Supreme Court of India
Jagraj Singh vs Birpal Kaur on 13 February, 2007
Author: C Thakker
Bench: C.K. Thakker, Lokeshwar Singh Panta

CASE NO.:
Appeal (civil) 711 of 2007

PETITIONER:
JAGRAJ SINGH

RESPONDENT:
BIRPAL KAUR

DATE OF JUDGMENT: 13/02/2007

BENCH:
C.K. THAKKER & LOKESHWAR SINGH PANTA

JUDGMENT:

J U D G M E N T (Arising out of S.L.P. (Civil) No. 9706 OF 2006) C.K. Thakker, J.

Leave granted.

The present appeal by special leave has been filed by the appellant-husband against the interim order dated May 04, 2006 passed by the High Court of Punjab & Haryana at Chandigarh in F.A.O. No. 13-M of 2005 issuing non-bailable warrant against him. Brief facts of the case are that marriage of the appellant and respondent was solemnized on July 6, 1993 at Barnala, District Sangrur, Punjab and from the said wedlock, a son was born to them on April 9, 1994, but he died in September, 1995. It is the case of the husband that after marriage, he went to Brunei, Darusslame in January, 1994. Respondent-wife also joined him after some days. There she appeared in an interview for a job of Pharmacist. But she was not selected for the said job and returned to the matrimonial home on February 15, 1994 and then came back to India and lived with her parents. In the meantime, relations between them became strained and on December 23, 2002, respondent-wife filed a petition for divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') on the ground of desertion and cruelty in the Court of District Judge, Faridkot, Punjab. Appellant, through his Special Power of Attorney, filed written statement contending inter alia that Faridkot Court had no territorial jurisdiction to hear and try the petition. He also denied the allegations of cruelty and desertion. It was also pleaded that the wife obtained degree of MBBS from Russia at the expenses of the appellant-husband and he and his parents had spent an amount of Rs. ten lakhs on the said MBBS course. The District Judge heard the matter. On the question of jurisdiction, the Court observed that since the wife was living with her parents in Barnala and not at village Saline, within the jurisdiction of District Faridkot, the District Judge at Sangrur had jurisdiction to try the petition and the District Judge, Faridkot had no jurisdiction to entertain and decide the petition. The Court, however, did not stop there and went on to enter into merits of the matter. Considering the evidence on record, the learned Judge held that the husband neither treated the wife with cruelty nor deserted her. He, therefore, held that the wife was not entitled to a decree

of divorce.

Aggrieved thereby, the wife preferred an appeal vide FAO No. 13-M of 2005 before the High Court. The High Court issued notice to the husband through the Special Power of Attorney. In order to bring out reconciliation between the parties, the High Court directed both the parties to remain present in person on November 29, 2005. On November 29, 2005, the Power of Attorney of the husband-appellant herein stated that the husband would positively remain present in Court on the next date of hearing, i.e. February 2, 2006. The husband, however, did not appear on that day and the case was adjourned to February 21, 2006 and again to May 4, 2006. On May 4, 2006, the High Court passed the following order "It appears that despite several opportunities granted after 29.11.2005 to the parties to remain present in the Court, the respondent-husband has not cared to obey the order. Let non bailable warrants be issued to the respondent-husband for 30.5.2006 to be executed through the Ministry of External Affairs, Government of India and the Office of Indian Consulate General/Ambassador in Italy on the address mentioned in the order dated 13.1.2005 namely; "Via Localite Pizzi Bornazzo 1, 01020 VT, Italy".

Hence, the present appeal by special leave. On May 29, 2006, this Court, while issuing notice, granted interim stay of the order of the High Court issuing non-bailable warrant against the husband. We have heard the learned advocates for the parties.

