

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6634 OF 2016

Nikhil Pramod Shah	.. Petitioner
<i>Versus</i>	
Shalini Nikhil Shah	.. Respondent

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Mr.Shekhar Jagtap with Ms.Sairuchita Chowdhary i/b J. Shekhar & Co. for the petitioner.

Mr.Abhijit D. Sarwate with Mr.Jayant Alane for the respondent.

CORAM: SMT.BHARATI H. DANGRE, J

DATED : 28th MARCH 2018

P.C:-

1 The Writ Petition is filed by the petitioner-husband assailing the order passed by the Judge, Family Court No.5, Pune on 14th March 2016, thereby directing him to pay the interim maintenance @ Rs.35,000/- for the respondent wife and his minor daughter from the date of filing of the application i.e. 18th November 2014 till final decision of the main petition. The petitioner has also been directed to pay educational expenses of the daughter in addition to the interim maintenance. Further, by the impugned order, the petitioner is also directed to provide 1(one) BHK flat in Bhosale Nagar area, Pune, or to the wife to pay Rs.25,000/- p.m as rent from the date of this order. The

petitioner-husband assails the said order on various grounds. It is to be noted that he is also facing the proceedings under the Contempt of Courts Act instituted by the respondent-wife in Contempt Petition No.20 of 2017 and this Court by a detailed order passed on 29th June 2017, was pleased to issue notice to the petitioner under Rule 9(1) of Chapter 34 of the High Court Appellate Side Rules, directing him to remain present. This Court had passed an order that the Writ Petition would be heard with priority and the petitioner was directed to deposit an amount of Rs.3,00,000/- (Rupees Three lakhs), which the petitioner has deposited as part of the arrears of maintenance, and therefore, this Court is proceeding to hear the main Writ Petition filed by the petitioner-husband challenging the impugned order.

2 The petitioner and the respondent belong to Hindu Religion and their marriage was solemnized on 20th June 1997. On account of certain marital distort, the respondent-wife instituted proceedings for divorce vide P.A. No.1287 of 2014 in the Family Court at Pune. Out of the said wedlock, there are two children and it is not in dispute that the son has attained majority and is residing with the petitioner-husband, whereas the daughter is minor and is residing with the respondent wife. On filing of the

petition for divorce, the respondent-wife in the same petition prayed for grant of interim maintenance. Such a prayer was opposed by the petitioner-husband by filing an application, by asserting that the relief cannot be claimed in the same proceedings and a separate application ought to have been filed, claiming maintenance under Section 24 of the Hindu Marriage Act. On 27th October 2015, the learned Judge, Family Court, rejected the said objection and the petitioner was permitted to contest the petition for divorce along with the prayer for interim maintenance. While rejecting the said objection, the Family Court on 25th November 2015, afforded an opportunity to the petitioner to contest the claim of interim maintenance and issued direction to the petitioner to disclose about his educational qualification, movable and immovable property, income and the petitioner's income source and earning capacity, if any, by filing a supporting affidavit. At the same time, the petitioner-wife was also directed to file an affidavit and disclose her educational qualification and income, if any, etc. In compliance, a reply was filed by the petitioner opposing the claim of interim maintenance and he has placed on record certain documents depicting his income.

On consideration of the matter on merits and the application made in the petition claiming interim maintenance under Section 24, the Judge, Family Court, passed the impugned order on 14th March 2016. By the said order, the petitioner was directed to pay maintenance @ Rs.35,000/- p.m to the wife and minor daughter along with rent of Rs.25,000/- p.m for a flat situated in Bhosale Nagar, Pune, or he was directed to make an arrangement for the flat in the said locality. Further, the petitioner was also directed to bear the educational expenses of the daughter.

