

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.95 OF 2007
WITH
CIVIL APPLICATION NO.217 OF 2015

Mrs.Sneha Sachin Dhuri	Appellant
versus	
Sachin Dinanath Dhuri	Respondent

WITH
FAMILY COURT APPEAL NO.211 OF 2007
WITH
CONTEMPT PETITION NO.29 OF 2015

Mrs.Sneha Sachin Dhuri	Appellant
versus	
Sachin Dinanath Dhuri	Respondent

Mrs.Prabha Badadare for Appellant-Wife in both appeals and for Petitioner in Contempt Petition No.29/2015 and for Respondent in CA No.217 of 2015.

Mr.Bipin J. Joshi for Respondent in both appeals and in contempt petition and for Applicant in CA No.217/2015.

CORAM : A.S.OKA AND P.D.NAIK, JJ.

DATE : 21st March 2016

ORAL JUDGMENT - (Per : A.S.Oka, J.) :-

1. The Family Court Appeal No.95 of 2007 preferred by the wife takes an exception to the judgment and decree dated 13th February 2006 passed by the learned Judge of Family

Court, at Mumbai. The appellant-wife filed an application under Sections 18 and 20 of the Hindu Adoption and Maintenance Act, 1956 (for short "the said Act"). The appellant prayed for a maintenance @ Rs.30,000/- per month for herself and Rs.20,000/- per month for the minor son. By the impugned judgment and decree, the Family Court directed the respondent-husband to pay Rs.10,000/- per month as maintenance to the appellant-wife and Rs.3,500/- per month as maintenance to the minor child. The respondent-husband was directed to provide suitable accommodation to the appellant-wife and the minor son.

2. Family Court Appeal No.211 of 2007 was filed by the present appellant-wife. The said appeal takes an exception to the order dated 1st November 2007 passed by the learned Judge of the Family Court on the execution application filed by the appellant-wife seeking execution of the decree subject matter of Family Court Appeal No.95 of 2007.

3. Family Court Appeal No.95 of 2007 along with Family Court Appeal No.211 of 2007 were placed for final hearing before a Division Bench of which one of us (A.S.Oka, J.) was a party.

4. It will be necessary to make a reference to the order dated 4th September 2014 passed by the Division Bench in

Family Court Appeal No.95 of 2007 and in particular paragraph nos.2 to 6, which read thus :

"2. We have heard the parties at length. The learned counsel appearing for the Respondent husband during the course of his submissions submitted that the Respondent may be permitted to adduce additional evidence both documentary as well as oral. The learned counsel appearing for the Appellant submitted that if the Respondent is allowed to be led additional evidence, even the Appellant may be allowed to lead additional evidence.

3. The learned counsel appearing for the Respondent has tendered across the bar an unaffirmed affidavit of the Respondent which is duly signed by the Respondent. Clauses (1) and (2) of the said affidavit read thus :

"1. Without prejudice to my rights and contentions, I undertake to pay sum of Rs.40,000/- (Forth Thousand only) per month to the petitioner as and by way of maintenance, from September 2014 onwards regularly till the hearing and final disposal of the above petition subject to the further orders of this Hon'ble Court.

2. Without prejudice to my rights and contentions, I further undertake to pay the differences amount i.e. sum of Rs.26,500/- (Rs.Twenty six Thousand Five Hundred only) per month from the date of decree dated 13.2.2006 till date, to the petitioner within period of 3 months from today."

He states that the affirmed in above terms will be filed by tomorrow. We accept the said statement. We accept the statements made in the said affidavit which are reproduced as above.

4. After having perused the evidence both oral and documentary, we find that this is a fit case where an opportunity deserves to be granted to both the appellant wife and the respondent husband to adduce additional evidence on

the issue of quantum of maintenance payable by the respondent.

5. By invoking the power of this Court under Rule 25 read with Rule 28 of the Order XLI of the Code of Civil Procedure, 1908, by keeping the Appeal pending in this Court, a permission deserves to be granted to the parties to adduce additional evidence before the Family Court.

6. As the Respondent husband has agreed to pay maintenance amount at the rate of Rs.40,000/- per month, sufficient care has been taken of the needs of the appellant wife for the time being."

5. By the said order, this Court permitted the parties to adduce additional evidence, both oral and documentary, on the issue of quantum of maintenance. Clauses(c) to (h) of paragraph 7 of the said order read thus :

"7(c) After allowing the parties to adduce additional evidence, the learned Judge of the Family Court shall hear the parties and shall record findings on the following two issues :

(i) What was the income of the Respondent husband on the date of the impugned decree i.e. 13th February 2006?

(ii) What is the present income of the Respondent husband?

