Punjab-Haryana High Court
Charanjit Singh Mann vs Neelam Mann on 3 April, 2006
Equivalent citations: AIR 2006 P H 201, (2006) 143 PLR 851
Author: S Kant
Bench: D Jain, S Kant
JUDGMENT Surya Kant, J.

1. This Letters Patent Appeal under Clause X of the Letters Patent is directed against the judgment, dated 23.8.2001, passed by the learned Single Judge whereby F.A.O. No. 114-M of 2001 preferred by the respondent-wife against the decree of divorce by mutual consent, dated 3.5.2001, was allowed and the said decree was set aside. The order, dated 10.10.2001, dismissing the Review Application No. 1196-CII of 2001 filed by the appellant against the above mentioned judgment and order, dated 23.8.2001, is also under challenge.

2. Brief recapitulation of the facts is as follows :

2.1 The appellant (husband), who is a Captain in Merchant Navy, was married to the respondent (wife) on 9.5.1994 at Ludhiana as per Sikh religious rites and ceremonies. Out of the wedlock, a female child, namely, Naseem (renamed as Nmrata) was born on 5.10.1995. Unfortunately, the appellant and the respondent could not pull on together and their marital chorus ended abruptly when a petition under Section 10 of the Hindu Marriage Act, 1955 (in short 'the Act') for judicial separation, was filed by the appellant on 15.4.1998 in the court of Additional District Judge at Ambala. Subsequently, the appellant sought amendment of the said petition to convert it under Section 13 of the Act for dissolution of their marriage. The amendment was allowed by the trial court, however, upon challenge by the respondent, this Court set aside the same in Civil Revision No. 2775 of 2000 decided on 22.11.2000.

2.2 In addition to the claim for maintenance pendentelite, it appears that the respondent also initiated criminal proceedings against the appellant and his family members for the alleged demand of dowry etc. It further appears that before the relations between them became soar, the parties were residing at Mohali in a house owned by the appellant, though according to him, immediate before he filed the petition under Section 10 of the Act, they were residing in his parental house at Ambala Cantt.

2.3 During the pendency of petition under Section 10 of the Act, the parties moved a joint application on 31.3.2001 and sought leave of the court to amend the said petition and convert it under Section 13-B of the Act for the grant of decree of divorce by mutual consent. Necessary permission was granted by the learned trial court. A perusal of the record shows that the aforesaid application was moved by them along with a 'written compromise' in terms whereof the appellant agreed to pay Rs. 3,000/-per month to the respondent and Rs.l500/-per month to his minor daughter as maintenance; the child was to remain in the custody of the mother with visiting rights to her father and in the event of re-marriage by the respondent and/or her going abroad in order to settle down there, the custody of the child was to be given to the father. While entertaining the afore-said joint petition, the learned trial court in its order, dated 31.3.2001, observed that it has

thoroughly questioned the parties and is of the considered opinion that the parties have voluntarily and without any pressure or coercion have decided to take divorce by mutual consent. The learned trial court also recorded their statements separately on 31.3.2001 in which both the appellant and the respondent deposed in support of their petition under Section 13-B of the Act. The case was thereafter adjourned to 4.4.2001.

2.4 On 4.4.2001 also, statements of the appellant and the respondent were recorded in which they reiterated their decision to part ways by way of a decree of divorce by mutual consent. The case was thereafter adjourned to 3.5.2001 when both the parties appeared before the learned trial court and stated that during the intervening period they again pondered over the issue and having realized that they are unable to live like husband and wife, want dissolution of their marriage. The learned trial court, conscious of the fact that minimum waiting period of 6 months, after the date of presentation of the petition under Section 13-B, was yet to expire, dispensed with the said requirement on the following premise: "...After amendment of the original petition which has since been allowed by this Court, the amendment petition would relate back to the date of filing of original petition. The court is of the considered opinion that marriage between the parties has irretrievably broken and no useful purpose will be served by keeping the petition pending for the lapse of six months from the date of institution of petition for divorce by mutual consent. In fact, the parties have already litigated for more than six months in the past and their act of showing adamancy, calls for dispensing with the condition of keeping the petition pending for six months. The said condition is accordingly dispensed with.

