

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5273 OF 2023

Neha Rajkumar Sethi nee Katyal.

...Petitioner.

Versus

Rajkumar Anilkumar Sethi.

..Respondent.

*Mr. Ashwin Shete, Mr. Santosh Avhad, Ms. Vidhi Karia i/b Jayakar & Partners
for the petitioner.*

Ms. Pooja Jalan and Ms. Mayuri Donwalkar for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : June 30, 2023.

P. C. :

1. The respondent-wife is before this Court invoking the jurisdiction of this Court under Article 227 of the Constitution of India seeking to challenge the orders dated 2nd December 2022 and 30th January 2023 passed by the Family Court at Bandra, Mumbai rejecting the petitioner's applications for setting aside "No WS Order" and closing the evidence of petitioner.

2. The facts about which there is no dispute is that there is acrimonious litigation between the parties to marriage. Apart from divorce proceedings, there is a complaint filed under the provisions of Protection of Women from Domestic Violence Act, 2005. There is also

proceedings which reached upto this Court in maintenance application. As far as the divorce proceedings, bearing No.A-972 of 2015 pending before the Family Court at Bandra is concerned, the same has been filed under section 13(1)(ia) of the Hindu Marriage Act, 1955 seeking dissolution of marriage solemnised between the parties. In the said proceedings, affidavit of evidence was filed by the respondent–husband on 11th March 2022 and the order of “No Cross” came to be passed on 1st August 2022 and the matter was adjourned for leading of evidence by the petitioner herein. On 2nd September 2022, as the petitioner was absent, her evidence was closed and the matter was kept for final arguments. Subsequently, on 3rd December 2022 the application was made by the petitioner for setting aside the No-Cross Order which came to be dismissed vide the order impugned and as such the present petition.

3. Heard Mr. Ashwin Shete, learned counsel appearing for the petitioner and Ms. Pooja Jalan, learned counsel appearing for the respondent.

4. Mr. Shete, learned counsel for the petitioner has taken this Court through the roznama which is annexed at page No.271 of the affidavit-in-reply. Pointing out from the roznama, he would contend that effectively there were only three dates between the period May

2022 to December 2022, where the petitioner-wife had not appeared in the matter. He would point out that the affidavit of evidence was filed by the respondent-husband on 5th March 2022. On 11th May 2022, the roznama records that the respondent was present and the case was adjourned for the cross of respondent to 6th July 2022. He would further submit that on 6th July 2022, the petitioner was not present and the matter was adjourned to 16th July 2022 when the Presiding Officer/Judge was not available and the matter was adjourned to 1st August 2022. He would contend that on 1st August 2022, the order of “No Cross” was passed despite the fact that it was only on 11th May 2022, 6th July 2022 and 16th July 2022 that the petitioner was not present. He would further point out that the matter was thereafter adjourned to 2nd September 2022 and the evidence is claimed to be closed on that date. As regards the delay in filing the application, he would contend that it is evident from the roznama that on 3rd November 2022 and 19th November 2022, the Court, i.e., Presiding Officer/Judge was not available. He would further submit that as is evident from petitioner’s application for setting aside the “No-Cross” order, the contention of the petitioner-wife was that there were multiple litigation pending between the parties and so also due to family issues and financial constraints, the petitioner was constrained to handle the case by herself. It is her

further contention that there was failure to pay the maintenance for past six months. He would further submit that apart from the issue of arrears of maintenance, there was settlement talk going on between the parties since 2016. He also points out from the roznama that the respondent–husband had failed to file his evidence from 20th January 2020 to 6th March 2021 and the case was kept for dismissal on 7 dates, i.e., from 6th April 2021 to 5th March 2022. As regards the observations in the impugned order that on 11th May 2022, the petitioner–wife was present, however, she purposely did not take the copy of affidavit of evidence on the previous occasion, learned counsel for the petitioner submits that as is evident from the roznama, the counsel for petitioner was not present, as such, she was unaware that she was required to take the copy of evidence. He would further submit that it is in the interest of justice that the impugned orders are set aside and the petitioner be permitted to cross-examine the respondent husband.

