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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 28.07.2016

% PRONOUNCED ON: 03.08.2016

\+ MAT.APP. (F.C.) 65/2015, CM APPL.9184/2015, 1964/2016, 18129-18130/2016

PARUL NAHAR ..... Appellant

Through: Mr. Salman Khurshid, Sr. Advocate with Mr. Alok Bhachawat, Ms. Swati Ghildiyal and Ms. Azra Rehman, Advocates.

versus

SOUMITRA KUMAR NAHAR ..... Respondent

Through: Ms. Geeta Luthra, Sr. Advocate with Mr. Attin Shankar Rastogi, Mr. Shivkant Arora and Mr. Rajesh Ranjan, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. This appeal under Section 19 of the Family Courts Act questions an order of the Family Court rejecting the wife's application for setting aside an order (dated 21.02.2015), setting her down *ex parte* in the husband's divorce petition.

2. The brief facts are that the appellant ("the wife" hereafter) was arrayed as respondent/opposite party in HMA 821/2011 (subsequently re-numbered as HMA 1383/2014). The respondent herein, ("the husband" hereafter) had preferred a petition seeking

dissolution of marriage between the parties, which had been solemnized on 10.12.2000. The couple had two minor children - born on 24.05.2005 and 10.10.2008. Presently, they are in the custody of the appellant. During the pendency of proceedings various orders were made at the behest of one or the other parties. On 1.3.2013, a Division Bench of this Court determined ₹60,000/- as *pendente lite* monthly maintenance payouts by the husband to the wife, inclusive of the children's educational expenses. With respect to the visitation rights in regard to the children, the matter was referred to mediation. Later, the wife had preferred the appeal in respect of certain orders made by the Family Court (MAT.A.63/2013). That appeal was permitted to be withdrawn. The Court then observed that by two earlier orders, i.e., 1.3.2013 and 2.4.2013, another Division Bench has desired that the divorce proceedings before the Trial Court should be concluded at the earliest and preferably within a year. By its order dated 29.11.2013, the Court emphasized that the Trial Court would make all endeavour to adhere to the deadline and file an Action Taken Report at the end of the period with its observations.

3. The proceedings before the Family Court continued and on different occasions either party, i.e., either husband or the wife approached this Court claiming to be aggrieved by one or other aspect of the family Court's order or proceeding. However, no substantial order was made except on 25.9.2014 (in MAT.A.41/14) where the Division Bench observed- after considering the Trial Court's records - that the order sheets ran into almost 200 pages and that the matter

with respect to the cross examination of the husband was still pending. The Court also issued certain directions vis-a-vis mediation in the context of visitation rights of the husband. While so, on 15.9.2014, the case was listed before the Family Court. The counsel for the appellant objected to the conduct of the proceedings on the part of the Presiding Officer, i.e., the Judge, Family Courts. Embarrassed, the judge felt constrained to recuse from the proceedings. In the light of this objection, the District and Principal Judge, Family Court, Dwarka issued a letter of request to the Registrar General of this Court for seeking appropriate orders. On 01.11.2014, the Principal Judge, who was originally incharge of the case Shri Rakesh Siddharth, adjourned the proceedings to enable the appellant to cross-examine the husband. The request for transfer was also noticed in an order of 20.11.2014 in an application in MAT. Appeal No. 41/2014. On 8.12.2014, the case was assigned to another Family Judge, Saket. On that date of hearing, there was no appearance on behalf of the appellant and the Court issued notice to her. Again on 14.1.2015 when the petition was listed before the transferee/new Judge, there was no appearance. The Court issued fresh notice. On the next date of hearing, i.e., 02.02.2015, the appellant was unrepresented. The Family Court, therefore, issued a notice yet again returnable on 21.2.2015. When on the latter date the appellant was unrepresented, she was set down *ex parte*. In these circumstances, the appellant moved the Court on 09.03.2015 contending that she became aware for the first time of having been set down *ex parte* on 05.03.2015 when in the presence of her counsel this

Court (in another interlocutory proceeding) was informed about the order dated 02.02.2015. It is in these circumstances that the appellant moved the Family Court stating that she was not aware of the proceedings before the new Judge and that her absences in the divorce proceedings were unintentional. This, according to her, amounted to "sufficient cause" necessitating recall of the previous order dated 21.2.2015.

