

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.3476 OF 2019

Vinayak Ashok Walankar	]	Petitioner
Vs.		
Somakshi Vinayak Walankar	]	Respondent

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Mr. S.M. Kelkar i/b Mr. Mahendra M. Agavekar, learned Counsel for the Petitioner.

Mr. Ashok B. Tajane, learned Counsel for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 2nd APRIL, 2019.

P.C.

Not on board. At the request of Mr. Kelkar, taken up in the production board.

2. Heard Mr. Kelkar, learned Counsel for the petitioner and Mr. Tajane, learned Counsel for the respondent.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 25th February, 2019 passed by the learned Judge, Family Court-5, Pune below Exhibit 47. The said order records thus;

“Evidence of P.W.2 is not submitted. Hence, evidence of plaintiff is closed. Put up for examination-in-chief of the respondents”.

4. Rule. Mr. Tajane waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. The petitioner has instituted P.A. No.105 of 2017 under section 13 (1) (i-a) and (i-b) of the Hindu Marriage Act, 1955 (for short 'Act'), *inter alia*, praying for divorce from the respondent. In paragraph 14 the petitioner has referred to the letter dated 25th March, 2015 sent by him by registered post to the respondent. In paragraph 16, he has relied upon the letter dated 31st March, 2015 sent by him by registered post to the respondent.

6. The respondent filed written statement on 10th August, 2017 opposing the Petition. *Prima facie*, perusal of the written statement does not indicate that the respondent dealt with these letters. Issues were framed on 29th October, 2018.

7. It appears that on 21st December, 2018, the petitioner filed affidavit of examination-in-chief which was marked as Exhibit 41. In paragraph 14, he has referred to the letter dated 25th March, 2015 sent by him by registered post to the respondent. In paragraph 16, he has referred to the letter dated 31st March, 2015 sent by him to the respondent by registered post. By order dated 29th January, 2019, the learned trial Judge passed no cross order below Exhibit 41. It is accepted by the learned Counsel for the petitioner that by that order, the respondent is precluded from cross-examining the petitioner. On 29th January, 2018, the petitioner filed application Exhibit 46 for filing additional affidavit of evidence and documents. By order dated 29th January, 2019, the learned trial Judge rejected the application. That order records if on the next date of hearing, the petitioner does not file evidence of P.W.2, it will

be presumed that he does not want to lead evidence and evidence closer order will be passed. As the petitioner did not file affidavit of examination-in-chief of P.W.2 before next date of hearing, the learned trial Judge by the impugned order closed evidence of the petitioner and adjourned the matter for examination-in-chief of the respondent. It is against this order, the petitioner has instituted the present Petition.

8. Mr. Kelkar, on instructions, states that in paragraph 8 of the application dated 25th February, 2019 at Exhibit 47, the petitioner has asserted that he does not intend to adduce additional evidence in so far as relief of divorce is concerned. In other words, Mr. Kelkar submitted that the petitioner relies only upon the letters dated 25th March, 2015 and 31st March, 2015 referred to in paragraph 15 and 16 of the Petition as also affidavit of examination-in-chief at Exhibit 41 and does not want to adduce evidence in respect of relief of divorce. He states that in so far as determination of permanent alimony is concerned, the petitioner may be permitted to adduce evidence.

9. Mr. Tajane, on instructions, submits that by consent of the respondent, the order dated 25th February, 2019 passed below Exhibit 47 may be set aside. He further submits that the respondent has not challenged the order dated 29th January, 2019 closing her cross-examination below Exhibit 41. The same order may be set aside. He further submits that even the respondent may be permitted to adduce evidence about capacity of the petitioner to pay alimony.

10. In view thereof, by consent of the parties, the Petition is disposed of in the following terms;

- [1] order dated 29th January, 2019 closing cross of the respondent below Exhibit 41 is set aside.
- [2] order dated 25th February, 2019 below Exhibit 47 is set aside.
- [3] the respondent is permitted to cross-examine the petitioner. After the cross-examination of the petitioner is over, the petitioner shall file affidavit of examination-in-chief of P.W.2 within two weeks therefrom.
- [4] the petitioner is permitted to adduce evidence for determining the permanent alimony.
- [5] the respondent is permitted to adduce evidence about capacity of the petitioner in that regard.
- [6] the learned trial Judge will consider the issue whether the petitioner has proved contents of the letters dated 25th March, 2015 and 31st March, 2015 in the light of the facts set out hereinabove.
- [7] Rule is made absolute accordingly with no orders as to costs.

[R.G. KETKAR, J.]