

Amitabh Bagchi Vs. Ena Bagchi

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Court : Kolkata

Decided On : Feb-16-2004

Reported in : AIR2005Cal11,(2004)3CALLT263(HC)

Judge : Amitava Lala, J.

Acts : [Constitution of India](#) - Article 227; ;[Evidence Act, 1872](#) - Section 3; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rule 4(3)

Appeal No. : C.O. No. 2312 of 2993

Appellant : Amitabh Bagchi

Respondent : Ena Bagchi

Advocate for Def. : Jiban Ratan Cahtterjee and ;Subrata Roy, Advs.

Advocate for Pet/Ap. : Gurudas Mitra, Adv.

Judgement :

A. Lala, J.

1. This is an application under Article 227 of the [Constitution of India](#) challenging the order passed by the District Judge at Howrah on 8th September, 2003 in the Miscellaneous Case No. 89 of 2001 arising out of Matrimonial Suit No. 487 of 2000.

2. The fact reveals that the petitioner's husband instituted the aforesaid Matrimonial Suit in the appropriate Court of District Howrah because according to him marriage was solemnized therein under the Hindu Marriage Act, 1955. Thereafter, they shifted along with the parents of the petitioner to New Delhi and consequently to the United States of America. However, the opposite party/wife stayed there for sometime due to passport and/or clearance of visa etc. Thereafter she also went there and stayed at the matrimonial house at Chicago, United States of America. According to the petitioner, due to various reasons which will be reflected from the statements in the plaint as well as application, she herself left the matrimonial house and came back to India.

3. Good, bad, indifferent I do not want to go to the controversy in respect of the matrimonial-relations because I have not been called upon to decide so. But the pious desire of the Court is that both the husband and the wife, for the sake of their child and/or their family members, should adjust in a manner with each other so that such type of disputes can be avoided. Unless and until it comes out from within themselves law cannot give protection very often as there is a well-known proverb that family law is no law. With my sincere expectation, now, I switch over myself to the real crux of the case. In the Matrimonial Suit an application was made by the opposite party under Section 24 of the Hindu Marriage Act for the purpose of grant of alimony and litigation cost. Such application was disposed of by the District Judge, Howrah by an order dated 3rd May, 2003 by granting Rs. 10,000/- per month towards maintenance pendente lite and a sum of Rs. 20,000/- as litigation cost with other incidental orders. A revisional application was made from such order in the High Court but in disposing of such revisional application being CO. No. 1681 of 2003 dated 11th August, 2003 the Court was pleased to set aside such order in view of the fact that income of the husband was ascertained but question of expenditure was not ascertained by the Court below to come to a finding as to alimony at the rate of Rs. 10,000/- per month. But in disposing of such revisional application Court below was directed to hear out the matter afresh on the basis of the evidence to be adduced by the parties and the same should be disposed of two months from date of communication of the order without granting any unnecessary adjournment. Thereafter the petitioner's husband made an application before the Court below for examining him by way of video conference.

According to him, he is permanently residing in United States of America and is an employee of a Company at New York. In course of employment he has to remain at the place of posting. According to him, it would be extremely prejudicial to come to India and depose in the instant case. It will involve an unnecessary amount of delay, expenditure and inconvenience which in the facts and circumstances of the case, will be patently unreasonable and extremely harsh upon him. The attendance of the petitioner can be procured without delay, expenses and inconvenience if the Court allows him to be examined by way of video conferencing. There is no difficulty in examining him in that way because perjury, if any, is a punishable offence therein. His examination is utmost necessary and to avoid difficulties as mentioned above an order to Commission to record his examination by way of video conferencing can be granted.

4. Learned counsel, appearing on behalf of the petitioner, has relied upon two effective judgments on that score. One is reported in : 2003 CriLJ2033 (State of Maharashtra v. Dr. Praful B. Desai), and another is reported in : AIR2003 Kant148 (Twentieth Century Fox Film Corporation and Anr. v.NRI Film Production Associates (P) Ltd.).

5. The ratio of the Supreme Court judgments is that 'presence' does not necessarily mean actual physical presence in the Court.

6. Section 3 of the Indian [Evidence Act, 1872](#) reads to a meaning of evidence which is as follows:

'Evidence - Evidence means and includes -

all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence.

All documents Including electronic records produced for the inspection of the Court.

Such documents are called documentary evidence.'

