
(2004) 10 BOM CK 0090

In the Bombay High Court

Case No : Writ Petition No. 2946 of 2004

Sharad Wasudeorao Kalmegh

APPELLANT

Vs

Leena Sharad Kalmegh

RESPONDENT

Date of Decision : 19-10-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4(1)

Citation : (2005) 2 ALLMR 662 : (2005) 2 BomCR 143

Hon'ble Judges : Lavande A.P., J

Bench : Single Bench

Advocate : Shyam Dewani, for the Appellant; A.C. Dharmadhikari, for the Respondent

Final Decision : Dismissed

Judgement

Lavande A.P., J.—Heard the learned Counsel for the parties.

2. Admit.

3. Shri A.C. Dharmadhikari, the learned Counsel waives notice on behalf of the respondent.

4. By consent of the learned Counsel for the parties the matter is taken up for final disposal.

5. By this petition, the petitioner challenges the order dated 8-7-2004 passed by the Judge, family Court, Nagpur in Petition No. A-467/99.

6. The petitioner is the husband of the respondent. The respondent has filed Petition No. A- 467/99 before the family Court, Nagpur seeking divorce. In the course of the proceedings before the family Court the respondent herein examined herself and her witness. Thereafter, the petitioner stepped in the box and he was party examined on 12-4-2003 and his further examination-in-chief was party recorded on 3-6-2003. At this stage the present petitioner filed application dated 8-7-2004 praying that he may be permitted to produce

remaining part of his examination-in-chief on affidavit as contemplated under Order 18, Rule 4(1) of the Code of Civil Procedure. This application was opposed by filing say on the same day by the respondent herein and by order dated 8-7-04. The Family Court dismissed the application. The petitioner being aggrieved, has filed the present petition assailing the said order dated 8-7-2004.

7. Mr. Dewani, the learned Counsel appearing for the petitioner, has submitted that the lower Court has exercised jurisdiction illegally in rejection the application filed by the petitioner. Accordingly to the learned Counsel, Order 18, Rule 4 of the CPC is mandatory in nature and there is no exception to it. The learned Counsel further submits that there is no discretion left in any Court after amendment of Order 18, Rule 4 to permit either the plaintiff or the defendant to step in the witness box for the purpose of recording examination-in-chief. According to the learned Counsel, valuable time of the Court would be lost if the petitioner is asked to depose in the Court and is not permitted to file his evidence by way of affidavit. The learned Counsel invited my attention to the aims, objects and reasons for amendment to the CPC (Amendment Act, 1999) and submitted that the purpose of amended Order 18, Rule 4 is to save valuable time of the Court in recording examination-in-chief of the witnesses. The learned Counsel, relying upon several judgments of the Apex Court and of this Court, has submitted that the impugned order passed by the Family Court is without jurisdiction and on that count the same is liable to be set aside. The learned Counsel has relied upon the following judgments.

- i) F.D.C. Limited Vs. Federation of Medical Representatives Association India (FMRAI) and Maharashtra Sales and Medical Representatives Association,
- ii) Madhur Industries Ltd. Vs. M.V. "ORIENT COMMERCE" an ocean-going vessel at present lying anchored at the Port of Cochin, Kerala, within the Admiralty and Vice Admiralty Jurisdiction of this Honourable Court and Shrevas Shipping Ltd.,
- iii) Salem Advocate Bar Association Vs. Union of India (UOI),
- iv) Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd.,
- iv) Shri Durgashankar S. Trivedi, Shri Ramshankar Magilal Trivedi, Shri Bhogilal Vishvanath Pandya, Shri Ganpatram Sunderji Joshi, Shri Vasu Shetty and Shri Maddu Kannappa Shetty Vs. Shri Babubhai Bhulabhai Parekh,
- v) J.P. Bansal Vs. State of Rajasthan and Another,

8. Per contra, Mr. A.C. Dharmadhikari, the learned Counsel appearing for the respondent submitted that the lower Court has exercised the discretion properly and it cannot be said that the discretion has been exercised in a perverse manner so as to warrant interference by this Court in exercise of jurisdiction under Articles 226 and/or 227 of the Constitution of India. Mr. Dharmadhikari invited my attention to the prayer made by the petitioner in Application dated 8-7-2004 filed before the Family Court and submitted that the petitioner has prayed that his remaining part of the examination-in chief be permitted to be

adduced by way of affidavit. The learned Counsel submitted that there is no provision in the CPC to permit for recording of the evidence of the witness partly in the Court and partly by way of affidavit. The learned Counsel further submitted that the petitioner himself stepped in the witness box and deposed in the Court on two occasions and, therefore, at this stage it is not permissible for the petitioner to contend that the remaining part of his examination-in-chief be permitted to be adduced by way of affidavit. According to the learned Counsel such a course is not contemplated by the Code of Civil Procedure. According to the learned Counsel, the petitioner ought to have made request to adduce evidence by filing an affidavit before stepping into the witness box and the petitioner having already stepped in the witness box, is not now entitled to contend that the remaining part of his examination-in-chief be permitted to be adduced by filing affidavit. The learned Counsel further submitted that this is not a fit case in which the Court should interfere in exercise of extra-ordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

9. I have considered the submissions made by the Counsel for both sides. I have also gone through the records and the judgments relied upon by the learned Counsel for the petitioner. Having regard to the law laid down by the Apex Court and in a catena of decisions of this Court, it can not be disputed that the Order 18, Rule 4 is mandatory. However, it is pertinent to note that none of the judgments cited by the learned Counsel for the petitioner deals with a situation of the type which arises in the present case. In the present case the examination-in-chief of the petitioner has been partly recorded on two occasions and it is only thereafter that the petitioner has filed an application seeking to produce remaining part of the examination-in-chief by way of affidavit. I find considerable force in the submission of the learned Counsel appearing for the respondent that such a course is not permissible under any provisions of the Code of Civil Procedure. The evidence of the petitioner having been partly recorded, in the normal course, it is appropriate that the trial Court continue with recording of evidence by way of examination-in-chief and cross-examination in the Court itself. The perusal of the impugned order discloses that the trial Court had rejected the prayer made by the petitioner on the ground that the oral evidence has already begun. In my opinion, there is no perversity in the findings given by the learned trial Court which warrants interference by this Court in exercise of writ jurisdiction. The discretion has been exercised by the trial Court after considering the fact that the examination-in-chief of the petitioner has been partly recorded. It cannot be said that the discretion has been exercised arbitrarily or illegally. The being the position, I am of the opinion that this is not a fit case to quash and set aside order dated 8-7-2004. I do not find any jurisdiction error so as to warrant interference in exercise of writ jurisdiction against the impugned order dated 8-7-2004. It cannot be said that the petitioner would be seriously prejudiced by the impugned order although some time may be taken by the trial Court in recording further examination-in-chief of the petitioner.

10. In the back drop of the above facts and circumstances, the petition deserves to be dismissed and is accordingly dismissed. Rule is discharged. The parties are directed to bear their own costs.

Since the matter pending before Family Court is matrimonial one, the judge of the Family Court, Nagpur is requested to take up the petition expeditiously and decide the same accordance with law. It is also expected that the parties will co-operate with the Judge in early disposal of the petition filed by the present respondent.