

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 284 of 2016
IN
CIVIL APPLICATION NO.193 OF 2015
IN
FAMILY COURT APPEAL NO.16 OF 2011

Sumangal Govind Dhepe. .. Applicant.

In the matter between

Smt. Anita Sumangal Dhepe. .. Appellant.

Vs.

Sumangal Govind Dhepe. .. Respondent.

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Mrs. Subhada S. Gokhale for the Applicant (Husband).

Shri S.N. Deshpande along with Shri S.P. Munshi and Shri N.S. Deshpande for the Respondent (Wife).

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

DATED : 15TH FEBRUARY 2017

P.C.

1. Heard learned counsel appearing for the Applicant husband who is the Respondent in the Family Court Appeal. The wife is the Appellant in the Appeal. She has taken an exception to the judgment and decree dated 9th December 2010 passed by the learned Judge of the Family Court at Bandra, Mumbai, by which the Petition filed by her for divorce has been dismissed. While dismissing the Petition filed by the Appellant wife on the ground of cruelty, the learned Judge of the Family

Court directed the Applicant husband to pay permanent alimony to the minor son at the rate of Rs.1,000/- per month till the date the minor son attains majority.

2. In the Family Court Appeal, the Civil Application No.193 of 2015 was filed by the Appellant wife under Section 24 of the Hindu Marriage Act, 1955 (for short “the said Act”). By the order dated 2nd September 2015, the Division Bench of this Court directed the husband to pay maintenance at the rate of Rs.5,000/- per month to the Appellant wife from the date of the said order. An Application for review of the said order was made by the present Applicant husband. By an order dated 2nd March 2016, the Review Petition was dismissed. In Paragraph 6 of the said order, the Division Bench permitted the present Applicant husband to file a reply and seek a modification of the said order dated 2nd September 2015 from Regular Court. In terms of the said observation, the present Application for modification of the order dated 2nd September 2015 has been made by the Applicant husband.

3. The learned counsel appearing for the Applicant husband has pressed into service the following grounds on which the Applicant husband is claiming that the Appellant wife is disentitled to claim maintenance. The first ground is based on the Judgment and Order dated 13th July 2011 passed by the learned Judicial Magistrate, First

Class, Vasai in Regular Criminal Case No.768 of 2007. By the said Judgment and Order, the present Applicant husband and the members of his family were acquitted for the offence punishable under Section 498A read with 34 of the Indian Penal Code. The first informant in the said case was the wife. The learned counsel appearing for the Applicant husband invited our attention to the findings recorded by the Criminal Court and especially the finding that the allegations of cruelty made by the wife were not proved. Her submission is that the said Judgment and Order has become final. Relying upon the decision of the Apex Court in the case of *K. Srinivas v. K. Sunita*¹, her submission is that as the grounds pleaded by the Appellant wife in her Petition for divorce are the same which are pleaded in the criminal prosecution, the main Appeal is liable to be dismissed. She also relied upon another decision of the Apex Court in the case of *Deb Narayan Haider v. Anushree Haider*². Her submission is that as the allegations of cruelty made by the wife could not be established by her in the criminal prosecution, she is disentitled to seek maintenance. The learned counsel appearing for the Applicant husband stated that the fact that in the Appeal filed in the year 2011, the Application for maintenance was made by the wife in March 2015 shows that she never needed any amount of maintenance from the husband as she was earning. Thirdly, it was contended by the Applicant husband that the wife is running a Beauty Parlour business at

1 (2014)16 SCC 34

2 Decided on 26th August 2003

her home and she also gives home visits to her clients. Reliance is placed on a document which is annexed at Page 12 to show that the wife was running a Beauty Parlour. It is claimed that the said document was produced before the Family Court. Therefore, it was submitted that the Respondent wife is continuously earning by running a business as Beautician and in any case, she has earning capacity. Lastly, it was submitted that the Applicant husband is drawing salary of only Rs.32,000/- per month. The husband has to maintain his mother who is a breast-cancer patient and his one sister who is unmarried and unemployed. Though the other two sisters are staying with him and are earning, they are unable to give helping hand to his mother and the unemployed sister.

4. We have given careful consideration to the submissions. Firstly, we must note here that in Paragraph 5 of the order dated 2nd March 2016 passed by the Division Bench of this Court in Review Petition No.1 of 2016 filed by the present Applicant husband, it has been held that the argument of the Applicant husband that the Respondent wife is not entitled to get maintenance is without any substance and that under Section 24 of the said Act, she is entitled to get maintenance. Paragraph 6 of the said order grants liberty to the Applicant husband to file a reply to the disposed of Application (Civil Application No.193 of 2015) and to pray for modification of the said

order. Though that course is not adopted by the Applicant husband, nevertheless we have considered the submissions of the learned counsel appearing for the Applicant husband on merits.

