

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.3286 OF 2014

Hemant Ganpat Rao Bhosle ... Petitioner
Vs.
Ms Sajidah / Rama Hemant Bhosle & another ... Respondents

Ms Armin Wandrewala a/w. Ms Sanaya Dadachanji and Ms Komal
Khushalani i/b. M/s. Manilal Kher Ambalal & Co. for Petitioner.
Mr. Saeed Akhtar a/w. Khushnood Akhtar, Hitesh Thorat and Rohan Ansari
for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 22, 2015

P.C. :

Heard Ms Wandrewala, learned Counsel for petitioner and Mr.
Akhtar, learned Counsel for respondent at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioner-husband has challenged the ad-hoc interim order dated 20.02.2014 as also the judgment and order dated 03.07.2014 passed by the learned Judge, Family Court No.7, Mumbai in Interim Application No.99 of 2012, exhibit-6 in Petition No.A-117 of 2012. By ad-hoc order dated 20.02.2014, the petitioner was directed to pay ad-hoc maintenance of Rs.15,000/- per month. By order dated 03.07.2014, the Family Court partly allowed the application made by respondent No.1 and directed the petitioner to pay monthly maintenance of Rs.40,000/- to her from the date of the application i.e. 20.03.2012 till the disposal of the Petition. The amount paid by the petitioner as per the ad-hoc order dated 20.02.2014 was ordered to be adjusted while calculating the interim maintenance. The petitioner was also directed to pay the costs of Rs.10,000/- to the respondent No.1.

3. In support of this Petition, Ms Wandrewala submitted that the respondent No.1 filed proceedings for decree of divorce under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (for short 'Act'). She also claimed interim and permanent maintenance under Sections 24 and 25 thereof before the Family Court at Bandra. During the pendency of these proceedings, she filed application for interim maintenance on or about 13.06.2009. By order dated 26.10.2010, the Family Court directed the petitioner to pay Rs.25,000/- per month to the respondent No.1 from the date of the application i.e. from 13.06.2009. Aggrieved by that order, the petitioner preferred Writ Petition No.1320 of 2011 in this Court. After hearing both sides, this Court set aside the order dated 26.10.2010 and directed the parties to place all documents before the Family Court showing therein their income as well as the documents showing their assets and estate, which will enable the Family Court to decide the matter. She submitted that after passing of this order, respondent No.1 instead of pressing interim application for maintenance filed Purshis exhibit-24 on 03.09.2011. It was asserted therein that she was unable to appear before the Family Court due to ill-health, and therefore, she may be allowed to not press the interim application. The interim application for maintenance was disposed of as not pressed. She thereafter also withdrew proceedings for divorce on 10.02.2012. Immediately thereafter, on 20.03.2012, respondent No.1 filed proceedings under Section 125 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') claiming maintenance @ Rs.2 lacs per month. She submitted that on one hand, respondent No.1 did not press interim application on the ground of ill-health and on the other, immediately within a period of 1 month from the withdrawal of the divorce proceedings, she filed proceedings under Section 125 of Cr.P.C. This amounts to forum shopping as also avoiding the Court and proceeding further with the interim application filed earlier. She submitted that the

present application under Section 125 itself is not maintainable as it is barred by res judicata as also on merits, respondent No.1 is not entitled to maintenance @ Rs.40,000/- per month. She invited my attention to the payment of Rs.46,544/- made by the respondent No.1 through credit card of Citi Bank. She submitted that during the pendency of the main proceedings, the Family Court directed on 20.02.2014 to pay ad-hoc maintenance of Rs.15,000/- per month. The petitioner has filed application for recalling that order and the same is kept pending and the Family Court disposed of the interim application. She submitted that respondent No.1 suppressed her income as also the properties standing in her name. Respondent No.1 was working as an air-hostess in Air India and after her retirement, was getting pension. However, she came with the case that she was getting monthly pension of Rs.800/-. In other words, respondent No.1 suppressed her real income as also the properties standing in her name before the Family Court. Ms Wandrewala further submitted that the matter was kept for evidence and suddenly respondent No.1 filed interim application for maintenance.

