

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

**CIVIL APPLICATION NO.290 OF 2017
IN
FAMILY COURT APPEAL NO.197 OF 2015**

Joy Anthony Payaapply .. Applicant

IN THE MATTER BETWEEN

Eureka D/o Alfred Baptista .. Appellant

V/s.

Joy Anthony Payaapply .. Respondent

Mr.Partha S. Sarkar for the applicant

Mr.G.S.Hegade i/b Ms.Pinky Bhansali for the appellant in Family
Court Appeal No.197 of 2015

**CORAM: K.K. TATED &
N. J. JAMADAR, JJ.**

DATED : DECEMBER 10, 2018

P.C. :

1 Heard.

2 By this Civil Application, Applicant-husband is seeking to vacate the interim relief granted by this court by order dated 14.10.2015 in Family Court Appeal No.197 of 2015 staying the order passed by Family Court, Mumbai at Bandra dated 1.7.2015

in Petition No.A-696 of 2012.

3 The second prayer in the present Civil Application is to direct the appellant wife to refund the amount of Rs.9 lacs which was paid by the Applicant husband by way of maintenance charges.

4 The third prayer made by the Applicant is, till the hearing and final disposal of Family Court Appeal No.197 of 2015, Applicant be spared to pay further maintenance charges. Prayer clause a, b, f, g and i of the present Civil Application reads thus:

“(a) To admit the instant application.

(b) To vacate the stay of the family-court's order dt/- 1st July, 2015, granted vide this Hon'ble Court's order dt/- 14th Oct, 2015 vide Exh – J.

(f) To direct the petitioner to refund the applicant amount of around 9 lacs, which thru misrepresentation / false submissions before the Court's of law had gorged out from the applicant.

(g) As a measure of equity, till the disposal of the captioned appeal, the instant applicant be spared to pay further maintenance.”

Other prayers are deleted by the Applicant as per order dated 5.4.2018.

5 In the present proceedings, initially the Applicant husband filed Petition No.A-696 of 2012 before the Family Court Mumbai

at Bandra for dissolution of marriage on the ground of cruelty under section 10(1)(i)(x) of the Divorce Act, 1869. After hearing both the sides, Family Court annulled the marriage between the Applicant and appellant by order dated 01.07.2015. Operative part of the said order reads thus:

“ORDER

1. *The Petition is allowed.*
2. *The marriage between petitioner and respondent dated 1.1.2010 took place at St.Xavier Church, Vile Parle, Mumbai is hereby annulled with effect from the date of decree.*
3. *Parties to bear their own costs.*
4. *Decree be drawn up accordingly.”*

6 During the pendency of the Family Court Appeal, Applicant husband paid some maintenance charges to the wife. Thereafter, this court by order dated 23.09.2016 (Coram: V.M.Kanade & Smt.Swapna S. Joshi JJ.) in Civil Application No.336 of 2015 directed applicant to pay maintenance charges of Rs.15,000/- per month to the wife and Rs.15,000/- per month to his daughter.

7 The learned counsel for the Applicant husband submits that order passed by this court on 14.10.2015 was ex-parte order. Hence, same is required to be vacated. It is to be noted that it is specifically recorded in the order that at the request of counsel for the Respondent-husband, matter was adjourned to

19.11.2015. Order dated 14.10.2015 passed by this court reads thus:

“P.C.:

1. At the request made by the learned counsel for the Respondent-Husband, stand over to 19.11.2015.

2. In the meantime, the impugned order is stayed. The Respondent-Husband shall clear the arrears of maintenance, if any, till the date of the order. Arrears to be paid before the next date.”

8 Bare reading of the order dated 14.10.2015 shows that same was passed after hearing both the sides. Therefore, there is no question of staying and or vacating the said order. Hence, prayer clause (b) made by the Applicant in the present Civil Application stands rejected.

9 Another prayer made by the Applicant husband directing appellant wife to refund sum of Rs.9 lacs paid by him towards maintenance charges. Bare reading of prayer clause (f) shows that the said sum of Rs.9 lacs was paid by the Applicant. It is very difficult to find out from the bare reading of prayer clause (f) by which order the Applicant paid sum of Rs.9 lacs to the appellant and for what purpose. During the course of argument, the learned counsel for the Applicant submitted that this court by order dated 23.09.2016 in Civil Application No.336 of 2015 directed Applicant husband to pay the enhanced maintenance charges.

