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

+ **MAT.APP.(F.C.) 16/2013**

MS NASEEM BEGUM Appellant

Through : **Mr.Manoj Bansal, Adv.**

versus

SHAFI MOHD. Respondent

Through : **Mr.Bashir Ahmed, Adv.**

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Date of Decision : 17th September, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (ORAL)

C.M.No.10353/2013 (delay)

1. This is an application under Section 5 of the Limitation Act moved on behalf of the Appellant praying for condonation of 146 days' delay in filing the appeal.
2. For the reasons stated in the application, the same is allowed and the delay in filing the appeal is condoned.
3. Application stands disposed of.

C.M.No.10354/2013 (Exemption)

1. Exemption granted, subject to all just exceptions.
2. Application stands disposed of.

MAT (F.C.) No.16/2013

1. The sufferings of the Appellant seem to be unending. First illiteracy, then poverty aggravated with a broken marriage, question of survival with a daughter to take care of, was staring in her face. The Appellant with an undying spirit to fight for right to have maintenance, took recourse to law about thirteen years back. To continue this legal battle was an uphill task for her. Being faced with a situation where the counsel engaged by her failed to render necessary legal assistance, the indifferent attitude of the Court towards the handicaps of the Appellant, added to her miseries. The learned Judge, Family Court failed to appreciate the legal principles empowering the Courts to exercise the judicial discretion vested (in the Courts) under Section 311 CrPC for just decision of the case.
2. In the instant appeal, the question that arises for consideration before us is should a litigant be made to suffer for her illiteracy and poverty due to which she is unable to hire good legal brain to prosecute her claim for maintenance. Perhaps she was not apprised of the legal aid she was entitled to.
3. It is well settled that the object of maintenance is to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support for themselves.
4. The Appellant (Petitioner before the Trial Court) before us is aggrieved by the order dated 23.11.2012 passed by learned Judge, Family Courts at Saket whereby her prayer to examine herself as witness was declined observing the prayer to be gross misuse of the law.
5. Let us have a brief look at the facts before dealing with the impugned

order. The Appellant is an illiterate Muslim lady who filed a petition in the year 2000 under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. During all these years, she has been receiving Rs.500/- (Rupees Five Hundred Only) per month from the Respondent, who is her ex-husband, as maintenance for her daughter. She had been diligently attending the Court on each date of hearing during all these 13 years. Under the legal advice, she examined five witnesses. However, her counsel did not get her examined as a witness. When this fact was noticed, an application under Section 311 CrPC was moved in the year 2006 with a prayer to examine her in the petition. Unfortunately, the application remained pending for seven long years and when she engaged another counsel, who inspected the record, this flaw was noticed. Thereafter the application under Section 311 CrPC was heard and disposed of. The impugned order reads as under :

‘CC No.230/08

23.11.2012

Present : Parties in person with Advocates M.S.Khan for plaintiff and Bashir Ahmed for Respondent.

Heard on application filed by the petitioner under Section 311 Cr.P.C.

By way of present application petitioner has sought to examine herself. The petition is of year 2000. P.E. was closed in year 2004, subsequently respondent has also led evidence and RE stands closed in year 2005. Subsequently this application was filed in year 2006. Till date the application has not been pressed by the counsel for the petitioner.

Now at this stage of final arguments counsel for the petitioner has pressed this application today. Perusal of the record shows that 5 witnesses of the petitioner already stands examined and cross examined. No fruitful purpose shall be served by reopening the whole

case again. No sufficient reason has been shown by the petitioner for the non-examination about seven years back when the other witnesses were being examined. Application is the gross misuse of the law. Same is therefore dismissed. To come up for final argument on 21.3.13.

*Sd/-
Judge-02, South East District
Family Courts, Saket, New
Delhi.'*

6. Learned counsel for the Appellant submitted that the Appellant is an illiterate woman with little means but she has been diligently pursuing her legal remedy under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 for the last 13 years. He further submitted that while pursuing the said case, she was wholly dependent on the advice of her previous counsel. In the proceedings under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, five witnesses were examined while leading petitioner's evidence but the previous counsel did not examine the Appellant as a witness. Thereafter the Appellant moved an application under Section 311 CrPC seeking permission to examine herself as a witness which remained pending for about seven years. Vide the impugned order dated 23.11.2012, the said application was dismissed by learned Trial Court. Learned counsel for the Appellant submitted that the Appellant should not be made to suffer for the lapse on the part of her counsel and one opportunity may be granted to her to examine herself as a witness.

7. Per contra, learned counsel for the Respondent urged that the Appellant has been appearing on each and every date of hearing before

learned Trial Court and despite that she preferred not to examine herself. He further submitted that the Respondent's evidence has already been closed and the case is at the final stage. While opposing the prayer of the Appellant, he contended that allowing the Appellant to examine herself at this stage would amount to 'de novo' trial. Thus, the impugned order may not be interfered with and the present appeal may be dismissed.

