

Bombay High Court

Mr. Mithun Kishore Patadia vs Mrs. Sheetal Mithun Patadia on 3 March, 2016

Bench: M.S. Sonak

skc

J-WP-9290-12862-15

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9290 OF 2015
WITH

WRIT PETITION NO. 12862 OF 2015

Mr. Mithun Kishore Patadia .. Petitioner

vs.

Mrs. Sheetal Mithun Patadia .. Respondent

Mr. Rohan Cama with Ms Sapana Rachure for Petitioner.

Mr. R. T. Lalwani i/b. Rizwan Merchant & Associates for
Respondent. ig CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 26 February 2016 Date of Pronouncing the Judgment : 03 March
2016 JUDGMENT :-

1] The learned counsel for the parties agree that these two petitions can be disposed of by a common judgment and order.

2] Accordingly, Rule in each of the petitions. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] In writ petition no. 9290 of 2015 challenge is to the following orders made by the Family Court at Bandra:

(a) Order dated 30 July 2015 below Exhibits 149 and 155 directing the petitioner to remain personally present for purpose of skc J-WP-9290-12862-15 cross-examination and consequently rejecting the petitioner's application for cross-examination through the facility of video conferencing;

(b) Orders dated 20 August 2015 and 23 November 2015 closing the petitioner's evidence in the matter for failure to comply with the directions in the aforesaid order dated 30 July 2015.

4] In writ petition no. 12862 of 2015 the challenge is to the order dated 23 November 2015 made by the Family Court at Bandra rejecting petitioner's application for issuance of summons to some witnesses to produce documents. The rejection is mainly on the ground that the Family Court, by the aforesaid orders dated 20 August 2015 and 23 November 2015 has already closed the evidence of the petitioner in petition nos. C-155 of 2007 and B-86 of 2008.

5] The orders dated 20 August 2015 and 23 November 2015 challenged in the two petitions, are really, consequential to the order dated 30 July 2015. This means that if the order dated 30 July 2015 is to be interfered with, then, even the orders dated 20 August 2015 and 23 November 2015 will have to be set aside and opportunity shall have to be granted to the petitioner to lead evidence in the two petitions pending before the Family Court. Rightly therefore, the skc J-WP-9290-12862-15 learned counsel for the parties focused upon their challenge and defence to the order dated 30 July 2015.

6] The impugned orders, have been made in petition no. C-155 of 2007 instituted by the respondent wife claiming maintenance and return of her belongings. The petition no. B-86 of 2008 has also been instituted by the respondent wife seeking declaration and injunction, in respect of certain immovable properties. Although the impugned order dated 30 July 2015 has been made in petition no.

C-155 of 2007, the orders dated 20 August 2015 and 23 November 2015 have been made in both the petitions by the Family Court at Bandra.

7] The petitioner, by application at Exhibit 149 had prayed for record of his cross-examination through video conferencing. The respondent wife, vide application at Exhibit 155, in turn, had prayed for directing the petitioner to remain personally present for cross-

examination, failing which for closure of the petitioner's evidence in the matter. By the impugned order dated 30 July 2015, the Family Court, has dismissed the application below Exhibit 149 but allowed the respondent's application below Exhibit 155, thereby, issuing directions to the petitioner to remain personally present in order to face cross-examination.

8] If impugned order dated 30 July 2015 is perused, the Family

Court, it appears, has premised the same on the basis of the following:

(A) That the matter is very old and there are directions for expeditious disposal of the petitions. If permission for cross-

examination through video recording is granted, the same might entail delay;

(B) That the petition involves serious disputes, inter alia concerning paternity. Therefore, the demeanor of the petitioner is vital. The cross-examination of the petitioner in person will enable the Family Court to witness the conduct and demeanor of the petitioner;

(C) The reason stated by the petitioner that he might not be permitted by his employer in Dubai to leave Dubai is untenable. This is because the contract of employment on record indicates that the petitioner is entitled to 30 days leave each year, which he can always avail in order to face cross-examination;

(D) The reason stated by the petitioner that he is not permitted to leave Dubai since, he has obtained a loan from his employer is untenable and stands demolished by the passport record produced by the petitioner himself evidencing his travel out of Dubai on 8 April 2015 and 10 July 2015;

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(E) The apprehensions that the respondent wife could arrange

to have the petitioner's passport impounded, in connection with the criminal cases instituted by her against the petitioner, are untenable, as, it is always open to the petitioner to take recourse to the legal provisions to redress such apprehensions.

