

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

FAMILY COURT APPEAL NO.217 OF 2018

WITH

CIVIL APPLICATION NO.358 OF 2018

IN

FAMILY COURT APPEAL NO.217 OF 2018

Jayprakash Shivakumar Hirepatta
Age Adult, Occu. Service
R/o 229, Kalyan nagar Division I,
Near Multani Bakery, Majrewadi,
Tal. North Solapur Dist. Solapur

.... Appellant

versus

Mrs.Deepa Jayprakash Hirepatta
Age Adult, Occu. Service
R/o C/o Deepa Rachaiyya Kaddevar @ Keddevarmath
R/o Basavrajendra Nagar
Sindgi Road, Indi, 586209
Asstt. Teacher at H.P.S. Deshpande
Laman Tanda No.1, Opposite Veer Bharti School,
Sindi Road, Indi, 586209
presently residing near Prabhulingeshwar Temple,
Terdal, Taluka-Jamakhandi,
District-Bagalkot.

... Respondent

.....

- Mr.Ashok Tajane, Advocate for Appellant.
- Mr.Nagesh Y. Chavan, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.**

DATE : 20th MARCH, 2019.

JUDGMENT : (PER : AKIL KURESHI, J.)

1. This Appeal is filed by the husband challenging a portion of the judgment passed by learned Judge of the Family Court, Solapur, on 14/02/2018, under which the Appellant-Husband is directed to pay permanent alimony of Rs.5,000/- per month to the wife and a similar amount to his son. By the said judgment, the Family Court allowed the husband's Petition for dissolution of marriage. The wife has not challenged this portion of the judgment and decree. The only question before us is whether the following directions contained in the impugned judgment of the Family Court are legal and valid.

“3. The petitioner-husband is hereby directed to pay permanent alimony of Rs.5,000/- (Rs.Five thousand only) per month to respondent-wife and Rs.5,000/- (Rs.Five thousand only) per month to son Samarth i.e. Total [Rs.10,000/- (Rs.Ten thousand only) per month] from the date of Decree, till further order.”

2. Learned Counsel for the Appellant at the outset submitted that the Appellant-Husband is not opposing the

payment of maintenance to the son. He however opposes payment of maintenance to the wife on the ground of her conduct and that she herself has sufficient source of income. In this respect the learned Counsel for the Appellant submitted that the Respondent-Wife is working as a teacher and earning more than Rs.35,000/- per month. The Family Court therefore committed a serious error in awarding alimony to her. He has submitted that the Family Court has granted decree of dissolution of marriage on the ground of cruelty. On this ground also the Family Court committed an error in granting alimony. He submitted that when the wife is earning sizable income, it is her joint duty to maintain the son as well.

3. On the other hand, the learned Counsel for the wife opposed the Appeal contending that if the alimony of Rs.5,000/- directed to be paid by the Family Court, since the wife is earning, is to be discontinued, then the maintenance amount in favour of the son should be increased.

4. The judgment of the family Court would show that the

Appellant-Husband had not produced the proof of his income. The wife had deposed on oath that the income of the husband was more than Rs.40,000/- per month. This suggestion was not even seriously challenged in the cross-examination of the wife. The family Court therefore had proceeded on the basis that the husband's salary is atleast Res.40,000/- per month. We had on the previous occasion asked both the sides to produce their current salary slips. The learned Counsel for the husband has produced a salary slip for the month of February 2019 which is taken on record, which shows that he is employed as a Medical Superintendent. His gross salary is Rs.52,393/-. After deductions of Rs.11,330/- which include payments towards insurance policy and other investments comes to Rs.9,000/-, his net take home pay comes to Rs.41,063/-. The wife has not produced the salary slip. However, Counsel for the Appellant relies on the income calculation which was prepared by the employer, school management for the financial year 2018-19. This document shows that the wife's gross salary is Rs.33,278/- for the month of February 2019.

5. These documents we have perused only in order to get further credence to the material and evidence already on record before the Family Court. As noted, the Family Court had concluded on the basis of such evidence that the husband earns more than Rs.40,000/- per month and the wife is also employed. Both these findings are perfectly legal.