8. We have considered the submissions made by learned counsel for the parties. Though the proceedings of learned Trial Court are not before us but undisputedly the Appellant had been regularly appearing before the Court to prosecute her petition seeking maintenance from her ex-husband. For all these 13 years, the Appellant had not only been surviving on a paltry sum of Rs.500/- per month but also taking necessary steps to have legal assistance of the level she could afford. Examination of five witnesses by her strengthens the case of the Appellant that she was following the legal advice rendered to her by the previous counsel. The Appellant being illiterate lady had to depend on the legal advice rendered as to the witnesses to be examined to prove her case. Lapse on the part of the counsel to examine the Appellant could not be attributed to her nor there is any unwillingness/reluctance on her part to enter the witness box. The mere fact that whenever this fact was noticed by her counsel, the application under Section 311 CrPC was moved which, unfortunately for whatsoever reasons, remained pending for seven years and for that situation Appellant cannot be blamed.

9. We find it apposite to refer the observation of Supreme Court in *The Secretary, Department of Horticulture, Chandigarh and Anr. vs. Raghu Raj 2008 (4) CCC 680 (CC)* wherein the predicament of the litigant was

discussed when he suffers due to default on the part of the counsel engaged by him. The relevant paragraphs No.28 to 30 of the report read as under:

‘28. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the advocate.

29. In Rafiq and Anr. v. Munshilal and Anr. MANU/SC/0076/1981 : [1981] 3SCR 509, the High Court disposed of the appeal preferred by the appellant in absence of his counsel. When the appellant came to know of the fact that his appeal has been disposed of in absence of the advocate, he filed an application for recall of the order dismissing the appeal and to permit him to participate in the hearing of the appeal. The application was, however, rejected by the High court, inter alia, on the ground that there was no satisfactory explanation why the advocate remained absent. The aggrieved appellant approached this Court.

30. Allowing the appeal setting aside the order passed by the High Court and remanding the matter for fresh disposal in accordance with law, this Court stated;

The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog

of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law.'

10. We have observed that for non-examination of the Appellant, she could not have been blamed. Once it was brought to the notice of the Court that due to lapse on the part of the counsel, she remained unexamined and the jurisdiction of the Court under Section 311 CrPC was invoked seeking permission to examine her, the prayer could not have been treated as gross misuse of the law by learned Judge, Family Court.

11. In the case of **Lakhmi & Ors. Vs. The State 1996 (1) AD (Delhi) 578**

this Court had considered the role of Trial Court while exercising the discretion vested under Section 311 CrPC and the observations made in the report are as under:

*‘5. Undoubtedly, the decision and the discretion in regard to the application which falls within the first part of Section 311 of the Code of Criminal Procedure is that of the trial court, but then in matters like these, **the role of the trial Magistrates is not akin to an uninterested by-stander. The very width of the discretion vested in him requires of him a corresponding caution. The goal is to do complete justice.** And I do feel that here is a case where the learned Magistrate lost the grip. The cross examination of the witness would obviously enable the court to arrive at the truth and ultimately to a just conclusion. The failure was of the counsel. Let the petitioners not suffer for that. Consequently, the application is allowed.’*

(Emphasis by us)

12. The role of the Trial Court has been deliberated upon by the Supreme Court in the case of ***Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack De Sequeria (Dead) thr. LRs. AIR 2012 SC 1727***, observing as under:

*‘In **Mohanlal Shamji Soni vs. Union of India** MANU/SC/0318/1991 : 1991 Supp. (1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.*

What people expect is that the Court should discharge its obligation

to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the Courts of justice '

(Emphasis by us)

13. In view of the legal position adumbrated above and looking into the peculiar facts and circumstances of the case, we are inclined to allow the appeal. The hardships being faced by the Appellant for all these 13 years while fighting this legal battle without sufficient means and lack of proper legal advice led to the situation that despite being present on each date of hearing in the Court, she remained unexamined. Though vested with enough power and discretion to examine the Appellant being essential for just decision of the case unfortunately learned Judge, Family Court failed to exercise the same.

14. The underlying principles in exercise of discretion vested under Section 311 CrPC being to obtain proper proof of relevant facts to meet the ends of justice/for just decision of the case, we are inclined to allow this appeal. The Appellant shall examine herself as a witness on the next date of hearing fixed before learned Judge, Family Court. We are informed that the matter is listed before the learned Judge, Family Court on 8th November, 2013. The Appellant shall examine herself on 8th November, 2013 and shall be cross examined by learned counsel for the Respondent on the same date. Since the case is very old, only one opportunity is given to the Appellant to examine herself and to the Respondent to cross-examine the Appellant on the same day and no further opportunity shall be granted to them for this purpose on any ground whatsoever except, if Presiding Officer happens to be on leave on that date, then the matter shall be taken up on the next

working day for the said purpose.

15. However, at the same time, to ensure that Respondent is not put to any disadvantageous position, if necessitated, the Respondent shall be at liberty to move an application before learned Judge, Family Court to re-examine himself.

16. If we cannot blame the Appellant to be responsible for her non-examination as a witness, we would not like to penalise her by awarding cost to the Respondent when she is struggling to have maintenance from the Respondent.

17. Appeal stands disposed of in above terms.

CM No.10352/2013 (Stay)

Since the appeal has been disposed of, the application is dismissed for having become infructuous.

PRATIBHA RANI, J

REVA KHETRAPAL, J

SEPTEMBER 17, 2013

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