

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 267 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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 ?

DEEPAKKUMAR HASMUKHLAL JAISWAL - Appellant(s)

Versus

SANDHYABEN DEEPAKKUMAR JAISWAL - Defendant(s)

Appearance :

MR PV HATHI for Appellant(s) : 1,

MR MEHUL SHARAD SHAH for Defendant(s) : 1,

CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 31/01/2008

ORAL JUDGMENT

1. The appellant – original defendant has filed this Second Appeal under Section 100 and 101 of the Civil Procedure Code challenging the

judgment and decree dated 1.7.2007 passed by the learned Additional District Judge, Patan, in Regular Civil Appeal No.58 of 2006, partly setting aside the judgment and decree of the maintenance dated 31.1.2006 passed by the learned Second Additional Senior Civil Judge, Patan in Special Civil Suit No.33 of 2000. The learned District Judge has awarded maintenance of Rs.6,000/- as against Rs.1200/- awarded by the learned Civil Judge, Patan.

2. Heard Mr. P.V.Hathi, learned advocate appearing for the appellant and Mr.Mehul Sharad Shah, learned advocate appearing on caveat on behalf of the respondent wife. It is the case of the appellant that in 1979 the respondent wife has moved an application under Section-125 of the Criminal Procedure Code claiming maintenance and amount of Rs.400/- was awarded. She has not initiated any proceeding nor moved any application for

enhancement for about 20 years. Thereafter, in the year 2000, Special Civil Suit No.33 of 2000 was filed claiming maintenance of Rs.12000/- p.m. The Court has passed an interim maintenance of Rs.4,000/-. The said order was challenged by way of Civil Revision Application before this Court. Because of the amendment in the Civil Procedure Code, Revision was withdrawn and Special Civil Application was filed. However, this Court did not interfere in the Special Civil Application. Thereafter, Letters Patent Appeal was filed and it was also dismissed and hence interim maintenance which was awarded by the trial Court has been confirmed by this Court.

3. Despite this fact, learned trial Judge has awarded the maintenance of Rs.1200/- only while disposing of the suit which has been challenged in Appeal before the District Court by the respondent wife and the District

Court has awarded the maintenance of Rs.6,000/- p.m. from the date of filing of the suit before the trial Court.

4. It is this order, which is under challenge in the present Second Appeal.

5. Mr. P.V.Hathi, learned advocate appearing for the appellant has submitted that the learned District Judge has wrongly enhanced the maintenance of Rs.6,000/- p.m. as against the amount of Rs.1200/- p.m. awarded by the learned trial Judge. He has further submitted that the learned District Judge has not considered the evidence produced on record and decided the Appeal only on the basis of inferences. He has further submitted that the findings arrived at by the learned District Judge are without appreciating the evidence on record or without considering the submissions made by the appellant, in their proper perspective. He has also submitted

that the learned District Judge has framed only one point for determination of appeal which is in complete breach of Order 41 Rule 31 of the Civil Procedure Code. He has further submitted that the only point raised by the learned District Judge is not sufficient for disposal of an appeal filed under Section 96 of the Civil Procedure Code and he has, therefore, acted against the binding decision of this Court as well as Hon'ble Supreme Court of India. He has further submitted that the order passed by the learned District Judge is required to be interfered with by this Court inasmuch as the respondent wife has filed suit for claiming maintenance after about 24 years of their separation and after 21 years from the date of the order of the Magistrate awarding maintenance of Rs.400/- p.m. The learned District Judge has not considered that the appellant has to maintain his family and amount of Rs.6,000/- is quite on the higher

side and far in excess of the income of the appellant husband.

6. In support of his submissions, Mr.Hathi relied on decision of this Court in the case of Mahmad Ahmadbhai Vs. Fatmaben Abdulla & Ors., reported in 2007(3) GCD 2414 (Guj.), for the proposition that all matters at issue are at large before the lower appellate Court being the first Court of Appeal. Points for determination are required to be framed in accordance with Order 41 Rule 31 of Civil Procedure Code and are required to be considered and decided in accordance with law. He has further relied on the decision of the Hon'ble Supreme Court in the case of Shantilal Kesharmal Gandhi Vs. Prabhakar Balkrishna Mahanubhav, reported in (2007) 2 Supreme Court Cases 619, for the proposition that the first appellate Court being the final court of fact and law, should have made proper examination of relevant material.

Mr.Hathi has relied on the decision of this Court in the case of **Dharamsi Dahyabhai Patel vs. Devyani Dharamsi Patel, reported in 1993 GLR 34(1) 387**, for the proposition that while fixing quantum of maintenance the Court has to take into account not only the needs of person who claims maintenance but also the capacity, status, commitments and the obligations of person who has to pay it. If the husband has to maintain other persons like his parents, his own children etc, reasonable allowance for their maintenance shall have to be made.

7. Mr. Hathi has, therefore, submitted that the learned District Judge has materially erred in arriving at the conclusion and the impugned order gives rise to the following substantial question of law.

