

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 8033 OF 2016

Archana Kaustubh Desai

...Petitioner

Versus

Kaustubh Arvind Desai

...Respondent

....

Mr. Hemant S. Deshpande, Advocate for the Petitioner.

Mr. Sugandh B. Deshmukh, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 04th JANUARY, 2019

P.C.

1. Heard Mr.Hemant S. Deshpande, learned counsel for the petitioner and Mr.Sugandh B. Deshmukh, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner-wife has challenged the order dated 4.3.2016 passed by the learned Civil Judge, Senior Division at Jaisingpur below Exhibit-14 in Hindu Marriage Petition No.96/2014. By that order, the learned trial Judge partly allowed application Exhibit-14 made by the petitioner. The learned trial Judge rejected the prayer for interim maintenance and directed the respondent-husband to pay Rs.10,000/- towards costs.

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

4. In support of this Petition, Mr. Deshpande has invited my attention to paragraphs-10 and 11 of the impugned order. He submitted that the learned trial Judge has rejected the prayer of interim maintenance mainly on the ground that in the past the petitioner was gainfully employed and thus she has capacity to earn and that the respondent had paid Rs.12 Lakhs from time to time. He submitted that the learned trial Judge has not considered the income of the respondent. Once the marriage between the parties is admitted, the learned trial Judge ought to have considered the fact that presently the petitioner is not gainfully employed and that the respondent is well to do person. He submitted that in paragraph-10, the petitioner has pointed out the financial status of the respondent. Without considering the income of the respondent and his financial capacity, the learned trial Judge rejected the application. He further submitted that the respondent has also instituted suit for recovery of Rs.12,13,800/- in Kolhapur Court. The learned trial Judge has not considered this aspect while passing the impugned order. He, therefore, submitted that the

petition requires consideration.

5. On the other hand, Mr. Deshmukh supported the impugned order. He has invited my attention to the order dated 23.1.2015 passed by the learned Judicial Magistrate, First Class at Kolhapur below Exhibit-5 in Criminal Misc. Application No.1051/2014. He submitted that the petitioner filed application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act') claiming the reliefs of residential order, maintenance order, order of compensation and protection order under various provisions of the D.V. Act. He submitted that in paragraph-9 of that order, the learned Magistrate has referred to the statement of account for the period of 8.3.2010 to 14.8.2014 of the petitioner's savings bank account maintained with the Bank of India, Shahupuri Branch. After considering various entries, the learned Magistrate observed that the respondent herein had deposited huge amounts in the account of the petitioner and the petitioner has withdrawn the amount in cash on various dates.

6. In paragraph-10, the learned Magistrate referred to the copies of the statements recorded by Hupari police station during the investigation of C.R. No.71/2014 and observed that the petitioner was in the habit of extracting money from her former husband and maternal

uncle of the respondent. He submitted that the application made by the petitioner was rejected on 23.1.2015. On instructions, he states that the petitioner has challenged this order before the Sessions Court and said proceedings are pending. He further submitted that the petitioner has filed present application Exhibit-14 on 21.2.2015 that is to say immediately after rejection of the application filed by her under D.V. Act. He further submitted that the matter is fixed before the trial Court on 19.1.2019 for recording of evidence of respondent's witness and the petitioner is not cooperating for disposal of the Marriage Petition. For the reasons recorded in paragraph-11 of the impugned order, he submitted that no case is made out for interfering with the impugned order.

7. In reply, Mr. Deshpande submitted that the learned Magistrate was not justified in relying upon the statement recorded by Hupari police during the course of investigation of C.R. No.71/2014.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the impugned order shows that in paragraph-10, the learned trial Judge has referred to the submission advanced by the petitioner in respect of financial capacity of the

respondent. In paragraph-11, the learned trial Judge has referred to the fact that the respondent had paid Rs.12 Lakhs to the petitioner from time to time. The learned trial Judge was of the view that in the past the petitioner was gainfully employed and thus she has capacity to earn. In my opinion, the approach of the learned trial Judge was wholly perverse. The learned trial Judge should have considered the earning capacity of the respondent and his financial status. Merely in the past the respondent had paid Rs.12 Lakhs from time to time to the petitioner, which is disputed by the petitioner, cannot be the ground for denial of maintenance. This is more so when the respondent has instituted suit for recovery of that amount. That apart, the learned trial Judge should have considered whether presently the petitioner is gainfully employed or not. Merely because in the past she was gainfully employed that by itself will not be sufficient to refuse maintenance. At the same time, it is also necessary to consider the fact that the petitioner had filed application under Section 12 of the D.V. Act and which was rejected by the learned Magistrate. The learned trial Judge will consider all these aspects afresh.

9. In view thereof, the impugned order is set aside. Application Exhibit-14 is restored to the file of learned trial Judge. As the matter is fixed before the trial Court on 19.1.2019, the parties assure that they will appear before the trial Court on that date. The learned trial Judge

will fix suitable date for hearing Exhibit-14 and will pass appropriate order in accordance with law. The learned trial Judge will also deal with the contentions recorded in this order and any other contention that may be advanced before him. All contentions of the parties on merits are expressly kept open. Parties assure that they will extend full cooperation for disposal of Hindu Marriage Petition No.96/2014 as expeditiously as possible and in any case within six months from 19.1.2019. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)