

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

WRIT PETITION NO. 7111 OF 2018

Anirudha Herwadkar
aged 41 years, Indian inhabitant,
residing at 93-C, Vidharbha Samrat,
Flat No.4, V.P. Road, Vile Parle (West),
Mumbai-400 056.

... Petitioner

V/s.

Namita Herwadkar
aged 37 years, Indian inhabitant,
residing at 31/B-7, Manish Nagar,
J.P. Road, Andheri (West),
Mumbai-400 053.

... Respondent

Ms. Veena Thadhani a/w Mr. Vishal Thadhani a/w Ms. Priyanka Raul a/w
Ms. Chaitali Gosavi for the Petitioner.
Mr. Vivek B. Panday for the Respondent.

CORAM : K.K. SONAWANE, J.

DATE : 18th JULY, 2018.

JUDGMENT :

1 Heard.

2 Rule.

3 Rule made returnable forthwith. The matter is taken up for final
hearing on merit with the consent of both sides. The present Writ Petition is
directed against the impugned order passed below Exh.1 dated 04.06.2018

and another order for appointment of Court Commissioner passed below Exh.1 dated 20.04.2018 by the learned Judge of the Family Court, Mumbai. Petitioner husband has preferred the present Writ Petition and agitated the validity and legality of both the impugned orders of the Family Court in matrimonial dispute pending between the spouses for dissolution of marriage and for custody of minor child.

4 The marriage of the Petitioner and the Respondent was solemnized on 23.11.2007. After the marriage, Respondent-wife joined the company of husband for cohabitation at matrimonial home. Respondent-wife begotten a female child “Janhavi” during wedlock from Petitioner-husband. But, there was marital discord in between the spouses resulting into their separate residence since February 2002. Meanwhile, the Petitioner-husband filed Petition No.A-1608 of 2012 for dissolution of marriage before the Family Court, Mumbai, whereas the Respondent-wife also instituted another Petition bearing No.D-77 of 2012 for custody of minor child. In view of nature of the subject matter the learned Trial Judge of the Family Court preferred to club and consolidate both the proceeding together for simultaneous hearing and its adjudication on merit jointly and in common for the sake of conviction and also to avoid conflict finding if any, on record. The order of clubbing both the Petitions came to be passed on

30.01.2014. Unfortunately, since then there was no effective and significant progress into the matter up till this date for its decision on merit. The record adumbrates that the parties to the present proceedings are more prone to drag each and every order of the Family Court to High Court on one or other pretext. The present Writ Petition is also one of the fallout of same endeavour on the part of Petitioner-husband.

5 Be that as it may, the Petitioner-husband put in controversy the impugned order passed by the Family Court dated 04.06.2018 below (Exh.1). It has been contended that this Court under order dated 16.03.2018 in Writ Petition No.9832 of 2017 categorically observed in para No.5 that :

“5. At this stage, the learned counsel for the respondent makes a statement that she does not have any hesitation in filing her affidavit in examination-in-chief on the next date of hearing i.e. 20th April 2018. This, however, is subject to rider that since the examination-in-chief of the husband is already on record, he will be subjected to cross-examination first. The learned counsel for the petitioner has no grievance about this and agrees for the same.”

6 According to the learned Counsel for the Petitioner-husband, in view of aforesaid mandate of this Court under order dated 16.03.2018, it was incumbent on the part of Respondent-wife to file her affidavit in lieu of examination-in-chief in the Petition filed on behalf of husband for dissolution of marriage and thereafter only the Petitioner-husband would be liable for

