
AIR 2010 Bom 34 : (2009) 111 BOMLR 3535 : (2010) 7 RCR(Civil) 1907

Bombay High Court

Case No: Family Court Appeal No"s. 20 and 44 of 2005

Smt. Manju Kamal
Mehra

APPELLANT

Vs

Mr. Kamal Pushkar
Mehra
 Mr. Kamal
Pushkar Mehra Vs Smt.
Manju Kamal Mehra

RESPONDENT

Date of Decision: July 18, 2009

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 " Section 13(1A), 18, 18(1), 18(2)#Hindu
Marriage Act, 1955 " Section 10, 11, 12, 13, 14

Citation: AIR 2010 Bom 34 : (2009) 111 BOMLR 3535 : (2010) 7 RCR(Civil) 1907

Hon'ble Judges: S.J. Vazifdar, J; B.H. Marlapalle, J

Bench: Division Bench

Advocate: P.M. Havnur, in Family Court Appeal No. 20 of 2005 and B.P. Jakhade, in Family
Court Appeal No. 44 of 2005, for the Appellant; B.P. Jakhade in Family Court Appeal No. 20 of
2005 and P.M. Havnur in Family Court Appeal No. 44 of 2005, for the Respondent

Final Decision: Dismissed

Judgement

B.H. Marlapalle, J.

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 22nd 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 (Exhibit-23, which was replied 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 u/s 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:

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 u/s 9 of the said Act has been

passed in his favour. Whereas the wife has challenged the decree passed u/s 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 u/s 18 of the Hindu Adoptions and Maintenance Act, 1956 or u/s 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 u/s 9 of the Act in favour of the husband is sustainable and ;

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 u/s 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 cohabit 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 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 cohabitation 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 u/s 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 u/s 13(1A)

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 u/s 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 parents house and also to the daughters school. Consequently the decree

passed u/s 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 u/s 18 of the Hindu Adoptions and Maintenance Act, 1956 or u/s 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 u/s 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:

...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 Dhawan (Smt) Vs. Jawaharlal Dhawan, , on the rights of the wife to receive any maintenance either u/s 18 of Hindu

Adoptions and Maintenance Act or u/s 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 uncoded 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

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 - 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 - 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.

11. In the case *B.P. Achala Anand Vs. S. Appi Reddy and Another*, , 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 u/s 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 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.