



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13459 OF 2023

Mrs. Ritu Agrawal ... Petitioner.
Versus
Mr. Avinash Agrawal ... Respondent.

Mr. Vishal Kanade a/w Ms. Chaula Solanki, Mr.H.H.Nagi, Mr.Ameya Vaidya, Ms.Niranjana Pradhan i/by Nagi & Associates for the Applicant.
Mr. S.V. Girdhar, Mr. Manan Savghai, Mr. Paarth Singh for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : November 02, 2023.

P. C. :

1. Heard.
2. The rejection of the Petitioner's application seeking recall of the respondent-husband for the purpose of cross-examination is the subject matter of challenge in the present Petition.
3. The undisputed fact is that in the year 2016, the Respondent had filed a Petition for divorce at Bengaluru, subsequent to which in October, 2019, the petitioner-wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure, 1973 in the Family Court at Mumbai. The Apex Court transferred the divorce Petition from Bengaluru to Family Court, Bandra at Mumbai. An application was made to club the divorce Petition and the Petition filed under Section 125,

which came to be allowed by the Family Court by order dated 11th February, 2021. By the said order, the Family Court directed the parties to lead their common evidence in the divorce Petition and liberty was given to the respondent-husband to file his evidence affidavit in the maintenance Petition after completion of the wife's evidence and also directed that both the petitions will be disposed of by common judgment and order.

4. On 20th February, 2020, the cross-examination of the respondent-husband in the divorce Petition was completed. Subsequently, the respondent-husband filed his affidavits of assets and liability and disclosure in the maintenance Petition being affidavits dated August, 2021, 11th October, 2021 and 12th October, 2021. He, however, chose not to file his affidavit of evidence in the maintenance Petition as directed by clause 4 of the order of clubbing. As the cross-examination of the respondent-husband in respect of the divorce Petition was already over and he did not choose to step into the witness box, there was no opportunity for the petitioner-wife to cross-examine the respondent-husband on the issue of maintenance in respect of the affidavits of assets and liabilities filed by the respondent-husband.

5. To counter the scenario, an application came to be filed under the provisions of Order XVIII Rule 17 of the CPC seeking recall of the

witness on two grounds, firstly that the earlier cross-examination in the divorce Petition was inadequate, inasmuch as, the blame was laid on the Advocate that on vital questions were not asked and secondly, that there was no chance to cross-examine the respondent-husband in respect of his affidavits of assets and liability relating to his income and pertinent for the purpose of adjudication of the application for maintenance. The said application came to be rejected by the impugned order on the ground that the same amounts to filling in lacunae in the prosecution evidence.

6. Mr. Kanade, learned counsel appearing for the Petitioner fairly conceded that as far as further cross-examination on the divorce Petition, the same will not be pressed and the cross-examination will be limited only as regards the three affidavits of August, 2021, 11th October, 2021 and 12th October, 2021 and limited to the aspect of maintenance.

7. *Per contra*, learned counsel appearing for the Respondent-husband submits that as regards the divorce Petition, the cross-examination is complete and no application for recall in respect of the said divorce Petition can be entertained. He would further submit that the respondent-husband has chosen not to lead his evidence in the maintenance Petition and he cannot be forced to lead evidence and adverse interference can be drawn.

8. Considered the submissions. The factual position indicates that

after the cross-examination was completed in the divorce Petition, the affidavit of assets and liability and affidavit of disclosure came to be filed in conformity with the decision of the Apex Court in the case of ***Rajnish Vs. Neha and Another***, reported in ***(2021) 2 SCC 324***. At the time of clubbing of the Petition, the Family Court had directed the parties to lead common evidence and had also directed that the petitions will be disposed of by the common judgment and order. Learned counsel appearing for the respondent-husband is right to the extent that if the Respondent does not wish to lead any evidence in the maintenance Petition, he cannot be forced to do so. However, in the present case, we are concerned with the application filed under the provisions of Order XVIII Rule 17 of CPC seeking recall of the witness. The provisions are very clear and it is now settled that it is not only the Court, who can suo motu recall the witness but same can be done even on the application of the parties.

9. The caveat in such a case is that the same is not for the purpose of filling in lacunae but only if the evidence on re-examination has a bearing on the ultimate decision. As fairly conceded by Mr. Kanade, learned counsel for the Petitioner that there will be no cross-examination on the issue of divorce, there is no question of the application for recall being for the purpose of filling in the lacunae. As the affidavits of asset

and liability and disclosure came to be filed after the closure of the cross-examination of the respondent-husband, the petitioner-wife did not have any opportunity to cross-examine the respondent-husband on that aspect. The application being now confined only for cross-examination of the respondent-husband on the issue of maintenance against the background of the affidavits filed by the respondent-husband, in my opinion, the application deserves to be allowed.

10. For the forgoing reasons, the impugned order dated 21st September, 2023 is hereby quashed and set aside.

11. This Court is informed that the matter is fixed for cross-examination on 4th November, 2023 and that the respondent-husband will be available for cross-examination. The petitioner-wife is directed to complete the cross-examination of within two dates of hearing viz. on on 4th November, 2023 and on the next adjourned date. The cross-examination to be completed in those two dates of hearing and no further extension will be sought. The cross-examination will be limited only as regards the maintenance against the background of the three affidavits which have been filed by the respondent-husband.

12. Writ Petition is accordingly allowed.

13. All concerned to act on the authenticated copy of this order.

(Sharmila U. Deshmukh, J.)