Allahabad High Court
Prabhat Narain Tickoo vs Mrs. Mamta Tickoo And Others on 5 May, 1998
Equivalent citations: 1998 (2) AWC 1551, II (1998) DMC 333
Author: M Katju
Bench: M Katju, S Saraf
JUDGMENT M. Katju, J.

1. Heard Sri Sunil Ambwani for the petitioner, Sri P. K. Srivastava for respondent No. 1 and learned Standing Counsel.

2. The petitioner is an officer in the Indian Navy and he has filed a divorce petition under Section 13 of the Hindu Marriage Act which is pending before the Additional Principal Judge, Family Court, Kanpur Nagar being Divorce Petition No. 750 of 1996.

3. Learned counsel for the petitioner has confined his argument only to the third prayer in the petition, viz., that the petitioner should be allowed to appear through his counsel before the Family Court.

4. The petitioner is an officer in the Indian Navy. He was married to respondent No. 1 in 1992. Presently he is posted in Bombay and he has difficulty in getting leave as he is in the Naval Service. The petitioner filed the aforesaid Divorce Case No. 750 of 1996 against respondent No. 1, and respondent No. 1 flled Misc. Case No. 603 of 1995 under Section 125, Cr. P.C. against the petitioner and both these cases are pending before respondent No. 3. On 26.4,1997, the Court concerned passed the following order :

^^eqdnek vkt is'k gqvk i{kdkj gkftj ugha gSa] oknh dh vksj ls isij ua- 15x2 nkf[ky fd;k A i=koyh nk- nrj gks tc oknh dks vodk'k fey tk, vkSj Lo;a vk lds rHkh okn pyk;s eqa'kh eqdnek ugha pyk ldrs gaSa A g-@viBuh;

,Mh- fizaliy tt] Qsfeyh dksVZ**

5. Thereafter the petitioner moved an application dated 3.11.1997 which is Annexure-14 to the writ petition and in that application, he prayed that a date in the case be fixed and he may be heard through his counsel. On this application, the following order was passed on 4.11.1997 :

^^dk;kZy; dh fjiksVZ %& vkns'k fnukad 26-4-97 ds vuqlkj QkbZy i=koyh nkf[ky nrj dh tk pqdh gS A**

6. A perusal of the above order shows that on 26.4.1997, the Court concerned had ordered that the case be consigned to the record but it further directed that it shall proceed when the petitioner personally appears. In our opinion, this does not mean that the petition was rejected on 26.4.1997. As a matter of fact, no Court can pass an order consigning a Judicial case to the record. The Court can either allow the petition or dismiss it or dispose it off in some other manner or adjourn the case, but it cannot pass an order finally consigning the case to the record. If the petitioner is not

appearing, the Court can dismiss the petition for default, but the Court cannot finally consign a case to the record. Such an order can only be passed in an administrative proceeding, not in a Judicial proceeding. In our opinion. If such order consigning the case to the record is passed, it is to be treated as an order adjourning the case sine die, but it will not amount to dismissal of the case. Hence we set aside the order dated 4.11.1997 and direct that the divorce petition and the petition under Section 125, Cr. P.C. shall continue and be decided expeditiously.

7. The question remains as to whether the petitioner is entitled to appear through counsel. In this connection, Section 13 of the Family Courts Act, 1984 states :

"Right of 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."

8. In our opinion, the correct interpretation of Section 13 of the Act is that a lawyer has no absolute right to appear on behalf of a party before the Family Court, but it is the discretion of the Family Court to permit the lawyer to appear or not. This interpretation becomes evident when we notice the words "as of right" in Section 13 of the Act. 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. The presence of the aforesaid words indicates that the intention of the Parliament was that it should be left to the discretion of the Family Court to allow lawyers to appear or not. As regards the proviso to Section 13, this only deals with the appointment of amicus curiae, and it was nothing to do with the representation of the parties. In fact, the Bombay High Court in Leela Mahadeo Joshi v. De. Mahadeo Sitaram Joshi, AIR 1991 Bom 105, has held in para 17 that Section 13 does not prescribe a total bar to representation by a legal practitioner. This view had been followed by Bombay High Court in Smt. Lata Pimple v. Union of India and others, AIR 1993 Bom 255.

