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

% *Date of Judgment: 6th August, 2018*

+ **MAT.APP.(F.C.) 182/2018 & C.M.30797/2018**

PRIYANKA VERMA Appellant

Through: Mr.Vivek Singh, Advocate

versus

KUNAL VERMA Respondent

Through: Mr.V.K.Gupta, Sr.Adv. with Mr.Sakal
Bhushan and Mr.Vipul Agrawal,
Advts.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. Although process fee has been returned with objection, Mr.V.K.Gupta, learned Senior Counsel, on instructions, has entered appearance on behalf of the respondent on an advance copy having been served and submits that the appeal is not maintainable.
2. Challenge in this appeal is to the order dated 04.07.2018 and 09.07.2018 passed by the Principal Judge, Family Court, Saket, New Delhi. We may note that this matter was listed on 03.08.2018 when we had passed the following order:

“MAT.APP.(F.C.) 182/2018 & CM No.30797/2018 (stay)

Challenge in this appeal is to the orders dated 04.07.2018 and 09.07.2018 passed by the Principal Judge, Family Court, Saket, New Delhi.

Mr.Singh, counsel for the appellant submits that on account of slanderous and sensitive nature of allegation made against the appellant, the appellant could not appear for recording of evidence before the local Commissioner appointed by the Family Court. While prima facie we find no infirmity in the orders passed by the

Principal Judge, Family Court who has also directed to record the evidence of the appellant in Camera. However, we are of the view that a lady local Commissioner should be appointed in the matter. Notice to show cause as to why the appeal be not admitted.

List on 06.08.2018.

The appellant will take steps to serve the respondent by all modes including dasti. Additionally, counsel will be informed telephonically via whatsapp and e-mail today itself.

Copy of this order be given *dasti* under the signature of Court Master.”

3. Today, counsel for the appellant submits that appellant is not agreeable for appointment of a lady Local Commissioner who would hold proceedings in camera. He relies on a judgment of the full bench of this Court rendered in the case of ***Pushpa Devi vs. Bimla Devi & Ors.*** reported in 2000 II AD (Delhi), more particularly paragraphs no.10 to 12, which we reproduce hereinbelow:

“10. It is due to such circumstances that Chapter X-A had been incorporated in the Delhi High Court (Original Side) Rules, 1967. We are in agreement with the observations in Fashion Linkers' case that something drastic had been required. Therefore this Rule had been incorporated. In our view the opinion expressed in Deepak Kapur's case that the Rule was merely a proviso or an exception to Order 26 of the Code of Civil Procedure is not the correct view. The beginning part of Chapter X-A clearly states that it is to apply "notwithstanding anything contained in Order 26 of the Code of Civil Procedure". This itself makes it clear that while exercising powers under this Rule the Court is not circumscribed by the limits which are laid down under Order 26 of the Code of Civil Procedure. Under this Rule Court can exercise power even for other reasons i.e. reasons/ circumstances not set out in Order 26, CPC, if in its discretion it is necessary to do so. However it is also clear that this Rule does not give to the Court an absolute discretion to refer recording of evidence to a

Commissioner without there being any reasons whatsoever. Recording of evidence by the Court has to be the normal rule/procedure. Examination of witnesses on commission has to be an exception. The discretion, vested by virtue of this Rule, has to be exercised judicially and for valid reasons. The Court must while exercising power under this Rule record those reasons in writing. It is also clear that while the Court may exercise the power under this Rule, it cannot by virtue of this Rule delegate any judicial powers to the Commissioner. Thus anything which is required to be dealt with judicially can only be done by the Court and cannot be delegated to the Commissioner. Thus for example the power to allow or disallow questions or to decide objections or to decide relevancy cannot be delegated to a Commissioner. The provisions of Order 26, Rule 16-A would continue to apply even though the Court may exercise power under Chapter X-A.

11. In cases where both the parties consent to refer the entire or part of the evidence to a Commissioner then unless there is some very strong reasons to rule otherwise, the Court should normally act on such consent. By consent of parties recording of evidence by the Commissioner can be directed even though the case may not be very old and there may be no other circumstances justifying it.