4. The application for recall of the order was opposed by the respondent who pointed out that transfer from one Judge to the other was sought by the appellant in the first instance and that her abstaining from the proceedings was deliberate and calculated to further delay the proceedings. It was further stated that once the parties were before the Court there was no obligation on its part to issue notice time and again to invite them to participate in the proceedings.

5. The Family Court in the impugned order was of the opinion that recall of the order dated 21.2.2015 - setting down the appellant *ex parte* was not warranted in the interest of the justice. The Family Court observed *inter alia* as follows: -

> *"8. Learned Predecessor of this Court however was pleased to issue court notice to the respondent as well as her counsel without PF. Here it could be seen that it was not incumbent on the part of learned Predecessor of this court to have issued the court notice when on the last date of hearing, the respondent was very well present in the court and attended the entire proceedings. The court may have issued the court notice by*

way of abundant caution.

9. The process had been received back with the report that "the premises was found locked" and the process sent to the Advocate was received back with the report "Advocate has gone out of Delhi". In such a scenario, the respondent was proceeded ex parte. It is relevant to mention here that the respondent has taken date after date for the purposes of cross examination of the petitioner. From the record her conduct is apparent that she is not ready to let the case proceed for trial Despite clear directions of the Hon'ble High Court of Delhi, the respondent has indulged herself in not letting the cross examination to happen for which she has taken umpteen number of dates.

10. It is trite that law does not come to the rescue of those who intentionally and willfully try to stall the proceedings of the court on one ground or the other taking date after date. Even if she is a lady, no licence has been given to her not to let the matter proceed further. It is intriguing to note that the respondent had immediately appeared when the ex parte order was passed against her which goes to show that she must have been watching the proceedings from outside and deliberately did not appear in the matter. Her conscious effort to delay the proceedings is not digestible on any ground whatsoever. Law comes to the rescue of those who prudently adhere to the procedure established by law and do not deliberately flout the same. The applicant deliberately and consciously did not appear in the matter despite the fact that she knew the next date of hearing when she was supposed to appear on 08-12-2014. No one can buy the argument of the applicant that she came to know about the date of hearing in March, 2014 simply because she was aware about the date of hearing on 15-11-2014 which is reflected in the ordersheet of 15-11-2014.

11. In view of the foregoing reasons and discussions, there is no merit in the applications and the same are dismissed."

6. It is urged on behalf of the appellant by her senior counsel Mr. Salman Khursheed that the impugned order is in error. It is pointed out that the proceedings in the order sheets of the Family Court clearly demonstrate that notices were issued, but it was not proved that such notices were ever served. Learned counsel relied upon the replies to the RTI queries and the documents furnished by the Saket Court to say that that the notices, which were sought to be served upon the appellant's lawyer were in his absence. It was submitted that the reasoning of the Family Court that there was no obligation on its part to issue notice to her once she was aware of the pendency of the proceedings and had contested it at regular intervals, was uncalled for. It is submitted in this regard that having issued notice on not one but at least three occasions, the obligation of the Family Court was to satisfy itself about the due service of notice before proceeding further. Submitting that the appellant had no knowledge about whether her request for transfer of the proceedings had been acceded to and which Court the divorce petition was transferred to learned counsel stated that service of notice is a pre-requisite for proceeding further.

7. Learned counsel also submitted that after proceeding to set down the appellant *ex parte*, the Family Court went ahead and closed the evidence of the respondent husband. It was stated that the husband had cited no less than 13 witnesses in support of his case. However, immediately upon the passing of the order setting down the

appellant *ex parte*, the respondent husband dropped 12 witnesses and closed his own evidence. It was emphasized that having regard to the fact that the grounds urged in support of the divorce petition would, if accepted, have drastic consequences, the appellant's counsel stated that recall of the order setting her down *ex parte* was necessary to avoid miscarriage of justice.