5. It is true that the Applicant has been acquitted in the criminal prosecution. The order of acquittal is of 13th July 2011. The said order could have been produced by the Applicant for opposing the Civil Application No.193 of 2015. However, that was not done. Moreover, on the basis of the said order of acquittal of the year 2011, the Application for Review was filed in the year 2015. In any case, the finding in Criminal Case will not bind this Court while deciding the Family Court Appeal.

6. The decision in the case of *K.Srinivas* will have no application as, at this stage, we are not deciding the main Appeal on merits. As stated earlier, in Clauses 4 and 5 of the order dated 2nd March 2016 in Review Petition No.1 of 2016, the Division Bench of this Court has already held that the Respondent wife is entitled to seek maintenance under Section 24 of the said Act. The said findings of the Division Bench have attained finality. Therefore, on the basis of the order of acquittal of the year 2011, the maintenance payable to the wife at the rate of Rs.5,000/- per month cannot be reduced.

7. Merely because the Respondent wife failed to apply for maintenance for a period of four years from the date of filing of the Appeal, that by itself is not sufficient to prevent her from claiming maintenance. It is no ground to draw an inference that the wife was earning. Unless the Applicant husband establishes that during this period, the Respondent wife was earning, mere failure to apply for maintenance for a period of four years will not defeat the right of the wife to claim maintenance.

8. Clause (c) of Paragraph 4 of the Civil Application filed by the present Applicant husband reads thus:

“(c) The wife is running a beauty parlour at home or by home visits. The evidence consisting of list of clients at Exh.26 in the family court is produced herein at Exh.B along with exh 25 in the family court which is the bio-data showing that she is a commerce graduate. Thus the Appellant is earning sufficiently to maintain herself.”

9. The document at Exhibit-B was produced by the Applicant during the pendency of the Petition before the Family Court which was decided on 9th December 2010. As far as Clause (c) is concerned, the Respondent wife has filed a reply. In Clause (c) of Paragraph 4 of the reply, the Respondent wife has stated thus:

“(c)In fact the work of beauty parlor was started at the instance of my sister in laws who had pressed the respondent to carry out the business since I had done 3 months course of beautician. The sister in law alongwith me were doing that work as per their convenience and money earned used to remain in custody of the in laws. The pamphlet at page no.61 was also printed and circulated by the respondent. The list of service charges which are on page no.62 were also in handwriting of my sister in law. The extract of diary which is at page 63 and 64 show how meager amount used to be received for such work. From 1.10.2011 to 11.11.2011 the total amount received was only Rs.591/-. I further submit that all that work I was able to do at the residence of respondent till 2 months of my pregnancy and thereafter it became impossible for me to carry out that work. I say that after I came to my parent's house and after delivery of my child till today I could not do the work of beautician for many reasons. Firstly that I am staying in a small residence admeasuring 180 sq. feet along with my parents and brother. In the said house total 5 people are staying. In fact some how they have adjusted me in their house only due to love and affection. In fact my brother could not get married because of small house problem and blame is also coming upon me. Now my brother and parents are also asking me to stay in some rented room. But due to financial crisis till today I am not able to take any rented room. Since the parents are very old they are not able to look after my child and entire time I have to spend upon the child only, as there is absolutely no scope for me to search for any job or carryout work of beauty parlor. In fact my education and all qualities have been made meaningless by respondent and his family members due to their abnormal behavior and conduct. Since I am totally unemployed & suffering the agonies of poverty, the respondent could not produce any proof of my carrying out any work of beauty parlor or doing any job after my stay in his residence was over..”

(Underlines supplied)

10. These factual statements have not been disputed by the Applicant husband. Moreover, there is no material on record to show that as on 2nd September 2015 or any time thereafter, the Respondent wife was earning by carrying out a business as a Beautician. We may note here that under the order dated 2nd September 2015, the maintenance at the rate of 5,000/- per month is made payable from the date of the said order and not from the date of filing of the Appeal.

11. As regards the responsibility of mother and one unmarried sister on the Applicant husband, assuming that the said ground is factually correct, even according to the case of the Applicant husband, his monthly salary is Rs.32,000/-. Apart from the sum of Rs.5,000/- per month made payable under the order dated 2nd September 2015, he is required to pay the sum of Rs.1,200/- to his son. Therefore, assuming that the Applicant husband has responsibility of his mother and one unemployed sister, the maintenance amount which is payable to the wife cannot be said to be an unreasonable.

12. As far as the decision of the Apex Court in the case of ***Deb Narayan Haider v. Anushree Haider*** is concerned, the same was dealing with the issue of maintenance under Section 125 of the Code of Criminal Procedure, 1973. The ratio of the said decision will not apply to the facts of this case.

13. Hence, there is no merit in the Application and the same is rejected.

(SMT.ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)