

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11493 OF 2014

Pooja Sandip Kedia ... Petitioner

Vs.

Sandip Sankarlal Kedia ... Respondent

Mr.PK.Dhakephalkar, Senior Advocate a/w Mr.R.T.Lalwani,
Ms.Sadhana Jayakar (Lalwani) i/b Mr.Prakash Mahadik, Advocates
for Petitioner.

Mr. Sharan Jagtiani a/w Mr.Akash Rebello i/b Mr.Pravin S.Patil,
Advocate for Respondent.

CORAM : R. G. KETKAR, J.
DATE : 24th FEBRUARY, 2015

P.C. :

. Heard Mr.PK.Dhakephalkar, learned Senior Counsel for the petitioner and Mr.Sharan Jagtiani, learned Counsel for the respondent at length. Rule. Mr.Pravin S.Patil waives service for respondent. At the request and by consent of the parties, rule is made returnable forthwith and the petition is taken up for final hearing.

2. By this petition under Articles 226 & 227 of the Constitution of India, the petitioner-wife has challenged i) order dated 19/08/2014 below Exhibit 86 ii) order dated 19/08/2014 below Exhibit 1 iii) order dated 19/08/2014 below Exhibit 87 and iv) order dated 05/12/2014 in Civil Misc. Application No. 206 of

2014 passed by the learned Principal Judge, the Family Court, Mumbai at Bandra.

3. By order dated 19/08/2014 below Exhibit 86, the Family Court rejected the application made by the petitioner for adjourning the matter for two weeks to enable her to move this Court and to seek appropriate reliefs in the Writ Petition already instituted by her. By order dated 19/08/2014 below Exhibit 1, the Family Court dismissed the petition being Petition No. B-102 of 2010 on the ground that the petitioner never remained present to face the cross examination. By order dated 19/08/2014 below Exhibit 87, the Family Court rejected the application made by the petitioner for withholding order for dismissal of the petition and permitting the petitioner to cross examine her witnesses. By order dated 05/12/2014, the Family Court dismissed the application taken out by the petitioner-wife for setting aside the order dated 19/08/2014 below Exhibit 86 thereby dismissing the Petition No. B- 102 of 2010 and for restoration of the said petition.

4. In support of this petition, Mr.Dhakephalkar submitted that the petitioner has instituted petition for declaration that she is the sole owner and title holder of flat No.1604, situate on 16th floor of Wing B/15, Valencia Apartments, Sundervan Complex, Lokhandwala, Andheri (W), Mumbai 400 053 (for short 'suit flat') as also for recovery of possession of the suit flat against the

respondent-husband. He submitted that the respondent admitted that consideration was paid by the petitioner-wife. He however, came with the case that consideration paid by the wife was reimbursed by him. The Family Court was, therefore, of the view that it is for the respondent to lead evidence first. Accordingly, order was passed on 30/04/2013 for respondent to lead evidence first. The matter was adjourned five times thereafter. The respondent, however, did not lead evidence. On 24/07/2013, the Court recorded that it was 5th date of hearing and last chance was given to the respondent to submit his evidence and to remain present for cross examination on 22/08/2013. He submitted that the orders dated 30/04/2013 & 24/07/2013 asking the respondent-husband to lead evidence first were challenged by instituting Writ Petition No 7615 of 2013. As the respondent did not remain present for cross examination on 22/08/2013 and applied for adjournment, the Family Court closed his evidence. The order dated 22/08/2013 was challenged by the respondent by instituting Writ Petition No. 8555 of 2013. Both these petitions were disposed of by this Court (Coram:Mrs. Roshan Dalvi J.) by common judgment and order dated 21/11/2013. Both petitions were dismissed by this Court with costs quantified at Rs.50,000/-. This Court directed the Family Court to proceed with the trial in accordance with law as discussed in that order.

