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

+ CM(M) 1203/2018 & CM No.40978/2018 (for stay).

SAVITA DEVI

..... Petitioner

Through: Ms. Rajeshwari H. And Ms. Nupur
Goswami, Advs.

versus

LALIT KUMAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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03.10.2018

CM No.40979/2018 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

CM(M) 1203/2018 & CM No.40978/2018 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order [dated 11th July, 2018 in HMA No.270/17 of the Judge Family Court (South-East)] of dismissal of objections filed by the petitioner wife against the earlier order of the Family Court issuing a commission for recording evidence in the petition for divorce filed by the respondent husband under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for dissolution of marriage with the petitioner wife.
4. The petitioner wife objected to the issuance of commission contending that she was unable to afford the fees of the commissioner directed to be paid equally by the parties.
5. The Family Court however, on the basis of the copy of the passbook of the bank account of the petitioner wife shown by the respondent

husband, has held that the petitioner wife can afford to pay the fees of the commission.

6. Attention of the learned Family Court is drawn to the consistent dicta of this Court in ***H. Dohil Constructions Co. (P) Ltd. Vs. Rohit Lal*** AIR 2014 Del 195, ***Dimple Sharma Vs. Vipin Sharma*** 2018 SCC OnLine Del 10272, order dated 22nd September, 2017 in CM(M) No.1061/2017 titled ***Jiya Sehgal Vs. Ashvin Sehgal***, order dated 12th September, 2018 in CM(M) No.610/2018 titled ***Sujata Gandhi Vs. Vijay Gandhi***, holding that on objection of either of the parties to bear costs thereof, commission cannot be issued.

7. The Family Court, in the impugned order has referred to (i) ***Priya Jain Vs. Priyank Jain*** CM(M) No.1424/2017 decided on 30.01.2018; (ii) ***Nidhi Trehan Vs. Ashish Khosla*** MAT. APP. (F.C.) 35/2017 decided on 16.03.2017; and, (iii) ***Deepak Khosla Vs. Karishma Khosla*** CM(M) 645/2017 decided on 27.07.2017 and observed that in the said orders/judgments, appointment of the Local Commissioner by the Principal Judge Family Court (South-East) has been upheld.

8. The copies of the said orders/judgments are immediately not available and the counsel for the petitioner wife also is not carrying the same. However the counsel for the petitioner wife, on enquiry states that she has personally gone through the said orders/judgments and they do not hold anything contrary to what has been said in the judgments aforesaid.

9. The counsel for petitioner wife also draws attention to ***Pushpa Devi Vs. Bimala Devi*** AIR 2000 Del 141 (FB) holding (i) that where the parties
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do not or a party does not consent to recording of evidence by Commissioner then the discretion must be exercised judicially and for valid reasons; (ii) 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; (iii) a matter being old and/or languishing would be a strong ground for the Court to refuse adjournments and take up trial immediately; and, (iv) 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 viz., where the Court cannot take up trial in the near future for some cogent reason 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.

10. The objection of the petitioner wife was, that she had been awarded interim maintenance of Rs.2,500/- per month only and besides herself, was also supporting a school going son of the parties aged seven years and had no other source of income.

11. The Family Court, on the basis of entries in the passbook, of deposit of cash other than by way of interim maintenance, has held that the petitioner wife could afford to pay the fees of the commission.

12. The counsel for the petitioner wife explains that the said deposits are by the brother of the petitioner wife who is supporting the petitioner wife owing to the interim maintenance being not enough for sustenance.

13. The Family Court undoubtedly erred in not considering, that the petitioner wife could not pay the fees of the commission from the monies

received from her brother.

14. The counsel for the petitioner wife today also states that the petitioner wife is agreeable to recording of evidence on commission if the entire expense of the commission is borne by the respondent husband.

15. The order impugned is thus wholly contrary to law and liable to be set aside.

16. In view of the limited controversy aforesaid and the settled position in law with respect thereto, it is felt that issuance of notice of this petition to the respondent husband and stay of recording of evidence on commission would only cause delay. It is thus deemed appropriate to allow this petition without hearing the respondent husband. The respondent husband however, if intends to contest the petition, will have liberty to apply.

17. The petition is thus allowed. The order dated 11th July, 2012 as well as the order of issuance of commission for recording evidence are set aside. The Judge, Family Court to give option to the respondent husband to, if ready to bear the entire expense of the commission, have the evidence recorded on commission; else, the Judge Family Court to record evidence as per the vintage of the matrimonial dispute.

18. The petition is disposed of.

Dasti under the signature of the Court Master.

RAJIV SAHAI ENDLAW, J

OCTOBER 03, 2018

‘pp’..