

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION STAMP NO.34033 OF 2016
ALONGWITH
WRIT PETITION STAMP NO.35920 OF 2016**

Sabita Maria Burges

..Petitioner

Versus

Mark Lionel Burges

..Respondent

Mr. Rohaan Cama i/by Ms. Sapana Rachure for the Petitioner in both the Writ Petitions.

Mr. Pradip Chavan a/w Mr. Ashwin Borhade i/by Pradip Chavan & Associates for the Respondent in both the Writ Petitions.

**CORAM : R. M. SAVANT, J.
DATE : 17th JANUARY, 2017**

PC.

1 The above Petitions arise out of the orders passed by the Learned Judge of the Family Court No.2, Mumbai, in the Marriage Petitions filed by the Petitioner herein and the Respondent in the said Court. The said Petitions are A-2729 of 2009 and Petition No.B-2 of 2010. The wife has filed Petition No.A-2729 of 2009 for judicial separation in which a counterclaim for divorce has been filed by the Respondent. The Respondent has filed Petition being No.B-2 of 2010 seeking reliefs relating to the right to reside in the matrimonial home and for a declaration.

2 It is not necessary to further dilate on the relief sought in the said Petitions.

Suffice it would be to state that by order dated 10.05.2016 the cross-examination of the Respondent husband by the Petitioner has been closed by the Learned Judge of the Family Court which can be said to be the principal order which is the subject matter of the above Petitions, alongwith the incidental and other orders, reference to which would be made hereinafter. In so far as the Writ Petition Stamp No.34033 of 2016 is concerned, the orders impugned are, the order dated 28.04.2016 passed on Exh.68, order dated 16.06.2016 passed on Exh.137, order dated 23.11.2016 passed on Exh.167, order dated 29.11.2016 passed on Exh.102 and order dated 01.12.2016 passed on Exh.173. In so far as the Writ Petition Stamp No.35920 of 2016 is concerned, the two orders which are challenged are the orders dated 02.12.2016 and 15.12.2016 by which orders the various applications filed by the Petitioner came to be rejected on the ground that the cross-examination of the Respondent has been closed vide order dated 10.05.2016 and since the said applications were to be decided after the cross-examination is complete, in view of the closure of the cross-examination, some of the applications have turned infructuous which are mentioned in the said order dated 15.12.2016. In so far as the order

dated 02.12.2016 the same is passed on Exh.123 and Exh.147 for striking of the defence of the Respondent herein which applications have been rejected.

3 The said order dated 10.05.2016 was passed by the Learned Judge of the Family Court in view of the fact that in spite of opportunities being granted, the Petitioner was not proceeding with the cross-examination of the Respondent and since the Petitions were more than five years old at the said relevant time, no further opportunity could be granted to the Petitioner. By order dated 23.11.2016, the Learned Judge of the Family Court has held that the applications filed by the Petitioner would be decided after the conclusion of the cross-examination of the Respondent. In so far as the said applications are concerned, the same find a mention in the application Exh.167 dated 26.10.2016, which are as under :-

- “(a)113: application to near Exh.68 for production of documents.
- (b)114: application to modify order dated 18.12.2015 directing me to pay the Court Commissioner's fees.
- (c) 123: application for striking of defences of the Respondent.
- (d)125: application to issue witness summons to the Respondent's bank HSBC for his bank statements.

- (e)126: application for amendment of redrafted issues in Petition A-2729/2009.
- (f)127: application to issue witness summons to the Respondent's company AET for his salary slips, bonus slips, incentives and increments give to the Respondent and copies of his passport to show the time spent overseas on board the ship.
- (g)140: application to hear Exhibits 68, 113, 125, 127 on production of documents of the Respondent.
- (h)141: application seeking details of medical insurance taken out by the Respondent's Company for myself and the children.
- (i)145: application for redrafting of issues of Petition B-2/2010.
- (j)146: application to recall the Petitioner's witnesses.
- (k)147: further application for striking of defences.
- (l)150: application to direct the Respondent to produce his income tax returns.
- (m)151: application to issue witness summons to the Respondent's bank to produce standing instructions given by the Respondent to his bank.
- (n)55: application for to cross-examine the Respondent in Petition B-10/2010 only.”

4 However the Petitioner in the instant Petition has out of the said applications culled out about five applications which are mentioned in a table appearing after ground (gg) at page 15 of the Petition. The said

five applications are Exh.68, Exh.125, Exh.127, Exh.150 and Exh.151. In so far the application Exh.125 and Exh.151 are concerned, they are relating to the issuance of witness summons to the Bank officials. In my view, the said applications can be clubbed together. However the Learned Counsel appearing on behalf of the Respondent Mr. Pradip Chavan states that the Respondent has placed on record his salary slip for the month of July 2015 and the Bank statements on record in the reply filed to the application filed by the Petitioner under Order XXXIX Rule 11 of the Civil Procedure Code. In my view, considering the applications and the object mentioned therein i.e. for issuance of witness summons, the aforesaid five applications ought to have been decided prior to the cross-examination of the Respondent being completed. In so far as the Respondent is concerned, it would be open for him to take such defences as are available in reply to the said applications.

5 In so far as the order dated 15.12.2016 is concerned, it would stand set aside and the applications covered by the said order would stand restored and be decided de-novo by the Learned Judge of the Family Court prior to the cross-examination of the Respondent in terms of the directions issued in the instant order.

6 In so far as the order dated 02.12.2016 is concerned, in my

view, there is no merit in the challenge to the said order rejecting the applications Exh.123 and Exh.147 for striking of the defence having regard to the fact that the affidavit has been filed on behalf of the Respondent husband that he has cleared of all the arrears of maintenance by the appointed date. Hence the following directions :-

- I) The applications Exh.68, Exh.125, Exh.127, Exh.150 Exh.151 and Exh.178 would be tried by the Learned Judge of the Family Court within two weeks from the date when the parties appear before the Family Court since the pleadings are complete. In so far as the other applications are concerned, the Learned Judge to decide the same at the time deemed appropriate by him. The parties would appear before the Family Court on 23.01.2017.
- II) After the said applications being decided and contingent upon the decision, the cross-examination of the Respondent husband would commence. Since the Respondent is sailing, the cross-examination would have to be done by Skype as was the procedure on the earlier occasion when the Respondent was sailing, through the Court Commissioner appointed for the said purpose. The cross-examination

would be completed within three days of its commencement and the Court Commissioner would see to it that the cross-examination is not unnecessarily delayed. The Court Commissioner may conduct the cross-examination as per the time convenient to the Respondent which should be the time convenient to the Petitioner also, considering the time zones. The costs of the Court Commissioner to be borne by the Petitioner.

III) The parties would not ask for unnecessary adjournments and the Petitioner would not file any further applications which would result in delay of the matter.

IV) The Family Court would be within its power to see to it that the applications are decided and the cross-examination is completed within the time frame stipulated by this Court.

V) The Family Court would therefore now not proceed on the basis of its earlier order that the Petitions would be heard on 25.01.2017.

VI) After the evidence is complete, the Family Court would undoubtedly hear the parties and decide the Petitions on

(912)-WPST-34033 & 35920-16.doc.

their own merits and in accordance with law uninfluenced
by any observations made in the instant order.

7 With the aforesaid directions, the Writ Petitions are disposed
of.

[R.M.SAVANT, J]