

Bench: B Marlapalle, S Vazifdar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.20 OF 2005

Smt.Manju Kamal Mehra

aged about 35 years, occ. Housewife,

Religion Hindu, resident of C/o G.K.

Chawla, G-1/23, Vijay Nagar, Marol-Maroshi

Road, Andheri (E), Mumbai-400 059.Appellant V/s.

Mr.Kamal Pushkar Mehra,

aged about 40 years, occ.business,

Religion Hindu, residing of 107,

Janak Apartment, Samarth Ramdas Nagar,

Navghar Vasai (East), District.ThaneRespondent

Mr.P.M. Havnur for the Appellant.

Mrs.B.P. Jakhade for the Respondent.

WITH

FAMILY COURT APPEAL NO.44 OF 2005

Mr.Kamal Pushkar Mehra,

aged about 40 years, occ.business,

Religion Hindu, residing of 107,

Janak Apartment, Samarth Ramdas Nagar,

Navghar Vasai (East), District.ThaneAppellant

V/s.

Smt.Manju Kamal Mehra

aged about 35 years, occ. Housewife,

Religion Hindu, resident of C/o G.K.

Chawla, G-1/23,Vijay Nagar, Marol-Maroshi

Road, Andheri (E), Mumbai-400 059.Respondent 2

Mrs.B.P. Jakhade for the Appellant.

Mr.P.M. Havnur for the Respondent.

CORAM : B.H. MARLAPALLE &

S.J. VAZIFDAR, JJ.

DATE : 18TH JULY, 2009.

ORAL JUDGMENT (PER B.H. MARLAPALLE, J.) :-

1. Both these appeals filed by the respective spouses arise from a common judgment and order dated 31.12.2004 passed by the Family Court at Pune in Petition No.A-978 of 2002 and hence they are being decided by this common judgment.

2. The parties were married at Mumbai on 12.7.1994 as per Hindu rites and they co-habitated at Dahisar where a daughter by name Aishwarya was born to the couple on 21.12.1995. As per the husband, the wife did not return to the matrimonial home after the daughter was borne. The husband claims that the wife abandoned the matrimonial home, whereas it is the case of the wife that she was thrown out of the matrimonial home before the birth of the child that is some time in September, 1995. In July, 1996, the wife's younger sister Anju was married and the husband along with his family member attended the said marriage. The couple stayed together from 22 nd to 26th July, 1996 in the house of the wife's parents but after 26th July, 1996, the wife did not return to the matrimonial home. It appears that the wife was working with M/s.R.G. Stone Hospital and she claimed that she left the said

job from 4.5.1998. The husband issued a legal notice on 30.4.2001 3 (Exhibit-23, which was reply on 10.5.2001, Exhibit-24). Second legal notice was issued on 8.6.2001 (Exhibit-25, which was replied on 15.6.2001, Exhibit-26). Third legal notice was issued on 12.6.2001 (Exhibit-27) and consequently a joint meeting between the two parties on 6.5.2002 to resolve matrimonial dispute was held. It was decided in the said meeting that both the parties should forget the past and start staying together. The wife conveyed that she was ready and willing to co-habit with the Petitioner and her father also supported the same plea and stated that his daughter must return to the matrimonial home at Dahisar. Despite the settlement, there was no cohabitation between the parties and therefore, Petition No.A-978 of 2002 was moved by the husband to seek a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. The said Petition was opposed by the wife. The following issues were framed by the Family Court and answered accordingly in the impugned judgment :-

ISSUES FINDINGS

- 1) Does the Petitioner proves that the Respondent has without any reasonable excuse withdrawn from his society ? Yes
- 2) Whether the Petitioner is entitled to a decree of restitution of conjugal rights ? Yes
- 3) Whether the Petitioner is entitled for maintenance Yes @ Rs. from the Petitioner for herself or the child ? 2500/- per month for
- 4) If yes, what should be the quantum ? herself & @ Rs.3000/-
p.m. for the
minor
daughter.
- 4-A) Whether the Respondent is entitled to Does not return of her streedhan from the Petitioner ? survive. 4
5. What order and decree ? As per final order.

