

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MR.JUSTICE DR. KAUSER EDAPPAGATH

FRIDAY, THE 26TH DAY OF FEBRUARY 2021 / 7TH PHALGUNA, 1942

OP (FC).No.146 OF 2021

PETITIONERS:

1 SETHI P.V.AGED 43 YEARS,
 S/O.PADMANABHAN, 'LAKSHMI NIVA', KIZHUNNA,
 THOTTADA, KANNUR-670 007, REP BY P.A.HOLDER AND
 BROTHER SAJAN.P.V., AGED 45 YEARS, S/O.
 PADMABANHAN, 'SREEPADMAM', P.O.KIZHUNNA,
 THOTTADA, KANNUR

2 SHANSA RAMESH
 AGED 31 YEARS
 D/O. RAMESH BABU, 'RAGAM', KUZHAKKUMBHAGAM,
 PINANRAYI P.O., THALASSERY, KANNUR-670741

BY ADV. SRI.SATHEESHAN ALAKKADAN

RESPONDENT:

NIL

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 26-02-2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

J U D G M E N T

Dated this the 26th day of February, 2021

Dr.Kauser Edappagath, J.

A joint petition filed by the estranged couple for divorce by mutual consent u/s 13B of the Hindu Marriage Act, 1955 (for short 'HMA') before the Family Court, Thalasserry was not entertained citing reason that the husband was represented through his power of attorney holder.

2. The petitioners got married on 8/5/2011. A male child was born to them in the year 2013. But, their marital bliss did not last long. Marital dispute arose and the relationship strained resulting in institution of various legal proceedings before the Family Court and Magistrate Court from 2014 onwards. Later on in 2020, at the instance of the well wishers, mediation took place and the entire dispute was settled and an agreement was executed by the petitioners on 11/1/2020. Having realised that they cannot pull along any longer, the petitioners took a decision to separate. As per the terms of the said agreement, the petitioners decided, inter alia, to file a joint petition for divorce by

mutual consent before the Family Court. Accordingly, the petitioners jointly filed a petition for divorce by mutual consent u/s 13B of the HMA before the court below. At the time of the institution of such Original Petition, the first petitioner/husband was at abroad and because of Covid-19 pandemic restrictions, he was not in a position to come back to India to present the petition. Hence, the first petitioner was represented by a duly constituted power of attorney holder, who is none other than his own brother. The Court below returned the Original petition as per the order dated 7/12/2020, marked as Ext.P1, which reads as follows:-

"Petition cannot be filed through P.A.H. u/s 13B of the HM Act. Hence, returned".

3. The said order is under challenge in this Original Petition filed under Art.227 of the Constitution of India.

4. Heard the counsel for the petitioners.

5. The short question that arises for determination is whether a power of attorney holder can sign and file a joint petition for divorce u/s 13B of HMA.

6. The learned counsel for the petitioners relying on S.20 of the HMA and Rule 5 of the Family Courts (Procedure) Rules,

1989, argued that every petition can be filed before the Family Court, either by the petitioner or some other competent person in the manner required by law for the verification of plaint and that the Act does not prohibit entertaining petition through a power of attorney holder. The counsel further submitted that the first petitioner has been represented by his own brother/power of attorney holder and as such, he is a competent person. The learned counsel also relied on the decision of the Division Bench of this Court in ***Kunhi Purayil Mukundan Naveen v. Anjalika Dinesh*** [2011 (3) KHC 80] in support of his contention that a petition for divorce can be presented before the Family Court either personally or even through a power of attorney holder.

7. The power of attorney is an authority whereby “one is set in the turne, stead or place of another” to act for him”. In Black's Law Dictionary, “power of attorney” is described as the instrument by which a person is authorized to act as an agent of the person granting it. The relation between the donor of the power and the donee of the power is one of principal and agent as recognised u/s 182 of the Indian Contract Act. The relation of agency arises whenever one person called the agent has

authority to act on behalf of another called the principal and consents so to act. The relationship has its genesis in a contract. S.2 of the Power of Attorney Act, 1882 empowers the donee of a power of attorney to do anything “in act with his own name and signature” by the authority of the donor of the power. Once such authority is granted, the said Act recognizes that everything done by the donee “shall be as effectual in law as if it had been done by the donee of the power in the name and with a signature of the donor thereof”. The above provision is statutory recognition of the maxim “*qui facit per alium facit per se*” which means that he who does anything by another does it by himself. In other words, the general rule is that whatever a person may do himself, he may authorize another to do for him.

