

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

CR No.680 of 2015 (O&M)
Date of decision : 13.01.2020

Gurjeet Singh Sangha

.... Petitioner

Versus

Kamalpreet Kaur

.... Respondent

Before: Hon'ble Mr. Justice B.S. Walia.

Present: Mr. Kunal Mulwani, Advocate for the petitioner.
 None for the respondent.

B.S. Walia, J.

[1] Prayer in the revision petition under Article 227 of the Constitution of India is for setting aside order, Annexure P/4 dated 05.01.2015 passed by the learned Addl. District Judge, Hoshiarpur allowing the application moved by the respondent for setting aside the ex parte order.

[2] Brief facts of the case as set up by the petitioner are that marriage between the petitioner and the respondent was solemnized on 02.02.2013 at Hoshiarpur. Both the parties lived together at the residential address of the petitioner for about 15 days where after the petitioner left for New Zealand and applied for Visa for the respondent. Pursuant to completion of documentation, the respondent reached New Zealand on 04.07.2013 where after her behaviour became worse and the parties stayed together in New Zealand till 18.09.2013. Thereafter, the respondent along with her entire belongings left her matrimonial home for an unknown destination on 22.09.2013 and in the circumstances, the petitioner filed a petition u/s 13 (1) (ia) of the Hindu Marriage Act, 1955 (hereinafter referred

parties by granting a decree of divorce. Notice was issued to the respondent, but since service was not being effected on the respondent, the petitioner on 11.08.2014 moved an application for service of the respondent by way of publication and the same was allowed. Thereafter, publication was made in the newspaper 'The Tribune'. However, despite service through publication, respondent chose not to appear and she was proceeded ex parte vide order dated 17.10.2014.

[3] That on being proceeded ex parte, the respondent moved an application through her Special Power of Attorney for setting aside of ex parte order dated 17.10.2014 and praying for permission to contest the petition.

[4] Plea of the petitioner is that the application for setting aside ex parte order dated 17.10.2014 was moved on the basis of Special Power of Attorney dated 14.11.2014 which was executed outside India but the same was not got embossed prior to filing of said application.

[5] Perusal of application, Annexure P/2 moved by the respondent for setting aside ex parte order dated 17.10.2014 reveals that the case was fixed for ex parte evidence for 04.12.2014, that she was residing at New Zealand and her address was known to the petitioner but he intentionally concealed the same from the Court just to get the proceedings conducted ex parte and on 17.10.2014, her parents received copy of the 'Tribune' newspaper sent to their house by the publisher in the evening and only then they came to know about the pendency of the petition before the Court. Immediately thereafter they contacted her at New Zealand and apprised her of the pendency of the case whereupon she sent her Special Power of Attorney authorizing her parents to contest the petition and also to file application to get the ex parte order set aside.

[6] That, in the reply to the application seeking setting aside of ex parte order dated 17.10.2014, stand was that the application was not maintainable as the same was not filed through competent person besides, power of attorney was not validly executed and was also not embossed by the concerned authority as required by law. Further that the application was time barred as it had been filed after the expiry of limitation as prescribed under law.

[7] Application moved by the respondent for setting aside ex parte order dated 17.10.2014 was allowed on the ground that no prejudice would be caused to the petitioner in case ex parte order dated 17.10.2014 was set aside and the respondent allowed to contest the petition rather it would help the Court to decide the controversy between the parties and even otherwise, it was well-settled law that no party should be condemned unheard. Accordingly, in view of the totality of the facts and circumstances of the case as well as in the interest of justice, the application was allowed and ex parte order dated 17.10.2014 was set aside and the respondent allowed to contest the proceedings.

[8] Learned Counsel for the petitioner was heard. However, despite the case having been called out twice, none was present on behalf of the respondent. Therefore, after hearing arguments of learned counsel for the petitioner, the case was reserved for orders.

[9] Learned counsel for the petitioner has reiterated the submissions made before the trial Court namely of the power of attorney not being embossed and the application not having been moved within time.

[10] It needs noticing here that the case was referred to Mediation but vide order dated 12.12.2016, report was submitted of mediation proceedings having failed.

[11] A perusal of the divorce petition reveals that although the petitioner was aware that the respondent was in New Zealand and had so mentioned it in the divorce petition, but he had given her address of Hoshiarpur while only mentioning that she was permanent resident of New Zealand.

