
(2015) 04 BOM CK 0295

Bombay High Court

Case No: Family Court Appeal No. 29, 49 of 2008, Civil Application No. 21 of 2015 in Family Court Appeal No. 29 of 2008 and 2008 and Civil Application No. 351 of 2014 in Family Court Appeal No. 49 of 2008

Anil Ramchandra
Hariname

APPELLANT

Vs

Rohini

RESPONDENT

Date of Decision: April 22, 2015

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 2, Order 41 Rule 33
- Hindu Marriage Act, 1955 - Section 10, 13, 13B

Hon'ble Judges: Abhay Shreeniwas Oka, J; A.K. Menon, J

Bench: Division Bench

Advocate: Sudipto Ghosal, for the Appellant; Sanjiv A. Sawant and Sachin Kadam, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Abhay Shreeniwas Oka, J.

1. The issue arising in these two Appeals is confined to the maintenance payable to the wife and two children. With a view to appreciate the submissions made across the bar, a brief reference to the facts of this case will be necessary.

2. The marriage between the parties was solemnized on 28th February 1997 in accordance with the Buddhist rites and customs. The son Ankit was born on 15th October 1991 and the daughter Anushree was born on 29th September 1997. The daughter Anushree has an impaired vision. The husband was employed with the Air India. During the pendency of these Appeals, by virtue of the superannuation, the husband ceased to be in the employment of the Air India with effect from 31st March 2012. The wife was earlier employed with the Air India. In 1993-1994, the wife lost employment. The case of

the wife is that the daughter Anushree requires constant medical attention and she was put in a Special School. As far as the son Ankit is concerned, it is brought on record during the pendency of the Appeals that from September 2013, he secured an employment with Jet Airways and has started getting a stipend of Rs. 13,000/- per month.

3. The proceedings were commenced before the Family Court by the wife by filing a Petition seeking a decree of judicial separation under Section 10 of the Hindu Marriage Act, 1955 (for short "the said Act") on the grounds set out in the clauses (ia) and (ib) of Sub-section (1) of Section 13 of the said Act. A relief of transfer of residential flat at Andheri, Mumbai described in the prayer clause (c) to the wife was sought. The husband filed a Written Statement. In the Written Statement, apart from praying for dismissal of the Petition filed by the wife, the husband sought a decree of divorce again on the grounds set out in Clauses (ia) and (ib) of sub-section (1) of Section 13 of the said Act. He prayed for a decree granting reasonable access to meet his minor children. The prayer for divorce made by the husband was contested by the wife by filing a Written Statement to the counterclaim.

4. The Petition for a decree of judicial separation was filed by the wife on 21st January 2000. It appears from the record that on 17th October 2005, the consent terms were filed by the husband and the wife. The consent terms provided for dissolution of marriage by mutual consent, but the issue of maintenance was kept open to be decided by the Family Court. The wife applied for grant of permission for withdrawal of the consent. The said Application was rejected. The Writ Petition No. 7175 of 2006 was filed by the wife before this Court for challenging the said order. The pending proceedings were not stayed in the said Petition. When the Matrimonial Petition before the Family Court was being finally heard, the wife made a statement that she would withdraw the said Writ Petition. Accordingly, the said Writ Petition was allowed to be withdrawn. Accordingly, the wife decided to abide by the consent terms. Therefore, the learned Judge of the Family Court framed only two issues relating to the claim for maintenance made by the wife. By the impugned judgment and decree dated 26th December 2007, the learned Judge of the Family Court proceeded to dissolve the marriage by a decree of divorce by mutual consent under Section 13B of the said Act. The learned Judge directed the husband to pay maintenance of Rs. 10,000/- per month each to the wife and the son and maintenance of Rs. 15,000/- per month to the daughter Anushree. Though the Petition was filed on 21st January 2000, the learned Judge directed that the maintenance shall be payable from 1st May 2007. The learned Judge observed that due to various Applications made by the wife in the Petition filed by her, disposal of the Petition was delayed. Therefore, the learned Judge declined to grant maintenance from the date of the filing of the Petition.