9] Mr. Cama, the learned counsel for the petitioner has submitted that the decision of the Hon'ble Apex Court in the case of State of Maharashtra vs. Dr. Praful B. Desai ¹, affords a complete answer to the contentions with regard to delay or demeanor. He submitted that the said decision of the Hon'ble Supreme Court has been followed by this Court in several decisions concerning matters in Family Court. Mr. Cama submitted that the circumstance of the petitioner leaving Dubai on two occasions has been taken into consideration by the Family Court without afford of any opportunity

to the petitioner to explain the same. Mr. Cama submitted that on both the occasions, the petitioner, had accompanied his employer and therefore, there was no question of the bar against travel outside Dubai applying to the said visits. Mr. Cama submitted that the petitioner has obtained a loan from his employer, the petitioner is not permitted to travel outside Dubai, even though, the contract of his employment, entitles him to leave of 30 days. Besides, Mr. Cama submitted that even though, the petitioner was not resisting 1 AIR 2003 SC 2053 skc J-WP-9290-12862-15 the legal processes in the criminal proceedings instituted by the respondent wife, the apprehensions expressed by the petitioner were not unfounded, particularly considering the circumstance that the respondent was bent upon destroying the petitioner's career in Dubai, through such means. For all these reasons, Mr. Cama submitted that the impugned order dated 30 July 2015 warrants interference in the interest of justice and fair play. The other impugned orders, being consequential to this impugned order, also warrant interference on the same grounds.

10] Mr. Cama also pointed out that the respondent wife had initially endorsed her no objection to the record of cross-

examination through video conferencing. However, after lapse of considerable time and only with a view to harass the petitioner, has sought to resile from her earlier representation. Mr. Cama submitted that since this aspect has been completely ignored whilst making the impugned order, the impugned order warrants interference.

11] Mr. Lalwani, the learned counsel for the respondent submitted that the petitioner, cannot, as a matter of right, insist upon the cross-

examination through video conferencing. He submitted that such facility can be granted by the Court in its discretion. He submitted that the petitioner in the present case having put-forth a false and skc J-WP-9290-12862-15 contradictory case, discretion was rightly exercised against him. He submitted that the petitioner came with false case with regard to inability to leave Dubai without permission. However, in the course of documents produced by the petitioner's constituted attorney i.e. the petitioner's mother, the petitioner's passport was produced which indicated very clearly that the petitioner had in fact left Dubai on two occasions. He submitted that such conduct was rightly taken into consideration by the Family Court and there is absolutely no perversity in the exercise of the discretion. He also submitted that the petitioner is avoiding legal processes and has virtually made himself scarce. In such circumstances, the Family Court, has rightly dismissed the petitioner's applications and granted the respondent's applications by the impugned order. Mr. Lalwani finally submitted that the petitioner has not made any case warranting interference under Articles 226 and 227 of the Constitution of India.

12] The rival contentions now fall for determination.

13] The Hon'ble Supreme Court in the case of Dr. Praful Desai (supra) has held that the term 'presence' in Section 273 of the Cr.P.C. does not mean actual physical presence in the Court.

Further, considering that advances in science and technology, due to which, the world has now shrunk, record of evidence through skc J-WP-9290-12862-15 video conferencing can always be permitted. In the said decision, the Hon'ble Apex Court has answered the issue of delay and examination of demeanor, when, evidence is requested to be recorded through video conferencing. The observations relevant in this regard are reproduced for sake of convenience :

"Video conferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players. When a person is sitting in his drawing-room and watching the match on TV, it cannot be said that he is in presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both, the persons sitting in the stadium and the person in the drawing-room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen.

Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties skc J-WP-9290-12862-15 are in presence of each other. The submissions of respondents counsel are akin to an argument that a person seeing through binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

"Recording of evidence by video conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the Accused. The Accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross- examination of the witness is as effective, if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Thus no prejudice, of whatsoever nature, is caused to

the accused. Of course, as set out skc J-WP-9290-12862-15 hereinafter, evidence by Video Conferencing has to be on some conditions."

