

(2017) 11 BOM CK 0003
In the Bombay High Court
Case No : 4331 of 2017

Shama Rahul Moholkar

APPELLANT

Vs

Rahul Deorao Moholkar

RESPONDENT

Date of Decision : 10-11-2017

Acts Referred:

[Special Marriage Act, 1954](#), [Section 36](#),
[Section 38](#) - Alimony pendente lite - Custody of children

Citation : (2017) 11 BOM CK 0003

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : Abhijit Sarwate, B. M. Patwardhan, Abhijit Kandarkar

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith with the consent of learned counsel for both the parties, heard finally at the stage of admission itself.
2. Both these writ petitions are arising out of one and the same order passed by the Principal Judge, Family Court, Pune in P. A. No.891 of 2014. Hence they are being decided by this common order.
3. For the convenience, parties are referred to by their original nomenclature, wife as "petitioner" and husband as "respondent".
4. By the said order, the Principal Judge of Family Court, Pune, has rejected the claim of petitioner wife for interim maintenance, residential accommodation, litigation costs and reimbursement of Medical Expenses. Hence she has preferred Writ Petition No.4331 of 2017, challenging the impugned order; whereas the Writ Petition No.4676 of 2017, is preferred by the husband, being aggrieved by the order, directing him to pay interim maintenance at the rate of Rs.25,000/- per month to petitioner for maintenance of daughter Siddhi, from the date of application till decision of the petition.

5. Brief facts of these Writ Petitions are to the effect that, the marriage of petitioner and respondent has taken place on 21.03.2011. However, on account of matrimonial dispute between the parties, both of them started residing separately since 24.4.2013. Thereafter the petitioner has filed a petition for divorce against respondent on the ground of cruelty under the provisions of Special Marriage Act, claiming permanent alimony and other reliefs.

6. During the pendency of the said petition, she has filed an application at Exh.5, under Sections 36 and 38 of the Special Marriage Act, 1954, for interim maintenance for herself and for her daughter. In support of her application, she relied upon various documentary evidence proving sound financial position of the respondent and her inability to maintain herself and daughter, having no source of income and being dependent upon the financial support provided by her father.

7. As against it, respondent made every effort to show that he is not having sufficient means to pay maintenance; whereas the petitioner is very well placed, being the Director of a Company and hence an application for interim maintenance cannot be entertained. In support of his submissions, he relied upon various documents proving the fact that the petitioner is a Director of ERP Corporation Private Ltd., and she is maintaining the car and lavish life style. It was also shown that her profile on various websites reveals that her qualification is MMS in HR, DCE, DBM, DID, however, she has tried to suppress her real income and also the fact that she was the Director of ERP Corporation.

8. Hence having regard to the fact that the petitioner wife is a highly qualified person and was working as Director of the company, the Family Court rejected her application for maintenance; whereas having regard to the financial position of respondent, the Family Court held that he is also liable to contribute to the maintenance of the child Siddhi and accordingly awarded interim maintenance to the child at the rate of Rs.25,000/- per month to the child Siddhi.

9. While challenging the impugned order of the Family Court, the submission of learned counsel Shri. Sarwate, for petitioner is that the Family Court has not at all taken into consideration the fact that the petitioner is having responsibility to maintain and look after the child of 3 to 4 years and therefore, though she may be having the potential of earning income, unless it is proved that she is actually earning the income, she cannot be deprived from getting maintenance. By placing reliance on the judgment of Apex Court in Shailja and anr -vs- Khobbanna, 2017 Supreme Court (SC) 75, it is urged that, "whether the wife is capable of earning or whether she is actually earning are two different concepts. Merely because wife is capable of earning is not sufficient reason to deny her maintenance.

10. Learned counsel appearing for the petitioner has also placed reliance on the judgment of Supreme Court in Mangatmal (dead) and anr -vs- Punni Devi (dead) and ors, I (1996) DMC 1 (SC), to submit that the maintenance necessarily must encompass a provision for residence. The provision of residence may be either by

giving any sum in money or property in lieu thereof. Here in the case, according to him, the Family Court has not at all awarded any amount towards residence of the petitioner though it was specifically brought to the notice of the Family Court that at present the petitioner is constrained to reside in the house of her parents, having no other place or roof on her head.

11. Learned counsel for petitioner Shri. Sarvate has then relied upon the judgment of Hon"ble Supreme Court in Rajesh Burmann -vs- Mitu I Chatterjee (Barman), AIR 2009 SC 651 to submit that the expressions "maintenance" and "support" used in Section 36 and 37 of the Special Marriage Act 1954 also include within their sweep medical expenses and hence in this case, he has submitted that the Family Court should have awarded reimbursement of medical and other expenses to the petitioner to the tune of Rs.1,61,710/-. The Family Court has avoided to reimburse the said amount stating that it can be decided at the time of final hearing. Thus, according to learned counsel for the petitioner, the impugned order passed by the Family Court to the extent of depriving the petitioner from her rightful claim for interim maintenance and other expenses needs to be quashed and set aside.

12. Per contra, learned counsel for the respondent has supported the impugned order to the extent of rejecting claim of wife for interim maintenance and other expenses. However, as regards, the order of interim maintenance at the rate of Rs.25,000/- per month towards maintenance of daughter Siddhi, it is challenged by submitting that, as compared to the husband, the petitioner is earning far more income. Her life style and her financial condition is also much better than that of the husband. Moreover, to enroll the daughter in a costly school like, "Kangaroo Kids" was her decision and hence respondent husband should not be saddled with these expenses. Learned counsel for respondent has, then placed reliance on the income tax returns of the respondent to show that his income is hardly 20 to 30,000/- per month and therefore, this amount of Rs.25,000/- which is awarded by the Family Court towards interim maintenance of the daughter being excessive, according to him, needs to be set aside or reduced.