5. Family Court Appeal No. 49 of 2008 has been preferred by the wife for enhancement of the maintenance. Family Court Appeal No. 29 of 2008 has been preferred by the husband praying for setting aside the decree of maintenance.

6. A brief reference to the orders passed by this Court from time to time will be necessary. After the Appeals were admitted, Civil Application No. 58 of 2008 was filed by the husband in his Appeal for stay of operation of the impugned judgment and decree. The wife filed Civil Application No. 93 of 2008 seeking enhancement of the maintenance by way of interim relief. By the order dated 4th June 2008, the Division Bench of this Court rejected both the Civil Applications.

7. Thereafter, Civil Application No. 51 of 2012 was filed by the wife in her Appeal. On 7th May 2012, a statement of the husband was recorded that though he has superannuated, he will withdraw only 40% of his retirement dues. The said statement was accepted and the Air India was directed to retain 60% of the amount payable to the husband. By the order dated 17th February 2014, a Division Bench of this Court disposed of the Civil Application No. 263 of 2013 filed by the husband and the Civil Application Nos. 51 of 2012 and 360 of 2013 filed by the wife. Operative part of the said order reads thus:

"(i) Civil Application No. 263 of 2013 is allowed to the extent that the order dated 4th June, 2008 passed by this Court in Civil Application Nos. 53 and 98 of 2008 stands modified by directing that the husband will not be liable to pay maintenance to the son Ankit with effect from 1st September, 2013;

(ii) Civil Application No. 51 of 2012 is disposed of by directing the second and third respondents therein (Air India) to deposit in this Court a sum of Rs. 10,00,000/- payable towards the retirement dues of the husband Anil Ramchandra Hariname. The amount shall be deposited by the Air India in this Court within a period of eight weeks from today. If the amount is deposited in this Court by the Air India, the same shall be invested by the Registry in Fixed Deposit with any nationalized bank. The Fixed Deposit shall be renewed from time to time till further orders. It will be open for the husband to withdraw the interest accrued on the said Fixed Deposit amount. The Air India shall permit the husband to withdraw remaining amount of retirement dues;

(iii) In the event the husband commits any default in payment of maintenance to the wife and daughter, they will be entitled to apply to this Court for seeking appropriate relief as regards the amount lying in this Court;

(iv) Civil Application No. 360 of 2013 is disposed of. However, we make it clear that prayer clause (d) is not rejected and we grant liberty to the wife to make fresh application as indicated in the order. So far as prayer clause (c) is concerned, as of today, it is not necessary to consider the said prayer on merits. Thus, prayer clauses (a) and (b) of the said application are rejected; and

(v) The appeals shall be added to the appropriate final hearing board, even if the same are not otherwise ready".

8. Thus, out of 60% of the retirement dues lying deposited with the Air India, a sum of Rs. 10 lacs was ordered to be deposited in this Court which was ordered to be invested in

any nationalized bank. The balance amount was permitted to be withdrawn by the husband.

9. On 28th January 2015, an order was passed by this Court directing the Air India to produce the record in relation to the salary and other emoluments and allowances payable to the husband during the Financial Years 2000-2001 to 2005-2006. Accordingly, the learned counsel representing the Air India has tendered an affidavit dated 23rd February 2015 of Shri Kiran Patel, the Assistant General Manager-Finance of the Air India Limited. Along with the said affidavit, copies of the necessary documents have been placed on record.

10. The learned counsel appearing for the husband has taken the Court through the pleadings and the notes of evidence. He pointed out that from 31st March 2012, the husband has no income. He invited our attention to the averments made in the Civil Application No. 21 of 2015 pointing out the amounts paid by the husband from time to time for the education of the children and for meeting the medical expenditure of the daughter. He pointed out that even for securing a job with Jet Airways, the husband paid a sum of Rs. 1,00,000/- to the son. He stated that he paid additional sum of Rs. 1,00,000/- to the son for buying a Laptop. He stated that even the fees of the Catering College and the fees of the School of the son have been paid by the husband. He pointed out that the husband has provided two split Air-conditioners in the flat occupied by the wife. He pointed out that the Respondent never produced her Bank Pass-book and other documents as directed by the learned Judge of the Family Court. He pointed out that the two industrial plots were purchased by the husband in the name of Partnership Firm in which the wife was shown as a Partner. He submitted that though the wife did not contribute anything, after the sale of the plots, an amount of Rs. 2,96,500/- was paid to the wife by the husband towards her share. He submitted that the said amount ought to have been refunded by the wife to the husband.

