

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.194 OF 2014
IN
FAMILY COURT APPEAL NO.138 OF 2014**

Mr. Kapil Sambhaji Kadam ...Applicant

In the matter between

Mr. Kapil Sambhaji Kadam ...Appellant

Versus

Mrs. Kanchanika Kapil Kadam ...Respondent

.....

Mr. Mandar Soman for the Applicant.

Mr. Chetan Gajanan Patil for the Respondent.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

DATED: 22nd MARCH, 2017.

P.C.:-

Heard the learned counsel appearing for the Applicant and the learned counsel appearing for the Respondent. The Applicant -husband is seeking stay of the following part of the impugned decree:

“2. Respondent shall pay maintenance @ Rs.4,000/- per month to the petitioner from the date of this petition.

3. Respondent shall pay past maintenance @ Rs.2000/- per month to the petitioner for a period of

three years prior to the institution of the petition.

4. Charge of maintenance be created on the properties bearing Gat No.21A, 21B and 256 situated at village Kheriwade, Tal: Panhala, Dist: Kolhapur to the extent of share of the respondent.”

2. First submission of the learned counsel appearing for the Applicant is that maintenance at the rate of Rs.2000/- p.m. granted for a period of three years prior to the institution of the Petition could not have been granted. His second submission is that both children are in the custody of the Applicant-husband. His third submission is that there is absolutely no evidence adduced by the Respondent-wife about the income of the husband and the learned Judge of the Family Court has proceeded to grant maintenance only on the ground that at the time of marriage, golden ornaments were offered to the Respondent -wife and a sum of Rs.2 lakhs was spent on reception. He submitted that the marriage between the parties was solemnised on 21st December, 1997 and amounts spent at that time cannot be a ground to grant maintenance in the year 2014 in the absence of any evidence adduced by the wife regarding the income of the husband. He pointed out that though in paragraph No.25 of the impugned

Judgment, the learned Judge has relied upon the fact that the Applicant has ancestral property, comprising of agricultural lands, the learned Judge has referred to the admission of the Respondent wife that the lands are uncultivated. Lastly, he invited our attention to the cross examination of a witness examined by the Respondent -wife and in particularly paragraph 3 thereof. He submitted that the facts contained in paragraph 3 thereof dis-entitle the wife to seek maintenance.

3. It is an admitted position that in terms of the impugned decree, the Applicant has not paid maintenance amount to the Respondent-wife. It is pointed out that an execution application filed by the Respondent -wife is pending. Lastly, the learned counsel for the Applicant submits that there was no occasion to create a charge for maintenance on the property mentioned in clause 4 of the operative part of the decree as the said relief can only be sought in the execution of the decree of maintenance. He pointed out that clause 3 of the operative part of the decree containing a direction to create charge has been stayed by a Division Bench of this Court while issuing notice. He invited our attention to the order dated 8th July, 2014.

4. We have considered the submissions. It is true that by ad-

interim order passed on 8th July, 2014 the operation of the clause 3 of the operative part of the decree has been stayed till further orders. But now we are finally deciding this Application for grant of interim relief. There was a specific prayer made in the Petition filed by the Respondent wife seeking maintenance for a period of three years prior to the date of institution of the Petition. The Petition under section 18 of the Hindu Adoption and Maintenance Act, 1956 was filed on 19th January, 2013. In the said Petition, there is a reference to the notice dated 29th November, 2012 issued by the Advocate for the Respondent -wife calling upon the Applicant-husband to resume cohabitation. In paragraph 6 of the Petition, there are specific averments that for last three years prior to the date of institution of Petition, the Respondent-wife has taken shelter in the house of her parents and she has no support. Thus, there was a specific prayer made in the Petition seeking maintenance for a period of three years prior to the date of institution of the Petition by contending that during the said period, the Respondent -wife had no support. Prima facie, such a prayer was maintainable.

5. Now turning to the quantum of maintenance, admittedly the Applicant-husband did not enter the witness box. His income was

within his special knowledge. There are specific assertions in the Petition filed by the wife giving details of the property held by the Applicant-husband and income of the Applicant-husband. The said assertions are in paragraph Nos.7 and 8 of the Petition filed by the Respondent-wife. In fact, the learned Judge of the Family Court could have been justified in drawing an adverse inference against the husband for not entering the witness box.

6. The learned Judge has referred to the cross examination of the Respondent -wife in which she admitted that the Applicant had studied upto 12th standard and doing wiring work. The Respondent-wife admitted that from the 7/12 extracts of the Bagayat lands filed on record it is seen that the lands are uncultivated. The learned Judge in paragraph No.25 refers to the large spending made by the Applicant-husband at the time of marriage. This aspect is recorded by the learned Judge for drawing an inference regarding financial condition of the Applicant-husband. 7/12 extracts of three agricultural lands were produced which are ancestral lands belonging to family of the Applicant-husband. Paragraph No.24 and paragraph No.25 of the judgment shows that lands are not cultivated. However, the learned Judge after perusing the 7/12 extracts, has observed that in some of

the 7/12 extracts, admittedly sugarcane cultivation is shown. Considering this material on record and considering the fact that the Applicant did not enter into the witness box, the learned Judge has taken a conservative view by fixing maintenance at the rate of Rs.2000/- p.m. for a period of three years prior to the institution of the Petition and the maintenance of Rs.4000/- p.m. from 19th January, 2013 (the date of the institution of the Petition)

7. As far as clause 4 regarding the charge on the property for maintenance is concerned, it is an admitted fact that as on today, the Applicant-husband has not paid maintenance amount payable to the Respondent-wife from the date of institution of the Petition for which there is no ad-interim relief granted. Considering this conduct of the Applicant, the execution and operation of clause 4 cannot be stayed as the claim of the Respondent-wife will have to be served.

8. We have perused paragraph 3 of the cross examination of witness Hindurao Kurane. All that is brought on record is that one Manoj Patil was known to Respondent-wife as they were studying in the same school. It is brought on record that even after marriage of the Respondent-wife, the said person used to visit her house and there was a dispute in the family over his visits. The witness has not stated

that there was any objectionable relationship between the Respondent-wife and the said third person. Taking what is stated in paragraph 3 as correct, all that is brought on record is that said person and the Respondent-wife studied together in the same school and after her marriage, he was visiting the house of the Respondent-wife. This no ground to deny the maintenance to the Respondent -wife. Hence, there is no merit in the Application and the same deserves to be rejected. It is brought to our notice that the Applicant has not paid maintenance in terms of the decree. We, therefore, propose to issue notice to him as to why his Appeal could not be dismissed.

9. We, accordingly pass following order:

(a) The Application is rejected;

(b) Clause 3 of the ad-interim order dated 8th July, 2014 stands vacated.

(c) Issue notice to the Applicant-husband calling upon him to show cause as to why his Appeal should not be dismissed in exercise of the powers under Rule 11 of order XXXIX of Code of Civil Procedure, 1908 on account of non compliance of the direction to pay maintenance from the date of institution of the Petition

before the Family Court. The said notice returnable on **26th April, 2017**. The Appeal shall be listed under the caption of “direction”.

(ANUJA PRABHUDESSAI, J.)

(A.S. OKA, J.)