

(2017) 10 BOM CK 0089
In the Bombay High Court
Case No : 778 of 2014

MRS SUSAN THEREZA PINTO

APPELLANT

Vs

MR AIRES JOSE OCTAVIANO JOAO

RESPONDENT

Date of Decision : 12-10-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Code of Civil Pro

Citation : (2017) 10 BOM CK 0089

Hon'ble Judges : Nutan D. Sardessai

Bench : SINGLE BENCH

Advocate : A.D. Bhobe, Ryan Menezes

Final Decision : Allowed

Judgement

1. Heard Shri A.D. Bhobe, learned Advocate for the Petitioner and Shri R. Menezes, learned Advocate for the Respondent.
2. This petition takes exception to the order dated 29/12/2008 passed by the Senior Civil Judge, Mapusa and particularly the order dated 08/08/2014 passed by the District Judge-I in the Misc. civil Application No.145 of 2009 in the petition under Article 226 and 227 of the Constitution of India.
3. The petitioner as the original applicant had initiated proceedings for divorce, separation of properties, permanent injunction and custody of the child before the Senior Civil Judge, Mapusa. In the said proceedings she had also filed an application for the grant of interim maintenance under Article 29 of the Family Laws. It was her case that she was in dire straits as her family was unable to continue maintaining her more so on account of the illness of her mother and that she would be rendered destitute in case the maintenance as prayed for was not granted. Besides, her husband i.e. the respondent held a good post i.e. of a Captain and was in a well placed job as a Chief Officer of the ship earning an

amount equivalent to Rs.2 lakhs per month and working on board the vessel in a senior position for the last 19 years. It was her case that he had accumulated a large amount of earning as savings and she was in need of interim maintenance to rebuild her life and prevent her from abject penury and dependency. The respondent had let out one of the flats to the students of IIAS unlike the petitioner who was depending on her family members and loans from her wellwishers to make ends meet.

4. The respondent had opposed her application for interim maintenance by taking a plea that she was employed in a boutique at Sangolda and earning a salary of Rs.8000/- per month apart from being a freelancer, beautician/hair dresser and generating income doing bridal make-up etc. She was owning a motor car unlike the respondent who was jobless for the last four years and looked after by his family members. Be that as it may be, the learned Senior Civil Judge vide the order dated 29/12/2008 was pleased to allow the application for maintenance and granted interim maintenance of Rs.15,000/- per month. The respondent preferred an appeal and this Court vide the order dated 07/05/2009 was pleased to admit the appeal and pass an interim order. However, the Appeal from Order was transferred to the District Court in view of The Goa Civil Courts (Amendment) Act, 2009 (Goa Act 22 of 2009). The learned District Judge by the Judgment dated 08/08/2014 allowed the appeal and quashed and set aside the order of the Senior Civil Judge dated 29/12/2008 giving rise to the present petition at her instance.

5. It was the contention of Shri Bhole, learned Advocate for the petitioner that the impugned order as passed by the learned District Judge was perverse inasmuch as he directed the petitioner to prove the income of the respondent. The Trial Court had correctly passed the order deciding the matter in the petitioner's favour unlike the District Court which committed a gross error. It was further his contention that Article 29 of the Family Law did not at all require that the resources of the husband had to be taken into consideration. The impugned order was fraught with illegality and, therefore, was liable to be interfered with in this petition.

6. Shri R. Menezes, learned Advocate for the respondent submitted that the Court while granting the maintenance under Article 29 of the Family Laws required the resources of the spouse to be taken into consideration, that the amount claimed was justified and in any event the amount awarded did not exceed 1/3rd of the income of the person directed to pay. He adverted to the order of the Trial Court and submitted that there was an error by the learned Trial Court in passing the order as it did unlike the First Appellate Court which had reversed the order and dismissed the application. The petitioner relied on the list of documents dated 09/12/2004 whereas she has had relied upon another application in which she had referred to various documents. There was no reason to disbelieve the case of the respondent. No prima facie findings were given by the Trial Court on the resources of the respondent to pay the

maintenance of Rs.15000/- per month to the petitioner. The learned Trial court had deviated from the scheme of Article 29 of the Family Laws. He placed reliance in Ramesh Damodar Bhakta v. Padmaja @ Ranjana Bhakta (Appeal from Order No 55/01 and 62/01) and concluded his arguments that no error was committed by the learned District Court and therefore no interference was called for with the order under challenge.