11. He invited our attention to the evidence of the wife. He pointed out that the wife admitted that she was staying in a Flat at "Saidham" Co-operative Housing Society Ltd., B-175, New D.N. Nagar, Andheri (West), Mumbai - 400 053, which is standing in the name of brother of the husband. He pointed out that she admitted that she was the owner of a flat at Nalasopara in Thane District having carpet area of 846 sq. ft. He pointed out that the wife has purchased the said flat on the ground floor along with an abutting garden plot. He urged that pending the Appeals, the property on which the said flat is situated has been redeveloped and in the redeveloped property, the wife has been allotted a flat. He urged that the case that the wife is drawing only a sum of Rs. 1,000/- per month towards rent from the said flat cannot be accepted. He pointed out that admittedly, the wife is holding a flat in Navi Mumbai. He pointed out that though a case is made out by the wife that she was the benami owner and the real owner of the said flat is her brother, the same has not been substantiated on evidence. He pointed out that the wife was in the employment of Air India and she got a substantial amount by way of her retirement dues. He also pointed out that admittedly, the wife is having a share in the agricultural land held

by her father. He submitted that considering the fact that the wife is an affluent person and is holding the property of her own, she is not entitled to get any maintenance from her husband. He stated that as far as the children are concerned, the husband has done everything which was required to be done for the children and now the question of payment of maintenance does not arise.

12. The learned counsel appearing for the wife urged that as far as the Flat at Nerul, Navi Mumbai is concerned, the same is in possession of the brother of the wife and she has no right, title and interest therein. He pointed out that as far as the flat at Nalasopara is concerned, the Chairman of the concerned Housing Society was examined and even his evidence will show that the rent of Rs. 1,000/- per month was being received by the wife. He submitted that at highest, the wife has an undivided share in the agricultural land held by her father, but there is no income derived by her from the said agricultural land. He pointed out that after the wife ceased to be in the employment, she had to undergo surgery on account of cancer and therefore, she was required to spend substantial amount. He relied upon the affidavit of Shri Kiran Patel, the Assistant General Manager-Finance of Air India. He submitted that apart from the salary, a large amount was received by way of allowances through vouchers both in the Indian currency and in US currency. He pointed out that the allowances paid through vouchers from the years 2002 to 2006 in US currency is 1,27,186.77 \$ and the allowances in the form of vouchers in the Indian currency for the said period is Rs. 9,32,330.63.

13. The learned counsel appearing for the wife relied upon a decision of the Apex Court dated 19th November 2014 in Criminal Appeal No. 2435 of 2014 in the case of Jaiminiben Hirenbbhai Vyas and Another v. Hirenbbhai Rameshchandra Vyas and Another. The Apex Court has held that there is no normal rule that the maintenance should be granted only from the date of the order and not from the date of the Application for maintenance. He pointed out that the Apex Court held that if the maintenance is to be granted from the date of the Application, reasons are required to be recorded by the Court. He invited the attention of the Court to the Roznama of the proceedings. He urged that an erroneous finding has been recorded by the learned Judge of the Family Court that on account of the Applications made by the wife, the proceedings were delayed. He urged that in the Writ Petition filed by the wife, there was no interim or ad-interim relief granted by this Court. He, therefore, submitted that the Family Court ought to have been granted total maintenance of Rs. 30,000/- per month from the date of the filing of the Petition. The learned counsel for the husband reiterated his earlier submissions and urged that in the Appeal preferred by the wife, there is no specific challenge regarding the denial of maintenance from the date of filing the Matrimonial Petition.

