(2010) 10 GUJ CK 0027

In the Gujarat High Court

Case No : Criminal Revision Application No. 378 of 2009

Jaiminiben Hirenbhai Vyas and Another — APPELLANT

Vs

Hirenbhai Rameshchandra Vyas and Another — RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Marriage Act, 1955 — Section 24

Citation : (2010) 10 GUJ CK 0027

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; R.J. Goswami and H.B. Champavat for Respondent 1 and Kartik Pandya, APP for Respondent 2, for the Respondent

Judgement

Akil Kureshi, J.—Petitioner No. 1 is wife of Respondent No. 1. Petitioner No. 2 is their minor daughter. They shall hereafter be referred to as wife, daughter and husband respectively. The Petitioners have challenged an order dated 31.1.2009 passed by the Family Court, Ahmedabad pertaining to maintenance u/s 125 of the Code of Criminal Procedure.

2. Shortly stated facts are as follows:

2.1 Marriage between Petitioner No. 1 and Respondent took place on 10.7.1989. Out of the marriage, one son was born on 3.9.1990. Daughter was born on 10.9.1999. Differences surfaced between husband and wife. Husband filed Hindu Marriage Petition No. 660/2003 before the Family Court, Ahmedabad seeking divorce. In the said proceedings wife sought maintenance for herself and two minor children. By an order dated 28.6.2003, Family Court directed the husband to pay interim maintenance to the wife and daughter together of Rs. 3000/- per month. This order is still in operation and Hindu Marriage Petition is also pending. Wife filed application u/s 125 of the Code of Criminal Procedure before the Family Court on 18.7.2003 being Criminal Misc. Application No. 1887/2003 claiming maintenance at the rate of Rs. 5000/- for herself and Rs. 2500/- for each child. She also prayed for interim maintenance in the said proceedings. Family Court, Ahmedabad by order dated 28.6.2006 directed husband to pay to the wife and daughter combined Rs. 6000/- per month. Amount of Rs. 3000/- awarded in divorce proceedings was to be adjusted towards this maintenance.

2.2 Since for considerable period of time such maintenance proceedings were not finally decided, wife approached High Court by filing Special Civil Application No. 6356/2003 in which by order dated 18.9.2008, Family Court was requested to dispose of such proceedings on priority and latest by 31.1.2009. Eventually after the extension granted as requested by the Family Court, maintenance proceedings came to be disposed of by impugned order dated 31.1.2009. Family Court granted maintenance in favour of daughter at the rate of Rs. 5000/- per month from the date of the judgment. For the period between the date of application till the date of judgment, interim maintenance order was made final. In other words, amount already paid or accrued till the date of judgment, under the interim order was not to be disturbed. It was further provided that the order shall not affect the direction for payment of interim maintenance in the Hindu Marriage proceedings in favour of both the claimants. Learned Judge however, was of the opinion that in addition to what the wife is receiving under the Hindu Marriage Petition, by way of interim maintenance, she is not to be paid any further maintenance.

2.3 It may be noted that admittedly son stays with father. Therefore, in his favour, no order of maintenance was passed. Wife is aggrieved by the said order of the Family Court to the extent it denies any maintenance to her u/s 125 of the Code of Criminal Procedure.

3. Before me, wife appeared in person and submitted that the Family Court committed serious error in not awarding any maintenance to her. Husband had sizable income which was believed by the Family Court. Husband''s life style, investments and expenditure for son would demonstrate that he was earning income between Rs. 50,000/- to Rs. 75,000/- per month. She relied on the following decisions:

1) In case of Vanitaben Naranbhai v. N.R. Makwana and Anr. reported in 1991 (1) GLH 227, wherein Learned Single Judge observed that it is not just the income of the husband but his capacity to earn income which would be relevant consideration for maintenance u/s 125.

2) In case of Hansaben Rameshkumar Patani Vs. Rameshkumar Ratilal Patani and Another, wherein it was observed that maintenance payable u/s 24 of Hindu Marriage Act and one u/s 125 of the Code of Criminal Procedure are for different purposes.

