

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Rev. P. No. 132/2009**

Reserved on : 03.08.2009
Date of Decision : 22.12.2009

Jyotsana Sharda

.....Petitioner

Through: Mr. R.P. Lao, Adv.

Versus

Gaurav Sharda

..... Respondent

Through: Mr. Jai Bansal, Adv.

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**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

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| 1. | Whether Reporters of local papers can be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not ? | YES |
| 3. | Whether the judgment should be reported in the Digest ? | YES |

V.K. SHALI, J.

1. Both these criminal revision petitions, one filed by Jyotsana Sharda/wife and another by husband/Gaurav Sharda, are assailing the orders dated 1st February, 2008 passed by the learned JMIC, Gurgaon wherein he dismissed the application filed by the wife of Jyotsana Sharda for her own ad interim maintenance and the maintenance of infant child as well as the

accommodation in the matrimonial home. The second order which is assailed is dated 9th May, 2008 passed by the learned Additional Sessions Judge who dismissed the appeal of the Jyotsana Sharda against the order of the learned Magistrate on the ground of limitation and so far as the cross appeals which were filed by the husband against the order of the learned JMIC granting maintenance of Rs.10,000/- only to the minor child are concerned, the learned Judge said that the same was in far excess than which ought to have been given.

2. The facts of the case are that the Gaurav Sharda got married on 16th February, 2004. They were blessed with a son who was named Aryaman. It is alleged by the husband Gaurav Sharda that his wife lodged the false complaint with Gurgaon Police on 17th June, 2006 for physical beating given by Gaurav Sharda and his brother which ultimately culminated into filing an undertaking from Gaurav Sharda and the parents of the petitioner that they will not visit the matrimonial home. It is further alleged by the husband Gaurav Sharda that on 29th September, 2006 he was not allowed to enter the house and the respondent lodged a false complaint. On 18th November, 2006 respondent wife lodged an FIR under Sections 406/498A IPC at P.S. Gurgaon. On 5th December, 2006 Jyotsana Sharda filed a complaint under Section 23 of Protection of Women from the Domestic Violence Act, 2005 which is still pending. On 1st February, 2008 the JMIC, Gurgaon passed an order deciding the application of Jyotsana Sharda under Section 23 of Protection of

Women from the Domestic Violence Act, 2005 wherein Gaurav Sharda was directed to pay a sum of Rs.10,000/- towards the maintenance of the minor child and further he was restrained from disposing Jyotsana Sharda from house No. 502, Tower-4, Shushant Estate, Sector-52, Gurgaon. The petitioner was also restrained from creating third party interest or taking the custody of the minor child.

3. The wife Jyotsana Sharda feeling aggrieved by the order of the JMIC, Gurgaon filed an appeal under Section 29 of the Protection of Women from the Domestic Violence Act, 2005 against the said order raising a grievance that the grant of interim maintenance to her was wrongly rejected by the learned Magistrate and that she was having no means to maintain herself as she was unemployed, and therefore, was entitled to maintenance. It may be pertinent to mention here that so far as the minor child Aryaman is concerned, the learned Judicial Magistrate had directed a payment of Rs. 10,000/- as interim maintenance to minor child although there was no clear cut evidence with regard to the earnings of Gaurav Sharda brought on record however his averment to the effect that he is earning Rs.40,000/- per month were taken as a basis for passing such an order.

4. Gaurav Sharda/husband also felt aggrieved by the order of the JMIC fixing up the interim maintenance at Rs.10,000/- per month in favour of his son. It was his case that the interim maintenance be reduced as he had limited resources from which

he had to maintain not only his parents but also to pay the installments of the loan which he had taken in respect of the flat. The learned Additional Sessions Judge considered both these appeals together and rejected the appeal of the wife of Jyotsana Sharda on the ground of limitation as it was filed with a delay of 52 days for which allegedly no explanation was furnished by her was not accepted.

5. So far as the appeal of the husband Gaurav Sharda is concerned, that was also dismissed on the ground that there is no merit in the same. The order of the learned Additional Sessions Judge did not satisfy either of them and both of them preferred revision petition against the order of the learned Magistrate and the learned Additional Sessions Judge in Punjab and Haryana High Court. However, as the wife Jyotsana Sharda filed a petition in Supreme Court she was able to get both the revision petition apart from other matters pending in the Court of District Court Gurgaon transferred to Delhi. This is how the main matter of divorce etc. were transferred to AD&SJ, Patiala House Courts, Delhi and the present revision petition bearing Nos. 132/2009 and 133/2009 filed by husband and the wife which have come to be assigned to the High Court.

6. I have been informed that as on date there are 10 cases pending between the parties in different forums and are highly contested. The intervention of the Court to settle the dispute between the parties amicably by referring them to Mediation and Conciliation Centre has also failed to yield any positive result.