5. *Per contra*, learned counsel for the respondent submits that the explanation which has been tendered by the petitioner in the application seeking to set aside the “No-Cross” order is belied from the material which has come on record. She would point from paragraph 3 of the present petition that it is the petitioner’s own

contention that on 11th May 2022, the petitioner had appeared before the trial Court through her advocate. She has invited the attention of this Court to the roznama and would contend that the “No-Cross” order was passed on 1st August 2022 and thereafter 7 dates have passed and the application came to be filed on 27th December 2022. She would further submit that the application does not set out any cause, muchless sufficient cause, for setting aside the “No-Cross” order. She points out that specific assertion was made in the affidavit-in-reply to the application that there are no arrears of maintenance and, as such, the reason set out by the petitioner as regards the financial constraints, has not been accepted by the Family Court. She would further submit that the intention of the petitioner is to pursue the maintenance application and she has given a complete go-bye to the divorce proceedings. She would further submit that no indulgence should be shown to such a litigant in exercise of powers under Article 227 of the Constitution of India. As regards the exercise of discretion under Article 227 of the Constitution, learned counsel for the respondent relied upon decision of the Apex Court in ***Garment Craft v. Prakash Chand Goel [(2022) 4 SCC 181]*** and ***Estralla Rubber v. Dass Estate (P) Ltd [(2001) 8 SCC 97]*** and decisions of this Court in ***Sunil Vitthal Jadhav v. Shamji Shankar Gawali [2009 SCC Online Bom 1979]*** and ***Dharmraj Sitaram Gavali v. Namdev Sitaram Gavli***

[2016 SCC OnLine Bom 2029].

6. For the purpose of deciding the present petition it would be necessary to take a look at the case history, which has been tendered by learned counsel for the petitioner. Perusal of the same shows that in the proceedings instituted in the year 2015, the issues were framed on 5th November 2019 and on 21st December 2019, the proceedings were listed for filing of the evidence of respondent-husband; thereafter the matter was adjourned on 15 dates and ultimately on 5th March 2022 when the matter was kept for dismissal, the affidavit of evidence came to be filed. No doubt, during this period due to Covid-19 pandemic, Courts were not fully operational. However, the case history is being reproduced to indicate that the respondent-husband after the issues were framed on 5th November 2019, filed the affidavit of evidence on 5th March 2022, i.e., after a period of more than 2 years. Learned counsel for the respondent seeks to place the blame of delay in adjudication of the proceedings on the petitioner-wife. In that respect if the roznama is perused, the same indicates that after the affidavit of evidence was filed on 5th March 2022, on 11th May 2022, the petitioner was present. The roznama indicates that the advocate for the petitioner was absent and, as such, the explanation tendered by learned counsel for the petitioner that the petitioner was not

aware that she had to collect the copy of evidence from the Court, which this Court is informed is a prevalent practice in Family Court, cannot be disbelieved. Thereafter, it appears that the matter was adjourned from 6th July 2022—when the petitioner was absent. Pertinently, the roznama records *“the respondent is absent, may be due to heavy rain”*, and as such the reason itself is recorded in the roznama. On 16th July 2022, the petitioner was present, however, the Court (presiding officer/ Judge) was on leave. Thereafter the matter was adjourned to 1st August 2022, when the order of “No-Cross” came to be passed. On 2nd September 2022, the matter was fixed for leading the evidence by petitioner and as the petitioner was absent, the evidence of petitioner came to be closed. During the period from 1st August 2022 to the filing of application on 3rd December 2022, there were six dates of listing of the proceedings and out of these six dates, on two dates, the Court was on leave and on one date, the Court being busy in some other matter, the subject proceedings was adjourned.

7. If we take a look at the application which has been filed by the petitioner seeking to set aside the order of “No-Cross”, the reasons which have been advanced are : (a) non payment of maintenance; (b) the settlement talks; (c) the respondent-husband’s failure to file affidavit of evidence; and (d) grave prejudice being caused as the right

to cross-examine is an indefeasible right.

8. As regards the non payment of maintenance is concerned, there was no rejoinder to the reply filed by the respondent-husband that the arrears have been duly paid and, as such, it can be taken that the explanation of non payment of maintenance cannot support the case of petitioner. What is relevant to note is that the petitioner has suffered great prejudice for the reason that she does not desire the divorce from the respondent and, as such, would want to contest the matter on merits. Even if it is taken that the reasons of non payment of maintenance and the settlement of talks would not assist the case of petitioner, it is required to be seen whether the petitioner is guilty of such gross negligence which will disentitle her of her right of cross-examination. In that context, as indicated above the respondent had failed to file his evidence in the proceedings which led to a stand-still, and as far as the present petitioner is concerned, the roznama indicates that she was absent from 11th May 2022 to 3rd December 2022 and as stated above, during this period, the Presiding Officer/Judge was on leave on certain dates.