cross-examination on behalf of Respondent-wife. The learned Counsel for Petitioner-husband explained the circumstances in detail and submits that the Respondent-wife has already adduced the evidence of expert witness Dr. Ashish Sheth in the proceeding bearing No.D-77 of 2012 filed on her behalf seeking relief for custody of minor daughter. But, the Respondent-wife did not file her own affidavit by way of examination-in-chief or affidavit of any other witnesses in support of her defence in the proceeding filed on behalf of Petitioner-husband. She did not file her affidavit of examination-in-chief for custody of the daughter. Hence, Petitioner-husband insisted for directions to the Respondent-wife to submit her affidavit in lieu of examination-in-chief in the proceeding pending before the Family Court to facilitate him to step into the witness box for cross-examination on behalf of Respondent-wife. But, the learned Judge of the Family Court found reluctant to nod in favour of Petitioner-husband and turned down the request on the part of petitioner-husband for directions to the Respondent-wife to file affidavit in lieu of examination-in-chief on record prior to his cross-examination in the proceeding. In the result, the learned Family Court passed the impugned order which is the subject matter of present Writ Petition.

7 The learned Counsel for Respondent-wife raised the objection and submits that the impugned order of the Family Court under challenge is

just, proper and reasonable. There is no error or illegality committed on the part of learned Judge of the Family Court. It has been rightly held that the Petitioner-husband shall begin with his evidence in the proceeding filed on his behalf for dissolution of marriage under Section 13 of the Hindu Marriage Act. The Petitioner-husband has no right to insist for affidavit in lieu of examination-in-chief of the Respondent-wife prior to his cross-examination into the matter.

8 Admittedly, there are two different and independent proceedings for distinct relief bearing No.A-1620 of 2012 filed for divorce by the Petitioner-husband whereas another proceeding bearing No.D-77 of 2012 instituted by the Respondent-wife for custody of minor daughter. The learned Trial Judge of the Family Court ventured to get both the matters clubbed for simultaneous hearing and its adjudication on merit for avoiding complications and conflict findings if any, into the matter. But it reveals that the parties to the proceedings, taking disadvantage of the situation attempted to protract the matter on one or other pretext and approached to this Court time and again.

9 It is an admitted fact that the Petitioner-husband has filed his affidavit by way of examination-in-chief jointly and in common in both the proceedings. It is also not denied that the Respondent-wife adduced

evidence of one expert witness Dr. Ashish Sheth in the proceeding filed on her behalf for custody of the minor daughter. Thereafter, the Petitioner-husband submitted an application for direction to the Respondent-wife to file her affidavit in lieu of examination-in-chief. The application was rejected by the learned Judge of the Family Court under order dated 03.04.2017. Moreover, the right to lead evidence in the proceeding by the Petitioner-husband also came to be forfeited and the learned Judge of the Family Court closed the evidence of Petitioner-husband by order dated 24.07.2017. Both these orders were challenged before this Court in Writ Petition No.9832 of 2017. However, during the course of hearing, the learned Counsel for the Respondent-wife agreed to file the affidavit of the Respondent-wife in lieu of examination-in-chief on the next date of hearing i.e. 20.04.2018. It was also observed that as the examination-in-chief of Petitioner-husband has already been produced on record, he will be subjected to cross-examination first at the point of time. The learned Counsel for the Petitioner-husband shown inclination for the same and, therefore, this Court disposed of the aforesaid Writ Petition with the specific observations as referred in para No.5 mentioned above.

10 Pursuant to aforesaid guidelines delineated by this Court under order dated 16.03.2018 in Writ Petition No.9832 of 2017 the learned Judge

of the Family Court, Mumbai, proceeded to deal with the matter for cross-examination of the Petitioner-husband on behalf of Respondent-wife first on the point of time and thereafter he was to deal with the directions in regard to filing of affidavit in lieu of examination-in-chief on behalf of Respondent-wife. But, once again the Petitioner-husband insisted for filing the affidavit in lieu of examination-in-chief of the Respondent-wife prior to his cross-examination on behalf of Respondent-wife. It appears that the Petitioner-husband attempted to misconceive the directions issued by this Court under order dated 16.03.2018 and once again bent upon for filing the affidavit of the wife prior to his cross-examination. The findings expressed by the learned Judge of the Family Court while rebuffing the relief claimed, does appear just proper and reasonable one. It is evident that there was no complication or ambiguity in the order passed by this Court dated 16.03.2018. It has been made clear that the affidavit in lieu of examination-in-chief of husband has already been filed on record, therefore, his cross-examination was essential to be completed first on the point of time and, thereafter, the issue of filing of affidavit by way of examination-in-chief by Respondent-wife would be dealt with. In case, the Respondent-wife failed to file affidavit in lieu of examination-in-chief on record, obviously it would create legal complications for her to establish the claim within ambit of law. In view of provisions of order XVIII Rule 1 to 4 of the Civil Procedure Code as

