

ADVERSE INFERENCE TO BE DRAWN WHEN INCOME OF HUSBAND DETERIORATES BY HIS OWN CHOOSING

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Abstract:

By way of this article, the author critically comments upon the existing practice of most Courts to accept the husband's current earnings as his income, for the purpose of adjudicating maintenance payable to his wife. This article specifically focuses *inter alia* on situations where husbands, deliberately avoid high paying jobs, continue to receive the same salary for several years, switch to lower paying jobs, quit a job altogether and lament that they can not find any; on the pretext to avoid paying maintenance to their wives, which often escapes the Court's notice and allows these husbands to get away with such unscrupulous practices. The author seeks to suggest certain additional factors which may be considered by the judiciary while assessing the husband's income in order curb such practices.

INTRODUCTION:

At the outset, the author is keen to emphasise that with respect to the laws and jurisprudence of maintenance, the objective ought to be that a balance is struck between both spouses. In furtherance to the same, the author, through the present article, is desirous to address the issue of husbands' suppression of income for the purpose of avoiding payment of maintenance to their wives.

Matrimonial disputes often seem to turn even the most honest persons into unscrupulous versions of themselves. A plethora of courts have observed how husbands tend to actively suppress their true incomes as soon as their liability to financially maintain their wives comes into the picture. The observations of the Hon'ble High Court of Delhi in the judgment titled "*Vikaas Ahluwalia Vs Simran Ahluwalia*"¹ succinctly illustrates this judicial view:

*11. ... The Family Court naturally took note of all these, and the well-known fact that when matrimonial disputes surface, husbands tend to suppress their real income and even resort to asset transfers to avoid payment of legitimate dues to their wives.
15. ... Equally, and as it often the case, some guesswork is not ruled while estimating the income of the non-applicants when all the sources or correct sources are not disclosed."*

To overcome this hindrance, as a general practice courts tend to examine numerous significant indicators of the status and lifestyle of the husband and wife to assess the true income of the husband as well as the genuine requirements of the wife as accurately as possible.

LIST OF FACTORS PROVIDED BY THE INDIAN JUDICIARY FOR ASSESSMENT OF THE INCOMES OF SPOUSES:

In their assessment of the incomes and expenditures of spouses, Courts are guided by a list of factors which have been propounded by, *inter alia*, the following landmark judgments:

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¹ *Vikaas Ahluwalia Vs Simran Ahluwalia*, 206 (2014) DLT 709 (India)

*“14. The Court, in considering an application for interim maintenance has to take into consideration the financial status of the parties, the earnings and the earning capacity of both the spouses. While granting maintenance, the spouse claiming maintenance should as far as possible be kept in the same status which he or she enjoyed while being in the matrimonial life with the other spouse”*²

*12. ... The Court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband.*³

“26. Although there cannot be an exhaustive list of factors, which are to be considered in guessing the income of the spouses, but the order based on guess work cannot be arbitrary, whimsical or fanciful. While guessing the income of the spouse or to get an idea of the income and lifestyle of the parties the Court can take into consideration amongst others the following factors:

Life style of the spouse;

(ii) The amount spent at the time of marriage and the manner in which marriage was performed;

(iii) Destination of honeymoon;

(iv) Ownership of motor vehicles;

Household facilities;

(vi) Facility of driver, cook and other help;

(vii) Credit cards;

(viii) Bank account details;

(ix) Club Membership;

(x) Amount of Insurance Premium paid;

(xi) Property or properties purchased;

(xii) Rental income;

(xiii) Amount of rent paid;

(xiv) Amount spent on travel/ holiday;

(xv) Locality of residence;

(xvi) Number of mobile phones;

(xvii) Qualification of spouse;

(xviii) School(s) where the child or children are studying when parties were residing together;

(xix) Amount spent on fees and other expenses incurred;

(xx) Amount spend on extra-curricular activities of children when parties were residing together;

*(xxi) Capacity to repay loan.*⁴

Perhaps the most significant initiative towards streamlining the above mentioned list of factors, came in the form of the landmark judgment titled “*Kusum Sharma Vs Mahinder Kumar Sharma*”⁵, which was later amended in 2017⁶, wherein a comprehensive draft affidavit of assets, income and expenditure encompassing *inter alia*, the above mentioned lists of factors, was formulated by the Hon’ble High Court of Delhi and promoted to all district courts so that they may, in turn, direct

