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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
FAMILY COURT APPEAL NO.113 OF 2013 WITH
CIVIL APPLICATION NO.165 of 2013

Ms Virginia Pascol Patil ...Appellant
vs.
Shashikant Mahadeo Patil
@ Pascol Francis Patil ...Respondent

Mr.T.M.Sagari i/b Nitin P. Dalvi for the Appellant
None for the respondent

CORAM : A.S.OKA, &
A.A.SAYED, JJ.
DATE : JUNE 8, 2016

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Heard the learned counsel for the appellant. None appears for the respondent. Today, the appeal is specifically listed under the caption of 'Final Hearing'. The appeal is preferred by the wife. The respondent is the husband. By a Judgment and Decree dated 9th March 2011 passed by the learned Judge of the Family Court at Bandra,Mumbai in petition No.A-682 of 2009, while granting a decree of divorce under the provisions of the Special Marriage Act,1954, the learned Judge granted a decree of permanent alimony in the sum of Rs.4,000/- per month from the date of decree.

2 The respondent-husband filed Miscellaneous Application No.18 of 2010 seeking modification of the Decree impugned in this Appeal granting permanent alimony. The application was opposed by

the appellant-wife. The parties led oral evidence. By the impugned Judgment and Decree, the earlier Decree dated 9th March 2011 was modified and the maintenance amount which was made payable at the rate of Rs.4,000/- per month was reduced to Rs.2,500/- per month. This order was passed in purported exercise of the powers under sub-section (2) of section 37 of the Special Marriage Act, 1954 (for short 'the said Act'). The Family Court while passing the Decree of Divorce is entitled to pass a Decree granting permanent alimony and maintenance. Under sub-section 2 of section 37, there is a power vesting in the Court to modify or rescind the Decree of permanent alimony and maintenance, if it is satisfied that there is a change in circumstances.

3 We have perused the application made by the respondent-husband, the reply of the appellant-wife to the said Application and the notes of evidence. In the application made by the respondent-husband, firstly, he has stated that the appellant-wife has falsely deposed in the main petition that she was not earning. It is contended that she was working as a teacher in Royal City English School from 15th June 2010 onwards. Reliance was placed on the information obtained from the school. Secondly, it is contended that in the petition filed under the Protection of Women from Domestic Violence Act, 2005 (for short "the said Act of 2005"), in addition to interim maintenance of Rs.1,000/- per month, an amount of Rs.400/- per month towards rent was granted by the learned Metropolitan Magistrate.

Thirdly, it is contended that the respondent had suffered an accident and since then, he has become handicapped. Fourthly, it is alleged that he has to pay for the expenses of son and daughter towards maintenance and education. Fifthly, the appellant-wife has earning capacity as she has studied up to graduation and has completed nursing course. Sixthly, it is contended that the wife is having a love affair with another person.

4 We have carefully perused the impugned Judgment. Permanent alimony granted at the rate of Rs.4,000/- per month is brought down to Rs.2,500/- per month on the following grounds:

(i)The Court of the Metropolitan Magistrate in the proceeding of the Domestic Violence Act,2005 granted interim maintenance at the rate of Rs.1,000/- per month to the wife and directed payment of Rs.400/- per month towards rent;

(ii)The wife has completed nursing course and she has admitted that she was working as a Teacher;

(iii)The wife admitted that she used to take coaching classes and used to get Rs.2000/- per month;

(iv)The wife has earning capacity;

(v) The wife admitted that the respondent-husband suffered an accident in the year 2006 and his leg was fractured;

(vi) The learned Judge of the Family Court

while passing the Decree has not considered the earning capacity of the husband, the earning capacity of the wife and the fact that in the year 2006, the husband suffered an accident and his leg has been fractured.