3 Being aggrieved by the said order, the present Writ Petition was filed by the petitioner on 13th June 2016. In the said petition, apart from the merits of the matter, he also raised an objection about the maintainability of the claim in a petition for divorce instead of filing a separate application as contemplated under Section 24 of the Hindu Marriage Act. It is to be noted that the objection, which was raised by the petitioner-husband about his claim being made in the same petition for interim maintenance was already rejected by the Family Court on 25th October 2015, and the petitioner did not chose to file any proceedings assailing the said order till 30th June 2016 when he compositely challenged the award of maintenance and specifically objected to the

quantum of maintenance granted in favour of the wife and daughter, and also pose the challenge to the maintainability of the application. In any contingency, this claim and contest about maintainability of the said claim, appears to be belated, since the Family Court had dealt with the merits of the matter and therefore, this Court would not deal with the said issue.

4 As regards the challenge to the impugned order on the merits is concerned, it is the case of the petitioner that the order passed by the Judge, Family Court is erroneous and it records a finding assuming the earning capacity of a husband, based on which, maintenance has been awarded to the wife and daughter. It is also a ground raised in the petition that the wife is highly qualified and it is for her to earn her own livelihood when she possesses the potential to earn her livelihood, and the Family Court had failed to take into consideration the said aspect of the matter.

Learned counsel for the petitioner invited the attention of this Court to the grounds raised in the petition and would argue that the earning capacity of the husband is depicted in the order of the Family Court and it was reflective of a rent which was received by him from the Idea Cellular Company, since

a tower has been erected in the property belonging to him which has been granted on the lease and which is fetching him a rent of Rs.22,500/-. Learned counsel for the petitioner would submit that he has already retired from M/s.Arjun Business Complex and therefore, he has no source of livelihood apart from the rent that he is fetching. Learned counsel would also invite attention of this Court to Annexure-F of the petition, wherein, according to the learned counsel, balance sheet as on 31st March 2012 has been placed on record along with the Income tax return of the Assessment Year 2011-12.

Based on these documents, learned counsel for the petitioner would vehemently argue that when the Income tax return was placed on record along with the balance sheet, the Family Court ought to have gauged the earning capacity of the petitioner-husband based on the said document, but instead, the Family Court appears to have been impressed by the lifestyle of the parents of the petitioner, as it has been brought on record by the wife that when they were living together, they were living in a big house, and the husband was driving a Mercedes, and they also own a Verna car. However, according to the learned counsel, none of these assets are in his name and they are in the name of his parents and in such circumstances, the finding recorded by the

Judge, Family Court that there is a presumption of jointness and not severance, and unless and until the respondent establishes that there was partition in the family by metes and bounds, it is to be presumed that he is a member of the joint family, is an erroneous finding. According to the learned counsel, the wife has not tendered any document on record to demonstrate the earning capacity of the petitioner, and on the other hand, the petitioner himself has come up fairly before the Family Court by tendering his Income tax return for the year 2011-12 and some of his balance sheet which ought to have formed the basis for arriving at a reasonable quantum of maintenance by the Family Court. The learned counsel would also submit that he is maintaining his son and also catering to the educational expenses and he is also bearing the educational expenses of the daughter as well as her day to day expenses. In such circumstances, the learned counsel would argue that in absence of any independent source of livelihood, except that the one which has been disclosed by him in the petition and the affidavits which have been placed before the Family Court, the order passed by the Judge, Family Court, directing him to pay the maintenance to the wife and children to the extent of Rs.35,000/- p.m is perverse, being based on no evidence and the order is liable to be quashed and set aside.

On the other hand, learned counsel for the respondent would invite my attention to the petition that is filed before the Judge, Family Court. He would take me through the specific pleadings made in the said petition specifically in paras 60 and 61 of the petition, wherein the respondent-wife had highlighted the business activity of the petitioner and his family's standard of living which reflected his earnings and his life style. Learned counsel would submit that the petitioner is presently staying in the house of his father and from the pleadings that have been specifically canvassed in the said paragraphs of the petition, it can be seen that the amount of maintenance that has been awarded by the Family Court cannot be said to be exorbitant amount, but it is an amount which would be needed by the wife for her own maintenance as well as maintenance of her daughter. Learned counsel would also invite the attention of this Court to the interrogatories, which have been answered by the petitioner on an affidavit. He would submit that the petitioner had admitted that he had resigned from the business of M/s.Arjun Business Complex in the year 2009 and has made a categorical statement that he has not received any salary/remuneration from that partnership, and therefore, there was no question of he receiving any profit from the said partnership. Learned counsel would invite the attention

