

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6144 OF 2017

John Tyronne Saldanha	...Petitioner
<i>Versus</i>	
Valerie Saldanha	...Respondent

WITH

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<i>Versus</i>	
Valerie Saldanha	...Respondent

Mr.Lale i/b. Mr.S.M.Shettigar, for the Petitioner.

Ms.Sumangala Biradar, for the Respondent.

CORAM : G.S.Kulkarni, J.

DATE : 8th September, 2017

ORAL JUDGMENT :

1. Rule returnable forthwith. By consent of parties, heard finally.

2. This petition under Article 227 of the Constitution of India challenges an order dated 10 January 2017 passed by the learned Judge, Family Court at Mumbai whereby the application as filed on behalf of the petitioner for issuance of witness summons to Father Joe Pereira and Dr.Menon who are stated to be attached to

Kripa Foundation, Mumbai, came to be rejected. The case of the petitioner is that the petitioner has filed Petition No.A-2487 of 2010 seeking annulment of marriage between him and the respondent and for a decree of divorce under Section 10(vii) and (x) of the Divorce Act,1869. The case of the petitioner as made out in the petition is in regard to the ailment which, according to the petitioner, came to be suppressed from the petitioner at the time of marriage between the parties which came to be solemnized on 26 December 2009. In regard to this ailment, there are specific averments which are made in the Divorce petition at paragraphs 27, 35 and more particularly paragraph 35(i), (k), (m) and (v). There is no need to extract these averments, suffice to observe that in paragraph 35(v) the petitioner has categorically pleaded in the petition that the respondent is getting reimbursement of money spent by the respondent for the treatment taken by her, from a NGO. Accordingly, having laid a concrete foundation that the respondent is likely to suffer from the ailment, the petitioner having received further information, moved an application in question on 29 September 2016 seeking issuance of witness summons to the said witnesses as noted above. The said application has been dismissed by the impugned order by the learned Judge of the Family Court accepting the contention of the respondent-wife that the petitioner has not pleaded any case in the

petition that the respondent was taking treatment at Kripa Foundation and what was sought by the application was the improvement in the case of the petitioner. Learned Judge in dismissing this application has observed that the matrimonial petition does not refer to the names of these witnesses from the Kripa Foundation and thus, there was no relevancy which can be found in the application as moved on behalf of the petitioner, and accordingly, dismissed the said application.

3. Learned Counsel for the petitioner in assailing the impugned order would submit that the basic premise on which the impugned order has been passed, itself is erroneous. It is submitted that there are sufficient averments which are made in the petition which would demonstrate that the grounds on which the petitioner had sought divorce was the alleged ailment. It is submitted that after substantial efforts, the petitioner could get information as also some documents which relate to the treatment as taken by the respondent at Kripa Foundation and therefore, to prove the case which already existed in the petition, the petitioner had filed the application in question to summon the witnesses from Kripa Foundation. It is submitted that the reason to dismiss the application as contained in the impugned order, that there is no reference to the name of the

witnesses in the petition, is wholly erroneous and overlooks the basic case of the petitioner in seeking the reliefs in the matrimonial petition filed by the petitioner. It is submitted that the application as filed by the petitioner for summoning the said witnesses, was required to be allowed.

3. Learned Counsel for the respondent has opposed this petition on similar grounds on which opposition came to be made before the Family Court. It is submitted that the matrimonial petition as filed by the petitioner for divorce does not say anything about Kripa Foundation or these witnesses. It is, therefore, submitted that what is intended by the petitioner was to completely change the nature of the case as pleaded in the petition and improve his case, more particularly after the cross examination of the petitioner is already concluded. My attention is also drawn to the relevant extracts of the cross examination of the petitioner to contend that the petitioner could not produce any material to support his contention. It is, therefore, submitted that the petition deserves to be dismissed. In support of the above contentions, learned Counsel for the respondent has placed reliance on the decision of Delhi High Court in the case “*Prakash Rattan Lal Vs. Mankey Ram*”¹ to contend that in

¹ (2010)ILR 3 Delhi 315

paragraph 4 of the decision, the Court has observed that the parties are required to lead evidence limited to their pleadings and the parties who are leading evidence cannot travel beyond pleadings, failing which the sacrosanctity of pleadings would come to an end and the entire purpose of filing pleadings also stand defeated.

