

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRI. APPELLATE JURISDICTION

WRIT PETITION NO.2451 OF 2017

Subrato R. Bhattacharya .. Petitioner  
Versus  
Gopa Subrato Bhattacharya & Anr. .. Respondents

Mrs. Neeta Karnik with ms. Payal Jain for petitioner  
Mr. I.R.Kulkarni for respondent No.1  
Ms. G.R.Golatkhar, AGP for State.

CORAM : MRS. BHARATI H. DANGRE, J.

DATE : 3rd April 2018.

P.C.

1] This is a petition by which the petitioner husband assails the concurrent findings recorded by the Courts below directing him to pay maintenance to the tune of Rs.20,000/- per month towards wife and Rs.20,000/- per month towards son along with an amount of Rs.1,25,000/- to be arranged for the education of the son for the years 2016-17 and thereafter for subsequent years so as to take care of the education of child. The said order has been upheld by the Additional Sessions Judge, Thane.

The learned Counsel for the petitioner Mrs. Karnik would

submit that the order has been passed without taking into consideration some of the relevant aspects and, the crucial amongst them, being the earning capacity of the wife. According to the learned Counsel for the petitioner, the respondent wife is a Doctor practicing Homeopathy and she is regularly practicing and earning an income out of the said practice. A query was specifically put to the learned Counsel for the respondent wife as to what was the material that was placed on record to demonstrate that the wife is not earning out of medical practice, to which the attention of the court is invited to a specific observation in para 7 of the impugned order passed by the Additional Chief Judicial Magistrate, where a specific contention of the wife that “she is not able to do medical practice as she is required to look after her son” is recorded.

2] Learned Counsel for the petitioner would invite attention of this Court to a suit, which is filed in the Court of Civil Judge, Bhivandi by the respondent wife Dr. Gopa Subrato Bhattacharya. In para 1 of the said suit, the respondent wife who is plaintiff therein has made a categorical statement to the following effect:-

“it is undisputed fact that the plaintiff is doing medical practice in the shop since then till today.”

Further, in the plaint it is categorically stated in para 18 to the following effect:-

“it is submitted that in any case, if the plaintiff selected to carry out any other business than the Medical practice, due to aforesaid reasons, which does not involve waste, alteration, destruction or damage to the suit property. It is under these circumstances, the plaintiff is entitled for carrying out any of the business other than the medical practice, in the suit property”.

3] Based on the said pleadings, the plaintiff has prayed for a declaration that she is lawful tenant in respect of the suit property viz., commercial premises being shop No.1, situated on the ground floor admeasuring about 350 sq.ft. carpet, lying being and situated in the house bearing house No.85, Kotergate. Teen Batti, Taluka Bhiwandi, Dist. Thane. Learned Counsel would also invite my attention to the affidavit filed in support of the said plaint wherein the respondent wife has categorically affirmed that she is practicing in the suit property. The said affidavit is sworn on 9th December 2015. The learned Counsel would also invite my attention to an affidavit filed by her, wherein a categorical statement has been

made in respect of the property being Thakur House, Room No.2, Ground Floor, J.M.Road, Thane 400 099 which stands in the name of respondent is leased out by the respondent and the electricity bills have been drawn on her name and paid by her.

4] However, the learned Counsel for the petitioner does not dispute that all these documents were not adduced before the Additional Chief Judicial Magistrate, Thane when the matter was being argued. However, it is to be noted that even the respondent wife did not adduce any evidence as to the earning capacity of husband and as far as her qualifications are concerned, she has admitted that she is a Doctor but a categorical statement has been made that she is unable to practice on account of the fact that she has to take care of her son.

5] In the peculiar facts, it can be seen that while awarding amount of maintenance, the Court has to be conscious of the fact about the earning capacity of the husband, expenses which are required for maintaining wife and children and the expenses which the husband himself has to meet. After considering the aforesaid factors, the Court has to arrive at an adequate figure which would

enable the wife to live a dignified life. However, a perusal of the impugned order would reveal that the impugned order fails to consider the earning capacity of the husband nor does it rebukes the specific contention of the husband that the wife is a medical practitioner. In these peculiar facts the matter needs to be remanded back for fresh consideration by the trial court after affording adequate opportunity to both sides to tender whatever documents and evidence which they intend to produce in support of their respective claims.

6] It is to be noted that the husband is to deposit an amount of Rs.3,45,000/- towards maintenance and Rs.1,25,000/- towards educational expenses for the year 2016-17. However, if earning capacity of wife is demonstrated, then the said expenses can be equally shared by the husband and wife and the burden is not entirely shouldered on the husband. As far as amount of maintenance of Rs.20,000/- per month is concerned, the trial court would arrive at a conclusion after reconsidering the factors that are required to be looked into while awarding the maintenance amount and for which the parties have been relegated back.

7] As far as total amount which has been deposited till date, it should not be considered as a bifurcated amount and at present it would be considered as an amount in compliance with the order and after the court comes to the conclusion on reconsideration of the matter, it is open for the lower court to bifurcate the amount and give due credit for the respective payment to wife and son.

8] It is however noted that this Court by an order dated 15<sup>th</sup> February 2018, had directed the petitioner to deposit an amount of Rs.50,000/- in addition to the amount already awarded on or before 5<sup>th</sup> March 2018. This is not yet been done. Let this amount be paid to respondent No.1 within two weeks from today.

9] Disbursement of the said amount is without prejudice to the rights and contentions of parties and would be subject to the final settlement of rival claims by the Magistrate on reconsideration of issues. Let the Magistrate make an endeavour to decide the matter as expeditiously as possible and within three months from today. The learned Magistrate is directed to decide the matter on its own merits, uninfluenced by the observations made in this order by this Court, which are prima facie in nature. The impugned order is

quashed and set aside. The matter is remanded back in view of the deficiency observed in the impugned order.

The petition is disposed of accordingly.

(MRS.BHARATI H. DANGRE, J.)