

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO. 6514 OF 2014

Mrs. Suvarna Rahul Musale ... Applicant  
vs.  
Rahul Prabhakar Musale ... Respondent

Mr. Abhijit Dilip Sarwate a/w. Mr. Mandar Soman, Advocate for the applicant.

Mr. Mandar Limaye, Advocate for the respondent.

**CORAM : MRS. MRIDULA BHATKAR, J.**  
**DATE : 9<sup>th</sup> September, 2014.**

**P.C.**

Rule. Rule made returnable forthwith. By consent, the matter is taken up for final hearing at the stage of admission.

2. By this Writ Petition, the jurisdiction of this Court in Article 227 of the Constitution of India is invoked by challenging the order dated 7<sup>th</sup> March, 2014 passed by the learned Judge of Family Court No. 5, Pune. The respondent/husband has filed the petition under section 9 of the Hindu Marriage Act for decree of restitution of conjugal rights on 3<sup>rd</sup> November, 2008 . The petitioner/wife in her written statement cum counter claim demanded divorce. A minor daughter Rujula was born out of the wedlock. The petitioner/wife has been working in USA since 18<sup>th</sup> June, 2011 and daughter who is 5 ½ years old stays with her mother. The

evidence of the husband is recorded by the Family Court. Now, the petitioner/wife has to lead her evidence, for that purpose, an Application is filed by her for recording her evidence through video conferencing and also for the appointment of Court Commissioner for recording the cross-examination of the petitioner/wife through video conferencing. The said Application Exhibit 83 was rejected by the Family Court Judge. Hence, this Writ Petition.

3. The learned counsel for the petitioner has submitted that the order passed by the learned Family Court Judge is erroneous and illegal. He submitted that the learned Judge was not correct in holding that the petitioner/wife is required to travel India for recording of evidence. The learned Judge has committed error in appreciating the Application on the ground that for recording evidence, the Court atmosphere should be available otherwise the witness may not give answers instantly and there is no scope to observe her demeanour. He submitted that the petitioner/wife is serving in U.S. and looking after minor daughter, so it is not convenient for her to come to India. He submitted that her application be allowed. In support of his submission, the learned counsel relied on the following judgments:

(i) Judgment of the Supreme Court in the case of State of

Maharashtra vs. Praful B. Desai, reported in AIR 2003 SC 2053.

(ii) Judgment of Calcutta High Court in the case of Amitabh Bagchi vs. Ena Bagchi, reported in AIR 2005 Calcutta 11.

4. The learned counsel for the respondent opposed the Application and supported the order of the trial Judge. He submitted that the Court will be deprived of an opportunity to observe demeanour of the witness which is necessary to arrive at correct conclusion. He submitted that physical appearance of a witness is necessary for the smooth going of the trial. There is no special circumstance that the Application of the petitioner for recording of evidence through video conferencing was to be allowed. He further submitted that the family of the petitioner resides in Pune. The reasons given by the petitioner/wife that it is expensive to travel is not acceptable, as she is drawing good salary in US. Therefore, adjudication of the matter and evaluation of the evidence is possible if the parties are present physically before the Court.

5. At the outset there is a substance in the Writ Petition. The petitioner/wife has moved an Application for recording of evidence through video conferencing because she is working in U.S. She has a minor daughter aged about 6 years and stays with her. It is a different

and distant country. Travelling to and fro from U.S. to India is undoubtedly financially expensive so also it is difficult for a mother of 6 years old girl to arrange the logistics. Though in the Application only financial difficulty and inconvenience is mentioned, it is necessary to understand what kind of inconvenience a mother of 6 years old child can face if she has to travel from U.S. To India to give evidence. Moreover she is a working lady and may face difficulty in getting leave and may be some hurdles in VISA. Hence, the Application for video conferencing is justified on all counts.

6. The learned Judge of the Family Court has lost sight that recording of evidence with the help of electronic methods and techniques is acknowledged and recognized in the judicial system. In the case of *Amitabh Bagchi vs, Ena Bagchi (supra)*, wife was in India and husband remained in U.S. When there was an issue of maintenance between the parties, the husband made application before the Court for examining him through video conferencing. The Court has allowed the Application and also gave directions when the evidence was to be recorded by video conferencing by the trial Court.

