

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.131 OF 2017
IN
FAMILY COURT APPEAL NO.176 OF 2016

Kalpana Mayur Gala.] ... Applicant

Versus

1. Mayur Premji Gala,]
2. Rajesh Atmaram Panchal.] ... Respondents

Mr. Vishal Kanade a/w K. M. Savla i/b Mr. Manish P. Jagani for Applicant.
Smt. Sharmila Deshmukh a/w Ms. Kanchan Chindarkar & Mr. Amar Mishra i/b SRM Law Associates for Respondents.

CORAM :- AKIL KURESHI &
SARANG V. KOTWAL, JJ.
RESERVED ON :- 10 APRIL, 2019
PRONOUNCED ON :- 18 APRIL, 2019

P. C. :-

1. This is an application filed by the original Appellant in Family Court Appeal No.176 of 2016. The application is preferred for two prayers. By the first prayer, the Applicant is seeking directions from this Court to direct the Respondent No.1 to pay a sum of Rs.75,000/- per month from the date of the impugned decree and by

the second prayer, the Applicant is seeking directions to the Respondent No.1 to allow the Applicant to reside in the residential premises, being flat at Sanewadi, Prarthana Samaj Road, Vile Parle (East), Mumbai.

2. The Applicant had got married with the Respondent No.1 on 16/02/2003. The couple has two children. Son Rahil was born in the year 1996 and daughter Mahek was born in the year 2000. Today both of them are major. The Respondent No.1 had filed Petition No.A-958 of 2010 before the Family Court No.4 at Bandra, Mumbai for dissolution of their marriage under Sections 13(1)(i) and 13(1)(ia) of the Hindu Marriage Act, 1955 ('the said Act', for short). The Petition was filed on 13/04/2010. Vide the Judgment and Decree dated 06/08/2018, the Family Court allowed the Petition filed by the husband (Respondent No.1 herein). The marriage was dissolved by a decree of divorce under the afore-mentioned sections. The custody of the daughter, who was then a minor, was directed to be retained by the husband - Respondent No.1. The son was already major by then. The learned Judge had held that the husband had proved that the Applicant had committed adultery and had treated him with cruelty.

3. During the pendency of the Petition before the Family Court, the Applicant had preferred an application for interim maintenance (vide Application No.34 of 2011). Vide order dated 06/02/2012 passed below Exh.20 in Petition No.A-958 of 2010, the husband was directed to pay Rs.15,000/- per month as interim maintenance to the Applicant from 17/02/2011 onwards till further orders. The husband had challenged that order unsuccessfully before this Court in Writ Petition No.3151 of 2012 and in Letters Patent Appeal No.103 of 2013. This order was continued till the main Petition i.e. Petition No.A-958 of 2010 was decided on 06/08/2016.

4. The Applicant challenged the Judgment and Decree passed by the Family Court by preferring Family Court Appeal No.176 of 2016 before this Court. The Appeal was admitted vide the order dated 04/01/2017. The order reads thus :

“In spite of service of notice, none appears for the respondents.

Admit.

Hearing expedited.”

5. During the pendency of Family Court Appeal No.176 of 2016, the Applicant has preferred the present Civil Application as

mentioned earlier. In the proceedings of this Civil Application, the husband filed Affidavit-in-Reply to which the Applicant filed rejoinder and thereafter the Respondent No.1 - husband filed his sur-rejoinder. The contentions raised by each party are vehemently disputed by the other.

6. It is the case of the Applicant that the Applicant is not employed and is not earning anything. She has to depend on her parents for her sustenance. She had not claimed enhancement of interim maintenance during pendency of the petition before the Family Court because she was hopeful of cohabiting with the Respondent No.1 - husband. However, now it was very difficult for her to survive. She has given a list of bare minimum expenses required. The Applicant has denied all allegations of adultery. In her rejoinder, the Applicant has given a list of various properties held by the Respondent No.1. and his family. The Respondent No.1, in his reply, has disputed ownership of these properties and has taken a stand that he had suffered heavy losses in his business. Their children were looked after by his parents and the expenses were provided by them. It is his case that the Respondent No.2 was regularly paying

Rs.35,000/- per month to her. It is his case that earlier interim maintenance of Rs.15,000/- was paid by him only after borrowing money from his father. He has further stated in his Affidavit that the Applicant was running a business of selling garments in the name and style 'Kalpa Creations' and thus was self-employed. He has further contended that the adulterous behaviour of the Applicant disentitles her from claiming any maintenance.