3. However, it appears that when Petition No.A-978 of 2002 was decided by the earlier judgment dated 30.4.2004, the Family Court had not recorded its findings on issue Nos.1 and 4-A. The said judgment was the subject matter of challenge in Family Court Appeal Nos. 94 of 2004 and 95 of 2004 and by a common judgment dated 18.8.2004, the Appeals were disposed off and the Petition filed by the husband was remanded to the Family Court to record its findings on issue Nos.1 and 4-A.

4. The husband examined himself and Kiran R.Vishvira, who is the partner of a firm by name M/s.Manav Mandir Builders. The wife examined herself and her father Gopal Kishan Chawla. She also examined Ajay Gulabchand Malpani, Treasurer of the Housing Society at Vasai and Dr.Manish Bansal, the Managing Director of R.G. Stone Hospital. Written arguments were submitted before the Family Court and the Petition filed by the husband came to be allowed in terms of the following order :-

"The Respondent is directed to restore conjugal rights with the Petitioner forthwith.

The Petitioner is directed to pay Rs.2500/- per month towards maintenance of the respondent and Rs.3000/- per month towards maintenance of the minor daughter Aishwarya, in aggregate Rs.5500/- per month from the date of order till the Respondent restitutes his conjugal rights.

5. The husband has challenged the directions to pay the maintenance to the wife despite the fact that the decree under Section 9 of the said Act has been passed in his favour. Whereas the wife has challenged the decree passed under Section 9 of the said Act and claimed that the Family Court did not consider the harassment and ill-treatment given to her in the matrimonial home and consequently she was justified in staying away

from the husband.

6. Mrs.Jakhade, the learned counsel for the husband submitted that in Petition No.A-978 of 2002, the wife did not file any application for any maintenance either under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 24 of the Act for maintenance pendant-lite. She also pointed out that the decree of restitution of conjugal rights was passed against the wife and surprisingly and equally shocking the Family Court directed the husband to pay maintenance to the wife and as per Mrs.Jakhade, this order itself is self-contradictory and the decree for restitution of conjugal rights became a nullity as the wife continued to stay away from the husband and the husband was required to deposit the maintenance amount every month. Mr.Havnur, the learned counsel for the wife on the other hand submitted that the decree for restitution of conjugal rights was grossly erroneous and the Family Court was not justified, in the facts of this case, to record its findings in the affirmative on issue No.1 framed by it. He also submitted that as the wife was thrown out of her matrimonial home along with her daughter much before the daughter was born and she had to maintain herself and the daughter, the Family Court was justified in granting maintenance by the impugned order. We are, therefore, required to examine :-

- i) Whether the decree of conjugal rights passed under Section 9 of the Act in favour of the husband is sustainable and ; 6
- ii) Whether the Family Court was right in law to direct the husband to pay maintenance to the wife after it had passed a decree under Section 9 of the Act in favour of the husband and directed the wife to join the husband in the matrimonial home.

7. So far as the first issue is concerned, the Family Court has referred to the oral depositions of the husband, wife and her father. As is required in law, both the parties were referred to the Marriage Counsellor who submitted her first report on 17.10.2002 (at Exhibit-3). The said report indicated that both the parties had expressed their wish for reconciliation and for resumption of co-habitation, but the second report of the Marriage Counsellor dated 17.3.2003 (at Exhibit-14) was negative and it stated that reconciliation between the parties was not possible and they were agreeable for divorce but there was a dispute regarding the quantum of alimony. A joint meeting between them on 6.5.2002 with the intervention of a common family friend by name Mr.Jain and the reconciliation therein was not disputed between the parties and the wife had shown her willingness to live and co-habit with the husband. The father of the wife in his depositions before the Family Court also stated that he wished that his daughter could return to her matrimonial home at Dahisar. The deposition of the wife also went to show that despite various allegations made by her against the husband and his family members about cruelty and ill-treatment, she wanted to go and stay at Dahisar and she was keen to save her marriage. She had categorically stated in the pleadings as well as in her depositions that she was ready and willing to co-habit with the Petitioner and she also reiterated about the compromise and to bury the past. The husband had also assured the parents of the wife 7 that he take her care. The Family Court therefore, held that the wife had condoned the acts of the alleged cruelty and ill-treatment. In paragraph 31 of the impugned judgment, the Family Court recorded its surprise about the wife in the following words :-

