

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4243 OF 2015

Mr. Anil Ambashankar Joshi,]
Age: 49 years, Occu : Business,]
R/At: 33B, Arcade Towers, Yamunanagar,]
Oshiwara, Andheri (W), Mumbai.]..Petitioner

Versus

1. Mrs. Reena Anil Joshi,]
Age: 46 years, Occu: Business,]
R/At: P/A,17, Utopia, Wanowrie]
Pune-411 040.]
2. The State of Maharashtra]..Respondents

Shri. Hitesh Vyas i/by Shri. Abhijeet Sarwate for the Petitioner.
Shri. Vivek Kantawala a/w Shri. Amey Patil i/by Vivek Kantawala &
Co., for the Respondent No.1.

CORAM : R. M. SAVANT, J.
DATE : 5th DECEMBER, 2016

ORAL JUDGMENT

1 Rule. Having regard to the nature of the challenge raised made returnable forthwith and heard.

2 The writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 08.10.2015 passed by the Learned Judge of the Family Court-5, Pune, by which order, the application Exh.18 which has been filed to discard the evidence

sought to be adduced by the Respondent by way of affidavit and direct her to step in the box and lead her own evidence which came to be rejected is taken exception to by way of the above Petition.

3 It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the impugned order has arisen out the proceedings filed under Section 125 of the Criminal Procedure Code (For short "Cr.PC.") by the Respondent. The Petitioner and the Respondent were married on 12.05.1995 and in around January 2005 they started living separately on account of the estrangement between them. The Petitioner is the husband and the Respondent is the wife. The Respondent filed Petition for divorce on the grounds mentioned therein. The said Petition was numbered as P. A. No.103 of 2008 and is pending adjudication in the Family Court, Pune. The Respondent filed an application under Section 125 of the Cr.PC. seeking maintenance from the husband. It seems that the Respondent had also filed a Petition under Section 7, 38 and 39 of the Specific Relief Act read with provisions of the Family Court Act bearing P. B. No.27 of 2008. It seems that all the proceedings between the parties were clubbed together and were to be tried simultaneously. The Petitioner husband has filed his written statement. The Court on the basis of the pleadings of the parties has framed issues in all the Petitions. It appears that in so far as the

application under Section 125 of the Cr.P.C. is concerned, which is P. E. No.50 of 2008, the Respondent who is the Applicant in so far as the said application is concerned filed her affidavit of evidence as contemplated by Order 18 Rule 4 of the Civil Procedure Code (For short "CPC"). The said affidavit of evidence has been taken on record by the Family Court and an order was passed for cross-examination of the Respondent. It seems that the cross-examination has been pending since October 2015. In the said application, the Petitioner filed the instant application Exh.18 praying that the Family Court discard the evidence of the Respondent filed through the medium of the affidavit of evidence and direct her to step in the witness box and lead her own evidence. The said application was replied to on behalf of the Respondent wife. In the reply, it was contended by her that in terms of the permission granted by the Family Court, she has filed her affidavit of evidence and therefore sought dismissal of the said application. The Learned Judge of the Family Court-5, Pune has by the impugned order dated 08.10.2015 rejected the said application.

4 The gist of the reasoning of the Learned Judge is that in terms of Order 18 Rule 4(1) of the CPC, it is mandatory on the part of every witness to lead evidence by way of an affidavit and therefore cannot be compelled to lead oral evidence by entering into the witness

box. It is further held by the Learned Judge that the Respondent having already filed her affidavit of examination-in-chief as per Order 18 of the CPC, if the instant application Exh.18 is dismissed, no loss would be caused to the Respondent because he has a right to cross-examine the Petitioner. The Learned Judge has accordingly rejected the said application Exh.18. It is the said order dated 08.10.2015 which is taken exception to by way of the above Petition.

5 Heard the Learned Counsel for the parties. The principal contention of the Learned Counsel for the Petitioner is that since an application filed under Section 125 of the Cr.P.C. is triable as a summons case, the procedure contemplated for a summons case is required to be followed by the Learned Judge of the Family Court. The Learned Counsel for the Petitioner drew this Court's attention to Sections 125 and 126 of the Cr.P.C. as also Section 10 of the Family Court's Act. The Learned Counsel in support of the said contention placed reliance on the judgment of a Learned Single of the Karnataka High Court reported in **2010(1) DMC 704** in the matter of **Aruna @ Suvarna and another Vs. Marilingappa**, the judgment of a Learned Single Judge of the Madhya Pradesh High Court reported in **LAWS(MPH)-2005-2-46** in the matter of **Rama Prasanna Tiwari Vs. Ashima**, the Division Bench judgment of the Karnataka High Court reported in **1993(2) DMC 197** in the matter of

Gayithri Vs. Ramesh and the judgment of a Learned Single Judge of this Court reported in **2003(1) DMC 580** in the matter of **Vinod Vs. Chhaya.** Relying upon the said judgments, it was the submission of the Learned Counsel that the procedure of permitting the witness to lead evidence by filing an affidavit of evidence is unknown in so far as Chapter IX of the Cr.P.C. is concerned.

6 Per contra, the Learned Counsel appearing on behalf of the Respondent Shri. Vivek Kantawala would seek to support the impugned order. It was the submission of the Learned Counsel that having regard to the fact that the proceedings are clubbed together, that the Learned Judge of the Family Court permitted the Respondent to lead her evidence by filing affidavit of evidence. The Learned Counsel would support the impugned order on the touchstone of Section 10(3) of the Family Court's Act, by which provision according to the Learned Counsel the Family Court is having the power to adopt its own procedure.

