

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CRIMINAL APPLICATION No. 1473 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the Civil Judge?

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PRATIBHA DINESHKUMAR VANIA & 1 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR BK DAMANI for Applicants
 MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent No.1
 MR SIKANDER SAIYED for Respondent No.2

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 31/08/2007

ORAL JUDGMENT

1. **Rule.** Mr.M.R.Mengdey, learned APP waives service of rule on behalf of respondent No.1. Mr.Sikander Saiyed, learned Advocate waives service

of rule on behalf of respondent No.2. With the consent of the learned Advocates appearing on behalf of respective parties, the matter is taken up for final hearing today.

2. Present application has been filed by the petitioners - original applicants under Article 227 of the Constitution of India to quash and set aside the order dated 12.07.2007 passed below Exh. No. 1 and Exh. No.10 in Criminal Misc. Application No. 2606 of 2005 passed by the learned Judge, Family Court No.4, Ahmedabad in so far as in granting interim maintenance to the petitioners i.e. Wife and minor child at the rate of Rs.2500/- per month only.

The petitioners herein - Wife and minor child has filed Criminal Misc. Application No. 2606 of 2005 before the learned Family Court, Ahmedabad for getting maintenance under Section 125 of the Criminal Procedure Code claiming maintenance from respondent No.2 - husband contending *inter-alia* that infact the respondent - husband is earning Rs.10,000/- per month and that he is serving in the Bank as Clerk and in support of the income the

petitioners have also submitted salary slip which was on record before the learned Family Court, Ahmedabad. That the learned Judge, Family Court No.4, Ahmedabad vide order dated 12.07.2007 granted interim maintenance to the petitioners at the rate of Rs.2500/- per month qua both the applicants till final disposal of the main application under Section 125 of the Cr.P.C. and further directed respondent No.2 herein to pay the same with effect from 17.10.2005. Being aggrieved and dissatisfied with the order passed by the learned Judge, Family Court No.4, Ahmedabad in granting interim maintenance at the rate of Rs.2500/- per month only, both the petitioners herein have preferred the present petition under Article 227 of the Constitution of India.

3. Mr.Damani, learned Advocate appearing on behalf of the petitioners has vehemently submitted that the learned Family Court has granted interim maintenance at the rate of Rs.2500/- per month to both the petitioners considering the income of the respondent No.2 husband at Rs.8000/- per month only, by raising presumption that income of respondent No.2 - husband can be presumed to be Rs.8,000/-. It is

submitted by him when the salary slip of respondent No.2 was very much on record before the learned Family Court, Ahmedabad showing gross salary of respondent No.2-husband at Rs.11,955/-, there was no question of raising presumption that respondent No.2 might be earning Rs.8000/- per month. It is submitted that the basis for awarding interim maintenance at Rs.2500/- only itself is wrong in view of salary slip of respondent No.2-husband. Therefore, it is requested to allow the present petition by suitably modifying and enhancing interim maintenance considering income of respondent No.2-husband at Rs.11,955.86ps.

4. On the other hand, Mr.Sikander Saiyed, learned Advocate appearing on behalf of respondent No.2 though not disputing the salary slip and salary mentioned in the salary slip has submitted that the learned Judge, Family Court has granted interim maintenance only and the main application is yet to be decided on merits by the learned Family Court. In view of above this Court may not interfere at this Stage more particularly, considering the nature of order i.e. interim maintenance. It is submitted that

all the aspects can be considered at the time of final disposal of main application under Section 125 of the Cr.P.C. Therefore, it is requested to dismiss the present petition.

5. Heard the learned Advocates appearing on behalf of the respondent parties.

6. At the outset it is required to be noted that respondent No.2 - husband is serving as Clerk in State Bank of Saurashtra and as per the salary slip of January 2007, his gross salary is Rs.11,955.86ps, out of which Rs.1814/- is deducted towards P.F. and Rs.1100/- is deducted towards festival loan. Now so far as the deduction of P.F. and festival loan is concerned, they can be said to be investment and therefore, the same is required to be considered in total income of respondent No.2-husband. Only those deduction which are compulsory such as Professional Tax, Income tax etc., are to be excluded for the purpose of considering the salary for awarding maintenance. Under the circumstances, even considering the salary of respondent No.2 - husband at Rs.11,955.86ps in the month of January, 2007, and

though the salary slip was before the learned Family Court, Ahmedabad, the learned Family Court, Ahmedabad has raised presumption that income of respondent No.2-husband can be presumed to be Rs.8,000/- per month. When conclusive proof of salary was before the learned Family Court, Ahmedabad by way of salary slip which has not been disputed by respondent No.2, there was no question of raising any presumption by the learned Family Court with regard to income of respondent No.2- husband. Instead of presuming that income of respondent No.2 might be Rs.8000/- per month, the learned Family Court straightway ought to have considered the income of respondent No.2 at Rs.11,500/- per month. In spite of salary slip showing income of respondent No.2 at Rs.11,955.86ps per month, the learned Family Court has awarded interim maintenance at Rs.2500/- per month to both the petitioners i.e. Wife and the Child. Under the circumstances, the basis for awarding interim maintenance itself is incorrect. Even while considering the interim maintenance, the learned Family Court ought to have considered salary mentioned in the salary slip at Rs.11,500/- per month

(after deducting taxes) and ought to have passed the order of interim maintenance considering the said amount. This Court is conscious of the fact that impugned order passed by the learned Family court is interim maintenance. Still when the basis for granting interim/awarding maintenance itself is incorrect and/or by raising presumption which was not warranted inspite of conclusive proof of salary slip on record and considering the fact that only Rs.2500/- is awarded to Wife and Child as interim maintenance, this Court is required to interfere with the said order as it will be very difficult for the petitioners to maintain themselves in these hard days and considering price rise and standard of living etc.

7. Under the circumstances, when salary slip was already on record suggesting income of respondent No.2 at Rs.11,955.86ps per month and still the learned Family Court has considered the income at Rs.8000/- per month and thereby awarding interim maintenance at Rs.2500/- per month only, the said order is required to be interfered at the hands of this Court in exercise of powers under Article 227 of

the Constitution of India. Considering the salary/income of respondent No.2-husband i.e. Rs.11,955.86ps (in the month of January 2007 which might have increased thereafter), the petitioners are entitled to atleast Rs.4500/- per month by way of interim maintenance. To that extent the impugned order passed by the learned Family Court requires to be modified.

8. For the reasons stated above, impugned order dated 12.07.2007 passed by the learned Judge, Family Court No.4, Ahmedabad below Exh.1 and Exh.10 in Criminal Misc. Application No. 2606 of 2005 in awarding interim maintenance to the petitioners at Rs.2500/- per month is hereby modified to the extent that the petitioners are entitled to Rs.4500/- (Rupees Four Thousand Five Hundred only) per month by way of interim maintenance from respondent No.2-husband with effect from 17.10.2005 and accordingly respondent No.2 - husband is directed to pay interim maintenance to the petitioners at Rs.4500/- per month with effect from 17.10.2005. The impugned orders passed by the learned Judge, Family Court No.4, Ahmedabad is hereby modified to the aforesaid extent.

Respondent No.2 is directed to pay interim maintenance accordingly and clear the arrears within a period of 1(one) month from today and continue to pay interim maintenance at Rs.4500/- per month to the petitioners till final disposal of Criminal Misc. Application No.2606 of 2005 by the learned Family Court, Ahmedabad. Rule is made absolute to the aforesaid extent.

[M.R.Shah, J.]

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