(d) The learned Judge of the Family Court shall record findings on the said two additional issues as expeditiously as possible and preferably on or before 30th April 2015;

(e) We accept the statements made by the Respondent husband in his affidavit referred to above;

(f) We direct the Appellant wife to furnish sufficient particulars of her Bank Account to the Respondent husband or to his Advocate so as to enable the Respondent to pay

differential amount of maintenance as well as maintenance at the rate of Rs.40,000/- per month by directly transferring the said amounts to the said Bank Account of the appellant-wife;

(g) Till the account particulars are furnished to the Respondent or to his Advocate, he shall deposit the maintenance amount with the Family Court;

(h) In the event, the Respondent commits any default in payment of maintenance amount at the rate of Rs.40,000/- and differential amount as stated in the affidavit of the Respondent husband, it will be open for the Appellant wife to move this Court for appropriate relief."

6. After the said order was passed, the respondent-husband did not lead any evidence before the Family Court. In terms of the order dated 4th September 2014, the Family Court passed order dated 30th July 2015. By the said judgment and order dated 30th July 2015, the learned Judge of the Family Court came to the conclusion that the monthly income of the respondent-husband was Rs.10 lakhs. Being aggrieved by the said order dated 30th July 2015, memorandum of objection has been filed by the respondent-husband in accordance with Rule 26 of Order XLI of Code of Civil Procedure, 1908.

7. On 4th September 2014, Family Court Appeal No.211 of 2007 was disposed of by consent, by setting aside the impugned order dated 1st November 2007 and by remanding the execution application to the learned Judge of the Family Court. Parties were permitted to lead evidence on the market value of the residential premises.

8. Family Court Appeal No.95 of 2007 came up before this Court on 4th February 2016. It was pointed out that in terms of order dated 4th September 2014, the respondent-husband had not paid the maintenance to the appellant-wife @ Rs.40,000/- per month. The said order records the statement of the appellant-wife that a sum of Rs.33 lakh to Rs.34 lakh was payable as per the said order, out of which amount, only a sum of Rs.5 lakh was paid by the respondent-husband by tendering a cheque to the advocate for appellant-wife. The said cheque has been encashed. Clause-3 of the order dated 4th February 2016 reads thus :

"3. We call upon the respondent-husband to file an affidavit showing cause as to why his defence in the appeal should not be struck out by exercising powers under Rule 11 of Order XXXIX of the Code of Civil Procedure, 1908. We also call upon the respondent-husband to show cause as to why objections filed by him in accordance with Rule 26 of Order XLI of the said Code should not be dismissed. Affidavit showing cause shall be filed by the respondent on or before 1st March 2016. For the purpose of hearing of show cause notice, the appeal along with Contempt Petition shall be listed under the caption "Directions" on 9th March 2016. Civil application filed by the respondent-husband shall also be placed for hearing on the same date."

9. By the said order, time was granted to the parties to explore possibility of settlement. Today, learned counsel for the parties have agreed that there is no possibility of settlement.

10. In terms of the show cause notice issued under order dated 4th February 2016, the respondent-husband has filed

affidavit-in-reply dated 1st March 2016. He has accepted that he had given undertaking to this Court on 4th September 2014 to pay maintenance @ Rs.40,000/- per month from September-2014 onwards. He has merely stated in paragraph 3 of the affidavit that the said undertaking is not capable of being complied with. The respondent-husband has contended that he has not taken any advantage of the order dated 1st September 2014. It is claimed that the respondent-husband has been under medical treatment of Dr.Harish Taori since July-2014. It is contended in paragraph 7 of the affidavit that the assurance was given to the Court to pay the maintenance in view of his bona fide belief that the family members of the respondent-husband would support him in making the payment of said amount. It is stated that the family members of respondent-husband have refused to extend any financial help to him.

11. Learned counsel appearing for the respondent-husband pointed out that Civil Application No.217 of 2015 has already been filed by the husband for recalling the order dated 4th September 2014. He submitted that the respondent-husband is not in a position to pay the amount in terms of the undertaking given by him.

12. We have perused the averments made in Civil Application No.217 of 2015. We have considered the aforesaid affidavit dated 1st March 2016 filed by the respondent-husband.

