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**(2022) 10 BOM CK 0128**

**Bombay High Court (Nagpur Bench)**

**Case No:** Criminal Writ Petition No. 670 Of 2022

Rajnesh

APPELLANT

Vs

Neha And Others

RESPONDENT

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**Date of Decision:** Oct. 21, 2022

**Acts Referred:**

- Code Of Criminal Procedure, 1973 - Section 125, 311
- Family Courts Act, 1984 - Section 10(3)
- Evidence Act, 1872 - Section 65B

**Hon'ble Judges:** M.S. Jawalkar, J

**Bench:** Single Bench

**Advocate:** G.B. Sawal, M.P. Naidu

**Final Decision:** Dismissed

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**Judgement**

M.S. Jawalkar, J

(1) RULE. Rule made returnable forthwith. Heard finally by consent of parties.

(2) Being aggrieved by the order dated 16/08/2022 passed below Exhibit No. 450 by the learned Judge, Family Court No. 3, Nagpur in Petition No. E-

443/2013, whereby the Application for permission to examine the witnesses of the Respondent " Husband therein came to be rejected, the

Petitioner prefers this Writ Petition.

(3) The facts leading to filing of the present Writ Petition are as under:-

(4) For the sake of convenience parties are referred as per their original nomenclature. The Petitioner and the Respondent No. 1 are Wife and

Husband. Their marriage was performed on 18/12/2011 and out of the said wedlock, they were blessed with a baby boy on 10/01/2013. In 2013, the

Petitioner " Wife levelled allegations of mental and physical harassment against the Respondent " Husband. Thereafter, they both started residing

separately. In September, 2013, the Wife filed Petition under Section 125 of the Code of Criminal Procedure for grant of maintenance before the

Family Court, Nagpur claiming Rs. 35,000/-for herself and Rs. 15,000/- for the minor child. The Husband appeared before the Family Court and filed

reply contesting the said Application. The Family Court allowed the Application of interim maintenance and directed the Husband to pay Rs. 25,000/-

which has been confirmed up till the Honable Apex Court. As the Respondent - Husband could not clear the arrears of interim maintenance, his

defence was struck off by this Court in Criminal Writ Petition No. 692/2021 and thus the Family Court closed the evidence of the Petitioner " Wife.

The Respondent - Husband challenged the same by way of Criminal Writ Petition No. 89/2022 which came to be allowed and the Petitioner was

permitted to cross-examine the Petitioner " Wife. The Petitioner - Wife had filed various documents on record including the IT Returns of the

Husband and made various communications to various Banks seeking banks' statements of the husband.

(5) According to the husband, since the wife had filed the documents of which she is not the author, it was necessary to examine the concerned

witnesses to prove the case of the Husband. Hence, the Respondent - Husband filed Application for grant of permission to examine the witnesses.

The learned Judge, Family Court has rejected the said Application of the Respondent - Husband. The said order of the Family Court is the subject

matter of challenge in the present Writ Petition.

(6) Learned Counsel for the Husband vehemently submitted that the false statements are made by the wife before the Family Court and it is stated in

her affidavit that the Respondent - Husband is having various accounts in various banks by different names and she placed on record bulk of

documents before the Family Court which was exhibited by the Family Court without ascertaining the truth therein. As such, her falsity can only be

surfaced by examining the bank witnesses. He further vehemently argued that as per the provisions of Section 311 of the Code of Criminal Procedure,

the Court has every power to summon the material witnesses or examine any person to bring out the truth on record. Otherwise also, the Family

Court, in view of Section 10(3) of the Family Court Act, is empowered to find out the truth of any matter and for that the Court can adopt its own

procedure. However, the Court refused to exercise its powers under Section 311 of the Code of Criminal Procedure on the ground that the powers

under Section 311 is in relation to the regular trial and is not applicable to the summary proceedings.

Â (7) In support of his contentions, the learned Counsel for the Husband relied on the following judgments:-

âœ(a) Judgment in the case of S.P. Chengalvaraya Naidu vs. Jagannath & others reported in (1994) 1 SCC 1;

(b) Judgment in the case of Balraj Taneja & another vs. Sunil Mandan & another reported in (1999) 8 SCC 396;

(c) Judgment in the case of Godrej Pacific Tech Ltd vs. Computer Joint India Ltd. reported in (2008) 11 SCC 108; and

(d) Judgment in the case of Munish Kakkar vs. Nidhi Kakkar reported in 2012 SCC OnLine P & H 19404âœ

(8) Learned Counsel Shri M.P. Naidu for the wife opposed the Writ Petition. However, undertaking was given to the Family Court that Wife will not

press the documents at Exhibit No. 252 and the Bank statements at Pages 23 and 35 to 56 of Exhibit No. 121. Learned Counsel for Wife further

submitted that if the pending amount of interim maintenance is paid, he has no objection if any number of witnesses the Petitioner may examine.

Learned Counsel for the Wife relied on the judgment in the case of Modula India vs. Kamakhya Singh Deo reported in 1988 (4) SCC 619 to support

his contentions.

(9) I have heard both the parties at length and have gone through the citations relied upon by both the learned Counsel and the order passed by the

learned Family Court.

