

(1992) 01 BOM CK 0012

In the Bombay High Court

Case No : Notice of Motion No's. 2240 and 2346 of 1991 in Suit No. 3043 of 1991

Harinder Kaur Narender Singh Dhanova and Others

APPELLANT

Vs

Narender Singh Rattansingh Dhanova

RESPONDENT

Date of Decision : 27-01-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9A

Family Courts Act, 1984 — Section 7, 8

Hindu Adoptions and Maintenance Act, 1956 — Section 18

Citation : (1992) 2 BomCR 61

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : Rajiv Narsla and Nirasjas, of Niranjana and Co, for the Appellant;
M.M. Vashi, for the Respondent

Judgement

S.M. Jhunjhunwala, J.—In the suit filed by plaintiff and the two minor children for maintenance, these notices of motion have been taken out by the plaintiffs for interim maintenance as prayed for therein.

2. The 1st plaintiff is the wife of the defendant. The 2nd plaintiff and 3rd plaintiff are the minor son and minor daughter respectively of the 1st plaintiff. The marriage between the 1st plaintiff and the defendant was solemnised on 6th February, 1976 as per Sikh religious rites. The parties are governed by Hindu Law.

3. Two sons and two daughters are born out of this wed-lock. The 2nd plaintiff who is the son of about 14 years age, is known as Tinku. The 3rd plaintiff who is a daughter of about 13 years old, is known as Pinki. One Harjinder Singh is a minor son of about 11 years age, is also known as Minku. Gurucharan Kaur is a minor daughter of about 8 years old. She is also known as Dinki. The plaintiffs and the defendant as also the said Harjinder Singh and Gurucharan Kaur resided together from the year 1984 in Flat bearing Nos. 103 and 104 on the 1st floor of

the building known as "Silver Cascade" Mt. Mary Road, Bandra (West), Bombay 400 050. The said Flat No. 103 and the Garage are owned by the 1st plaintiff and same are standing in the name of the 1st plaintiff in "Silver Cascade Co-op. Housing Society Ltd." Bandra, Bombay : 400 050. The said Flat No. 104 stood in the name of the defendant and the same has been disposed of by the defendant. The said Flats bearing Nos. 103 and 104 have been matrimonial house of the 1st plaintiff and the defendant. The 2nd plaintiff is studying in the St. Elis School at Bandra. The 3rd plaintiff is studying in Durocelo Convent at Bandra. Both the 2nd and 3rd plaintiffs are in IX Standard. Prior to joining the aforesaid Schools, both the 2nd and the 3rd plaintiffs were studying at Panchagani as Boarders. The said Harjinder Singh and Gurucharan Kaur who were also studying at Panchagani, continue to study at New Era High School at Panchagani. Harjinder Singh is in VIth Standard and the said Gurucharan Kaur is in IIIrd Standard.

4. On 9th May, 1981, the defendant left the matrimonial home without the consent and knowledge of the 1st plaintiff and without any reasonable cause. It is the case of the 1st plaintiff that the defendant thereby deserted her. Since then, the defendant is not residing at the matrimonial home. According to the plaintiffs, the defendant while staying with the plaintiffs at the matrimonial home used methods and languages which hurt the 1st plaintiff mentally and physically. The general behaviour of the defendant qua the plaintiffs acquired standard which did not make it possible for the 1st plaintiff to have a normal married life with the defendant. Although the defendant was well looking after the plaintiffs and the other two children prior to leaving the matrimonial home, since May 1991, the defendant did not look after and maintain the plaintiffs and consequently, the suit has been filed by the plaintiffs for maintenance as prayed for in the plaint.

5. The defendant has denied his obligation to maintain the plaintiffs. Mr. Vashi, the learned Counsel appearing for the defendant, has submitted that the suit being for recovery of maintenance, under the provisions of the Family Courts Act, 1984, this Court has no jurisdiction. Mr. Vashi has further submitted that the issue pertaining to the jurisdiction of this Court has to be tried as a preliminary issue under the provisions of section 9-A of the Code of Civil Procedure, 1908. Mr. Vashi has further submitted that assuming this Court has the jurisdiction to try to entertain and try the suit, there being no provisions u/s 18 of The Hindu Adoptions and Maintenance Act, 1956 (hereinafter for brevity's sake referred to as "The said Act") for grant of interim maintenance, this Court cannot grant any interim relief to the plaintiffs in the Notices of Motion as prayed for or otherwise and as such, the Notices of Motion taken out by the plaintiffs are liable to be dismissed. Mr. Vashi, lastly submitted that the defendant being heavily indebted and having no sufficient income, cannot be made to pay any maintenance amount to the plaintiffs.