We have already quoted extensively the order dated 4th September 2014 passed by this Court in Family Court Appeal No.95 of 2007 when the appeal along with companion appeal were extensively heard. A request was made by the respondent-husband for grant of permission to adduce additional evidence. the said request was accompanied by an assurance which is recorded in paragraph 3 of the said order. It is only because of this assurance that this Court showed indulgence and permitted the respondent-husband to lead additional evidence. Accordingly, the learned Judge of Family Court has passed an order dated 30th July 2015 which records that the respondent-husband had not appeared before the Family Court on the basis of order dated 4th September 2014. On 20th June 2015 the learned Family Court Judge passed an order to proceed ex-parte against the respondent-husband. After hearing the appellant-wife, the learned Family Court Judge recorded a finding that as on the date of the impugned decree (i.e. 13th February 2016), the probable income of the respondent-husband was Rs.3 lakh per month and his present income is Rs.10 lakh per month.

13. It is pertinent to note that in terms of the order dated 4th September 2014, no amount was paid by the respondent-husband. It is also pertinent to note that Civil Application No.217 of 2015 was affirmed on 1st April 2015 and was filed on 9th April 2015. We may also note that in Civil Application No.217 of 2015 in Family Court Appeal No.95 of

2007, instead of annexing a copy of order dated 4th September 2014 passed in Family Court Appeal No.95 of 2007, the respondent-husband has annexed copy of order dated 4th September 2014 passed in Family Court appeal No.211 of 2007, which was disposed of by consent. Another relevant aspect of the matter is that under the order dated 4th September 2014, the respondent-husband was directed to appear before the Family Court on 6th October 2014. Notwithstanding the said clear direction, the respondent-husband did not appear before the learned Judge of Family Court. In paragraph 2 of the order dated 30th July 2015, the learned Judge of Family Court has set out the efforts made by him to procure the presence of respondent-husband. A summons was issued to the respondent-husband which was not accepted by his brother. A notice was issued by RPAD which was returned with remark "not claimed". If the respondent-husband had any genuine difficulty in making payment in terms of the order dated 4th September 2014, he would have approached the Court immediately after the order dated 4th September 2014 was passed. Therefore, Civil Application No.217 of 2015 lacks bona fides.

14. It is sought to be contended by the learned counsel for the respondent-husband that there is no prejudice caused to the appellant-wife. The said contention deserves to be rejected for more than one reason. The order dated 4th September 2014 was passed on the request made by respondent-husband after

the appeal preferred by appellant-wife was substantially heard. As a result of representation made by respondent-husband that order dated 4th September 2014 was passed. Even today, the appeal of the year 2007 filed by the appellant-wife has not been decided. Thus, the conduct of the respondent-husband has led to inordinate delay in disposal of the appeal. We may also note here the averments made in paragraph 8, which read thus :

"8. In the circumstances mentioned hereinabove, the Respondent could not comply with the order of this Honourable Court dated 4.9.2014 nor could comply with the undertaking given to this Honourable Court."

We may also note here that it is not as if that the respondent-husband was not interested in contesting the matter. Though the respondent-husband did not appear before the Family Court, he has filed objections dated 30th February 2015.

15. Though, as of today, arrears payable in terms of order dated 4th September 2014 are approximately Rs.30 lakhs, between 4th February 2016 and till today, no further amount has been paid by the respondent-husband.

16. Considering the conduct of the respondent-husband, there is absolutely no justification for not complying with the undertaking given to this Court to pay maintenance to the appellant-wife @ Rs.40,000/- per month. The said gross breach is wilful and deliberate. Therefore, this is a fit case to invoke

the power of this Court under Rule 11 of Order XXXIX of the Code. The defence of the Respondent-husband in Family Court Appeal No.95 of 2007 deserves to be struck out and the objections filed by the respondent-husband under Rule 26 of Order XLI of the Code deserve to be dismissed. Needless to state that this action will be in addition to the action under Contempt of Courts Act, 1971.

17. Accordingly, we pass following order :

(a) In view of breach of order dated 4th September 2014 committed by the Respondent-husband and in view of breach of undertaking given by the Respondent-husband to this Court, the defence of the Respondent-husband is struck out in exercise of power under Rule 11, Order XXXIX of the Code of Civil Procedure, 1908;

(b) The objections filed by the Respondent-husband to the order dated 30th July 2015 on 21st October 2015 stand dismissed;

(c) The appeal be added to the weekly board of Family Court Appeals;

(d) Civil Application No.217 of 2015 accordingly stands dismissed;

(e) Contempt Petition No.29 of 2015 shall be fixed for hearing on 12th April 2016 under caption of "fresh matters". The Respondent-husband is directed to personally remain present in the Court on 12th April 2016.

18. At this stage, after dictating the above order in Court, the learned counsel for the Respondent-husband prays for stay of the present order passed in Family Court Appeal No.95 of 2007. Considering the conduct of the Respondent-husband which is recorded in the order above, the prayer is rejected.

(P.D.NAIK, J.)

(A.S.OKA, J.)

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