8. Law is well settled that a power of attorney holder can appear, plead and act on behalf of a party in all proceedings in any Court of civil jurisdiction. Relevant statutory provisions are Order VI Rule 14, Order III Rules 1 and 2 of the Code of Civil Procedure, 1908 (for short 'CPC') and Rules 22 and 23 of the Kerala Civil Rules of Practice, 1971.

Order VI Rule 14 of CPC reads thus:

“14. Pleading to be signed.—Every pleading shall be signed by the party and his pleader (if any):

Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.”

Order III Rules 1 and 2 of CPC reads thus:

“1. Appearances, etc., may be in person, by recognized agent or by pleader.—Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law 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.

2. Recognized agents - *The recognized agents of parties by whom such appearances, applications and acts may be made or done are-*

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make

and do such appearances, applications and acts.”

Rules 22 and 23 of the Civil Rules of Practice reads thus:-

“22. Party appearing by agent. (1) When a party appears by an agent other than a pleader, the agent shall, before making any appearance or application, or doing any act before the Court, file in Court the power of attorney, or other written authority thereunto authorising him or a properly authenticated copy thereof: or, in the case of an agent carrying on a trade or business on behalf of a party without a written authority, an affidavit stating the residence of his principal, the trade or business carried on by the agent on his behalf and the connection of the same with the subject-matter of the suit, and that no other agent is expressly authorised to make such appearance, or application or do such act.

(2) The Judge may thereupon record in writing that the agent is permitted to appear and act on behalf of the party; and until the said permission is granted, no appearance, application or act of the agent shall be recognised by the Court.

23. Signing or verification by agent – If any proceeding which under any provision of law or these rules, is required to be signed or verified by a party, is signed or verified by any other person on his behalf, a written authority in this behalf signed by the party, except in the case of persons under disability, shall be filed in Court, with an affidavit by such person verifying the signature of the party, and stating the reasons for the inability of the party to sign or verify the proceeding.”

9. Order VI of CPC deals with contents of pleadings and Order VI Rule 14 of Order VI provides for signing of the pleadings.

It specifically provides that every pleading shall be signed by the party and his pleader, if any, and where a party pleading is unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. Rule 15 of Order VI deals with verification of pleadings which says that the verification to a plaint must be either by a party pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts to which a person is verifying. Thus, it can be seen from the conjoint reading of Rules 14 and 15 of Order VI that the pleading can be signed either by the party or his pleader or by a duly authorized agent and the pleadings can be verified by either the person pleading it or by some other person who is acquainted with the facts of the case. Further, by virtue of Order III Rule 1 of CPC, any appearance, application or act in or to any Court, required or authorized by law, to be made by a party in person is allowed to be done by his recognized agent. This, however is subject to an exception where any law expressly forbids this to be done. Going by sub-rule (2) of Order III, a recognized agent would cover a person who is a power of attorney holder specifically authorized to act on behalf of the

original party. Thus, an appearance, application or act in any Court or to any Court can be effectively made or done by a party either he himself or by his power of attorney holder.

10. Order III Rule 1 of CPC empowers a party in a suit or proceedings to be represented by a pleader, but so far as the proceedings in the Family Court are concerned, the right or representation by the pleader does not exist. The operation of Order III Rule 1 is subject to any law for the time being in force. In addition to the said exclusion in the case, S.13 of the Act prohibits operation of Order III Rule 1 to the extent that the case be represented by the legal practitioner. The recognized agent appointed under Order III Rule 2 stands on a different footing from pleader. However, recognized agent cannot be a legal practitioner. The embargo on the appearance of legal practitioners cannot be extended to recognized agent. There is no prohibition in the Act or Rules for a petition being filed by an authorized agent who is not legal practitioner.

11. Rule 22 of Kerala Civil Rules of Practice mandates that when a party appears by an agent other than a pleader, the agent shall file in Court the power of attorney, or other written

authority authorizing him or a properly authenticated copy thereof and the Judge may thereupon record in writing that an agent is permitted to appear and act on behalf of the party. Rule 23 of Kerala Civil Rules of Practice also mandate that for signing or verification of pleadings by an agent, a written authority has to be produced before the Court. The Single Bench of this Court in ***Narayanan Nair v. John Kurien*** (1988 (1) KLT 673) has held that even oral authorization would be sufficient to constitute due authorization under Order VI Rule 14 of CPC r/w Rule 23 of the Kerala Civil Rules of Practice.

