

(2013) 05 DEL CK 0422

Delhi High Court

Case No: FAO 97 of 2013

Kanika Darira

APPELLANT

Vs

Manish Darira

RESPONDENT

Date of Decision: May 2, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 7, 151
- Hindu Marriage Act, 1955 - Section 24

Citation: (2013) 200 DLT 551 : (2013) 172 PLR 30

Hon'ble Judges: V. Kameswar Rao, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: Sindhu and Mr. Narender Mukhi, for the Appellant; R.P. Luthra and Mr. Vikas Chadha, for the Respondent

Judgement

Pradeep Nandrajog, J.

CM No. 3192/2013

In view of the fact that the appeal is being disposed of with consent, instant application stands disposed of as withdrawn.

FAO 97/2013

1. Howsoever obstructive may be the attitude of a lawyer, a Judge, that too, presiding over the Family Court has to maintain calm and composure. A lawyer may be taken to task for the obstructive attitude and if warranted personal costs on the lawyer could also be imposed. But judicial proceedings cannot travel on a track where miscarriage of justice ensues. Having perused the impugned order and the record of the learned Judge, Family Court, we express our displeasure at the manner in which the learned Counsel for the appellant and the appellant have conducted the proceedings before the learned Judge, Family Court. The proceedings would reveal every endeavour made to somehow or the other prolong the agony of the

parties. But, we find that a fundamental error has been committed by the learned Judge, Family Court.

2. Mercifully for us we need not note the facts in detail since the learned Counsel for the respondent concedes that in view of the law declared by the Supreme Court in the opinion reported as [Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya](#), , the learned Judge, Family Court ought to have accorded the appellant an opportunity to lead evidence.

3. The reason is that after filing the written statement and after issues were settled, as recorded in the order dated October 13, 2011, the respondent, who was the petitioner before the learned Family Court, examined himself as PW-1 on November 25, 2011. Thereafter he was cross-examined on various dates. Matter was listed on April 20, 2012 for the respondent to be further cross-examined. Mother of the appellant appeared and sought pass-over for Counsel to appear as recorded in the order dated April 20, 2012 with the time being 11.00 a.m. Thereafter the matter was called again and again at 11.15 a.m., 12.30 noon, 1.15 p.m. and 2.30 p.m. Neither appellant nor her mother nor Counsel appeared and thus learned Judge proceeded ex parte against the appellant and closed further cross-examination. Matter was adjourned for May 25, 2012 for remaining evidence of the petitioner. Before that date, on May 8, 2012, appellant filed an application under Order 9 Rule 7, CPC praying that order dated April 20, 2012 proceeding ex-parte against her be recalled. The said application was dismissed on October 19, 2012, against which order the appellate remedy taken before this Court failed when for reasons best known to the Counsel for the appellant he withdrew FAO 459/2012 stating that the appellant would request the Family Court to permit appellant to join the proceedings, a request which was not required to be made for the reason as per the law declared by the Supreme Court in Sangram Singh's case (supra) the appellant had a legal right to participate in the further proceedings.

4. For reasons unknown, appellant's Counsel sought review of the order dated April 20, 2012. That right to question the said order had been lost by the appellant when her Counsel withdrew the appeal filed in this Court laying a challenge to the order dated April 20, 2012 and thus it was doubtful whether a review could be prayed for. Application seeking review was dismissed by the learned Judge, Family Court on January 14, 2013. The learned Judge thereafter proceeded to hear arguments and pronounced an ex parte decision in favour of the respondent ignoring that on January 23, 2013, the appellant had moved an application u/s 151, CPC annexing therewith a decision of the Supreme Court reported as [Arjun Singh Vs. Mohindra Kumar and Others](#), , which referred to the law declared by the Supreme Court in Sangram Singh's case.

5. The law declared is that where a party is proceeded ex parte, if order proceeding ex parte is not set aside, and proceedings have not terminated, the party concerned can join at any stage but would be entitled to the onward journey and whatever

proceedings have taken place in the interregnum i.e. between the date when party was proceeded ex parte till when the party joined the proceedings would not be re-opened.

6. Accordingly, we dispose of the appeal, setting aside the ex parte judgment and decree dated January 24, 2013. HMA No. 627/2010 is restored on the file of the learned Judge, Family Court with a direction that if the petitioner before the learned Judge, Family Court wants to lead any further evidence he may be permitted to do so, failing which the respondent before the learned Judge, Family Court i.e. the appellant before us would be permitted to lead evidence in rebuttal.

7. We caution learned Counsel for the appellant and the appellant not to be obstructive in further conduct of proceedings before the learned Judge, Family Court.

8. Order in favour of the respondent u/s 24 of the Hindu Marriage Act is also restored.

9. Parties shall appear before the learned Judge, Family Court on May 20, 2013.

10. Record be returned through Special Messenger.

11. No costs. DASTI.

CM No. 3190/2013 (stay)

Since the appeal stands disposed of instant application which seeks stay of the impugned decree is dismissed as infructuous.