4. I have heard the learned Counsel for the parties and with their assistance, I have also perused the impugned orders and the relevant documents as placed on record. At the outset, it may be observed that perusal of the averments as made in the petition as filed before the family Court, would clearly indicate that the basic case of the petitioner in seeking a decree of divorce was on the ground of an ailment suffered by the respondent as alleged by the petitioner. There were specific averments made in the petition which as pointed out on behalf of the petitioner, were of substance to accept the case of the petitioner that what was intended by the application in question, was examine these witnesses to bring on record evidence to substantiate the case which was already pleaded. A perusal of the averments in the petition would clearly indicate that it is not a new case which was being pleaded by the petitioner to allege such ailment. In fact as noted above in paragraph 35(v), there is specific reference to the medication for the ailment and reimbursement of

money through a NGO. The petitioner has also received documents which supports the pleadings, which can be proved, according to the petitioner, by examining the said witnesses. If this be the case, then, surely the reasons as recorded in the impugned order to dismiss the application as filed by the petitioner, cannot be accepted. The observations of the learned Judge of the Family Court, in the impugned order that for summoning these witnesses, it would actually require specific pleadings, mentioning the names of the witnesses or the name of Kripa Foundation with which institute the witnesses are associated, are not well founded. In my opinion, the basic case of the petitioner that respondent is suffering from this ailment and in that regard, she is receiving treatment as also reimbursement from NGO was a sufficient foundation to sustain the petitioner's application for summoning the said witnesses. The reasoning as set out by the learned Judge of the Family Court in the impugned order and more particularly in paragraph 3, in my opinion, does not stand the test of law even as Order XVI Rule 1 of the CPC would contemplate. Merely because the names of these witnesses were not furnished initially, it does not mean that the petitioner can never be allowed to examine these witnesses. The Court would always exercise discretion considering the facts and circumstances of the case and judiciously, in considering such applications, as the one

in question. This is a case where the petitioner had set out his purpose for which he intends to examine these witnesses.

5. As regards the contention as urged on behalf of the respondent as now the cross examination of the petitioner was concluded and that even in the cross examination, there is no support which can be found to sustain such application, also cannot be accepted. A perusal of the cross examination shows that in paragraph 82, the petitioner has clearly deposed that the petitioner had produced prescription of Kripa Foundation to show that the respondent used to buy medicine worth Rs.10,000/-, Rs.15,000/- per month. This would clearly indicate that it is not a case that the petitioner without any basis, or trying to improve his case, has filed the application. In any event the cross examination of the petitioner appears to have been concluded on 17 December 2016 whereas the application in question to summons the said witnesses came to be filed on 29 September 2016 that is much before the cross examination of the petitioner would be concluded. In the fact situation, it would have been appropriate for the learned Judge of the Family Court to decide this application before proceeding with the cross examination, so that the parties are appropriately positioned to lead their evidence. The reliance on behalf of the respondent to the

order passed by this Court dated 14 June 2013 in Writ Petition No.11375 of 2012 dismissing the petition filed by the petitioner, against an order passed by the Family Court, where the petitioner's prayer before the Family Court, for medical examination of the respondent, was rejected, would not assist the respondent. This Court considering the stage of the proceedings had declined to interfere in the said order. However, perusal of the said order passed by this Court, would clearly indicate that it can have no relevance as far as the issue in hand is concerned. The issue in hand arises on a separate and independent application, which came to be filed by the petitioner seeking prayers for summoning of the two witnesses as noted above and which has been rejected on the grounds completely unsustainable in law.

5. In the light of the above discussion, the petitions need to succeed. The application as moved on behalf of the petitioner dated 29 September 2016 to summon the two witnesses is required to be allowed. Hence, the following order:-

ORDER

1. The applications dated 29 September 2016 of the petitioner for summoning the witnesses -Father Mr.Joe Pereira and Dr.Menon of the Kripa Foundation, stand allowed. The impugned

orders dated 10 January 2017 as challenged in the above petitions, are set aside.

2. Learned Judge of the Family Court shall endeavour to complete the evidence in respect of the said witnesses after granting an opportunity to the respondent to cross examine the said witnesses. The entire exercise be undertaken within a period of three months from today.

3. The petitions are allowed in the above terms. No costs.

[G.S.Kulkarni, J.]