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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FAMILY COURT APPEAL NO. 144 OF 2013
IN
M.J.PETITION NO. A - 382 OF 2008**

Madhu Gupta]
Age 61 years, Occ: Housewife]
Residing at 504, Sheetal `A' Wing]
Swami Samarth Nagar,]
Off. Four Bungalows Andheri West]
Mumbai-400 053].. Appellant
(Ori. Respondent)

Vs.

Pravin Kumar Gupta]
Age 65 years, Retired]
Residing at 1105, 11th floor]
Panchavati C.H.S. Ltd.]
Off Yari Road, Versova]
Andheri (West), Mumbai-400 061]..Respondent
(Ori. Petitioner)

**WITH
CIVIL APPLICATION NO. 137 OF 2013
IN
F.C.A.NO. 144 OF 2013
IN
M.J.PETITION NO. A-382 OF 2008**

Madhu Gupta]
 Age 61 years, Occ: Housewife]
 Residing at 504, Sheetal `A' Wing]
 Swami Samarth Nagar,]
 Off. Four Bungalows Andheri West]
 Mumbai-400 053].. Applicant/Appellant
 (Ori. Respondent)

IN THE MATTER BETWEEN:

Madhu Gupta]
 Age 61 years, Occ: Housewife]
 Residing at 504, Sheetal `A' Wing]
 Swami Samarth Nagar,]
 Off. Four Bungalows Andheri West]
 Mumbai-400 053].. Appellant
 (Ori. Respondent)

Vs.

Pravin Kumar Gupta]
 Age 65 years, Retired]
 Residing at 1105, 11th floor]
 Panchavati C.H.S. Ltd.]
 Off Yari Road, Versova]
 Andheri (West), Mumbai-400 061]..Respondent
 (Ori. Petitioner)

WITH
CIVIL APPLICATION NO. 16 OF 2014
IN
F.C.A.NO. 144 OF 2013

Pravin Kumar Gupta]
1105, 11th floor]
Panchavati C.H.S. Ltd.]
Off Yari Road, Versova]
Andheri (West), Mumbai-400 061]
Temporarily Residing at]
40, Denzil Ave,]
St. Clair, NSW 2759,]
Sydney, Australia]..Applicant/Respondent

IN THE MATTER BETWEEN:

Madhu Gupta]
504, Sheetal 'A' Wing]
Swami Samarth Nagar,]
Four Bungalows Andheri West]
Mumbai-400 053].. Appellant (Ori. Respondent)

Vs.

Pravin Kumar Gupta]
at 1105, 11th floor]
Panchavati C.H.S. Ltd.]
Yari Road, Versova]
Andheri (West), Mumbai-400 061]..Respondent (Ori. Petitioner)

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Mrs. Mrunalini Deshmukh and Ms. Devika Deshmukh along with Mr. Mahesh Londhe and Ms. Radha Ved Advocates i/b M/s. Sanjay Udeshi and Co. for Appellant in FCA No. 144 of 2013 and Applicant in CAM No. 137 of 2013 and Respondent in CAM No. 16 of 2014

Mr. Dattatray P. Adarkar Advocate for Respondent in FCA No. 144 of 2013 and CAM No. 137 of 2013 and Applicant in CAM No. 16 of 2014

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**CORAM : SMT.V.K.TAHILRAMANI AND
SHRI. P.N.DESHMUKH, JJ.**

DATED : FEBRUARY 11, 2014

JUDGMENT: [PER SMT. V.K.TAHILRAMANI,J.] :

1 Heard the learned counsel for the appellant-wife and the learned counsel for the respondent-husband. By consent of the parties, the matter is taken up for final hearing and disposal. For the sake of convenience, hereinafter, the appellant will be referred to as "the wife" and the respondent will be referred to as "the husband".

2 This Family Court Appeal has been filed by the wife against the judgment and order dated 22.10.2012 passed in M.J. Petition No. A-382 of 2008 by the Family Court No.2, Bandra, Mumbai, whereby her counter-claim for maintenance

was dismissed. Admitted facts in this matter are that they have two children i.e. one son Anindya and one daughter. Both the children are married and they are settled abroad. The husband had filed a petition for divorce on the ground of cruelty which came to be dismissed. He has not challenged the said decision in the petition for divorce. The wife had filed counter-claim seeking judicial separation and maintenance of Rs.15,000/- per month. The husband contested the counter-claim by filing his Written Statement. The husband's petition for divorce was dismissed on 13.1.2009 by the Family Court. Thereafter, the wife adduced her evidence claiming for a decree of judicial separation and maintenance of Rs.15,000/-. On 13.8.2008, the Family Court ex parte decreed the counter-claim and accordingly decree of judicial separation was passed and the husband was directed to pay Rs.25,000/- per month as maintenance to the wife. The husband preferred Misc. Civil Application for setting aside ex parte decree passed on 13.8.2008. However, he did not challenge the decree of judicial separation and he had only prayed for setting aside the order relating to the maintenance. Misc. Civil Application was granted on 19.3.2012. Thus, the decree passed on 13.8.2008

in relation to maintenance, was set aside by order dated 19.3.2012. Thereafter, the wife led her evidence and the evidence of her son Anindya and the husband adduced his evidence.

