

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO. 601 OF 2021
WITH
CIVIL APPLICATION NO.12810 OF 2021 IN SA/601/2021**

Khurshid Chandsab Shaikh

Age - 56 Years, Occu.: Agri. & Busniess,

R/o Kallan Galli, Ausa,

Tq. Ausa, Dist. Latur

... Appellant
(Orig. Defendant)

Versus

Bibi W/o Khurshid Shaikh

Age : 54 Years, Occu.: Household,

R/o. Gangapur, Tq. & Dist. Latur

... Respondent
(Orig. Plaintiff)

....

Mr. Gaurav L. Deshpande, Advocate for the Appellant

....

CORAM : SHRIKANT D. KULKARNI, J.

Reserved on : 09.12.2021

Pronounced on : 13.12.2021

FINAL ORDER:-

1. Mr. Gaurav L. Deshpande, learned counsel for the appellant assures that he would remove the office objections during the course of the day. His statement is accepted. He seeks leave to place on record the private paper book.
2. Leave granted. Private paper book is taken on record.

3. The challenge in the second appeal is to the judgment and decree passed in R.C.S. No. 262/2015 by the 2nd Jt. Civil Judge, Senior Division at Latur and confirmed in R.C.A. No.114 of 2017 with modification to the extent of quantum of maintenance at the hands of District Judge -2 at Latur.

4. The respondent / original plaintiff has filed a suit for maintenance against her husband / appellant by taking aid of provisions of Mahomedan Law.

5. The appellant / original defendant appeared in the suit and filed written statement. The respondent / original plaintiff produced her evidence in support of her prayer for maintenance. The appellant / original defendant failed to adduce any evidence.

6. The learned Judge, after taking into consideration the facts of the case and evidence on record, was pleased to decree the suit partly and awarded maintenance to the respondent / wife at Rs.3,000/- per month from the date of institution of the suit. The charge of maintenance amount ordered to be kept on the landed property of the appellant / original defendant to the extent of his share.

7. The respondent / wife feeling aggrieved by the amount of maintenance awarded by the trial Court, preferred an appeal before the District Court at Latur by taking the aid of Section 96 of the Code of Civil Procedure.

8. The appellant / husband appeared in the appeal and contested the claim for maintenance put forth by his wife.

9. Learned District Judge-2, Latur after considering the facts of the case, evidence on record and arguments advanced on behalf of both the sides was pleased to allow the appeal partly. The appellate Court / District Court was pleased to modify the decree to the extent of quantum of monthly maintenance. The amount of monthly maintenance came to be enhanced from Rs.3,000/- to Rs.5,000/- from the date of institution of the suit.

10. The appellant / original defendant, is thereafter, before this Court by way of second appeal in view of Section 100 of the Code of the Civil Procedure.

11. Heard Mr. Gaurav L.Deshpande, learned counsel for the appellant on the point of admission of second appeal.

12. Mr. Gaurav Deshpande, learned counsel for the appellant vehemently submitted that the trial Court has committed a grave error in the eye of law while allowing the claim of maintenance of wife under Clause 180 of the Mahomedan Law. He submitted that Clause 180 of the Mahomedan Law relates to objects partly valid and partly invalid where wakf is created for mixed purposes. The trial Court has decreed the suit under the wrong provisions of law. It is a clear case of non application of mind by the court below. On this sole ground, the second appeal needs to be admitted. The appellate Court / District Court has also committed the same error. It is nowhere stated by the District Court while allowing the appeal under which provision the maintenance is awarded to the wife / respondent. The appellant / husband is a labour and has no source of income. The findings recorded by the courts below are erroneous and bad in law.

13. According to Mr. Gaurav Deshpande, the core issue in the matter is not properly adjudicated. As such, the appeal needs to be

admitted and during the pendency of this appeal, the impugned judgment and decree passed by the courts below need to be stayed including the execution proceedings.

14. Perused the impugned judgment and decree passed in R.C.S. No.262/2015 by the Civil Judge, Senior Division at Latur and confirmed by the District Court / appellate Court in R.C.A. No.114/2017 with slight modification while partly allowing the appeal preferred by the wife / respondent.

15. I have gone through the private paper book furnished by Mr. Gaurav Deshpande, learned counsel for the appellant, which consist appeal memo in R.C.A. No.114/2017, judgment in R.C.S. No.262/2015, plaint in R.C.S. No.262/2015 with all the orders below exhibit 1.