12. However where the parties do not or a party does not so consent then the discretion must be exercised judicially and for valid reasons. The mere fact that the matter is old and/or languishing would not; by itself, be a ground justifying referring the recording of evidence to a Commissioner. A matter being old and/or languishing would be a strong ground for the Court to refuse adjournments and take up trial immediately. Thus for referring, without consent, the recording of evidence to a Commissioner the factum of the case being old must be coupled with other circumstances or reasons justifying such a course being followed. To give some examples the parties being very old if there is some cogent reasons why the Court cannot take up trial in the near future or if there is a grave urgency to have the evidence recorded due to possibility of evidence being lost and/or not available or if there are a large number of witnesses, the

Court could exercise powers under Chapter X-A. Clarified that the examples given are merely illustrative and not exhaustive.”

4. Counsel for the appellant submits that the divorce petition was filed in the year 2017. There is no urgency in the matter, neither any application was filed for appointment of a Local Commissioner nor any reason has been cited by the court while appointing a Local Commissioner to record the evidence.
5. We do not find force in the submissions made by the counsel for the appellant. With a view to appreciate the background which led to passing of the order appointing the Local Commissioner and the rejection of the request made by the appellant herein for recall of the said order. We deem it appropriate to reproduce the orders dated 05.05.2018, 3.07.2018, 04.07.2018 & 09.07.2018, which are reproduced as under:

“05.05.2018

Present: Petitioner with learned counsel Shri Vijender Sharma
Learned Counsel Sh. Ravi Bhushan for the respondent.

Replication filed, copy furnished. On the pleading of the parties the following issues are framed.

1. Whether the consent of the petitioner for marriage was obtained by fraud within Section 12 of Hindu Marriage Act. OPP
2. Whether the respondent after the solemnization of marriage has treated the petitioner with cruelty within the meaning of Section 13 (1) (ia) of the Hindu Marriage Act. OPP
3. Whether the respondent has been incurably of unsound mind or has been suffering continuously intermittently from

mental disorder of such a kind and to such an extent that the petitioner cannot reasonably expected to live with the respondent. OPP

4. Relief

No other issues arises or pressed for. List of witnesses be furnished within one month from today. Advance copy of the affidavit of the witnesses to be examined by the petitioner be supplied to the respondent/counsel one month in advance. At this stage it is prayed by the petitioner that the Local Commissioner be appointed for recording evidence in the present case.

Sri Ravi Bhushan learned counsel for the respondent submits that he has no objection for recording of evidence by the local commissioner. Sri Bhushan however submits that he shall seek instruction from the respondent that whether she will bear the expenses for her witnesses.

Sri S.C. Malik retired ADJ is appointed as local commissioner for recording of evidence in the present case. His fee is fixed at Rs.40,000 as retainer and Rs.10,000 for each witnesses. Petitioner undertakes to bear the retainer amount and expenses for his witnesses. Learned counsel shall communicate with Shri SC Malik and settle the date for recording of evidence. Alhmad shall make available the file to the local commissioner. Rs.500 is assessed as fee of Alhmad for making available the file with the LC on each date of hearing, Demand draft for fee of Local Commissioner be placed on record in favour of Sri S.C. Malik within two weeks from today. Alhmad shall thereafter communicate the order to Shri SC Malik and request him to record the testimony of the witnesses. Petitioner/husband shall arrange the secretarial services and bear the expenses thereof.

Proceedings of the local commissioner will be held in the family Court, Saket, New Delhi.

Now to come up for 18.08.2018 before this court after conclusion of the recording of entire evidence. Copy of this order be given Dasti to both the parties and one copy be also sent to Shri S.C. Malik learned Local Commissioner.

03.07.2018

It is 12:30 PM.

Present: Petitioner with learned counsel Sh. Vijender Sharma.
Learned Proxy Counsel Sri Siddharth Verma for the respondent.

File has been put up by Learned Local Commissioner as the respondent's main counsel has not appeared for cross-examination though the dates were fixed with consent and to the convenience of the parties and counsel.

The request for deferment of cross examination has been strongly opposed by the counsel for the petitioner.