5 We have perused the affidavit in lieu of examination in chief of the respondent-husband. From the affidavit in lieu of examination in chief it appears that apart from producing photo copies of the certain documents, the respondent-husband has not proved a single document. In the impugned Judgment, there is no reference of even a single document. In the cross examination, the husband stated that he was unemployed. Perhaps, the learned Judge has completely ignored further part of the cross examination which reads thus:

"...It is true to say that I am having a house at Dharavi bearing No.155/A/B/C. It is true to say that the house is of two floors. It is true to say that on ground floor there are five shops. My father has given shop on rent to a person who is preparing bags. I am not aware about the rent of Rs.30,000/- per month. I am not aware whether five shops are given on rent and Rs.1 lac per month are rent."

6 Thus, the respondent-husband admitted that he was having a house at Dharavi in Mumbai consisting of two floors. He also admitted that there are five

shops on the ground floor. He admitted that one shop is given on rent to a person who is preparing bags. Without disputing the correctness of the suggestion that the rent is being paid by the said person, he pleaded ignorance about the fact that the rent is of Rs.30,000/- per month. He did not disclose the rent. He pleaded ignorance whether five shops have been given on rent and the rent of Rs.1,00,000/- per month is being received. He did not dispute that the five shops were let out. In the subsequent paragraphs, he pleaded ignorance about the fact whether the first floor of his house is given on rent to a person who is preparing garments. Later on he stated that he is having only one room. He pleaded ignorance about the fact that his father is having a land at Lonavala and whether he was getting Rs.30,000/- per month from the Guest House. Thus, admitted position is that the respondent-husband is having a house at Dharavi in Mumbai consisting of two floors. There are five shops on the ground floor which appear to have been let out. Thus, even if we go by the statements made by the husband, even assuming that he was/is unemployed, inference can be drawn that he is receiving substantial income from his house at Dharavi which consists of five shops. Even the conservative estimate of the income from the house cannot be less than Rs.50,000/- per month.

7 Now, we turn to the evidence of the wife. In the cross examination, she denied to have completed D.Ed course. She admitted that she has completed HSC

in English Medium and she has completed Nursing Course of one year. She stated that she was working as a Teacher till May 2009 and thereafter, she is not working as a teacher. The husband was unable to adduce evidence to show that on the date of decree, the wife was working as a Teacher. In the cross examination, while referring to her deposition in Petition No.A-682 of 2009, she admitted that at that time, she used to take Coaching Classes and used to earn Rs.2,000/- per month. No evidence was adduced by the husband to show that after the decree of which modification was sought, the appellant-wife was running Coaching Classes and was earning income.

8 Thus, it can be easily inferred that the respondent-husband must be getting a very large income from the five shops on the ground floor of his house at Dharavi, Mumbai. On the one hand, the husband could not lead evidence to show that the appellant-wife was earning and on the other hand, the cross examination of the husband shows that the respondent is holding substantial property and was getting a large income irrespective of the alleged injuries in the accident in the year 2006.

9 There is one more aspect. The Decree of permanent alimony was granted in exercise of power under sub-section (1) of section 37 of the said Act of 1954. There is a power vesting in the Court to modify the order/decreed of permanent alimony and maintenance under sub-section (2) of section 37 which reads thus:

"37 (2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just."

10 On plain reading of sub-section (2), the power of modification can be exercised only on one ground. The said ground is that there is a change in circumstances after the original order of permanent alimony was passed. In the present case, there is no specific finding recorded by the learned Judge of the Family Court that there is any change in circumstances as contemplated by sub-section (2) of section 37.

11 Accordingly, we find that there was absolutely no ground to reduce maintenance amount from Rs.4,000/- to Rs.2,500/- per month even after taking into consideration interim maintenance ordered to be paid in the proceedings under the said Act of 2005 considering the income of the husband. Therefore, the Appeal must succeed.

12 Hence, we pass the following order:

(I) The impugned Judgment and Order dated 1st April 2013 passed by the learned Judge of the Family Court No.2 is hereby set aside;

- (II) Civil Miscellaneous Application No.18 of 2012 in Petition No.A-682 of 2009 is hereby dismissed;
- (III) We direct the respondent-husband to pay cost of this Appeal quantified at Rs.10,000/- to the appellant-wife within a period of eight weeks from today;
- (IV) Civil Application No.165 of 2013 does not survive and the same is disposed of.

(A.A.SAYED,J.)

(A.S.OKA,J.)