

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 6361 OF 2021

Kaushal Arvind Thakker

..Petitioner

Versus

Jyoti Kaushal Thakkar & Anr.

..Respondents

....

Mr. Niranjan Mundargi a/w Asha Bhuta i/by Bhuta & Associates,
Advocate for the Petitioner.

Ms. Jyoti Kushal Thakkar, Advocate for the Respondent No.1 present
in person.

Shri. H.J. Dedhia, APP for the Respondent - State.

....

CORAM : PRAKASH D. NAIK, J.

DATE : 14th JUNE, 2022.

PC.

1. The Petitioner has invoked Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure challenging order dated 11th November, 2021 passed by Additional Sessions Judge, Greater Mumbai in Criminal Appeal No.360 of 2021 and order dated 11th October, 2021 passed by the learned Metropolitan Magistrate, 61st Court, Kurla, Mumbai below Exhibit-113 in Criminal Case No.172/DV/2017, and seek directions to the Court of learned Metropolitan Magistrate 61st Court, Kurla, Mumbai to permit the Petitioner to be examined as witness and record his evidence (examine in chief and cross-examination) in C.C. No.172/DV/2017.

2. Order dated 11th October, 2021 was passed below Exhibit- 113 preferred by Petitioner to recall him as witness and take on record affidavit in evidence earlier filed by him for the purpose of proceeding with cross examination. It was also prayed that order passed on Exhibit – 80 be recalled. The learned Magistrate rejected the said application by aforesaid order. The order dated 11th November, 2021 was passed in appeal preferred by Petitioner challenging order dated 11th October, 2021. The appeal was dismissed and order dated 11th October, 2021 was confirmed.

3. The proceedings under protection of Women from Domestic Violence Act, 2005 viz. C.C. No.172/DV/2017 were initiated by Respondent No.1 before the Court of learned Metropolitan Magistrate, 61st Court, Kurla, Mumbai. The Petitioner is arraigned as Respondent in the said proceedings.

4. According to Petitioner, he is citizen of USA. He is currently employed in USA. The Respondent No.1 is currently working in Mumbai. She is the former wife of Petitioner. Their marriage was performed on 3rd January, 1994. The Respondent No.1 abandoned her marriage in May – 2008. The Petitioner filed petition for Divorce

in USA in April – 2017. The Court passed Decree of divorce and dissolved the marriage on 3rd January, 2018.

5. Learned Advocate for Petitioner submitted that the impugned orders are depriving the Petitioner of his right to lead evidence. The Petitioner is employed in USA. Whereas the Respondent No.1 is currently working in Mumbai. The marriage was preformed in 1994. The Respondent No.1 had joined the matrimonial home with Petitioner in USA. She abandoned the marriage in may 2008 and did not maintain contact for 10 years. The Petitioner filed Divorce Petitioner in Dallas County Court as both were citizen of USA. The Respondent No.1 entered her appearance through Advocate and thereafter did not participate in the proceedings. She filed proceedings under Domestic Violence Act in Mumbai in 2017. On 3rd January, 2018 the Dallas Court passed decree of divorce and dissolved the marriage. The application preferred by Petitioner vide Exhibit 113 was to recall the witness. The brother of Respondent No.1 filed affidavit of Evidence and his cross examination was conducted through video conferencing. The Petitioner filed affidavit of evidence seeking permission to conduct cross examination through

video conferencing, since he was in USA. The application was allowed. Due to internet related issue, connection could not be established for cross examination. Thereafter the Court passed order on 10th January, 2020 directing Petitioner to appear personally. The said order was challenged before high Court. Relief was not granted. Thereafter Petitioner was directed to appear personally for cross examination. On 9th March, 2020 the trial Court discarded evidence of Petitioner. On 2nd November, 2020, application was filed by Advocate for Petitioner under Section 25 of the D.V. Act. The evidence of Petitioner's mother was filed. She was cross examined through video conferencing. The application of Petitioner for video conferencing was rejected on 8th January, 2021. The Petitioner moved high Court vide Interim Application No. 7268 of 2020. The application was withdrawn. The Petitioner challenged order dated 8th January, 2021 passed by learned Magistrate before Sessions Court by preferring appeal which was rejected. Thereafter, application Exhibit – 113 was filed for recalling the Petitioner as witness and recalling order below Exhibit-80. The application was rejected on 11th October, 2021. The appeal challenging the said order was