3) In case of Pannaben Ramanlal Soni v. Jitendra Kumar Chimanlal Soni and Anr. reported in 1991 (1) GLH 616, wherein the Magistrate while awarding maintenance u/s 125 of the Code of Criminal Procedure, had taken into

consideration the fact that wife was serving during her stay with the husband and deducted such income from her maintenance. Finding that no evidence was led by the husband to show that wife was earning any income even after separation, order of Magistrate was to that extent set aside.

4) In case of Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. reported in (1978) 4 SCC 70, wherein the Apex Court observed that maintenance fixed by the Civil Court u/s 24 of the Hindu Marriage Act pending divorce petition had no relevance for fixation of maintenance u/s 125 of the Code of Criminal Procedure.

4. On the other hand, counsel for the husband oppossed the petition and submitted that under the Hindu Marriage Act as well as u/s 125 of the Code of Criminal Procedure, husband is already paying substantial sum to wife and daughter. Husband does not dispute liability to maintain his daughter. Wife however, was previously employed. She has qualification of M.Com and ICWA. She is therefore, capable of maintaining herself. She is otherwise also receiving interim maintenance under the Hind Marriage proceedings. He drew my attention to order dated 9/9/2010 passed in Criminal Misc. Application No. 10418/2010 wherein husband was permitted to dispute findings of the Family Court to the effect that husband''s income is between Rs. 50,000/- to Rs. 75,000/-. Following observations were made in the said order:

2. In this petition, however, his prayer is to expunge certain observations made by the learned Judge in Para-12 of the said order, wherein it is stated that from evidence on record and depositions of the witnesses and the bank statements of the husband, his income can be assessed to be between Rs. 50,000/to Rs. 75,000/-, per month.

3. When the Petitioner has not challenged the ultimate directions issued in the order dated 31.01.2009, only for disputing a particular finding, the present petition need not be entrained. However, it is clarified that it would be open for the Petitioner to dispute this finding in cognate proceedings for enhancement of maintenance, filed by the wife.

5. Having thus heard learned advocates for the parties and having perused the documents on record, I find that before the Family Court the wife had contended that she was being ill-treated mentally and physically by the husband. She was in fact once beaten up badly, and once her ribs were broken for which she had to take medical treatment. Wife''s contention that due to such treatment she could not reside with husband was accepted by the Family court. These findings have not been questioned by the husband.

6. The Family Court also posed a question whether wife was able to maintain herself. Learned Judge observed that wife admitted in her cross examination that before marriage, she was serving. Later on she however, had left her job. She was previously working in Torrent Laboratory, thereafter, in Malhotra Accounts as an Accounts Officer. She lastly worked in Ambuja Protein as an Executive. She

had qualification of M.Com, ICWA. Learned Judge therefore, was of the opinion that wife would be able to earn income at-least of Rs. 5000/- to Rs. 7000/- per month. This was the ground for not granting further maintenance to her.

7. I am of the opinion that learned Judge committed error in coming to such conclusion. The wife''s deposition would at best show that she was gainfully employed before marriage and may have continued to work for some time after marriage. However, one cannot lose sight of the fact that during the marriage she gave birth to two children. Husband was earning sizable income which aspect I will refer to shortly. It is not however, even the case of the husband that he was not earning income or that family required the wife to continue her service to augment family income. In short, to look after the home affairs, she discontinued her service after marriage. Marriage life of the couple appears to be in turbulent. Additionally, Petitioner''s daughter was born in the year 1999. Presently she would be about 11 years of age. It can thus be seen that wife who had left service long back and who was also separated from husband and was looking after minor daughter, would not be in a position to work and earn any income. Learned Judge committed error in believing that wife was able to maintain herself. In facts and circumstances of the case, I find that such conclusions were not warranted.