"Reliance was then placed on Sections 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open Court. It was submitted that video conferencing would have to take place in the studio of VSNL. It was submitted that that this would violate the right of the accused to have the evidence recorded by the Magistrate or under his dictation in open Court. The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these Sections would be fully met. To this method there is however a draw back. As the witness is now in Court there may be difficulties if he commits contempt of Court or perjures himself and it is immediately noticed that he has perjured himself. Therefore as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are also punishable."

"Thus in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the Court may dispense with such attendance and issue a commission for examination of the witness. As indicated earlier Dr. Greenberg has refused to skc J-WP-9290-12862-15 come to India to give evidence. His evidence appears to be necessary for the ends of Justice. Courts in India cannot procure his attendance. Even otherwise to procure attendance of a witness from a far of country like USA would generally involve delay, expense and/or inconvenience. In such cases commission could be issued for recording evidence. Normally a commission would involve recording evidence at the place where the witness is. However advancement in science and technology has now made it possible to record such evidence by way of video conferencing in the town/city where the Court is. Thus in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience the Court could consider issuing a commission to record the evidence by way of video conferencing."

"In this case we are considering whether evidence can be recorded by Video-Conferencing. Normally when a Commission is issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the Commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a Judicial Officer) would be required to record the evidence and to ensure/compel attendance. However new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the Court can be deputed to record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The Court in Mumbai would be skc J-WP-9290-12862-15 issuing commission to record evidence by video conferencing in Mumbai. Therefore the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a Judicial Officer) to proceed to the office of VSNL and record the evidence of Dr.

Greenberg in the presence of the respondent. The officer shall ensure that the Respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr. Greenberg. The officers shall also ensure that the Respondent has full opportunity to cross-examine Dr. Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence."

"To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who, will know which is the most convenient time for video conferencing with a person in USA. The respondent and his counsel will have to make it convenient to attend at the time fixed by the concerned officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruptions they skc J-WP-9290-12862-15 would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has left the country. There also have been cases where foreign witness has given evidence in a Court in India and that then gone away abroad. In all such cases Court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court.

Even in those cases the Court could only ignore or disbelieve the evidence. The officer deputed will ensure that the respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this skc J-WP-9290-12862-15 submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr. Greenberg is not attending at the time/s fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions,

the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly the costs of video conferencing would have to be borne by the State."

[Emphasis supplied] 14] In my judgment, the aforesaid decision of the Hon'ble Supreme Court does afford an answer to the issues of delay and witnessing of the demeanor and conduct of the petitioner. Relying upon this decision of the Hon'ble Apex Court, this Court, in the case of Mrs. Suvarna Rahul Musale vs. Rahul Prabhakar Musale² has permitted the record of evidence by way of conference. To the same effect, is the decision of the Calcutta High Court in the case of Amitabh Bagchi vs. Ena Bagchi³. Mr. Cama is therefore right in his submission that certain irrelevant considerations have seeped² Writ Petition No. 6514 of 2014 decided on 9 September 2014.

3 AIR 2005 Calcutta 11

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into the decision making process, which has led to the making of the impugned order.

15] The record also bears out that the petitioner was not afforded adequate opportunity to explain his travel outside Dubai on two occasions, notwithstanding his contention that there is a bar to said travel, on account of his having obtained a loan from his employer.

The explanation now tendered that said travel on two occasions was along with his employer and for the purposes of employment, does not appear to be unreasonable or fanciful in the facts and circumstances of the present case. The material on record, indeed establishes that the petitioner, cannot, attend the proceedings before the Family Court without amount of delay, expenses and inconvenience, particularly, in the context of his employment in Dubai. At this stage, there is no material on record to condemn the petitioner as some fugitive, on the run. In any case this does not appear to be the basis for making the impugned order dated 30 July 2015. Therefore, in the facts and circumstances of the present case, there was no warrant to make the impugned order.

16] The record also bears out the application at Exhibit 149, seeking leave to record cross-examination through video conferencing was made by the constituted attorney of the petitioner skc J-WP-9290-12862-15 on 17 June 2015. Copy of this application was served upon the respondent, on whose behalf a no objection was endorsed thereon.