rejected by Sessions Court on 11th November, 2021. If the said orders are not set aside, grave prejudice would be caused to the Petitioner. Any adverse order in the proceedings would be violative of principle of natural justice. The Petitioner is willing to appear before the Court. Fair trial must be provided to the Petitioner.

6. The Respondent No.1 has appeared in person. She tendered short synopsis of dates and events, written submissions and also advanced oral submissions. It is submitted that the proceedings are pending since, 2017. The Petitioner has been delaying the proceedings. Divorce was granted by ex-parte decree. While the marriage with Respondent equally subsists, Petitioner has married again. The evidence of Petitioner has been discarded by order dated 9th March, 2020. Thereafter, he examined five witnesses. The case is posted for final arguments. He has preferred applications repeatedly. In spite of opportunity being given to the Petitioner, he did not appear for cross examination through video conferencing. Throughout the proceedings the Petitioner has never appeared personally even once. The Respondent No.1 had closed her evidence on 4th October, 2019. The matter was adjourned to 17th October,

2019 for Petitioner's evidence. On 17th October, 201, the Petitioner sought time to file affidavit-in-lieu of examination-in-chief, Adjournment was granted. On 16th November, 2019, the Petitioner against sought time to file affidavit in lieu of examination-in-chief. Adjournment was granted. On 23rd November, 2019 the Petitioner again sought adjournment to submit his affidavit in evidence. Learned Magistrate granted adjournment when the Petitioner's Advocate assured that on the date the affidavit would be filed and the Petitioner would be available for cross-examination. On 13th December, 2019 Petitioner filed affidavit in evidence but he was not available for cross-examination. The case was adjourned for cross-examination. On 21st December, 2019, the Petitioner and his Advocate were absent. The Petitioner was not available for cross examination. The case was adjourned. On 7th January, 2020, the Petitioner and his Advocate were absent. The trial Court informed the parties that the Kurla Court was facing technical issues and therefore, the video conferencing facility would not be available. On 10th January, 2020 the trial Court passed order directing the Petitioner to appear personally for recording his cross-examination.

The trial Court granted adjournments on 21st January, 2020, 7th February, 2020, 20th February, 2020 and 29th February, 2020 to allow the Petitioner to challenge the order directing his personal attendance. The Petitioner filed Criminal Appeal No.78 of 2020 which was withdrawn. He preferred Criminal Revision Application No. 123 of 2020 which was rejected on 5th February, 2020. Writ Petition No. 1006 of 2020 was filed before the High Court which was rejected on 28th February, 2020. The order of learned Magistrate directing the Petitioner to appear personally for cross-examination was upheld by the High Court. On 29th February, 2020, the Petitioner sought adjournment to allow him time to travel to India. Specific directions were given by learned Magistrate to attend court on next date, failing which necessary orders would be passed. The case was fixed for cross-examination on 9th March, 2020. The Petitioner failed to present himself for cross-examination on 9th March, 2020. Application was preferred for adjournment to settle the dispute. The trial Court rejected the application and discarded his evidence by order dated 9th March, 2020. On 18th March, 2020 the Petitioner and his Advocate were absent. Thereafter due to pandemic, matter was

