

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

% Date of hearing and order: 13th March 2015

+ **MAT. APP. (F.C.) 60/2014**

SHRI PRAVEEN KHOLI Appellant

Through: Mr. Inderpal Khokhar, Advocate

versus

SMT. KOMAL @ KAMLESH Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

% **ORDER**
13.03.2015
I.S.MEHTA, J (ORAL)

1. The appellant has preferred the present appeal under section 19 of the Family Court Act, 1984 assailing the impugned judgment and decree dated 24.08.2013 passed by the learned trial court of Shri Sameer Bajpai, Tis

Hazari Court, and order dated 21.04.2014 passed by the learned court of Ms. Reena Singh Nag, Judge, Family Court, West, Tis Hazari Courts.

2. The brief facts stated in the petition GP No. 73/12 titled as Smt. Komal @ Kamlesh versus Sh. Praveen Kohli are that the marriage between the appellant (Sh. Praveen Kohli) and the respondent (Smt. Komal @ Kamlesh) was solemnized on 15.02.2004 at Delhi according to Hindu rites and customs and out of the said wedlock, a daughter, namely, Archita was born on 18.07.2006. The respondent had filed the petition under section 25 of the Guardian and Wards Act for the custody of the minor daughter baby Archita from the custody of Praveen Kohli (appellant) on the ground that the appellant had developed an illicit relationship with one Ms. Kanchan Tiwari and has a child namely, baby Mahi from the said illicit relationship. Subsequently, the respondent (Komal@ Kamlesh) was thrown out of the matrimonial home in only wearing apparels.

3. Consequently, the respondent (Komal @ Kamlesh) took the help of her brother Rohtash who took her to the parental home after giving information vide DD No. 37-B dated 04.09.2010. Thereafter, the appellant i.e. Sh Praveen Kohli, filed a petition under section 25 of the Guardian and Wards Act on false, frivolous and concocted ground and the respondent i.e. Komal @ Kamlesh, filed a written statement as well as maintenance

application under section 26 of D.V Act, then the appellant withdrew his petition on 23.11.2010. Further, during the pendency of the said guardianship petition, the respondent made a complaint dated 21.10.2010 at C.A.W. Cell and thereafter the appellant took the respondent and the minor child to the matrimonial home from the C.A.W. Cell. Further, on 12.10.2011 the said Kanchan Tiwari forcibly tried to enter the room of the respondent and misbehaved, man-handled and tried to dispossess her and her minor child then, the respondent called the police. Later, the police took the appellant and all his family members and Kanchan Tiwari to the police station. Further, on 19.03.2012 the appellant forcibly took away the minor daughter of the respondent from the school. Thereafter, the appellant broke open the lock of the respondent's premises and removed/stolen entire goods and articles.

4. Subsequently, on 21.03.2012 the respondent reached at the house of the appellant alongwith her brother and sister-in-law where the appellant was living in adultery with the said Kanchan Tiwari. Appellant along with the said Kanchan Tiwari gave merciless beatings to the respondent, her brother and sister-in-law. Then the respondent lodged a complaint vide D.D. No. 23 on 21.03.2012 and MLC was prepared but the police took no action regarding the same. It is further stated that the appellant has already

remarried with other girl and is having children from the said wedlock, so the custody of the minor daughter, namely, Archita is not safe in the hands of the appellant. The respondent is in well position to look after and take care of the minor daughter and the future as well as the welfare of the minor is safe in the custody of the respondent.

5. The appellant was served with a notice of the petition but he did not turned up to contest the case and the appellant was proceeded ex-parte vide order dated 05.01.2013. It is pertinent to mention that the appellant has filed an application under order 9 rule 7 read with section 151 CPC for setting aside/recalling the ex-parte order dated 05.01.2013. The said application was dismissed for non-prosecution vide order dated 19.07.2013. And subsequently, on the basis of the evidence on record the petition was allowed in favor of the respondent (Komal @ Kamlesh) on 24.08.2013, directing the appellant (Praveen Kohli) to handover the custody of the minor child, namely, Archita to the respondent.

6. Subsequently, the appellant filed an application under order 9 rule 13 read with section 151 CPC on 01.11.2013 for setting aside the ex-parte impugned order dated 24.08.2013. The said application finding devoid of merit was dismissed by order dated 21.04.2014 passed by the learned court

of Ms. Reena Singh Nag, Ld. Judge, Family Court, West, Tis Hazari Courts.
Hence the present application.

7. The contentions put forward by the learned counsel for the appellant are that the allegations made against the appellant by the respondent in the petition (GP. No. 73/12) were false and frivolous and the appellant was deprived to appear and contest the said false and frivolous petition by the respondent deliberately and malafidely as it is apparent that the respondent deliberately mentioned wrong and false addresses of the appellant. Further, it is contended that it was within the knowledge of the respondent that the appellant was residing at EXB-39, Gali No. 10, Hari Nagar, New Delhi, but the respondent did not furnished the said correct address of the appellant as to obtain an ex-parte judgment and decree against the appellant.

8. Further, the learned counsel submits that the appellant was not served summons in the petition and the learned Trial Court proceeded ex-parte against the appellant vide order dated 05.01.2013. Thereafter, the appellant filed an application under Order 9 Rule 7 read with section 151 CPC for setting aside the ex-parte order dated 05.01.2013. When the said application for setting aside the ex-parte order dated 05.01.2013 was filed the matter was adjourned for 19.07.2013, which unfortunately, was wrongly noted down as 29.10.2013 by the counsel for the appellant and subsequently, the

said application was dismissed vide order dated 19.07.2013 and the learned Trial Court passed an impugned judgment and decree dated 24.08.2013 allowing the said guardianship petition of the respondent and directed the appellant to handover the custody of the minor child Archita to the respondent.