2.5 The ordeal, however, did not come to an end for either of the parties. Alleging that her 'consent' for divorce was obtained in invitum and through fraudulent means, the respondent filed an appeal in which, while issuing notice to the appellant herein, a Division Bench of this Court vide order, dated 29.5.2001, restrained him from re-marrying till further orders and also stayed operation of the judgment and decree, dated 3.5.2001, passed by the learned Additional-District Judge.

2.6 The record suggests that notices were issued to the appellant-husband (respondent in the aforesaid appeal) on two addresses, namely, (i) his permanent address at Ambala Cantt., and (ii) at House No. 2404, Phase XI, Mohali. The notice dated 30.5.2001 sent at the appellant's permanent address of Ambala Cantt was received by his father Gurbachan Singh Mann, who endorsed the receipt thereof with the remarks that the appellant's whereabouts were not known to him as he had gone abroad after getting remarried and that as soon as he receives any communication from his son, he (the father) will inform him (the son). The process server's remarks indicate that the appellant's father received the summons and noted the date as well as the interim order passed by this Court. On the second set of summons which was sent at the Mohali address of the appellant, the process server remarked on 9.6.2001 that Charanjit Singh Mann has gone to Ambala for some Bhog ceremony. His another attempt to serve the appellant on 12.6.2001 also failed. However, finally he sent a report on 166.2001 stating that a copy of the summons along with the copy of the appeal was handed over to Charanjit Singh Mann who after reading the same, refused to accept the same and a copy of the summons was affixed at the house.

2.7 The appeal was thereafter taken up for final hearing on 23.8.2001 by the learned Single Judge and no one appeared initially on behalf of the appellant. The learned Single Judge, in view of the report of service on the second set of summons, referred to above, took the view that the appellant was deemed to have been served. Relying upon the judgment of the Supreme Court in the case of Smt. Sureshta Devi v. Om Parkash (1991-1)99 P.L.R. 411 (S.C.) as well as an order, dated 20.8.2001, passed by this Court in F.A.O. No. 39-M of 1998 (Raj Rani v. Des Raj Kalra) the learned Single Judge held that no decree for divorce by mutual consent could have been passed by the trial court until the expiry of mandatory waiting period of 6 months as prescribed under Section 13-B(2) of the Act and accordingly, set aside the impugned decree of divorce on this score alone.

2.8 It appears that when the learned Single Judge was about to conclude the judgment in favour of the wife, a learned Counsel intervened on behalf of the appellant and submitted that: (i) instead of setting aside the divorce decree the case may be remanded to the trial court; (ii) the appellant had gone out of India and this fact may be taken notice in the order; (iii) he had been instructed to inform the court that the appellant had re-married. The learned Single Judge, however, repelled these contentions and observed that:

Learned counsel, Shri Vinod Bhardwaj has made submission, on instructions which clearly shows that the respondent has received notice but is deliberately avoiding service. Counsel has not filed appearance formally nor is he willing to file his appearance. This shows that the respondent is simply attempting to delay the matter.

2.9 On 14.9.2001, the appellant moved an application under Order 47 Rule 1 read with Sections 114 and 151 C.P.C. for the review of the judgment and order, dated 23.8.2001. After giving a brief summary of the long drawn fight between the parties at different platforms, it was averred by him that the respondent had consented for divorce without any fraud or coercion; the decree of divorce for mutual consent was in terms of written compromise Ex.Cl; it was after expiry of 30 days that he re-married in the first week of June 2001; he left Ambala Cantt. On 8.6.2001 for Delhi for his onward journey to Mumbai to sort out his programme to visit Singapore and to sign a contract with the employer at Mumbai and he left India by Air India flight No.SO407 on 13.6.2001; he was not present at both the addresses i.e. Ambala Cantt. and Mohali when the notices in the First Appeal were sought to be served; that a false report in connivance with the process serving agency was procured by the respondent's father, who is an Advocate and also witnessed the report of the process server on the second set of summons sent at Mohali address; that no proper service was effected upon him, therefore, the ex pane judgment and order, dated 23.8.2001, deserved to be recalled.