It is noticed that the respondent is also not available. No reason have been assigned for her absence. There can be no justification in the absence of the respondent.

Matter is passed over to be taken up at 2 PM.

Learned proxy Counsel shall ensure the presence of respondent failing which the court shall proceed ex-parte against the respondent under order IX Rule 12 CPC.

Called again, it is 02.05 PM.

Present: Petitioner with learned counsel Sh. Vijender Sharma.
Learned Proxy Counsel Sri Siddharth Verma for the respondent.

Shri Verma submits that neither the respondent nor the main counsel can appear today.

It is noticed that the matter is already listed before the Learned Local Commissioner for 04.07.2018 at 11:00 AM.

Put up before the Learned local commissioner on the date fixed.

It is made clear that failing the presence of the respondent Court may proceed against ex-parte and filling the presence of counsel right to cross-examine the witness may be closed.

Before Shri SC Malik, retired A.D & S.J appointed by the court of Sri Narattom Kaushal, Principal Family Judge, Saket Courts, New Delhi for recording of evidence.

03.07.2018

Present: Sh. Kunal Verma in person with his counsel Shri Vijender Sharma (Mobile No. 9810475118) Shri Kartar Sharma (Mobile No. 09958996959) Sh. Siddharth Verma (Mobile No. 9810984587), advocate as proxy counsel for Sri Ravi Bhushan (Mobile No. 9810988643) advocate for respondent Smt. Priyanka Verma without the respondent.

The Alhmad has put up the file before me at 11 AM for recording of PE, he has been paid his diet money even my fees for recording the evidence already stands paid.

As the petitioner is present, his examination in chief as PW-1 has been recorded, but when the stage of his cross examination has come, Sri Siddharth Verma advocate proxy counsel for Sh. Ravi Bhushan advocate for respondent has submitted that learned counsel for the respondent is not available for cross-examination of the witness due to his personal difficulty and therefore the Cross examination of the witness be deferred. The request for deferment of cross examination of the witness is strongly opposed on the ground that personal difficulty of the

counsel is no ground for adjournment especially when date for today has been given with the consent of the parties, their counsel. It is submitted for the petitioner that if adjournments are granted like this and for like reasons the very purpose of appointment of Local commissioner for recording evidence for expeditious disposal of cases is defeated. In these circumstances I deem fit that this put before the Hon'ble Court for appropriate order. The file be put before the Hon'ble Court just now.

03.07.2018 (second order sheet of post lunch session)

Present: as before today in the morning.

The file had been put before the Hon'ble Court for appropriate orders in the facts and circumstances of this case. The Hon'ble Court has passed appropriate orders after hearing learned counsel for the parties.

Now to come up on 04.07.2018, 09.07.2017, 10.07.2018, 11.07.2018, 12.07.2018 & 13.07.2018 which are the dates already fixed with the consent of learned Counsel for the parties at 11:00 AM.

04.07.2018

File is taken up today as per the instruction of learned Local Commissioner.

Present: Petitioner with learned counsel Shri Vijender Sharma.

Learned Counsel Sh. Ravi Bhushan for the respondent.

Shri Bhushan tenders apology for conduct of his proxy counsel on the last date of hearing 03.07.2017. Apology accepted.

An application has been moved under Section 11 of Family Courts act for holding camera proceeding. Application is

allowed. Learned Local Commissioner shall ensure that no outsider is present at the time of proceeding before him.

Another application filed under Order VI Rule 17 of CPC has been moved by Shri Bhushan seeking amendment in WS. It is submitted that certain documents which were apart of Petition were handed over to learned counsel on 05.05.2018 at the time of filing of replication. He submits that on study of documents filed on 05.05.2018 necessity has arisen to file amended WS. Shri Sharma on instruction from petitioner does not oppose the same, however he submits that he may be granted an opportunity to file amended replication. Shri Bhushan submits that amended WS will be filed by 05.07.2018 with advance copy to the other side. Amended WS be file on 05.07.2018, replication thereafter be filed within two days. To appear before the learned Local Commissioner on 09.07.2018. Shri Bhushan undertakes that he will ensure the presence of respondent before the local Commissioner on 09.07.2018.

