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

+ CM(M) 213/2023, CM APPL. 6361/2023—stay

SMT PRIYANKA

..... Petitioner

Through: Mr. R.P. S. Sirohi, Adv.

Versus

SH. RAHUL KUMAR

..... Respondent

Through: Mr. Amit Madan, Adv.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

ORDER

14.02.2024

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1. The present petition has been filed under Article 227 of the Constitution of India impugning the correctness, legality and propriety of the impugned order dated 01.12.2022 passed by the learned Judge, Family Court, North District, Rohini Courts, Delhi (hereinafter referred to as 'Trial Court') in HMA No. 572/2017 titled as 'Sh. Rahul Kumar v. Priyanka' whereby the application under Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (CPC) filed on behalf the petitioner herein for recalling the respondent i.e. PW-1 before the learned Family Court, for cross-examination is dismissed.

2. It is submitted that respondent herein had filed a divorce petition under Section 13(1)(ia) & (ib) of the Hindu Marriage Act, 1955 (HMA Act) on 09.05.2017 against the petitioner herein before the learned Trial Court making various averments.

3. Upon service of the notice, the petitioner put in appearance on 01.08.2017 and filed her written statement to contest the aforesaid divorce



petition.

4. On the pleadings of the parties, the issues were framed and the matter was fixed for recording the evidence of the petitioner on 18.04.2018. The examination-in-chief by way of an affidavit of the respondent i.e. PW-1 was completed on 21.02.2019 and PW-1 was partly cross-examined on behalf of the petitioner.

5. The matter was posted for further cross-examination of the PW-1 on 25.04.2019. However, on the said date of hearing as the counsel for the petitioner could not appear to conduct the cross-examination of PW-1, the opportunity for further cross-examination of PW-1 was closed by the learned Trial Court. Subsequent thereto, the petitioner filed an application under Order XVIII Order 17 of the CPC, which was allowed vide order dated 15.01.2020 subject to the cost of Rs. 2,000/- and the matter was posted for 12.02.2020 for further cross-examination on 12.02.2020, PW1 could not appear. Moreso, the learned Presiding Officer was also on leave. Subsequent thereto, the cross-examination could not be conducted as settlement talks were going on between the parties. Thereafter, due to one or the other reasons the cross-examination of the PW-1 could not be concluded, which was not on account of any fault from the side of the petitioner. However, on 22.09.2022, the counsel for the petitioner could not make himself available in the Court till 12:45 P.M., therefore, the right to cross-examine the PW-1 was closed.

6. Aggrieved by the aforesaid order, the petitioner moved an application under Order XVIII Rule 17 of the CPC which was dismissed vide order dated 01.12.2022. It is submitted on behalf of the petitioner that the fault does not completely lie with the petitioner for not holding the cross-



examination of the PW1. It is submitted that it was only on two occasion when the counsel for the petitioner could not appear i.e. on 25.04.2019 and 22.09.2019 when the cross-examination could not be conducted, however, the learned Judge, Family Court has taken a harsh view and has dismissed the aforesaid application filed under Order XVIII Rule 17 of the CPC.

7. The submissions have been refuted on behalf of the respondent submitting that the PW-1 has been standing in the witness box since 21.02.2019 and his cross-examination could not be concluded despite various opportunities granted to the petitioner and she had to move an application under Order XVIII Rule 17 of the CPC twice, therefore, in view of the said conduct of the petitioner, there is no illegality in the interim order which does not require interference from this Court.

8. Apart from hearing arguments on behalf of the parties, impugned order and record has also been perused.

9. The learned Trial Court while disposing of the application moved on behalf the petitioner herein under Order XVIII Order 17 of the CPC vide order dated 01.12.2022 has observed as under:

“A perusal of record would show that on 22.09.2022 the matter was already fixed for 12:00 noon, vide order dated 28.07.2022. The witness was present but the counsel for respondent was not available despite the fact that matter was called several times. Ultimately, the right of the respondent to cross-examine PW1 was dosed by giving detailed reasons. The record of the case speaks volumes about the conduct of the respondent and all relevant aspects were duly considered while passing the order dated 22.09.2022. The time of 12:00 noon was duly mentioned in order dated 28.07.2022 in the presence of the parties. Further, even after 22.09.2022, the respondent has not taken the things seriously and no application was filed immediately after order dated 22.09.2022. As per own case of the applicant,



the counsel for respondent came to know about the closure of right to cross-examine the PW1 on 31.10.2022, but thereafter also around a month has been taken to file the present application, which has been filed on 24.11.2022. Even after filing of the application, steps have not been taken by the respondent for serving notice on the petitioner as per order dated 26.11.2022, which shows that the respondent is interested in further delay.

The record of the ease suggests that the present application filed by the respondent is not bonafide and the same is also devoid of merits. Hence, in the given facts and circumstances, the above application is dismissed. ”

10. The crux of the matter is that undoubtedly that the evidence of the PW-1 could not be concluded since 21.02.2019 which has caused substantial delay in the disposal of the petition. Needless to say, the counsel for the petitioner was not available on two dates of hearing for conducting cross-examination of PW1. On the other dates of hearing, for one or the other reason i.e. non-availability of the witness, the settlement talks or due to non-availability of the presiding officer, the cross-examination could not be concluded.

11. In view of the above said facts and circumstances and the submissions made, subject to the payment of cost already imposed by the learned Judge, Family Court upon the petitioner herein, the petitioner is, hereby, granted only one single opportunity to cross-examine the PW-1 which shall be concluded on the date to be fixed by the learned Judge, Family Court as per the convenience of the roster, however, the learned Judge, Family Court shall ensure that the date for cross-examination of the PW-1 be granted within three weeks from today.



12. In view of the above directions, the present petition along with pending application is disposed of.

SHALINDER KAUR, J

FEBRUARY 14, 2024/aks