7 Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, the issue that arises in the above Petition is as to whether recourse could be taken to Order 18 Rule 4 of the CPC in the matter of filing of an affidavit of evidence in a proceeding under Section 125 of the Cr.P.C. In so far as Section 125 of the

Cr.P.C. is concerned, the same finds a place in Chapter IX of the Cr.P.C. The said provision is followed by Section 126. In so far as Section 126 of the Cr.P.C. is concerned, the same postulates that all evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made. Meaning thereby that the witness would have to depose in the presence of the person against whom maintenance is sought. Hence in terms of Section 126 of the Cr.P.C., the evidence in a proceeding under Section 125 of Cr.P.C. would have to be recorded in the manner prescribed for a summons case. In so far as the proceedings before the Family Court are concerned, the same are regulated by Section 10 of the Family Court's Act which for the sake of ready reference is reproduced hereinunder :-

“10. Procedure generally.-(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 to 1908) and of any other law for the time being in force all apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter (X of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one part and denied by the other.”

8 A reading of Sub Section (2) of Section 10 of the Family Court's Act makes it absolutely clear that the provisions of the Cr.PC. or rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court. If that be so, the procedure as contemplated in Section 126 and Section 274 of the Cr.PC. would have to be adopted in so far as evidence to be recorded in the said Section 125 proceedings are concerned.

9 Now, coming to the judgments on which reliance has been placed by the Learned Counsel for the Petitioner. In so far as the judgment in *Aruna @ Survana's* case (*supra*) is concerned, it has been held by the Learned Single Judge of the Karnataka High Court that Section 126(2) of the Cr.PC. makes it clear that all evidence in respect of Section 125 of the Cr.PC. shall have to be recorded in the manner prescribed for a summons case and that the procedure prescribed for recording of evidence in summons case as found in Section 274 of the Cr.PC. would have to be followed.

10 In so far as the judgment in *Rama Prasanna Tiwari's* case (*supra*) is concerned, it has been held by a Learned Single Judge of the Madhya Pradesh High Court that Section 10 of the Family Court's Act contains a specific provision which postulates that the procedure for the proceedings under Chapter IX of the Cr.P.C. are required to be adopted. It has further been held that all evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made.

11 Now coming to the Division Bench Judgment of the Karnataka High Court in *Gayithri's* case (*supra*), it has been held by the Division Bench that the Family Court whilst dealing with a Petition preferred under Section 125 of the Code is bound to follow the procedure prescribed in Section 126 thereof. It has further been held that the evidence shall be recorded in the manner prescribed for a summons case and that there is no provision in the Code enabling a Magistrate to take affidavit of evidence in a summons case. It is held that the procedure of taking an affidavit in a summons case is completely unknown to the provisions of the Code and the evidence has to be recorded as prescribed by Section 274 of the Code which relates to recording evidence in summons cases and inquiries.

12 In so far as the judgment of a Learned Single Judge of this Court in *Vinod's case (supra)*, it has been held by the Learned Single Judge of this Court that in so far as an application for maintenance under Section 125 of the Cr.P.C. is concerned, the same falls under Chapter IX of the Cr.P.C. and hence CPC has no application and the proceedings would be governed by the Code of Criminal Procedure. The Learned Single Judge in the said case was dealing with an order, whereby the Family Court had struck off the defence of the Defendant. It is in the said context that the Learned Single Judge held that the striking of defence was a procedure not contemplated by the provisions of the Cr.P.C. and that the procedure that was required to be followed in respect of the application under Section 125 is concerned was governed by the Cr.P.C. and not the CPC and therefore the provision for striking of defence is not applicable.

13 Hence having regard to the aforesaid judgments, the weight of the judicial pronouncements can be said to be in favour of the procedure that is required to be followed whilst trying a summons case in so far as an application under Section 125 of the Cr.P.C. is concerned. The application of the said procedure to a proceeding under Section 125 of the Cr.P.C. before the Family Court can be said to be ingrained in Section 10 of the Family Court's Act, under which the Family Court can regulate

its procedure.

14 Now coming to the contention of the Learned Counsel for the Petitioner that it is in the context of the fact that since all the proceedings were clubbed together that the facility of leading evidence by way of an affidavit of evidence was extended to the Respondent. However a reading of the impugned order does not disclose that the same was the consideration that weighed with the Learned Judge of the Family Court. In fact, the reasoning in the last paragraph discloses that the Learned Judge has proceeded on the basis that the CPC and especially Order 18 Rule 4 thereof applies to an application filed under Section 125 of the Cr.P.C. This Court is informed that except the instant application under Section 125 of the Cr.P.C. all other proceedings have come to an end in so far as the Family Court is concerned. In so far as Sub Section (3) of Section 10 of the Family Courts Act is concerned, the same would also not further the case of the Respondent in so far as the application of the procedure applicable to the summons cases are concerned. The Learned Judge of the Family Court has missed the aforesaid aspects whilst dealing with the application Exh.18 is concerned. The Learned Judge of the Family Court seems to have been swayed by the fact that the proceedings are pending for a long time. In my view, that cannot be the basis for giving go bye to the procedure that is

contemplated by the statute.

15 In that view of the matter, the impugned order dated 08.10.2015 is required to be quashed and set aside and is accordingly quashed and set aside. The affidavit of evidence filed by the Petitioner vide Exh.17 would have to be discarded. The Respondent however would be entitled to lead her evidence by stepping into the witness box. Her evidence would be recorded by the Trial Court as per the schedule convenient to it. Since the Trial Court has already observed in clause 2 of the operative part that the parties to co-operate and assist the Court in early disposal of the old cases, it is expected of the parties that both the examination-in-chief and cross-examination would be completed expeditiously and not later than 31.01.2017. Since the matters are kept on 14.12.2016, the Learned Judge of the Family Court may proceed with the examination-in-chief of the Respondent however complete the evidence latest by 31.01.2017. The Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs.

[R.M.SAVANT, J]