2.10 The learned Single Judge, after taking notice of the fact that the review application was filed through one of the counsel who had actually appeared and made submissions on behalf of the appellant at the time of hearing of the main appeal and, thus, the appellant had knowledge of pendency of the appeal, did not find any substance in the review application and dismissed the same with costs.

3. Aggrieved, the appellant has preferred this appeal.

4. We have heard Shri P.S.Khurana, learned Counsel for the appellant and Shri Ashok Aggarwal, learned Senior Counsel on behalf of the respondent and have perused the entire record with their assistance.

5. It is vehemently contended on behalf of the appellant that:

(i) the minimum waiting period of 6 months prescribed under Sub-section (2) of Section 13-B of the Act can be waived off with the consent of the parties;

(ii) once the appellant's petition under Section 10 of the Act was allowed to be converted into a petition under Section 13-B of the Act, the amendment will 'relate back' to the date of original petition which was filed more than 6 months before the passing of the consent decree on 3.5.2001 which amounts to substantial compliance of Section 13-B(2) of the Act;

(iii) the judgment by the Apex Court in Smt. Sureshta Devi's case (supra) is no longer a binding precedent as its ratio descendi has been subsequently doubted by the Supreme Court in the case of Ashok Hurra v. Rupa Bipin Zaveri ;

(iv) no valid service was effected upon the appellant in the first appeal and he was proceeded against ex parte on the basis of a false report procured by the father of the respondent in connivance with the process serving agency.

6. On the other hand, Shri Ashok Aggarwal, learned Senior Counsel, contended that condition of a minimum 6 months waiting period after the presentation of a petition for divorce by mutual consent, is mandatory in nature and cannot be dispensed with even with the consent of the parties. Shri Aggarwal also argued that the appellant was duly served in the first appeal; he had the knowledge of pendency of the appeal and in view of the fact that the appellant's counsel did appear and argued the case before the learned Single Judge, the judgment under appeal cannot be termed as an ex parte order. It was further contended that even if the appellant is assumed to have gone out of India when summons were sent to him on his second address at Mohali, the receipt of first set of notice sent at the appellant's Ambala Cantt address by his father and when as per his own case the appellant was also in India till 13.6.2001, the said service of notice shall amount to be a valid'service on the appellant.

7. On a consideration of the rival submissions, we find that the following issues arise for adjudication :

1. Whether trie matrimonial court is competent to waive off the minimum waiting period of 6 months prescribed in Sub-section (2) of Section 13-B of the Act or is it required to be mandatorily observed?

2. Whether in the present case, amendment of the petition under Section 10 into a petition under Section 13-B of the Act will relate back to the date of filing of the unamended petition?

3. Whether the appellant was duly and validly served with notice in the first appeal?

8. In order to appreciate the contentions in relation to issue No. 1, it may be mentioned that Sub-section (1) of Section 13-B of the Act permits both the parties to a marriage to present a joint petition for dissolution of their marriage on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and (hey have mutually agreed that the marriage should be dissolved. Sub-section (2) then provides that:

On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in Sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

9. The Objects and Reasons for passing the Act No. 68 of 1976 whereby Section 13-B was incorporated, indicate that the provision for divorce by mutual consent was intended more or less on the lines of Section 28 of the Special Marriages Act, but having felt that once the parties have chosen to move the court for divorce by mutual consent, it was not necessary to make them wait for a further period of one year to obtain the relief, that the period of one year was decided to be reduced to 6 months.