17] However, on 14 July 2015, i.e. after almost a lapse of one month, the respondent wife chose to file application at Exhibit 155 seeking direction to the petitioner to personally remain present for cross-examination and failing which, a prayer was made that the petitioner's evidence must be closed. The petitioner, in his reply dated 15 July 2015 to the application at Exhibit 155 pointed out that the respondent had already consented to the petitioner's application at Exhibit 149. The

respondent even made an attempt to withdraw her consent, which attempt, failed. In order to get over the consent already recorded, the application at Exhibit 155 came to be made by the respondent wife. The respondent wife has explained that the consent granted was without understanding the implications and with a view to avoid any further delay in the proceedings. Mr. Lalwani submitted that although, an order was made for payment of maintenance, the same was ultimately set aside by this Court with directions to the petitioner to deposit an amount of Rs.20,00,000/-

before the Family Court. Out of this amount, the respondent wife has been permitted to withdraw Rs.15,00,000/- and application is still pending for permission to withdraw the balance Rs.5,00,000/-.

Mr. Lalwani pointed out that the proceedings are quite old and till skc J-WP-9290-12862-15 date, the respondent wife is in receipt of hardly any maintenance amount. In contrast, the petitioner, is bent upon delaying the proceedings unreasonably, to the utmost prejudice of the respondent wife. Mr. Lalwani submitted that even this is a factor which is required to be taken into consideration, before the petitioner's application for leave to be cross-examined through facility of video conferencing is taken into consideration.

18] Mr. Cama, the learned counsel for the petitioner, on basis of instructions, has made a statement that the petitioner will have no objection whatsoever to the respondent wife withdrawing the balance amount of Rs.5,00,000/- deposited in the Family Court by the petitioner in pursuance of the order made by the Division Bench of this Court. He submitted that the petitioner will indicate that he has no objection to the respondent withdrawing an amount of Rs.5,00,000/- upon the same terms and conditions, to which the respondent was permitted to withdraw the amount of Rs.15,00,000/- in the pending application made by the respondent wife seeking withdrawal. This statement is accepted.

19] Further, even though, the petitioner has made out a case for interference with the impugned order, it is only appropriate that the petitioner pays substantial costs to the respondent, because, the skc J-WP-9290-12862-15 petitioner, to a certain extent, is responsible for the delay in the progress of the two petitions, which have already been expedited.

As a result of such delay, the respondent, has been deprived of making out a case with regard to maintenance and other reliefs.

Further, since, cross-examination is to be held by video conferencing, the respondent will have to make arrangements to ensure that her Advocate is available on the date fixed and proceeds with the cross-examination as per the convenience of the Court as well as the convenience of the petitioner.

20] The petitioner, in the aforesaid regards, cannot insist upon any special liberties or concessions. The petitioner should strictly abide by any reasonable conditions, which the Family Court may deem it appropriate to impose in the matter of cross-examination through video conferencing. Further, the petitioner, to pay costs of Rs.50,000/- (Rupees Fifty Thousand) to the respondent wife, before the actual date fixed for cross-examination by video conferencing.

This, together with the statement that the withdrawal of Rs.5,00,000/- will not be objected to at least to some extent, will redress the grievance of the respondent wife on the aspect of delay and consequent denial of maintenance. The Family Court is at liberty to make consequential orders in the context of safeguards that are necessary for record of cross-examination through the skc J-WP-9290-12862-15 facility of video conferencing. In this regard, the Family Court may refer to the relevant observations in the case of Dr. Praful Desai (supra).

21] The impugned order dated 30 July 2015 is accordingly set aside. Since, as noted earlier, the orders dated 20 August 2015 and 23 November 2015 (both the orders) are consequential to the making of the impugned order dated 30 July 2015, even they are set aside. The Family Court, to reconsider the petitioner's application for summons to witnesses to produce documents now that the order dated 23 November 2015 (which is impugned in writ petition no. 12862 of 2015) is set aside.

22] Subject to the observations as aforesaid, Rule is made absolute to this extent in both the petitions. The petitioner to pay costs of Rs.50,000/- (Rupees Fifty Thousand) to the respondent within a period of two weeks from today. The Family Court to ensure that such costs are indeed paid by the petitioner to the respondent wife. The petitioner's statement that he shall have no objection to the respondent wife withdrawing the amount of Rs.5,00,000/-

deposited in the Family Court in pursuance of the order made by the Division Bench and subject to the same terms and conditions, by which, the respondent wife was permitted to withdraw amount of skc J-WP-9290-12862-15 Rs.15,00,000/-, is accepted. The directions for expedition of the two petitions, are once again reiterated.

23] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.) Chandka