4. In support of her submission, she relied upon the following decisions:

- a. **Vishramji Vs. Kausalyabai, II (1984) DMC 227**, and in particular paragraph 9 to contend that the present application under Section 125 is barred by principles of res judicata;
- b. **Baburao Vs. Kusum Baburao, 1980 Mh.L.J. 871** to contend that the proceedings under Section 125 of Cr.P.C. are essentially civil in nature and the principles of res judicata are applicable to the proceedings under Section 125;
- c. **Hukum Singh Vs. Smt. Satya Bhama, II (1995) DMC 502** (Madhya Pradesh High Court) to contend that order of maintenance can be passed only in case of great hardship;

d. **Gulab Khan Vs. Nairun Nisha, II (2011) DMC 454** (Jharkhand High Court) to contend that maintenance amount cannot be granted without considering paying capacity of petitioner-husband; and

e. **Chaturbhuj Vs. Sita Bai, (2008) 2 SCC 316**, and in particular para 7 thereof, to contend that the burden is placed in the first place upon the wife to show that the means of her husband are sufficient.

She submitted that the petitioner is suffering from Cancer and has no paying capacity. The properties standing in his mother's name as also her reputation cannot be considered while fixing the amount of maintenance.

5. Ms Wandrewala also invited my attention to the allegations made by the respondent No.1 in interim application as regards properties standing in the name of the petitioner and the response of the petitioner in his written statement. For all these reasons, she submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr. Akhtar supported the impugned order. He submitted that during the pendency of the main proceedings, by order dated 20.02.2014, the Family Court directed the petitioner to pay ad-hoc maintenance @ Rs.15,000/- per month. Till date, the petitioner has not complied that order and has not paid maintenance @ Rs.15,000/- per month. He further submitted that the petitioner has sufficient means to pay the maintenance. He submitted that the petitioner has also not produced the documents before the Family Court and the said fact is considered in paragraph 13 of the impugned order. He, therefore, submitted that no case is made out for interfering with the impugned order.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, respondent No.1 had filed proceedings under the provisions of the Act and also claimed interim maintenance. By order dated 26.10.2010, the Family Court directed the petitioner to pay maintenance @ Rs.25,000/- per month from the date of the application i.e. 13.06.2009. Aggrieved by that decision, the petitioner instituted Writ Petition No.1230 of 2011 in which this Court (Coram: R. Y. Ganoo, J.) passed an order on 25.04.2011. In paragraph 5 of that order, it was observed thus,

“5. It is noted that the respondent was in service of Air India as Air Hostess and has since retired. It is the claim of the petitioner that she draws pension. A perusal of the impugned order dated 26.10.2010 shows that the respondent has not produced before the court necessary documents to show as to whether she gets pension and if yes, how much amount of pension she gets. She has also not produced documents to show her assets and estate after her retirement. The learned Judge of the Family Court has decided the matter in the absence of these papers. In my view, the production of these documents by the respondent were required in order to arrive at the proper conclusion. It has been the contention of the respondent before this Court that the petitioner has not produced satisfactory documents to show the correct income of the petitioner. Be that as it may. Fact remains that the learned Judge of the Family Court was not made available proper documents for the purpose of deciding the matter on merits. In such a case, the impugned order is required to be set aside. Both the parties are required to file documents to show their income, their assets and estate so that the learned Judge will be able to arrive at appropriate conclusion and pass an order on merits.”

8. After the disposal of the Petition, respondent No.1 filed Purshis exhibit-24 on 03.09.2011 for not pressing the interim maintenance application. The interim maintenance application was disposed of as not pressed on the same day. Respondent No.1 also withdrew proceedings under the Act on 10.02.2012. It is material to note that the proceedings filed earlier under the provisions of the Act including proceedings for interim maintenance were not decided on merits. The present

application is filed on 20.03.2012 claiming maintenance. It is in that context, one has to consider decisions of this Court in the cases of **Vishramji** (*supra*) and **Baburao** (*supra*). In the case of **Vishramji** (*supra*), wife had instituted Regular Civil Suit for declaration that the divorce deed is a nullity and for grant of permanent maintenance. The said claim was decided against the wife by the trial Court as well as the appellate court. The wife preferred Second Appeal, which was also dismissed. It was only thereafter she filed proceedings under Section 125 of Cr.P.C. Thus, on merits, the Civil Court had denied the maintenance.