8. Learned senior counsel for the respondent Ms. Geeta Luthra relied upon the record of the Trial Court and the observations of this Court in the past in MAT.A 41/2014 to emphasize that the appellant wife was responsible for prolonging divorce proceedings. It was stated that time and again the appellant sought adjournments on frivolous grounds. These included adjournment on personal grounds by her counsel and on grounds such as elections in the Saket Court Bar Association, all of which are documented. It is these and the other conduct such as filing of unnecessary applications, which caused undue delay. As part of this series, stressed counsel, the appellant moved an application to embarrass the Presiding Officer objecting to his conduct of the proceedings. Quite naturally, the Judge was constrained to refer it for appropriate action and after receiving instructions the case was assigned to another Judge. Learned counsel stated that the appellant having requested for the transfer was expected to be diligent in regard to following up as to what was the outcome. In these circumstances, when the case was listed on 8.12.2014, 14.1.2015 and 02.02.2015, the appellant's absence to appear had to be seen as intentional with a view to delay

and ultimately defeat the divorce petition.

9. Learned counsel relied upon the "India Post" documents to say that in fact the speed post containing the notice issued on 14.1.2015 was delivered to and served upon the appellant on 28.1.2015. In these circumstances, the appellant's claim that she was unaware as to the date or the Judge having control of the divorce petition was untenable. It was submitted that the service of notice issued on 14.01.2015 appears to have been overlooked by the Family Court, which proceeded to issue notice afresh on 02.02.2015 even though it was not required to do so.

10. It was urged that the law aids the diligent and the alert. In this case, the appellant made utterly unwarranted allegations against the conduct of the Presiding Officer of the Family Court who is sensitive and sought instructions for recusal. Having successfully thwarted the proceedings at that stage, the appellant intentionally kept herself away without caring to enquire as to the fate of her transfer request and claiming ignorance. It is submitted that as a result the impugned order cannot be faulted and is in consonance with justice.

11. The records of the Family Court were summoned for purposes of this appeal. It would be an understatement to say that the state of affairs is less than satisfactory; it is abysmal. Long ago - in November 2014, this court lamented that the order sheet of the case file ran into 200 pages; in fact the digitized record is in six volumes. It is filled with all sorts of applications. To apportion the blame entirely against the wife, or the husband, would however be unfair. They have both-

either through their action, or those of their counsel, been responsible for the delay. Consequently, it would be imprudent for this court to look into past conduct of the wife, in considering her present complaint of wrongful dismissal of her application. What is most material are the relevant facts for the purpose of this appeal.

12. The records bespeak of assignment of the case file to a new judge, on 08.12.2014. On that date, as indeed on the next date, i.e., 14.01.2014, the appellant was unquestionably unrepresented. Her application for transfer/reassignment of the divorce proceeding was acceded to. However, she does not appear to have been formally intimated about this; nor did the previous judge fix any date before himself. Nor for that matter, did the District and Principal Judge, assign or fix any date, to notify the parties about the outcome of the High Court's decision, on the request for transfer. This omission had a telling impact- notwithstanding the remissness shown by the wife or her counsel. Courts of first instance, especially Family Courts, which is expected to resolve disputes sensitively (for which considerable latitude is given by law, under Section 10(3) of the Family Courts Act, to device a peculiar procedure conducive to the case at hand) and to the satisfaction of the parties. Given that this often results in the Family Courts engaging quite deeply in aiding settlements, the least expected of them would be to notify parties, or device methods of notifying parties of the outcomes of requests for transfer in such cases. Unfortunately neither the original judge having control over this case, nor even the District Judge (who sent the request for

transfer to this court) deemed it appropriate to fix a date in advance before the Court, to merely notify the outcome of the transfer request. This omission has, in the opinion of the court, been a major contributor for the present dispute.