8. With respect to income of the husband, the Family Court found that husband was doing business in Autofin Lease and earning substantial income. He is also earning dividend income. He has club membership in his name. In the cross examination husband admitted that he was employed as Sales Officer in Tata Automative Company. After leaving the job, he had started business in name of Autofin Lease. In the month of October 2008, he had received Rs. 26,900/-, in July 2008 Rs. 60,938/- and in November Rs. 84,239/- was deposited in the bank account. He is spending more than Rs. 20,000/- for education of his son. Learned Judge therefore, was of the opinion that husband is not disclosing his true income and his income could be assessed between Rs. 50,000/- to Rs. 75,000/-. This is the most contentious issue between the parties. Wife has contended that husband earns Rs. 50,000/- to Rs. 75,000/-. Counsel for the husband submitted that he earns no more than Rs. 25,000/- per month.

9. Number of documents have been brought on record by the wife to show that husband earns sizable income. In her deposition, she had contended that husband is doing finance business in partnership firm. He had made substantial investments. His other partners are Vibhor Babulal Parikh and Dhruvesh Patel. Partnership firm has branches at other places, such as Surendranagar and other towns. He is also involved in car repairing business in name of Auto Fair Centre. He is having bank account in HDFC bank. He is paying substantial premium in LIC, holding credit card of Standard Chartered Bank. In addition to such oral testimony she produced several documents.

10. At exh. 38, statement dated 25.5.2003 of VISA Master card of the husband showing expenditures and payments of approximately Rs. 26,800/- for the

month of April 2003 through such credit card.

11. At exh. 39, his statement of Life Insurance premium of Rs. 3700/-(approx.) being paid by the husband every month in the year 2004.

12. At exh.41, mobile bill of husband for the month of July 2004 is produced showing monthly bill of 2479/-.

13. His electric bill of his flat 5/F, Manek Flat, situated near Prabhudas Thakkar college for the month of November-December 2002 shows charges of Rs. 2114/-.

14. Exh.53 shows his mobile bill for the month of December 2004 at Rs. 2608/-.

15. Exh.55 is his mobile bill for November 2004 at Rs. 2721/-.

16. Exh.68 is the statement of installment of premium of Rs. 5123/- paid by the husband for his life insurance with Kotak Mahindra.

17. Exh.74 is the statement of account of husband in Kotak Mahindra Bank for the month of July 2007 which shows deposit of Rs. 60,938/- on 20th July, 2007.

18. Exh.76 is such statement for the month of November 2007, wherein husband had deposited amount of Rs. 94,239/- in his bank account on 7th November, 2007.

19. At Exh.87 we also have I.T. Computation statement (provisional) of the husband for the period 1.4.1997 to 31.3.1998. From the employment he had drawn gross salary of Rs. 2,26,051/- in the said year. HE had paid Life Insurance premiu of Rs. 41,184/-.

20. Exh.113, statement of bank account of the husband in HDFC bank for the period 17.10.1998 to 9.12.2004 is on record. This statement shows frequent substantial deposits by husband in his bank account. Following substantial deposits in excess of Rs. 5000/- or more are made in his account:

------------------------------------	Date	Amount
------------------------------------	11.10.1998	20,679.77
------------------------------------	29.10.1998	15,297.00
------------------------------------	30.11.1998	15,297.00
------------------------------------	30.12.1998	17,697.00
------------------------------------	29.1.1999	15,298.00
------------------------------------	10.2.1999	5,000.00
------------------------------------	1.3.1999	5,762.00
------------------------------------	27.3.1999	43,012.00
------------------------------------	29.4.1999	31,949.00
------------------------------------	3.6.1999	15,204.00
------------------------------------	29.6.1999	13,585.00
------------------------------------	12.7.1999	6,888.00
------------------------------------	29.7.1999	17,287.00
------------------------------------	30.8.1999	17,287.00

