

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 31.10.2019

Date of Decision : 14.11.2019

+ CM(M) 1361/2019 & CM No. 41114/2019

RAJNI GUPTA

..... Petitioner

Through: Mr.Ashish Aggarwal, Ms.Reena Jain, Mr.Vineet Malhotra and Ms.Shefali Kishore, Advs.

versus

VIKAS GUPTA

..... Respondent

Through: Ms.Geeta Luthra, Sr. Adv.with Mr.Altmish Siddiki and Ms.Kamakshi Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. By the present petition the petitioner challenges the order dated 21.08.2019 passed by the learned Judge Family Court, District Shahdara, Karkardooma, Delhi in HMA No.166/2017, titled ***Dr.Vikas Gupta v. Dr.Rajni Gupta***. The Impugned Order dismisses the application filed by the petitioner seeking to produce additional documents as also examine various witnesses. The Impugned Order also appoints a Local Commissioner to record the evidence of the petitioner.
2. The learned senior counsel for the respondent has raised a preliminary objection on the maintainability of the present petition. She contends that against the Impugned order an appeal under Section 19(1)

of the Family Courts Act, 1984 (hereinafter referred to as the ‘Act’) is maintainable. This is disputed by the learned counsel for the petitioner.

3. Section 19 of the Act is reproduced hereinbelow:

“19. Appeal.-

(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.”

4. Sub-Section 1 of Section 19 of the Act provides that an appeal shall lie from every judgment or order, not being an *interlocutory* order, passed by a Family Court to the High Court, both on facts and law. Therefore, what is to be determined is whether the Impugned Order challenged in the present petition can be termed as an *interlocutory* order within the meaning of Section 19(1) of the Act.

5. A Division Bench of this Court in its judgment dated 13.09.2012 passed in FAO 388/2012, titled **Manish Aggarwal v. Seema Aggarwal & Ors.**, has considered the scope and ambit of Section 19 of the Act and has held as under:

“26. We, thus, conclude as under:

i. In respect of orders passed under Sections 24 to 27 of the HM Act appeals would lie under Section 19 (1) of the said Act to the Division Bench of this Court in view of the provisions of sub-section (6) of Section 19 of the said Act, such orders being in the nature of intermediate orders. It must be noted that sub-section (6) of Section 19 of the said Act is applicable only in respect of sub-section (1) and not sub-section (4) of Section 19 of the said Act.

ii. No appeal would lie under Section 19 (1) of the said Act qua proceedings under Chapter 9 of the Cr.P.C. (Sections 125 to 128) in view of the mandate of sub-section (2) of Section 19 of the said Act.

iii. The remedy of criminal revision would be available qua both the interim and final order under Sections 125 to 128 of the Cr.P.C. under sub-section (4) of Section 19 of the said Act.

iv. As a measure of abundant caution we clarify that all orders as may be passed by the Family Court in exercise of its jurisdiction under Section 7 of the said Act, which have a character of an intermediate order, and are not merely interlocutory orders, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act.”

6. The above view was affirmed by another Division Bench of this Court in its judgment dated 01.10.2019 passed in MAT. APP.(FC) 211/2017, titled ***Colonel Ramesh Pal Singh v. Sughandhi Aggarwal***.

7. In view of the above dicta, it would have to be considered if the Impugned Order can be termed as an ‘intermediate’ or as an ‘interlocutory’ order.

8. In ***Shah Babulal Khimji*** (supra), the Supreme Court even while considering the scope of ‘judgment’ under the Letters Patent Act, held as under:

“In the course of the trial, the Trial Judge may pass a number of Orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.” (Emphasis added)

9. Therefore, the Supreme Court held that an order refusing permission to file an additional document on record or to summon additional witnesses would be an *interlocutory* order. There is no reason not to follow the same view for considering the scope of exclusion in

Section 19(1) of the Act. Clearly, the Impugned Order would, therefore, not be appealable under Section 19 of the Act. I find no merit in the preliminary objection raised by the learned senior counsel for the respondent.

10. As far as the merit of the petition is concerned, few dates would first require specific mention: The marriage between the parties was solemnized on 22.02.1992. They have been blessed with two children. The divorce petition was filed by the respondent on 28.11.2014. While the issues were framed on 06.04.2018, the written statement filed by the petitioner formally came on record only on 15.05.2018. In the meantime, by an order dated 23.12.2016 passed by this Court in CM (M) 1379/2016, the learned Trial Court had been directed to expedite the trial of the petition.

11. By an order dated 13.07.2018, the learned Trial Court rejected the respondent's application to take on record additional documents. This was challenged by the respondent before this Court by way of MAT APPL. (F.C) 273/2018, titled **Mr. Vikas Gupta vs. Rajni Gupta**. The said appeal was disposed of by a consent order, directing as under:-

"It is agreed that the wherever the stand taken in the replication is inconsistent with the stand taken in the divorce petition, the same would be considered by the Family Court at the time of final hearing. As far as the documents are concerned, the documents will not be exhibited unless the same are proved as per law. Liberty, as prayed, granted to the appellant to summon witnesses to prove such documents sought to be relied in accordance with law."