7. Therefore, the interpretation of the Supreme Court on that score is that in the Court physical presence of a person may not be required for the purpose of adducing evidence. Evidence includes video conferencing. Although the Supreme Court dealt with the criminal matter in delivering the judgment but the necessary explanation given therein is that it is applicable to all cases including criminal matter. Therefore, there cannot be any embargo so far as the present matter is concerned. Video conferencing is an advancement of science and technology which permits one to see, hear and talk with someone far away with the same facility and ease as if he is present herein. The only difference is that one cannot touch the person concerned. Even then, it will not disentitle a person to give evidence in such way because of various reasons which we are now considering.

8. In agreeing with the judgment of the Supreme Court I can say that if any incident is seen by an eye-witness through binocular or telescope and if it is brought to the notice of the Court by such person can it be said that he is not an eye-witness? More so, if we watch something through the same can it be said that we have not watched it? The essential requirement of advancement of technology and its application is to make things easier and flexible. The Court is meant for the people. So it is required for the Court to give reasonable and appropriate facility to the people. Now-a-days several steps are taken as a matter of policy to reach to the bottom level of the people. We are making various types of Courts and Benches and offering justice to facilitate the people. Video conferencing is one such facility. It is to be remembered that by virtue of an amendment and insertion of Sections 65A and 65B of the Evidence Act a special provision as to evidence relating to electronic record and admissibility of electronic records has been introduced with effect from 17th October, 2000. Consequential amendments are also made therein. Therefore there is no bar of examination of witness by way of Video Conferencing being essential part of electronic method. Hence, such prayer cannot be ignored as unnecessary. It is to be evaluated with the amount of delay, expenses or inconvenience. If it appears that electronic video conferencing is not only much cheaper but also facilitates the Court and avoids delay of justice, a practical outlook is to be taken by the Court. In such circumstances, Court may dispense with such attendance and issue a Commission for examination of the witness. However, in allowing such prayer Court will first of all consider whether

linkage of such facility will be available between two places or not.

9. In : AIR2003 Kant148 (supra) the High Court elaborately discussed about the scope and ambit of Order 18 Rule 4(3) of the amended Code of Civil Procedure. As per the ratio of such judgment presence in the Court under Order 18 Rule 4(3) does not necessarily mean physical presence. Rule 4(3) provides for recording evidence either by writing or mechanically in presence of the Judge. I want to be little explanatory on that score. Rule 4(3) of the Code of Civil Procedure does not speak only about recording of evidence by the Court. It says that the Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit. Therefore, the real import is when writing and mechanically both process can be applicable disjunctively for the Court and Commissioner by the amendment with effect from 1st July, 2002 much after the amendment of the Evidence Act on that score, with effect from 17th October, 2000 the mechanical process includes the electronic process both for the Court and the Commissioner. Those are empowered to adopt the mode of evidence as per the amended Evidence Act.

10. In addition to the above I fully agree with Supreme Court and Karnataka High Court at least to such extent that if the Law Courts do not permit technology development in the Court proceedings it would be bagging behind compared to other sectors. Technology is definitely a tool. But the following safe guards are to be taken for purpose of recording evidence through Audio-Video Link : (1) Before action of the witness under Audio-Video Link starts the witness will have to file an affidavit or an undertaking duly verified before a Judge or a Magistrate or a Notary that the person who is shown as the witness is the same person as who is going to depose on the screen with a copy of such identification affidavit to the other side. (2) The person who wishes to examine the witness on the screen will also file an affidavit or an undertaking in the similar manner before examining the witness with a copy of the other side with regard to identification before hand. (3) As soon as identification part is complete, oath will be administered through the media as per

the Oaths Act, 1969 of India. (4) The witness will be examined during working hours of Indian Courts. Plea of any inconvenience on account of time difference between India and other country will not be allowed. (5) The witness action, as far as practicable, be proceeded without any interruption without granting unnecessary adjournments. However, discretion of the Court or the Commissioner will be respected. (6) Witness includes parties to the proceedings. (7) In case of non-party witness, a set of plaint, written statement and/or other papers relating to proceeding and disclosed documents should be sent to the witness for his acquaintance and an acknowledgement in this regard will be filed before the Court. (8) Court or Commissioner must record any remark as is material regarding the demur of the witness while on the screen and shall note the objections raised during recording of witness either manually or mechanically. (9) Depositions of the witness either in the question answer form or in the narrative form will have to sign as early as possible before a Magistrate or Notary Public and thereafter it will form part of the record of the proceedings. (10) Mode of digital signature, if can be adopted in this process, such signature will be obtained immediately after day's deposition. (11) The visual is to be recorded at both the ends. The witness alone can be present at the time of video conference, Magistrate and Notary is to certify to this effect. (12) In case of perjury Court will be able to take cognizance not only about the witness gave evidence but who induced to give such evidence. (13) The expenses and the arrangements are to be borne by the applicant who wants to this facility. (14) Court is empowered to put condition/s necessary for the purpose.