14. We have carefully considered the submissions. We have perused the record. The learned Judge of the Family Court in the impugned judgment has referred to the evidence regarding income of the husband during the two years before the date of the impugned judgment and decree. In Paragraph 11 of the judgment, the learned Judge has noted that the husband admitted that his taxable income from the salary and flying allowances is to

the tune of Rs. 10,00,000/- per year. He observed that for the year 2006-2007, the income of the husband was Rs. 11,50,000/-. The learned Judge of the Family Court, therefore, came to the conclusion that the income of the husband was Rs. 85,000/- per month. Based on the said income, the learned Judge granted maintenance of Rs. 10,000/- per month each to the wife and the son. He granted an amount of Rs. 15,000/- per month to the daughter considering that she is born visually impaired and therefore, needs higher amount for the purposes of medical treatment, education etc. As stated earlier, the maintenance has been granted from 1st May 2007 though the Petition was filed by the wife on 21st January 2000.

15. It will be necessary to make a reference to the evidence on record. In the examination-in-chief, the husband stated that he was working as Flight Purser/Manager-Cabin Crew in Air India. He stated that he was drawing the gross salary of Rs. 23,116/- and after deductions, he was getting the net salary of Rs. 12,720/-. In the cross-examination, he stated that his salary was approximately Rs. 25,000/- per month. In addition, he was receiving 11 \$ per hour as flying allowance, if he was doing flying duty. He stated that he was generally doing duty for 70 hours per month. He stated that if he stays overnight, he gets voucher of 15\$ as breakfast allowance. He stated that if he stays abroad for more than 24 hours, he receives 55\$ as layover meals allowance. He stated that after deducting the taxes, he receives Rs. 30,000/- per month towards flying allowance. He claimed that he stays with his brother and pays a sum of Rs. 10,000/- as paying guest charges to his brother. He admitted that in the year 1993, he had opened an account in a Bank in U.K. He claimed that he closed the said account about 7 to 8 years back. He admitted that though the property tax receipt of House No. 823/AA/007 at Nashik stands in his name, he was not aware about the said receipt. He stated that the flat in which the wife was residing was purchased by him in the year 1983 and that he transferred the same to his brother in the year 1988 or 1990. He admitted in his evidence recorded on 25th July 2007 that he received approximately 30,000\$ and Rs. 2,20,000/- approximately as flying allowance.

16. As directed by this Court, Shri Kiran Patel, the Assistant General Manager-Finance of Air India has filed an Affidavit along with the documents. The documents show the income of the husband from the Financial Year 2000-2001 to 2005-2006. It also contains a chart of allowances paid through vouchers in the Indian currency for the said period and the allowances paid through vouchers in US currency for the same period. After having read the Exhibits-A and B to the said affidavit, we find that broadly, the income of the husband was as under:

17. It is true that the allowances paid in US currency were basically for the use of the husband when he used to be abroad and, therefore, for the purposes of determination of the income for computing the maintenance, the allowances received in US currency will have to be kept out of consideration. By keeping aside the said allowance paid in US currency, the net income of the husband (including allowance in Indian Currency) after deducting the income tax, the net income of the husband per month for the Financial

Years 2001-2002 to 2005-2006 would be Rs. 44,416/-, Rs. 54,781/-, Rs. 69,071/-, Rs. 82,321/-, Rs. 68,012/- and Rs. 82,997/- respectively. As far as the retirement dues received by the husband are concerned, in the Paragraph 7 of the reply to the Civil Application No. 351 of 2014, the husband has stated the total retirement dues with arrears received from Air India were Rs. 37,33,562.06. As pointed out earlier, out of the said amount, a sum of Rs. 10 lacs is lying deposited in this Court and the balance amount has been received by the husband.

18. Before we go to the quantum of maintenance, it is necessary to consider the reasons recorded by the learned Judge of the Family Court for not granting maintenance from the date of the filing of the Petition which is 21st January 2000. The reason given by the learned Judge is that the wife delayed the disposal of the Petition. Even assuming that the said reason is correct, that was no ground to deny the maintenance to the children from the date of filing of the Petition. In any event, the husband was under an obligation to maintain the children, irrespective of the fact whether a Petition was filed or not. Till the disposal of the Petition by the learned Judge of the Family Court by the impugned decree, both the children were minor.