5. Mr.Dhakephalkar submitted that aggrieved by this decision, the respondent has instituted Special Leave Petition before the Apex Court and the same is pending admission. He submitted that the petitioner is unable to come to India leaving behind the child at Dubai and the child cannot travel because of travel ban imposed on him by the respondent. He submitted that her absence to face cross examination is not deliberate and because of compelling circumstances beyond her control, she filed application Exhibit 86 on 19/08/2014 seeking adjournment for two weeks to enable her to move this Court and seek appropriate reliefs in the Writ Petition already instituted by her. By order dated 19/08/2014, the Family Court rejected the application and dismissed the Petition. The petitioner, therefore, filed application Exhibit 87 praying for withholding order of dismissal of her petition and permitting her to lead evidence of other witnesses. By order dated 19/08/2014, the Family Court dismissed the application on the ground that the main petition itself was dismissed and therefore, application Exhibit 87 has become infructuous. In view of the order below Exhibit 86, the Family Court dismissed the petition as petitioner never remained present for facing cross examination. Civil Misc. Application No.206 of 2014 was taken out for setting aside order of dismissal of the petition dated 19/08/2014 and for restoration of the petition. By order dated 05/12/2014, the Family Court dismissed the application.

6. Mr.Dhakephalkar, upon instructions, states that in view of the decision of this Court dated 21/11/2013 in Writ Petition No 8555 of 2013, at present, the petitioner does not want to lead her evidence or even evidence of other witnesses. He states that the judgment and order dated 21/11/2013 passed by this Court in Writ Petition No. 8555 of 2013 is subject matter of challenge before the Apex Court. The petitioner will consider her position depending upon the outcome of the Special Leave Petition which is pending before the Apex Court. He states that in case, the Special Leave Petition is allowed, petitioner will consider leading evidence. In case, the Special Leave Petition is dismissed, then, the petitioner does not want to lead her evidence as also evidence of her witnesses. He, therefore, submitted that the impugned orders may be set aside and the Petition No. B-102 of 2010 may be restored to the file of the Family Court. The statements made by Mr.Dhakephalkar, on instructions, are recorded.

7. On the other hand, Mr.Jagtiani supported the impugned orders. He submitted that after passing of the order dated 21/11/2013 in Writ Petition No. 7615 of 2013 and Writ Petition No. 8555 of 2013, the petitioner has filed her affidavit of evidence Exhibit 63 on 23/09/2013. She, however, did not remain present for facing cross examination on number of dates. On 26/09/2013, she filed application Exhibit 65 for taking her cross examination by video

conferencing and the said application was rejected on 15/04/2014. In other words, the Family Court insisted petitioner to remain present before it for facing cross examination. The petitioner remained absent even thereafter and finally on 19/08/2014, the Court had given last chance for facing the cross examination. The applications at Exhibits 86 & 87 were rightly rejected by the Family Court. He submitted that the parties have to be treated on equal footings. He submitted that on 22/08/2013, the evidence of the respondent was closed for his remaining absent for facing cross examination. Similar treatment is given by the Family Court while dismissing the petition as the petitioner remained absent and did not face cross examination. He submitted that in fact, the petitioner filed purshis on 09/05/2014 placing on record that she would remain present on 30th & 31/05/2014 as per her convenience. The matter was thereafter placed on 27/05/2014 and thereafter on 30/05/2014 as per purshis given by her. Despite that, she failed and neglected to appear before the Court. The Court showed leniency and matter was placed for cross examination on 21/06/2014. On 27/05/2014, application was made on her behalf on the ground that travel ban is still on the child and the respondent should lift it. The said application was also rejected on 30/05/2014. On 21/06/2014, respondent filed application Exhibit 84 for dismissal of the petition. The matter was thereafter posted on 07/07/2014 under the caption

'for dismissal'. The proceedings before the Family Court were thereafter stayed by this Court as the settlement talks were going on between the parties. The matter was thereafter adjourned on 24/07/2014 and finally on 19/08/2014. He submitted that when the respondent could not appear, the Court deemed it fit to close evidence. By the same yardstick, since the petitioner failed to appear on number of occasions, the same standard may be applied. The Family Court, after considering the material on record and applying the same yardstick, came to the conclusion that no sufficient cause was made out by the petitioner and accordingly, dismissed the application. He submitted that the Court has to decide proceedings as on the date on which the applications Exhibits 86 & 87 were decided namely, position obtaining as on 19/08/2014. That time, petitioner was ready and willing to lead evidence. Now, the petitioner cannot turn around and make statement before this Court that she does not want to lead her evidence as also evidence of the witnesses. For all these reasons, he submitted that no case is made out for invoking powers under Articles 226 & 227 of the Constitution of India.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, Writ Petition No. 7615 of 2013 which was filed challenging the orders dated 30/04/2013 and