(1) Whether the learned Additional District Judge committed a substantial error of law in reversing

the judgment and decree of the learned trial Judge even though the same was passed on proper considerations as set out in sub – Section (2) of Section 23(1) of the Hindu Adoption and Maintenance Act ?

(2) Whether the learned Additional District Judge committed a substantial error of law in interfering with the discretion of the trial Court determining the maintenance amount even though the said order was not unreasonable or perverse in any manner ?

(3) Whether the learned Additional District Judge Committed a substantial error of law in determining the monthly amount of maintenance at Rs.6,000/- (i) without considering the evidence of the parties,(ii) without specifying the date from which the said amount was to be paid, and (iii) without considering the impact of the order of enhancement on the entire family of the appellant – husband ?

(4) Whether the learned Additional District Judge Committed a substantial error of law in not considering the respective evidence led by the parties, particularly, the admissions made by the respondent – wife about her source of income and in allowing the appeal only because the said judge took a different view on the facts of the present case ?

(5) Whether the learned Additional District Judge Committed a substantial error in law in allowing additional evidence solely with a view to increase the amount of maintenance and for reversing the judgment and decree of the learned trial Judge ?

8. As against submissions of Mr.Hathi, Mr.Mehul

Sharad Shah, learned advocate for the respondent wife has submitted that the learned District Judge has considered all the aspects of the matter and come to the right conclusion by awarding maintenance amount of Rs.6,000/- p.m. He has further submitted that while awarding the said maintenance the learned District Judge has considered status, position, way of life, income of the appellant husband, family circumstances and all relevant aspects of the matter. He has further submitted that the appellant husband has deserted the wife way back in 1979. Thereafter, the appellant husband has been staying with another woman and from that woman he is having three children. He is having various properties worth Rs.25 to 30 lacs in his name and his income is about Rs.5 lacs per annum. He has further submitted that even the maintenance which was awarded by the trial Court has not been regularly paid by the husband and every time the

respondent wife has to file execution proceeding. He has further submitted that the amount of Rs.4,000/- which was awarded by way of interim maintenance has become final. Despite this fact the learned trial Judge has awarded the maintenance of Rs.1200/- only, which is absolutely unreasonable, unjust and improper and hence the learned District Judge has rightly interfered in the award. He has, therefore, submitted that looking to the income, property and luxurious life of the husband, the maintenance of Rs.6,000/- awarded by the trial Court is just and proper and no interference is called for. Lastly, he has submitted that the Court has decided the Appeal on the basis of evidence produced and this being finding of fact, no question of law much less any substantial question of law arises out of the order of the learned District Judge and hence this Court should not interfere in this Second Appeal filed by the appellant husband.

9. Having heard learned advocates for the respective parties and having gone through the impugned orders passed by the trial Court as well as District Court and having considered the evidence which are produced before the Court, the Court is of the view that the judgment and decree passed by the learned District Judge is just and proper and it does not require any interference by this Court while exercising its appellate jurisdiction under Section 100 & 101 of the Civil Procedure Code. All these aspects, which have been raised before the learned District Judge have been properly considered in their true perspective. The suit was filed after 20 years only because the wife has lost shelter of her father, who expired and, thereafter, the suit was filed in 2000. Filing of suit in 2000 would not come against respondent – wife as it is otherwise beneficial to the husband because the amount

is awarded from the date of filing of the suit i.e. 2000 onwards. Even the claim made for earlier 3 years is also rejected by the trial Court and confirmed by the District Court. As far as framing of issue is concerned, the learned District Judge has framed the issue, which actually covers the entire controversy between the parties and while deciding this issue all aspects were taken into consideration and hence on this ground no fault could be found with the order of the learned District Judge that he has not properly framed the points at issue for determination. The decision of this Court in the case of Mahmad Ahmadbhai (Supra) relied on by Mr.Hathi would not help to the case of the appellant. Even the Hon'ble Supreme Court's decision in the case of Shantilal Kesharmal Gandhi (Supra) on which reliance was placed is also not rendering any assistance to the appellant as here in the present case the learned District Judge has

considered all the aspects of the matter and arrived at just and proper conclusion. Even the Gujarat High Court's decision in the case of Dharmasi Dahyabhai Patel (Supra) with regard to the quantum of maintenance would not lead any further the case of the appellant as the learned District Judge has taken into consideration the income and properties of the husband and thereafter awarded maintenance of Rs.6,000/- p.m. In that case before this Court, the maintenance amount of Rs.1500/- was reduced to Rs.1250/- and it was in 1993. If one considers the amount of Rs.1250/- in 2008, the amount of maintenance of Rs.6,000/- p.m. cannot be said to be unreasonable.

10. In the above view of the matter, the amount awarded by the District Court is just and proper and it does not call for any interference by this Court. Apart from the above discussion, while looking to the

questions framed, this Court is of the view that no question of law, much less substantial question of law arises out of the order of the learned District Judge. The Appeal therefore fails.

11. Since the Appeal is dismissed the Civil Application does not survive and it is accordingly rejected.

(K. A. PUJ, J.)

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