9. The question then arises as to how the Family Court should exercise its discretion in this connection, in other words, when should the Court permit representation by lawyers and when it should not. The Bombay High Court has taken the view that the Family Court should permit representation by lawyers where complicated questions of law and facts are involved. In our opinion, this approach will lead to unnecessary wrangles in almost every case on the question whether complicated questions 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 Courts, on this preliminary point, causing great delay. Moreover, the criterion laid down by the Bombay High Court is, in our humble opinion, vague and subjective. Whether complicated questions are involved or not will differ from Judge to Judge. Hence a simpler, clearer, and more objective guideline is required.

10. 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 in cases under Section 13B of the Hindu Marriage Act (divorce by mutual consent). However, if the reconciliation attempt falls, and the matter has to be adjudicated, in our opinion, the Court should ordinarily allow lawyers to appear on 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 properly 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 cruelly 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 his 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.

11. The view we are taking may appear to be Judicial legislation. However, it is now well-settled in India, England, America, Australia, etc. that Judges do legislate. The 19th Century positivist jurisprudence of Bentham and Austin has been largely replaced in the 20th Century by the Sociological Jurisprudence of Jherlng, Roscoe Pound, Julius Stone, etc., which permits legislative activity by the Judiciary.

12. Thus in the Constitution Bench decision of the Supreme Court in Sarojini Ramaswami v. Union of India, AIR 1992 SC 2219. It was observed in paragraph 92 :

"In this context, it is also useful to recall the observations of R. S. Pathak, C.J. speaking for the Constitution Bench in Union of India v. Raghubir Singh (Dead) by L.Rs., (1989) 2 SCC 754 : AIR 1989 SC 1933, about the nature and scope of Judicial review in India. The learned Chief Justice stated thus :

".....It used to be disputed that Judges make law. Today, it is no longer a matter or doubt that a substantial volume of the law governing the lives of citizens and regulating the functions of the State flows from the decisions of the superior courts." There was a time, observed Lord Held, "when it was thought almost indecent to suggest that Judges make law--they only declare it.....But we do not believe In fairy tales any more."

13. In fact even in England with its Parliamentary Supremacy, the theory that Judges do not legislate was really a fiction. What is the entire British Common Law but Judge made law? What is Rylands v. Fletcher, Donoghue v. Stevenson, Rookes v. Barnard? These epoch-making judgments were law-creating Judgments, as everyone recognises today. In our own country, Keshavanand Bharti's case, Maneka Gandhi's case, the cases in which new dimensions have been given to Articles 14 and 21, etc., are all law-making Judgments.

14. The dispute today in all countries following the Common Law System is not whether Judges can legislate {everyone accepts that they can and do) but to what extent. In what circumstance, in what manner, etc.? Thus Prof. Friedmann of Columbia University in his article "Limits of Judicial Law-Making" (29 MLR No. 6, 19966) writes :

"The Blackstonian doctrine ag the 'declaratory' function of the Courts, holding that the duty of the Court is not to "pronounce a new law but to maintain and expound the old one, has long been little more than a ghost. From Holmes and Gerry to Pound and Cardozo, contemporary jurists have increasingly recognised and articulated the law-making functions of the Courts. .....It is, therefore, time to turn from the State controversy over whether Judges make law to the much more complex and controversial question of the limits of Judicial law-making."

15. It seems that Judicial law-making has passed through three stages. The first stage was where the Judges would make law while pretending not to. The classic example of this can be given of the decision of Blackburn, J-, in Rylands v. Fletcher, (1866) LR 1 Ex. 265, where in fact the Judge created a new law (the law of strict liability) while pretending to follow existing law. This approach was adopted particularly by British Judges since in England there is no written Constitution and Parliament is Supreme, and hence the Judges had to maintain the fiction that they are not legislating, otherwise there would be violation of the principle of Parliamentary Supremacy.

