

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 264 OF 2018

Shri. Paul F. D'souza	...Petitioner
<i>Versus</i>	
Mr. Francis Melwyn D'souza and another	...Respondents

....

Mr. R.R. Varma, Advocate for the Petitioner.
Mr. Clive D'Souza, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.
DATE : 24th APRIL, 2019

P.C.

1. Heard Mr. R.R. Varma, learned counsel for the petitioner and Mr. Clive D'Souza, learned counsel for the respondents, at length.

2. This Petition takes exception to the order dated 16.5.2017 passed by the learned Judge, Family Court No.2, Mumbai below Exhibit-6 in Petition No.E-181/2015. By that order, the learned trial Judge rejected the application made by the petitioner *inter alia* praying for the relief, which reads thus :

“(a) this Application be kindly allowed and the Respondents No-1 and No.2 be ordered to grants Rs.20000/- per month as maintenance which included food, clothing, residence and medical attendance and treatment in our favour.”

3. Rule. Mr. D'Souza 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. The petition was heard on 25.2.2019. It was observed that the learned trial Judge rejected the application mainly on the ground that filing of the application by the petitioner was clearly an afterthought. The learned trial Judge was further of the view that the application is filed by the petitioner only after the Court held that the petitioner is liable to pay maintenance to his wife.

5. Notice was issued to the respondents as *prima facie* the entire reply filed by the respondents at Exhibit-16 was silent about their income.

6. The petition was thereafter heard on 14.3.2019. On behalf of respondents No.1 & 2 time was sought for filing reply for placing their income on record. The matter was accordingly adjourned to 11.4.2019. On that date, Mr. Dsouza submitted replies of respondents No.1 & 2. The matter was kept today in the supplementary board.

7. Mr. D'Souza has invited my attention to the reply dated 13.4.2015 given on behalf of respondents No.1 & 2 to the petitioner's Advocate. In paragraph-4 of that reply, the respondents contended that the petitioner had purchased three flats in Goa i.e. one at Waman Apartments, Duler, second at Claudins, Duler and the third at Navelim, Margao between 1986 and 1996. In paragraph-5 it is claimed that the petitioner has sold those flats in Goa and invested the same money in building a big house at New Vaddem, Vasco Goa 403802. In short, he submitted that the petitioner has sufficient means for maintenance and, therefore, no fault can be found with the impugned order.

8. A perusal of the replies filed by respondents No.1 & 2, however, do not disclose that they have dealt with the aspect of the petitioner purchasing three flats in Goa and selling these properties and building a big house in Vasco in the affidavits. It is, therefore, not possible for this Court to investigate for the first time the disputed questions of facts. In order to give opportunity to the parties and for placing the material on record, it is desirable to set aside the impugned order and restore Exhibit-6 for deciding it afresh. Hence, the petition is disposed of in the following terms :

- i. The impugned order dated 16.5.2017 passed by the learned Judge, Family Court No.2, Mumbai below Exhibit-6 in Petition No.E-181/2015 is set aside. Application Exhibit-6 is restored to its original position before the learned trial Judge for deciding it afresh.
- ii. The petitioner shall file additional affidavit placing on record the fact whether he had purchased three flats in Goa i.e. one at Waman Apartments, Duler, second at Claudins, Duler and the third at Navelim, Margao and sold them subsequently and thereafter purchased a big house at New Vaddem, Vasco Goa 403802. The petitioner shall file documents along with additional affidavit within four weeks from today and serve copy on the other side during this period.

- iii. Respondents No.1 & 2 shall file reply to the additional affidavit of the petitioner and will also enclose documents on which they propose to rely. Let that reply be filed within two weeks from receipt of the additional affidavit of the petitioner.
 - iv. The learned trial Judge will consider this additional material and pass a reasoned order.
 - v. All contentions of the parties on merits are expressly kept open.
 - vi. The learned counsel appearing for the parties assure that they will appear before the learned trial Judge on 7.6.2019 and for that purpose no fresh notice be issued to the parties.
 - vii. Rule is made absolute in aforesaid terms with no order as to costs.
9. All concerned parties, including the trial Court, to act upon the authenticated copy of this order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)