10 The learned counsel for the Applicant submits that appellant wife made false statement before the Trial Court for obtaining the order of maintenance charges. He submits that before the Trial Court, appellant wife specifically made a statement that she is not working and or earning anything. In support of this contention, the learned counsel for the Applicant relies on paragraph 33 of the Trial Court's order which reads thus:

"33. It appears from the record that P.W. 3 Mrs.Philomena Nunes who is mediator of the marriage between petitioner and respondent has categorically stated that at the time of initial settlement talks of the marriage, the mother of respondent has stated that the respondent has appeared for 12th Std. Exam in I.B.Board and she is taking tutions, earning an amount of Rs.30,000/- to 40,000/- p.m. This fact was categorically mentioned by the petitioner in his evidence as well as P.W. 2 i.e. sister of petitioner has categorically narrated said fact in her evidence. It appears from the cross examination of above three witness nothing has brought on record to disprove the version of petitioner and hi witnesses."

11 The learned counsel for the Applicant also relies on the ground no.P and U of the appeal memo which reads thus:

"(P) The Ld. Trial court ought to have, besides granting proper maintenance to appellant and both her daughters, must have made provisions for the residence, education, marriage and proper upbringing of the daughter."

(U) The Ld. Trial Court committed the substantial error in granting the Decree of Divorce and also not granting the required amount of maintenance to the appellant and her daughters.”

12 The learned counsel for the Applicant also relies on the photograph which is on page 16 in Civil Application No.180 of 2018 to show that appellant wife was working. He submits that though the appellant wife was earning more than Rs.30,000/- to Rs.40,000/- per month, she made false statement before the court of law and obtained an order of maintenance. Hence, the appellant wife be directed to refund sum of Rs.9 lacs paid by him towards the maintenance charges.

13 The learned counsel for the Applicant submits that in the present proceedings, appellant wife made false statement before the Trial Court as well as before this court for obtaining order of maintenance. Hence, appellant wife be directed to refund sum of Rs.9 lacs which was paid to her towards maintenance charges. In support of these submissions, the learned counsel for the Applicant relied on following authorities:

1. Dalip Singh vs. State of Uttar Pradesh and Others, (2010) 2 SCC 114, paragraph 2
2. Mrs.Gurpreet Kaur Alagh vs. Mr.Gurpreet Singh Alagh, 2017 SCC Online Bom 9857, paragraph 4 and 5
3. Subrata Roy Sahara vs. Union of India and Others, (2014) 8 SCC 470, paragraph 191 and 194

4. Dnyandeo Sabaji Naik and Another vs. Pradnya Prakash Khadekar and Others, (2017) 5 SCC 496, paragraph 14
5. N. Natarajan vs. B.K. Subha Rao (2003) 2 SCC 76, paragraph 8
6. J.I.K Industries Co. Ltd. vs. Shri Maruti Nashik Mene & Ors., 2017 SCC Online Bom 3477, paragraph 14
7. Fareed Ahmed Qureshi vs. The State of Maharashtra and Anr., 2018 SCC Online Bom 960, paragraph 8
8. Union of India v. Mr.Harish V. Milani 2018 SCC Online Bom 2080, paragraph 4 and 6
9. E. S. Reddi vs. Chief Secretary, Government of A.P. and another, (1987) 3 SCC 258, paragraph 11
10. Hindustan Organic Chemicals Ltd. vs. ICI India Ltd. (2017) 5 BCR 119, paragraph 12
11. Chandra Shashi vs. Anil Kumar Verma (1995) 1 SCC 421, paragraph 2
12. Sejalben Tejasbhai Chovatiya vs. State of Gujarat, 2016 SCC Online Guj 6333, paragraph 19

14 On the basis of these submissions, the learned counsel for the Applicant submits that if the order is obtained fraudulently, that order is required to be set aside. He submits that in the case in hand, appellant wife obtained order of maintenance charges by suppressing the fact that she was working and earning nearabout Rs.30,000/- to Rs.40,000/- per month and therefore, whatever amount is paid by the Applicant to the applicant wife, is required to be refunded.

15 Another prayer i.e. prayer clause (g) is made by the applicant that, Applicant may be spared to pay further maintenance in view of above mentioned facts of the present case.

16 On the other hand, the learned counsel for the Respondent appellant wife vehemently opposed the present Civil Application. He submits that wife also preferred Civil Application No.304 of 2018 for an order against Applicant husband to clear the entire arrears of maintenance being Rs.91,500/- and for other reliefs. He submits that those reliefs reads thus:

“(a) this honourable court be pleased to order and direct the respondent to pay the entire arrears of maintenance being Rs.91,500/- being the differential amount of maintenance payable by the respondent till March 2018 and also pay the arrears calculated at the rate of Rs.30000/- per month from the month of April 2018 of upto August 2018 and continue to pay the same, even thereafter every month, as directed by this honourable court in the orders dated 31st March 2016 and 23rd September 2016, 7th March 2017 and 2nd May 2017;

