

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2203 OF 2018

Amruta Rahul Gawde	]	Petitioner
Vs.		
Rahul Sharad Gawde	]	Respondent

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Mr. Rahul S. Kadam, for the petitioner.
Mr. Sagar A. Joshi, for the respondent.

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CORAM : R.G. KETKAR, J.

DATE : 14TH JUNE, 2018.

P.C.

Heard Mr. Kadam, learned Counsel for the petitioner and Mr. Joshi, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 4th January, 2018 passed by the learned 5th Joint Civil Judge (Senior Division) Kalyan in M.P. No.216 of 2016. By that order, the learned trial Judge partly allowed the application made by the petitioner/wife. The learned trial Judge rejected claim of the petitioner for maintenance to herself. The learned trial Judge directed the respondent/husband to pay interim maintenance @ Rs.7,000/- to his minor daughter Kaira from the date of the application till conclusion of the Petition.

3. Rule. Mr. Joshi waives service. Having regard to the narrow controversy raised in this Petition, at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Mr. Kadam submitted that application dated 18th February, 2016 was filed by the petitioner claiming maintenance @ Rs.50,000/- for herself and her minor daughter. In support of that application, she filed Affidavit dated 26th September, 2017. In paragraph 9, the petitioner specifically contended that amount reflected in the Fixed Deposits standing in her name has been invested by her father since her childhood. In short, he submitted that amount invested in Fixed Deposits is not from petitioner's own income. The learned trial Judge has not considered this aspect. The learned trial Judge was, therefore, not justified in refusing maintenance to the petitioner. He further submitted that on respondent's own showing, his income is Rs. 1,50,000/- per month. The learned trial Judge was, therefore, not justified in awarding maintenance of Rs.7,000/- per month to the minor daughter. He submitted that Petition requires consideration.

5. On the other hand, Mr. Joshi invited my attention to the Affidavit in reply dated 5th April, 2018 filed by the respondent to the present Petition and in particular paragraph 4 thereof. He further submitted that respondent No.1 disputed paternity of the daughter Kaira. As the petitioner gets yearly interest of Rs. 3,73,209/-, the learned trial Judge rightly rejected petitioner's claim towards her maintenance. Having regard to the fact that respondent has to pay monthly installments towards various loans, no case is made out for interfering with the impugned order.

6. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In so far as paternity of the daughter Kaira is concerned, the learned trial Judge has rightly observed in paragraphs 4 and 8 that at this stage, respondent's claim that he is not biological father of the minor daughter cannot be considered. The learned trial Judge further observed that child is born during subsistence of marriage

and there is legal presumption about legitimacy of the child which is rebuttable. Unless it is rebutted, legal presumption stands in favour of the legitimacy of the child. The learned trial Judge accordingly awarded monthly maintenance @ Rs.7,000/- to daughter Kaira from the date of the application.

7. In so far as maintenance to petitioner/wife is concerned, the learned trial Judge noted that the petitioner is receiving interest on the Fixed Deposit to the tune of Rs. 3,73,209/- per annum, and declined to grant maintenance to her.

8. After considering the material on record and after perusing the impugned order, it is evident that the learned trial Judge has not considered Affidavit dated 26th September, 2017 made by the petitioner in support of application Exhibit 5. Having regard to the fact that even on respondent's own showing, his monthly income is Rs. 1,50,000/- per month, in my opinion, the learned trial Judge was not justified in directing the respondent to pay maintenance @ Rs.7,000/- per month to the minor daughter. The impugned order, therefore, deserves to be set aside, thereby, restoring application Exhibit 5 for deciding the same afresh. It has come on record that the respondent has not filed reply to application Exhibit 5. Mr. Joshi assures that respondent No.1 will file reply to application Exhibit 5 within 4 weeks from today.

9. In view thereof, in my opinion, ends of justice will be served by passing the following order;

- [1] Impugned order dated 4th January, 2018 is set aside and application Exhibit 5 is restored to the file of the learned trial Judge.
- [2] The respondent to file reply to application Exhibit 5 within 4 weeks from today.

- [3] Without prejudice to the rights and contentions of the parties, respondent shall pay Rs.15,000/-per month towards maintenance to daughter Kaira from the date of the application till application Exhibit 5 is decided afresh subject to adjustment of the deposits made by the respondent.
- [4] It is made clear that direction issued to the respondent to pay maintenance of Rs. 15,000/- per month to the minor daughter shall not construed as an expression on merits of the case. The learned trial Judge will consider application Exhibit 5 and decide the same on the basis of the material on record, on its own merits and in accordance with law.
- [5] The learned trial Judge is requested to dispose of the application within four weeks from completion of the pleadings.
- [6] Parties are at liberty to file additional documents before the learned trial Judge in advance.
- [7] All contentions of the parties on merits are expressly kept open.
- [8] Rule is made absolute in aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]