"31. It is very peculiar that the petitioner has filed this petition for restitution of conjugal rights and the respondent in her pleadings as well as in her evidence has deposed that she is also ready and willing to

co-habit with the petitioner. The father of the respondent in his evidence has also deposed that he desires that the respondent co-habits with the petitioner. It is also an admitted fact that meeting of the family members was held with the common friend Mr.Jain house and it was agreed that they would live together. The father of the respondent has admitted in his cross- examination that a compromise was arrived at for the petitioner and the respondent to stay together. He also admitted that the petitioner does not own any property at Dahisar. During the pendency of the proceedings various attempts were made for the parties to resume their co-habitation in view of the desires of both the parties, but failed because the petitioner wants that the respondent should resume his conjugal rights at Vasai where he owns his ownership flat, and the respondent wants to return and stay at Dahisar, where she was living from the day after her marriage till she left the house."

8. The Family Court recorded the finding that the wife was not justified and she had no good reason to stay away from her husband and she had withdrawn from the society of the husband without any reasonable excuse. Having referred to the evidence placed before the Family Court by the respective parties, we are satisfied that these findings recorded by the Family Court cannot be faulted with and the decree of restitution of conjugal rights under Section 9 of the said Act was rightly passed in favour of the husband. We are informed that till this date, the wife has not submitted to the said decree and she continues to stay with her parents. In fact the husband could have been justified in asking for dissolution of the marriage under Section 13(1-A) of the said Act on the ground that there was no resumption of co-habitation between the parties for one year or thereafter, after the decree under Section 9 of the said Act was passed, but he has not done so and the learned counsel for the husband stated before us that the husband is keen to continue with the marriage and desires that his wife along with daughter Aishwarya to join the matrimonial home. We are also informed and it was the same case before the Family Court as well that the husband is willing to stay away from other family members in his ownership flat at Vasai. However, the wife insists that he should shift to a place in Andheri which is close to her parent's house and also to the daughter's school. Consequently the decree passed under Section 9 of the said Act has remained on paper.

9. So far as, issue No.1 maintenance is concerned, pending the proceedings before the Family Court at the behest of either of the parties, wife was entitled to apply for interim maintenance either under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 24 of the Act. She did not submit any such application nor did she file a counter claim in the Petition filed by the husband. The Family Court in its second round of the judgment, held that the wife was not justified in staying away from her husband and directed her to submit to the decree under Section 9 of the Act. However while doing so, it proceeded to consider the expenditure incurred by the wife while she was staying away from her husband. The Court noted that the wife had no employment since May, 1998 on the basis of the evidence of Dr.Bansal, the Managing Director of R.G. Stone, Urological Research Institute, corroborated by the evidence of her father and thus she was without any source of income. The Court further observed as under :- 9

"..... It can therefore be held that the Respondent has no source of income and hence the Respondent is entitled to claim maintenance for herself. As regards the daughter, it is moral, social and legal obligation of the Petitioner father to maintain her. The Petitioner has nowhere in his pleadings stated as to what he is doing and what is his income. But in reply to the interim application it is observed that it is an admitted fact that the Petitioner is dealing in shares. He has stated that his average income is Rs.7000/- per month..... Hence considering the status of the parties and needs of the Petitioner for herself and the minor daughter, and that the Petitioner has no other dependents upon him, the cost of living, it can be held that he is capable and able to pay Rs. 2500/- per month towards the maintenance for the wife and Rs.3000/- per month towards the maintenance for minor daughter, in aggregate Rs.5500/- per month from the date of order till the Respondent restitutes to his conjugal rights."