(b) this honourable court be pleased to order and direct that the said amount of maintenance be paid to the applicant wife, on or before 7th of each month and the respondent be further directed to file an undertaking to that effect in this Hon'ble court as earlier directed by this Hon'ble in its order dated 2nd May 2017;

(c) this honourable court be pleased to take serious cognizance of the defaults committed by the respondent in paying the enhanced maintenance as

ordered and directed by this honourable court vide orders dated 31st March 2016, 23rd September 2016 and 7th March 2017, also the conduct of the respondent to cause proceedings filed through relations making wild and reckless allegations and as such hold that the respondent is guilty of contempt of this honourable court and is liable to be prosecuted and be prosecuted and punished in accordance with law for wilful disobedience of the orders passed by this honourable court as well as for interfering with this honourable court in the administration of justice;

(d) That the further proceedings of civil application no.290 of 2017 and civil application no.180 of 2018, writ petition no.67000 of 2018 and civil application no. 1857 of 2018 and any other proceedings as filed by the respondent and his relatives, be stayed till the entire amount of arrears are paid to the applicant herein and undertaking, as directed by this Hon'ble court in its order dated 2nd May 2017, is filed by the respondent herein;

(e) Ad-interim relief in terms of prayer Clause (a) to (d) of the civil application;

(f) Such further and other reliefs as the nature and circumstances of the case may require;

(g) Cost of the civil application be provided for.”

17 The learned counsel for the Appellant-wife submits that as Applicant is in arrears of maintenance charges payable to the wife, court should not hear any Application filed by Applicant husband in the present proceedings. He further submits that Trial Court after hearing both the sides passed interim order directing Applicant husband to pay maintenance charges. Not only that, this court by order dated 23.09.2016 specifically recorded in paragraph 2 that advocate appearing on behalf of

Applicant husband failed to file his Affidavit-in-Reply, inspite of that, time was granted. He submits that paragraph 2 of the said order reads thus;

“2. Though time was taken by the advocate for the Respondent-husband in March, 2016 for filing an affidavit in reply, he has not filed any reply till today. It is obvious that the Respondent-Husband is trying to protract the proceedings. Today in the morning as well as in the afternoon session, the advocate for the Respondent-husband did not appear before us. The Trial Court has granted maintenance of Rs.10,000/- p.m. to the Appellant-wife and Rs.5,000/- p.m. to their daughter.”

18 The learned counsel for the Appellant submits that this court passed order dated 23.09.2016 in Civil Application No.336 of 2015 on its own merits. Therefore, there is no question of directing appellant wife to refund the amount paid by the Applicant husband towards the maintenance charges. Hence, Civil Application is required to be dismissed with costs.

19 We have heard both the sides.

20 It is to be noted that in the present proceedings, bare reading of prayers in the present Civil Application shows that Applicant is seeking to vacate the order dated 14.10.2015 passed by this court by which the impugned order passed by Family Court in Petition No.A-696 of 2012 was stayed. In any case, Family Court Appeal is already admitted. Therefore, there is no question of vacating the said order. Hence, prayer clause (b) of the present Civil Application is rejected.

21 The second prayer made by the Applicant is about refund of amount of Rs.9 lacs. It is to be noted that in the present proceedings, during the pendency of Divorce Petition No.A-696 of 2012 before Family Court, Family Court directed Applicant husband to pay maintenance charges. Thereafter, this court by order dated 23.09.2016 in Civil Application No.336 of 2015 enhanced the amount of maintenance charges. Whether the appellant wife has obtained this order by committing fraud and suppressing the fact that she was working and earning Rs.30,000/- to Rs.40,000/- per month, is required to be decided at the time of final hearing of the Family Court Appeal. Therefore, the authorities relied by the Applicant as stated hereinabove are not applicable in the facts and circumstances of the present case and this issue is required to be decided at the time of final hearing of Family Court Appeal. Hence, prayer clause (f) made by the Applicant in the present Family Court Appeal stands rejected.

22 Another prayer made by the Applicant is about payment of maintenance charges. It is the case of the Applicant that in view of the fraud committed by the appellant wife, Applicant husband be spared to pay further maintenance. It is to be noted that order passed by this court 23.09.2016 in Civil Application No.336 of 2015 is intact till today. Neither same is challenged by the Applicant before the higher court nor filed any Review Petition. Therefore, there is no question of entertaining the Applicant's prayer clause (g) of the present Civil Application.

23 In view of above mentioned facts, we do not find any substance in the present Civil Application.

24 Civil Application stands rejected.

(N. J. JAMADAR, J)

(K.K. TATED, J.)