



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11628 OF 2023

Aseem Rafiyoddin Sayyad
Age : 32 years, Occu.: Service,
(Medical Practitioner)
R/o. 14 Fatema Housing Society,
Ward No.1, Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar

... PETITIONER

Versus

Dr. Saniya w/o Aseem Sayyad,
C/o. Rajjak Sayyed,
Age : 26 years, Occu.: Doctor,
(Medical Practitioner),
Home No. 35, Vijaynagar, Bolhegaon Fata,
MIDC, Ahmednagar

... RESPONDENT

Mr. V. R. Dhorde, Advocate for the petitioner
Mr. R. K. Temkar and Mr. D. R. Adhav, Advocate for the respondent

CORAM : R. M. JOSHI, J.

DATE : 11th JUNE, 2024

JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of both sides, heard finally at the stage of admission.
2. Being aggrieved by grant of interim maintenance to the wife in suit filed by the petitioner-husband for restitution of conjugal rights, present petition is filed.
3. The parties are referred to as husband and wife for the sake

convenience.

4. The parties hereto profess Islam religion. Both are doctors. They entered into wedlock on 3rd March, 2019. Out of the said wedlock one child is begotten. It is the case of the husband that on 24th September, 2020 wife left matrimonial home and as she did not return for about three months, notice for cohabitation was issued on 9th December, 2020. Husband filed suit being RCS No. 204 of 2021 for restitution of conjugal rights. The suit filed by the petitioner before Civil Judge, Junior Division, Shrirampur was transferred to Family Court, Ahmednagar on application made by wife and it was registered as Petition No. A 512 of 2021. In the said proceeding application (Exhibit 21) was filed by wife for seeking maintenance for herself as well as the child. The learned Family Court granted interim maintenance by partly allowing application by passing impugned order dated 4th March, 2022.

5. Learned counsel for the petitioner at the outset, on instructions, makes statement that the petitioner does not wish to challenge the amount of interim maintenance granted for the child and that he restricts the challenge in this petition to the extent of the maintenance granted to the wife. Learned counsel for the petitioner submits that the Family Court has committed serious error by granting interim maintenance by applying the principles/ provisions of Section 24 of the Hindu Marriage Act which are not applicable to mohammedans.

According to him, admittedly the parties herein are mohammedans and as such the said provisions are not applicable to them. According to him, the issue in the present case is squarely covered by the judgment of this Court in case of ***Shabbir Ahamed Sheikh Ibrahim Vs. Smt. Shakilabanu w/o Shabbir Ahamed***, 1984 All MR OnLine 379.

6. Learned counsel for the wife opposed the said contention by submitting that it was within the jurisdiction of the Family Court to pass order of maintenance since the wife has not been maintained by the husband. It is his further submission that having regard to the facts and circumstances of the case there would not be any justification for causing interference therein.

7. Admittedly, the parties hereto are mohammedans. The question raised by the petitioner-husband about the powers of the Court to grant interim maintained in the proceedings filed by the husband for restitution of conjugal rights is no more *res integra*. The said issue is squarely covered by the judgment of this Court in case of ***Shabbir Ahamed Sheikh Ibrahim*** (cited supra). The learned single judge of this Court while deciding the said issue had made following observations.

"10. However, the learned counsel for the non-applicant/wife has brought to my notice a recent decision of this Court in the case of Madhukar Akhand vs. Smt. Bhima Akhand and others (AIR 1983 Bom. 480) in which this Court has held that the right to grant interim relief in a suit for maintenance flows from the substantive right in sections 18 and 20 themselves of

the Hindu Adoptions and Maintenance Act and, if not, section 151 can be called in aid to translate that right into practice to give the actual relief. This Court further held that the power to grant such a relief is incidental and ancillary to the power to grant final maintenance both under sections 18 and 20. It was also held that where the principal power or the main right to grant relief is conferred upon the Court or upon an authority, such Court or an authority has also powers to grant those and such reliefs which are incidental to the main relief. It is thus clear from the decision of this Court, cited supra, that in a suit for maintenance based upon section 18 of the Hindu Adoptions and Maintenance Act the Civil Court has power to grant interim relief of maintenance. Apart from the controversy as regards the grant of interim relief of maintenance in a suit for maintenance, the real controversy in this case is whether in a suit for restitution of conjugal rights filed by the husband in interim relief of maintenance can be granted to the wife. This is not the question dealt with in the above decisions.