Learned counsel appearing for the appellant submitted before us that the High Court had no jurisdiction to issue direction to the husband to remain personally present in the court and non-bailable warrant for non-appearance of parties under the Act could not have been issued. By doing so, the Court had exceeded its power, authority and jurisdiction. He further submitted that the personal appearance of the party to the proceeding is not mandatory, and at the most the Court may proceed to consider the matter ex parte. He, therefore, submitted that the order passed by the High Court deserves to be set aside by directing the Court to decide the matter in accordance with law. The learned counsel for the wife, on the other hand, submitted that the order is interim in nature which does not call for interference by this Court in the exercise of discretionary jurisdiction under Article 136 of the Constitution. He further submitted that the Court has authority to direct personal presence of the parties and no objection can be raised if such direction is issued. It cannot be termed to be an order without jurisdiction. We have given our anxious consideration to the rival submissions of the learned counsel. We must admit that we are unable to accept bald assertion of the counsel for the appellant that no Court of law can direct a party to remain personally present. Apart from the matters under the Act i.e. Hindu Marriage Act, 1955, even in civil matters also, a Court of law may order either the plaintiff or the defendant to remain personally present in Court. For instance, Rule 1 of Order III of the Code of Civil Procedure, 1908 ('Code' for short) states that a party may appear in Court either in person or by his recognized agent or by a pleader on his behalf. The proviso to the said rule, however, declares that any such appearance shall, if the Court so directs, be made by the party in person. Likewise, Rule 12 of Order IX provides that where a plaintiff or defendant, who was ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the said Order applicable to plaintiffs and defendants respectively who fails to appear. It is thus clear that in appropriate cases, a Civil Court may direct a party to the suit plaintiff or defendant, to

appear in person. Special provisions have been made in the Code by the Code of Civil Procedure (Amendment) Act, 1976, in respect of suits relating to matters concerning the family in Order XXXII-A. Rule 3 of the said Order requires the Court to make efforts for settlement of family disputes. The said rule reads thus:

3. Duty of Court to make efforts for settlement. (1) In every suit or proceedings to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit of proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

The Act (Hindu Marriage Act, 1955) is a special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. Chapter V (Sections 19 to 28A) deals with jurisdiction and procedure of Court in petitions for restitution of conjugal rights, judicial separation or divorce. Sub-section (1) of Section 23 expressly states that where a petition for divorce is filed under Section 13 of the Act on certain grounds, before proceeding to grant any relief, the Court, 'in the first instance', should make an endeavour to bring about reconciliation between the parties.

Sub-sections (2) and (3) are material which may be reproduced:

(2) Before proceeding to grant any relief under this Act, it shall be the duty of 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:

Provided that nothing contained in this sub- section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub- section (1) of section 13.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report. As observed by this Court in Saroj Rani v. Sudarshan Kumar Chadha, (1985) 1 SCR 303 : (1984) 4 SCC 90, conjugal rights are not merely creature of statute but inherent in the very institution of marriage. In R.V.S.L. Annapurna v. R. Saikumar, (1981) Supp SCC 71, there were matrimonial problems between the

husband and the wife. The Court observed that the two young persons had led to more than one litigation. The Court felt that such a case should not be driven to a 'bitter legal finish'. On the contrary, every possible effort must be made so as to restore the conjugal home and bring back harmony between the husband and the wife. The Court appreciated the efforts made by learned counsel for both the sides and after some amount of discussion, persuasion and suggestion, the husband and wife agreed to live together in a separate house. The Court stated that they would live together for one month jointly on a trial basis and parents or grant parents of both the spouses would not, for the time being, visit them. The Court stated; "Not that we are suggesting that parents or grandparents should not under any circumstance visit their children or grandchildren, but we are making an experiment in creating mutual confidence and in that endeavour even possible irritations and misapprehensions should not be allowed to vitiate the atmosphere. Solely on that basis and without casting any reflection on any person, we have made the suggestion, which is acceptable to both sides. Therefore, within this provisional period of one month the husband and wife will live together, hopefully happily without their parents or grandparents visiting them during this spell". (emphasis supplied) The above decisions of this Court make it more than clear that the approach of a Court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses. Probably, this aspect has been kept in view by the Legislature in enacting sub-section (2) of Section 23 of the Act by requiring a court to make all efforts to bring about reconciliation between the parties.