7. In the case of *State of Maharashtra vs. Praful B. Desai*, though the issue before the Court was in respect of interpretation of section 273 of Cr.

PC. wherein the the meaning of the phrase “in the presence of accused” was discussed and section was interpreted. In the said judgment the Court has approved the principle of updating construction. Advancement of new techniques and skills are introduced in day-to-day life. Over a period of time new technologies are introduced in the day-to-day life, however, speed and frequency of the change in law does not commensurate to speed in the change of science and technology. The process of change and amendment in law is tedious and lengthy. On the other hand, the technology introduces new machines, techniques and facilities very speedily. For eg.: document earlier was restricted to paper or inscriptions, writing on paper like material, however, the document today includes database in computer. In the said judgment, the Supreme Court has reproduced valuable observations of Justice Bhagwati in the case of National Textile Workers' Union vs. P.R. Ramakrishnan at page 256 as follows:

*“We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself.”*

8. It is to be noted that our legislature has wisely taken note of this fact and accordingly has made the changes in the Evidence Act by amending Section 65 and thereby section 65A, 65B are inserted on the point of recording of evidence relating to electronic record and admissibility of electronic record. When the legislature has expanded the scope of term 'Evidence' acknowledging advance technology and scientific methods used by people in their day-to-day activities, it is the duty of the Judicial officers to put life to those letters of law by interpreting them effectively.

9. An Attitudal change in Judges is required. We need to train ourselves to understand the pulse of the new generation who is avidly technosavvy. Though it is difficult for the Judges, especially who are in their middle age, to accept and digest the entry of new language and methods of evidence in the established judicial system, it is high time for us to change our mind set and see whether this new technology can help us to increase the speed and also we have to take into account the convenience of the parties as our judicial system is necessarily litigant centric.

10. The presence of the person can be obtained physically so also virtually. What is important is that a person should be seen and be heard

and vice versa. These are the methods of distant communication, which is possible by virtual measures and microspeakers. Therefore, it is not necessary for the Judge to insist for the physical presence of the witness when it is not possible especially in the circumstances of this case, a virtual presence can be secured which is very much legal and for this purpose, it is not necessary for the Judge himself to give time but such evidence can be recorded by appointing Commissioner. Hence, I set aside the order passed by the Judge and allow this Application of Appointment of Commissioner to record the evidence.

11. Rule is made absolute on the following terms:

- (i) The Family Court to appoint any retired Judge as a Court Commissioner to record the evidence of the petitioner/wife by cross-examination through video conferencing. I suggest the name of retired Judge Mr. J.L. Deshpande subject to his availability. However, it is the discretion of the Judge of Family Court.
- (ii) It is to be noted that besides this, the learned Judge of the Family Court may direct the petitioner to appear before him/her through video conferencing, if the Family Court Judge wants to put some questions with a view to ascertain any fact in the evidence.

- (iii) The petitioner shall submit her affirmed copy of the affidavit-in-chief on or before 30<sup>th</sup> September, 2014 and unaffirmed copy of the said affidavit is to be handed over to the respondent on or before 25<sup>th</sup> September, 2014.
- (iv) The Commissioner to record cross-examination of the petitioner maximum for 8 hours which may spread over not more than six working hours and it is to be recorded till 30<sup>th</sup> October, 2014 as per the convenient time and place of the Commissioner. The charges of the Commissioner so also the cost of the commission including expenses of video conferencing is entirely to be borne by the petitioner/wife.
- (v) The cross-examination preferably should not exceed more than 8 hours. The Commissioner to be paid Rs.5,000/- per hour plus the cost of commission and cost of video conferencing.
- (vi) If the District Court is in a position to make available video conferencing facility to the parties and the Commissioner, then on payment of charges without causing any inconvenience to the District Court, the video conferencing may be held in District Court.
- (vii) Copy of the order may be produced before the District Judge.

**(MRS.MRIDULA BHATKAR, J.)**