

Urmila Ingale

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

WRIT PETITION NO. 1333 OF 2022

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Mrs. Chaitali Bhavesh Thaker
Age: 45 years, Occ: Homemaker
Residing at: A 301, Shanti Vihar
Apartments, S.V. Road, Opp.
Beauty shop, Kandivali (W)
Mumbai 400 067 ..Petitioner

vs.

Mr. Bhavesh Prakashchandra Thaker
Age: 45 years, Occ: Business
R/at, Ganga Residency, 2nd Floor,
Swastik Chowk, Behind Om foods,
Bapat mala, Market yard, Sangli 416416 ..Respondent

Ms. Vaishnavi M. Gujarathi, for petitioner.
Mr. Parul S. Abhyankar, for respondent.

CORAM : M. S. KARNIK, J.

DATE : OCTOBER 10, 2022

ORAL ORDER :

1. This petition filed under Article 227 of the Constitution of India by the petitioner-Chaitali challenges an order dated 06/04/2021 passed by the learned Judge, Family Court Mumbai, Bandra in Interim Application No. 124 of 2018.

2. Briefly stated, it is the case of Chaitali (petitioner-wife) that her marriage with Bhavesh (respondent-husband) was solemnized on 04/09/2002. The couple was blessed with three children. After staying together for almost 12 years, certain temperamental differences arose between the parties, as a result of which, the couple started residing separately from 17/09/2014. Chaitali filed proceedings under the Protection of Women from Domestic Violence Act, 2005 (hereafter "DV Act", for short) before the Judicial Magistrate, First Class (hereafter "Magistrate", for short), Sangli on 03/11/2014. Learned Magistrate granted interim maintenance of Rs. 3,000/- to Chaitali and Rs.2,000/- each to the children, thus, a total maintenance of Rs.9,000/- per month was granted in favour of Chaitali and her three children. At the relevant time, Chaitali along with her children was residing in Sangli.

3. Chaitali filed a petition for divorce before the Family Court at Bandra under section 13 of the Hindu Marriage Act, 1955 (hereafter "the said Act", for short) on 26/12/2014. An application for maintenance under section 24 of the said

Act was filed by Chaitali before the Family Court at Bandra on 21/08/2015. The Judge, Family Court rejected the application on 02/03/2016 on the ground that Chaitali is already getting maintenance from the proceedings filed before the Magistrate at Sangli. Some time in 2017, Chaitali withdrew the DV proceedings that she had filed before the Magistrate, Sangli. It is contended that till the date of withdrawal, Bhavesh was in arrears of maintenance to the tune of Rs.2,01,000/-. Learned counsel for Chaitali prayed that Bhavesh be directed to deposit the arrears of maintenance.

4. By the impugned order dated 06/04/2021, the application below Exhibit 19 for interim maintenance is rejected on the principles of *res judicata*, as according to the learned Judge, Family Court, the principles of *res judicata* are applicable in respect of the orders passed even at the interim stage.

5. Learned counsel for Chaitali in challenge to the impugned order submitted that the Family Court was not justified in rejecting the application for maintenance on the

ground that the application as filed is barred by principles of *res judicata*. She submitted that this was a case where the DV proceedings filed before the Magistrate Court, Sangli came to be withdrawn and hence, as Chaitali was no longer in receipt of any maintenance, she was entitled to file a fresh application for maintenance before the Family Court at Bandra. In her submission, the order passed by the Family Court virtually has the effect of depriving her and her children from getting any maintenance which runs counter to the benevolent object of providing maintenance under the provisions of the said Act.

6. Learned counsel for Bhavesh on the other hand supported the impugned order passed by the Family Court. Learned counsel submitted that knowing fully well that the application for maintenance filed before the Family Court at Bandra was rejected on 02/03/2016, Chaitali still proceeded to withdraw the DV proceedings. In his submission, the proceedings initiated before the Family Court at Bandra are for divorce at the instance of Chaitali and even the proceedings before the Magistrate, Sangli under the

provisions of DV Act are initiated at the instance of Chaitali. Chaitali was already prosecuting the DV proceedings and was in receipt of maintenance by virtue of the order passed by Magistrate at Sangli. There was no occasion or reason for her to withdraw the DV proceedings. It is urged by the learned counsel that the principles of *res judicata* are squarely applicable in the present case and the conduct of Chaitali disentitles her from claiming any maintenance by filing a fresh application. Learned counsel prays for dismissal of the petition.

7. Heard learned counsel. At the relevant time when the DV proceedings came to be filed before the Magistrate, Sangli, Chaitali was residing at Sangli. An application was made by her for maintenance in the DV proceedings which came to be granted. The interim order granting maintenance by the Magistrate Court, Sangli was passed on 30/01/2015. Prior to the passing of this order, Chaitali filed the proceedings for divorce before the Family Court Bandra on 26/12/2014. Chaitali filed the divorce proceedings before the Family Court at Bandra, as by then,

she decided to shift to Mumbai. After the academic session of the children got over, learned counsel submits that she actually shifted to Mumbai in March 2015 and since then, Chaitali is residing in Mumbai along with her three children.