12. The Family Courts Act, 1984 (for short 'the Act') which was enacted to have a mechanism for settlement of family disputes without formal trappings and with the intention to advance the cause of matrimonial happiness and harmony confers jurisdiction to the Family Court to try suit or proceeding between the parties to a marriage claiming dissolution of marriage by mutual consent u/s 13B of HMA. S.10 of the Act provides that the provisions of CPC shall apply to all suits or proceedings before the Family Court. It is also stated that Family Court shall be deemed to be a civil Court for the purpose of

provisions of the CPC and shall have all the powers of such courts. S.21 of the HMA also provides that proceedings under the Act shall be regulated by CPC. S.141 of CPC provides that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. Thus, it is clear that the Family Court is bound to follow CPC and is deemed to be a civil Court for the purpose of the provisions of the Act and possesses the powers of the Civil Court. Either the Family Court Act or the Rules framed by the High Court of Kerala or the Rule framed by the Government of Kerala u/s 23 of the Act do not prohibit in presenting the petition before the Family Court through a power of attorney holder. S.13B of the HMA does not contain any provision abrogating the power of attorney holder under CPC and therefore the procedure governing the proceedings filed under Section 13B of the HMA would be governed by Order III as well as Order VI of CPC. That apart, S.20(2) of HMA enables the Court to receive petitions filed by the party either by the petitioner himself or by some other competent person in the manner required by law for the verification of the plaint or a petition.

13. The Single Bench of this Court in ***Puthiyapurayil Abdul Salam v. P.P.Mariyumma and Others*** [2007 (1) KHC 156] has held that a power of attorney can represent the party before a Family Court and it will not disable the court to pursue efforts for settlement of the case. That was a case which arose u/s 13 of the Family Courts Act. The husband filed a petition represented by the power of attorney holder to set aside the ex parte order passed against him and to prosecute the petition through power of attorney holder. The Division Bench of this Court in ***Kunhi Purayil Mukundan Naveen's case*** (supra) held that it is open to the party to present the petition either personally or even through a power of attorney holder before the Family Court. That was a case filed u/s 13(1)(a) of the HMA for divorce on the ground of cruelty. Again the Division Bench of this Court in ***Jane Chakuprakal and Another v. Max George*** [2017 (1) KHC 796] took the view that there is no restriction for power of attorney holder to file an application to set aside the ex parte order or to file an application seeking leave of the Court for the parties to appear through power of attorney holder before a Family Court. In a suit filed before the Family Court for realisation

of value of jewellery and money, it was held by the Division Bench of this Court [**Suma R v. Rajan Pillai** : 2007 (4) KLT 379] that the defendant can appear through power of attorney holder. The Punjab and Haryana High Court in **Navdeep Kaur v. Maninder Singh Ahluwalia** (AIR 2010 P & H 90) has held that the personal appearance of the parties at the time of presentation of the petition for divorce by mutual consent is not mandatory and the parties may be represented through duly constituted power of attorney. Similar view was taken by the Lucknow bench of Uttar Pradesh High Court in **Kanwalijeet Sachdev v. State of UP and Others** [2016 (6) ALJ 589]. The Hyderabad High Court in **Dasam Vijay Rama Rao v. M.Sai Sri** (AIR 2015 Hyderabad 191) has held that power of attorney holder can depose and also lead evidence on behalf of his principal before the Family Court. The Madras High Court in **Sudha Ramalingam v. Registrar General, High Court of Judicature at Madras and Another** [2015 KHC 1680] has held that in a petition for divorce by mutual consent, there is no legal impediment for a power of attorney to appear on behalf of the party. But, the party should make personal appearance before the

Court as and when so stipulated or directed by the Family Court. The Bombay High Court in **Harshada Bharat Deshmukh v. Bharat Appasaheb Deshmukh** (AIR 2018 Bombay 148) has held that there is no legal impediment in filing a joint petition for mutual consent u/s 13B of the HMA before a Family Court through a power of attorney. The Delhi High Court in **Raja Banerji v. Alka Banerji** (AIR 2019 Delhi 1) held that law permits parties to appear and make statements through attorney before a Family Court.

14. On analysis of the statutory provisions and precedents discussed in detail above, there cannot be any dispute that attorney of a party can appear in any Court of civil jurisdiction including Family Court and do the act specified in the power of attorney. The authorities have gone to the extent of observing that an attorney is not incompetent witness and he can appear in the Court and depose in the Court as a witness in respect of the facts which are in his knowledge. The Apex Court in **Janki Vashdeo Bhojwani v. Indusind Bank Ltd** (AIR 2005 SC 439) has held that the word 'acts' employed in Order III Rules 1 and 2 of CPC confines only in respect of 'acts done by power of attorney

holder' in exercise of power granted by the instrument and it would not include deposing in place of and instead of the principal. It was also held that he cannot depose for the principal in respect of a matter which only the principal can have the personal knowledge and in respect of which the principal is entitled to be cross-examined.

