

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST.) NO.1 OF 2019

Maheshwari Sunder Raj	...	Petitioner
Vs.		
Sunder Raj s/o. Sundar Das and another	...	Respondents

Ms Harjeet Kaur a/w. Mr. A. S. Anand for Petitioner.
Ms Jyoti Jadhav a/w. Mr. T. Kannan for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 4, 2019

P.C. :

Heard Ms Kaur, learned Counsel for the petitioner and Ms Jadhav, learned Counsel for the respondent No.1 at length.

2. At the request of Ms Kaur, leave to delete respondent No.2 is granted as in the present proceedings, respondent No.1 is the contesting respondent. Amendment shall be carried out forthwith.

3. This Petition takes exception to the order dated 26.10.2018 passed by the learned Judge, Family Court No.6, Mumbai below exhibit-17 in Petition No.A-1745 of 2014. By that order, the learned trial Judge allowed the application made by the first respondent-husband for DNA test of son Venkatesh and directed the petitioner herein to give blood test of Venkatesh to the lab of J.J.Hospital, Mumbai, on the next date of the case. Respondent No.1 is directed to bear all the expenses of the test. The concerned lab is also directed to submit confidential report to the Court instead of handing over the same to the parties.

4. Rule. Ms Jadhav waives service on behalf of the respondent No.1. Having regard to the narrow controversy raised in this Petition and at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing. The facts and circumstances of the case giving rise to filing of the present Petition,

briefly stated, are as under:

5. The petitioner has instituted application No.E-393 of 2014 claiming maintenance for herself and daughter Sudiksha and son Venkatesh against the first respondent. Respondent No.1 has filed Divorce Petition against the petitioner and the second respondent being Petition No.A-1745 of 2014. The parties had approached this Court on earlier occasions. It is not necessary to refer to the various orders passed by this Court. Suffice it to note that by order dated 07.07.2017 passed by this Court (Coram : K. K. Tated, J.) in Criminal Revision Application No.348 of 2016, this Court had set aside the order dated 03.05.2016 passed by the Family Court No.3, Mumbai below exhibit-13 for DNA test in Petition No.E-393 of 2014 and remanded the application exhibit-13 to the Family Court for hearing on its own merits along with the main Petition E-393 of 2014 by permitting both the parties to lead evidence if they so desire.

6. It is common ground between the parties that Maintenance Petition and Divorce Petition were clubbed together and common issues are framed. Evidence is also adduced by the parties in both the Petitions. It is also not in dispute that application exhibit-13 is filed by the first respondent in Maintenance Petition for DNA test and petitioner has filed reply to the said application. Respondent No.1 has filed application exhibit-17 in Divorce Proceedings for the self-same relief. Comparison of application exhibit-13 and exhibit-17 prima facie shows that identical assertions are made. It is not in dispute that petitioner has not filed reply to that application. Be that as it may, a perusal of the impugned order shows that the learned trial Judge has observed in paragraph 3 that the opponent (petitioner herein) failed to file reply to application exhibit-17. Equally, there is no specific order passed on application exhibit-17. In paragraph 4, the learned trial Judge also noted that the parties did not press this issue initially and proceeded with the trial and lastly it was

pressed.

7. As mentioned earlier, no reply to exhibit-17 was filed by the petitioner. While passing the impugned order, the learned trial Judge also did not take into consideration a reply filed by the petitioner to exhibit-13. The order directing DNA test has serious consequences. In view thereof, without going into merits of the case, in my opinion, it is necessary to set aside the impugned order with liberty to the petitioner to file reply to exhibit-17. Ms Kaur, on instructions from the petitioner, who is present in the Court, assures that within two weeks from today, she will file reply to exhibit-17 and serve copy on respondent No.1's Advocate during that period.

8. In view thereof, Petition is disposed of in the following terms:

- a. Impugned order dated 26.10.2018 is set aside with liberty to the petitioner to file reply to exhibit-17 within two weeks from today. Petitioner shall also serve copy of the reply on the Respondent No.1's Advocate during that period. If the petitioner fails to file reply within the stipulated period, the learned trial Judge will decide the application exhibit-17 after considering the reply filed by the petitioner to application exhibit-13;
- b. The learned trial Judge will decide application exhibit-17 afresh in accordance with law and uninfluenced by the observations made in the impugned order;
- c. The learned trial Judge is requested to decide the application within 4 weeks from today and thereafter will proceed with the hearing of Maintenance Proceedings and Divorce Proceedings.
- d. Rule is made absolute in the aforesaid terms with no order as to costs.

9. Order accordingly.

(R. G. KETKAR, J.)