

SAS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12992 OF 2018

Janvit Talwar,
Aged: 35 years, Occ: Service,
R/at 506, Ayesha Co-op. Society,
Marol Maroshi, Andheri (E),
Mumbai-400 059 ..Petitioner.

V/s.

Vikas Talwar,
Aged: 33 years, Occ: Service,
R/at Rushab Apartments,
B-204, Flat No.205, 7 Bungalows,
Andheri (W), Mumbai-400 058. ..Respondent.

Ms.S.P. Kode for the petitioner.

Ms.T.F.Irani with Ms.Disha Shetty for the respondent.

CORAM: M.S.SONAK, J.

DATE : DECEMBER 12, 2018

ORAL JUDGMENT

Heard learned counsel for the parties. Rule.

2. Rule is made returnable forthwith with consent and at the request of the parties, heard finally.

3. The challenge in this petition is to the order dated October 22, 2018 made by the Family Court, Mumbai which declined that the petitioner's evidence cannot be considered, since, she has failed to present herself for cross-examination. The order dated October 22, 2018 reads as under :-

*“Vikas Talwar V/s. Janvi Talwar
Civ. M.A.150/2015 & 171/2015
R.W.1, Exh-114& 114-A*

**Further cross examination of R.W.1 resumed on S.A. By
Adv. Smt. Irani:-**

The respondent R.W.1 called repeatedly but absent. Advocate Purvi Shah and Shri Yadav are also absent. Advocate of petitioner is present and ready to cross examine R.W.1. The witness is not available for facing cross examination. (This is a time bound matter. On last date direction was given to the respondent to remain present at 11.00 a.m. sharp for cross by imposing cost of Rs.1500/-. Even cost is not paid till date.

Hence, no cross order is passed and her evidence cannot be considered for not available for further cross.

*Mumbai
Date : 22-10-2018*

*(Laxman B.Magdum)
Judge,
Family Court No.5, Mumbai.”*

3. There is really no serious error in the order passed by the Family Court. There is a direction for disposal of the matter in a time bound manner, therefore, there was no justification for the petitioner to remain absent on October 22, 2018. In this case, there was a specific direction on the previous date to the petitioner to remain present and even costs of Rs.1,500/- was imposed. Despite all these, the petitioner remained absent and, therefore, the learned Family Court had no option then to make the impugned order.

4. Learned counsel for the petitioner, however, explains that there was certain difficulty to attend the Court on October 22, 2018. Though the explanation does not inspire confidence, the assurance of learned counsel for the petitioner that the petitioner would positively attend the Court on the next date i.e. December 14, 2018 is required to be taken into consideration. Besides, in terms of the order dated November 27, 2018 passed by this Court, the petitioner has already deposited an amount of Rs.10,000/- before the Family Court by way of security of costs. Learned counsel for the petitioner states that the petitioner will have no

objection if this amount is paid to the respondent.

5. Ms.Irani, learned counsel for the respondent supports the order of the Family Court. She submits that despite several opportunities to the petitioner, she remained absent and, therefore, the impugned was ultimately passed.

6. There is no doubt that the impugned order is justified but in order to promote substantial justice and to grant the petitioner yet another opportunity, the impugned order is being reluctantly set aside. The fact that the petitioner has assured this Court that she will remain present before the Family Court and offer herself for cross-examination is another circumstance that can be taken into consideration. The respondent, no doubt is prejudiced in the matter and, therefore, the respondent is permitted to withdraw the costs of Rs.10,000/- already deposited by the petitioner before the Family Court.

7. The petition is, therefore, disposed of with the following order :-

- (a) The impugned order dated October 22, 2018 is hereby set aside;

- (b) The petitioner is directed to remain present before the Family Court, Mumbai on December 14, 2018 and offer herself for cross-examination;
- (c) In case the petition remains absent on December 14, 2018, then, this petition shall be deemed to have been dismissed and the impugned order dated October 22, 2018 shall stand confirmed;
- (d) Notwithstanding such dismissal, the respondent will be entitled to withdraw the costs of Rs.10,000/- already deposited by the petitioner before the Family Court. Even otherwise the respondent is permitted to withdraw the amount of Rs.10000/- deposited by the petitioner before the Family Court;
- (e) Since the matter is not disposed of on merits, all contentions of the parties are left open to be determined by the Family Court.
- (f) The rule is made absolute in aforesaid terms;

All concerned to act on an authenticated copy of this order.

(M.S.SONAK, J.)