of the Court to a reply to Interrogatory no.5 in point no.5, where the petitioner has admitted that there is a firm in the name of Shah Enterprises and he is the sole proprietor of the said firm and there was a shop license granted in favour of the said firm. However, he has made a categorical statement that no business is carried out by the said firm and therefore, there is no income accruing from the said firm for the last two years. Learned counsel would also invite attention to the other replies in regards to the foreign trip and some of the interrogatories as regards the sponsoring of the said trip where the petitioner-husband has made a categorical statement that whenever he has undertaken foreign trip, the expenses were borne by his father and sometimes the trips were sponsored by his friends. As regards the lease hold rights in respect of the terrace flat on Sahil Apartment, Model Colony, Pune, the petitioner has answered the Interrogatory by stating that he is getting rent of a mobile tower situated on the said terrace.

5 The learned counsel for the respondent would submit that the petitioner possesses means, to support the respondent wife, who is unable to maintain herself and the amount awarded by the impugned order is an amount which would barely permit

the respondent-wife to maintain herself and her daughter. He would also invite the attention of this Court to the conduct of the petitioner by pointing out that an amount of Rs.20 lakhs is due as on date as arrears arising out of the impugned order and barring when this Court had compelled him to pay an amount of Rs.3,00,000/- (Rupees Three lakhs), it has has deposited and on one occasion, an amount of Rs.50,000/- thereby totalling it to Rs.3,50,000/- (Rupees Three lakhs Fifty thousand) was paid, but till date, an amount of Rs.20 lakhs is due and payable. The insistence of the learned counsel is that the main proceedings ought not to have been heard in absence of deposit of the entire arrears and he would place reliance on a judgment to reflect the position of law and to support his submission that the Court should not proceed to hear the proceedings to be filed by husband in case he is in arrears of any amount of maintenance.

6 I have heard learned counsel for the parties and perused the documents on record. It is no doubt true that the maintenance to be awarded under Section 24 of the Hindu Marriage Act is a “maintenance *pendente lite*”, and the purpose of the provision is to enable a party who has no independent income, sufficient for her or his support. During the pendency of the

proceedings under the Hindu Marriage Act. The key words of the said section being “having no independent income sufficient for her support”. The purport of Section 24 is to grant maintenance, pending the proceedings under the Hindu Marriage Act to a party who has no sufficient income for supporting herself. The respondent wife had instituted proceedings for divorce and she has taken out an application for interim maintenance claiming maintenance to the tune of Rs.50,000/- per month and she claimed that this would be the amount which would be sufficient for her to maintain herself and her daughter.

On perusal of the order passed by the Family Court, it can be seen that the Family Court has taken into consideration the statement coming from the respondent-wife that she is unable to maintain herself. Perusal of a petition before the Court below would reveal that though she is highly qualified and she possess the Masters Degree from Human Resources from Bharati Vidyapeeth University, her attempts, on her marriage to undertake any job, was strongly opposed by the petitioner and his family and she was not permitted to work. Thereafter, on having two children, she was not permitted to take any job. Therefore, the wife, in absence of any employment on account of her educational

qualification, at present, is unable to maintain herself, having no source of income. It cannot be expected for the petitioner wife to secure a job on the basis of a degree which he has secured long back, and she now being 40 years of age, it is not an easy task to fetch a job. Since the wife did not have any earning capacity and is not capable of supporting herself, she claimed maintenance by claiming the amount as prayed in the application.