9. It is contended by learned counsel for the respondent-husband that the application for setting aside the "No-Cross" order came to be filed after seven dates, on 3rd December 2022, however,

the respondent was absent on these seven dates and the copy of affidavit of evidence was received by the petitioner when she appeared in the matter. Taking a look of the dates which has passed since the date of filing of affidavit of evidence, the issue which will arise for consideration is whether the petitioner has been grossly negligent. In my opinion, the right of cross-examination is a valuable right of the party and unless it is shown to the Court that the petitioner by her conduct has disentitled herself to cross-examine the other side, the same cannot be fettered by refusing to set aside the order of "No-Cross". The case status which is filed on record shows that the proceedings commenced in the matter in the year 2015 and it is only in the year 2022 that there was failure on the part of petitioner-wife to attend the matter. In my opinion, considering the case history as well as the roznama which has come on record, it cannot be said that the petitioner has been grossly negligent in attending the matter. No doubt, the application for setting aside could have been more detailed. However, what is to be taken care of is the right of petitioner to contest the matter on merits.

10. The decision of the Apex Court in the matter of ***Garment Craft (supra)***, which has been relied upon by learned counsel for the respondent deals with the exercise of powers by the High Court under

Article 227 of the Constitution to set aside the order allowing an application under Order-IX Rule-1 of CPC. It is in that context, the Apex Court has held that the supervisory jurisdiction is not to correct every error of fact or even a legal flaw when final finding is justified or can be supported. It is further held that the High Court is not to substitute its own decision on facts and conclusion, for that of inferior Court or tribunal. What is important to note is that in that case, the application filed under Order-IX Rule-13 of CPC was allowed, which came to be set aside by the High Court and the pertinent observation of the Apex Court are in paragraph 15, which read thus :

".....It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice."

11. The second decision of the Apex Court in ***Estralla Rubber (supra)***, relied upon by learned counsel for the respondent, deals with the case under Order-VI Rule-17 of the CPC where the amendment application filed by the defendant was allowed by the District Court, which was set aside by the High Court in exercise of powers under Article 227 of the Constitution of India. It is in that context, the Apex Court considered the scope and ambit of exercise of powers and jurisdiction by the High Court under Article 227 of the Constitution. What is required to be noted is that the Apex Court has held that the

exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected.

12. As regards the decision of this Court in ***Sunil Vitthal Jadhav (supra)***, the same indicates that in that case the petitioner had placed the blame on the advocate and it was in the facts of that case, this Court held that the petitioner was not diligent enough and careless in the Court proceedings, should not be given advantage, to the disadvantage of a litigant, seeking redressal of his grievance from the Court. This Court observed that the petitioner was enjoying the possession on the basis of agreement for sale and as per the claim of plaintiff, had not complied with the terms and conditions, was enjoying the suit property. The facts of that case are clearly distinguishable inasmuch as the petitioner therein was not shown to be diligent in contacting his advocate and taking necessary steps in the proceedings. In the present case, it is not the contention of learned counsel for the petitioner is that although the advocate has been engaged, the advocate was not present and as such the petitioner is not at fault. Learned counsel for the petitioner has fairly

admitted that on those dates, the petitioner wife was not present and for that reason, the order of “No-cross” came to be passed. The submission which is made by learned counsel for the petitioner is that on the ground of interest of justice that the order of No-Cross” as well as closure of evidence of the petitioner-wife be set aside so that the contest can be on merits.

13. The next decision which has been relied upon by learned counsel for the respondent is by this Court in ***Dharmraj Sitaram Gavali (supra)***, which was a gross case inasmuch as the defendant therein had not filed the written statement and as such “No-cross” order was not interfered with by this Court.

14. The above decisions have been rendered in the proceedings which can be said to be property related disputes. However, in the present case, the proceedings is matrimonial dispute between the parties and, as such, in my opinion, deserves to be considered on different parameters than an ordinary litigation would be. It is for the reason that in the matrimonial disputes, it is the personal life of parties which is involved and also the issues are personal as regards the maintenance and the custody of children. In my opinion, in such disputes a lenient view is required to be taken, particularly when it is not shown to this Court that the petitioner-wife has been grossly

negligent and was not diligent in pursuing the proceedings. Admittedly, it was only on few dates, as indicated above, the petitioner-wife was absent and the absence on those few dates cannot be said to be so grossly negligent that no discretion can be exercised in favour of the petitioner. The decisions which have been relied upon by learned counsel for the respondent reiterates the position that the discretionary relief has to be exercised so that there is no miscarriage of justice. The petitioner – wife in the present case desires to contest the matter on merits and, in my opinion, the same deserves to be permitted.

15. In the light of above, the orders impugned, namely the order dated 2nd September 2022 and 30th January 2023 are hereby quashed and set aside.

16. Considering that the proceedings are of the year 2015, the Family Court is requested to decide the same expeditiously and in any event within a period of one year from today.

17. Writ petition stands allowed in above terms.

[Sharmila U. Deshmukh, J.]