8. No doubt, Chaitali was getting maintenance by virtue of the order passed by Magistrate, Sangli. Initially Chaitali made an application under section 24 of the said Act for maintenance before the Family Court which came to be rejected on 02/03/2016 as she was already in receipt of maintenance in the proceedings initiated under the DV Act in Sangli. In the application filed at Exhibit 19, Chaitali stated that she has no source of income and that her father had expired long back. Chaitali and her three children are dependent on her mother. It is further stated that she has taken out a recovery application in DV petition at Sangli, but Bhavesh paid only sum of Rs. 33,000/- against the arrears of more than Rs. 2,00,000/- towards maintenance. In the application, it is stated that due to harassment and cruel attitude of Bhavesh that the DV petition before the Magistrate Court came to be withdrawn.

9. The question is whether the Family Court was justified in rejecting the application for interim maintenance applying the principle of *res judicata*. Chaitali has specifically taken a contention that Bhavesh was in arrears of maintenance and due to the harassment and cruel attitude of Bhavesh that she decided to withdraw the DV proceedings in Sangli. In my opinion, the Family Court was not justified in rejecting the application made by Chaitali on the principle of *res judicata*. I have to be conscious that these are ultimately matrimonial proceedings. If the wife is unable to maintain herself, she is entitled to claim maintenance for herself and her children from the husband. Even though she was granted maintenance by the Magistrate at Sangli in the DV proceedings, she is not precluded from claiming maintenance before any other Court if such a provision exists in a different enactment. The Court would then consider whether the maintenance which is already awarded has to be adjusted/set off by the concerned Court while deciding on the quantum. In any case, it is well settled that if there are change in

circumstances, it is always open for wife to claim enhanced maintenance for herself and her children.

10. A valuable statutory right is conferred to claim interim maintenance if the wife is unable to maintain herself. The benevolent intent of the legislations providing succour of interim maintenance to the wife and children cannot be defeated by restricting the wife from claiming maintenance from only one forum. It cannot be the intent that once a competent statutory Court/forum grants interim maintenance, the wife is precluded from initiating any other proceedings for grant of interim maintenance. So long as the concerned Court/forum is competent to maintain the application for interim maintenance, it obviously can entertain the claim for grant of interim maintenance, subject however to the adjustment/set off of the interim maintenance already granted by any other Court.

11. In the present case, Chaitali shifted her residence from Sangli to Mumbai. Bhavesh was in arrears of maintenance to the tune of Rs.2,00,000/-. Instead of prosecuting the DV proceedings in Sangli, which Chaitali

contends would cause grave inconvenience to her, and rightly so, having shifted to Mumbai more so when she has to file proceedings seeking enforcement of the interim maintenance order at Sangli as the husband is in arrears of maintenance, she preferred to withdraw the DV proceedings and instead file the application below Exhibit 19 for maintenance before the Family Court at Mumbai. As on the date when the application Exhibit 19 was made, Chaitali and her children were not in receipt of any maintenance. In such circumstances, merely because Chaitali was in receipt of maintenance by virtue of an earlier order passed in DV proceedings which have since been withdrawn, would not preclude Chatali from making a fresh application seeking interim maintenance before the Family Court. It is also not as if that on the date when the application Exhibit 19 was made, Chaitali was in receipt of interim maintenance. The DV proceedings in Sangli, for justifiable reasons were withdrawn by her. This is not a matter where the application Exhibit 19 could be dismissed on the application of the principle of *res judicata*. It cannot be said that the order

granting of interim maintenance in the DV proceedings at Sangli attained finality merely on the withdrawal of the DV proceedings to attract the principle of *resjudice* for subsequent proceedings. In fact, to hold that the interim maintenance order passed in DV proceedings, which no longer subsists, would be *res judicata* for subsequent proceedings instituted, would run counter to the benevolent object of statutes governing the law of maintenance. It also does not make any material difference if on an earlier occasion, the application for maintenance was rejected on 02/03/2016, as the same was rejected on the ground that Chaitali was in receipt of maintenance at the relevant time, which reason now does not subsist. In my view, the impugned order calls for interference, in as much as, depriving Chaitali and her three children of maintenance altogether is unjust and inequitable.

12. In this view of the matter, the impugned order is set aside.

13. The trial Court is requested to decide the application Exhibit 19 on its own merits in accordance with law as

expeditiously as possible and in any case, within a period of 8 weeks from 20/10/2022. On 20/10/2022 the parties may place the order passed by this Court on record before the Family Court.

14. The petition is of the year 2015. The parties submitted that the matter is at the stage of evidence. The Family Court is requested to decide the petition as expeditiously as possible and preferably within a period of one year from today.

15. So far as the arrears of maintenance are concerned, without prejudice to the rights and contentions, Bhavesh who is personally present in the Court, through his advocate submits that an amount of Rs. 1,50,000/- will be paid to Chaitali within a period of 8 weeks from today. Statement is accepted.

16. The writ petition is disposed of.

(M. S. KARNIK, J.)