7 In order to ascertain what is the earning capacity of the husband, the Judge, Family Court, has taken into consideration the documents that were produced on record. The Judge, Family Court had taken into consideration the agreement which has been placed on record which is executed between the Idea Cellular Company and the petitioner, by which the petitioner has secured a rent of Rs.22,500/- per month towards the Idea Cellular Network Tower installed on the top of terrace of Sahil Apartments. This income is not disputed by the learned counsel for the petitioner. Learned counsel for the respondent has placed on record an agreement which is executed between the petitioner and the respondent on one hand and a licensee Garware Bestretch Limited on the other hand, for the purposes of providing temporary accommodation to the outstation employees as on requirement

basis in respect of a flat bearing no.302 on 3rd floor admeasuring 1650 sq.ft built-up, including two adjoining terrace in a building known as "Sahil Apartments" situate in Model Colony, Shivaji Nagar, Pune. The said agreement reflects that the petitioner namely, Nikhil Pramod Shah and respondent namely, Shalini Nikhil Shah, who are being referred to as licensor are the absolute owners of the said residential flat as mentioned above. In the said capacity, they have entered into an agreement of licence to the licensee of the said flat along with the furniture and its fixtures mentioned in schedule appended to the said agreement. This agreement for leave and licence basis is executed with effect from 6th January 2013. This clearly reflects that it is not only the terrace of the flat which belongs to the petitioner from which he is fetching a rent of Rs.22,500/-, but this flat has been granted on leave and licence to the licensee by the said agreement and it is fetching a rent as mentioned in the said agreement. It is not the case of the petitioner that this flat is either being sold out or it is no longer in his name.

Learned counsel for the petitioner has vehemently referred to the Income tax return and would submit that, in all fairness, he had reflected his true income before the Court.

Perusal of the Annexure-F would reveal that the balance sheet which is produced on record as on 31st March 2012 is not an authenticated/certified balance sheet, but as per caption, “a tentative balance sheet as on 31st March 2012”, is only tentative. This balance sheet also make an interesting reading. On left hand, the liability of the petitioner has been shown, whereas the right hand column of the said balance sheet reflects the assets. It is surprising that in the assets column, the balance sheet refers to a two-wheeler scooter, a mobile phone and also one Maruti Swift worth Rs.4,40,125/-. Further, in the assets, column “investment” is being reflected in the form of shares to the tune of Rs.96,157/-. Further, there are also deposits with Cosmos Bank to the tune of Rs.3,74,706/- in the name of the children and there is also an account captioned as “Tijori Account” where the assets of Rs.8 lakhs are shown. Then, there is an entry of loans and advances from M/s.Arjun Business Complex and the cash and bank balances also reflect a cash in hand to the tune of Rs.3,38,863/-. This Court is not assessing the veracity of the said statement. However, by referring to the said statement, it can only be seen that in the interrogatories, the petitioner had categorically given an answer that he does not own any vehicle and whatever vehicles are there, they are in the name of his father and mother. The said statement

is falsified by his own documents produced at Annexure-F. Further, it is also surprising to note that why the petitioner has filed his income tax return for the year 2011-12 specifically when the application was preferred for the year 2014, and it came up for consideration before the Court in the year 2015-2016, since the impugned order came to be passed on 14th March 2016. There is no reason why the petitioner has exhibited the Income Tax return for the Assessment Year 2011-12 only. The probable reason appears to be that this is an assessment of the year immediately when he has resigned from M/s.Arjun Business Complex. However, even looking at the said Income tax return, it is clear that there are certain rent amounts which are received by him and it also reflects receipts of remuneration from the firm. When specifically asked as to what this amount stands for, the learned counsel for the petitioner makes a statement that these are the dues which were being continued to be paid when he resigned from the firm. This does not appear to be plausible explanation and it appears that these are the remunerations which are credited to his account on a regular basis and in the interrogatories itself, the petitioner had categorically admitted that there is a firm in the name of Shah Enterprises of which he is a sole proprietor. However, he has answered that it does not carry any business.

This, however, is falsified by the entry from his own document which reflects that the amounts have been credited into his account from the said Shah Enterprises and even the balance sheet on 31st March 2011, which has been annexed by the petitioner himself, it shows the entry of Loans and Advances from Shah Enterprises to the tune of Rs.3,34,641/-.