3 It is well settled law that a wife who has no sufficient permanent source of income, can only claim and get maintenance from her husband who is having sufficient means. The burden lies on the wife to prove that the husband has refused and neglected to maintain her though he is having sufficient means. The evidence of the wife and son Anindya shows that the wife is staying separate since 2007 and the husband has not given any amount to her towards maintenance. It is an admitted fact that both the parties are staying separately since the year 2007. As the decree for judicial separation was granted in favour of the wife and the decree of judicial separation has not been challenged by the husband, on this ground the wife has a right to live separately from husband. The husband has stated in his evidence that he is staying in Australia and he is doing part-time work at Local Community College (Nepean Community College). He has

further stated that he was teaching three courses based on his skills in Sales and Computers. Each course is of 8 lecturers of 2 hours duration each. He is paid 500 Australian Dollars post-tax for the full course. His average monthly income post-tax was 400 Australian Dollars.

4 The learned counsel for the wife produced some documents to show that the husband was a C.E.O. in XL2WIN CONSULTANCY PVT. LTD. in Australia. The said business is conducted from 40 Denzil Avenue, St. Clair, NSW 2759. She pointed out that one other firm i.e. Architectural Drafting and Design Services also carries out business from the very same address which shows that the husband is connected with the said business. In order to support the claim that the husband is connected with both the businesses, she pointed out that the address of the said two businesses is the same as the residential address of the husband. As far as these documents are concerned, they were not produced before the Family Court. No evidence was led in respect to these documents. Even if the said documents are taken into consideration, they do not show the income of the respondent-husband. Hence,

these documents would be of no use to the appellant-wife.

5 In considering the prayer for maintenance, two issues have to be considered viz. (1) whether the husband has capacity to pay maintenance ? and (2) whether the wife has any source of income to maintain herself ? The evidence of the husband shows that he was earning an amount of 400 Australian Dollars per month. The wife has to prove that she does not have any permanent source of income to maintain herself. The wife is required to prove that she is not having any permanent source of income and she is unable to maintain herself. In order to prove the same, the wife has adduced her evidence and evidence of her son Anindya. It is pertinent to note that the wife has not specifically pleaded and stated in her evidence that she is not having any permanent source of income and that she is unable to maintain herself. It is further pertinent to note that she has admitted in her cross-examination in paragraph 52 that near about Rs.50 lakhs have been deposited in the Banks as Fixed Deposits. As per Section 58 of the Evidence Act, admitted facts need not be proved. Even otherwise the learned counsel for the appellant-wife has

admitted that about Rs.50 lakhs is in the name of the wife in the Bank. The evidence of the wife clearly shows that the wife has invested Rs.50 lakhs in the Banks in Fixed Deposits and she is getting interest on the said Fixed Deposits. In such case, the appellant-wife could have produced and proved the Fixed Deposit Certificates and rate of interest which she is getting. Admittedly, she has not produced the Fixed Deposit Certificates, therefore, it has not come on record that how much interest she is getting. It is an admitted fact that the wife is a senior citizen. In such case, she would get more interest than the other depositors. If 9% is held to be the rate of interest, then the wife would get Rs.4,50,000/- per year which means that she would get Rs.37,500/- per month as interest on Fixed Deposits of Rs.50 lakhs. The wife has stated in her cross-examination at paragraph 48 that she is ready to produce the Statements of Accounts of Mutual Funds standing in her name alone but she has not produced the Statements of Accounts of Mutual Funds. This shows that she has also made investments in Mutual Funds in addition to Fixed Deposits which clearly stand in her name but she has not produced the same. If she would have produced the Statements of Accounts

of Mutual Funds, then it would have gone against her, therefore, she has not produced the same. In such circumstances, an adverse inference is required to be drawn against the appellant-wife and it is required to be held that she is getting some dividends regularly from the investments made in the Mutual Funds.

