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

% *Date of Judgment: 20th August, 2018*

+ **MAT.APP.(F.C.) 138/2017**

RAJIV MEHTA

..... Appellant

Through: Mr. C. Prakash and Mr. Manmohan
Singh Narula, Advocates.

versus

SAVITA MEHTA

..... Respondent

Through *Nemo*

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE C.HARI SHANKAR

G.S.SISTANI, J. (ORAL)

CM.APPL 28001/2017(delay of 68 days)

1. This is an application filed by the appellant seeking condonation of 68 days delay in filing the present appeal. Reliance has been placed on the judgment *Shivram Dodanna Shetty vs. Sou. Sharmila Shivram Shetty* passed by the High Court of Bombay on 01.12.2016 to contend that for an appeal under sub-section (1) of Section 19 of the Family Courts Act, 1984, the period of limitation prescribed under sub-section (4) of Section 28 of Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') would apply, which is 90 days.
2. For the reasons stated in the application and the judgment relied upon by the appellant the same is allowed. Delay of 68 days in filing the appeal is condoned.
3. The application stands disposed of.

MAT.APP.(F.C.) 138/2017

4. This is an appeal under Section 19 of the Family Courts Act, 1984 against an order dated 06.04.2017 passed by the Family Court whereby a decree of divorce has been granted under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 in favour of the respondent-wife.
5. The necessary facts to be noticed for the disposal of this appeal are that the marriage between the appellant-husband and the respondent-wife was solemnized on 23.01.1988 at Delhi. Out of the said wedlock, two children (male twins) were born on 29.07.1991. Both the parties have been living separately since the year 2004.
6. Mr. Prakash, learned counsel appearing on behalf of the appellant has restricted his arguments on the limited point that the Family Court did not grant an opportunity to the appellant to recall PW1 for fresh cross-examination as the evidence recorded by the Family Court is self destructive which could be attributed to the unprofessional approach of the earlier counsel engaged in the matter.
7. Learned counsel for the appellant has further contended that the learned Family Court has erred in allowing the petition for dissolution of marriage between the parties, in the absence of the counsel for the appellant-husband and it was only on the basis of the arguments advanced on behalf of the respondent-wife, the Family Court has passed the impugned order. The counsel further contended that the opportunity to rebut the arguments advanced by the counsel for the respondent-wife was not granted to the appellant-husband by the Family Court.

8. Attention of this Court has been drawn to paras 23, 25 to 28 alongwith 32 and 34 of the impugned judgment to contend that the learned Family Court has acknowledged and termed the cross-examination of PW1 as bizarre and self damaging but despite the said acknowledgement, the learned Family Court has passed the erroneous judgment.
9. Learned counsel for the appellant also submits that he had filed an application under Section 151 read with Order 18 Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'CPC') before the learned Family Court. The said application was made for re-calling of PW1, on the ground that all the suggestions put to her by the previous counsel engaged by the appellant were regarding non-existence of facts. However, when the said application came up for hearing, it was dismissed as withdrawn by the counsel for the appellant for the reasons best known to him as the appellant was not present in the Court on that day.
10. We have heard the learned counsel for the appellant and carefully examined the order dated 06.04.2017 passed by the Family Court. We deem it appropriate to extract para 28 of the impugned judgment which reads as under:

“28. The said line of cross-examination of PW-1 leaves this Court with an impression that either it was a case of unprofessional approach by the Ld. Counsel for the respondent in putting wrong kind of suggestions or questions to the witness due to sheer incompetence or a deliberate design to play with the emotions or sentiments of the witness or perhaps a dark area of wrong dictation and typing. Be that as it may, what emerges is that the version of PW-1 comes out unscathed that respondent had been of a philandering nature or at times

promiscuous and having no concern or regard to marital fidelity. RW-1 also did not challenge the call data records of his landline No. 2541717 for 31.03.2003 to 31.05.2003 RW-1 1/PX-1 suggesting that several calls made on landline telephone number 31065697 from their landline telephone number 2541717 during the absence of the petitioner from the matrimonial home but RW-1 ducking the question that such number belong to Manjot Kaur. During cross-examination of PW-1 on 13.08.2008, another suggestion was given that reads: "It is correct that the respondent had an affair with Ms. Manjot Kaur who was his patient, I know that they were having an affair when we returned from the vacation in May/June 2003, the telephone bills for the preceding month showed that the respondent had been speaking to her from the residence landline on her Reliance mobile on night from 12 AM to 7 AM" Evidence of PW1 further goes to reveal that she went to the house of the said lady and confronted her, who admitted of having an affair with the respondent. The said inference of the character of the respondent is further fortified from the testimony of RW-1 who did not challenge the mobile call records from 05.10.2007 to 27.02.2009 Ex.RW1/P-1 admitting that he had made several calls on mobile number 9958290224 belonging to one Shobha Keshwani from his mobile number 9958290222. No suggestion was put to her that she was telling a lie or trying to cook up or concoct a story about promiscuous conduct or his love affairs or flings."

11. At the outset, we deem it proper to discuss the law on Order 18 Rule 17 of CPC. The Hon'ble Supreme Court in the case of **Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate**, reported at **(2009) 4 SCC 410** more particularly para 28 held as under:

"28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC."

(Emphasis Supplied)

12. Further, in the case of *K.K. Velusamy v. N. Palanisamy* reported at (2011) 11 SCC 275 discussed the power of the Court under Order 18 Rule 17 of CPC. It was held that this power is only for clarification i.e. to enable Court to clarify any issue or doubt, it may have in regard to evidence led by parties by recalling any witness so that the Court itself can put questions to such witness and elicit answers. The relevant paras 9, 10 and 19 read as under:

“9. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

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19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very

purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.”

(Emphasis Supplied)

13. In the case on hand, the counsel for the appellant has fairly submitted that when the said application came for hearing, it was dismissed as withdrawn by the counsel for the appellant for the reasons best known to him. Once the application was dismissed as withdrawn, the appellant cannot complain that the Family Court did not allow the witness to be re-examined. Moreover, applying the law laid down to the facts of the present case that Order 18 Rule 17 of CPC is to be sparingly exercised and it is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination. However, the provision is primarily to enable the Court to clarify any issue or doubt, by recalling any witness either *suo motu*, or at the request of any party, so that the Court itself can put questions and elicit answers. In this background, we are of the view

that the power under Order 18 Rule 17 is not intended to be used in routine manner.

14. With regard to the contention raised by the counsel for the appellant that the learned Family Court did not give opportunity to the appellant-husband to rebut the argument raised by the counsel for the respondent-wife. The reading of para 16 of the impugned judgment would show that the Family Court gave ample opportunities to the husband (appellant herein) but despite this, there was no one who appeared on behalf of the appellant-husband.
15. After a careful reading of the paragraphs which were challenged by the counsel for the appellant, we find that the learned Family Court has carefully analysed the entire evidence while passing the decree of divorce.
16. We find no infirmity in the order passed by the Family Court. The present appeal is devoid of any merits. Resultantly, the appeal is dismissed.

G.S.SISTANI, J.

C.HARI SHANKAR, J.

AUGUST 20, 2018

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