

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.4175 OF 2018

Jagruti Samir Bhatia ... Petitioner
Vs.
Sameer @ Samir Girish Bhatia and another ... Respondents

Ms Seema Sarnaik and Mr. Ameya Tamhane for Petitioner.
Mr. Yogendra M. Kanchan for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 29, 2018

P.C. :

Heard Ms Sarnaik, learned Counsel for the petitioner and Mr.Kanchan, learned Counsel for the respondent No.1 at length.

2. Ms Sarnaik seeks leave to delete respondent No.2, it being a formal party. Leave as prayed for is granted. Amendment shall be carried out forthwith.

3. This Petition takes exception to the order dated 05.09.2018 passed by the learned Judge, Family Court No.2, Mumbai below exhibit-1 in Civil Miscellaneous application No.89 of 2015. By that order, the learned Judge directed the parties to rely only on affidavits without cross-examination. Rule. Mr. Kanchan waives service for the respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Petition No.A-1585 of 2010 was filed by the first respondent, hereinafter referred to as 'respondent', seeking dissolution of marriage under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 (for short 'Act'). Petition No.E-17 of 2011 was instituted by the petitioner for

maintenance under Section 125 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'). By order dated 17.07.2014, the learned trial Judge partly allowed the Petition for divorce and dissolved marriage dated 19.06.1999 solemnized between the parties under Section 13(1)(i-a) of the Act. The learned trial Judge noted that the permanent custody of elder daughter Esha born on 07.08.2002 has already been crossed over to the respondent. The permanent custody of younger daughter Riya born on 04.05.2004 was granted to the respondent with immediate effect. In so far as the maintenance petition instituted by the petitioner is concerned, the learned trial Judge directed the respondent to pay maintenance inclusive of rent @ Rs.40,000/- per month with effect from 01.07.2014 to the petitioner. The respondent was further directed to pay litigation expenses of Rs.15,000/- to the petitioner and bear his own. The petitioner is also entitled to access as already agreed and regularly acted upon i.e. every alternate Saturdays-Sundays with over night stay and 50% vacations and 50% on birthdays of the daughters and the petitioner herself. Aggrieved by this decision, appeals are instituted by the petitioner alone in this Court and the said appeals are pending.

5. The petitioner has filed Miscellaneous Application No.89 of 2015 under Section 127 of Cr.P.C. inter alia praying for directing the respondent to arrange for a permanent accommodation of not less than one bedroom, hall, kitchen (above 600 sq.ft. carpet area) on an ownership basis close to the vicinity of Murli Mahal, Bhaudaji X Road No.10, Near King's Circle, Matunga, Mumbai (for short 'said premises') or in the alternative, to give possession of one bedroom, hall, kitchen, toilet of flat No.7 or 8 of the said premises. The petitioner has also sought maintenance of Rs.60,000/-per month for herself. Pending the hearing and final disposal of that application, petitioner sought direction to the respondent to pay Rs.60,000/- as rent per month for leave and licence accommodation as well as pay for the deposit of leave and

licence accommodation of the flat situate in the vicinity of the said premises. During the pendency of this application, petitioner filed application at exhibit-13 for interim relief. Respondent filed reply exhibit-14 resisting that application. Respondent also filed Miscellaneous Application No.10 of 2016 under Section 127 of Cr.P.C. for reduction of maintenance amount from Rs.40,000/- per month to Rs.6,500/- per month due to change of circumstances. The learned trial Judge has framed the issues on 25.04.2017.

6. In the impugned order, the learned trial Judge recorded that respondent has no objection if the parties rely on affidavits sans without cross-examination. Counsel for the petitioner however, submitted that she has no objection to rely on affidavits but she wants to show to the Court that the documents relied by the respondent are fabricated. She, therefore, wants to cross-examine the respondent to demonstrate about his true income and other changed circumstances. By the impugned order, the learned trial Judge held that application can be decided on affidavits. Entering into full trial by cross-examination would protract the matter and delay the justice. Parties were directed to file their affidavits and affidavit of witnesses and documents. There will be no cross-examination of parties or witnesses as only issue of changed circumstances is to be decided. It is against this order, the petitioner has instituted the present Petition.

7. In support of this Petition, Ms Sarnaik relied upon Sections 125, 126 and 127 of Cr.P.C. Section 126 lays down the procedure to be followed while dealing with proceedings under Section 125. Section 127 lays down that on proof of a change in the circumstances of any person, receiving a monthly allowance under Section 125 for the maintenance or interim maintenance, the Magistrate may make such alteration, as he

thinks fit. She, therefore, submitted that the alteration can be made only upon a proof of the change in circumstances. The truth can be elicited only upon cross-examination of the witnesses. She submitted that the learned trial Judge was not justified in observing that the application can be decided on affidavits and entering into full trial by cross-examination would protract the matter and delay the justice. She submitted that the respondent has not challenged the order dated 17.07.2014 passed by the learned trial Judge directing him to pay Rs.40,000/- per month towards maintenance, inclusive of rent with effect from 01.07.2014. Thus, there is no question of delaying the trial as observed by the learned trial Judge.