15. A perusal of the impugned order would show that no reason has been stated by the Court below for returning the original petition. What is stated is that joint petition for divorce u/s 13B of the Act cannot be filed through power of attorney holder. When two parties to a marriage come before a Family Court and ask for dissolution of their marriage by mutual consent u/s 13B of the HMA, the Court is required to adjourn the motion moved by both parties for a period not earlier than 6 months as per sub-section (2) of S.13B. Further, sub-section (2) requires that the Court shall, on being satisfied, after hearing the parties and after such enquiry as it thinks fit regard to the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of such decree. Physical presence of both parties is generally insisted at

that time and it is necessary to verify the authority of the identity of the parties to confirm their consent. This might have obviously weighed the mind of the Court while returning the original petition. Of course, at the time of such enquiry, if the Court feels, the physical presence of the parties can be insisted. Merely because the petition is one for divorce by mutual consent u/s 13B of HMA, it does not mean that a party cannot institute a proceedings through a duly constituted power of attorney holder in as much as S.13B of HMA does not contain any provision abrogating the power of power of attorney holder under Order III Rules 1 and 2 and Order VI Rule 14 of CPC and S.20(2) of HMA enables the Court to receive petitions filed by the party either by the petitioner himself or by some other competent person in the manner required by law for the verification of the plaint or a petition. That apart, the Family Court Act or the Rules framed by the High Court of Kerala or the Rule framed by the Government of Kerala u/s 23 of the Act do not prohibit the presentation of the petition before the Family Court through a power of attorney holder. Hence, no distinction can be taken in respect of petition u/s 13B of HMA. For all these reasons, we hold that a power of

attorney holder can sign, file and prosecute a petition for divorce by mutual consent u/s 13B of HMA before a Family Court.

16. It is true that in the enquiry which is to be conducted by the Family Court u/s 13B of HMA, the answers and willingness of the party is to be gathered directly from the party. The Court is free to insist the personal appearance of the party at that stage as contemplated in law. The advanced technology such as video conferencing facility can also be made use of to conduct enquiry contemplated u/s 13B of the HMA without insisting for physical presence of the parties in a case where parties are unable to appear before the Court personally. The Family Court has been given ample power to modulate its procedure. The Supreme Court of India in ***State of Maharashtra v. Dr.Praful B.Desai*** [(2003) 4 SCC 601) has held that the evidence of witnesses can be made through video conferencing. The Apex Court in ***Santhini v. Vijaya Venketesh*** (AIR 2017 SC 5745) has held that in Family Court proceedings, video conferencing could be allowed if both parties file consent memorandum for hearing of the case through video conferencing. Petition u/s 13B of HMA is filed jointly by both parties to the marriage with mutual consent.

Hence, the enquiry contemplated u/s 13B can be conducted using video conferencing facility. On interacting with the parties via video conferencing, if the Family Court feels that personal/physical appearance of the party is necessary, it would be appropriate for the court at that juncture to direct the party to be physically present before the Court.

17. Coming to the facts of the case, the original petition was filed before the Family Court along with a petition to receive the power of attorney executed by the first petitioner in favour of his brother under Rule 22 of Civil Rules of Practice. The original petition was verified and signed by the power of attorney holder of the first petitioner. The petitioner specifically pleaded in paragraph 8 of the original petition that the enquiry u/s 13B(2) of HMA can be conducted either through the video conference or the personal appearance of the first petitioner before the Family Court if so insisted. The first petitioner undertakes to co-operate with the Family Court by his physical presence or through the video conferencing. For all these reasons, we hold that the refusal by the Court below to entertain the application to permit the 1st petitioner to be represented by his brother as power of

attorney holder cannot be sustained. The Court below has committed illegality in refusing to entertain the application to allow the first petitioner to be represented by a power of attorney holder on the ground that it is a joint petition for divorce by mutual consent u/s 13B of the Act.

For the reasons stated above, we allow the original petition. We direct the Family Court, Thalassery to receive Ext.P1 Original Petition on file and dispose of it in accordance with law. We make it clear that permitting the petitioners to institute proceedings by a power of attorney holder will not detract from the power of the court to insist on personal appearance or appearance through video conferencing at any subsequent stage as contemplated in law.

Sd/-

A .MUHAMED MUSTAQUE

JUDGE

Sd/-

Dr .KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX

PETITIONERS' EXHIBITS:

EXHIBIT P1

**TRUE COPY OF THE RETURNED OP FILED BY
THE PETITIONERS WITH THE ORDER DATED
07.12.2020 OF THE FAMILY COURT,
THALASSERY**