19. As far as the aspect of delay is concerned, we have carefully perused the Roznama of the proceedings of the Family Court. The learned Judge in the impugned judgment and award has observed that repeatedly the wife made Applications to the Family Court and filed a Petition in this Court which resulted into the delay.

20. The husband filed Written Statement at Exhibit-46 on 21st January 2003. On 2nd July 2003, the wife filed Written Statement (Exhibit-47) to the counter-claim. On 5th August 2003, the issues were framed. We must also note from the roznama what transpired before the pleadings were complete.

21. We must note here that on 22nd November 2000, as both the husband and the wife were absent, the Petition was dismissed for non-prosecution. Prior to the said date, the Petition was fixed on 24th October 2000 when the Family Court directed that the Petition filed by the wife will proceed without Written Statement. It appears that the Miscellaneous Application No. 20 of 2001 was immediately filed by the wife. On 11th February 2002, the Petition filed by the wife was restored and thereafter, the parties were referred to the Marriage Counselor. Prior to the dismissal of the Petition, on 5th September 2000, the parties filed consent terms before the Marriage Counselor. On 30th October 2002, the Application for interim maintenance filed by the wife was allowed. From 26th June 2000, the total interim maintenance of Rs. 10,000/- was granted (Rs. 3,500/- per month each for the children and Rs. 3,000/- per month for the wife).

22. As stated earlier, the Written Statement to the counterclaim was filed on 2nd July 2003. The issues were settled on 5th August 2003. On 24th September 2003 and 14th November 2003, though the wife was present, the husband was absent. On 12th February 2004, the husband applied for adjournment. The affidavit-in-lieu of the

examination-in-chief was filed by the wife on 12th May 2004. On the next date i.e. 24th June 2004, several documents were exhibited after hearing the parties. On 2nd September 2004, the learned Principal Judge of the Family Court recorded in the roznama by an order that both the parties have agreed to take divorce by mutual consent. The learned Principal Judge, therefore, purported to pass a decree of divorce under Section 13B of the said Act. The learned Principal Judge recorded that the parties have agreed that the custody of both the children shall be with the wife with the visitation right to the husband. The learned Principal Judge recorded that the issue of maintenance is not settled and for that purpose, the learned Principal Judge referred the parties to the Marriage Counselor. The order dated 22nd September 2004 records that the parties agreed that the maintenance amount shall be decided by the Court based on the respective affidavits of evidence. The learned Principal Judge directed the wife to produce documentary evidence to show that the consideration for the flat at Nerul, Navi Mumbai has been paid by her brother.

23. On 14th March 2005, the husband was absent. On 9th May 2005, the wife was absent. On 16th August 2005, the husband was absent though the wife was present. Certain documents were exhibited on 17th October 2005. On 19th December 2005, the evidence of two witnesses examined by the wife was recorded. On 19th January 2006, the evidence of a witness of the husband was recorded. On 3rd March 2006, the wife applied for grant of time for change of Advocate. On the next date i.e. 3rd April 2006, the wife applied for withdrawal of her consent by making an Application at Exhibit-125. On 24th July 2006, the said Application was rejected. On 24th August 2006, the husband applied for time. On 22nd September 2006, on the Application made by the wife, a last chance was granted to the wife to proceed with the matter. On 16th October 2006, the wife applied for stay of the proceedings. That Application was rejected on the same date. On that date, an Application for amendment of the Petition was made by the wife. That Application was rejected on 20th November 2006. On 21st November 2006, again an Application was made by the wife for stay which was rejected on the very date. On 12th December 2006, the wife was absent. On 21st December 2006, an adjournment Application was made by the wife, but her cross-examination by the Advocate for the husband was recorded. On 8th January 2007, the Advocate for the husband further cross-examined the wife. On 31st January 2007, an Application for adjournment was made on the ground that the Writ petition filed by the wife was before this Court. On 17th April 2007 and on 8th May 2007, further cross-examination of the wife was recorded. On 16th July 2007, an Application for adjournment was made by the Advocate for the husband as the husband was absent. On 25th July 2007, the cross-examination of the wife was completed. Recording of evidence continued on 8th August 2007. On 16th October 2007, the arguments of the wife were partly heard when the Advocate for the husband as well as the husband was absent. On 17th October 2007, the learned Judge of the Family Court started dictating the judgment. The Advocate for the wife interrupted the dictation of the judgment and stated that he was desirous of applying for the recasting the issues. Accordingly, the learned Judge adjourned the matter till 18th October 2007

