



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Divorce Empowerment: The Changing Role of Power of Attorney in the Contemporary Legal Environment

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Received 22 August 2023; *Accepted* 14 September 2023; *Published* 18 September 2023

This article delves into the emerging role of the power of attorneys in divorce proceedings, highlighting their applicability in modern legal scenarios. The complexities of divorce cases within the framework of diverse personal laws in India are explored, underscoring the need for adaptable solutions. Analyzing legal provisions, the article unveils the authority vested in the power of attorneys, emphasizing their role as recognized agents empowered to represent parties in court. Recent judgments from various high courts provide valuable insights into the legitimacy of the power of attorney representation in divorce cases. While such representation offers convenience and practicality, inherent limitations and potential drawbacks necessitate careful consideration. Balancing the benefits and challenges, the article underscores the importance of ensuring justice and upholding parties' rights in an evolving legal landscape where the power of attorneys plays an increasingly significant role.

Keywords: *divorce, attorney, legal empowerment, environment.*

INTRODUCTION

Divorce is undoubtedly one of the most challenging phases a married couple can face. Under personal laws, different communities or religions in India are governed by different laws. The

Hindu Marriage Act 1955¹ governs Hindus, Jains, Sikhs and Buddhists; similarly, Parsis are governed by the Parsi Marriage and Divorce Act 1936² and other communities by their laws. Inter-religious marriages are governed by the Special Marriages Act 1954³. These various acts govern the conditions for divorce between married couples in these respected communities.⁴

As society is progressing and the dimensions are changing, a Power of Attorney is no longer just used in property-related matters or some contractual matters but in divorce proceedings as well. For example, if a divorce proceeding is to be held in India and a party resides out of the country, he/she can be represented through a Power of attorney.

UNVEILING POWER OF ATTORNEY'S ROLE

Order III Rule 1⁵ explicitly states that any appearance or application to the court can be made by the party or by his agent until any law expressly bars it. Such an appearance can be made by the party itself if the court directs the same. Further, Rule 2 (a) states that power of attorney is a recognized agent who can make an appearance and application on behalf of the authorized party.

Section 2⁶ states that a donee of a power-of-attorney if he thinks fit, can sign or seal any instrument or thing with his signature and seal by the authority given by the donor of power. Any instrument or thing signed by a power of attorney would have the same legal validity as if the original party signed it.

Section 10(1)⁷ states that a family court shall be deemed a civil court and all the required provisions of the code would apply.

¹ Hindu Marriage Act 1955

² Parsi Marriage and Divorce Act 1936

³ Special Marriages Act 1954

⁴ Shreya Malhotra, 'Divorce Proceedings by Power of Attorney: All You Should Know!' (*Lawyers Club India*, 16 September 2020) <<https://www.lawyersclubindia.com/articles/divorce-proceedings-by-power-of-attorney-11938.asp>> accessed 12 August 2023

⁵ *Civil Procedure Code 1908, Or III r 1*

⁶ Power of Attorney Act 1882, s 2

⁷ Family Courts Act 1984, s 10(1)

In divorce cases where a party is represented by a power of attorney, such power of attorney is generally non-durable, which means that the authority bestowed on such an agent is generally for a short period – for example, representing a party in court if such a party is out of the country or is physically unwell. A principal can revoke the authority of such an agent for any reason he deems fit. Such an agent's authority is revoked automatically when the principal is deemed unfit.⁸

LEGAL INSIGHTS FROM RECENT JUDGMENTS

For further understanding of this topic, we need to look into its applicability. Many courts have dealt with this issue. So, now we must refer to some of the essential cases.

In the recent judgment of *Sethi P V v Nil*,⁹ the Honorable Kerala High Court, the court dealt with the issue of whether a power of attorney has a right to sign the mutual divorce petition.

The petitioners and respondent got married in 2011, but since 2014, disputes have arisen between the husband and wife and they lived separately. Later in 2020, mediation took place and both parties decided to divorce through mutual consent under section 13(B)¹⁰. When the petition was filed, the COVID-19 pandemic was at its peak and the respondent's husband was out of the country. So, he bestowed a power of attorney to his brother. The family court at Thalasserry rejected the petition.

