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% 28.10.2010

Present:- Mr. Vikas Goyal for the appellant.
Mr. A.K. Mishra for the respondent no.1.
The parties are present in person.

**+MAT APP NO. 46/2010 & CM. No. 6367/2010(under
Section 24 of HMA) & CM. NO. 6366/2010**

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By this appeal filed under Section 28 of the Hindu Marriage Act, 1955, the appellant seeks to challenge the judgment and decree dated 18.7.2008 passed by the Court of Ms. Madhu Jain, ADJ in HMA Petition No.740/07.

Counsel for the appellant states that the respondent no.1 had played serious fraud upon the appellant in not disclosing the fact that the appellant continued to reside with him at her matrimonial house i.e. A2/31, Budh Vihar, Phase-1, Near Radha Devi Public School, Delhi-110086 by falsely stating his residential address that of P-41, Budh Vihar, Phase-1, Delhi-110086. Counsel for the appellant has drawn attention of this court to the address disclosed by the respondent no.1 in his affidavit filed by him in support of his divorce petition. Counsel has also drawn attention of this Court to the same

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address i.e. A-2/31, Budh Vihar, Phase-I, Near Radha Devi Public School, Delhi furnished by the respondent no.1 in his affidavit filed by him by way of evidence and also when he entered the witness box to adduce his evidence. Counsel for the appellant also states that the respondent no.1 without disclosing the correct facts to the appellant got the written statement signed from her while in fact the appellant was never aware of the fact that her husband had filed a divorce petition against her. The contention of the counsel is that the said written statement was got signed from the appellant in collusion with the counsel for the respondent no.1 and that of the appellant through whom the said written statement was got filed. Counsel submits that it is apparent from the fact that in paras 6,14 and 16, the appellant is alleged to have admitted her sexual relationship with respondent no.2/Lalit @ Jipsy. The contention of the counsel is that no lady would admit such a fact blatantly even if she is having such relationship, although counsel states that there was no such relationship with the appellant and the respondent no.2 Lalit @ Jipsy. Counsel thus

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submits that ex-parte judgment and decree passed by the learned trial court deserves to be set aside.

Refuting the said submissions of the counsel for the appellant, Mr. Mishra counsel for the respondent states that the residential premises bearing no. A-2/31, Budh Vihar, Phase-I, Near Radha Devi Public School, comprises of various small houses and one of the house belongs to the mother of the respondent no.1 and due to that reason the said address was furnished by him. Counsel submits that the summon was received by the appellant at the other house although bearing the same municipal number. Counsel also submits that the appellant had moved an application under Order 9 Rule 13 CPC but due to non-prosecution the same resulted into dismissal. Counsel thus submits that no separate remedy has been availed by the appellant so as to assail the said order which has become final. Counsel for the respondent, however, submits that he will have no objection if the matter is sent back to the learned trial court for fresh trial from the stage from where the appellant stopped appearing before the trial court. Counsel also states that there was no collusion of the counsel of the

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respondent no.1 with the counsel who was representing the appellant before the trial court.

I have heard learned counsel for the parties.

There cannot be any dispute that the respondent no.1 in the divorce petition had disclosed his address to be that of A-2/31, Budh Vihar, Phase-I, Near Radha Devi Public School, Delhi. The said address had been disclosed by the respondent no.1 in his affidavit filed by him in support of the main petition and also in the affidavit filed by him by way of evidence. The respondent no.1 also disclosed the same address when he entered the witness box. Counsel for the respondent no.1 has taken a plea that there are various small houses situated on a plot of 200 sq. yards and one of the house bearing the same municipal number belongs to the mother of the respondent no.1. This argument of the counsel for respondent no.1 does not find favour with this court as once the respondent no.1 had given his address that of P-41, Budh Vihar, Phase-I, Delhi in the main petition then where was the reason for him to give the address of his mother in the affidavit filed by him. So far the issue of admission of the appellant in the written statement

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admitting her sexual relationship with the respondent no.2 is concerned, it is left to the appellant to move an application before the learned trial court to seek amendment in the written statement by explaining the reasons which led to filing of the said written statement. The matter is accordingly remanded back to the learned trial court for fresh trial and adjudication of the controversy. So far the contention of the counsel for the respondent no.1 with regard to the appellant not taking any remedy against the order passed by the learned trial court under Order 9 Rule 13 CPC is concerned, this court is of the view that the appellant should have taken a separate remedy to assail that order but considering the fact that the appellant has challenged the impugned judgment and decree dated 18.7.2008 on the ground of fraud played upon her by the respondent no.1, therefore, in the interest of justice, this court deems it fit to set aside the impugned judgment and decree dated 18.7.2008. Accordingly, the impugned judgment and decree dated 18.7.2008 is set aside.

Let fresh trial to decide the petition filed by the respondent no.1 under Section 13 (1) (ia) of the Hindu

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Marriage Act take place from the stage when the appellant was proceeded ex-parte. However, it is made clear that the appellant shall be permitted to move an application to seek amendment in her written statement and it will be for the concerned court to take independent decision on the said application to be moved by the appellant.

With the above directions, the matter is remanded back to the learned trial court.

The parties are directed to appear before the trial court on 15.11.2010.

October 28, 2010

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KAILASH GAMBHIR, J