12. It is of some relevance to note that in the meantime, respondent's evidence had continued and was recorded between May 2018 to 17.08.2019, with the respondent examining himself and ten additional witnesses.

13. It is at that stage that the petitioner filed an application seeking to bring on record additional documents as also file a list of witnesses.

14. In the application, the ground urged by the petitioner for not producing these documents at an earlier stage was stated as under:-

“3. That from the last one year the Respondent was also under great pressure for cross examining the Petitioner and during the cross examination of the Petitioner, the Respondent also tried to search all her documents to disprove the case of the Petitioner and with great difficulties she could find some of the documents and provided her counsel to file the same on record.

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6. That now after getting free from the proceedings of the Ld. L.C. the Respondent got some time to trace all these documents from different places and is now filing the same on record and is also exhibiting them in her evidence by way of affidavit.”

15. As far as the relevance is concerned, the petitioner further stated as under:-

“5. That the documents which the Respondent is filing on record are related to her education, work experience with different institutions, Entrance Examinations, Medical papers of Shivam Surgical & Maternity Centre, conference invitations which she attended, M.A & M.B.A Degree of her father, some marriage photographs. It is pertinent to mention here that all these documents could not be filed as all these documents were lying here and there and the Respondent could not arrange them firstly

as she was under deep depression and was rigorously, day and night was attending the proceedings before the Ld. L.C. after her office hours even on holidays. The copy of the documents is being filed herewith as Annexure-A (Colly), and the original Photographs are filed herewith as Annexure-B (Colly)."

16. The learned Trial Court, however, dismissed the said application by way of its Impugned Order *inter alia* giving the following reason:-

"Respondent also moved an application u/s 151 CPC for filing additional documents from internal page no. 5 to 28 annexed with the application. It is alleged that respondent went under deep depression due to the act of the petitioner as well as due to pressure of the evidence led by him and could not file the documents earlier. It is not in dispute that most of the documents annexed with the present application were already in the knowledge and possession of the respondent. Even if some documents were not in her possession, then also she had not filed any list of reliance to inform the court with whom those documents were lying which she could not produce before framing of issues. However, no such list of reliance was filed so these new documents cannot be taken on record. The grounds given in the application that due to depression and pressure, she could not search the documents is not believable because she admittedly used to attend her office, different seminars, used to visit outstation etc. and such conduct of the respondent create doubt about her theory that she was under depression. No date, time and place is given when she found these documents after great difficulties through in depth search. Moreover, it is not disclosed in the application how and in which manner these document are relevant to the defence of the respondent. The marriage between the parties is not in dispute so there is no need to file the photographs of the marriage. There is nothing in the application to show how the MBA and MA degree of the father of the respondent is relevant to decide any controversy regarding the matrimonial dispute of the parties. How the documents pertaining to education, work experience, conferences attended by the respondent, her place

of posting, leave record etc. are relevant to any disputed fact is also not disclosed in the application. Similarly, how RTI reply obtained by some third person regarding non availability of indoor facilities in some dispensaries is necessary to be proved in defence is also not explained in the present application. I am of the opinion that on the basis of the vague and general averments without any solid ground and explanation itself does not entitle the respondent to file these new documents which otherwise also not concerned with the controversy in question. Hence, this application is liable to be rejected on these grounds.”

17. As far as the additional witnesses were concerned, the learned Trial Court held as under:-

“Vide order dated 06.04.2018, the respondent was also given direction to file the list of witnesses within 10 days but that order was not complied with by her. Now she has filed a list of witnesses mentioning the name of 20 witnesses to be examined in her defence on the last date of hearing only. The witnesses at Sr. No. 3 to 20 are the official witnesses who are to prove record pertaining to service, qualification etc. of the respondent. If the list of witnesses is compared with the application u/s 151 CPC, then it reveals that almost all the official witnesses have to prove the documents which are not allowed to be taken on record. When the application of the respondent u/s 151 CPC for filing the additional documents is already rejected above, then now there arises no question to summon these official witnesses. Hence, the request made by the respondent to examine witnesses from Sr. No. 3 to 20 is rejected. Witness at Sr. No. 2 is the real brother of the respondent and he will prove the defence of the respondent so I am permitting only him to be examined by the respondent alongwith respondent herself through LC despite the fact that the list of witness was not filed in time.”