8. On the other hand, Mr. Kanchan supported the impugned order. He invited my attention to Section 10 of the Family Court's Act, 1984. Sub-section (1) thereof lays down that subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (for short 'C.P.C.') and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Cr.P.C.] before a Family Court and for the purposes of the said provisions, a Family Court is deemed to be a civil court and has all the powers of such court. Sub-section (2) thereof lays down that the provisions of Cr.P.C. and the rules made thereunder shall apply to the proceedings under Chapter IX of Cr.P.C. before a Family Court. Sub-section (3) thereof lays down that nothing in sub-sections (1) or (2) shall prevent a Family Court from laying down its own procedure with a view to arriving at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other. Thus, under sub-section (3) of Section 10, Family Court is empowered to lay down its own procedure with a view to arriving at a settlement in respect of the subject matter of the suit or

proceedings or at the truth of the facts alleged by the one party and denied by the other. In the present case, the learned trial Judge thought it appropriate that the parties could prove their case only by filing affidavits and not by cross-examining so that the trial is not protracted. He, therefore, submitted that no fault can be found with that order. In support of this proposition, he relied upon decision of this Court in **Aniket Subhash Tupe Vs. Piyusha Aniket Tupe, 2018 SCC OnLine Bom. 601.**

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Section 125 of Cr.P.C. in so far as it is relevant for the present controversy reads thus,

“125. Order for maintenance of wives, children and parents.-

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, **upon proof of** such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

(emphasis supplied)”

10. Section 126 lays down the procedure. The relevant portion, in so far as the present controversy is concerned, reads thus,

“126. Procedure.-(1) Proceedings under section 125 may be taken against any person in any district-

- (a) where he is, or
- (b) where he or his wife resides, or
- (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases.

(emphasis supplied)”

11. Section 127(1) reads thus,

“127. Alteration in allowance.- (1) **On proof of a change in the circumstances of any person,** receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(emphasis supplied)”

12. A perusal of Sections 125, 126 and 127 shows that in order to fix the interim maintenance, it is necessary for the party to prove neglect or refusal [Section 125(1)]; Section 126(2) lays down that all evidence to proceedings under Section 125 shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made and shall be recorded in the manner prescribed for summons-cases. Section 127(1) lays down that on proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the

allowance for the maintenance or the interim maintenance, as the case may be. In other words, the only upon a proof of change in circumstances, the Magistrate is empowered to make alterations in allowance for maintenance or interim maintenance, as the case may be.

13. Mr. Kanchan relied upon the decision in **Aniket Subhash Tupe** (*supra*). In that case, the question that arose for consideration was whether Section 28(2) of the Protection of Women from Domestic Violence Act, 2005 (for short 'D.V. Act') enables the Court to permit the parties to file affidavit of evidence in the proceedings filed under Section 12 of the D.V. Act. After considering the rulings cited before the Court, in paragraph 29, it was observed that “keeping in mind the aim and object of the Act and scope of Section 28(2), the Court can deviate from procedure prescribed under Sub-section (1) of Section 28 read with Rule 6(5) and devise its own procedure, which would include permitting evidence by say of an affidavit. In other words, the Court in its discretion can allow evidence on affidavit and permit cross-examination to test veracity of the evidence”. In my opinion, the finding recorded in paragraph 29 supports the case of the petitioner herein rather than the case of the respondent. In my view, the learned trial Judge was, therefore not justified in permitting parties to file only affidavit in evidence without cross-examination. It is fundamental principle that cross-examination is allowed so as to elicit the truth from the witness. It is also part of the principles of natural justice.

14. In view thereof as also having regard to the fact that the maintenance is already awarded by the trial Court by order dated 17.07.2014, which order is not stayed by this Court, the reason given by the learned trial Judge that entering into full trial by cross-examination would protract the matter and delay the justice, cannot be allowed to stand. Hence, the impugned order dated 05.09.2018 is set aside thereby

permitting the parties to cross-examine on the basis of affidavits already filed.

15. Mr. Kanchan states that the respondent is present in the Court and assures that within two weeks from today, he will file affidavit of evidence. Ms Sarnaik states that petitioner has already filed affidavit and matter was adjourned from 16.02.2018 till 05.09.2018 for her cross-examination.

16. In view thereof, the learned trial Judge will permit the respondent to file affidavit of evidence within 2 weeks from today and will permit the parties to cross-examine each other and witness, if any. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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