not taken on board until October – 2020. Despite sufficient time and opportunity was given to the Petitioner, he consciously chose not to step into witness box and consequently his evidence was discarded. The order dated 9th March, 2020 was not challenged and it attained finality. In June and July – 2020 the Petitioner attempted to deal with flat jointly owned by the parties and tried to create third party rights. Interim Application was filed by Respondent No.1 for urgent reliefs. The High Court by order dated 20th July, 2020 appointed Court received to taken possession of the flat and also granted injunction restraining Petitioner from alienating the flat. The Petitioner filed two Interim Applications in the partition suit before the High Court. This proves that even during the pandemic, the Petitioner had full access to the Court and legal advise in India but consciously chose not to challenge order dated 9th March, 2020 discarding his evidence. The Petitioner examined his mother in November – 2020. The Interim Application preferred by the Petitioner in partition suit was rejected by the High Court. The Petitioner than filed applications, which directly or indirectly sought the same relief of allowing his cross examination to be recorded. Al

the applications were rejected. Application under Section 25 of D.V Act before the learned Magistrate to allow him to record evidence on video conferencing was rejected on 8th January, 2021. Simultaneously the Petitioner sought the same relief in Criminal Application No. IAST/7268/2020 in Criminal Writ Petition No.1006/2020. The application was heard on 20th January, 2021. The Court indicated disinclination to grant relief, the application was withdrawn. The order dated 8th January, 2021 was challenged by Petitioner by preferring appeal before Sessions Court, which was dismissed on 15th March, 2021. Thereafter, the Petitioner filed an application to recall the order discarding evidence and recall him as witness. The said application was rejected on 11th October, 2021. The appeal challenging the said order was rejected on 11th November, 2021. This petition is not maintainable. It is an abuse of process of High Court. There are two concurrent findings against the Petitioner. The impugned order were passed assigning reasons. After forfeiting the right to step into the witness box, the Petitioner cannot be permitted to raise a grievance regarding the consequences since has to be blamed for it. Petitioner's evidence was discarded two

years ago. Since then, Petitioner has adduced evidence by examining five witnesses. Grave prejudice would be caused to the Respondent No.1 if Petitioner is allowed to be relegated to position he would have occupied if he had appeared on the date when he deliberately absented.

7. The factual matrix emerges from the documents on record is as follows :

(a) The Respondent No.1 filed the proceedings under the D.V. Act on 7th July, 2017. The Respondent No.1 and her witnesses were examined. The evidence of Respondent No.1 was closed on 4th October, 2019.

(b) The Petitioner sought time to file affidavit of evidence on 17th October, 2019, 16th October, 2019. He filed affidavit in evidence on 23rd November, 2019.

(c) The Petitioner filed application on 23rd November, 2019 for recording his evidence through video conferencing since he is employed at USA. The application was allowed by permitting Petitioner to appear on 7th January, 2020 for cross examination

through video conferencing. According to Petitioner he presented himself for cross examination on 7th January, 2020. However, due to internet related issues cross examination was not recorded.

(d) The Respondent No.1 preferred an application to direct the Petitioner to appear personally to face cross examination. Vide order dated 10th January, 2020, the learned Magistrate observed that the case is pending for cross examination of the petitioner on the affidavit. Since filling the D.V. proceedings the Petitioner has never appeared. It was agreed to proceed with cross-examination through video conferencing but due to technicalities and service failure of internet, cross-examination cannot be conducted. On one occasion the Petitioner was not available. Now, cross is of Petitioner and not of any witness. Cross is of important witness. It cannot be said that in future also there would not be failure of internet service. The internet service is not functioning since more than one month. If the Petitioner remains present before the Court personally then it would be easy to Judge Respondent's demeanor and body language for appreciating evidence. In D.V. proceedings if opponent never appears it is also difficult to Judge the real nature of Respondent. Considering

the nature of proceedings, it would be necessary that the Petitioner remains personally present before the Court. The Court directed the Petitioner to appear personally for cross-examination.

