

Bench: R S Dalvi

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8954 OF 2009

Neelam Dadasaheb Shewale .. Petitioner Vs.

Dadasaheb Bandu Shewale .. Respondent Mr. Milind N. Jadhav i/b Mr. Sagar G. Talekar for the Petitioner.
Mr. R. T. Lalwani for the Respondent.

CORAM : MRS. R. S. DALVI, J.

DATE : 17TH FEBRUARY, 2010

JUDGMENT:

1. This writ petition challenges three interim orders passed in MJ Petition No.A1633/97 which was for enhancement of maintenance under 25 (2) of the Hindu Marriage Act.

2. It may be mentioned that an application under that provision can be filed only upon change in the circumstances of either party which would require modification of the order of permanent alimony passed. 2

3. Two orders are passed upon three applications of the parties.

4. One application was filed by the exhusband (husband) seeking to restrain his exwife (wife) from using his surname (name) since divorce decree has been already passed and has become final. This application came to be filed as an interim application in the fresh petition filed by the wife after divorce.

5. The Advocate on behalf of the wife argued that the separate petition only should have been filed. Both these reliefs, permanent and interim, are between the same parties pursuant to the same marital relationship which has since ceased. Under Section 7 of the Family Courts Act the Family Court has jurisdiction to decide the petition/application as well as a suit or proceeding (permanent or interim), for injunction arising out of the marital relationship. The husband can, therefore, file a separate application/petition for injunction or take out an application in the wife's application/petition already filed. In fact, the husband can 3

file a counterclaim in any petition with regard to any relief arising out of the marital obligation. An application which may be in the nature of counterclaim, can therefore be allowed an interim application.

6. The substance of the application is required to be considered rather than its form. The substance of the application of the husband is that the wife should not use his name.

7. The Advocate on behalf of the wife fairly concedes that since the marriage has been dissolved by a decree for divorce which has become final, the wife cannot use the name of the husband. That is the only substance to be considered by the Family Court. Under the impugned order dated 23rd September, 2009 the Family Court has considered that aspect as an application arising out of a marital relationship. It is correctly

considered. The order needs no interference.

8. In fact, the Advocate on behalf of wife mentioned that the bank account of the wife stands in both her names. That 4

statement itself shows that the wife uses the name of the husband even after their marital relationship has been dissolved by an order of the Court. The description of the bank account is therefore improper. It is, therefore, clarified that the wife cannot use the husband's name anywhere including in her bank account. The injunction granted by the Family Court in the application of the husband shall be effectuated for all purposes.

9. The writ petition also challenges another order of the same date between the same parties but in two different applications. One was the application filed by the wife for her to be represented by her constituted attorney on the ground that she is ill, does not know English, she has been mentally tortured at the hands of the husband and she would not be able to stand the court proceeding. The other application is filed by her constituted attorney asking for permission to represent the wife as she cannot financially afford a lawyer, lawyers are otherwise not permitted and that she would be entitled to assistance of the person she has faith in.

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10. The legal right of a party in Family Court to be represented by her constituted attorney in place of her Advocate who is registered legal practitioner is required to be seen. Under Section 13 of the Family Courts Act no party is entitled as of right to be represented by a legal practitioner. However, the Court may appoint legal expert as amicus curie to assist her/him. A party has full right to appear before the Family Court. None can object to such appearance. The wife does not desire to have an Advocate. She has refused legal aid offered to her. She contends that she has faith only her constituted attorney. The extent of the right of a constituted attorney is laid down in Order III Rule 1 of the Civil Procedure Code as follows :

ORDER III :

1. Appearances, etc., maybe in person, by recognized agent or by pleader. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be,] on his behalf :

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Provided that any such appearance shall, if the Court so directs, be made by the party in person.

