

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5313 OF 2015

Sharmila @ Sharayu Vijaykumar Pawar ... Petitioner
Vs.
Vijaykumar Bhagwat Pawar ... Respondent

Mr. Bhushan A. Walimbe i/b. Mr. P.G. Sarda, Advocate for the petitioner.
Mr. Prasad B. Kulkarni, Advocate for the respondent.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE : **JULY 2, 2015**

P.C.:

Rule. Rule made returnable forthwith. By consent, the petition is heard finally at the stage of admission.

2. This Writ Petition is directed against the order dated 5th August, 2015 passed by the Principal Judge of the Family Court, Solapur thereby dismissing the Application filed by the wife for issuance of summons to witnesses to depose or produce the documents.

3. The petitioner/wife and respondent/husband got married on 15th November, 1992. The respondent/husband has filed a petition for divorce on the ground of cruelty and in the counter claim, the petitioner/wife has prayed for judicial separation. The evidence of the parties is being recorded. The evidence of respondent/husband is over. In between,

amendment in the counter claim was set aside and the said application was rejected. The matter was taken in the High Court and this Court by the order dated 23rd February, 2015 allowed amendment. Thereafter, amendment was carried out. The petitioner/wife was examined in the month of March, 2015 and their son, who was witness for the petitioner, was examined in the month of April, 2015. After his examination, the application was moved by the petitioner on 27th April, 2015 for issuance of summons to witnesses to depose or to produce the documents. In all, list of 9 witnesses was given. The learned Judge of the Family Court has rejected the Application mainly on the ground that the case is pending for almost 7 years; the issues were framed long back; the parties have examined the material witnesses and also held that most of the documents and incidents are not in dispute. So, the learned Judge of the Family Court relying on Order 16 Sub Rule 1 to 3 of the Code of Civil Procedure used his discretion and rejected the Application for issuance of summons to additional witnesses.

4. The learned counsel for the petitioner/wife has submitted that the witnesses are produced because the documents are not admitted. The learned Judge of the Family Court has erred in holding that the documents and incidents are not in dispute while the husband has denied the incident of second marriage and also the fact of mediation by the police, so these

facts are to be proved.

5. The learned counsel for the respondent/husband has submitted that while passing this Petition, the petitioner/wife was aware that these facts are not admitted by the respondent/husband and she should have placed the list of all the witnesses before the commencement of the evidence. He further submitted that all the facts and the contents in the documents on which she is relying is within her knowledge and yet she was inclined to keep quiet in the beginning and this Application was moved at the far end of evidence. The learned counsel supported the order passed by the learned Judge of the Family Court.

6. The petitioner/wife has prayed for judicial separation in the counter claim so to that extent, the burden lies on her to prove certain facts. It is submitted by the learned counsel for the petitioner that the fact of second marriage, harassment at the hands of respondent/husband and ill-treatment given to her under the effect of alcohol are all denied by the respondent/husband in the cross-examination. If it is so, then the finding given by the learned Judge in paragraph 11 that most of the documents and incidents are not in dispute and therefore, under section 58 of the Indian Evidence Act, the facts admitted need not to be proved is not legal. Under such circumstances, I allow this Petition partially.

7. It is to be noted that the petitioner/wife has not given pursis of the closure of evidence and yet her evidence is open, therefore, at this stage, it is necessary to allow the Application. Even if this Application is allowed and witnesses are called, no prejudice will be caused to the respondent/husband and he will get an opportunity to cross-examine the witnesses.

8. I have gone through the Application (Exhibit-88) filed by the petitioner/wife and the list of the witnesses and reasons mentioned therein, out of which it is not necessary to call all the witnesses. The witness in Item no. 1, witness in item no. 5 and witness in item no. 6 are necessary and the issuance of summons to these witnesses are allowed.

9. Writ Petition is disposed of accordingly.

(MRS.MRIDULA BHATKAR, J.)