10. As is discernible from its plain language, Sub-section (1) of Section 13-B of the Act enables the court to grant divorce by mutual consent only when it is satisfied that:

(i) the marriage had been solemnized between the parties; (ii) the parties have been living separately for more than one year before presenting the petition; (iii) they were not able to live together at the time of presenting the petition and continued to live separately; (iv) they had mutually agreed to dissolve the marriage before or at the time the petition was presented; and (v) the contents of the petition are true and factually correct.

11. However, irrespective of existence of the above stated grounds, Sub-section (2) of Section 13-B does not permit the court to dissolve a marriage by mutual consent not earlier than 6 months after the date of presentation of the petition or later than the expiry of 18 months after such presentation. The legislature, in its wisdom, has consciously provided the minimum and maximum waiting period during which alone a decree for divorce by mutual consent can be passed. The apparent object behind providing this period is to allow time to the spouses to reconsider their decision and finally make up their mind. It also enables the court to satisfy itself that the 'consent' is free from any extraneous influence and is also not tainted with any 'collusion' between the parties.

12. The nature and scope of Sub-section (2) of Section 13-B of the Act has been considered by the Supreme Court in Sureshta Devi's case (supra) and after holding that the waiting period of 6 to 18 months is required to be observed mandatorily, their Lordships explained thus:

From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorize the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition....At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section 2 of Section 13-B is clear on this point....

13. In Ashok Hurra v. Rupa Bipin Zaveri (supra), the Supreme Court after noticing that in Smt. Sureshta Devi's case (supra), the observations that, mutual consent should continue till the divorce decree is passed, are inconsistent with the outer limit of 18 months waiting period provided in Sub-section (2) of Section 13-B and to the extent aforementioned, the judgment in Sureshta Devi's case would require reconsideration in an appropriate case, observed as follows :

...the observations of this Court to the effect that mutual consent should continue till the divorce decree is passed, even if the petition is not withdrawn by one of the parties within the period of 18 months, appears to be too wide and does not logically accord with Section 13B(2) of the Act. However, it is unnecessary to decide this vexed issue in this case, since we have reached the conclusion on the fact situation herein. The decision in Sureshta Devi's case (supra) may require reconsideration in an appropriate case. We leave it there.

14. It, thus, stands crystallized that the view taken by the Supreme Court in Sureshta Devi's case (supra) to the effect that the waiting period of 6 to 18 months is mandatory in nature, has not been doubted in Ashok Hurra's case (supra). The conclusion drawn in Sureshta Devi's case (supra) that mere filing of a petition for dissolution of marriage with mutual consent does not authorize the court to pass a decree for divorce until the expiry of minimum waiting period of 6 months, thus, still holds the field as a binding precedent.

15. To be fair to the learned Counsel for the appellant, he has placed, reliance upon the following judgments of this Court:

(i) Shobha Srivastva v. T.D. Srivastva 1998(2) Marriage Law Journal 473;

(ii) Jasbir Singh v. Smt. Mahindro Devi 2004(3) R.C.R. (Civil) 170;

(iii) Saranjit Singh v. Satwant Kaur 2000(2) Marriage Law Journal 257;

(iv) Smt. Harwinder Mann v. Gurpal Singh Mann (1999-3)123 P.L.R. 164;

(v) Ved Parkash v. Manju 1998(3) R.C.R. (Civil) 44;

(vi) Jagjit Singh v. Jasbir Kaur 1999(2) R.C.R. (Civil) 72;

(vii) Dalip Jerath v. Shalini Jerath 2001(2) H.L.R. 341;

(viii) Arun Chawla v. Reena ;

(ix) Ritu Shobha v. Dr. Dharampal (F.A.O. No. 33-M of 1985);

(x) Major Pradeep Mehta v. Monika Arora alias Meenu 2000(1) M.L.J. 34;

(xi) Jagsir Singh v. Paramjit Kaur ;

(xii) Rajni v. Rajesh Sawhney 1996(1) R.R.R. 347 : F.A.O. No. 52-M of 1994.