-------------------------------------	28.9.1999	26,804.00
-------------------------------------	13.11.1999	6,354.00
-------------------------------------	13.11.1999	6,000.00
-------------------------------------	14.12.1999	10,000.00
-------------------------------------	5.1.00	6,000.00
-------------------------------------	3.2.00	15,166.00
-------------------------------------	22.2.00	10,000.00
-------------------------------------	8.4.00	25,000.00
-------------------------------------	20.4.00	25,000.00
-------------------------------------	22.5.00	34,849.66
-------------------------------------	8.6.00	7,277.00
-------------------------------------	28.7.00	92,734.58
-------------------------------------	22.8.00	130,000.00
-------------------------------------	7.9.00	36,127.45
-------------------------------------	8.11.00	8,400.00
-------------------------------------	5.12.00	5,000.00
-------------------------------------	8.1.2001	5,237.00
-------------------------------------	8.2.2001	5,237.00
-------------------------------------	7.3.2001	5,237.00
-------------------------------------	31.3.2001	7,918.00
-------------------------------------	7.4.2001	5,237.00
-------------------------------------	28.4.2001	64,850.00
-------------------------------------	5.5.2001	64,850.00
-------------------------------------	5.5.2001	64,850.00
-------------------------------------	30.5.2001	14,420.00
-------------------------------------	10.8.2001	6.090.00
-------------------------------------	10.8.2001	10,000.00
-------------------------------------	19.9.2001	16,310.00
-------------------------------------	8.10.2001	5,237.00
-------------------------------------	11.10.2001	12,072.00
-------------------------------------	12.10.2001	18,000.00
-------------------------------------	2.11.2001	20,000.00
-------------------------------------	3.12.2001	12,000.00
-------------------------------------	5.12.2001	12,000.00
-------------------------------------	7.1.2002	5,237.00
-------------------------------------	9.1.2002	7,500.00
-------------------------------------	10.1.2002	15,000.00
-------------------------------------	30.1.2002	10,000.00
-------------------------------------	31.1.2002	10,000.00
-------------------------------------	13.3.2002	5,237.00
-------------------------------------	30.3.2002	7,000.00
-------------------------------------	9.4.2002	5,237.00
-------------------------------------	18.4.2002	8,000.00
-------------------------------------	18.4.2002	7,000.00
-------------------------------------	30.4.2002	10,000.00

------------------------------------	1.6.2002	10,000.00
------------------------------------	6.6.2002	5,000.00
------------------------------------	14.6.2002	10,000.00
------------------------------------	6.7.2002	5,000.00
------------------------------------	17.7.2002	7,468.00
------------------------------------	27.8.2002	25,000.00
------------------------------------	8.11.2002	5,237.00
------------------------------------	13.11.2002	12,200.00
------------------------------------	4.12.2002	5,437.00
------------------------------------	9.12.2002	5,237.00
------------------------------------	7.1.2003	5,237.00
------------------------------------	20.1.2003	30,000.00
------------------------------------	22.2.2003	10,000.00
------------------------------------	6.3.2003	12,500.00
------------------------------------	20.3.2003	8,000.00
------------------------------------	7.4.2003	5,237.00
------------------------------------	7.5.2003	5,237.00
------------------------------------	7.6.2003	5,237.00
------------------------------------	19.6.2003	10,000.00
------------------------------------	5.7.2003	5,500.00
------------------------------------	7.8.2003	5,237.00
------------------------------------	3.9.2003	5,437.00
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21. Exh.126 is the statement of bank account of Auto Trade Link with Saraspur Nagrik Co.op Bank ltd, Navrangpura branch which shows substantial deposits and withdrawals and overall balance of such accounts for the period between 1.6.2001 10.9.2008.

22. One Ramnikbhai Radhavbhai Patel of Saraspur Co-operative bank Ltd. was examined at exh.128. He deposed before the Court with respect to bank accounts of Autofin Lease, Auto Trade Lease and Auto Finance Services. He stated that management of three firms are common. All three could transfer funds internally. All three firms had same address.

23. Exh. 136 is partnership deed of M/s. Auto Trade Link dated 4.5.2001 between Dhruvesh Patel, Hiren Rameshbhai Vyas i.e. husband and Sonal Vibhor Parikh. Document shows that husband had 15% stake in the partnership firm.

24. Exh. 136A is the document dated 5th October 2002 by which the husband retired from the said partnership firm.

25. Significantly at Exh.144, we have a copy of letter dated 5.12.2006 written by Dhruvesh Patel to the Manager, Saraspur Nagrik Sahkari Bank Ltd. stating as under:

Subject: Clarification regarding the Signing Authority on Cheque

With respect to the above stated subject we are having Current Account with your bank since long time vide Account No. 231 in which the signing authority is Mr. Hiren Vyas and Sonal Parikh.