The aforesaid documents have been referred to by this Court in order to deal with the submission of the learned counsel for the petitioner that he has no source of income, except the rent which he is receiving from the Tower which has been erected on the terrace of Sahil Apartment, and the rent that he fetches, is only Rs.22,500/-. As against this, he has invited the attention of the Family Court to the liability which he has to incur. An affidavit has been filed in this Court today in the morning by the petitioner, wherein he gives his fixed assets in the form of movable property and states that there are no immovable assets in his name. He has shown the current assets in his name to the tune of Rs.20,000/- and he has also admitted that he is in receipt of income from the Cellular Tower. In paragraph 4 of the said affidavit which is tendered today, he has calculated the amount of Rs.65,000/- per annum which he is required to bear as educational expenses of his

son, and an amount of Rs.1,24,200/- as the expenses which is required to incur for taking care of his daughter, including her educational expenses, her clothing etc. Relying on the affidavit, an attempt is made on behalf of the petitioner to canvass that the amount which he is required to bear for the expenses of the children, is more than what his earnings are. This Court can only observe that the calculations appear to be completely manipulative and in any case, it was the duty of the petitioner to disclose the true facts. As per Section 106 of the Indian Evidence Act, he was duty bound to disclose the true and correct facts of which he had special knowledge and had it been a case that he wanted to disclose his income in truth and reality, he could have placed before the Court the Income tax returns for the successive year, and not merely relied on a solitary Income Tax Return of the year 2011-12.

In this backdrop, the impugned order of the Family Court in paragraph-16 makes a specific noting that the husband is a business man and he is having income proof in his possession, but he has not produced the same, and therefore, the Court was left with no option than to draw an adverse inference against him. The Income Tax return of a person, who is a salaried employee

stand on a different footing than the Income tax return of a businessman and the Court is not bound to go *ipse dixit* by the said version specifically when it is not unknown as to the manner in which the returns are filed by the businessman. In such circumstances, the Family Court was perfectly justified in deriving an adverse inference against the petitioner and based on the statements which are not highly improbable, the Family Court has derived at a figure of Rs.35,000/- for maintenance towards the wife and children. In any contingency, the Court is duty bound to look into the earning capacity of the husband, the status of the parties, the basic requirement of the person claiming the maintenance qua the liability on the person providing for maintenance and it would also take into account the inflationary trend so as to enable the wife to maintain herself. When a query is put to the learned counsel for the petitioner as to what would be the tentative amount on the basis on which the wife can maintain herself, learned counsel for the petitioner graciously answered that an amount of Rs.6,000/- to Rs.8,000/- p.m would be sufficient for the wife to maintain herself. It appears that the statement made by the learned counsel for the petitioner probably based on the instructions of the petitioner, is far from truth and what is expected and the object in granting maintenance, in any form,

may be maintenance *pendente lite* is to ensure a dignified life for the wife though it may not be a luxurious life. In such circumstances, when the object of grant of maintenance under Section 24 is to prevent vagrancy and destitution, the amount awarded by the Family Court to the tune of Rs.35,000/- cannot be stated to be an exorbitant amount and it is rather borne from the record that is being produced before the Family Court based on which he has arrived at this figure so as to enable the wife to maintain a dignified life for herself and her growing daughter.

8 In light of the aforesaid discussion, the contention of the learned counsel for the petitioner that the order passed by the Judge, Family Court is perverse and not sustainable, cannot be accepted. The Judge, Family Court, has taken into consideration the relevant factors while fixing the quantum of maintenance and has directed the petitioner to pay an amount of Rs.35,000/- toward maintenance of the respondent and the minor daughter. No perversity or illegality can be found in the said order passed by the Family Court. The impugned order dated 14th March 2016 is therefore, upheld and the Writ Petition filed by the petitioner is dismissed.

(BHARATI H. DANGRE, J)