18. A reading of the averments in the application as also findings of the learned Trial Court would show that the petitioner had not given any cogent reason for not producing these documents at an earlier stage. Infact, the ground urged by the petitioner in her application was extremely vague and unbelievable. As far as the additional witnesses were concerned, the learned Trial Court had allowed one additional witness to be examined, that is, the brother of the petitioner, while holding that the other witnesses were only official witnesses who were to prove the additional documents and as the additional documents themselves have not been taken on record, these witnesses were not relevant to be examined.

19. The learned counsel for the petitioner has urged that as the respondent was allowed to bring on record the additional documents by the order dated 07.01.2019 passed by this Court in the appeal filed by the respondent, there was no reason for the petitioner herein to be not given the same right.

20. I cannot accept the above argument of the petitioner. As noted hereinabove, the order dated 07.01.2019 was passed with the consent of the petitioner. It is also brought to my notice that the documents that were allowed to be placed on record by the said order, had been filed alongwith replication which was also allowed to be taken on record subject to the condition that if any averment made therein was inconsistent with the stand of the respondent in the divorce petition, the same would be considered by the learned Family Court at the time of final hearing. Further, the documents were directed not to be exhibited

unless the same were proved as per law. In any case, this is not a matter of claiming parity. The petitioner has to stand on her own legs.

21. Section 10(1) of the Act makes the provisions of the Code of Civil Procedure, 1908 (CPC) applicable to the Suits and proceedings pending before a Family Court. Order 8 Rule 1A of the CPC requires the Defendant to produce in Court any documents that it seeks to rely upon alongwith the written statement. If the document is not in possession or power of the Defendant, the Defendant has to state, wherever possible, person in whose possession or power it is. Order 8 Rule 1A(3) of the CPC states that where the document is not produced alongwith the written statement, the same shall not be received in evidence without the leave of the Court. It is only where the Defendant satisfies the Court that after exercise of due diligence, the document that is sought to be placed on record at a later stage was not within his knowledge or could not be produced at an earlier stage, that the Court may permit the same to be brought on record.

22. One of the objectives of the Act is to secure speedy settlement of disputes relating to marriage and family affairs. In the present case, as noted hereinabove, the petition seeking divorce has been filed in November 2014 and far back in December 2016, this Court had directed the learned Trial Court to expedite the disposal of the petition. Not only this, the respondent has been examined alongwith other witnesses that he had produced in support of his claim. To allow the petitioner at this stage to file additional documents would be to reopen the trial of the case and set it back in time. It is not the case of the petitioner that the documents that are now sought to be placed on record were not within her power and

control or could not have been placed on record by exercise of due diligence. As noted hereinabove, the main plank of the petitioner is one of seeking parity as if this is a matter of Article 14 of the Constitution of India. The petitioner further urged that these documents became necessary to be produced due to certain answers given by the respondent in his cross-examination. This cannot be accepted as a sufficient reason for the petitioner to be allowed to file additional documents on record at this belated stage.

23. It is also to be noted that this Court has been asked to interfere with the Impugned Order in exercise of its power under Article 227 of the Constitution of India. Such power has to be exercised sparingly and can be exercised only in case of grave dereliction of duty or flagrant violation of law or an error of jurisdiction or in case where grave injustice would be done unless the High Court interferes. It is not an appellate or revisional power and therefore, cannot be exercised to correct an error of fact or of law, not being one which is apparent on the face of the record. Such power cannot be used to interfere with the *intra vires* exercise of a discretionary power, unless it is arbitrary or capricious. In the present case, applying the above test, no ground for interference with the Impugned Order is made out.

24. As far as the additional witnesses are concerned, as noted by the learned Trial Court, the witnesses were to prove the documents sought to be produced. Production of such document having been denied, such witnesses, therefore, become irrelevant to the case.

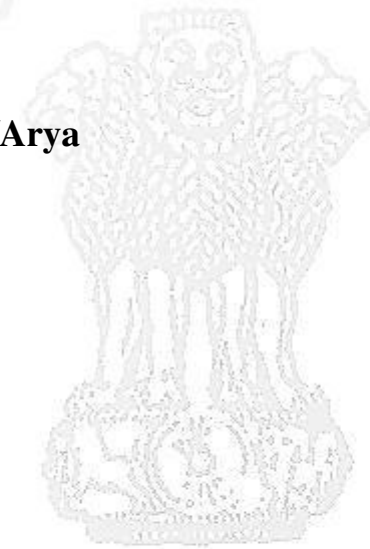
25. The other challenge of the petitioner is to the appointment of a Local Commissioner for recording evidence. The learned counsel for the

petitioner submits that the petitioner would have no objection if the Local Commissioner recording the evidence is changed by this Court. I do not find any ground having been made out in the petition for seeking such change. The Local Commissioner acts as an officer of the Court and therefore, cannot be changed at whims and fancies of the parties.

26. In view of the above, I do not find merit in the present petition. The same is dismissed. The parties shall bear their own cost.

NAVIN CHAWLA, J

NOVEMBER 14, 2019/Arya



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