well as the provisions of Sections 137 and 138 of the Evidence Act, when the Petitioner-husband has filed affidavit by way of examination-in-chief on record in divorce proceeding he is liable to be cross-examined by his opponent. It is the rule of law that the examination-in-chief of the witness alone without his cross-examination, is incomplete statement of witness and not admissible for appreciation to determine the matter-issue-in on record. In such premise, it reveals that the contentions put forth of Petitioner-husband agitating the validity of impugned order passed below Exh.1 on 04.06.2018 appears to be preposterous and incomprehensible one. It is fallacious to appreciate that the Respondent-wife should be insisted to file her affidavit by way of examination-in-chief in the proceeding prior to cross-examination of the husband. It would be reiterated that the relief claimed on behalf of husband is for dissolution of marital relations whereas the Respondent-wife claimed custody of the minor daughter following marital discord. In view of nature of the subject matter, the impugned order passed by the learned Judge needs no interference. Hence, the Writ Petition to that effect being devoid of merit deserves to be dismissed.

11 Now turning to the another spectrum of the matter in regard to appointment of Court Commissioner under order dated 20.4.2018 by the learned Family Court, Mumbai, it appears that the impugned order came to

be passed unilaterally in absence of both the parties. Learned Judge of the Family Court proceeded to pass the impugned order by giving much more emphasis on the order passed by this Court in Writ Petition No.9832 of 2017 for appointment of Court Commissioner within a period of 15 days. It is true that there was an endeavour on the part of learned Judge of the Family Court to comply with the directions issued by this Court. But, the Petitioner-husband ventilated the grievance that the impugned order came to be passed in their absence which cause prejudice and injustice to them. Moreover, he raised objection in regard to the name of Court Commissioner, who has been appointed by the concerned Judge of the Family Court. In such circumstances, there is no impediment to relegate back the issue of appointment of Commissioner once again to the concern family Court for its hearing afresh and decision after giving reasonable opportunity to both parties to the proceeding. Hence, impugned order below Exh.1 dated 20.04.2018 for appointment of Advocate Rupali Ghogle as Court Commissioner, stands revoked and upset. The learned Judge of the Family Court is hereby directed to adjudicate the issue of appointment of Court Commissioner for verification the transcript and audio- video recordings etc. placed on record on behalf of Respondent-wife, afresh. The reasonable opportunity of hearing be given to both the parties of the Petition.

12 In view of aforesaid discussion, the Writ Petition stands partly allowed in above terms. No order as to costs.

Date : 18th July 2018.

(K.K. SONAWANE, J.)

13 At this juncture, the learned Counsel for Petitioner-husband prayed to give respite to the order of dismissal of Writ Petition seeking directions to the Respondent-wife for filing her Affidavit in lieu of examination-in-chief. The learned Counsel added that the Petitioner-husband is intending to approach to the appellate forum to get redress his grievance. The learned Counsel for Respondent-wife opposed the contentions put forth on behalf of Petitioner-husband. In view of nature of the subject matter, it would justifiable to afford reasonable opportunity to the Petitioner-husband to approach to the appellate forum against the present order. Hence, the order of rebuffing the relief for directions to wife to file Affidavit by way of examination-in-chief be kept in abeyance up till 06.08.2018 to facilitate the Petitioner-husband to take recourse of law for redressal.

(K.K. SONAWANE, J.)