

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 16 OF 2019

Aarti Malay Shah

.. Appellant

Versus

Malay Amar Shah

.. Respondent

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- Ms. Firdaus Moosa i/by Manoj Gupta for the Appellant
 - Mr. Sarosh Bharucha a/w Mr. Algaus Shaikh i/by HK Law Associates for the Respondent
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CORAM : AKIL KURESHI &
N.B. SURYAWANSHI, JJ.

DATE : AUGUST 23, 2019.

ORAL ORDER (Per Akil Kureshi, J.)

1. This appeal is taken up for final hearing at the stage of admission with consent of the learned Advocates for the parties.

2. This appeal is filed by the wife challenging the judgment and decree of the Family Court dated 16.8.2018 pertaining to the claim of the wife in terms of the maintenance for two children and herself. By the said judgment, the husband's petition for restoration of conjugal rights was rejected. By way of interim maintenance, the

husband was directed to pay Rs. 10,000/- per month each to both the children from the date of the application i.e 5.11.2011 till disposal of the Family Court proceedings i.e 16.8.2018. The claim of the wife for interim maintenance was rejected.

3. The case of the appellant is that the husband was engaged in the business of sharebroking. He was also engaged in the business of tour operator. From these businesses, he was earning sizable income. He had suppressed income from the Family Court. The wife was unemployed. She had no independent source of income. The Family Court committed an error in awarding interim maintenance of only Rs. 10,000/- each to both the children and no maintenance to the wife at all.

4. On the other hand, the case of the husband is that the wife herself was employed being a graduate in interior designing. She was earning nearly Rs. 60,000/- per month from her employment. The Family Court, therefore, correctly granted no interim maintenance to her. There is no further

scope for enhancement in maintenance in favour of the children. Learned counsel for the respondent would submit that the husband had suffered huge financial losses in his sharebroking business. He is still repaying the debts. He has paid the maintenance to the children as directed by the Family Court. Over and above, he has also paid the entire school fees of the children.

5. A perusal of the judgment of the Family Court would show that both the sides have attempted to project an exaggerated picture of the earning of the opposite side while disclaiming the income of his / her own. Learned counsel for the respondent was correct in pointing out that the wife had in her written statement in opposition to the respondent's petition for restoration of conjugal rights contended that she was working with Darwin Rhodes Pvt Ltd at Worli, Mumbai. She had to bear the household expenditure and also provide pocket money to the husband. At the same time, the Family Court from the documents on record found that the husband had not produced all necessary documents of his income.

6. We had, therefore, asked the husband to produce his income tax returns for the last three years as well as his bank statements. Before advertizing to to this evidence, we may dispose of the question of the wife's gainful employment. She has not disputed that previously she was engaged as a designer in a private firm. However, the record would suggest that after separation from her husband, she has been residing at Vapi since the year 2011. Her job was at Worli, Mumbai. According to her, she was unable to commute a long distance and therefore, was forced to resign in the year 2012. In any case, the company where she was working closed down in the year 2014. Under these circumstances, it cannot be held that the wife either had independent source of income or that she had capability of earning income which she did not employ. She did not have a residence in Mumbai. After separation from her husband, therefore, she went back to her native place at Vapi. The same was natural. The husband has not disputed two circumstances namely her resignation from the job and closure of the company in which she was previously working. Even otherwise, it would be impracticable to expect a woman

to do full time job after commuting distance of more than 100 kms while continuing to look after two children who were aged about 4 and 5 years respectively at the relevant time.

7. It is true that the wife had opposed the husband's petition for restitution of conjugal rights with an assertions that she was the main earning member of the family and that the husband had no perennial source of income. However, it does not mean that the situation must continue in the same manner. We have already accepted the wife's explanation of the circumstance under which she lost her job and was unable to gainfully employ herself elsewhere. The husband may have also, suffered temporary set backs and losses from his sharebroking business, however, the same does not have to be a permanent situation. Even presently, the husband admits to be in his business of sharebroking as well as tour operator. His income tax returns though cannot be taken as the final statement of his true income, nevertheless, provide some basis to hold that he has considerable income. His return for the assessment year 2016-17 showed a gross total income of Rs. 5 Lakhs

approximately. This does not take into account a sum of Rs. 67,000/- received by him by way of dividend which was tax exempt. He had claimed deduction under Chapter VI-A of the Income Tax Act for a sum of Rs. 1,58,000/-. He had declared income from other sources of Rs. 1,36,000/- including interest income from his investments. Subsequent returns show a similar pattern though not identical figures. His bank accounts maintained by him in his individual capacity as well as for the purpose of his business also show considerable credit and debit entries. We are conscious that in a sharebroking business, total of all these credit entries would not be a safe guided to judge his net income. So also for business as a tour operator, his entire collection would not be his net income. In any case, these entries are perused only for the purpose of our guidance that the husband has two ongoing active businesses of sharebroking and of tour operating.

8. The declaration made by the husband that he had paid the school fees of the children cannot be accepted. Firstly, it is a bald statement without any supporting

documents. Nothing prevented him from producing documents if he had paid the fees and obtained receipts thereof. The Family Court had found that the husband was not forthcoming or forthright about his real income and the source thereof. The Family Court had also criticized him as not disclosing necessary facts and documents.

9. As per the order of the Family Court till the date of disposal of the Family Court proceedings, the husband had to pay interim maintenance of Rs. 10,000/- each to both the children. Considering the facts of the case, estimated earning of the husband and our conclusion that wife has no source of income, we direct him to pay additional sum of Rs. 10,000/- per month to the wife. This direction shall take effect from the 1.1.2013 since the wife had resigned in the year 2012. While disposing of this appeal, it is, therefore, directed that for the period from 1.1.2013 to 16.8.2018 that is the date when the Family Court disposed of the proceedings, the husband shall pay interim maintenance to the wife at the rate of Rs. 10,000/- per month. The arrears shall be cleared in three equal installments falling due on

1.9.2019, 1.10.2019 and 1.11.2019 directly to the wife. Request of the appellant to further enhance pendente lite maintenance for the children cannot be granted since in our estimate income of the husband gathered from the documents on record does not justify outflow of more than Rs. 30,000/- per month which is payable to wife and children as per this order.

10. We pass these directions on the basis of available material before us and the same will not prejudice either side in the pending application filed by the wife for permanent maintenance, which will be decided on the basis of material and documents which may be brought on record.

11. In view of the above, Family Court Appeal is disposed of.

[N.B. SURYAWANSHI, J]

[AKIL KURESHI, J]