

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6128 OF 2014

Neema Hingarh ... Petitioner
Vs.
Ashish Hingarh ... Respondent

Mr. Ashish Kamat a/w. Mr. Vishal Kanade i/b. Ms Maya B. Idnani for
Petitioner.
Ms Taubon F. Irani for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 22, 2015

P.C. :

Heard Mr. Kamat and Mr. Kanade, learned Counsel for petitioner
and Ms Irani, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the
petitioner-wife has challenged the order dated 25.04.2014 passed by the
learned Judge, 6th Family Court, Mumbai below exhibit-104 in Petition
No.A-984 of 2010. By that order, the Family Court rejected the
application made by the petitioner seeking permission to file questions
disallowed by the Court.

3 Mr. Kanade submitted that the affidavit of the respondent was
tendered few minutes back and it is not possible to file rejoinder and it
should not be construed that the petitioner has admitted the contents of
the affidavit. In view thereof, the arguments proceed on the basis of
denial.

4. In support of this Petition, Mr. Kamat submitted that the cross-
examination of the respondent was conducted on 07.01.2014,
12.03.2014 and lastly on 02.04.2014. During the course of cross-
examination, the petitioner's advocate had asked number of questions,

which were disallowed by the Court. On 02.04.2014, in the second session, in the evening, post closing of cross-examination, the Court directed petitioner's advocate to write and give disallowed questions and to file them on the same day. Due to short time, her advocate could prepare in her handwriting, a list of only some of the disallowed questions put to respondent on 02.04.2014. The petitioner thereafter filed application dated 25.04.2014, exhibit-104 for placing on record disallowed questions asked during respondent's cross-examination on 07.01.2014, 12.03.2014 and 02.04.2014. It was contended that those questions are relevant. He submitted that on 02.04.2014, the Family Court had taken on record the questions which were disallowed on 02.04.2014 and were marked as exhibit-103. In the application at exhibit-104, prayer was made for taking on record the disallowed questions. Upon taking instructions from the instructing Advocate, Mr. Kamat submitted that the application was duly served on the other side and no reply was filed. On the same day, the Family Court rejected the application.

5. He submitted that the Family Court committed serious error in not taking on record questions which were disallowed during the cross-examination of the respondent. That apart, the learned Judge of the Family Court also did not record any reason for disallowing the questions. The practice adopted by the Family Court has vitiated the cross-examination. In support of his submissions, he relied upon the following decisions:

- a. **Irfan Badshah Vs. State**, 2013 CRI.L.J.3604;
- b. **Bipin Shantilal Panchal Vs. State of Gujarat**, (2001) 3 SCC 1;
- c. **Rameshwar Dusadh Vs. Emperor**, 55 Indian Cases 593.

6. On the other hand, Ms Irani submitted that on 07.01.2014, the petitioner had cross-examined the respondent. During the course of

cross-examination, certain questions were repeated which were disallowed by the Court as respondent had already answered the questions. She submitted that on 02.04.2014, the Court permitted the petitioner to file the alleged disallowed questions on record as the Court was aware that there were no such questions. She submitted that the cross-examination of the respondent was over at about 4.00 p.m. On 25.04.2014, the petitioner filed application exhibit-104. A copy of that application was not served on her. The Court called upon the petitioner to point out under which provision of law, the application at exhibit-104 was filed. She submitted that though time was sought for filing reply, the Court was of the view that since it was rejecting the application as it was not tenable, respondent's say was not required. She further submitted that the procedure adopted by the petitioner requires to be strongly deprecated. An attempt is made by the petitioner to make allegations against the learned Judge with a view to improving her case. The petitioner has also not filed any application to record evidence in question and answer form even though it is alleged that questions were disallowed on 07.01.2014, 12.03.2014 and 02.04.2014. For all these reasons, she submitted that no case is made out for interfering with the impugned order.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. On one hand, the petitioner claims that certain questions were disallowed by the Family Court on 07.01.2014, 12.03.2014 and 02.04.2014 and on the other, the respondent is contending that certain questions were repeated and hence, the learned Judge disallowed those questions. Respondent also contends that there were, in fact, no such questions. It is not possible to go into this controversy. I am told that even the learned Judge who passed the impugned order is promoted. In my opinion, if at all, the petitioner was aggrieved with the procedure

followed by the learned trial Judge, he should have requested the learned trial Judge to- (i) record the questions that were disallowed, (ii) answer of the witness and (iii) objections as regards admissibility / relevancy of the question. The final decision to reject particular question as irrelevant or inadmissible could have been taken at the end of the trial.