In this case, the Kerala High Court explicitly mentions that the nature of the petition being one for divorce through mutual consent under Section 13(B)¹¹ should not lead to the assumption that a party is prohibited from initiating proceedings with the assistance of a properly authorized power of attorney holder. This is because Section 13B of the HMA¹² does not include any provision that negates the authority of a power of attorney holder as stipulated under Order III

⁸ Adv. Deepali S., 'Divorce through Power of Attorney' (*Legal Raj*, 28 August 2020) <<https://legalraj.com/articles-details/divorce-through-power-of-attorney>> accessed 03 August 2023

⁹ *Sethi PV v NIL OP (FC) No 146/2021*

¹⁰ Hindu Marriage Act 1955, s 13B

¹¹ *Ibid*

¹² Hindu Marriage Act 1955, s 13B

Rules 1¹³ and 2¹⁴ and Order VI Rule 14¹⁵ of the Civil Procedure Code. Furthermore, Section 20(2)¹⁶ allows the Court to accept petitions submitted by the concerned party or by another competent individual in the manner prescribed by law to validate a complaint or petition.

Moreover, it is crucial to note that neither the Family Court Act nor the regulations established by the High Court of Kerala, nor the directive introduced by the Government of Kerala under Section 23¹⁷ of the Act, prohibit the submission of a petition before the Family Court through a duly authorized power of attorney holder. Therefore, there is no valid reason to make any distinction concerning petitions filed under Section 13B¹⁸.

The fact that the petition involves seeking divorce by mutual consent does not imply that using a power of attorney holder to initiate the proceedings is prohibited. The relevant legal provisions in the Hindu Marriage Act, Civil Procedure Code and the absence of any specific prohibition under the Family Court Act or relevant rules collectively support the right of a party to use a power of attorney holder for submitting a petition without any differentiation based on the nature of the petition being filed under Section 13B.¹⁹

In this judgment, *Mr. Aditya Jagannath v Nil*²⁰ given by Justice B.V Nagarathna, the High Court of Karnataka states that nowadays, when married couples are heading for divorce, they usually make this decision after many negotiations and sometimes both the husband and wife could reside in different parts of the globe. In such a situation, being represented by a power of attorney can only help in aiding the justice process. Nevertheless, sometimes in such crucial matters as divorce, both parties' opinions may need to be taken and the court may need their presence. In such situations, they can join in through video calls. However, dismissing the petition because a party is being represented through a power of attorney is wrong.

¹³ *Civil Procedure Code 1908, Or III r 1*

¹⁴ *Civil Procedure Court 1908, Or III r 2*

¹⁵ *Civil Procedure Court 1908, Or VI r 14*

¹⁶ *Hindu Marriage Act 1955, s 20(2)*

¹⁷ *Family Courts Act 1984, s 23*

¹⁸ *Hindu Marriage Act 1955, s 13(B)*

¹⁹ *Ibid*

²⁰ *Mr. Aditya Jagganath v NIL MFA No 4453/2020 (FC)*

The court also relied on the Supreme Court's judgment in *Amardeep Singh v Harveen Kaur*,²¹ wherein the court observed that a court could adopt the method of video conferencing for the presence of the main parties. Additionally, the court may allow parties to be represented by their close relatives, such as parents or siblings when they cannot be present in person. This permission is contingent upon the reason being justifiable and valid in the court's eyes. The overarching aim of these measures is to ensure that the principles of justice are upheld.

In the case of *Dr. Deepak Sharma v Smt. Vineeta Sharma*²², the husband was represented by a power of attorney. When the trial court's application was taken up for hearing, the Trial Judge examined the language and purpose of Section 28²³. This section pertains to divorce by mutual consent. The judge concluded that to obtain a divorce through mutual consent, both spouses must jointly submit a divorce petition on two occasions. However, since one of the spouses (the husband) was absent during the proceedings, the requirements outlined in Section 28(2)²⁴ of the Act still needed to be met.

The critical point here is that the judge emphasized the importance of both parties being actively involved in filing for divorce by mutual consent. The judge reasoned that the absence of one party, in this case, the husband, prevented the court from presuming that the absent party had not withdrawn their earlier consent for divorce. In other words, since the husband was absent to confirm his ongoing agreement to the divorce, the judge could not assume that his initial consent still stood.

The Calcutta High Court discusses the extent of authority given to the power of attorney holder and cites the Supreme Court's decision. The Supreme Court's ruling specifies that a power of attorney holder can only testify about 'acts' they performed based on the power granted in the instrument. They cannot testify on behalf of the principal regarding matters within the principal's knowledge, particularly matters that the principal would need to be cross-examined

²¹ *Amardeep Singh v Harveen kaur* AIR 2017 SC 4417

²² *Dr. Deepak Sharma v Smt. Vineeta Sharma* AIR 2008 Cal 55

²³ Special Marriages Act 1954, s 28

²⁴ Special Marriages Act 1954, s 28(2)

about. If the principal cannot appear in court, the court can issue a commission to record their testimony.