13. This is a peculiar case in which both the husband and wife are highly qualified, well off and having their own independent sources of income. Respondent has done his Bachelor in Engineering from V.J.T.I, Matunga, Mumbai and Masters in Management Studies from NMIS, Mumbai. He is also Director of Xlrite Consulting Private Ltd and having his office at Bhagatsing Road, Mumbai. He owns Tata Indigo Car. Just before the proceeding in the Family Court were filed, he has sold out 2 BHK flat at Mulud (W) and was in the process of purchase of flat at Lokhandwala Complex. He stays in a bungalow, belonging to his father at NIBM Road, Pune . He has various bank accounts, numerous credit cards. His profile seen on screen shots produced on record of the Family Court indicates that his name is the owner of M/s Canary Recruitment and Training Consultancy. Respondent has not disputed the fact that he is running this Xlrite Consultancy Pvt. Ltd.

14. However, respondent has produced on record the income tax returns of the last three years showing his income to be around Rs.1,80,000/- per annum. As rightly pointed out by learned counsel for the petitioner, all these three returns are filed on the same date after the divorce petition was instituted in the Court. Hence much reliance cannot be placed on these income tax returns. Otherwise also, law is well settled that income tax return do not reflect true income of the parties and the Court has to assess the said income on the basis of documentary evidence.

15. Here in the case, one can take into consideration the profile of the respondent husband filed on Jeevan Sathi.com stating his annual income around Rs.25 lacs and above and further states that he was having his own income from HR Recruitment and Consultancy Training Software Services for clients across India.

16. It cannot be accepted that immediately after filing of the divorce petition his income is reduced. Conversely one can safely conclude that this attempt of showing reduced or no income, after filing of matrimonial proceeding appears to be a routine phenomena of which notice is taken by the Hon"ble Supreme Court in Manish Jain -vs- Akanksha Jain, CDJ 2017 SC 352, by observing in paragraph No. 39 as follows :- "It has now become a matter of routine that as and when an application for maintenance is filed, the non applicant becomes poor displaying that he is not residing with the family members if they have a good business and movable and immovable properties in order to avoid payment of maintenance. Courts cannot under these circumstances close their eyes when tricks are being played in a clever manner"

17. Thus, the fact remains that respondent herein is well qualified and having regard to life style of both the parties, it can hardly be accepted that he is unable to contribute an amount of Rs.25,000/- per month towards interim maintenance of his daughter Siddhi.

18. In addition to that, as rightly held by the Family Court, respondent has to pay educational expenses of daughter Siddhi. Therefore, as regards the writ petition of respondent, this Court does not find any merit therein to entertain the same and hence the same deserves to be dismissed.

19. As regards the writ petition of petitioner wife, as stated above she is also a very well qualified person. Her qualifications are MMS, HR, DBM, DID. She is convent educated. She had worked with the company for over 7 years. At present also in her maiden name, "Shama Vasant Padale", she is Director of ERP Corporation Pvt. Ltd. Her name is accordingly registered with Ministry of Corporate Affairs. The print out thereof is also produced on record. Copy of her consent is also produced on record.

20. When these documents were produced in the Court by respondent, she has filed an affidavit before the Family Court stating that she is only a nominal or formal Director and on account busy schedule of the child she is not in active

participation in the work. However, the fact remains that she has not produced on record her income tax returns for the last three years to prove that she is not having any income therefrom. However, the respondent has produced on record documents to show that earlier petitioner was having 1/3 share in the said company as a Director and now one of the Directors having been resigned, she is practically having 50% share. Even if it is accepted that the offices of the said company are at Bangalore and at Mumbai and presently she is placed in Pune, being a Director, it is not necessary that she should participate actively in the day-to-day affairs of the company. She can exercise supervisory control over the affairs of the company even from Pune and get her share in the dividend and profits of the company. Therefore, her case that she is having no source of income at present and her father is maintaining her also cannot be accepted.

21. Assuming that there is some difference in the earning and income of the petitioner and respondent, provisions of interim maintenance are not made for equalising their income but to ensure that either spouse does not suffer because of paucity of the income in the course of the proceeding. Where both the husband and wife are earning and having good income, merely because there is some difference in the respective income earned by them, an order of maintenance cannot be justified, especially, if one has regard to the provision of section 36 of the Special Marriage Act, 1954 which provides that only when it appears to the Court that wife has no independent income sufficient for her support and necessary expenses of the proceedings, the Court can order the husband to pay her expenses of the proceeding and also interim maintenance. Here in the case the petitioner wife is having independent source of income. In such situation she cannot be entitled for interim maintenance. Since both the petitioner and respondent are on equal footing and earn more or less some income, the Family Court, has rightly rejected the wife's claim for interim maintenance.

22. As regards the provision for residence, the Family Court has observed that the petitioner has a provision of residence. Moreover, she is also capable of taking residence on rent being the Director of the Company. In respect of medical and other expenses, the claim of the petitioner is to the tune of Rs.1,61,710/-. The Family Court has rightly held that the said claim can be decided at the time of final hearing.

23. To sum up, therefore, I do not find that any ground is made out either by the petitioner wife or by respondent husband to interfere in the impugned order passed by the Family Court, as the order is balanced one and is passed by the Family Court after taking into consideration all the relevant material aspects of the case.

24. Both these Writ Petitions, therefore being devoid of merits, stand dismissed.

25. Rule discharged.