7. Article 29 of the Family Laws of Goa, Daman and Diu provides that either of the spouses is entitled to claim maintenance from the other, if in need of the same. The sole paragraph reads that the quantum of such maintenance shall be fixed having regard to the needs of the spouse who has to receive it and the circumstance of the spouse who has to provide it. However, in no case, shall it exceed one third of the net income of the latter. Therefore, a bare reading of Article 29 conveys that either of the spouses claiming maintenance from the other provided he or she is able to show the need for such maintenance. In terms of the sole paragraph, the quantum of such maintenance shall be fixed taking into consideration the need of the spouse who has to receive it and the circumstance of the spouse who had to provide it and in any event the amount awarded cannot exceed one third of the income of the person providing for the maintenance.

8. The petitioner had filed a suit for divorce, separation of properties, permanent injunction and custody of the child and besides had claimed maintenance on the premises that she was the legally wedded wife of the respondent, having a minor son and that he was well placed in a job as a captain of the ship earning equivalent to Rs.2 lakhs and having a lots of savings on account of his long service in a Senior position on bulk carrier containers and that she was in dire strait as her family members were unable to continue maintaining her more so on account of her mother's illness and that she was depending on them and loans from her wellwishers to make ends meet, who had clarified that they could not go on endlessly supporting her and, therefore, she was constrained to seek interim maintenance in the amount of Rs.15,000/-.

9. The respondent had opposed the application vehemently on the premise that she was employed in the boutique earning Rs.8,000/- per month apart from getting additional income from her job as a beautician/ hair dresser and that she also owned a car. Besides, he was rendered jobless since the last four years and had been looked after by his family members for his daily needs. Unlike the case of the petitioner, he had not let out his flat and it was occupied by his friend and students of IAS. On considering the material and upon hearing the learned Advocates for the parties, the Trial Court came to a prima facie finding that the respondent was possessed of sufficient means including a flat which he had purchased and that he was having accounts in several banks and otherwise filed a suit for Specific Performance of Contract for the purchase of two flats and in that view of the matter held on a consideration of the Judgment in Ramesh Bhakta (supra) that the petitioner was entitled to the interim maintenance and

she had established that the respondent despite sufficient means had grossly neglected and failed to provide maintenance to her and her minor son and directed him to pay the interim maintenance of Rs.15000/- per month.

10. This order was taken up in appeal initially before this Court and on account of the change in the pecuniary jurisdiction, the appeal was transmitted to the District Court which passed the impugned order. However, the learned District Court in his wisdom at one point observed that the Senior Civil Judge had rightly held that Article 29 of the Family Laws was correct but that he had erroneously held that the same was not applicable in the facts and circumstances of the case. Although such a finding was in fact given by the learned Senior Civil Judge, the learned District Judge misconstrued the same and held further that the application for interim maintenance was not decided in accordance with the provisions of Article 29 of the Family Laws. The learned District Judge for that matter proceeded to hold that the contention on behalf of the respondent that the burden was on the petitioner to establish what was the net income of the respondent and only then the quantum of maintenance restricted to one third be fixed in the matter. The learned District Judge hastily concluded that the petitioner had not produced any documents before the Senior Civil Judge to prove the net income of the respondent despite the fact that he had clearly recorded that the respondents was possessed of two flats, one at Miramar and one flat being occupied by his friends and students of IIAS.

11. One fails to understand how the learned District Judge could walk into the trap laid by the respondent to project that he had given the flat to the students and his friend gratis when he was himself at the mercy of his family and not having any earnings. The learned District Judge in his wisdom cast the burden on the petitioner that she had not produced any rent agreement to show that he was earning any rent from the flat at Miramar and what was the quantum of rent so received by him. She had clearly produced documents on record to show that he had multiple Fixed Deposits and to which a reference was also made by Shri R. Menezes, learned Advocate for the respondent by inviting attention to the application under Order XVI Rule 6 C.P.C, moved by the Petitioner to summon the documents. A fair statement was made that the amount held by the respondent in these various accounts were utilised by him to purchase the flats and that he had no means. There was no singular dispute at the instance of the respondent to the fact that he was employed overseas as the Captain of the ship and he was earning Rs.2 lakhs or thereabout per month. There was also no singular dispute at his instance that he was serving abroad for almost 19 years and that he had earned a substantial amount and had savings from the said amounts. Yet, the learned District Judge was swayed by his statement that he had no means and found fault with the order passed by the learned Senior Civil Judge to hold in the respondent's favour.