² Vikaas Ahluwalia Vs Simran Ahluwalia, 206 (2014) DLT 709 (India)

³ Vinny Parmvir Parmar Vs Parmvir Parmar, (2011) 7 SCALE 741 (India)

⁴ Manmohan Kohli Vs Natasha Kohli, decided by the Hon'ble High Court of Delhi on 6th February 2013 (India)

⁵ Kusum Sharma Vs Mahinder Kumar Sharma, AIR 2015 Delhi 53 (India)

⁶ Kusum Sharma Vs Mahinder Kumar Sharma, 2018 246 DLT 1 (India)

spouses to reveal all pertinent financial details in order to arrive at a true and accurate assessment of their income and financial needs.

It is cautioned, however, that the above – mentioned affidavit of income, assets and expenditure is not a mandatory requirement in other states of India, but is applicable only to the Courts of Delhi, as evident from the following directions contained in the said judgment:

“25. Copy of this judgment along with Annexure A be sent to Registrar General of this Court who shall send the same to all Family Courts and other Courts dealing with matrimonial cases. The format of the affidavit of assets, income and expenditure (Annexure A) be loaded in the website of the District Courts/Family Courts to enable the lawyers/litigants to download the same. 26. Copy of the order dated 18th September, 2014 as well as this judgment along with the Annexure A be also sent to the Delhi Judicial Academy to sensitize the judicial officers about the guidelines laid down by this Court.”

(Emphasis Supplied)

On account of the limited and non-uniform applicability of these guidelines in all states across the country, there exists a wide scope for guesswork and estimation in states other than Delhi, which makes it even easier for husbands in these states to suppress their true income and their actual earning capacity.

JUDICIAL GUIDELINES FOR DETERMINATION OF QUANTUM OF MAINTENANCE:

Once the net income of the respective parties is assessed, the Courts apportion a percentage of the combined income of the spouses, as maintenance to the spouse who is in need of and has petitioned for maintenance, in keeping with the guidelines in the following judgments in this regard:

Vide judgment titled “*Kulbhushan Kumar Vs Raj Kumari & Ors*”⁷ the Hon'ble Supreme Court of India held:

“In proceedings for maintenance of deserted wife High Court allowed claim of wife to monthly maintenance upto 25% and 15% for maintenance of daughter.”

Following suit, the Hon'ble Supreme Court of India reiterated its stance in this regard, by observing as under, *vide* judgment titled “*Kalyan Dey Chowdhury Vs Rita Dey Chowdhury nee Nandy*”⁸:

“16. ... Following Dr. Kulbhushan Kumar v. Raj Kumari and Anr, (1970) 3 SCC 129, in this case, it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the Respondent-wife.”

The Hon'ble Delhi High Court, *vide* its judgment titled “*Annurita Vohra Vs Sandeep Vohra*”⁹ arrived at a slightly different method of distributing the combined income of the spouses among the family members, in the following manner:

“2. In my view, a satisfactory approach would be to divide the Family Resource Cake in two portions to the Husband since he has to incur extra expenses in the course of making his earning, and one share each to other members”

Interestingly, the Allahabad High Court, having considered multiple other pronouncements in relation to the distribution of income among family members, has justified up to 50% of the husband's income being awarded as maintenance to the wife, in its judgment titled “*Veena Panda Vs Devendra Kishore Panda*”¹⁰, while maintaining that no fixed, straightjacket formula is applicable to all cases:

⁷ *Kulbhushan Kumar Vs Raj Kumari & Ors* AIR 1970 SC 234 (India)

⁸ *Kalyan Dey Chowdhury Vs Rita Dey Chowdhury nee Nandy* 2017 5 SCALE 55 (India)

⁹ *Annurita Vohra Vs Sandeep Vohra* 110 (2004) DLT 546 (India)

¹⁰ *Veena Panda Vs Devendra Kishore Panda* 2006 SCC Online All 332 (India)

“10. ... As regards quantum of maintenance it may be from 1/3rd to 50% of the income of the respondent but no rigid formula can be fixed. It may differ from case to case.”