6. Under the circumstances Advocate for the Appellant may be absolutely correct in contending that the wife cannot get any alimony from the husband as she herself has sufficient independent source of income to sustain herself. This however, does not mean that the Appellant can disown his responsibility to support his own son. Learned Counsel for the Appellant made a strange argument that the Appellant is ready to take custody of the child and that therefore the directions of paying maintenance to the son should be deleted. The question of custody of child and that of paying maintenance for the child would stand on entirely different considerations. Before us, the

wife's custody of the child is not disputed. Under such circumstances the Appellant cannot avoid his responsibility to maintain the child as his income is more than Rs.52,000/- per month. The deductions suffered by him from such salary are predominantly in the nature of his savings. Even after the deductions, his take home pay is more than Rs.42,000/- per month. Considering such circumstances, it would be fully justified to direct the Appellant to pay monthly maintenance of Rs.10,000/- to the son, who is aged about 8 years. At the same time, the direction to pay Rs.5,000/- per month to the wife shall have to be deleted. In other words, the total outflow for the Appellant would remain the same, i.e. Rs.10,000/- per month, but under different heads.

7. Though, not having been argued, we must address the question of the power of this Court to make this modification in the order passed by the Family Court in Appeal filed by the husband. To begin with, as noted above, the direction for total maintenance as contained in the impugned judgment of the Family Court and this judgment would remain the same.

Secondly, section 19 of the Family Court Act, 1984 also needs to be perused, relevant portion of which reads as under;

“Section 19 -:

(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.”

8. A person aggrieved by an order passed by the Family Court other than interlocutory order, could file the Appeal before the High Court in terms of sub-section (1) of section 19. Sub-section (1) of Section 10 of the Family Courts Act provides that subject to the provisions of the said Act and the Rules, provisions of Code of Civil Procedure shall apply to the suits and proceedings before the Family Court. Sub-section (3) of Section 10 of the Family Courts Act provides that nothing contained in

sub-sections (1) and (2), shall prevent the Family Court from laying down its own procedure to arrive at a settlement. Thus, to the proceedings of the Family Court, provisions of C.P.C. would apply but the Family Court would also have flexibility to device its own procedure for arriving at a settlement.

Section 107 of the C.P.C. pertains to powers of the Appellate Court and reads as under :

“107. Powers of appellate Court. - (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power-

- (a) to determine a case finally;*
- (b) to remand a case;*
- (c) to frame issues and refer them for trial;*
- (d) to take additional evidence or to require such evidence to be taken.*

(2) Subject as aforesaid, the appellate Court shall have the same power and shall perform as nearly as maybe the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.”

Thus, in addition to the wide powers referred to in sub-section (1) of Section 107 of C.P.C., in terms of sub-section (2) the Appellate Court would have same powers as enjoyed by the Court of original

jurisdiction. In this Appeal, while in continuation of the original proceedings, therefore, we see no lack of powers to make this minor modification.

9. In the result, the Family Court Appeal is disposed of by making following modifications in the impugned judgment of Family Court -:

Paragraph No.3 of the order of the Family Court dated 14/02/2018, would be substituted by the following:

“The petitioner-husband shall pay maintenance of Rs.10,000/- per month to his son from the date of decree of the Family Court, till he attains majority.”

10. Family Court Appeal stands disposed of accordingly.

- 11.. In view of the disposal of the Family Court Appeal, the Civil Application would not survive.

12. Learned Counsel for the Appellant requested that the stay granted by this Court in an order dated 17/12/2018 passed in the Civil Application No.358/18 may be continued. He states that husband has deposited a sum of Rs.1,00,000/- before this Court. The said amount of Rs.1,00,000/- may be paid over to the Respondent towards satisfaction of the directions contained in this judgment. On the condition that the Appellant continues to deposit Rs.10,000/- per month for the maintenance of the son, effective from 01/04/2019, there shall be no further recovery for a period of four weeks from today.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)