16. We, however, find that the afore-mentioned orders were passed by the learned Judges on the statements and concessions made by both the parties and the scope or interpretation of Section 13-B of the Act was neither raised nor adjudicated upon.

17. To buttress his contention in relation to issue No. 2, learned Counsel for the appellant has relied upon the judgment of the Supreme Court in Sampath Kumar v. Ayyakannu and Anr. wherein it has been held that, an amendment once incorporated relates back to the date of the suit. The Apex Court, however, explained that the doctrine of 'relation back' in the context of amendment of pleadings is not one of universal application.

18. After a ruminated consideration of the point in issue, we are unable to persuade ourselves to agree with the learned Counsel for the appellant. The doctrine of 'relation back' being not of universal application, cannot be pressed into service to defeat a statutory provision or its object. The legislative scheme unfolds that occasion to observe the minimum and/or maximum waiting period envisaged under Sub-section (2) of Section 13-B of the Act would arise only when a joint petition in terms of Sub-section (1) thereof is presented before the court. Thus, if the theory of 'relate back' is applied in such like cases then the 'waiting period' will precede the presentation of a joint petition. Such a consequence being totally alien and contrary to the legislative intentment behind the afore-said provision, we reject the appellant's contention that on conversion of his petition under Section 10 into under Section 13-B of the Act, the joint petition shall be deemed to have been filed on 15.4.1998.

19. At this stage, it may also be mentioned that in Ashok Hurra's case (supra) as well as in the case of Smt. Swati Verma v. Rajan Verma , the Supreme Court while granting divorce by mutual consent waived off the waiting period provided in Sub-section (2) of Section 13-B of the Act by invoking its powers under Article 142 of the Constitution. The powers akin to Article 142 of the Constitution are concededly not enjoyed upon by the High Court while exercising its appellate jurisdiction.

20. We now proceed to examine issue No. 3, namely, whether in the first appeal the appellant was duly served or not. Relying upon the contents of CM. No. 761 of 2004, learned Counsel for the appellant strenuously contended that upon issuance of notice by this Court on 29.5.2001, summons were sent to the appellant on two addresses, i.e. (i) his permanent address at Ambala Cantt; and (ii)

at House No. 2404, Phase XI, SAS Na-gar, Mohali, District Ropsir. The summons sent at the Ambala Cantt address were received back with the report that the father of the appellant was found present at home who endorsed the receipt thereof with the remarks that the appellant had gone abroad after re-marrying and that he will try his best to inform the appellant regarding pendency of appeal. On the second set of summons which were issued on 31.5.2001, however, a report dated 16.6.2001 was procured by the father of the respondent-wife as if the appellant after reading the contents of the appeal and the interim stay, refused to accept the same. It was argued that since the appellant had already gone abroad on 13.6.2001, the report on the 2nd set of summons was totally false and fabricated. It is, thus, contended that the appellant was never served personally in the first appeal.

21. On the other hand, Shri Aggarwal, learned Senior Counsel for the respondent, on the strength of Order 5 Rule 15 C.P.C., contended that even if the appellant's assertion that he had gone abroad on 13.6.2001 or that he was never served at his Mohali address, are assumed to be correct, yet, the first notice sent at the appellant's permanent address and served upon his father, should be taken as sufficient service upon the appellant. It was argued that since the appellant was not found at his permanent address, he had admittedly gone abroad, and his father having refused to inform as to when the appellant would return, there was no likelihood of his being found at the address within a reasonable time. In these circumstances, the service of summons upon his father is a valid service in the eyes of law. Shri Aggarwal also made a pointed reference to the second proviso to Order 9 Rule 13 C.P.C. according to which a court shall not set aside an ex pane decree merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the party had notice of the date of hearing and had sufficient time to appear and answer the opposite party's claim.

22. There can be no quarrel that service can be made under Order 5 Rule 15 C.P.C. on an adult member (male or female) residing with a party to the lis subject to, however, fulfillment of two conditions, namely, (i) the party upon which service is to be effected resides at that address; and (ii) there is no likelihood of his being found within a reasonable time. The expression reasonable time shall vary from case to case. There can, however, be no doubt that before effecting service on an adult member of a defendant's family, there has to be satisfaction regarding likelihood of his non-availability at his residence within a reasonable time.

