

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 05, 2008

Date of Order: September 19, 2008

CM(M) 1030/2008

19.09.2008

Mr. Vinay Jude Dias ...Petitioner

Through: Mr. Sandeep Sethi with

Mr. Anshu Mahajan and

Mr. Vikas Aggarwal, Advs.

Versus

Ms. Renajet Kaur ...Respondent

Through:

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT:

1. The petitioner is aggrieved by an order of learned ADJ dated 25th August, 2008 whereby in a Divorce Petition by mutual consent filed by the petitioners, the Court directed personal appearance of both the parties for purpose of its satisfaction regarding an inquiry under Section 10(A) of the Divorce Act.
2. Notice of the petition was accepted by the respondent in the Court and respondent supported the petition and wanted the petition to be allowed. Thus, the Court has only to examine whether the personal appearance of the petitioner before the Court below was necessary in order to obtain divorce with mutual consent under Section 10(A) of Divorce Act.
3. In the present case, the special power of attorney in favour of one Mr. Lal Babu Tiwari was executed by the petitioner (husband) to appear before the Court and testify about the contents of the petition. The petitioner has signed the petition before Indian consulate High Commission of India in UK under Section 3(2) of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1947 under which the documents do not require any further evidence.
4. The learned ADJ relying on Janaki Vasudeo Bhojwani Vs. IndusInd Bank Ltd. AIR 2005 SC 439 wherein Supreme Court had held that 'a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become witness on behalf of party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself', considered that the attorney cannot depose in the Court to satisfy the inquiry as required under Section 10(A) of Divorce Act.
5. There can be no dispute that the attorney of the petitioner can appear in the Court on behalf of the party and do the act as specified in power of attorney. An attorney is not an incompetent witness. He can appear in the Court and depose in the Court as a witness in respect of facts which are in his knowledge. He cannot depose in respect of the facts which are not in his knowledge and knowledge of which has been derived by him from principal without witnessing the facts himself. However, if an attorney has witnessed all those facts himself which were also

witnessed by the principal, an attorney cannot be told that he cannot appear in the witness box and depose in the Court in respect of the facts known to him. Facts, which are within the special knowledge of principal and are not in the knowledge of attorney can only be deposed by the principal. Whether the parties were married on a particular day, is not a private act of the parties. Marriage is normally a public act in this country and evidence can be given by anyone who has knowledge of the fact. Whether the parties are living separate or not is also known to other people associated with the parties and is not something secret. Similarly, for how long parties were living separate can be deposed in the Court by any person who is aware of the facts. If an attorney aware of these facts and can answer the questions of the Court, the attorney cannot be told that he is not a competent witness or his statement would not be recorded. Similarly an attorney, on the basis of instructions/directions given to him, can answer the queries, if there was any possibility of parties patching up and living together or the marriage has broken down irretrievably. An attorney has to be allowed to appear in the witness box and make statement. The Court may reject that part of his statement which is based on hearsay or which he has no personal knowledge. But he cannot be prevented from appearing in the witness box and deposing and answering the queries. Same is the import of judgment of Supreme Court in Janaki Vasudeo Bhojwani (supra) wherein Supreme Court had not debarred an attorney from appearing in the witness box but the Supreme Court has stated the facts which are only in the knowledge of the principal, about those facts attorney cannot testify in the Court.

6. This Court in Neelima Chopra vs. Anil Chopra 1986 (11) DRJ 188 held that if both the parties, by way of affidavits or through counsel, state that they are 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 can be no reason as to why the Court should not record its satisfaction as envisaged under Section 13-B(2) of Hindu Marriage Act, despite the fact that parties had not appeared in person and pass a decree for divorce.
7. The Division Bench of Calcutta High Court in Annalie Prashad vs. Romesh Prashad AIR 1968 Calcutta 48 had made following observations :
 - “3. In our opinion, neither of the above two reasons can be sustained in law. The Special Marriage Act by Section 40 attracts the Code of Civil Procedure subject, of course, to the other provisions of the said statute and to such rules as the High Court may make in that behalf. The learned trial Judge does not say that there is anything in the statute or in the rules, which would conflict with the view that affidavit evidence would be permissible, unless we agree with him that the Act, having prescribed that the parties should be heard, would necessarily require their personal appearance or presence before the Court. We do not, however, think that that is the consequence of the words “hearing the parties” and, accordingly, the reason given by the learned trial Judge in that behalf cannot be accepted. We are also unable to agree that, in a case of divorce by mutual consent, affidavit evidence should be excluded on the ground that in such a case, it is desirable that the parties themselves should be present in Court. In the premises, Order 19 of the Code of Civil Procedure would be attracted by the above special statute as part of the Code and would not be excluded either expressly or by necessary implication.”
8. 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. Attorney is competent to act on behalf of the principal on the basis of power of attorney executed by the principal. The Courts have been allowing attorneys to file the petition, to withdraw the

petition, to carry on proceedings in the Court on behalf of their principal in all other cases. The attorney can also act in matrimonial cases as per instructions of their principle. The Court can take necessary precautions to prevent frauds being perpetuated on it but unless the Court smells some kind of fraud being played with it, the Court should normally recognize the act of the attorneys.

9. I therefore allow this petition. The order of the Trial Court insisting on the personal appearance of the parties is set aside. The attorneys are permitted to make statement before the Court below.

September 19, 2008

SHIV NARAYAN DHINGRA J.