The learned High Court also laid down some essentials needed to obtain a decree of divorce through mutual consent:

- The parties should have been living separately for a year or more than a year. They were not able to reside together.
- They both have agreed mutually for the dissolution of the marriage.
- The parties could not reconcile during the interregnum period and the adjustment between the two parties was no longer possible.
- Consent of both parties for divorce was not obtained through fraud, force, or undue influence.

In light of the ingredients mentioned earlier, the Learned High Court held that a power of attorney could not prove these essentials on behalf of the principal or conform them in an affidavit. This limitation arises because the actions that constitute these requirements are not actions that the power-of-attorney holders themselves have taken. Instead, these actions are closely tied to the personal experiences and knowledge of the parties involved in the case.

Since these requirements hinge on factors that only the parties would have direct knowledge of, the court asserts that only the parties can provide proof. The court emphasizes that the power-of-attorney holder cannot carry out the essential actions or situations that make up these requirements. Therefore, the parties are responsible for substantiating these requirements by presenting a sworn written account (affidavit of evidence) as prescribed by Order 19²⁵ or by providing their testimony in the court proceedings.

MERITS AND LIMITATIONS

Using a power of attorney to conduct divorce procedures has numerous significant benefits. First, they offer an appropriate remedy for cases where physical presence is hampered by

²⁵ *Civil Procedure Code 1908, Or 19*

distance or other conditions. This can speed up the legal procedure considerably and ease logistical difficulties. The power of attorneys also facilitates quicker discussions and decision-making, which may reduce the time and money needed for the processes. Another advantage of privacy is that it allows one side to preserve secrecy by avoiding direct participation in court appearances. Using a power of attorney might result in financial savings since travel expenditures and associated costs are reduced. Furthermore, giving someone power of attorney can help them avoid the mental strain of having to actively participate in the procedures if they are experiencing emotional or physical suffering. Lastly, picking a family law specialist attorney-in-fact will provide skilled counsel throughout the divorce procedure.²⁶

However, there are significant drawbacks when choosing divorce through power of attorney. One of the main worries is the possibility for the chosen attorney-in-fact to abuse or misuse their position. Decisions that are contrary to the absent party's objectives or interests may be made as a result of this. A severe negative is the absence of direct participation in the process, which can cause a separation between the missing party and important decisions that will affect their future. As the attorney-in-fact could not wholly comprehend the absent party's desires, there is a danger of miscommunication and misrepresentation, which could result in misunderstandings and poor representation. Giving power of attorney also implies giving up some control, which might lead to consequences that the absent individual finds objectionable. Due to the party's absence from hearings and talks, which are frequently essential throughout the divorce, there may be a lack of emotional support. Given the attorney-in-fact's limited knowledge of the complex legal and financial factors, complex legal dynamics may need to be appropriately managed. Finally, depending on the responsiveness and effectiveness of the attorney-in-fact might cause delays and even lengthen the divorce procedure as a whole.

CONCLUSION

In conclusion, the evolving legal landscape surrounding divorce proceedings in India has seen a notable expansion in the role of the power of attorneys. As marital complexities persist within

²⁶ Nikita Aganoff, 'The benefits of a power of attorney' (*StandardLaw Co*)

<<https://www.standardlaw.com.au/2020/10/the-benefits-of-a-power-of-attorney/>> accessed 07 August 2023

the diverse framework of personal laws, these legal agents have found applicability in modern legal scenarios. This article has illuminated the significance of the power of attorneys in representing parties in court, particularly when physical presence is hampered by distance or other circumstances.

While the emergence of the power of attorneys in divorce cases offers undeniable convenience and practicality, it is imperative to treat it cautiously due to inherent limitations and potential drawbacks. The analysis of recent judgments from various high courts has underscored the legitimacy of the power of attorney representation. However, their role is not without challenges. The need for active involvement by both parties, especially in mutual consent divorce proceedings, has been a central aspect explored through these judgments. This highlights the balance that must be struck between harnessing the advantages of power of attorney representation and safeguarding the interests and rights of the absent party.

This paradigm shift in divorce empowerment calls for a nuanced approach that blends technological advances with traditional legal principles. The assertion that only the parties themselves can substantiate certain essential requirements of divorce by mutual consent echoes the principle that personal experiences and knowledge cannot be seamlessly transferred through proxies. This aligns with the tenet that individuals involved in the case are best positioned to provide authentic testimony.

As the legal system grapples with the integration of the power of attorneys in divorce cases, it is vital to preserve the core tenets of justice. Ensuring that individuals are not deprived of their rights due to physical absence is a commendable step forward. However, striking a balance between practicality and the preservation of the parties' rights is crucial. This calls for constant vigilance, adaptability and the continued pursuit of solutions that champion both convenience and fairness within the evolving legal milieu.