FALLACY IN THE APPLICATION OF THE AFORESAID GUIDELINES FOR THE ASSESSMENT OF THE QUANTUM OF MAINTENANCE AS A STRAITJACKET FORMULA :

It is interesting to note that, in the entirety of the above mentioned procedure adopted by the courts, it is mostly the *present* income of the husband which is assessed as his actual income for the purpose of adjudication of maintenance payable to his wife, irrespective of the fact that the husband is suppressing his true income and/or his capacity to earn. It is understandable if the husband has been forced into lower paying jobs due to various inhibiting circumstances beyond his control, such as, *inter alia*, downsizing and lay-offs in the industry owing to the existing pandemic or otherwise, over employment prevailing in his job profile, dependants on the husband whose daily care and attention may not allow him to work a full time job, or even an artificially created adverse state of affairs where the litigations initiated by the wife against him would have genuinely decreased his chances of an increment or of being accepted for a higher paying job.

However, often times, the husband's income deteriorates by his own choosing and by his *mala fide*, deliberate actions and inactions. Not surprisingly, there is a drastic drop in the wealth of husbands immediately preceding/ during the course of matrimonial proceedings. The Hon'ble Supreme Court of India has recently observed that when estranged wives ask for maintenance, husbands start saying that they are living in penury or have gone insolvent. This is a prevalent practice in India adopted by husbands to try to avoid paying maintenance to their wives, as correctly observed by the Hon'ble Supreme Court of India recently:

“When estranged wives ask for maintenance, husbands start saying they are living in penury or have gone insolvent, the Supreme Court has observed.

The observation was made by the apex court while asking a Hyderabad based doctor working in a reputed hospital not to leave the job just because his estranged wife was seeking maintenance.”¹¹

Earlier in 2016, the Hon'ble High Court of Bombay had also given a similar finding *vide* judgment titled “*Rupal Mayur Doshi Vs Mayur Jaswantray Doshi*”¹², the relevant portion of which judgment is reproduced below for reference:

“2. ... It is obvious that in order to ensure that he is not required to pay higher maintenance to his wife and children, his income has reduced drastically.

5. We have seen that there is a tendency on the part of husbands to show that either they have no income or they have lost their job immediately after an application for maintenance is filed and all sort of defences are raised in order to ensure that they do not pay maintenance to their wife or children.”

SUGGESTIONS OF THE AUTHOR:

The author suggests that in situations where a husband has deliberately or *mala fidely* resigned from a high paying job, or has switched from the same to one which provides a lesser income, thus choosing not to be gainfully employed without cogent reasons for the same, and basis his now reduced / NIL income claims an inability to pay adequate maintenance to his wife; then the Courts must draw an adverse inference from such ill-intentioned decisions.

¹¹ “Husbands go insolvent live in penury when wives seek maintenance observes SC”, The News Scroll, Outlook, 22nd January 2019, 7.06PM <https://www.outlookindia.com/newscroll/husbands-go-insolvent-live-in-penury-when-wives-seek-maintenance-observes-sc/1463255>

¹² Rupal Mayur Doshi Vs Mayur Jaswantray Doshi, 2016 SCC Online Bom 14352 (India)

This argument finds support, to some extent, in the observations of the Hon'ble Bombay High Court expressed in the above mentioned judgment titled *Rupal Mayur Doshi*¹³, which is as under:

“4. In our view an adverse inference will have to be drawn against the husband for not showing his correct income.

5. ... It is well settled position in law that if the court comes to the conclusion that there is an attempt not to disclose the real income then adverse inference can be drawn against him”

In order to curb such *malafide* practices and to draw an adverse inference as suggested above, the author proposes, *inter alia*, the following measures:

1. The affidavit of income, assets and expenditure drawn up by the Hon'ble High Court of Delhi, or a similar affidavit, ought to be made mandatory in all states:

At present, the affidavit implemented by the Hon'ble High Court of Delhi (as described above), which provides for a number of headers that can help ensure a higher degree of accuracy in the judicial assessment of the financial status of spouses, is not universally applicable across all jurisdictions in India for the purpose of assessment of income of the spouses while awarding maintenance. It is high time, therefore, that this affidavit, or a similar one, be standardised and made universally and mandatorily applicable, and that it is followed by the parties in letter and spirit, in order to achieve uniformity in the process of adjudication of maintenance, as well as to ensure that husbands do not forum shop and attempt to establish jurisdiction in courts outside Delhi merely to avoid disclosing information as per the mandate of the affidavit given by the Hon'ble High Court of Delhi.

2. The courts may also factor the husband's engineered reduced / NIL pay while assessing his income for the purpose of determination of maintenance.