(10) It is well settled principle that mere exhibition of the documents would not amount to admission of the contents of the documents. It appears that

several documents were exhibited at the instance of Petitioner - wife herein during the course of her examination-in-chief and the cross-examination.

Out of these documents, several documents appear to be supported with the Certificate of Section 65B of the Indian Evidence Act. The Petitioner -

Wife herein claimed that the Respondent - Husband is having multiple businesses and having substantial income which the Respondent - Husband

claims it to be false. It appears that this Court has permitted the Respondent - Husband to conduct the cross-examination of the Petitioner - Wife with

limited extent to bring on record the falsity of the Petitioner - Wife and weakness of the case.

Accordingly, he was at liberty to cross-examine the Petitioner - Wife. It is his contention that despite the opportunity to cross-examine, there were

certain falsities i.e. multiple businesses of the Husband namely R.I. Work, Rajind Motors Pvt. Ltd. etc., which were already left by the Husband prior

to 2013. So also, the alleged possession of the premises i.e. LIC premises was already handed over to LIC in 2012. Many of the bank accounts which

were shown in the name of the present Petitioner are not in fact the accounts in his name. The learned Family Court to examine the documents

though exhibited itâ€™s contents can not be said to be in relation with Husband â€™ Respondent. It may be with certificate under Section 65 â€™ B of

the Evidence Act.

(11) It is an admitted fact that the Application for striking off the defence which was rejected by the Family Court was challenged before this Court

and this Court has struck off the defence of the Petitioner herein. As opportunity of cross-examination was rejected by the Family Court, it was

challenged before this Court and this Court issued directions to give opportunity of conducting cross-examination with limited extent i.e. for proving the

weakness and falsity of the Petitionerâ€™s case.

(12) Learned Counsel for the Petitioner â€™ Husband herein relied on various citations. Insofar as the judgment in the case of S.P. Chengalvaraya

Naidu (supra) is concerned, there was no question of striking off the defence. The question involved in the said case was the decree obtained by fraud

whether to be treated as nullity and can be questioned in collateral Proceedings. Therefore, in my considered opinion, it is not applicable in the present

set of facts. In the judgment in the case of Balraj Taneja (supra), the facts involved are distinguishable, wherein the Plaintiff itself was indicating that

there are disputed questions of fact involved in the case regarding which two different versions are set out in the Complaint itself. The Court held that it would not be safe for the Court to pass a judgment without requiring the Plaintiff to prove the facts so as to settle the factual controversy even if there is no Written Statement filed by the Defendant. There is no such question involved in the present matter. The Husband - Respondent was having an opportunity to cross-examine the Wife - Petitioner. Insofar the judgment in the case of Godrej Pacific Tech Ltd (supra) is concerned, since the peculiar facts of striking off the defence arising in this Writ Petition was not there in the said citation, as such it is not applicable. So far as the judgment in the case of Munish Kakka (supra) is concerned, there was no question of striking off the defence of the Petitioner " Husband. It is held by the Punjab and Haryana High Court that the determination of the income of the husband is the most material aspect of the Proceedings under Section 125 of the Code of Criminal Procedure to determine the extent of liability to pay maintenance to the wife. The discretion under Section 311 of the Code of Criminal Procedure to summon any witness or to recall or re-examine any person already examined can be exercised if it appears essential to the just decision of the case. It is further held that it will be premature to express any opinion that the income tax returns for the years 2009 to 2012 are not essential for the just decision of the case. Therefore, the order of recalling of the witnesses from the Income Tax Department to prove the income tax returns held to be the just decision. In this case also, there was no question of striking off the defence was involved.

(13) As against the citation relied upon by the Respondent in the case of Modula India (supra) wherein the defence was struck off, however, it was held that the tenant was entitled to cross-examine the Plaintiff's witnesses and address argument. The cross-examination would however be limited to pointing out false, weakness of the Plaintiff's case. It was held that the tenant is entitled to demonstrate to the Court that the witnesses of the Plaintiff are not speaking the truth and that evidence put forward by the Plaintiff is not sufficient to fulfill the terms of statute. While recording so, the Hon'ble Apex Court also held that the Defendant cannot be allowed to lead his own evidence or try to substantiate his own case.

(14) In view of this settled position of law, it is not open for the Petitioner herein to call the witnesses to lead evidence. As such, I do not see any illegality in the order passed by the learned Family Court. Once the defence is struck off, there is no right to examine the witnesses on behalf of the Petitioner herein. Admittedly, for want of compliance of the order of deposit of maintenance, the defence was struck off and there is no provision allowing the Petitioner herein to adduce evidence after his defence is struck off. So far as the falsity in the documents or in the affidavit placed on record by the Petitioner's Wife is concerned, the Petitioner herein is at liberty to adopt appropriate Proceedings. The learned Family Court, after considering the evidence on record, if satisfied that there is a need to call the witness, the Family Court is at liberty to call the witness as a Court witness. Observations of the Family Court to the extent that he is not empowered to invoke Section 311 of the Code of Criminal Procedure is not correct.

(15) Considering the facts and circumstances and the settled law position, there is no substance in the Writ Petition and hence the same is liable to be dismissed. The Writ Petition stands dismissed. Pending Application(s), if any, stand(s) disposed of.