

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14595 OF 2018

Shri. Rajesh Ramdas Nival

...Petitioner

Versus

Sau. Alka Rajesh Nival

...Respondent

....

Mr. Ashutosh S. Kale, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 17th JANUARY, 2019

P.C.

1. Not on board. At the request of Mr.Kale taken up for admission.
2. Heard Mr.Ashutosh Kale, learned counsel for the petitioner, at length.
3. This Petition takes exception to the order dated 6.11.2017 below Exhibit-40 as also the order dated 18.8.2018 below Exhibit-119 in P.D. No.20/2012 passed by the learned Judge, Family Court No.2, Pune. By order dated 6.11.2017 below Exhibit-40, the learned trial Judge disposed of application Exhibit-40 and took the written statement filed by the respondent on record. By order dated 18.8.2018 below Exhibit-119, the learned trial Judge rejected the application filed by the petitioner for review of the order dated 6.11.2017 passed below Exhibit-40.
4. In support of this Petition, Mr.Kale strenuously contended that

by order dated 25.9.2017 passed in Writ Petition No.8536/2017 this Court directed the trial Court to decide the application Exhibit-40 on merits. The learned trial Judge instead of deciding the application Exhibit-40 on merits, was of the view that it is better to decide the case on merits rather than on default and, therefore, accepted the written statement. He further submitted that while passing the order below Exhibit-40, the learned trial Judge noted that the petitioner and his counsel were absent and the counsel for the respondent was present. He invited my attention to paragraph-16 of the Review Application at Exhibit-119 and submitted that on 6.11.2017, at the request of respondent's Advocate, it was decided to hear the application Exhibit-112 and thereafter arguments on Exhibit-40 were to be advanced at 3:00 p.m.. Instead of hearing Exhibit-40 at 3:00 p.m., application Exhibit-40 was heard in the morning session and, therefore, the petitioner's Advocate was not present. The learned trial Judge, however, rejected the Review Application on 18.8.2018 on the footing that no ground was made out under Order XLVII Rule 1 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for recalling the order dated 6.11.2017. He, therefore, submitted that the petition requires consideration.

5. I have considered the submissions advanced by Mr. Kale. I have also perused the material on record. A perusal of the impugned order dated

18.8.2018 below Exhibit-119 shows that the learned trial Judge was also of the view that in matrimonial litigation, it is necessary to give sufficient and fair opportunity to the parties to place their case before the fact finding Court. It would be just and proper to have verdict on merit.

6. In paragraph-9, the learned trial Judge observed that Order VIII Rule 1 of C.P.C. is directory in nature and not mandatory. It is settled law that the provisions of Order VIII Rule 1 of C.P.C. are directory in nature and not mandatory.

7. It is also matter of record that the petitioner has instituted the proceedings for custody of the children. In such circumstances, the learned trial Judge was justified in observing that in matrimonial litigation, it is necessary to give sufficient and fair opportunity to the parties to place their case. It is also material to note that in case the written statement is not taken on record, the respondent will be precluded from adducing evidence in support of her case. It would cause serious prejudice to her in prosecuting the custody petition.

8. That apart, the Advocate for the petitioner was absent when application Exhibit-40 was heard. Though in paragraph-16 of the Review Application it is sought to be contended that hearing of Exhibit-40 was fixed at 3:00 p.m., no material is produced on record to substantiate said fact. As the learned trial Judge has passed discretionary order thereby

taking on record the written statement of the respondent, I do not find that any case is made out by the petitioner for invocation of powers under Article 227 of the Constitution of India. It cannot be said that the learned trial Judge has exercised the discretion arbitrarily, capriciously or perversely so as to warrant interference at the hands of this Court under Article 227 of the Constitution of India. Hence Petition fails and the same is dismissed.

9. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of C.P.C. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)