6 The wife has admitted in her evidence that she is staying in Sheetal Apartment at Andheri, Mumbai. The flat in Sheetal Apartment at Andheri, according to her, was bought out of the money put in by her and her husband. The husband has another flat which is also in Andheri in Panchavati Building. The learned counsel for the respondent-husband has stated that the flat has been given exclusively to the wife and she is in exclusive possession of the same. This fact is admitted by the learned counsel for the appellant-wife. In such case, there is no question of giving rent for accommodation to the wife.

7 The learned counsel for the appellant-wife submitted that though the Family Court had held that the wife has to incur medical expenses, daily expenses, maintenance of

society etc. yet, the Family Court has not awarded any maintenance to the wife. She further pointed out that on 30.11.2013 the wife was required to undergo surgery for both knees and the expenses for the said surgery came to about Rs.10,39,000/-. She has further stated that the flat in which the wife is staying is in dire need of repairs and she has produced a copy of a letter of the Architect dated 9.1.2004 which shows that the flat needs repairs. Thus, it was submitted that the wife would be required to incur expenses in relation to the repairs of the flat also. As far as the documents relating to the medical expenses for knee replacements are concerned, the said expenses were incurred on 30.12.2013 which was after the judgment and decree was passed in the present case. The judgment and decree in the present case was passed on 22.10.2012 and the events mentioned in the documents have occurred after the judgment and decree has been passed. In view of this subsequent developments, the judgment passed by the learned Judge of the Family Court cannot be faulted. Similar is the situation in respect of the expenses for repairs of the flat.

8 It was contended on behalf of the wife that amount was siphoned off by the husband from their joint account. The said amount was about Rs.19,85,641/-. It is interesting to note that the wife herself had not made any mention about the same in her evidence. The son Anindya has made some reference to such fact, however, no witness from the Bank has been examined to prove that the husband had siphoned off such amount from the joint account.

9 The learned counsel for the appellant-wife reiterated time and again that the appellant wife was and is a home maker and she has no independent source of income. It is also an admitted fact that the wife has Rs.50 lakhs in Bank Accounts, obviously, as the wife was not earning, the said amount of Rs.50 lakhs must have come out of the husband's earning. Besides the amount of Rs.50 lakhs which is deposited in the Fixed Deposits in the name of the wife, it may be stated that the husband had deposited Rs.2,00,000/- by way of interim maintenance for the wife. The wife was allowed to withdraw the said amount. She has deposited the said amount in the Bank as Fixed Deposits which is admitted by her in her

cross-examination in paragraph 58. If really the wife was in need of money for her maintenance, then definitely she would have spent the amount and would not have invested it in Fixed Deposits in the Bank. This shows that the wife is having sufficient money for her maintenance. The wife is getting at least an amount of Rs.37,500/- per month from the Fixed Deposits. In addition, she is getting some additional amount of interest on Rs.2,00,000/- which has been invested by her which was received by her by way of interim maintenance. In addition to this amount, she is getting some amount by way of interest on the money she has invested in Mutual Funds. All these amounts are more than sufficient for her maintenance. It is seen that the wife is having sufficient permanent source of income to maintain herself.

10 The learned counsel for the respondent-husband submitted that the wife is having sufficient means for her survival and therefore, she is not entitled to get maintenance. He has placed reliance on the ratio laid down by this Court in the case of **Shehnaz Arvind Mudbhatkal Vs. Arvind Ramkrishna Mudbhatkal** reported in **2011(6) Mh. L. J. 719**.

In the said case, this Court observed that the wife was earning Rs.45,000/- per month as salary and she has received Rs.11 lakhs as back-wages. Her daughters were not dependent on her. Therefore, this amount is sufficient to the wife for her maintenance. This Court observed that in such case, the wife is not entitled for maintenance from the husband. In the present case, it is seen that the wife is getting more than Rs.37,500/- per month as interest. She has more than 50 lakhs in the bank. In addition, the applicant's son is providing money for her maintenance and other expenses. No one is dependent on her. Thus, the facts in the decision relied upon and the facts in the present case are quite similar and the ratio would apply to the facts of the present case.

11 Looking to the evidence on record, we are of the opinion that the Judge of the Family Court has rightly held that the appellant-wife is having sufficient income for her survival and she has failed to prove that she is entitled for any maintenance. Thus, we find no merit in the present Appeal. Appeal is, therefore, dismissed.

12 In view of dismissal of the Family Court Appeal, Civil Application Nos. 137 of 2013 and 16 of 2014 do not survive and are disposed of as such.

[SHRI. P.N.DESHMUKH, J.]

[SMT. V.K.TAHILRAMANI, J.]

Kandarkar

Bombay High Court