

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FAMILY COURT APPEAL NO.41 OF 2014

Smt Bhima W/o. Madhukar @ Gomaji
Akhand, aged about 53 Yrs.,
Occ.: Household,
R/o. C/o. Yeshwantrao Bende,
Khirulalwadi, Gadikhana,
Nagpur. Distt. Nagpur.

....APPELLANT

...VERSUS...

1. Shri Madhukar @ Gomaji S/o. Pirajirao
Akhand, Aged about 73 Yrs.,
Occu.: Retired, R/o. C/o. Punjabrao
Akhand, House No. 25, Plot No. 7,
Larokapura, Khatikpura,
Bhandewadi, Nagpur-440 008

...RESPONDENT

Shri A. P. Chorghade, Advocate for appellant
None for the respondent

CORAM : A. S. CHANDURKAR AND G. A. SANAP, JJ.

DATED : 30.11.2021

ORAL JUDGMENT (Per : G. A. Sanap, J.)

In this appeal challenge is to the Judgment and order dated 30.12.2005 passed by the Family Court, Nagpur in Petition No. C-40/1996, whereby the learned Judge of the Family Court partly allowed the petition filed by the appellant for enhancement of the maintenance from '₹.100/-' to '₹.1000/-'.

2] The facts leading to this appeal are as follows:

The appellant and the respondent were married on 22.05.1972. They have two sons, who at this stage are major. It is the case of the appellant that due to dispute between her and the respondent she started living separately. The respondent did not make provision for her maintenance. She was unable to maintain herself. Initially, on the application made by the appellant the maintenance was granted @ of ₹.100/- per month. It is the case of the appellant that due to the rise in the prices of essential commodities and cost of living she was unable to maintain her in the amount of ₹.100/-. According to the appellant, on the date of the petition, the respondent was doing service and getting monthly salary of ₹.6000/-. The respondent according to the appellant, despite having sufficient means failed and neglected to maintain the appellant. Therefore, she prayed for the enhancement of the maintenance from ₹.100/- to ₹.2000/-.

3] The respondent opposed the application. There is no dispute by the respondent about the grant of maintenance to appellant @ of ₹.100/- per month. However, it is the case of the respondent that the appellant is not entitled to get the enhancement in the amount of

maintenance. It is the case of the respondent that despite efforts made by the respondent to bring the appellant back she has failed to join the company of the respondent. The decree of restitution of conjugal right was not respected by the appellant. It is further contended that the appellant is having source of income. On these averments he prayed for dismissal of the petition.

4] The parties adduced their evidence before the Family Court. The learned Judge of the Family Court on the basis of the evidence found the appellant entitled to get the enhancement in the amount of maintenance from ₹.100/- to ₹.1000/-. The appellant being aggrieved by partly allowing her petition came before this Court in appeal. According to the appellant, her claim for enhance maintenance of ₹.2000/- per month was justifiable and ought to have been granted by the learned Judge of the Family Court.

5] We have heard the learned Advocate for the appellant. The respondent and his Advocate are absent. The record reveals that this appeal was dismissed for default vide order dated 06.01.2020. On the application of the appellant it was restored, vide order dated 28.01.2021.

In the restoration application the notice was duly served upon the respondent. But, the respondent failed to attend the Court despite service of notice. Even today also the respondent and his Advocate are absent.

6] With the assistance of the learned Advocate for the appellant we have gone through the record and evidence. The learned Advocate for the appellant submitted that considering the cost of living brought on record and escalated prices of the essential commodities the learned Judge ought to have granted enhancement of the maintenance @ ₹.2000/- per month, as claimed by the appellant. The learned Advocate submitted that there is ample evidence on record that at the time of retirement the respondent got retirement benefits running in to lakhs of rupees. The learned Advocate took us through the evidence and pointed out that in addition to the monthly pension, the respondent has other source of income. In the submission of the learned Advocate for the appellant, the learned Judge of the Family Court has not taken all these facts and evidence into consideration. The learned Advocate submitted that considering the income of the respondent brought on record, the petition made by the appellant ought to have been granted in toto.

7] It is undisputed that the appellant has retired from the service and he is getting monthly pension. The two sons of the appellant and respondent are residing separately from the respondent. The respondent being the husband of the appellant is liable to make provision for maintenance of the appellant. On going through the evidence we are satisfied that the appellant has proved that she has no source of income to maintain herself. It has also been proved that the respondent has not made provision for her maintenance. On account of the failure of the respondent to make such provision, the appellant has been made to adopt this proceeding. On going through the record and the evidence we are satisfied that the evidence on record is sufficient to accept the claim of the appellant for enhancement of the maintenance @ ₹.2000/- per month. In our view, the learned Judge of the Family Court has not properly appreciated the evidence keeping all the above facts in mind.

8] During the course of the argument, the learned Advocate brought to our notice the order dated 15.12.2011 passed in Civil Application No. 1469 of 2010 in this appeal and submitted that the interim maintenance pending the appeal was granted on the application of the appellant @ ₹.3000/- per month. In the submission of the learned

Advocate for the appellant, since the interim maintenance was quantified at ₹.3000/- per month the said order would be required to be maintained as final order in case the Court allows the appeal. In our opinion, even though the appellant is found entitled to get the enhancement as prayed for in the petition we are unable to accept this submission advanced by the learned Advocate for the appellant. It is pertinent to note that in the main petition, the appellant prayed that the enhancement be granted @ ₹.2000/- per month. The acceptance of a submission for continuing the order of interim maintenance @ ₹.3000/- per month would tantamount to granting the relief beyond the prayer made in the application. In our opinion, such order would not be justified. In this context it would be necessary to refer the order passed by the learned single Judge on 29.06.1999 in Civil Revision Application No. 1063 of 1998. In this Civil Application, the order passed by the Civil Court granting interim maintenance @ ₹.2000/- per month to the appellant was set aside on the ground that in the main petition the appellant had prayed for the maintenance @ ₹.1000/- per month. The learned Single Judge found that granting interim maintenance more than the one claimed in the main application would be the error apparent on the face of the record. While deciding the interim application the interim maintenance @

₹.2000/- per month was granted for the appellant and for her two children. The learned Judge found that the grant of interim maintenance @ ₹.1000/- per month to the appellant alone would be more than the one claimed by the appellant. In our view, therefore, the prayer to continue the said order granting interim maintenance of ₹.3000/- per month would not be possible. Therefore, submission on this point cannot be accepted.

9] In the facts and circumstances, in our opinion, it would be open to the appellant to take recourse to the appropriate remedy by making an application for enhancement of the maintenance. It is necessary to mention that the petition was filed in the year 1996. The order passed by the Family Court is dated 30.12.2005. The appeal was filed in the year 2006. It therefore goes without saying that there would be changed in the circumstances vis-a-vis of the appellant as well as the respondent. It would be, therefore, open to the appellant to apply for the enhancement of the maintenance, if so advised, on the ground of change in the circumstances.

10] In view of above, we conclude that the evidence on record is sufficient to accept the case of the appellant for enhancement of the maintenance from ₹.100/- to ₹.2000/-. Considering this position, the order passed by the learned Judge of the Family Court would be required to be modified. Hence, the following order-

ORDER

- i] The Family Court Appeal is allowed.
- ii] The judgment and order dated 30.12.2005 passed by the Family Court, Nagpur in Petition No. C-40/1996 is modified by enhancing the maintenance of ₹1000/-per month to ₹ 2000/- per month to the appellant from the date of the petition.

In view of the peculiar facts, the parties shall bear their own costs.

JUDGE

JUDGE

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YOGESH
DHARKAR

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