09.07.2018

Present: Petitioner with learned counsel Shri Vijender Sharma
Respondent with Learned counsel Sh. Ravi Bhushan.

Replication filed. Copy furnished.

Sh. Bhushan has moved an application under order VIII Rule 1 A (3) read with Section 151 CPC seeking to bringing on record the documents. Shri Bhushan submits that these documents have been referred in the amended WS, but could not be filed along with amended WS as the same were not available.

Shri Sharma has objected to the documents being taken on record on ground that there is no justifiable explanation as to

why the same were not filed along with the amended WS, though the same was referred to.

It is submitted that the respondent is only creating circumstances for delay in disposal of the case.

I find merits in the submission of Shri Sharma. However considering the fact that documents are referred in the amended WS, same are permitted to be taken on record with a warning to the respondent that any further conduct designed towards delay of the disposal of the case shall call for adverse orders. Documents are taken on record. Copy furnished.

Respondent has also moved an application under section 24 of HMA and an application under section 26 of HMA. However, the application under Section 24 of HMA is not accompanied with income and assets affidavit as provided for in Kusum Sharma's judgment.

Respondent's right to claim maintenance shall commence from the date complete application in compliance of Kusum Sharma's judgement is filed along with required documents and copy is given to the opposite side.

At this stage an application under Order 47 CPC has been moved seeking to recall the orders dated 05.05.2018 and 04.07.2018. Application is accompanied by another application seeking condonation of delay in filing the application. Copy furnished.

Shri Bhushan submits that on 05.05.2018 when order appointing Local Commissioner was passed, he had not sought the instructions from the respondent and made a statement without respondent's instructions. The respondent has now instructed him not to agree for appointment of Local Commissioner. Delay is sought to be condoned on the ground

that information were given by the Counsel to applicant/respondent on 02.07.2018.

It is noticed that after appointment of Ld. Local Commissioner, the matter has been taken up on two dates of hearing. It is pointed out by Shri Sharma that application for conducting proceedings in camera was also moved by Shri Bhushan on 04.07.2018.

A study of the conduct of the respondent for the last few days of hearing indicates that she is moving application after the other and creating situations for delay in disposal of the main case. Application for review of order dated 05.05.2018 is evidently with the same design. The averments that the order appointing Local Commissioner was not intimated to the respondent till 02.07.2018 does not seem to be genuine and does not appeal to the court. If that be so, the respondent is not diligently pursuing her case. Proceedings of 05.05.2018 were not enquired by her from counsel till as late as 02.07.2018. In the modern time when the modes of communications transfer information within seconds. This court will not accept this arguments of the respondent. The application is, therefore, time-barred. Further, there can be no valid objection of the respondent in recording of evidence by Local Commissioner, when the same is being done by an retired judicial officer of the rank of Additional District Judge, who has had long experience of recording evidence.

Section 21 (B) (2) of HMA mandates the court to decide the petition expeditiously and to make and endeavour to conclude the trial within six months. It may be noticed that this court has pendency of about 2000 trials, in such circumstances, the appointment of Local Commissioner for recording of evidence is with the purpose of complying with the legislative mandate as enshrined in the section 21 (B) (2) of HMA. There is

evidently no error on the record of the case, so as to call for review.

It is further pointed out by Shri Sharma that learned Local Commissioner shall be prejudicial to the interest of petitioner who has already spent substantially for the said period. The application is, therefore, dismissed on merits, as well as, on the point of delay.

At this stage, Sh. Bhushan submits that dates fixed before the learned Local Commissioner in this week be cancelled and he shall make himself available for conducting cross examination of the witness, in case he is afforded an adjournment of 10-15 days. He further submits that parties are trying to work out a settlement.

Shri Sharma on instructions from the petitioner does not oppose the aforesaid prayer of Shri Bhushan. Let the matter be listed before the learned Local Commissioner on 06th, 08th, 09th, 10th, 13th & 14th August, 2018. Cross examination shall commence from 11 AM onwards.

Learned Local Commissioner is requested to conclude the petitioner's evidence by the aforesaid date.