16. In the second stage, while giving up the fiction that Judges do not make law, it was proclaimed that they make law only interstitially. The classic statement in this connection is of Mr. Justice Oliver Wendell Holmes who said "I recognise without hesitation that Judges must and do legislate, but they do so only interstitially, they are confined from molar to molecular motions" (See The Mind and Faith of Justice Holmes'). Thus, while accepting that Judges make law, the interstitial theory permitted judicial legislation on a modest and limited scale.

17. A similar view was taken by Lord Denning in England, in Seaford Court Estates v. Asher, (1949) 2 KB 481, he observed : "It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a Judge cannot simply fold his hands and blame the draftsman. A Judge must not alter the material of

which it (the law) is woven, but he can and should iron out the creases."

This view was no doubt overruled by the House of Lords in Magor and St. Mellons Rural District Council v. Newport Corporation, (1951) 2 All ER 839, which declared it as 'a naked usurpation of the legislative function' but our own Supreme Court has preferred the view of Lord Denning to that of the House of Lords vide Directorate of Enforcement v. Deepak Mahajan, 1994 (3) SCC 440 ; State of Karnataka v. Hansa Corporation, AIR 1981 SC 463 ; Bangalore Water Supply and Sewerage Board v. Rajappa, AIR 1978 SC 548, etc.

18. In his book The Nature of the Judicial Process', Mr. Justice Cardozo of the U. S. Supreme Court said, "He (the Judge) legislates only between gaps. He fills the open spaces in the law."

19. This 'interstitial' theory proceeds on the basis that the legislative draftsman is also a human being, and hence there are bound to be some omissions and other defects in the statute he has drafted. Hence the gaps in the law have to be filled in by the Judges.

20. The third stage of Judicial law-making has best been described by Mr. Justice Murphy, former Judge of the Australian High Court who said, "Now it is the function of the Judges, I believe, to bring the laws uptodale with the expectations and the needs of our changing society. They should produce laws which are rational, humane. Just and simple" (See 'Judging the World' by Carry Sturgess and Philip Chubb, P. 17). Roscoe Pound expresses the same idea when he says "Law must be stable, and yet it cannot stand still" (see 'Pound's 'Jurisprudence').

21. This third stage or dynamic theory (which is still in the process of formation) is based on the view that modern society is dynamic and fact-changing, and it cannot be expected of the Legislature to conceive of every situation which may develop in the future and cater to it. Hence the Judges have to play the role of social engineers, they have to help society in its onwards progress and not Just remain as by-standers. In fact, sometimes the Judge should make a law which is not in accordance with the predominant opinion in society (as some Jurists advocate) but one step ahead of it, so as to pull society forward. This third stage (or dynamic) theory is bolder and more socially conscious than the interstitial theory, and gives greater scope to the Judges for making law.

22. In the present case, the interstitial theory can be adopted. According to our interpretation, Section 13 of the Family Court Act gives a discretion to the Judge to permit or not to permit representation by lawyers. However, Section 13 does not mention as to when and in what circumstances, permission should be granted and when it should not. Hence this gap in the law has to be filled in by Judge-made law, which we have tried to do as best as we could.

23. In our opinion, therefore, the petitioner as well as respondent No. 1 are both entitled to representation by lawyers and we direct accordingly. We further direct that both the cases shall be decided within six months of the production of a certified copy of this order before the Court concerned. With these observations, the petition is finally disposed off.

24. Before parting with this case, we would like to say that divorce cases usually cause a great deal of psychological trauma to the parties and hence they must be decided expeditiously. It is evident that if divorce cases take ten years or more to decide (as it often happens), it would lead to the parties becoming psychological wrecks. Hence such cases must be decided quickly. We, therefore, issue a general mandamus that all divorce and other family cases must be decided within a year of filing of the same by the Court concerned.

25. Let a copy of this order be sent by the Registrar of this Court to all the Family Courts and District Judges in U. P. Copies of this judgment shall also be sent to the President/Secretary of all District Bar Associations in U. P. as well as to the President/Secretary. High Court Bar Association.