

# Niharika Ghosh @ Niharika Kundu vs Shankar Ghosh & Anr on 17 March, 2023

**Author: Tushar Rao Gedela**

**Bench: Tushar Rao Gedela**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CM(M) 431/2023

NIHARIKA GHOSH @ NIHARIKA KUNDU

Through: Mr. Om Prakash Gulabani  
alongwith petitioner.

versus

SHANKAR GHOSH & ANR

Through: None

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

ORDER

% 17.03.2023 [ The proceeding has been conducted through Hybrid mode ] CM APPL. 13059/2023  
(Exemption)

1. This is an application seeking exemption from filing certified copies of the annexures/documents.
2. Exemption is allowed, subject to all just exceptions.
3. The application stands disposed of.

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4. The petitioner challenges the order dated 07.02.2023 passed in MCA SCJ 1/2022 titled 'Niharika Ghosh @ Niharika Kundu vs. Shankar Ghosh', whereby the appeal under Order XLIII Rule 1 (r) of CPC, 1908 was dismissed by the learned First Appellate Court.

5. Having considered the issue raised by the learned counsel, it is apposite to extract para-9 of the impugned order herein which is as under:-

"9. It is submitted by the Ld. Counsel for the appellant that the impugned order is based on conjunctures, surmises and based on facts contrary to the case. The Ld. Trial Court has overlooked the fact that the respondents had been feeding 10 street dogs in the shared household and this illegal act is in violation of fundamental rights

which includes right to life and right to health of the appellant. He submits that the Ld. Trial Court has overlooked the fact that keeping the street dogs in the house would ultimately cause number of disease and nuisance to the appellant. That the photographs which are on record clearly shows that various dogs are being kept by the respondents. The Ld. Trial Court has observed in the impugned order that 3 of the dogs are pets and - other 2 to 3 dogs can be seen in the photographs filed by the plaintiff/appellant. This fact itself shows that there are 5 to 6 dogs which are being kept by the respondents in the property. The Ld. Trial Court has gravely arrived at a conclusion that various acts of harrasment having been done against the appellant as "matter consisted of trivial issue. However, the act of harrasment cannot be termed as trivial issue. He submits that the real intention of the respondents is to cause inconvenience, harrasment and mental torture to the appellant. He submits that the observation of the Ld. Trial Court in the impugned order that there is no prima facie case, is contrary to the estabilshed rule of law. The Ld. Trial Court has overlooked very essential facts while disposing off the interim application. He submits that as per the judgment titled as Nestle India Ltd. (supra), the impugned order is liable to be set aside being arbitrary, illegal, capricious and perverse."

Learned counsel submits the relationship between petitioner on one hand and husband and the mother-in-law on the other is acrimonious.

6. Having considered the contents of para 9 of the impugned order, this Court is of the opinion that the First Appellate Court ought to have, prima facie, considered balancing equities between the parties, especially, keeping in view the, inter se relation.

7. That apart, it goes without saying that the right to residence in a matrimonial home, under the provisions of the Protection of Women from Domestic Violence Act, 2005, also would subsume within itself, the definition of "right to safe and healthy living" too. Hence, requiring interference by this Court.

8. Issue notice. Upon petitioner taking steps within a week, notice may be served through all permissible modes. Additionally, through learned counsel appearing for the respondents before the learned Trial Court.

9. Reply, if any, be filed within four weeks. Rejoinder thereto, if any, be filed within four weeks thereafter.

10. List on 22.05.2023.

TUSHAR RAO GEDELA, J MARCH 17, 2023 Aj