12. Although it was the case of the respondent that she was gainfully employed in a Boutique and earning Rs.8,000/- per month and besides she had

supplementary income as a beautician and hair-dresser and other allied sources, he had not produced any document to that effect. The learned District Judge applied two yardsticks to weigh the case of the petitioner juxtapositioned with that respondent and non suited the petitioner on her claim to interim maintenance.

13. In Ramesh Bhakta (supra), a Judge of this Court was seized with the order dated 27/07/2001 pursuant to which the learned Trial Judge awarded an interim maintenance at the rate of Rs.15,000/- per month in favour of the respondent and also secured by an order of injunction restraining the husband from dispossessing the plaintiff and the children from the matrimonial home and also from assaulting them. It was contended on behalf of the husband that the learned trial Court did not address itself to the real issue, namely finding out as to what was the real income of the appellant for the purpose of fixing the maintenance and the only documents available were the Income Tax Returns, where the income was shown as Rs.1,64,000/- for the Assessment Year 1997-1998. It was further contended that in these circumstances the trial Court could not have fixed an interim compensation of Rs.15,000/- and, therefore, the order to that extent was liable to be set aside or modified. The wife too had preferred an appeal who took a plea that the amount awarded was on the lower side considering the material placed on the record and that in the suit filed by her for divorce she had claimed maintenance at the rate of Rs.30,000/- per month apart from a permanent injunction and the interim maintenance came to be granted by the impugned order.

14. In Ramesh Bhakta (supra), the learned Single Judge found that the Income Tax Certificate by itself could not be the basis on which maintenance ought to have been granted since the sum of Rs.1,64,000/- as considered, would hardly work out to Rs.13,000/- per month. Besides, at the relevant time the appellant and the respondent were residing in a bungalow in Mapusa admeasuring 132 sq.mts. and they had two cars no doubt in the name of the firms and which would show that the figures as shown in the Income Tax Returns could not be the basis for awarding maintenance. In that backdrop it deemed it appropriate to examine the family background of the parties, the life styles enjoyed by both and when it was borne out from the records that the wife herself was employed in a Bank and her father was retired as a Manager of a Bank and would therefore have been accustomed to a good living condition apart from having car. If all these aspects were taken into consideration including the expenses shown to be incurred for a normal household and with two growing children, one in college and the other in school, some interim compensation had to be paid to her. However, when the appeal was admitted this Court directed an interim payment of Rs.6,500/- per month and directed the husband to pay the arrears. In that view of the matter it was found that no interference was called for with the order of the Trial Court.

15. At the cost of repetition the petitioner had relied on the list of documents in

which she had referred to innumerable deposits held by the respondent in ANZ Grindlays Bank, Mumbai apart from the draft deed of sale to which he was a signatory and later she had relied on other documents. It is not as if, the petitioner had not relied on any documents to support her case on the financial status and the stability of the respondent as erroneously observed by the learned District Judge while passing the order under challenge. She has also enumerated the list of movable property held by him worth in US \$ and when converted would be worth much more. Yet, the learned District Judge in his wisdom had turned the tables on the petitioner ignoring this vital documents and set aside the order of the Senior Civil Judge which cannot be countenanced on any premise. The contention of Shri R. Menezes, learned Advocate that the Fixed Deposits of the respondent in banks were not in existence and they were in existence in 2004 and earlier liquidated to pay for the flat would only buttress the case of the petitioner that the respondent did have the means in the nature of immovable assets accepting his case that he had converted the said deposits and utilized the amounts towards the purchase of the flats. There was also no rebuttal at his instance that he owned flats in Panaji. Therefore, considering all these aspects which was clearly lost on the learned District Court that the Trial Court had properly appreciated the matter. Rather, the District Court had acted in excess of its jurisdiction in passing the impugned order which is per se illegal and cannot be allowed to stand calling for an interference by this Court in exercise of its writ jurisdiction under Article 227 of the Constitution of India.

16. In the result, therefore, I pass the following: ORDER

The Writ Petition is allowed and the impugned order passed by the learned District Judge is quashed and set aside restoring that of the learned Senior Civil Judge granting interim maintenance in the petitioner's favour. There shall be no order as to costs.