Actually the partnership is formed in 04/05/2001 by Mr. Dhruvesh G. Patel, Mrs. Sonal V. Parikh & Mr. Hiren R. Vyas and we have opened account by signing authority of the Mr. Hiren Vyas & Sonal Parikh.

Further on 1/10/2002 the Partner Mr. Hiren R. Vyas is retired and new structure of the partnership is existence by only Mr. Dhruvesh Patel & Sonal Parikh and there is no Existence of the Hiren Vyas as a partner of the firm.

So We authorised Mr. Dhruvesh Patel for the signing authority on the cheque as a partner of the firm. And we here enclosed the Change Partnership deed in favour of the Mr. Dhruvesh G. Patel & Sonal Parikh.

Further Either Mrs. Sonal Vibhor parikh or Mr. Dhruvesh G. Patel can sign on cheques and we all Both Partner aware of all the affairs of the AUTO TRADE LINK.

Kindly do needful for the same and we have already given this instruction in 2002 regarding this matter.

26. From the above voluminous evidence on record, it can be seen that husband would be earning sizable and handsome income. Way back in the year 1998, itself he was employed in a Public Company. There are documents showing that at that time he was earning nearly Rs. 20,000/- gross salary. He left the job to pursue his private business. Though he had tried his best to ensure that his real income does not come on record, wife has made great efforts to have certain documents produced on record which could throw light on the income and earning capacity of the husband. It is not in dispute that husband was engaged in partnership business. Partnership deed is on record entered into in the year 2001. It is the case of the husband that partnership is dissolved on 1st October 2002(Deed produced at Exh.60). Case of the wife is that husband never retired from the partnership and only to defeat wife''s claim for maintenance that such a stand is taken. It is not in dispute that different partnerships are not registered. The partnership deeds and dissolution/retirement deeds are not therefore, registered. Significantly, as per letter Exh.144, to the Saraspur Nagrik Co-operative Bank Ltd., husband had retired from a partnership from 5.10.2002, this was conveyed to the bank only vide said letter dated 5.12.2006 to discontinue his name from authorised signatory of the partnership. This creates considerable doubt whether actually in the year 2002, husband retired from the partnership.

27. Quite apart from the above conclusion, there are several other documents on record to suggest that husband is leading life of considerable luxury. He has bank accounts. He has credit card. He has made considerable payments through such credit card. His mobile bills comes to average Rs. 2500/- per month. He has Life Insurance policy in his name. It cannot be denied that husband would be earning substantial income to be able to sustain such life style. Though the Family Court

may not have full particulars to hold that husband earns Rs. 50,000/- to Rs. 75,000/- per month, and I may therefore, not endorse such conclusion in its entirety, nevertheless, it is inescapable that husband earns substantial income from his business interests.

28. In addition to above conclusion, I have already held earlier that the Family Court erred in dis-entitling wife from the maintenance on the ground that she is capable of maintaining herself.

29. Effect of these conclusions would be that wife should also be granted maintenance u/s 125 of the Code of Criminal Procedure. As recorded, husband is paying Rs. 5,000/- per month to the daughter u/s 125 of the Code of Criminal Procedure from the date of the judgment of the Family Court. He is further paying Rs. 3000/- between mother and daughter in the divorce petition under the Hindu Marriage Act.

30. Taking into account totality of facts and circumstances of the case, additional payment of Rs. 5,000/- to the wife as claimed by her would not be unreasonable. Such payment however should be from the date of judgment and not earlier.

31. In the result, in partial modification of the judgment of the Family Court, it is directed that from 31.1.2009, wife shall receive Rs. 5,000/- per month from the husband by way of maintenance u/s 125 of the Code of Criminal Procedure. This is in addition to the maintenance that he has to pay to the daughter under said provision and also to the Petitioners u/s 24 of the Hindu Marriage Act in divorce proceedings.

32. Revision application is disposed of accordingly.