6. So far as the issue of jurisdiction is concerned, in my opinion, Mr. Vashi is right in his submission that the said issue is to be tried as a preliminary issue under

the provisions of section 9-A of the Code of Civil Procedure, 1908 (hereinafter referred to as "The said Code"). When an objection to the jurisdiction of a Court of Law to entertain a suit is taken by any of the parties to the suit, the Court is to proceed to determine the same at the hearing of an application for interlocutory reliefs therein. Any such application is required to be heard and disposed of by the Court as expeditiously as possible and is not to be adjourned to the hearing of the suit. Accordingly, I frame the following issue as a preliminary issue to be decided while disposing of the aforesaid notices of motion taken out by the plaintiffs : "Whether by reason of section 7 of the Family Courts Act, 1984, this Court has no jurisdiction to entertain or try this suit."

7. It is correct that the suit as framed and filed is for maintenance of the plaintiffs. Section 7 of the Family Courts Act, 1984 reads as under :

"7. Jurisdiction:---(1) Subject to the other provisions of this Act, A Family Court shall :

(a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court of, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation :---The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely :

(a) a suit or proceedings between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void, or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage :

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise :

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973; and

(b) such other jurisdiction as may be conferred on it by any other enactment."

While putting reliance on section 7(1)(f) to the Family Courts Act, 1984 Mr. Vashi has submitted that this Court has the jurisdiction in respect of suit for maintenance.

8. In view of the judgment of this Court in the case of Kanak Vinod Mehta Vs. Vinod Dulera Mehta, , I find no difficulty in holding that this Court has the jurisdiction to entertain and try the suit. In the case of Kanak Vinod Mehta (supra), the Division Bench of this Court has held that on a consideration of the relevant provision of law and the decisions, the jurisdiction of this Court on its Original Side is not ousted of any of the provisions contained in the Family Courts Act, 1984 and this Court shall continue to exercise the jurisdiction vested in it under the Letters Patent and all other laws, notwithstanding the provisions sections 7 and 8 of the Family Courts Act, 1984. I hold that this Court has the jurisdiction to entertain and try the suit and the preliminary issue is accordingly answered.

9. Mr. Vashi, then submitted that section 18 of the said Act does not provide for awarding interim maintenance pending decision on the claim to maintenance in contest in the suit. In the submission of Mr. Vashi, this Court has no power to award any interim maintenance and as such, the notices of motion taken out by the plaintiffs are liable to be dismissed. In support of his submission, Mr. Vashi has relied upon the case of Gorivelli Appanna Vs. Gorivelli Setthamma, as also upon the case of Ramchandra Behera and Others Vs. Smt. Snehalata Dei, . It is correct that in both these cases relied upon by Mr. Vashi, it has been held that the inherent powers recognised by section 151 of the said Code cannot extend to matters other than procedural and that the Court cannot resort to the provisions of section 151 to encroach upon substantive rights of parties or an interlocutory application upon matter which await adjudication in the suit and that no order u/s 151 can be made except in aid of the suit. The Courts in the aforesaid two cases have taken a view that the Court has no power to award interim maintenance unless statute expressly confers such a power on it. A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents whether he possesses any property or not. The obligation to maintain these dependants is personal in character and arises from the very existence of the relationship between the parties. A right of wife for maintenance is an incident of the status of estate of matrimony and a Hindu is under a legal obligation to maintain his wife. If in a suit for maintenance which is contested, the wife and the minor children are to wait indefinitely for receipt of maintenance amount till the suit is finally decided and disposed of, it will not only cause irreparable harm and injury to the wife and minor children but will virtually make it impossible for them to survive. Right to recover maintenance arises from

day to day and is entitled to be adjudicated upon, satisfied and sanctioned from time to time and from day to day. In the case of Madhukar Akhand Vs. Bhima Akhand and Others, , this Court, while dissenting from the case of Gorivelli Appanna v. Gorivelli Sethamma (supra), has held that the right to grant interim relief flows from the substantive right in sections 18 and 20 of the said Act themselves and if not, section 151 of the said Code can be called in aid to translate that right into practice and actual reliefs. The power to grant such a relief is incidental and ancillary to the power to grant final maintenance both under sections 18 and 20 of the said Act. It is further held that the right to maintenance even in the household of a husband where the husband neglects or does not provide maintenance to his wife is conferred by section 18(1) of the said Act. It is not necessary for the operation of the said section 18(1) that the wife must be also entitled to live separately in the circumstances provided under sub-section (2). The liability to maintain is spelt out by section 18(1) and is absolute and is not subject to any conditions excepting so far as may be provided by sub-section (3). Where the principal power or main right to grant relief is conferred upon the Court or upon an authority, such Court or authority has also powers to grant those and such reliefs which are incidental to the main relief. In that view of the matter I hold that the Court has the power to award interim maintenance.

