madras, in ***Pavithra Vs. Rahul Raj*** 2002 SCC OnLine Mad 774 held that though Order III Rule 1 of the Code of Civil Procedure, 1908 (CPC) empowers a party in a suit or proceeding 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. It was further held that the operation of Order III Rule 1 is subject to any law for the time being in force and Section 13 of Family Courts Act, 1984 prohibits the operation of Order III Rule 1 to the extent of the case being represented by the legal practitioner. Though it was held that the said bar did not apply to authorised agent appointed under Order III Rule 2 of the CPC but personal appearance of the parties was held to be inevitable to comply with mandatory provisions of the Act. The same view was reiterated in ***Gayathiri Vs. Thirumaran*** 2017 SCC OnLine Mad 14117; it was held that unless the parties are personally appearing, it would be very difficult for the Family Court to assess whether they have changed their mind since the date of petition and that mere filing of the affidavit through their power agent will not solve the problem. It was held that the Family Court is required to make every endeavour and to assist the parties in arriving at speedy settlement of the matter and should ensure personal presence of the parties. A Division Bench of the High Court of Kerala also in ***Rekharani Vs. Prabhu*** MANU/KE/0717/2007 held that matters of emotional incompatibility of temperaments, decision to dissolve the marriage by mutual consent and the consent being not vitiated by fraud, collusion, undue influence or misrepresentation and there being no chance of re-union, are matters requiring personal knowledge and in such matters, the evidence cannot be tendered through the power of attorney holder. It was further reasoned that under Section 13B, a petition for dissolution of marriage by a decree of divorce by mutual consent is to be presented by the parties to the marriage and not through the power of attorney holder. The

same is the view of the High Court of Calcutta in ***Dr. Deepak Sharma Vs. Vineeta Sharma*** AIR 2008 Cal 55.

8. That brings me to the dicta of the Supreme Court in ***Amardeep Singh*** supra. Supreme Court in that case was concerned with the question, whether the minimum period of six months stipulated under Section 13B(2) for a motion for passing a decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations. After holding that the Court is entitled to waive the statutory period after considering the factors laid down therein, in para 21 of the judgment it was held as under:-

“21. Needless to say that in conducting such proceedings the Court can also use the medium of videoconferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.”

9. It would thus be seen that the Supreme Court in ***Amardeep Singh*** was not directly concerned with the question as has arisen in this petition.

10. However, even if ***Amardeep Singh*** is followed, the same also permits “genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason”. In the present case, in the proceedings under Section 13B(1), the petitioner husband Raja Banerji son of Asit Nath Banerji was represented through his special power of attorney holder Sandeep Dhanuka and the respondent wife Alka Banerji daughter of Som Prakash Luthra was represented through special power of attorney holder Devki Kumari. Neither the special power of attorneys, nor the statements of

the attorneys recorded in Section 13B(1) proceedings nor this petition discloses the relationship of the special attorneys with the petitioner husband and the respondent wife. It is not the case that the special attorneys are close relations of the parties, such as parents or siblings. There is nothing to show that the affidavit in support of petition under Section 13B(1) was of respondent wife herself; it appears the said affidavit was of the Power of Attorney holder only. It is also not the case that the petitioner husband and the respondent wife are unable to appear before this Court. In fact it has emerged that the petitioner husband was in Delhi at the time of filing of this petition on 21st July, 2018. Nowhere it is pleaded that the petitioner husband or the respondent wife, within the time permitted for filing of petition under Section 13B(2), are unable to be present in India.

11. Else, the consistent view of those High Courts which have held statements through power of attorney to be permissible, also is that the Court should take necessary precaution and if smells a fraud being practised, insist on personal presence.

12. Once the Family Court in the present case, after interacting with the parties via videoconferencing, has given reasons for issuing direction for personal presence, it would not be appropriate for this Court to, in exercise of jurisdiction under Article 227 of the Constitution of India, interfere with such direction. There is no material before this Court to find any error in direction issued by the Family Court. Merely because the law permits the parties to act through attorney, even in the matter of seeking dissolution of their marriage, does not bind the Court to, even where it feels that personal presence of the parties is necessary and gives reasons therefor, act

mechanically on the basis of petitions filed by attorneys and dissolve marriage after interacting with the attorneys of the parties only.

13. The counsel for the petitioner at this stage states that the terms settled between the parties have already been complied with.

14. I may also notice, that the respondent wife, who was found by the Family Court to be uncomfortable with the proceedings and who primarily has been directed to appear in person at the stage of 13B(2) proceedings, is not aggrieved by the directions and has not preferred this petition.

15. Faced therewith, the counsel for the petitioner husband states that the Advocate for the respondent wife is also present. However Mr. Ravi Kumar, Advocate who is present, claims to be the proxy counsel for Mr. C.M. Grover, Advocate for the respondent wife and does not have authority, either in his favour or in favour of Mr. C.M. Grover, Advocate, to appear or to consent to the petition, though Mr. Ravi Kumar on enquiry states “that he has no issue and has no objection to the modification of the order”, without however knowing whether the said statement is being made under authority of the respondent wife after knowing the impugned order. No reliance can be placed thereon and the said statement of Mr. Ravi Kumar, Advocate cannot dislodge the doubt entertained by the Family Court and which led to the direction for personal appearance.

16. There is no merit in the petition.

17. Dismissed.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 11, 2018

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