10. In the case of Chand Bhawan v. Jawaharlal Dhawan, (1993) 3

SCC 406, on the rights of the wife to receive any maintenance either under

Section 18 of Hindu Adoptions and Maintenance Act or under Section 24 of

the said Act, the Supreme Court stated as under :-

"23. The preamble to the Hindu Marriage Act suggests that it is an Act to amend and codify the law relating to marriage among Hindus. Though it speaks only of the law relating to marriage, yet the Act itself lays down rules relating to the solemnization and requirements of a valid Hindu marriage as well as restitution of conjugal rights, judicial separation, nullity of marriage, divorce, legitimacy of children and other allied matters. Where the statute expressly codifies the law, the court as a general rule, is not at liberty to go outside

the law so created, just on the basis that before its enactment another law prevailed. Now the other law in the context which prevailed prior to that was the uncodified Hindu law on the subject. Prior to the year 1955 or 1956 maintenance could be claimed by a Hindu wife through court intervention and with the aid of the case-law 10

developed. Now with effect from December 21, 1956, the Hindu Adoptions and Maintenance Act is in force and that too in a codified form. Its preamble too suggests that it is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. Section 18(1) of the Hindu Adoptions and Maintenance Act, 1956 entitles a Hindu wife to claim maintenance from her husband during her lifetime. Sub-section (2) of Section 18 grants her the right to live separately, without forfeiting her claim to maintenance, if he is guilty of any of the misbehaviours enumerated therein or on account of his being in one of objectionable conditions as mentioned therein. So while sustaining her marriage and preserving her marital status, the wife is entitled to claim maintenance from her husband. On the other hand, under the Hindu Marriage Act, in contrast, her claim for maintenance pendente lite is durated (sic) on the pendency of a litigation of the kind envisaged under Sections 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenance or alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. Thus when her marital status is to be affected or disrupted the court does so by passing a decree for or against her. On or at the time of the happening of that event, the court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. Not only that, the court retains the jurisdiction at subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gammit (sic gamut) of a diseased or a broken marriage. And in order to avoid conflict of perceptions the legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. In other words without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time than the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionizing the law applicable to Hindus."

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11. In the case B.P. Achala Anand v. S. Appi Reddy and another, AIR

2005, SC 986, a three Judge Bench held that Section 18 of the Hindu

Adoptions and Maintenance Act confers a right on a wife to be maintained by

her husband during her lifetime and such a right for maintenance is an

incident of the status or estate of matrimony and a Hindu is under a legal

obligation to maintain his wife. Section 25 of the Act enables the Court to

pass an order for providing alimony and maintenance in favour of the

divorced wife. The Court further observed that on the status of the wife being

terminated by a decree for divorce under the Act, rights of divorced wife seem

to be cribbed, confined and cabined by the provisions of and to the rights available Sections 25 and 27 of the said Act.

12. When the husband has succeeded in obtaining a decree of restitution of conjugal rights against the wife, it is implied that the wife was required to join the company of the husband at her matrimonial home and therefore, there is no question of maintenance at least from the date of the said order. If the wife is directed to be paid maintenance despite the said decree, reluctance of the wife to join the husband would be further strengthened and she would be encouraged to stay away from the husband despite the decree passed by the Court. The decree for restitution of conjugal rights would be rendered inoperative and for such an act of the wife, the husband would be penalized to pay the maintenance to the wife, who does not subject to the decree passed by the Court. Such a direction would be incentive to frustrate the decree passed under Section 9 of the Act. It is well settled that if such a decree is passed at the instance of the wife and against the husband, the Court would be justified in directing the husband to pay 12 maintenance to the wife till he resumes cohabitation with her or calls upon her to join him at the matrimonial home pursuant to the decree passed by the Court in her favour. Such is not a case before us. We are, therefore, satisfied that the Family Court acted without jurisdiction in directing the husband to pay maintenance at least from the date when the impugned order was passed and therefore, the impugned order to that extent is required to be set aside. However, we are not inclined to interfere in the maintenance granted to the daughter.

13. In the premises, Family Court Appeal No.20 of 2005 fails and the same is hereby dismissed. Family Court Appeal No.44 of 2005 succeeds

partly and the directions to pay an amount of Rs.2500/- per month by way of the maintenance to the wife are hereby quashed and set-aside. Undoubtedly till the wife resumes cohabitation with the husband, the order for access passed by this Court dated 20.10.2006 shall continue to operate.

14. The parties to bear their own costs.

(S.J.VAZIFDAR, J.) (B.H.MARLAPALLE, J.)