Instead of considering the husband's actual reduced / NIL pay, the courts may account for the husband's latest / last salary drawn just prior to the reduction in his income. This has been so commendably done by the Ld Family Court, Gurugram, Haryana, in the proceedings of a divorce petition in 2019, in which the author had the occasion to appear. In the said case, while determining interim maintenance payable to the wife and children, the Ld Family Court of Gurugram has held as under:

“Apparently the respondent resigned from the job immediately on suspecting the commencement of matrimonial litigation on receiving a legal notice. Otherwise also it is a usual practice that whenever there are matrimonial differences, the spouses tend to manipulate their financial status to defeat the rights of the other spouse. However the fact remains that the respondent has been earning more than Rs. 3 – 5 lakhs per month, and admittedly bearing all the expenses. ... The respondent was earning more than Rs 3 lakhs per month and there is no reason why he should not get a better or similar job with his experience. It is not digestible that the respondent left the job without any reason and without having any other avenue of earning.”

(Emphasis Supplied)

Basis the above mentioned rationale, it is evident that the Ld Family Court, Gurugram, Haryana assessed the husband / respondent's income to be his last drawn salary, while noting the respondent's capability to earn at a similar capacity even at the time of passing of the said order of interim maintenance, despite the fact that the respondent claimed to be unemployed and having no present source of income.

3. The courts may account for the future earnings of the husband by applying a standard incremental rate to his present income for assessment of the same:

The standard incremental rate, to the extent possible, being applied by the industry pertaining to the husband's field of employment, must be considered while determining the amount of maintenance to be granted, irrespective of whether such increment has been actually earned. In other words, the Courts must assess the income of the husband at his expected rate of earnings or expected incremental income receivable, had the said husband continued to be

¹³ Rupal Mayur Doshi Vs Mayur Jaswantray Doshi, 2016 SCC Online Bom 14352 (India)

gainfully employed at the same higher paying job, instead of considering his actual earnings after he voluntarily resigned from the said higher paying job. In doing so, the courts must explore the current incremental rates being offered in other companies / businesses within the industry of the husband's field of employment. The rationale behind the author's proposal is, that it is vital for the courts to understand the impossibility of a person holding the same level of employment for years on end without any increments to the salary whatsoever; with inflations in expenditure, it is naturally expected that one's income is also being enhanced.

This concept of an incremental rate has found favour in certain judgments dealing with motor vehicle accident claims. *Vide* its judgment "*National Insurance Co. Ltd vs Pranay Sethi*"¹⁴, the Hon'ble Supreme Court of India considered the statement of law in *Wells v. Wells*, and observed as under:

"46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days."

13. *With regard to the addition of income for future prospects, this Court in Reshma Kumari (supra) adverted to Para 24 of the Sarla Verma's case and held:-*

.... The standardisation of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. We approve the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more than 50 years. Where the annual income is in the taxable range, the actual salary shall mean actual salary less tax.

14. *In our view, it will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc. would remain the same throughout his life.*
(Emphasis Supplied)

CONCLUSION:

In a nutshell, the author wishes to emphasise, that it is the need of the hour to ensure that in the determination and adjudication of maintenance, the loopholes which are exploited by devious husbands for their own vested interests, especially those which allow them to easily suppress and conceal their true income, are successfully sealed. As suggested, this may be done, *inter alia*, by adopting one or more of the three methods put forth by the author in this article.

Firstly, the affidavit of income, assets and expenditure propounded by the Hon'ble High Court of Delhi, or a similar affidavit, ought to be standardised and made consistent nation-wide; it is only when husbands are made compulsorily answerable to each of the exhaustive list of entries contained in such an affidavit, that their scope of concealing material information from the concerned courts can be drastically reduced.

Secondly, as an extension of drawing an adverse inference against such husbands, the courts may also endeavour to identify the husband's income to be his latest salary drawn immediately prior to his reduced income / NIL income. In doing so, the courts will have effectively defeated the husband's ploy of using his reduced / NIL income as a cover to conceal his true income and thereby avoid paying maintenance to his wife.

Lastly, by taking into account the husband's expected annual increments while awarding maintenance, the courts can strive to ensure that the wife is adequately maintained in accordance

¹⁴ National Insurance Co. Ltd vs Pranay Sethi, 2017 16 SCC 680 (India)

with the inflations in the expenditure incurred by her; with the rise in prices over time, if the amount of maintenance received by her continues to remain stagnant, the wife may soon be in danger of reaching a state of vagrancy and destitution, which in turn would defeat the very purpose of the maintenance laws created for her benefit.