Though there is no direct decision of this Court on interpretation of Section 23(2) of the Act, various High Courts have interpreted the said provision. Before more than four decades, in Jivubai v. Ningappa, AIR 1963 Mys 3, the High Court of Mysore stated; "There can be no doubt that a duty is laid on the Court to make every endeavour to bring about a reconciliation between the parties whenever the nature and the circumstances of the case permit it to do so". Failure of the trial Court to make such effort does not mean that appellate Court at a later stage should not undertake such exercise. "The intention of the provision undoubtedly is to render all possible assistance in the maintenance of the marital bond and if at any stage of the case the circumstances are propitious for reconciliation it will be the Court's duty to make use of such circumstances irrespective of the stage". If no endeavour had been made by the Court, it will undoubtedly be a serious omission.

In Chhote Lal v. Kamla Devi & Ors., AIR 1967 Patna 269, the High Court of Patna held that sub-section (2) of Section 23 of the Act enjoins upon the Court a duty to make a sincere effort at reconciliation before proceeding to deal with the case in the usual course. It was observed that in order that the requirement of making 'every endeavour' is fulfilled, it is at least requisite that the court should have a first hand version. Such first hand version, obviously, can be had if the parties are present before the Court. In such a situation, the Court would be in a position to appreciate what really had led to the estrangement between the husband and wife. The Court stated:

"A perusal of sub-section (2) of Section 23 of the Act leaves no room for doubt that even where the estrangement between the parties to the marriage might seem to be acute, it is the duty of the court

to make every endeavour to bring the parties to reconciliation. Of course, the court cannot help, if in spite of its endeavour no reconciliation can be brought about, but every endeavour in that direction has got to be made in cases of this nature". (emphasis supplied) In Raghunath v. Urmila Devi, AIR 1973 Allahabad 203, construing Section 23(2) of the Act, the Court held that the effort of reconciliation is to be made by the Court right from the start of the case and not only after the closure of final hearing of the matter and before the Court proceeds to grant relief under the Act. It was also observed that the Court should not give up the effort for reconciliation merely on the ground that there is no chance for reconciliation. It was held that since the matter is very much personal to the parties, their appearance in person before the Court is all the more essential while the Court proceeds to bring about reconciliation between them. It is the duty of the Court to make sincere endeavour at reconciliation. In that case, the Court ordered the parties to remain personally present. On the adjourned day, however, counsel for the wife stated that there was no possibility for reconciliation whereupon the Court ordered that the attendance of wife would not be necessary and recalled the previous order. Setting aside the order, the High Court observed: "This was clearly not in consonance with the provisions of sub-section (2) of Section 23 of the aforesaid Act. The Court below did not direct the opposite party No.1 to appear in person and state about that fact nor did it ask for her personal affidavit. In my view, the requirements of the law were not complied with and the Court below failed to perform its duty laid down in the aforesaid provision of the Act". (emphasis supplied) In Jaswinder Kaur v. Kulwant Singh, AIR 1980 P&H 220, a similar view was taken by the High Court of Punjab & Haryana. It was observed that an attempt for reconciliation between the parties should be made in the beginning and not at the end. It was indicated that the matrimonial Court, beside being a Court of law, has to decide matters and grant relief thereon in a very sensitive field. It is for the Court to choose, with or without the suggestion of the counsel or the parties, the time at which reconciliation, wherever possible and whenever consistently with the nature and circumstances of the case, should be attempted. In Smt. Manju Singh v. Ajay Bir Singh, AIR 1986 Delhi 420, it was observed that the Court should try first for reconciliation. If an endeavour of reconciliation is not made, the order would be illegal.

In Sushma Kumari v. Om Prakash, AIR 1993 Patna 156, it was held that the duty is cast on the Court to take steps for reconciliation between the parties, though non-observance of endeavour for reconciliation would not make the order of the Court without jurisdiction. But in that case the defect can be rectified by the appellate Court.

