

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

Date of Reserve: 27th January, 2010
Date of Order: January 28, 2010

CM(M) No. 9/2010 & CM No. 77/2010

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28.01.2010

Puja Kakar

... Petitioner

Through: Mr. Amit K. Chadha, Sr. Advocate with
Mr. Arun Batta, Advocate

Versus

Arjun Kakar

... Respondents

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

By the present petition, the petitioner has assailed orders dated 20th March, 2009 and 23rd July, 2009 passed by the Guardianship Court.

2. A perusal of order dated 20th March, 2009 would show that the matter on that day case was listed for cross examination of witnesses of petitioner (respondent herein) Five witnesses viz. Shri Arjun Kakar, Shri B.M.Kakar, Ms. Uma Kakar, Shri Kapil Gupta and Shri Kunj Lal were present for their cross examination. Proxy Counsel for respondent/petitioner appeared and moved an application for adjournment on the ground that the car of main Counsel was stolen on 10th March, 2009 and in the car file of the present case was also lying due to which Counsel for respondent/petitioner required time to reconstruct the file and to prepare the cross examination. The application was opposed by the Counsel for the plaintiff stating that it was a false plea. He showed that throughout the conduct of the petitioner had been to somehow prolong the proceedings and the petitioner had deliberately not

been cross examining the witnesses of the plaintiff since she was having custody of child in question and she wanted to prolong the proceedings. On various earlier occasions the petitioner had been burdened with costs but the same had no affect on the petitioner and the cross examination should be closed.

3. The learned trial Court went through the record and found that on framing of issues by the Court, the parties were granted two opportunities each to conclude the evidence. The petitioner/respondent filed affidavits of three witnesses on 20th October, 2008 and the matter was adjourned for cross examination of witnesses to 19th December, 2008. On 19th December, 2008, adjournment was sought on behalf of petitioner herein on the ground that copies of affidavits of PWs got misplaced and the Counsel could not prepare the cross examination. The Court therefore adjourned the case for 20th March, 2009 for cross examination of witnesses subject to cost of Rs.2,000/- and granted a last opportunity to the petitioner to cross examine the witnesses. On 20th March, 2009 when five witnesses were present in the Court, the application was made for adjournment on the ground of loss of file due to theft of car. The trial Court noted that the file was allegedly stolen on 10th March, 2009, but the advocate whose car was stolen with file had not signed the application neither he furnished the affidavit and there was no reason to believe that the file of the case, which was fixed before the Court on 20th March, 2009 was lying in the car on 10th March 2009. The last date of the case was 19th December, 2008 and next date was 20th March, 2009. No reason was furnished by the Counsel as to why the file was lying in the car when the date of theft of car was neither the last date nor the next date. It was found by the Court that there was force in the arguments of the plaintiff that the Counsel for petitioner had sufficient time to reconstruct the file. There were about 10 days available to the Counsel for reconstruction of the file even if it had been stolen. The court found ground for adjournment frivolous and

dismissed the application for adjournment and closed the cross examination of the witnesses and fixed the case for respondent's (petitioner herein) evidence.

4. A review application was filed on 20th April, 2009 for reviewing the order dated 20th March 2009 just on the last day of limitation. This application was dismissed vide order dated 23rd July, 2009 and in the order for review, it was observed by the Court that there was no force in the review petition. The Court also found that on the one hand the plea taken was that all the files of petitioner herein pertaining to different cases with respondent were tagged together and lying in the car which got stolen whereas the same Counsel for the respondent argued the matter for the petitioner before the High Court on 12th March, 2009 and 20th March, 2009 in pending litigations between the parties arising out of the divorce petition. If the files had been tagged together and lost, the Counsel for the petitioner herein would not have been in a position to argue the matter in the High Court on 12th March 2009 and 20th March, 2009. It was observed by the learned ADJ that the Counsel for the petitioner tried to wriggle out of this situation by stating that one of the files containing certain proceedings concerning divorce was lying at his office. The Court observed that the plea taken by the petitioner's counsel that all the files pertaining to various litigation between petitioner and respondent tagged together were lying in the car, was not convincing and it was difficult to swallow that files fixed for different cases in different Courts could have been tagged together and could have been just dumped in the car when there was no date. The Court found that there was no ground for review and dismissed the application.

5. Before this Court the Senior Counsel Mr. Amit K. Chadha argued that the petitioner had engaged a Counsel for conducting trial at the lower Court and for the negligence of the Counsel of the petitioner the petitioner should not suffer. A plea was also taken that because this Court observed on 7th January, 2010 that no complaint had been filed against the previous counsel, the petitioner after 7th

January, 2010 also filed a complaint against the previous Counsel to the Bar Council. It is submitted that the Court should grant one more opportunity to the petitioner for cross examination of witnesses since it would cause great prejudice to the petitioner as non cross-examination of witnesses shall in fact amount to admission of testimony of the witnesses.