11. In the instant case, the petitioner wanted to pay expenses. In such circumstances, if the guidelines and/or safe guards are directed to be followed in examining the witness from the United States of America no prejudice will be suffered by the opposing party. The whole compass of the argument made by the opposite party is that the application for recording evidence by video conferencing is a dilatory tactics on the part of the petitioner. According to her, the approach of the petitioner herein is not a honest approach to the Court of law. Learned counsel, appearing for her, made submission that when the parties were residing in America what was the necessity of filing the suit in the District Court of Howrah, West Bengal, India is unknown to him. It could have been filed there. But for avoiding huge amount of alimony the suit was instituted in India and now he is

showing the ground of expenses in coming to India and has applied for recording his evidence by video conferencing.

12. According to me, sitting in the Court of Superintendence under Article 227 of the [Constitution of India](#) I cannot adjudge the merit. It is open for the Court where the suit and/or the proceeding is pending. The only question before this Court is whether the application for recording evidence by way of video conferencing is illegal and whether the learned District Judge rightly refused such application or not. In spite of the interesting arguments having been made by the parties in the Court below a surprising order was passed by the learned District Judge, Howrah that as because two months period has been granted by the Court such application could not be entertained. The Court said that the order was brought to notice of the Court on 1st September, 2003 and thereafter the case was fixed without giving particulars of the date. Thereafter it was observed that it goes without saying that if application is allowed it will take a long time to dispose of the application and the same would be against the direction of the Hon'ble High Court. A submission of the opposite party/wife was recorded therein that to avoid warrant of arrest as against a complaint filed under Section 498A of the Indian Penal Code the petitioner/husband is avoiding the Court and wants to give evidence. Although no such point has been agitated herein since the application was dismissed only on account of time given by the Hon'ble High Court I do not want to propose to go into such part in detail. But it is to be remembered that a stray comment in respect of a criminal proceeding cannot be an appropriate basis of a decision of an independent proceedings.

13. Therefore, coming back to the operative part of the order impugned I can say that giving two months time from the date of communication of the order without granting any unnecessary adjournment in hearing such application as given by this Hon'le High Court in the earlier occasion is a pious desire of the Court. Neither it can be said to be a compelling circumstances nor it is reflected from the order. Whenever the part '.....without granting any unnecessary adjournment' is added with a time given it means that the Court should not be casual in hearing the matter and should allow a time-bound programme to go on without a genuine cause. Can it not be said that allowing such type of application is a genuine

cause.? Even if there is a doubt the Court could have directed the parties to mention this matter to the High Court for extension of time period on account of exigency. But avoidance of such application is definitely a vital cause for refusal of justice which the Learned Judge failed to appreciate. Moreover, it is a wrong appreciation of fact that process of video conferencing will cause delay. As and when the question of delay is a substantial question before the Court either to grant relief or not to grant relief intention of the party is to be adjudged carefully. The order of the High Court was communicated to the Court below on 1st September, 2003 admittedly and the order impugned was passed on 18th September, 2003. Therefore, such application should have been presented before the Court immediately after the communication of this order. This is not the case that just before the expiry of two months period given by the High Court such application was made. Had there been so it could have been established that the petitioner is inclined to delay the proceeding. But that inference can not be drawn which even as per the order of the High Court about one and half months approximately is left. When the order of the High Court will be construed as mandate by the Court below then it is desirable that the Court will take the task as an emergency. For an example when a time period is fixed by the High Court to dispose of the matter within a specified time day to day hearing is obvious. Instead of doing so if periodical posting of matter has been made in the diary as per suitability and/or convenience of the administration of the Court below then the case of delay can not be attributed upon the shoulder of the petitioner.

14. Therefore, in all, such order cannot be sustained. Therefore, the order impugned stands set aside. The application will be considered in merit and the matter expedited, if necessary, by giving day-to-day hearing preferably within a period of three months from the date of communication of this order. Under an interim order, the petitioner was directed to pay alimony pendente lite at the rate of Rs.5000/- per month which is hereby increased to Rs.7500/- and the same will be paid regularly until and unless further order or orders will be passed by the appropriate Court to that extent. However, such direction of payment is strictly without prejudice to the rights and contentions of the parties. No order is passed as to costs of this application.

Parties are entitled to take down the gist of the order and to communicate the same who will act upon such communication.

Let an urgent Xeroxed certified copy of this judgment, if applied for, be given to the learned Advocate for the parties within two weeks from the date of putting the requisites.

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