

In the High Court of Punjab and Haryana at Chandigarh

**Crl. Revision (F) No. 39 of 2015
Date of Decision: 29.8.2018**

Roshan Lal

.....Petitioner

Versus

State of Haryana and another

.....Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Pratyaksh Kumar, Advocate
for the petitioner.

Mr. M.S.Yadav, Advocate
for respondent No. 2.

ANITA CHAUDHRY, J

This revision is directed against the judgment dated 22.1.2015 passed by the District Judge, Family Court, Gurgaon on the petition filed under Section 125 Cr.P.C.

The issue for examination in this revision is whether the husband had the right of cross-examination in the petition filed under Section 125 Cr.P.C. The Family Court in its order dated 11.4.2014 ordered that evidence of the parties to be taken on affidavits. It relied upon *Shabana Banu versus Imran Khan* reported in *2010(1) RCR (Criminal) 158* to make that order but the judgment relied upon does not deal with the issue.

Record was called for and has been perused.

Babita by way of her evidence tendered her affidavit Ex. PA in evidence and introduced some documents and made a statement closing her evidence. The Court did not give the respondent the right of cross-

examination. The case was adjourned for respondent's evidence. The respondent did not appear on the adjourned hearing and his exemption was sought and finally when the matter was taken up on 12.1.2015, he moved an application seeking permission to cross-examine the witness as false statement had been made by the wife. The following order was passed by the District Judge, Family Court on 12.1.2015:-

“Today the case is fixed for evidence of the respondent, but learned counsel for the respondent has moved an application for seeking permission to cross-examine the witness on the plea that the petitioner has taken false, fabricated and concocted grounds. The respondent is being harassed and hence this application. Learned counsel for the petitioner has vehemently opposed the application pleading that it is a delaying tactic. It is observed from the records of the case that the evidence of the petitioner was recorded on 30.5.2014 and since then the respondent has availed the third effective opportunity for today to lead evidence. It has been submitted by the learned counsel for the respondent that he is not ready for evidence today. The evidence of the petitioner was recorded in presence of the counsel for the respondent but till date no such application or prayer had ever been made. No cogent reason has been given for seeking to cross-examine the petitioner. The proceedings u/s 125 Cr.P.C. are to be disposed on the basis of affidavits and in the instant case there is no reasonable ground for permitting the respondent to cross-examine the petitioner. The application is accordingly dismissed. Since the respondent and his counsel are unwilling and unprepared for evidence, the case is adjourned to 14.1.2015 for evidence of the respondent to be brought at his own responsibility. Last opportunity is granted.”

The case was then adjourned and the statement of the respondent was recorded and his evidence was closed. The case was again

adjourned for arguments. The respondent moved an application again seeking recall of the petitioner so that he could cross-examine the witness. The Family Court observed that no request or application for cross-examination was filed on the date the petitioner (wife) was examined and the respondent was only delaying the case and dismissed the application and adjourned the case for final arguments. It finally disposed of the petition allowing maintenance to the wife.

It would be useful to reproduce Section 10, 15, 16 and 20 of the Family Courts Act, 1984 ('Act' for short) which read as under:-

10. Procedure generally.-

(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) 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 Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court. -(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) 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 Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court."

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive 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.

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15. Record of oral evidence. - In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit. - (1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court. (2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

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20. Act to have overriding effect. - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 15 deals with record of oral evidence and provides that in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, can record or cause to be recorded, a memorandum of substance of what the witness deposes, and such memorandum has to be signed by the witness and the

Judge and shall form part of the record.

Further, Section 16 provides that evidence of formal character can be given by affidavit and can be read in evidence in any suit or proceeding. Sub-section (2) of Section 16 provides for summoning and examination of person giving the affidavit, on an application.

An over all analysis of the above provisions reveals that while provisions of CPC have been made applicable for the purpose of procedure before the Family Court, Section 15 of the Act enables a Family Court to record the evidence of witness by way of memorandum of the substance of what the witness deposes and provides that 'it shall not be necessary' to record the evidence of witnesses at length. The use of expression 'it shall not be necessary' to record the evidence of witnesses at length cannot be read as a prohibition against recording of evidence at length and it cannot be said that in case instead of recording the deposition of witnesses by way of memorandum of the substance, evidence of witness at length has been recorded, the said procedure would stand vitiated.