when an Application was made by the wife for recasting of the issues. On 15th November 2007, adjournment was sought by the husband. On 29th November 2007, the Application for recasting of the issues was rejected. On 12th December 2007, the husband and his Advocate were absent. On 19th December 2007, the husband was absent. On 26th December 2007, the impugned judgment was delivered in the open Court. We must note here that against the order rejecting the Application for withdrawal of the consent recorded in the consent terms, a Writ Petition was filed by the wife which was withdrawn on 28th August 2007. Admittedly, there was no stay granted in the said Writ Petition.

24. It is true that the Petition filed by the wife was dismissed for non-prosecution but was immediately restored. At one stage, the Family Court had passed an order directing that the Petition will proceed without Written Statement of the husband.

25. As far as the Application for withdrawal of the consent is concerned, it can be said that by making the said Application, the proceedings were delayed. Under the order dated 2nd September 2004, a decree of divorce under Section 13B of the said Act was purportedly passed by the learned Principal Judge of the Family Court and, therefore, making an Application on 3rd April 2006 for withdrawal of the consent terms was hardly a remedy. After the dictation of the judgment was commenced by the learned Judge of the Family Court, on 17th October 2007, an Application for recasting of the issues was made by the wife and, therefore, the judgment was delayed till 26th December 2007. However, we must also note here that as stated earlier, on number of occasions, even the husband applied for time. On some occasion, he was absent. Though the husband caused appearance in the Petition on 18th April 2000, the Written Statement was filed on 21st January 2003. Therefore, it can be said that if there was a delay in disposal of the Petition, both the parties have contributed to the delay and, therefore, there was no reason to deny maintenance to the wife from the date of filing of the Petition before the Family Court. Therefore, maintenance will be payable to the wife and children from the date of filing of the Petition which can be taken as 1st February 2000.

26. Now we come to the contention regarding availability of the source of income to the wife. As far as the amount received from Air India by the wife is concerned, it appears that there was an inquiry initiated against her and in the year 1993-1994, she was removed from the employment. In her evidence, she has stated that in the year 2000, she received a sum of Rs. 1,80,000/- from the Air India towards her retirement dues. She stated that thereafter, she underwent a surgery breast cancer for which she incurred the expenditure. The amount received by the wife in the year 2000 towards her dues from her employment cannot be a ground to completely deny the maintenance from 2000 as admittedly she was not employed atleast from the year 1993-1994. Nevertheless, it is a factor to be considered.

27. As far as the Flat at Nalasopara is concerned, Shri Gajanan Dattatray Shivalkar, the Chairman of Chandaresh Jyoti Co-operative Housing Society was examined by the husband. He deposed in the examination-in-chief that for two years, the wife had given

the flat on leave and license basis for the compensation of Rs. 1,000/- per month. He deposed that the market value of the flat was Rs. 2,50,000/-. This is the deposition of the witness examined by the husband.