(e) The order dated 10th January, 2020 was challenged by the Petitioner by preferring Criminal Revision Application No.123 of 2020 before the Sessions Court rejected the Revision application on the ground that it is not maintainable since the impugned order is interlocutory. However, the learned Sessions Court has also observed that evidence has started and the aggrieved lady complete her evidence. The evidence of Petitioner had started and the case is pending for cross-examination. Earlier it was agreed to cross-examine the Petitioner through video conferencing. However, due to failure of internet service, cross-examination could not be conducted and on one occasion Respondent No.1 was not available. Section 28 of D.V. Act lays down that the Court is justified in laying down its own procedure for disposal of application under Section 12 or under Section 23(2) of the Act. The Court can adopt its own procedure. In view of mandate of Section 28(2), there is no illegality in the order passed by learned Magistrate.

(f) The Petitioner preferred Criminal Writ Petition No.1006 of 2020 before this Court challenging order dated 5th February, 2020. By order dated 28th February, 2020, this Court had dismissed the said petition. This Court had observed that the proceedings are pending from 2017. By order dated 10th January, 2020, the Petitioner was directed to appear personally for cross-examination. He was directed to appear only once. Section 28 of the D.V. Act, grants liberty to Trial Court to adopt the procedure which is deemed fit for carrying out mandate of Section 12 of the D.V. Act. Thus there is no infirmity in the impugned order. The petition was dismissed.

(g) On 29th February Petitioner sought adjournment. The case was fixed for cross examination, on 9th March, 2020, indicating that if he fail to appear necessary order would be passed. On 9th March, Petitioner did not remain present and sought adjournment vide Exhibit – 79. According to Respondent No.1, the adjournment was sought to settle the dispute. The Respondent No.1 filed application for closure of Petitioner's evidence (Exhibit-80). The learned Magistrate rejected the application for adjournment and the evidence of Petitioner was discarded by order dated 9th March, 2020. It was

also directed that if the Petitioner fails to lead any further evidence on next date, necessary order will be passed closing evidence.

(h) On 13th October, Respondent No.1 made an application for fixing early date. The proceedings were adjourned to 27th October, 2020. On the application of Petitioner's Advocate the matter was adjourned to 2nd November, 2020.

(i) On 2nd November, 2020, the Petitioner filed an application under Section 25 of the D.V. Act. It was contended that application for cross-examination of Petitioner through video conferencing was filed before the Court. The same was rejected. He was directed to appear in person for his cross-examination. These orders were before lock-down. Due to pandemic it is risky for the Petitioner to travel to India and give his physical appearance. He is an U.S. citizen. By invoking Section 25 of the D.V. Act, the Petitioner prayed for modification of order and prayed that, the Petitioner may be allowed to appear for cross-examination through video conferencing. The said application was marked as Exhibit-83. The evidence of Petitioner's mother was filed. The Respondent No.1 filed reply. According to Petitioner the application for cross-examination of

Petitioner's mother by video conferencing was allowed and her cross-examination was conducted. The Respondent No.1 filed reply opposing the application. The application was rejected by order dated 8th January, 2021.

(j) The order dated 8th January, 2021 refers to Section 25 of the D.V. Act. It is observed that the Petitioner is trying to delay the proceedings. It was also observed that though pandemic situation is all over world, the bubble flights are coming from USA to India and going from India to USA since 3 to 4 months. The Petitioner never appeared before the Court or tried to appear or never showed his bonafide to appear. It appears that the conduct of Petitioner is that, he never wants to appear before the Court and how keep on prolonging his application preferred under the D.V. Act. The application preferred by the Petitioner is nothing but to review order of Court. The order directing the Petitioner to personally appear before the Trial Court was confirmed by the High Court.

(k) The Petitioner filed Interim Application No.7268 of 2020 in Criminal Writ Petition No.1006 of 2020 before this Court for allowing him to give cross-examination through video conferencing.