It would be relevant to refer to the judgment of the Rajasthan High Court reported in *Sarswati versus Narayan, Civil Writ Petition No. 6667 of 2015*. A writ petition was filed in the High Court challenging the order passed by the Family Court vide which the application filed by the wife seeking exclusion of the evidence from record was dismissed. It was a petition filed under Section 13 of the Hindu Marriage Act filed by the husband. After the parties had led their evidence the wife filed an application contending that the evidence of the parties had been produced on affidavits under Section 15 of the Family Courts Act and evidence could not be taken on affidavits and those could not be read and should be

evidence.

In reply the husband took the stand that the examination-in-chief had been produced on affidavits and witnesses had been cross-examined and the evidence had been accepted without an objection and cross-examination had been conducted under the provisions of the Act and no objection had been raised earlier and therefore the application should be dismissed.

In that context the provisions of the Family Courts Act were considered and the following observations were made:-

*“The emphasis laid by learned counsel for the petitioner that evidence of only formal character can be taken on affidavit with reference to Section 16 is misplaced. The provisions of Section 16(1) have been incorporated to apparently take care of provisions of Section 1 read with Section 3 of the Evidence Act, 1872, which provides that the said Act does not apply to affidavits presented to any Court and as held by Hon'ble Supreme Court in the case of **Sudha Devi v. M.P. Narayan : AIR 1988 SC 1381** that affidavits are not included in the definition of evidence in Section 3 of the Evidence Act and can be used in evidence only if the Court permits it to be so used for sufficient reasons. Even under Sub-section (2) of Section 16 of the Act, on an application of any of the parties, even the deponents of affidavits produced by way of evidence of formal character, can be cross-examined, therefore, the submissions made by learned counsel for the petitioner that it is only the evidence of formal character, which can be produced by way of affidavit and not examination in chief qua substantive evidence pertaining to the suit or proceeding before the Family Court has apparently no substance.”*

The Family Court in the case in hand gave no opportunity of cross-examination to the husband. It has been seen that in matrimonial

disputes each party gives exaggerated accounts and it is the duty of the Court to extract the truth from falsehood.

The duty of the Court is to search for the truth and then do justice and this is the very object for which the Courts are created. The Courts have to remove chaff from the grain, to separate falsehood from truth. Matrimonial litigation begins with parties mounting claims on each other which often are exaggerated to such an extent that truth and falsehood become inextricably mixed up and it is difficult to separate them and it would become more difficult if the right of cross-examination to the witness is closed. Therefore in matrimonial litigation the family Courts have to take due care and caution in closing the valuable right to file the written statement or to lead evidence or the right of cross-examination of any witness.

No doubt Section 10(3) of the Act does not prevent the Court from laying down its own procedure but it is for the purposes of arriving at a settlement for the petitions under Section 125 Cr.P.C. The petitioner filed application seeking to cross-examine the witness but the Family Court did not deal with this issue and rejected the prayer made by the husband saying that there was no reasonable grounds. Section 15 of the Act provides that it is not necessary to record the evidence of witnesses at length but the Judge can record a memorandum of substance of what the witnesses depose. Section 16 provides that evidence of formal character is to be taken on affidavit.

The provisions of Section 15 and 16 do not render evidence taken on affidavits to be illegal but a witness has to be subjected to cross-examination and that right has to be given and cannot be closed.

The Family Court clearly fell in error in dismissing the application of the petitioner and disallowing cross-examination. The Family Court had acted in contravention of provisions of Section 15 of the Act.

The petition is allowed. The order passed by the Family Court is set aside. The parties are directed to appear before the Family Court, Gurugram on 10.9.2018. The Court would give opportunity of cross-examination to both the sides and then decide the case afresh.

(ANITA CHAUDHRY)
JUDGE

August 29, 2018
Gurpreet

Whether speaking/reasoned : Yes
Whether reportable : Yes