10. Mr. Vashi has lastly submitted that the defendant is heavily indebted and his income is not sufficient to make payment of any maintenance amount to the plaintiffs. He has further submitted that the defendant has even no house to stay and as such, stays in Hotel. In the facts and circumstances of the case, it does appear to me that although the defendant had started with modest life, prosperity bestowed on him. The defendant has adopted luxurious style of living and while staying with the plaintiffs, the defendant maintained the 1st plaintiff and brought up the children born out of the wed-lock in that style of living. It is possible that for carrying his business as normally it is done, the defendant might have taken loans and advances from Banks and other institutions. That by itself does not mean that the defendant is heavily indebted or is a pauper or that he has not sufficient income to make payment of maintenance amounts to his wife and children.

11. Mr. Narula, the learned Counsel appearing for the plaintiffs, has submitted that on the facts on record. It is evident that the monthly income of the defendant is not less than Rs. 1,50,000/-. The defendant owns 12 trucks (Vehicles) in his own name which he plies on hire. There are four trucks owned by the 1st plaintiff but same are plied on hire by the defendant himself and income in respect of these trucks are derived and received by the defendant. The defendant also owns a plot of land at New Bombay whereat he intends to have his own Steel Factory.

Besides there being vast agricultural land owned by the defendant at Mohalli near Chandigarh, the defendant also owns two flats at New Bombay. The

defendant also owns a Bungalow having 14 bed rooms near Chandigarh. He has business premises at 14, Acharya Shopping Centre at Chembur. He has account with various banks where the monies are deposited. Though the defendant has deposited of his FLAT Car, presently the defendant owns a Maruti Van and a mini bus of Ford make Even at the said matrimonial home prior to deserting 1st plaintiff, the defendant used to keep four televisions, two Refrigerators, Washing machine, Cooking range, Pioneer set music system, one National make two-in-one and one Sony two-in-one, two V.C.Rs, one imported weighing machine, one exercise cycle, National make oven geyser, driers Cameras, furniture, crockeries etc. The defendant had employed three maid servants and two chauffeurs. On deserting the 1st plaintiff, the defendant has removed all these articles from the matrimonial home and has left the plaintiffs in such precarious condition that the 1st plaintiff is now required to cook on kerosene stove. Prior to the 2nd and 3rd plaintiffs being shifted from Panchagani, all the said four children of the 1st plaintiff and the defendant were getting education in New Era High School at Panchagani. The 2nd plaintiff and 3rd plaintiff are now residing with 1st plaintiff and the other two children are with the defendant. The said two children are still continuing their education at Panchagani which is very expensive. The defendant had to pay a sum of Rs. 65000/- each for the two elder children and about similar amount for the two younger children for studying at New Era High School at Panchagani. After the 2nd and 3rd plaintiff shifting to Bombay, the defendant is continuing to bear and pay the educational expenses for the other two children who are with him. Although there is cryptic effort on the part of the defendant to deny his monthly income at Rs. 1,50,000/- in the letters which the defendant had written to the 1st plaintiff with a view to have amicable settlement of distribution of the properties, the defendant has in fact admitted that his monthly income is at Rs. 1,50,000/-. He has further admitted that he owns flats at New Bombay as also a plot of land whereat the factory is to be started by him. He has also admitted that he owns properties at Chandigarh and that he receives income which is not accounted for. He has further admitted that larger part of his income is in cash and that if the settlement for division of properties is arrived at, the 1st plaintiff would get lacs of rupees. In view of these facts, which have been brought on record, it is not possible to hold that the defendant has no means to pay maintenance amounts to the plaintiffs. However, the question does arise as to what is the reasonable amount to be paid by the defendant to the plaintiffs as and by way of interim maintenance.