6. It is submitted that the case was fixed for respondent's evidence on 28th January, 2010.

7. It is apparent from the order dated 20th March, 2009 of the trial Court that the efforts of the petitioner had been to drag the case. She first did not file WS, her defence was struck off, she made an application for reviving the defence and recalling the order by which defence was struck off, which was allowed subject to cost and she was given time to file WS. Again she did not file WS in the time given and made an application for allowing more time for filing of WS, which was allowed subject to cost. Even thereafter her sole concern had been to drag the litigation. When the witnesses of the petitioner/respondent appeared in the Court for their cross examination they were sent back because the Counsel took the plea that he had misplaced the affidavits.

8. Every Counsel who has to cross examine the witnesses has to prepare cross examination in advance on the basis of affidavits supplied to him. The cross examination is not prepared in the Court or on the very date of hearing. If the Counsel wanted to cross examine the witnesses, he could have requested opposite side Counsel for giving him another copy of the affidavit but as it goes, the effort was to seek adjournment. The adjournment was granted subject to paltry cost, which did not have affect on the petitioner. On next date of hearing, when the respondent's five witnesses were present in the Court for cross examination, a proxy counsel is sent for taking adjournment on the plea that the car was stolen about 11 days back and

the file of the petitioner was also stolen along with the car. The trial Court vide detailed order dismissed the application. The order of the trial Court was perfectly justified. There was no reason that the trial Court should have believed the story put forward by the petitioner's proxy counsel or the petitioner's counsel. Then a review is filed on the last date of limitation, in the meantime, the proceedings remain standstill. The review is dismissed on 23rd July, 2009. Against the dismissal of review, this petition under Article 227 is filed after about five months, few days before the next date fixed before trial Court. This conduct of petitioner itself shows that the efforts have been to make applications on the last date or with a delay and obtain orders from the Court pleading mercy. In the present petition also, the plea of illness of father and other mercy pleas have been raised by the petitioner. The petitioner's Counsel before trial Court took patently frivolous pleas of having misplaced the affidavits and having lost the files in a car stolen on 9th March, 2009, when the case was fixed on 20th March, 2009. This despite the fact that the same Counsel though had taken plea that all files were tagged together and lost, had argued the case of the petitioner in High Court on 12th March, 2009 and 20th March, 2009. The entire efforts of the petitioner have been to drag the case, even if some cost was imposed.

9. It is seen that these efforts of dragging the case succeeds because of the latitude shown by the High Court in allowing such mercy pleas and in acceding to requests of granting one more opportunity. It looks as if there is an understanding between the Courts and the advocates that come what may, the orders of trial Court refusing adjournments shall be set aside on mercy pleas and one more opportunity shall be granted. It is because of this attitude that in almost all cases where the advocates intend to drag the case either they let the case get proceeded ex parte or they don't examine the witnesses on one or the other pretext or seek adjournment subject to cost, then don't pay cost and when the evidence is closed or cross examination is closed, they rush to High Court and pray for one more opportunity,

which they normally get with some more costs. This entire unwritten procedure which is followed on the basis of previous precedents has created bottlenecks in the entire judicial system and a lot of trial Courts' efforts and time is wasted. Efficiency comes down. A host of frivolous applications are moved and a lot of time first of trial Court and then the High Court is wasted in entertaining petitions. A case which normally should not take more than one year in decision keeps dragging for years and years. The witnesses keep on appearing in the Courts and adjournments are granted in the name of strike or in the name of elections or in the name of personal difficulty of the Senior Counsel or in the name of personal difficulties of briefing Counsel or because the two Counsel agree for adjournment. This whole culture of adjournment is one of the big reasons that a case or a petition which should be decided in two or three hearings keeps pending for more than 100 hearings. A separate breed of advocates have cropped up, who are 'adjournment experts' and 'case dragging expert'. Such advocates are deliberately engaged, who put forward all kinds of excuses to see that the case is adjourned. I consider that this culture has to be brought to an end and no petition for setting aside such orders of the trial Court, where cross examination is closed or other steps are taken by the trial court to enforce the procedure as laid down by CPC, should be allowed on the ground that the petitioner should not suffer for the negligence of the Counsel. A litigant has to be vigilant and has to pursue the case diligently on all hearings. Where a litigant does not appear in the Court and leaves the case at the mercy of his Counsel without bothering as to what different frivolous pleas were being taken by his/her Counsel for adjournments is bound to suffer.

10. Counsel is engaged only for giving expert legal advice and on all hearing litigants must be present in the court and if he/she finds that the Counsel was not diligently following the case, the litigant should withdraw the case from the

Counsel immediately and give it to other Counsel and should also claim suitable compensation from such Counsel.

11. In this case filing of present petition after five months of the passing of the order itself shows that the effort of the petitioner was to prolong the proceedings and not to allow the proceedings to proceed. In this effort, the earlier Counsel had only been trying to prolong the case and this prolongation of the case could not have been done without consent of the petitioner. I find no force in the petition. The petition is hereby dismissed.

Janaury 28, 2010
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SHIV NARAYAN DHINGRA, J.