13. Having said that, the record also discloses that at least on 14th January, when the new court issued notice- India Post reported service upon the Appellant, on 28thJanuary 2015. The appellant's Greater Kailash address finds mention in the Registered speed post receipt produced along with the reply to her application, by the respondent. This receipt was either overlooked, or not on the record when the case was called on 02.2.2015 - when the court issued another notice, yet again. Undoubtedly, this notice was not served on the appellant; her counsel was apparently absent when it was received in his office, and someone there felt incompetent to receive it. The husband here, in the opinion of this court, has a point. Whether the last notice (02.02.2015) was served or not, the wife certainly had to explain why she did not respond to the notice received by her on 28th January 2015. Given that she had requested for transfer, the explanation that her counsel advised that she had no cause to worry and that the court would notify about further proceedings, in due course, is an omission which is inexplicable. At least the receipt of the Speed Post (regardless of whether notice was in the envelop or not - she alleges that it was not) should have alerted the wife to at least get inquiries made. She however, sat back, and cannot now explain this conduct. The result was that on the date of hearing, 21.02.2015,

the proceedings were set down *ex-parte* against her; the husband (who had relied on a list of 13 witnesses) concluded his examination in chief and closed his evidence.

14. It is a stale cliché that the law aids the diligent. If seen from that perspective, the appellant has much to explain: maybe she cannot convincingly show her lack of knowledge of the proceedings from 28.01.2015 on. Yet, would that inevitably entail rejection of her application for being permitted to contest the divorce proceeding? It is here that the court has to pause; to reflect on the consequences. The husband has sued the wife for divorce on grounds including *adultery*. Now, this court is unable to (and should perhaps, not unwisely desist) assess the strength of his claim. However, without delving further, there could be a possibility- howsoever remote, of his succeeding. In such event, the consequences would be too severe and drastic for the wife; her claim for custody may be seriously and irreparably jeopardized; in any event the outcome of divorce would cast a long shadow on that claim. Given that the wife had approached the court with an application for recall of *ex parte* order just after two weeks of its making, in this instance, this court has no doubt that its rejection has resulted in grave prejudice to her. This court is of opinion that given the mandate of Section 10, a strict and unbending view of procedural law and lack of "sufficient cause" was unmerited; the wife's quality of defense has been the casualty. The court could, having regard to the overall circumstances, have exercised its discretion by putting the wife to terms and also laying down pre

conditions for further conduct of proceedings, while giving the benefit of doubt. It did not do so.

15. This court is compelled to notice- with reluctance that despite exhortation to the parties to complete the proceedings, they have dragged on. We cannot for a moment doubt the Family Court's efforts, which appears to have done everything possible to speed up the proceedings. However, those efforts were of little avail; parties (without a reflection on any one of them) used every occasion to approach this court. This dampened the Family Court's endeavor at speeding the main proceedings. Furthermore, the court notices the innumerable occasions where the Family Court was compelled to accommodate the request of the parties, or their counsel- quite often the latter, on grounds of *personal* inconvenience or preoccupation. When these confront courts of first instance, there is, we suspect, a sense of helplessness and frustration- especially where the appellate or supervising court exercises micro managerial oversight over the proceedings and remote controls (without thought- or more often than not, without information of, of settled calendars and case management exercises of the trial court) end results within a specific time frame. Every court is anxious to ensure that justice processes are speeded up; yet remote controlling and micro-managing trial court dockets, as sops or palliatives to litigants who approach the appellate court cannot always be happy; it could be positively counter-productive.

16. During the hearing, this court had enquired from the parties

about the number of witnesses they can limit their proceedings to; the appellant's counsel had stated that her witnesses would not be more than 5 (five) and the respondent submitted that he would confine his trial to reliance on 6 (six) witnesses' depositions. These are material to the final order we propose to make.

17. In the light of the above observations and findings, the Court hereby sets aside the impugned order; the appellant is directed to bear the costs of these proceedings, quantified at ₹50,000/- (Rupees fifty thousand) to be paid to the respondent in two months. The parties are directed to be present before the concerned Family Court, on 08.08.2016. The parties' statement about the number of witnesses (five for the appellant and six for the respondent) shall bind them. The modified list of witnesses shall be furnished to the Family Court on the next date of hearing. The respondent's witnesses' cross-examination shall be taken up thereafter. Given that the present case has reached its fifth anniversary, the Family Court shall endeavor to render final judgment expeditiously. We advise the Family Court to be less tolerant to requests for adjournment on grounds of counsel's inconvenience (the exception being illness or obvious emergencies). The appeal is allowed in these terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

AUGUST 03, 2016