12. In support of the Notice of Motion bearing No. 2346 of 1991 taken out by the plaintiffs, an affidavit has been affirmed by the 1st plaintiff to which the statement of the amounts required to be spent on education of the 2nd and 3rd plaintiffs is annexed. As per the said statement, about sum of Rs. 3,500/- per month is required to be spent on the education of the 2nd plaintiff and about Rs. 3,000/- per month is required to be spent on the education of the 3rd plaintiff. Besides the amounts so required to be spent on education of these two children, further amounts are also required for maintenance of these children. In respect

of the said flat where the 1st plaintiff is residing with the 2nd and 3rd plaintiffs, the defendant used to make payment of outgoings and maintenance charges prior to the defendant deserting the 1st plaintiff. As aforesaid, since the month of May 1991, the defendant has not made any payment as and by way of maintenance to the plaintiffs except ad-hoc maintenance amount fixed by Dhanuka, J., in these proceedings, I am informed by the learned Counsel appearing for the plaintiffs that about the sum of Rs. 22,000/- is immediately required to be paid to the said Society in respect of the said flat for maintenance, Municipal taxes and Sinking Fund etc. The plaintiff is unemployed and has no source of income. Four trucks though in the name of the 1st plaintiff are plied by the defendant and the income derived therefrom is also received by the defendant. On the admission of the defendant himself, he used to pay to the 1st plaintiff the sum of Rs. 8,000/- every month to meet household expenses which includes ration, milk, day-to-day expenses, servants' salary. The defendant has further admitted that to meet the requirements of the 1st plaintiff, he used to pay to her the sum of Rs. 18,000/- every month in addition to the said sum of Rs. 8,000/- per month for household expenses. The 1st plaintiff needs these amounts for her maintenance. The defendant has denied to make payment of the maintenance amount to the 1st plaintiff alleging that the 1st plaintiff is having illicit relations with various persons. The defendant has denied to make payment of maintenance amounts to the 2nd and 3rd plaintiffs on flimsy grounds of behaviour of the 2nd and 3rd plaintiffs being not proper inasmuch as the 2nd plaintiff is guilty of allegedly committing theft in the school and the 3rd plaintiff had allegedly attempted to give poison in whisky to the defendant. Prima facie, the allegations made by the defendant are baseless and without any substance and as such cannot be taken into consideration in fixation of maintenance amounts payable by the defendant to the plaintiffs. In any event, the allegations made by the defendant are required to be proved which the defendant has not been able to establish. Taking over all view of the facts and circumstances of the case and documentary evidence on record, I am more than satisfied that the defendant has sufficient means to pay the maintenance amounts to the plaintiffs keeping in mind the amounts which are required to be spent for on mere education of the 2nd and 3rd plaintiffs who are residing with the 1st plaintiff, I fix the interim maintenance payable by the defendant to each of the 2nd and 3rd plaintiffs at Rs. 5,000/- per month. So far as the 1st plaintiff is concerned, besides requiring the amount to meet her daily requirements, the 1st plaintiff is also entitled to enjoy the status which the defendant is presently enjoying. The defendant as aforesaid, prior to living the matrimonial home, was accustomed to live a luxurious life and maintained the plaintiffs also in the same style of living. The defendant having taken entire articles and belongings from the said matrimonial home and having left the 1st plaintiff to cook on kerosene stove and also keeping in mind the spiral rise in prices and cost of living, in my view, reasonable amount of interim maintenance to be paid by the defendant to the 1st plaintiff is Rs. 10,000/- per month. Besides these amounts, the defendant has also to pay the areas of maintenance charges, Municipal Tax and Sinking

Fund etc., payable to the said Society in respect of the said Flat No. 103 which aggregates to Rs. 22,000/-. Accordingly, I pass the following order :

(a) The defendant do pay to the 1st plaintiff the sum of Rs. 10,000/- every month as and by way of interim maintenance for the 1st plaintiff and the sum of Rs. 5,000/- every month as and by way of maintenance for the 2nd plaintiff and further sum of Rs. 5,000/- every months as and by way of maintenance for the 3rd plaintiff with effect from be made on or before 31st January, 1992 and subsequent payments for each and every succeeding month.

(b) The defendant is ordered and directed to pay to the 1st plaintiff additional sum of Rs. 22,000/- for making payment of arrears of maintenance charges, Municipal Tax, Sinking Fund etc. payable in respect of the said Flat No. 103 to "Silver Cascade Co-op. Housing Society Ltd" Bandra.

(c) Notice of Motion No. 2240 of 1991 is also made absolute in terms of prayer (c) therefore;

(d) The defendant is ordered and directed to pay to the 1st plaintiff the costs of both Notices of Motion bearing Nos. 2240 of 1991 and 2346 of 1991.

Both of Motion are accordingly disposed of.

Prothonotary is directed to issue certified copy of the minutes of order to the concerned parties on priority basis.