From the above case-law, in our judgment, it is clear that a Court is expected, nay, bound, to make all attempts and endeavours of reconciliation. To us, sub- section (2) of Section 23 is a salutary provision exhibiting the intention of Parliament requiring the Court 'in the first instance' to make every endeavour to bring about a reconciliation between the parties. If in the light of the above intention and paramount consideration of the Legislature in enacting such provision, an order is passed by a Matrimonial Court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the Court has no such power and in case a party to a proceeding does not remain present, at the most, the Court can proceed to decide the case ex parte against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the learned counsel for the appellant, therefore, cannot be

upheld.

There is another aspect also which is relevant and material. As already observed by us earlier, the petition for divorce was filed by the wife in the Court of District Judge, Faridkot. The petition was contested by the husband raising several contentions including the contention as to jurisdiction of Faridkot Court to entertain, deal with and decide the matter. Though the Court upheld the contention and ruled that it had no jurisdiction, it went into merits of the matter. No effort whatsoever had been made by the Court as required by sub-section (2) of Section 23 of the Act and the Court held that the record did not show that the husband either treated the wife with cruelty or deserted her and accordingly the petition was dismissed on merits observing that the wife was not entitled to a decree for divorce. It is settled law that once the Court holds that it has no jurisdiction in the matter, it should not consider the merits of the matter. In the present case, though the issue as to jurisdiction of the Court was decided against the wife, without following the procedure under Section 23(2) of the Act, the Court dismissed the petition on merits which could not have been done.

There is yet one more reason which is important. When the appeal was filed in the High Court by the aggrieved wife, the Court entertained it. Since the husband was not in India, notice was issued to him at his address as given in the Special Power of Attorney at Itali. The said order was passed on January 13, 2005. On July 28, 2005, the Court noted that the notice had not come back served or unserved and hence, fresh notice was issued by making it returnable on November 22, 2005. On the returnable date, i.e. November 22, 2005, the wife was present in the Court. The Power of Attorney and brother of husband was also present in Court in person. The Court noted that the Power of Attorney contacted the respondent who is residing in Italy to find out the date on which he can remain present in the Court in person in the month of December, 2005. The Power of Attorney stated that he would be able to give a final date within one week. Accordingly, the case was differed for one week. On November 29, 2005, the Power of Attorney made a statement before the Court that the husband "shall positively be present in person on 2.2.2006". The case was, therefore, adjourned to February 2, 2006. On that day, however, the husband did not appear. Again, by an order dated April 17, 2004, the parties were directed to be present in Court on May 4, 2006. Since on that date also, the husband did not remain present whereas the wife attended the Court, the impugned order directing issuance of non-bailable warrant was passed.

The learned counsel for the husband contended before this Court that the sole intention of the wife was to get him arrested and it was not possible for the husband to come to India. Considering the grievance and apprehension on the part of the husband, this Court, while issuing notice on May 29, 2006 granted interim stay against issuance of non-bailable warrant and the said interim relief continues even today. At the time of hearing of the appeal, we have asked the learned counsel for the appellant-husband that if the apprehension of the husband is that he would be arrested on coming to India, interim relief granted earlier and operative can be continued so as to enable him to remain personally present in Court and to comply with the order. The learned counsel, however, insisted that no such order could have been passed by the Court. Since we are of the view that the Court has jurisdiction to pass such order, it cannot be said that the direction issued by the High Court is without authority of law.

Again, we are exercising discretionary and equitable jurisdiction under Article 136 of the Constitution. If, in spite of protection granted by this Court, the husband is bent upon to disobey and flout the order passed by the Court which is in consonance with Section 23(2) of the Act, he cannot claim as of right the equitable relief from this Court.

For the foregoing reasons, in our opinion, no case has been made out by the appellant. The order passed by the High Court deserves no interference as we see no legal infirmity therein. The appeal deserves to be dismissed and is accordingly dismissed with costs.