7. We have heard Mr. Vishal Kanade, learned Counsel for the Applicant and Smt. Sharmila Deshmukh learned Counsel for the Respondents.

8. Both the learned Counsel basically made the same submissions which are averred by the parties in their pleadings. Mr.Kanade further submitted that the Appeal against the Judgment and Decree is already admitted by this Court and therefore, the question of committing adultery by the Applicant was under consideration before this Court. He further submitted that the list given by the Applicant shows that the Respondent No.1 and his family have huge properties in Mumbai and therefore, the contention that

the Respondent No.1 was dependent on his father, is not true. Mr.Kanade further submitted that it would be just and proper if the Respondent No.1 is directed to pay a reasonable amount per month for sustenance of the Applicant as she was not earning herself. He further submitted that the contention that she was self-employed and was having business of selling garments by name 'Kalpa Creations', is not true as it was only on one occasion that she had sold garments and that was long time ago.

9. As against this, Smt. Sharmila Deshmukh contended that since the marriage was dissolved on the ground of cruelty and since it was held that the Applicant had committed adultery, such finding disentitles the Applicant from claiming any maintenance. She invited our attention to Section 25 of the Hindu Marriage Act, 1955 regarding permanent alimony and maintenance. She emphasized on sub-Section (3) of Section 25 of the said Act which reads thus :

“(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may be at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.”

She submitted that this sub-Section clearly provides that if the wife has not remained chaste, she is not entitled to claim any permanent alimony and maintenance. Smt. Deshmukh further submitted that no maintenance under Section 24 of the said Act can be granted to the Applicant as the maintenance *pendente lite* and expenses of proceedings as provided under Section 24 of the said Act could not be extended to the present proceedings of Appeal before this Court. Section 24 reads thus :

“24. Maintenance pendente lite and expenses of proceedings.-- *Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable :*

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]”

10. Section 24 empowers the Court to grant such sum which may seem reasonable to Court having regard to the income of the parties. For this purpose, we have considered the rival contentions.

Contention of the learned Counsel that the Family Court having granted divorce on the ground of adultery, wife cannot claim interim maintenance, cannot be accepted. Firstly, the Judgment of the Family Court has not become final. Appeal against the Judgment is admitted and is pending. Secondly, the object of Section 24 of the Hindu Marriage Act, 1955 is to ensure that any party to a matrimonial dispute may not suffer a hardship in defending the cause on account of financial constraints. If the wife is denied maintenance on the ground of adultery, she will certainly be handicapped in pursuing her appeal which challenges such finding of adultery. There is nothing on record to show at this stage that the Applicant is earning any income. The claim that she was self-employed and was in the business of selling garments, is not substantiated. According to the Applicant, it was only on one occasion that she had an occasion to sell some garments. The Applicant has given a list of properties held by the Respondent No.1's family. Though the Respondent No.1 - husband has claimed that most of these properties are held by his family, the list of these properties does indicate that the family of the Respondent No.1 is a well to do rich family. Along with her Affidavit dated 01/03/2018, the wife has produced a list of immovable properties

owned by the family members of the husband jointly or individually. This list includes several properties situated in Mumbai. Counsel for the husband orally stated that some of the properties are already sold. Even going by the oral statement, the husband and his family members continue to own large number of immovable properties in Mumbai which include residential and commercial properties. There is no reason as to why the Respondent No.1 - husband should not provide the basic necessary financial help to the Applicant for her sustenance. Though the wife has sought directions to allow her to reside in the flat at Sanewadi, Vile Parle (East), Mumbai, the ownership of such flat is not established for the purposes of deciding this application. However, it would be reasonable to direct the Respondent No.1 to provide certain amount to the Applicant so that the Applicant can have a shelter of her own. The interim maintenance of Rs.15,000/- per month was given from 17/02/2011 till disposal of the Petition before the Family Court. After passage of time, it is only reasonable that it should be enhanced to a reasonable degree. Considering the totality of circumstances, in our considered view, it would be just and proper if the Respondent No.1 - husband is directed to pay Rs.30,000/- for monthly expenses of the Applicant and

Rs.15,000/- per month for her residential accommodation. Hence, the following order.

ORDER

- (i) The Respondent No.1 - husband is directed to pay Rs.45,000/- (Rupees Forty Five Thousand Only) per month to the Applicant - wife during the pendency and final disposal of Family Court Appeal No.176 of 2016.
- (ii) The Application is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)

11. At the time of pronouncement of this order, learned Counsel for Respondent No.1 prayed for stay of the operative part of the order for a period of two weeks. The request is refused.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)