9. Relying upon the decision in the case of **Baburao** (*supra*), it was submitted that wife is not entitled to claim maintenance as her application itself is not maintainable as it is barred by principles of res judicata. In the case of **Baburao** (*supra*), wife had filed proceedings under Section 10 of the Act for judicial separation alleging cruelty and re-marriage by the husband as also desertion. The civil court dismissed the petition. It is thereafter the wife applied for maintenance under Section 125 of the Cr.P.C. on the same set of facts. It is in that context, the learned Single Judge held that the proceedings filed by the wife under Section 125 was not maintainable in the face of the earlier decision of the Civil Court. As noted earlier, in the present case, the earlier proceedings filed for interim maintenance were not pressed. In other words, the proceedings were not decided on merits. In view thereof, I do not find any merit in the submission of Ms Wandrewala that the present proceedings under Section 125 of Cr.P.C. are not maintainable.

10. As far as merits of the case are concerned, the Family Court has considered the income tax returns submitted by the petitioner. It was

noted that the petitioner did not place on record whether he is exempted from the tax by the Government of U.K. The income tax details are useful only for assessment of income for the purpose of paying tax. It is not a truthful or correct income in each and every case. The income tax returns is, therefore, not conclusive proof of income. On the basis of the income tax returns, the Court cannot conclusively determine the economical status of the parties.

11. The Family Court also noted in paragraph 13 that the petitioner did not file any document to prove his income. it is very difficult to consider the income of the parties to the proceedings. In paragraph 14, the learned Judge noted that the pension papers filed on record by the respondent No.1 show that she is receiving pension of Rs.800/- per month. Having regard to the status of the respondent No.1 as also having regard to the fact that she is receiving meagre amount, the Family Court held that respondent No.1 is entitled for interim maintenance. It was observed in paragraph 14 that the petitioner is staying at abroad. Considering the lifestyle of the NRI person and considering the circumstances in which the petitioner is born and brought up, the respondent No.1 is entitled to maintenance @ Rs.40,000/- per month which will meet the ends of justice.

12. In the case of **Chatur Bhuj** (*supra*), the Apex Court has observed in paragraph 8 as under:

“8. ... The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In *Bhagwan v. Kamla Devi* (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.”

13. The reliance placed by Ms Wandrewala on the decisions of **Hukum Singh** (*supra*) and **Gulab Khan** (*supra*) to the effect that the order of maintenance can be passed only in case of great hardships as also maintenance cannot be awarded without considering the paying capacity of the husband do not assist the petitioner. In view of the test laid down by the Apex Court extracted hereinabove, the Court while awarding maintenance has to follow the test laid down by the Apex Court. Apart from this, the main proceedings are pending and the impugned orders are interim in nature. The parties will have to lead evidence in support of their respective case. In view thereof, I do not find that the Family Court committed any error in passing the impugned orders. More so, when it is not shown that the petitioner complied the ad-hoc order directing payment of maintenance @ Rs.15,000/- per month. For all these reasons, the Petition fails and the same is dismissed. It is made clear that the Family Court will decide the main proceedings on the basis of the evidence on record and uninfluenced by any observations made herein.

14. At this stage, Ms Wandrewala orally applies for continuation of ad-interim order dated 09.09.2014 for the period of 2 weeks from today. Mr. Akhtar opposes this prayer. Having regard to the fact that the petitioner has not complied even the ad-hoc order dated 20.02.2014, in my opinion, no case is made out for granting stay. Order accordingly.

(R. G. KETKAR, J.)