

MANU/RH/0518/2004

Equivalent Citation: I(2005)DMC745

IN THE HIGH COURT OF RAJASTHAN

Civil Misc. Appeal No. 503 of 2003

Decided On: 19.05.2004

Appellants: **Laxmi Kanwar**

Vs.

Respondent: **Laxman Singh**

Judges/Coram:

N.N. Mathur and K.K. Acharya, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Shailendra Kala, Adv.

For Respondents/Defendant: M.K. Trivedi, Adv.

Subject: Family

Acts/Rules/Orders:

- Family Courts Act, 1984 - Sections 9, 10, 13 and 19;
- Rajasthan High Court Family Court Rules, 1990 - Rule 22;
- Hindu Marriage Act, 1955 - Section 13, 13(1), 13(2) and 13B;
- Securities and Exchange Board of India Act, 1992;
- Code of Civil Procedure, 1908 (CPC) - Order 3, Rule 1 - Order 5, Rules 1(2) and 4;
- Constitution of India - Articles 19 and 21;
- Securities and Exchange Board of India Regulations - Regulation 28(5);
- Divorce Law;
- Family Law

Cases Referred:

- Smt. Kailash Bhansali v. Surendra Kumar, 2000 (3) WLC (Raj.) 543;
- Pett v. Grayhound Racing Association Ltd., (1968) 2 All England Reporter 545;
- Board of Trustees, Port of Bombay v. Dilip Kumar, AIR 1983 SC 109;
- Kalindi v. Tata Locomotive, AIR 1960 SC 914;
- Brooke Bond (India) Ltd. v. Subba Raman, 1961 (2) LLJ 417;
- Dunlop Rubber Company v. Workman, AIR 1965 SC 1392;
- C.L. Subramaniam v. Collector of Customs, AIR 1972 SC 2178;
- Mitesh Manubhai Sheth v. Secretary, Govt. of India, AIR 1998 Gujarat 60;
- Leela Mahadeo v. De Mahadeo Sitaram Joshi, II (1991) DMC 125 (SC), AIR 1991 SC 105;
- Prabhat Narain Tickoo v. Mamta Tickoo, (1998) DMC 333;
- Komal S. Padukone v. Principal Judge, AIR 1999 Karnataka 427;

- Smt. Nandana v. Pradeep Bhandari, (1996) DMC 285, (1996) 2 WLC (Raj.) 234

Citing Reference:

Brooke Bond (India) Ltd. v. Subba Raman,	Discussed
C.L. Subramaniam v. Collector of Customs, MANU/SC/0281/1972	Mentioned
Dunlop Rubber Company v. Workman, MANU/SC/0211/1964	Mentioned
Kalindi v. Tata Locomotive, MANU/SC/0237/1960	Discussed
Komal S. Padukone v. Principal Judge,	Discussed
Leela Mahadeo v. De Mahadeo Sitaram Joshi,	Discussed
Mitesh Manubhai Sheth v. Secretary, Govt. of India,	Discussed
Pett v. Grayhound Racing Association Ltd.,	Discussed
Port of Bombay v. Dilip Kumar, MANU/SC/0184/1982	Discussed
Prabhat Narain Tickoo v. Mamta Tickoo,	Discussed
Smt. Kailash Bhansali v. Surendra Kumar,	Discussed
Smt. Nandana v. Pradeep Bhandari,	Discussed

Disposition:

Appeal Allowed

CaseNote:

Civil - Representation of - Section 13 of Family Courts Act, 1984 - Whether Appellant/wife was entitled to appear through Counsel - Held, in instant case, Appellant /wife was staying in concerned State - It was torturous for her and her parents to travel to other city of other State on each date of hearing - Convenience could not be compensated in terms of money - Thus, there was no reason to deny her to services of Lawyer - She may not have claim to be represented through Lawyer as of right but if convenience so required, it was obligatory on Court to extend such facility - Proviso to Section 13 of Act casts duty on Court to consider if in interest of justice, assistance of legal expert as amicus curiae was necessary - Judge of Family Court in facts of case had committed error in refusing Appellant to be represented through legal practitioner - Hence, miscellaneous appeal allowed

JUDGMENT

N.N. Mathur, J.