[12] Order dated 17.10.2014 proceeding ex parte against the respondent is not available on the record.

[13] However, it is settled law that Section 23 of the Act mandates the Court before granting decree for divorce to satisfy itself if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or liability for the purpose of such relief and if the petitioner has not been in any manner accessory to or connived at or condoned the act or acts complained of, or where the ground of petition is cruelty, the petitioner has not in any manner condoned the cruelty and a duty is also cast on the Court to make every endeavour to bring about reconciliation between the parties. A petition for divorce is not like any other commercial suit. Accordingly, it is obligatory on the party of the Family Court to endeavour in the first instance to effect a reconciliation or settlement between the parties.

[14] Hon'ble the Supreme Court in **Balwinder Kaur vs Hardeep Singh, 1997 (11) SCC 701** was pleased to hold that a party could not defeat the provisions of sub-section (2) and sub-section (3) of Section 23 of the Act by remaining ex parte and the Court would not be helpless in requiring the presence of that party even if the circumstances of the case so required and that in such a situation the Court could require the personal appearance of the parties. Hon'ble the Supreme Court further held that although the proceedings were ex parte but in a case like this the Court could not be a

silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them. Relevant extract of the decision is reproduced as under :-

“8. A petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress should always be on preserving the institution of marriage. That is the requirement of law. One may refer to the Objects and Reasons which led to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is "laid on conciliation and achieving socially desirable results" and eliminating adherence to rigid rules of procedure and evidence. These further note:

"The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same advisory approach prevails."

14. Section 23 of the Hindu Marriage Act mandates the court before granting decree for divorce, whether defended or not to satisfy itself (1) if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief and (2) the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty. A duty is also

cast on the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-section (3) of Section 23 of the Act, the court can even refer the matter to any person named by the parties for the purpose of reconciliation and to adjourn the matter for that purpose. These objectives and principles govern all courts trying matrimonial matters. The judgment of the District Judge is silent of the learned Judge took into consideration all what is mentioned in Section 23 of the Act. A question also arises can a party defeat the provisions of sub-section (2) and sub-section (3) of Section 23 of the Act by remaining ex-parte and the court is helpless in requiring the presence of that party even if in the circumstances of the case so required. We are of the opinion that court can in such a situation require the personal presence of the parties. Though the proceedings were ex-parte in the case like this the court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them.”

[15] In the light of the position as noted above, the hyper-technical plea of the petitioner seeking to oust the respondent from putting-forth her view point before the Court in a divorce petition based on cruelty cannot be accepted as even otherwise, it is the duty of the Court under Section 23 sub section (2) of the Act to ascertain the truth from the parties by putting questions to them and eliciting answers from them as also to make an attempt at reconciliation in keeping with the mandate of Section 23 of the Act.

[16] In the circumstances, without going into the question as to whether the Special Power of Attorney not being embossed could not have been the basis for filing the application, the revision petition is dismissed in view of the provisions of Section 23 (2) of the Act as it is incumbent upon the Court to not only ascertain the truth by putting questions to the witnesses

and eliciting answer from them but also to make attempts at reconciliation and for doing so, it can require the personal presence of the parties. The respondent has also appeared in person in the conciliation proceedings before this Court. Even otherwise, as per the admitted position, the power of attorney holders of the respondent-wife i.e. her parents received the notice regarding the pendency of the divorce petition by way of publication in the Tribune newspaper on 17.10.2014 and therefore, took some time to get the power of attorney from the respondent who was in New Zealand. In the circumstances, the respondent has been vigilant in prosecuting the case and has put in appearance before the Court at the earliest possible, therefore, there exists sufficient cause for setting aside the order proceeding ex parte against the respondent and the hyper-technical objection of the power of attorney in favour of the parents of the respondent not being embossed is merely an irregularity and cannot be made the basis for ousting the respondent from contesting the proceedings and of being granted the opportunity of being heard especially in view of the fact that the respondent herself in person has already put in appearance before this Court during conciliation proceedings and is in India, therefore, the mere irregularity, if any, can be rectified.

[17] In view of the position as noted above, no circumstances exist warranting interference with the well-reasoned order Annexure P/4 dated 05.01.2015 passed by the learned Addl. District Judge, Hoshiarpur. The revision petition is bereft of merit and is accordingly dismissed.

13.01.2020
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(B.S. Walia)
Judge