9. Consequently, on 01.11.2013 the appellant filed an application under Order 9 Rule 13 read with section 151 CPC for setting aside ex-parte judgment and decree dated 24.08.2013, before the learned Trial Court and the same finding devoid of merit was dismissed by the learned Court of Ms. Reena Singh Nag, Judge Family Court, West, Tis Hazari Court, Delhi, vide impugned order dated 21.04.2014.

We have heard the learned counsel for the appellant and also perused the material on record.

10. As per the affidavit of the appellant dated 22.05.2013, his address is stated as EXB-39, Gali No. 0, Hair Nagar, Delhi and the addresses given by the respondent i.e. Komal @ Kamlesh, in the petition GP No.73/12 under section 25 of the Guardianship and Wards Act for the appellant (Praveen Kohli) are as follows:

- i) Sh. Praveen Kohli s/o Sh. REoshan Lal, R/o E-179-180 (D.S.)
Ramesh Nagar, Delhi-110015;

- ii) B-39, Extn., Gali No. 0, Hari Nagar, New Delhi-110018;
- iii) H. No. 115-116, Pocket-5, sector-21, Rohini, Delhi-110085.

The material placed on record shows that the appellant himself has given the address in the affidavit filed before the learned court of Sh. Sameer Bajpai, senior civil judge, Delhi on 22.05.2013.

- 11. As per the report from the process server at the Hari Nager address one Narender (brother of the appellant) had met and had a telephonic conversation with the applicant wherein the appellant had then conveyed that he had already received the summons.
- 12. There is no reason to disbelieve the report of the process server. As per para no.3 of the present appeal the address given by the appellant is EXB-39, Gali No. 10, Hari Nagar, New Delhi.
- 13. The relevant part of the appeal is reproduced as under:

“...The respondent was well within the knowledge that the appellant was residing at EXB-39, Gali No. 10, Hari Nager, New Delhi, but the respondent did not furnish the said correct and actual address of the appellant so as to get obtained the exparte judgment and decree against the appellant...”

Whereas, his own affidavit dated 22-05-2013 he himself has stated his address as EXB-39, Gali No. 0, Hari Nagar, Delhi.

The address as shown by the appellant in the appeal made by him itself is contradictory to the address given in the said affidavit.

14. Bare perusal of the aforesaid facts shows that it is nothing but is only a deliberate attempt on the part of the appellant to take undue advantage and misuse the judicial process.
15. It is further evident that the appellant himself has filed a petition under section 25 of the Guardian and the Wards Act, and when the same was contested by the respondent by filing a written statement as well as an application under section 26 of the D.V Act, the appellant had withdrawn the said petition on 23.11.2010, compelling the respondent to file an application under section 25 of the Guardian and Wards Act, for the custody of the minor daughter baby Archita on the ground that the appellant being in an illicit relationship with one Kanchan Tiwari, the custody of the minor daughter with the appellant who is having an illicit relationship with the said Kanchan Tiwari is not in a proper and safe and is not in the interest qua the minor daughter (baby Archita).
16. In presence of the natural mother (respondent) the learned Trial Court has rightly given the custody of the minor daughter i.e. baby Archita to the natural mother i.e. respondent on 24.08.2013.

17. The appellant despite service of the summons was trying to gain his ulterior motive by not appearing before the Trial Court. Consequently, the learned Trial Court proceeded ex-parte against the appellant on 05.01.2013.

18. The appellant thereafter, filed an application under order 9 rule 7 read with section 151 CPC for setting aside the ex-parte order dated 05.01.2013 the same was dismissed for non-prosecution vide order dated 19.07.2013.

The said order dated 19.07.2013 is reproduced as under:

“...19.07.2013

Present: Petitioner in person with Ld. Counsel.

None for the respondent despite repeated calls since morning. The application under Order 9 Rule CPC dated 22.05.2013 is dismissed for non-prosecution.

Matter to come up for final arguments on 03.08.2013.

Sd/-

(SAMEER BAJPAI)

JSCC-Cum-ASCJ-Cum

GUARDIAN JUDGE (West)

Delhi: 19.07.2013”

19. The plea of the appellant that the date of adjournment i.e. 19.07.2013 was wrongly noted down by the counsel for the appellant as 29.10.2013 is not convincing as the appellant himself has filed an application under order 9 rule 7 read with section 151 CPC dated 22.05.2013 and subsequently, he himself has not taken any step for the same and further, the application

under order 9 rule 7 moved on behalf of the appellant was dismissed for non-prosecution.

20. This inaction on the part of the appellant is nothing but with obvious reason of ulterior motive. The conduct of the appellant is not clean on the part of limitation and merit which deserves dismissal. We find no tangible reason to disagree with the reasoning given by learned Trial Courts i.e. the learned court of Sh Sameer Bajpai, JSCC-CUM-ASCJ-CUM- Guardian Judge (West), Delhi and the learned court of Smt. Reena Singh Nag, Judge Family Court, West, Tis Hazari, Delhi. Finding no merit in the present appeal, the same is hereby dismissed. No costs.

I.S.MEHTA
(JUDGE)

KAILASH GAMBIR
(JUDGE)

MARCH 13th, 2015
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