Now to come up before this Court on 18.08.2018.

6. Section 21B (1) and (2) of Hindu Marriage Act, 1955 read as under:

“21B. Special provision relating to trial and disposal of petitions under the Act-

(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible, and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.”

(Emphasis added)

7. Section 21B of the Hindu marriage Act relates to trial and disposal of petitions under the Act. Sub-Section (2) provides that every petition filed under this Act is to be treated expeditiously and endeavour should be made to conclude trial within six months from the date of service of the notice. It is in this backdrop Family Courts have been appointing Local Commissioner for recording of the evidence and this case is no exception.
8. The Local Commissioner was appointed by an order passed by the Family Court on 05.05.2018. Reading of this order would show that counsel for the respondent (appellant herein) before the Family Court was present and his no objection for recording of evidence by the Local Commissioner was noted. It was also noted that counsel for the respondent (appellant herein) would seek instructions from the respondent limited to the extent whether she would bear expenses for her witnesses or not. A local commissioner was appointed. Thereafter, on 03.07.2018 it was noted by the Family Court that although the matter was listed before the Local Commissioner but the counsel for the respondent (appellant herein) did not appear to cross-examine though the dates were fixed with the consent and taking into consideration the convenience of the parties and their counsel. The matter was then passed over to be taken up at 2 p.m. The Family Court did not pass any adverse orders but adjourned the matter for 04.07.2018 for 11 a.m.

before the Local Commissioner. The order of 03.07.2018 of the Local Commissioner is self-explanatory which shows that the respondent (appellant herein) did not appear to cross examine the witnesses. On 03.07.2018 fresh dates were fixed i.e. 04.07.2018, 09.07.2018, 10.07.2018, 11.07.2018, 12.07.2018 and 13.07.2018 with the consent of the parties. On 04.07.2018 another application was filed by the respondent (appellant herein) under Section 11 of the Family Courts Act for holding camera proceedings. Even at that stage, the appointment of Local Commissioner was not challenged. The application was allowed. The counsel for the respondent/applicant (appellant herein) had tendered his apology for the conduct of his proxy counsel. Another application seeking amendment to the written statement was also filed, which was also allowed. On 09.07.2018, a Review Petition was filed. The counsel for the respondent/appellant had informed the Family Court that the consent given by him for appointment of a Local Commissioner, was without any instructions and he sought recall of the order. However, in the latter part of the order, the counsel had submitted that date fixed before the Local Commissioner be cancelled but he would make himself available for conducting cross-examination of the witnesses and prayed for an adjournment of 10 to 15 days. This prayer was not opposed and fresh dates were fixed for 06th, 08th, 09th, 10th, 13th & 14th of August, 2018 for recording of evidence. We have reproduced the relevant orders which would clearly establish that after the issues were framed on 5.5.2018 and a Local Commissioner was appointed to record the evidence, the appellant herein made at least three applications and finally an application was made seeking review

of the order dated 5.5.2018. Post-dismissal of the review application on the same date, the counsel for the appellant sought cancellation of the dates fixed and sought adjournment for 10 to 15 days on the ground that parties are trying to work out a settlement.

9. The judgment rendered in ***Pushpa Devi***'s case (*supra*) does not apply to the facts of the present appeal. In our view, every effort was made to somehow delay the trial in the matter. Additionally, it is established that the Local Commissioner was appointed with the consent of the counsel for the appellant. We see no infirmity in the impugned order, the present appeal is without any merit and the same is accordingly dismissed.
10. However, keeping in view the submissions made and scandalous allegations against the appellant, we deem it appropriate to appoint a lady Local Commissioner. We have asked the parties if they have any suggestion, to which they have stated that they will leave it to the Court. Accordingly, we appoint Mrs. R.Kiran Nath, District & Sessions Judge. All the dates fixed in the matter i.e. 08th, 09th, 10th, 13th & 14th of August, 2018 (except for today i.e. 06.08.2018) shall remain fixed.
11. Copy of order be given *Dasti* to the parties under signature of the Court Master.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

AUGUST 06, 2018/rb