11. To show that the interim relief for maintenance can be granted in a proceeding instituted by a husband for restitution of conjugal rights the learned counsel for the wife has submitted before me that in the case reported in Sushilabai v. Ramcharan (1976 Mh. L.J 82) this Court has granted interim maintenance in a suit for partition and separate possession. It is, therefore, urged that even if the nature of the suit is different in the sense that the principal relief claimed in the suit is not for maintenance still in the interest of justice this Court can under section 151 of the Code of Civil Procedure grant interim relief for maintenance. I do not think that the analogy drawn by the learned counsel for the wife regarding the facts in the aforesaid decision and the facts in the instant case is apt. In a suit for partition and separate possession the plaintiff and the defendant have a right as co-owners in the property to be partitioned. The wife or widow is also entitled to be maintained out of the joint family property. The relief granted in such suit is in favour of both the plaintiff and the defendant insofar as their separate shares are determined in such suit in which each is entitled to his or her share in the joint family property. The further

important thing to be observed in the said decision is that it was not in dispute in the said case that there was a joint family property and that the plaintiff had an interest in that property. It is in the context of the above facts and circumstances that the inherent power of the Court under section 151 Civil Procedure Code was invoked to grant interim maintenance to the plaintiff as well as to the defendant No. 2 in the said suit. In the other decision cited supra (AIR 1968 Mys. 270) relied upon on behalf of the non-applicant wife, the wife had interest in the property and, therefore, in the gifts being declared void. It was, therefore, open to her to claim interim maintenance or any allowance during the pendency of the suit in view of her interest in the property in question.

12. However, the claim in the instant case is different. The plaintiff/husband sues the wife for restitution of conjugal rights on the ground that she has deprived him of cohabitation without any reasonable or probable cause. The defence raised by the wife is that she was driven out by the husband and that she was illtreated by him. As I have already pointed out under the Mahomedan Law the right conferred upon the wife is to sue for maintenance and unless she establishes that her husband has neglected her or refused to maintain her without any reasonable cause she is not entitled to a decree for maintenance. Further it has to be seen that she is not entitled at all to a decree for past maintenance, unless the claim is based on a specific agreement. All these things have to be proved in a suit properly filed for maintenance by the wife. Unless these are proved under the Mahomedan Law a wife is not entitled to maintenance. It is open to doubt whether the wife governed by Mahomedan Law would be entitled to interim maintenance unlike under the Hindu Law even in a suit for maintenance itself. Here in the instant case she is a respondent in a suit for restitution of conjugal right. Section 24 of the Hindu Marriage Act is a special provision made in the said Act where in any proceedings under the said Act the petitioner is entitled to claim interim maintenance from the respondent. In my view the same right cannot be carved out by reference to section 151 of the Civil Procedure Code in regard to the matrimonial cases which are not covered by Section 24

of the Hindu Marriage Act.

8. The learned Judge finally has held that the nature of the suit for restitution of conjugal rights is different from the suit for maintenance which a mohammedan wife is entitled to file under the Mohammedan Law. She has remedy to claim maintenance even under Section 125 of Code of Criminal Procedure. Thereafter it is conclusively held that the Civil Court had no jurisdiction to grant any interim relief by way of interim maintenance pending decision of the case of restitution of conjugal rights filed by the husband, where parties are Muslim.

9. This Court has carefully gone through the judgment cited supra and finds no reason to take any different view. In view of the law laid down by this Court the learned Family Court had no jurisdiction to grant any interim relief by way of interim maintenance in the proceedings filed by the husband for restitution of conjugal rights. The order of grant of maintenance to the wife therefore cannot sustain.

10. It is, however, made clear that the setting aside of the said order would not become an impediment for the wife claim maintenance in any other proceeding from the husband in accordance with law.

11. Learned counsel for the petitioner submits that since the wife has no right to seek maintenance in the instant proceeding and as order passed by the learned Family Court is void ab-initio, the amount of

maintenance paid to the wife be adjusted towards the maintenance of the child. Learned counsel for respondent opposes this submission. This Court finds no reason or justification to refuse said request having come to the conclusion that no interim maintenance could have been granted in the present proceeding. It is, therefore, directed that the amount of maintenance paid to the wife pursuant to the impugned order be adjusted towards the maintenance payable to the child.

12. Petition is allowed. Rule is made absolute in the afore stated terms.

(R. M. JOSHI, J.)

ssp