1. This miscellaneous appeal filed under Section 19 of the Family Courts Act, is directed against the order of the Judge, Family Court, Jodhpur dated 1.4.2003 dismissing the appellant's application filed under Section 13 of the Family Courts Act, 1984, hereinafter referred to as "the Act of 1984" read with Rule 22 of the Rajasthan High Court Family Court Rules, 1990, hereinafter referred to as "the Rules of 1990" seeking leave to be represented through a Counsel.

2. This respondent-husband filed a petition in the Court of Judge, Family Court, Jodhpur against the appellant-wife under Section 13 of the Hindu Marriage Act, 1955, hereinafter referred to as "the Act of

1955" for divorce. The notice of the petition was served on the appellant-wife at her Kapadganj address in the State of Gujarat, where she is residing with her parents. She used to travel from Kapadganj to Jodhpur for attending the Family Court on dates of hearing, escorted by her parents. On account of illness, she could not appear on 17.5.2001, which led to ex parte proceedings against her. However, the ex parte proceedings were recalled by order dated 19.7.2001. It was a great harassment to her parents and herself to travel from Kapadganj to Jodhpur on every date of hearing. In these circumstances, leave was sought to be represented through Counsel. The application was opposed by the respondent-husband on the ground that

the appellant-wife being an educated lady holding the qualification of M.A., B.Ed. and also a student of LL.B. final, could travel alone and defend her case. The respondent-husband placed reliance on a decision of the learned Single Judge of this Court in Smt. Kailash Bhansali v. Surendra Kumar, reported in MANU/RH/0217/2000. In the said case, the Judge, Family Court, Udaipur granted leave to the party to be represented through a Counsel. On appeal, the learned Single Judge of this Court set aside the said order with a cost of Rs. 10,000/-. The said judgment has been set aside by the Division Bench in special appeal being D.B. Special Appeal No. 550/2000 decided on 15.12.2000. However, the Judge, Family Court preferred to rely on the judgment of the learned Single Judge in utter disregard to the Division Bench judgment. In the opinion of the learned Family Judge, the difficulty of visiting Jodhpur for attending the Family Court on dates of hearing, could be redressed by directing respondent-husband to pay the actual expenses incurred. It was further observed that she is not only M.A., B.Ed. but also student of LL.B. The learned Judge, Family Court made a personal remark against the appellant-wife that she can defend her own case much more effectively than a Lawyer. Thus, the learned Judge, Family Court made a personal remark against the appellant-wife that she can defend her own case much more effectively than a Lawyer. Thus, the learned Judge by the impugned order dated 1.4.2003 rejected the application filed by the appellant under Section 13 of the Family Courts Act.

3. The core question which arises for consideration in the instant appeal is that in the facts of the case as to whether the appellant-wife is entitled to appear through Counsel? In this connection, it would be apt to read Section 13 of the Act of 1984 as follows;

"Section 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."

4. It would be further relevant to refer to Rule 22 of the Rules of 1994, which is extracted as follows:

"Permission for representation by a Lawyer--The Presiding Officer of a Family Court, in his discretion, may permit a lawyer/Advocate to appear in the Court wherever he feels that it is necessary in the interest of justice."

5. The object of the Family Courts Act appears to be to establish such Courts with a view to promote conciliations and to secure speedy settlement of disputes relating to marriage and other family affairs and all other matters indicated therein. Thus, the Family Courts are supposed to adopt a radically different approach than what is adopted in ordinary civil proceedings. Section 9 of the Act of 1984 imposes a duty on a Family Court to assist and persuade the party to arrive at a settlement in respect of the subject matter of the suit or proceedings. Section 10 provides that subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 and of any other law for the time being in force shall apply to the proceedings before the Family Court and the Family Court shall be deemed to be a Civil Court for the purpose of the Code and shall have all powers of such Court. However, Section 13 prohibits appearance of a lawyer in the proceedings as of right. It is significant to notice that while in all other civil proceedings as provided under Sub-rule (2) of Rule 1 of Order 5, C.P.C., the defendant may appear in person or by a pleader duly instructed and able to answer all material questions relating to suit but such a liberty is not available to a defendant in proceedings civil in nature in Family Court. It is further significant to notice that Order 5 Rule 4, C.P.C. provides that no party shall be ordered to appear in person unless he resides within the local limits of the Court's ordinary jurisdiction or at a place less than fifty miles distance from the Court-house where there is an established public conveyance for one-sixths of the distance between the place where he resides and the place where the Court is situated or less than two hundred