24/07/2013 passed by the Family Court. By these orders, the Family Court directed the respondent to lead evidence first. The said orders were passed in view of the fact that the respondent admitted that the consideration amount for purchasing the suit flat was paid by the petitioner-wife. It is his case that he has reimbursed that amount and therefore, burden lies upon the respondent to establish the fact of reimbursement. It is in that context, the Family Court directed the respondent to lead evidence first. The respondent did not file his affidavit of examination-in-chief and also did not remain present for facing cross examination on 22/08/2013. Since the respondent did not remain present for cross examination on 22/08/2013, his evidence was closed. That order was also challenged by instituting Writ Petition No. 8555 of 2013. Both these petitions were disposed of by common judgment and order dated 21/11/2013 and the petitions were dismissed with costs quantified at Rs.50,000/-. It is not in dispute that aggrieved by these decisions, respondent has instituted Special Leave Petition which is pending before the Apex Court.

9. The moot question is whether in the circumstances, petitioner is required to lead evidence to establish her case. In view of the decision of this Court dated 21/11/2013 in Writ Petition No. 7615 of 2013 & Writ Petition No. 8555 of 2013, Mr.Dhakephalkar stated that at present, the petitioner does not want to lead her

evidence and evidence of her witnesses and that the petitioner will consider her position subject to the outcome of the proceedings pending before the Apex Court. Perusal of the impugned orders shows that the Family Court rejected the applications Exhibits 86 & 87 as also Civil Misc. Application No. 206 of 2014 on the ground that the petitioner is not facing cross examination. In view of the statement made by Mr.Dhakephalkar that at present, the petitioner does not want to lead her evidence as also evidence of her witnesses, in my opinion, the impugned orders are required to be set aside. In fact, in my opinion, the question viz. whether the petitioner is required to lead evidence or not should have been examined by the Family Court, more so in view of the order of this Court dated 21/11/2013.

10. Mr.Jagtiani submitted that the Family Court applied the same yardstick to the petitioner while closing her evidence and therefore, no case is made out for interfering with the impugned orders. I do not find any merit in this submission. As noted in the order dated 21/11/2013 passed by this Court, burden lies on the respondent-husband to establish reimbursement of the consideration paid by the petitioner-wife.

11. In view thereof, the impugned orders cannot be sustained and are liable to be quashed and set aside. Petition is disposed of in the following terms.

- 1) The impugned orders namely i) the order dated 19/08/2014 below Exhibit 86 ii) the order dated 19/08/2014 below Exhibit 1 iii) the order dated 19/08/2014 below Exhibit 87 and iv) the order dated 05/12/2014 passed in Civil Misc.Application No. 206 of 2014 by the learned Principal Judge, the Family Court, Mumbai at Bandra are quashed and set aside.
- 2) Petition No. B-102 of 2010 is restored to the file of the Family Court, Mumbai at Bandra for deciding it on its own merits and in accordance with law.
- 3) The statements made by Mr.Dhakephalkar that at present, petitioner does not want to lead her evidence and evidence of her witnesses and that the petitioner will consider her position subject to the outcome of the proceedings pending before the Apex Court and that in case the Special Leave Petition is allowed, the petitioner will consider leading evidence and in case, the Special Leave Petition is dismissed, the petitioner will not lead her evidence as also evidence of her witnesses, are recorded.

12. Rule is made absolute in the aforesaid terms with no order as to costs.

13. At this stage, Mr.Rebellow orally applies for stay of further proceedings of Petition No. B-102 of 2010 for a period of 8 weeks from today. He assures that respondent will not seek further extension of time. The assurance given by Mr.Rebellow is recorded.

14. In view thereof, the Family Court will not proceed with the Petition No. B-102 of 2010 for a period of 8 weeks from today. Order accordingly.

(R. G. KETKAR, J.)

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