The order dated 20th January, 2021 passed by this Court in Interim Application Stamp No. 7268 of 2020 mentions that, after hearing the counsel for the Petitioner at length, when the Court express this disinclination to grant any relief on the ground that substantive petition seeking similar relief dismissed on merits by the co-ordinate branch by speaking order dated 28th February, 2020, leave is sought to withdraw application unconditionally. Leave is granted and the application is dismissed of withdrawn.

(l) The order dated 8th January, 2022, was thereafter, challenged before the Sessions Court by preferring Criminal appeal No.28 of 2021. The appeal was dismissed by order dated 15th March, 2021.

(m) The Petitioner filed an application Exhibit-113 for to recall the Petitioner as witness and taken on record affidavit of evidence earlier below Exhibit-I and take on record the affidavit of evidence that was earlier filed by him for the purpose of cross-examination and also recall order on Exhibit-80. Respondent No.1 filed reply Exhibit-114, the learned Magistrate by order dated 11th October, 2021 rejected the application.

(n) The Petitioner then approached the Sessions Court by preferring Criminal Appeal No.360 of 2021 challenging the order dated 11th October, 2021. The appeal was dismissed vide order dated 11th November, 2021. While dismissing appeal, the Sessions Court had observed that the Petitioner was given ample opportunity to adduce the evidence.

8. The Petitioner filed affidavit of evidence. He was permitted to make himself available for cross examination. Subsequently by order dated 10th January, 2020 he was directed to appear personally for cross examination. It is relevant to note that the application under Section 12 of the D.V. Act is preferred by Respondent No.1 in 2017. The Affidavit in evidence of Petitioner was filed on 23rd November, 2019. The order dated 10th January, 2020 has not been set aside by any Court. The revision challenging said order was rejected. Criminal Writ Petition No.1006 of 2020 challenging the order dated 10th January, 2020 the order dated 5th February, 2020 passed by Sessions Court was dismissed by order dated 28th February, 2020. Thus, direction of trial Court to appear in person for cross examination was confirmed. In spite of opportunities, the Petitioner

did not appear before Court personally. Hence, by order dated 9th March, 2020 evidence of Petitioner was discarded. This order has attained finality. The Petitioner then initiated another inning of preferring applications. He preferred application under Section 25 of D.V. Act. The prayers was to permit Petitioner to appear for cross examination by video conferencing. Thus, the said relief was sought after order dated 10th January, 2020, order dated 5th February, 2020 passed by Sessions Court and order dated 28th February, 2020 passed by High Court confirming order passed by Courts below directing the Petitioner to appear in person. Thus, under the garb of modification the Petitioner was again seeking permission to appear through video conferencing for his cross examination. In this process, the Petitioner had delayed the proceedings. It is also pertinent to note that vide order dated 9th March, 2020 the evidence of Petitioner was discarded. The above application was preferred after the said order, the application under Section 25 of D.V. Act was rejected by trial Court on 8th January, 2021. Surprisingly, the Petitioner also preferred Interim Application No. 7268/2020 in Criminal Writ Petition No.1006/2020, for allowing the Petitioner to give cross examination

through video conferencing. The said application was withdrawn since Court was not inclined to grant any relief. Thereafter, application Exhibit – 113 was preferred to recall Petitioner as witness, to take his affidavit and cross examine him. This application was rightly rejected by trial Court and Sessions Court. This was another attempt to reiterate the same relief by adopting different mode. The Petitioner cannot be permitted to claim same relief by preferring multiple proceedings. Having directed to appear personally, and discarding his evidence, the question of grant of relief in application Exhibit-113 does not arise. Sufficient opportunity was given to the Petitioner. All the applications were seeking same relief directly or indirectly. There is no infirmity in the order dated 11th October, 2021 and 11th November, 2021. The order are well reasoned. The petition is devoid of merits and deserves to be rejected.

ORDER

- i. Criminal Writ Petition No. 6361 of 2021 is rejected and stands disposed of.

(PRAKASH D. NAIK, J.)