miles distance from the Court-house. Order 3 Rule 1 provides that any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any laws for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing applying or acting, as the case may be, on his behalf : provided that any such appearance shall, if the Court so directs, be made by the party in person. Thus, a reasonable opportunity to defend has always been considered as an essential part of principles of natural justice. Unfortunately, there is a class of people, without having first hand experience of the working of Mufassil Courts, blames Lawyers for the delay in Court proceedings. In our opinion, far from delaying the proceedings, the presence of Lawyer makes it more smooth to expedite because of his knowledge of law and procedure and his training. The experience shows that in the matter of reconciliation in the matrimonial matters, the Lawyers have played a significant role. It is difficult to conceive a Court without a Lawyer. A Lawyer is gifted with natural quality, ability and experience not only to persuade the Judges on a point of fact or law, but also the parties to settle their dispute,

6. Lord Denning in a leading case *Pett v. Grayhound Racing Association Ltd.*, reported in (1968) 2 All ER 545, observed thus:

"I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he has also a right to speak by Counsel or solicitors."

7. The Apex Court in *Board of Trustees, Port of Bombay v. Dilip Kumar*, reported in MANU/SC/0184/1982 : AIR 1983 SC 109, after referring to its earlier decisions in *Kalindi v. Tata Locomotive*, reported in MANU/SC/0237/1960 : AIR 1960 SC 914; *Brooke Bond (India) Ltd. v. Subba Raman*, reported in 1961 (ii) LLJ 417; *Dunlop Rubber Company v. Workman*, reported in MANU/SC/0211/1964 : AIR 1965 SC 1392; and *C.L. Subramaniam v. Collector of Customs*, reported in MANU/SC/0281/1972 : AIR 1972 SC 2178, took a forward march

to fair play in action and held that refusing to grant request defended by a Lawyer would amount to denial of reasonable opportunity to defend himself and the principle of natural justice would be violated.

8. A learned Single Judge of the Gujarat High Court (Mathur, J.) in *Mitesh Manubhai Sheth v. Secretary, Govt. of India*, reported in AIR 1998 Gujarat 60, while considering the validity of the proviso to Regulation 28(5) of the Securities and Exchange Board of India Act, 1992, which provided complete embargo on inquiry officer even to consider request of stock broker to permit him to be defended through Lawyer, struck down the provision having found it to be violative of Articles 19 and 21 of the Constitution of India. It was held that the statutory provisions are required to be in consonance with the principles of natural justice inasmuch as the rights of a person having serious civil and pecuniary consequences, are not deprived except by a fair procedure. A bare reading of Section 13 of the Act of 1984 shows that a Lawyer has no absolute right to appear on behalf of the party before the Family Court but it is in the discretion of the Family Court to permit the Lawyer to appear. The use of words "as of right" in Section 13 is of significance. If the intention of the Parliament was to debar the Advocates absolutely from appearing in the proceedings of the Family Courts, the words "as of right" would not have been there. It has been left to the discretion of the Family Court.

9. The Bombay High Court in *Leela Mahadeo v. De Mahadeo Sitaram Joshi*, reported in 2 (1991) DMC 125 (SC) : AIR 1991 SC 105, has taken the view that the Family Court should permit representation by Lawyers where complicated questions of law and facts are involved. However, the Allahabad High Court in *Prabhat Narain Tickoo v. Mamta Tickoo*, reported in 2 (1998) DMC 333, observed that such an approach will lead to unnecessary wrangles in almost every case on the question whether complicated question of law and fact are involved or not, and this will take a lot of time, and parties will very often go upto the Higher Court on this preliminary issue, causing great delay. In the opinion of the Allahabad High Court, whether

complicated questions are involved or not will differ from Judge to Judge and hence a simpler, clearer, and more objective guideline is required to be adopted. It will be relevant to extract para 7 from the said judgment:

"7. In our opinion, the correct approach should be that the Family Court should not permit lawyers to appear before it when it is trying to seek reconciliation between the parties under Section 9 of the Family Courts Act. It may be mentioned that it is the first duty of the Court hearing matrimonial cases to try to reconcile the parties as envisaged by Section 9 of the Act. At this stage, Lawyers are not at all necessary, and it is for the Court to try to persuade the husband and wife to get reconciled. Lawyers may also not be allowed to appear on cases under Section 13B of the Hindu Marriage Act (divorce by mutual consent). However, if the reconciliation attempt fails, and the matter has to be adjudicated, in our opinion, the Court should ordinarily allow Lawyers to appear in behalf of the parties. This is necessary because Divorce Law and other Family Law has now become a complicated branch of law, and an ordinary layman cannot be expected to know this law. It may be mentioned that there is a catena of decisions both in England and India on this branch of law, and without a knowledge of the same, a party cannot represent himself/herself in the case, and only a trained Lawyer can do so. For example, Section 13(1)(ib) of the Hindu Marriage Act provides that separation for two years is a ground for divorce. A layman would probably think that proof of two years of physical separation alone is required for divorce on this ground, but the case law on this point is that mere physical separation for 2 years is not sufficient and the petitioner has also to prove animus deserendi i.e., intention to bring cohabitation permanently to an end. Similarly, cruelty is a ground for divorce, and the layman would ordinarily regard cruelty to mean physical cruelty, but by judicial decisions it has been interpreted to mean mental cruelty also. There is a catena of case law on this subject, and no layman can be expected to know this case law as it takes years to study and understand it. Moreover, a layman would be ignorant of procedural rules also. Hence

it is obvious that a layman cannot ordinarily represent himself properly in such cases. Representation by Lawyers will not only be of great assistance to the parties, it will also be of great assistance to the Court to do justice expeditiously. Some people say that Lawyers will cause delay in the proceedings. In our opinion, far from delaying the proceedings, a Lawyer will greatly expedite it because by his knowledge of law and procedure and this training he can quickly come to the relevant points. Moreover, lawyers know the art of the cross-examination, and the rules of procedure, which a layman does not. Hence we are of the opinion that the discretion in granting/refusing representation by Lawyers must be exercised in the manner aforementioned, namely that at the stage when the Court is trying to reconcile the parties or when divorce is sought by mutual consent no Lawyer should ordinarily be permitted but otherwise when the matter is being adjudicated Lawyers should ordinarily be allowed to represent the parties."

10. The Karnataka High Court in the case of Komal S. Padukone v. Principal Judge, Family Court reported in MANU/KA/0471/1999, observed that the Family Courts should adopt a practical and humane approach and arrange its work suitably having regard to the workload, in such a manner that the parties before it are not put to unnecessary inconvenience. The Court provided guidelines for the Family Court as follows:

"13. A combined reading of the Act and the rules with relevant provisions of C.P.C. make the following evident:

(i) A petition to the Family Court may be presented by a petitioner either in person or through an authorised agent. The petition may be presented even by an Advocate as an authorised agent. But, if the petitioner wants 'representation' by a legal practitioner, he/she should seek and obtain the permission of the Family Court.

(ii) A respondent, who is served with notice of the proceedings, may either appear in person or enter appearance through an authorised agent (including a legal practitioner). But, if the respondent wants to be represented by a legal Practitioner in

the proceedings, he/she should seek and obtain the permission of the Family Court.

(iii) In regard to proceedings before the Family Court, 'entering appearance' in response to a notice/summons through an authorised agent (including a Legal Practitioner), is different from being represented in the proceedings by a legal practitioner.

(iv) While representation through Legal Practitioner without permission is barred, entering appearance in a case, in response to a notice/summons, through a Legal Practitioner is not barred, if a Legal Practitioner, having entered appearance, wants to represent party in the proceedings, permission of the Family Court should be obtained for such representation.

(v) When one party has been permitted to be represented by a Legal Practitioner, such permission cannot under any circumstances, be denied to the other party.

(vi) The authorised agent (or the Legal Practitioner permitted to represent a party)

can prosecute or defend the proceedings and represent the party unless and until the Family Court makes a specific order to the parties to appear in person, either on a specified date or on further hearing dates, depending on the facts of the case and stage of the case. Once an order for personal appearance has been specifically made, a party will have to seek exemption from appearance, if he/ she is not able to appear in the matter.

(vii) Where a Family Court has a large backlog of cases, and there is no possibility of taking up all cases, listed on a day, it may restrict the requirement of personal appearance of parties to specified stages like conciliation and evidence.

(viii) Where it is possible to do so, consistent with the nature and circumstances of the case, the Family Court, either directly or through Counselors, in the first instance, assist and persuade the parties in arriving at a

settlement in respect of the subject-matter of the proceedings."

