

Santosh

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

WRIT PETITION NO. 9832 OF 2017

Anirudha Herwadkar

... Petitioner

versus

Namita Herwadkar

...Respondent

Mr. Veena Thadhani, a/w Mr. Vishal Thadhani, Ms. Priyanka Raut and Ms. Chaitali Gosavi, for the Petitioner.

Mr. Vivek B. Pandey, for the Respondent.

CORAM : SMT. BHARATI H. DANGRE, J

DATE : 16th MARCH, 2018.

P.C. :-

1. The present writ petition filed by the husband impugns two orders passed by the Family Court, Bandra. The first order being an order passed below Exhibit-128 in petition No. D-77/2012 dated 3/4/2017 and another common order below Exhibit-67 and Exhibit-68 on 24/3/2017 in Petition No. A-1608/2012.

2. The order dated 3rd April, 2017, rejects the application filed by the respondent-husband to direct the petitioner to file affidavit in lieu of examination-in-chief for other witness in D-77/2012 filed by her despite the fact that the evidence of the respondent has already commenced with recording evidence of expert witness Dr. Ashish Saith.

3. By the order dated 24/7/2017, the Family Judge has rejected application Exh.67 filed by the petitioner-husband and allowed the application Exh.68 filed by the husband. The Court has held that the petitioner-husband has failed to face cross-examination and his right to lead evidence is forfeited and his evidence is closed.

4. In paragraph 3 of the order passed on 3/4/2017, the learned Judge Family Court observed that two matters have been clubbed for the sake of convenience as the parties are same, allegations and counter allegations are same in both the matters in order to avoid complicated decision. Since the husband of the petitioner is in earlier point of time, he is ready to begin the evidence and then the wife can be asked to lead her evidence and for practical purposes the oral evidence of both parties can be kept in respective case or in one case but

in any case each party will give opportunity to cross-examine the rival party on only one occasion. The Court observed that the husband has filed affidavit-in-examination-in-chief so he will be cross-examined first and allowed to lead further evidence and then the wife will lead evidence. Unless and until the evidence of the husband is over, the wife cannot be asked to file her affidavit in lieu of examination-in-chief. With the said observation Exh.128 came to be rejected.

5. On hearing learned counsel for the parties, at considerable length of time, it appears that the petitioner-husband has filed Petition No.A-1608/2012 seeking divorce and continuation of the custody of the minor child with him whereas the respondent-wife has filed Petition No.D-77/2012 seeking the custody of the child. On 30/1/2014 the Family Court was pleased to club the petitions together since the parties to the petition being same and evidence to be adduced in both the petitions would also be same, the Court observed that conflict can be avoided if both the petitions are heard together. After recording of oral evidence in Petition D-77/2012, the respondent wife put her expert witness Dr. Ashish Seth in the witness-box and filed his affidavit in lieu of

examination-in-chief. The petitioner-husband has already filed his affidavit in evidence in lieu of examination-in-chief before the Family Court which covers both the petitions A-1608/2012 and D-77/2012. The respondent wife who is a petitioner in petition No. D-77/2012, however, has not filed affidavit in lieu of examination-in-chief of any other witness, despite cross-examination of her witness Dr. Ashish Seth had already commenced. The petitioner therefore moved Exh.128 praying that the petitioner in Petition D-77/2012 i.e. the wife should be directed to file her affidavit in lieu of examination-in-chief as well as that of other witnesses in support of her case, if she wish to lead further evidence. At this stage, the learned counsel for the respondent makes a statement that she did not have any hesitation in filing her affidavit in examination-in-chief. 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. Considering the statement made by the learned counsel for the petitioner and the respondent, the grievance raised in

the present petition filed by the petitioner-husband no longer survives and the writ petition deserves to be disposed of.

7. This Court would, however, observe that the battle for custody of the child, age 7 years, is pending for adjudication since 2012, which is a considerable long period of time. The learned counsel for the parties have invited the attention of this Court to the interim order passed by this Court by which the child has been referred to the Child Psychologist and the report of the Psychologist was called. The preliminary report came to be submitted before this Court, however, the final report of Psychologist is awaited and it is informed by the learned counsel for the parties that the counselling sessions of the child along with the mother as directed by this Court are in progress. The learned counsel for the petitioner has also invited my attention to order dated 3/4/2017 passed by the Family Court below Exh.127 on 3/4/2017 on an application for appointment of Commissioner to verify the contents in audio-video recording and transcript given by the respondent. The application has been allowed and the Commissioner has been appointed for verifying the contents of audio-video recording and the transcripts. The parties were directed to give names of

the Commissioner and it is informed that the parties are at the stage of finalising the name of the Commissioner.

8. This Court while dealing with Writ Petition No.5700 of 2017, had thought, it is appropriate to refer the child to a Child Psychologist for ascertaining her behavioural issues and the preliminary report has been placed on record and final report is awaited. The said report be now permitted to be tendered before the Family Court since the parties are relegated to the Family Court for decision on main petition. It is directed that the said report be tendered by Dr. Malini Yadav, to the Family Court in the proceedings pending before it.

9. Taking into consideration, the aforesaid backdrop, the following order would serve the ends of justice.

(a) The proceedings instituted by the Petitioner as well as the Respondent should be dealt with expeditiously and the learned Family Court is requested to complete the proceedings on or before 15th December, 2018. An attempt should be made to complete proceedings within the stipulated period and both the parties are directed to co-operate with

the Judge, Family Court, for conclusion of the said proceedings within the stipulated period.

- (b)** The order passed below Exhibit-127, should be implemented by the Family Court by appointing a Commissioner forthwith and not later than a period of 15 days, thereafter the Commissioner would be permitted to address the issue which has been referred to, in the order dated 30th April, 2017.
- (c)** The Judge, Family Court, is directed to obtain the final report from the Child Psychologist as expeditiously as possible though the preliminary report of the Psychologist was placed before this Court, it would be appropriate for the Family Court to seek the final report since the proceedings between the parties are being dealt with by the Family Court and it would be finally determined as to whether the petitioner or the respondent is fit to retain the custody of the child.
- (d)** The interim report of the Psychologist which has been submitted to this Court may be permitted to

be inspected by the parties.

(SMT. BHARATI H. DANGRE, J)