28. As regards the Flat at Nerul, Navi Mumbai is concerned, the husband examined one Shri Shaukat Abdulla Mukhri who was the President of the Friends" Apartments Owners Association. He stated that the Room No. 2 in Building No. 15 is an independent flat having an area of 400 sq. feet. He stated that on account of the availability of the additional FSI, by making addition construction, one additional room was made available to each member. In his deposition recorded in February 2006, he stated that the said Flat/Room No. 2 was in the name of the wife which was transferred by her two months back in the name of her brother. He stated that the market value of the said flat was Rs. 5,00,000/- to Rs. 6,00,000/-. We have already referred to an order passed by the learned Judge of the Family Court directing the wife to produce the documents showing that the consideration for acquiring the said flat was paid by her brother as her contention was that her brother was the real owner of the said flat. The wife did not produce any evidence in that behalf. Thus, this Court will have to proceed on the footing that the wife is the owner of the said flat though she is not deriving any income from the said flat as her brother is in occupation of the same. As far as the agricultural land held by the wife is concerned, in the cross-examination, the wife stated that her father was the owner of 65 acres of land in Taluka - Niphad, District - Nashik. She admitted that after her father's death, she has a share in the property. She, however, denied the correctness of the suggestion that after the demise of her father, the land was partitioned and she received her separate share. She stated that her brother was looking after the said land. She denied the suggestion that from the two flats and the agricultural land, she was getting the income of Rs. 35,000/-.

29. There is nothing on record to show that the wife is deriving any income from the agricultural land held by her father. As far as the flat at Nalasopara is concerned, the wife has stated in her cross-examination that the carpet area of the said flat is 846 sq. feet and the same is on the ground floor. She stated that she acquired the said flat along with the garden plot abutting the said flat. As stated earlier, Shri Shivalkar, who is the Chairman of the Chandaresh Jyoti Co-operative Housing Society at Nalasopara was examined by the husband on 19th December 2005. He stated that the market value of the said flat was only Rs. 2,50,000/-. The said flat is in Nalasopara in District -Thane. He stated that it can fetch license fee of Rs. 1,000/- per month.

30. As far as the quantum is concerned, the minimum net income of the husband after deduction of the Income Tax for the Financial Year 2000-2001 was about Rs. 44,000/-. This is apart from the allowance paid to him in US currency. Thereafter, the net income fluctuated from Rs. 54,781/- to Rs. 82,947/- per year till the Financial Year 2005-2006 (exclusive of the allowance paid in US currency).

31. As far as the daughter Anushree is concerned, there is no dispute that she is visually impaired from the birth. The wife stated that the daughter Anushree is under treatment from 23rd December 1997 of Dr. S. Natarajan, Medical Director of Aditya Jyot-Eye Hospital at Dr. Ambedkar Road, Dadar T.T., Mumbai. She stated that she has to incur lot of expenditure on medical treatment of the daughter. About the disability of the daughter, there is no dispute. In fact, in the Civil Application No. 21 of 2015 filed by the husband, he has come out with a case that he had paid certain amounts to the teacher for his daughter's Braille lessons. When the Petition was filed by the wife, the age of the daughter was 3 years and when the Petition was decided, her age was about 10 years. Considering the salary and allowances payable to the husband from the year 2000 and considering the disability of the daughter, the maintenance of Rs. 15,000/- per month fixed from 1st May 2007 cannot be said to be unreasonable. Considering the income of the husband, from the date of filing of the Petition till 1st May 2007, the maintenance deserves to be granted to the daughter at the rate of Rs. 10,000/- per month. As far as the son Ankit is concerned, his age at the time of filing of the Petition before the Family Court was about 9 years and when the Petition was decided, his age was 15 years. Therefore, considering the income of the husband, the maintenance at the rate of Rs. 10,000/- per month from 1st May 2007 is very reasonable. The maintenance at the rate of Rs. 6,500/- per month can be reasonably granted to the son from the date of the filing of the Petition till 1st May 2007.

32. One of the submissions canvassed by the learned counsel appearing for the husband was that in the Memorandum of Appeal preferred by the wife, there is no specific ground taken regarding the denial of maintenance amount from the date of filing of the Petition i.e. 21st January 2000. The said argument is a very hyper-technical which deserves to be rejected. In any event, in view of Rule 2 of Order XLI of the Code of Civil Procedure, 1908, the Appellate Court can grant leave to an Appellant to urge grounds which are not set out in the Memorandum of Appeal. In the facts of the case, when the Appeals were adjourned on the earlier dates, there was sufficient notice to the Advocate for the husband that the said issue will be agitated and the Advocate for the husband has been heard on the said issue. In any event, the Appellate Court has more than sufficient power under Rule 33 of Order XLI of the Code of Civil Procedure, 1908 to pass a decree which ought to have been passed by the Court of the first instance.