23. Testing the yardstick of "within reasonable time" in the facts and circumstances of the present case, it is not denied that: (i) the appellant is a permanent resident of Ambala Cantt. and summons were sent to him on that address only; (ii) the appellant was not found at his residence and his father informed the process server that the appellant had gone abroad after re-marrying; (iii) the appellant's father did not disclose as to how soon the appellant would come back from abroad; and (iv) the appellant's father did not commit that he will definitely inform the appellant regarding filing of the appeal or the interim order passed by the Court though he assured in this regard. In these peculiar facts and circumstances and having regard to the nature of litigation, it can be safely inferred that the summons could not have been served upon the appellant personally within a reasonable time, therefore, service of notice upon the appellant's father, who admittedly received the summons, squarely falls within the safeguards of Rule 15 of Order 5 C.P.C. and has to be treated as a valid service upon the appellant.

24. In addition, a perusal of the impugned judgment unveils that a learned Counsel actually appeared on behalf of the appellant and made more than one alternative submissions before the learned Single Judge. It was argued by him that:

(i) instead of setting aside the decree, the case may be remanded to the trial court;

(ii) the case may be adjourned as the appellant had gone out of India; and (iii) the appellant had already re-married.

The learned Single Judge, however, did not find these contentions convincing and after observing that the plea taken on behalf of the appellant lacked bona fide, turned down the same being simply attempting to delay the matter. The judgment under appeal, thus, cannot be termed as an ex parte order. We are satisfied that the appellant had the notice of the pendency of the appeal as also of the date of hearing and he had sufficient time to contest the same as the notice was served upon him on 9.6.2001 whereas the appeal was taken up for final hearing on 23.8.2001. It also appears that instead of getting the appeal decided on merits, the appellant wanted to prolong its hearing until he returned to India. In such like situation, the learned Single Judge was not obligated to adjourn the appeal for an indefinite period leaving its adjudication at the mercy of the appellant.

25. Lastly, a futile effort has been made to invoke equity in favour the appellant on the pretext that after dissolution of the marriage by a consent decree on 3.5.2001 and on expiry of one month period thereafter, that he got re-married on 5.6.2001 and now has an issue out of the second wedlock. The respondent, however, has seriously contested the afore-said date of second marriage, as according to her, the second marriage was solemnized on 15.6.2001. Be that as it may, we are of the view that the unusual situation is appellant's own creation. We can only say that the second marriage, irrespective of the date of its solemnization, appears to be a step in haste, especially knowing fully well that in view of a Division Bench judgment of this Court in Smt. Krishna Khetarpal v. Satish Lal A.I.R. 1987 P&H 191, appeal against a consent decree passed under Section 13-B of the Act is also maintainable. Had the appellant acted with due diligence, he could have got it verified from the Registry of this Court as to whether or not the respondent has filed appeal against the consent decree dated 3.5.2001. In fact, no delay in filing of the appeal can be attributed to the respondent who promptly filed the same and obtained an interim order on 29.5.2001 restraining the appellant from re-marrying. The manner in which the appellant is stated to have gone abroad immediately after remarrying also speaks volumes that he was desperate to re-marry, may be, to defeat the lawful claim of the respondent in appeal. We, accordingly, repel this contention as well.

26. It may also be noticed that so many unsavory allegations and counter-allegations have been made by the appellant and the respondent/her father in Civil Misc. No. 76l of 2004 on one hand and Civil Revision No. 1969 of 2000 filed for enhancement of the maintenance pendente-lite. We decline to go into the same leaving it open to the parties to pursue their respective remedies in accordance with law, if so desired.

27. For the reasons stated above, we do not find any merit in this appeal which is, accordingly, dismissed with costs of Rs. 20,000/-.