8. In the case of **Irfan Badshah** (*supra*), the learned Single Judge of Delhi High Court considered Section 148 of the Indian Evidence Act, 1872 as also the decision of the Apex Court in the case of **Special Cell, New Delhi Vs. Navjot Sandhi alias Afshan Guru and others**, (2003) 6 SCC 641, wherein it was observed thus,

“... the endeavour of the Court wherever there is a serious dispute with regard to the relevancy and admissibility of a question should be to elicit the answer of the witness after noting the objections. The final decision to reject particular evidence as irrelevant or inadmissible can be if required taken at the end of the trial. This procedure benefits even the appellate court as in a case where the question is disallowed or excluded from evidence and the appellate court feels that the same was essential, it is at this stage not required to remand back the matter for re-examination of the witness. Cross-examination is the main tool of an accused to test the veracity of the evidence of the witness and discredit his trustworthiness. Moreover, this does not mean that the trial court will not exercise its discretion in disallowing irrelevant questions.”

9. In the case of **Bipin Shantilal Panchal** (*supra*), in paragraph 14, the Apex Court observed thus,

“14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all

other objections the procedure suggested above can be followed.)”

10. In the case of **Rameshwar Dusadh** (*supra*), in paragraph 17, it was observed thus,

“17. The two remaining objections are that the petitioners were prejudiced because they were not given sufficient opportunity of cross-examining the prosecution witnesses and of calling their own defence witnesses. Now with regard to cross-examination it appears that there was fairly full cross examination in respect of some of the prosecution witnesses, but that in respect of others the learned Court disallowed which were in the nature of hearsay. What other questions were disallowed does not appear from his order but it is said that they were material questions and that the petitioners have been grossly prejudiced.”

11. In paragraph 19 of that report, the Division Bench observed that the concerned magistrate was extremely anxious to finish the case before the Pujah Holidays. It is in that context, it was observed thus,

“19. ... the fact appears to be that the Magistrate was extremely anxious to finish the case before the Pujah Holidays, and for this reason he wished the petitioners to hand in a list of their witnesses before 1 p.m. on the 26th September, so that the witnesses might be produced forthwith, and examined before the Court rose on that date. The Court was as a matter of fact, at Bihpur till late on the 26th, and it would certainly have been possible for the petitioners to have produced their witnesses before the Court left the place, but on the other hand, it has to be borne in mind that no less than 110 witnesses had been examined for the prosecution and that the petitioners were entitled to a reasonable interval for considering what evidence they should bring for the purpose of rebutting that evidence and a demand for two days' time in the circumstances does not appear to me to have been at all unreasonable. ...”

12. In paragraph 20, it was observed that there were a great many witnesses whose depositions were scantily recorded and who contented themselves by the bare statement that in their belief, the petitioners were thieves and robbers. The Division Bench did not discuss the quantum of evidence as it remitted the matter to the District Magistrate

so that that the petitioners will have an opportunity of cross-examining the prosecution witnesses and of adducing evidence in their own defence.

13. As noted earlier, the petitioner has filed application dated 25.04.2014 at exhibit-104. The petitioner was not in a position to demonstrate under which provision, the said application was filed. Even if that application is allowed, it will serve no purpose as the learned trial did not -(i) record the questions that were disallowed, (ii) answer of the witness and (iii) objections as regards admissibility / relevancy of the question. Merely taking those disallowed questions on record, in my opinion, will serve no purpose.

14. Subject to above, the Petition fails and the same is dismissed. Liberty is reserved to the petitioner to take out application for cross-examining the witness during whose evidence, the questions were disallowed on 07.01.2014, 12.03.2014 and 02.04.2014. The respondent will be at liberty to raise all objections to such application. It is made clear that by granting liberty, I have not expressed any opinion on the merits of such application.

15. At this stage, Ms Irani submits that the trial Court may be directed to decide the matter in a time-bound manner. It is not possible to issue such direction. However, liberty is reserved to the respondent to take out appropriate application for expeditious disposal of the proceedings. If such application is taken out, the learned trial Judge will pass appropriate order.

(R. G. KETKAR, J.)