33. Considering the fact that the income of the husband in the year 2006-2007 was more than Rs. 10,00,000/-, the maintenance at the rate of Rs. 10,000/- per month fixed for the wife from 1st May 2007 is certainly reasonable even after considering that she has some income from the flat at Nalasopara. Considering the fact that the wife is having two flats, one in Nalasopara and another in Nerul, Navi Mumbai, from the date of filing of the Petition, she will be entitled to the maintenance at the rate of Rs. 5,000/- per month from the date of filing of the Petition before the Family Court.

34. As far as the flat in which the wife and children are residing is concerned, the husband admitted that he purchased the said flat. He claims that he transferred the said

flat to his real brother. However, nothing is brought on record to show that whether her brother has paid the consideration for the said flat. His case is that he is paying Rs. 10,000/- per month to his brother as paying guest. Apart from the fact that this case cannot be believed, the brother has not been examined as a witness.

35. We have already pointed out that even according to the case of the husband, on superannuation, he received the total amount of Rs. 37,33,562.06. The husband claims to have paid a substantial amount towards maintenance. The superannuation of the husband from 31st March 2012 is no ground to deny maintenance as apart from the retirement dues, he must be having his own savings as he was in the employment for a long time. Moreover, from 1st September 2013, he is not liable to pay maintenance to the son.

36. Before we part with the judgment, we must make it clear that we have not made any adjudication on the question of the alleged right of the wife to occupy the flat which she is occupying today and all the issues in that behalf are kept open.

37. Hence, we pass the following order:

ORDER:

"(a) Family Court Appeal No. 29 of 2008 filed by the husband is dismissed with no order as to costs;

(b) Family Court Appeal No. 49 of 2008 filed by the wife is hereby partly allowed by modifying the impugned decree in the following terms:

(i) The Respondent-husband in the said Appeal shall pay to the Appellant-wife maintenance at the rate of Rs. 5,000/- per month from 1st February 2000 till 1st May 2007. From 1st May 2007, the Respondent husband shall pay maintenance at the rate of Rs. 10,000/- per month to the wife as directed under the impugned judgment and decree;

(ii) The Respondent husband shall pay maintenance at the rate of Rs. 6,500/- per month for the son Ankit from 1st February 2000 till 1st May 2007. From 1st May 2007, the Respondent husband shall pay maintenance for the son Ankit at the rate of Rs. 10,000/- per month till 1st September 2013;

(iii) The Respondent husband shall pay maintenance at the rate of Rs. 15,000/- per month for the daughter from 1st February 2000 onwards;

(iv) The Respondent husband shall be entitled to adjust the interim maintenance paid as per the orders of the Family Court as well as this Court towards the maintenance payable in terms of the modified decree;

(v) The Registrar (Judicial-II) after hearing the parties shall calculate the arrears of maintenance payable in terms of the modified decree;

(vi) The maintenance payable to the children shall be payable to the wife;

(vii) The computation of the amount payable by the Respondent husband shall be made within a period of three months from today. The amount of arrears payable to the wife, son and daughter shall be paid to the wife from the amount of Rs. 10 lacs with interest accrued thereon, if any, lying deposited in this Court;

(viii) After making payment of the arrears, the balance, if any, shall be paid over to the Respondent husband;

(ix) In the event the amount of Rs. 10 lacs and interest accrued thereon is not sufficient to take care of the arrears, the balance amount shall be paid by the Respondent husband to the Appellant wife within a period of six months from today;

(x) The maintenance payable hereafter shall be directly transferred by the Respondent husband to the Bank Account of the Appellant wife. The Advocate for the Appellant wife shall furnish necessary details of the Bank Account of the Appellant wife to the Advocate for the Respondent husband within a period of one month from today;

(xi) In the event, the wife is required to incur higher expenditure on the medical treatment of the daughter, she will be entitled to apply to the Family Court for appropriate relief;

(c) The husband shall pay costs of Rs. 15,000/- to the wife in Family Court Appeal No. 49 of 2008."