(emphasis supplied)

11. What is appearance, application or act has been considered by Chief Justice Chagla, as he then was, in the case of Aswin Shambhuprasad Patel and others Vs. National Rayon Corporation Ltd. (AIR 1955 BOMBAY 262). The provision of the aforesaid order was considered taking into account the Bar Councils Act and the Bombay Pleaders Act. It has been held that the aforesaid rule would not apply where a law for the time being in force otherwise expressly provided. It is held that pleading is not included in the expression "appearance, application or act in or to any Court". This is so because, the right of audience in Court, the right to address the Court, the right to examine and cross-examine the witnesses are dealt with in other parts of the Civil Procedure Code and not under Order 3. It was further held the right of audience in Court is a part of pleading in Court and not "acting" as provided under Order 3. It is further observed that a party in person would have a right of audience in Court and not his recognized agent who would be "appearing, applying or acting" on his behalf. 7

12. Further the right of pleaders to plead in a Court of law under authority of the client and to have a right of audience in Court as a member of Bar is not dealt with under Order 3. The members of the Bar have a right in clause 10 of the Letters Patent as they are qualified to plead in Court as required by specific legislation and rules. Under that clause no person except Advocates, Vakils or Attorneys would be allowed to act or plead for and on behalf of any suitor except the suitor himself. Considering Section 8 of the Bar Councils Act under which no person was entitled to practice as an Advocate unless his name was entered in the roll of Advocates, it was observed that the expression "practice" is wider than the expression "plead". Similarly Section 9 of the Bombay Pleaders Act, which was similar to the above section, was considered. The proviso to that section allowed a party to appear, plead or act on his own behalf but a recognized agent of the party was allowed to only appear or act (and not plead). It was therefore observed that proviso made a distinction between appearing, pleading or acting and appearing or acting. Whereas the party could do all three of the above her/his constituted attorney 8

could do only the above two. Consequently it was held that in the District Courts a recognized agent had no right to plead by relying on provision 9 of the Bombay Pleaders Act. It was observed that the right of audience is a natural and necessary concomitant of the right to plead and as the recognized agent had no right to plead, it follows that he has no right of audience in Court.

13. The law that is laid down in the aforesaid judgment holds true and good till now and even within Section 13 of the Family Courts Act. The object of Section 13 of the Family Courts Act is to allow a party to represent her/his case and consequently right of the lawyer to plead, appear and have audience in Court is limited but the right given to the party to appear is not extended to that parties' constituted attorney. Hence, the general law of procedure under Order 3 Rule 1 as also the special laws contained in the Bar Councils Act and the Bombay Pleaders Act would apply even in a Family Court. The object of that provision is that only qualified persons are entitled to appear in Courts and represent the case of their parties. The qualification is of the knowledge of the law and 9

the enrollment under the Act. If constituted attorneys of all the parties are allowed to appear, the Court would be overrun by any number of unqualified, unenrolled persons. Since Civil Procedure Code would generally apply to a Family Court under Section 10 of the Act, the restraint upon appearance under Order 3 of the Code must hold good.

14. In the case of Pavithra Vs. Rahul Raj (AIR 2003 MADRAS 138) it has been held that the recognized agent of the party in a Family Court proceedings cannot be allowed to prosecute it. Considering the various provisions of the Family Courts Act which follow the procedure different from the Civil Courts, it is observed that the parties themselves can be heard. Some times legal assistance can be provided. However, personal appearance of the parties is inevitable to comply with the mandatory provisions of the Family Courts Act. Though the authorized agent, who is not a legal practitioner can file a petition, he can only prosecute or defend it or represent the party only until the Family Court passes an order directing the party to appear in person depending upon the facts and stage of the case. In that case the constituted attorney sought 10

permission to defend the case on the ground that she was not able to come to India to contest the case. Such a permission, it was held, could not be granted.

15. In the case of Sudha Kaushik Vs. Umesh prasad Kaushik (AIR 2005 GUJARAT 244) upon considering the law under normal circumstances as aforesaid it was held since that case the petitioner's life was in danger his father was allowed to represent his son in the interest of justice though it was held that in normal circumstances any citizen or party is not allowed to be represented by his power of attorney unless he is an Advocate of the Court.

16. Consequently both the orders of the Family Court, Bandra, Mumbai dated 23.09.2009 are correct and cannot be interfered with. Writ petition is dismissed.

(R. S. DALVI, J.)