11. The experience of Family Courts in the State of Rajasthan in absence of the Lawyers has been painful. It has become torturous for the parties, their parents and Presiding Judges as well. A Division Bench of this Court in *Smt. Nandana v. Pradeep Bhandari*, reported in MANU/RH/0178/1995, has observed to the extent that the remedy has proved more harmful than the disease itself. It was desired that the Legislature should take a second look at the provisions of Section 13 contained in the Family Courts Act. We can do no better than extract the feelings of the Hon'ble Judges as contained in para 18 of the said judgment:

"18. Before parting with the case we feel it necessary to record that the way in which this litigation is being conducted by the parties leaves us sad. The purpose of keeping the Lawyers away from such litigation seems to be completely defeated in this case. Parties have to take upon themselves the task of pleading their respective cases as Lawyers have not been allowed. The decorum and dignity with which cases are normally conducted before the Civil Court with the aid of professionals steeped in the age-old traditions of the Bar are totally lost and unrestricted and relentless acrimony has taken their place. It cannot be believed that parties to such litigation prosecute it without the aid of Lawyers. If that is so, no useful purpose can be served by keeping the Lawyers out of the Court. When the Lawyers appear before the Court as proxy to their clients, they are expected to have a subtle, studied sense of detachment from the cause of their respective clients and they are expected not to personally involve themselves in the cause. They have a responsibility towards the Court also. When the roles are reversed and the Lawyer is only expected to act behind the scenes, the litigant willy-nilly may become a proxy and the battle may be fought between the two Lawyers using the litigants as puppets or cat's paw. The result is fierce no-holds-barred battle between two hapless persons estranged from each of the party. The purpose of keeping the Lawyers out of the Court is defeated and a litigant who finds himself unequipped and unable to plead his

own case and who has in any case to depend on Lawyer for advice is deprived of the services in Court of a competent and responsible professional. It appears to be a case where the remedy has proved more harmful than the disease itself. It is high time, the Legislature takes a second look at the provision contained in Section 13 of the Family Courts Act, 1984."

12. We fully associate with the feeling expressed by the learned Judges in Smt. Nandana's case (supra).

13. Thus, on a combined reading of the provisions of the Act of 1984 and the Rules of 1990 with relevant provisions of the Code of Civil Procedure, it emerges that--

(i) a petition may be presented before the Family Court by a petitioner either in person or through an authorized agent;

(ii) a respondent, who is served with notice of the proceedings, may either appear in person or enter appearance through an authorized agent;

(iii) on appearance of the defendant, the Judge of the Family Court should proceed to hear the plaintiff and the defendant without looking into their pleadings with a view to understand their problem and persuade the parties to arrive at a settlement in respect of the subject matter of the suit or proceedings;

(iv) in case the conciliation fails and both or either of the parties submits an application of leave to be represented through a Lawyer, it should normally be granted more particularly in a case where the parties are to travel from outside the place of sitting of Court. In such an event, it is desirable that both the parties are allowed to be represented through Lawyers. If one of the parties is not inclined to engage a Lawyer, that should not be a ground to refuse the other party to be represented through a Lawyer;

(v) depending upon the facts and stage of the case, a specific order should be passed on which the parties in person are required to remain present. There should not be unnecessary insistence for the presence of the parties on each date of hearing; and

(vi) during trial, further attempt should be made for conciliation between the parties either directly or through the Counselor or the Lawyers.

14. In the instant case, the appellant wife is staying in Gujarat. It is torturous for her and her parents to travel to Jodhpur on each date of hearing. The convenience cannot be compensated in terms of money. Thus, there is no reason to deny her to services of a Lawyer. She may not have a claim to be represented through a Lawyer as of right but if the convenience so required, it is obligatory on the Court to extend such facility. The proviso to Section 13 casts a duty on the Court to consider if in the interest of justice, the assistance of a legal expert as amicus curiae is necessary. The learned Judge of the Family Court in the facts of the case has committed an error in refusing the appellant to be represented through a legal practitioner.

15. Consequently, the miscellaneous appeal is allowed. The order of the Judge, Family Court dated 1.4.2003 is set aside. The application filed by the appellant Smt. Laxmi Kanwar under Section 13 of the Act of 1984 is granted. She is allowed to be represented through a legal practitioner. Learned Judge, Family Court will pass an appropriate order with respect to her presence in the Court on the date of hearing.

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