16. On perusal of the private paper book, it is noticed that the appellant / original defendant could not file written statement within time. The trial Court constrained to pass No W.S. order against the appellant / original defendant. The appellant / original defendant moved an application before the trial Court for

setting aside No W.S. order with a prayer to accept his written statement. That application came to be allowed after hearing both the sides subject to payment of costs of Rs.300/-. The appellant / original defendant did not bother to pay costs of Rs.300/- and ultimately No W.S. order passed against him remained in force.

17. Be that as it may, on perusing the written statement of the appellant / husband, it would be clear that the appellant has not disputed the relationship with the respondent as a wife. It is the stand of the appellant that the plaintiff / wife did not cohabit properly and left his company. He has performed second marriage with one Sultana. Therefore, it is clear that the relationship between the parties as husband and wife is admitted.

18. Let me first deal with the point raised by Mr. Gaurav Deshpande, learned counsel for the appellant regarding incorrect mentioning of the provision of the Compendium of Islamic Law. It is true that first page of the judgment passed by the trial Court indicates that the trial Court has mentioned the provision of Clause 180 of the Mahomedan Law regarding enhancement of maintenance. Clause 180 of the Mahomedan Law pertains to

wakf's objects partly valid and partly invalid. It is not related to the maintenance of a wife. This appears to be a mistake committed by the learned trial Judge while mentioning the provision of the Compendium of Islamic Law/ Mahomedan Law.

19. The question poses whether the judgment can be said to be defective in the eye of law only because of incorrect clause of Mahomedan Law is mentioned. The answer is no. The judgment of the trial Court needs to be read as a whole in order to gather whether it was a suit for maintenance filed by the wife against her husband under the provisions of the Mahomedan Law and what are the findings recorded by the trial Court. Whether the trial Court has applied its judicial mind having regard to the facts of the case and evidence on record. That exercise is more important. The judgment cannot be said to be void only because the trial Court has mentioned incorrect provision while delivering the judgment.

20. On perusing the provisions of the Mahomedan Law / Compendium of Islamic Law, there is provision of maintenance of wives. Clause 277 speaks about husbands duty to maintain his

wife. It provides that it is the duty of husband to maintain his wife unless she is too young for matrimonial intercourse and so long as she is faithful to her husband and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to her husband or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty. According to the above referred provision of the Mahomedan Law, it is the duty of husband to maintain his wife.

21. Clause 278 of the Mahomedan Law speaks about the order for maintenance. It provides that if the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree for *past* maintenance, unless the claim is based on a specific agreement. Or she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1908, Section 488, in which case the court may order the husband to make a monthly allowance in the whole for her maintenance not exceeding five hundred rupees.

22. It is, therefore, clear that there are provisions under the Mahomedan Law for awarding maintenance to the wives. The judgment cannot be set aside only because the trial Court has referred incorrect provision in the judgment. It is not the case that there is no provision under the Mahomedan Law to award maintenance to the wives. There is provision under the Mahomedan Law to provide maintenance to wives if the husband neglects or refuses to maintain his wife without any lawful cause. The trial Court has considered the facts of the case and evidence of respondent / wife and awarded maintenance of Rs.3,000/- per month. The respondent / wife aggrieved by the amount of maintenance granted by the trial Court, preferred an appeal before the District Court under Section 96 of the Code of Civil Procedure. The learned District Court / appellate Court has considered the facts of the case and evidence on record and argument advanced by both the sides, and modified the amount of maintenance from Rs.3,000/- to Rs.5,000/- per month from the date of institution of the suit.

23. Even though the learned District Judge has not specifically referred the provisions of the Mahomedan Law while dealing with

the appeal, it is evident that the District Court has considered the facts of the case and evidence produced by the wife and litigation between the parties in the past regarding the payment of maintenance.

24. There are concurrent findings of the two courts below. In view of the scheme of second appeal provided by section 100 of the Code of Civil Procedure, interference is permissible only in case of perversity in the findings and gross misappropriation of evidence causing injustice.

25. Both the Courts below after appreciation of evidence recorded the finding that the respondent / wife is entitled to get maintenance. The amount of maintenance fixed by the District Court / appellate Court at Rs.5,000/- per month appears to be reasonable. The appellate Court has awarded the maintenance from the date of institution of the suit, which cannot be said to be against the Clause of 278 of the Mahomedan Law. The so called questions of law framed by the learned counsel for the appellant in the appeal memo, more particularly in para XXI (A to H) cannot be said to be substantial questions of law.

25. Having regard to the above reasons and discussion, I arrived at conclusion that no substantial question of law is involved in this appeal.

ORDER

- (i) The second appeal is dismissed in limine.
- (ii) In view of disposal of second appeal, the civil application also stands disposed of.

[SHRIKANT D. KULKARNI]
JUDGE

S.P. Rane