7. I have heard the learned counsel for the parties and perused the record.

8. The main contention of the learned counsel for Gaurav Sharda is two-fold. Firstly, the contention of Mr. Lao is that the husband is earning approximately Rs.40,000/- per month from which he has to repay the installments of loan in respect of the flat which is presently fully under the occupation of his wife Jyotsana Sharda though it is owned jointly by Gaurav and his mother and he has to maintain his parents also. Therefore, the grant of Rs.10,000/- per month as interim maintenance in favour of an infant is highly excessive. It was also urged by him that the respondent Jyotsana Sharda in order to show high expenditure of the infant child has shown the amount in the receipts purported to have been received from the school where he was admitted, which are all interpolated. In this regard, the learned counsel has drawn my attention especially to the receipt which was issued for a sum of Rs. 21,100/- dated 7th May, 2008 wherein the amount of Rs.3,000/- has been added subsequently by the respondent. It was also urged by Sh. Lao that so far as the cross petition for grant of interim maintenance by the wife is concerned, that is untenable in law because she has admittedly been working with different banks like City Bank and HSBC Bank and even with Taj Hotel where she has voluntarily resigned and thereafter she is doing a lucrative trading business in the shares for which documentary proof has been placed by the husband on record. It is alleged that she is earning sufficiently

well to maintain not only herself but also her minor child. Next, it was contended that if a sum of Rs.10,000/- has been fixed by way of an ad interim maintenance by the learned JMIC the same is to be shared by Gaurav Sharda and his wife Jyotsana Sharda because both of them have independent source of income and can maintain themselves.

9. This argument was refuted by the learned counsel for the Jyotsana Sharda/wife who stated that the maintenance of the infant was essentially primary responsibility of the husband father. It was also stated by the learned counsel for Jyotsana Sharda that presently she is unemployed as she has to take care of her infant child. It was also denied by her that she was making profit by trading in shares to which the learned counsel said admittedly is in recession presently, and therefore, the learned counsel justified the grant of ad interim maintenance @ Rs.10,000/- per month not only the infant child but herself also at the same rate.

10. The learned counsel contended that the respondent Jyotsana Sharda was unemployed at present, therefore, she must be granted interim maintenance and the Judicial Magistrate had fallen into an error by rejecting the prayer of Jyotsana Sharda for grant of interim maintenance and similarly the learned Additional Sessions Judge, Gurgaon had also fallen into error by not condoning the delay in filing the appeal and disposing of the same on merits.

11. The second submission which has been vehemently urged by the learned counsel for Jyotsana Sharda was to the effect that the respondent Jyotsana Sharda is presently occupying the house No. 502, Tower-4, Shushant Estate, Sector-52, Gurgaon which admittedly was the property jointly owned by the Gaurav Sharda and his mother. It was contended that the Gaurav Sharda and his mother intended to go to the flat in question but are being restrained from doing so without their being the Court order. It was contended by the learned counsel for Gaurav Sharda that Jyotsana Sharda may have a right of residence in the matrimonial home or in an accommodation owned by her husband or by the joint family of which her husband is a member, but she does not have any right to stay in a accommodation which is owned by her mother in law as she is not under any obligation to provide the residence to her. It was contended by the learned counsel for Gaurav Sharda that he is ready to provide an accommodation to Jyotsana Sharda by hiring a premises to which she can shift while as they will pay the rent, and the electricity bills, water charges to the landlord. Alternatively it was contended that the property could be either divided half and half and she could share one half of the said property while the other half could fall to the share of Gaurav Sharda and his mother after partition. The third alternative given by the petitioner husband is that the property in question should be itself be disposed of and wife gets one fourth share

because she at best is entitled half share in the share of her husband.

12. This argument was contested by the learned counsel for the Jyotsana Sharda on the ground that the property may be in the name of the mother but actually the entire sale consideration has been received by the son. It is alleged that the mother was only at best benami owner of the house of the property. It was also pointed out that Gaurav Sharda had himself given in writing before the police in Sector 29 Gurgaon when the Jyotsana Sharda was subjected to physical beating that neither he nor his family members or any relations would ever visit the matrimonial home to dislodge Jyotsana Sharda forcibly.

13. I have considered the submissions advanced by the learned counsel for Jyotsana Sharda as well as the learned counsel for Gaurav Sharda. I have also gone through the record.

14. The first grievance of Jyotsana Sharda/wife is that the learned Additional District Sessions Judge has arbitrarily and erroneously dismissed the appeal of the appellant on the ground that it is time barred. A perusal of the impugned order passed by the learned Additional Sessions Judge holding the appeal of the Jyotsana Sharda/wife as time barred is liable to be set aside. The learned Additional Sessions Judge has rejected the appeal of Jyotsana Sharda on the ground that she has not explained each and every day's delay in filing the appeal. The total number of days delay which was there in the filing of appeal of the Jyotsana

Sharda/wife was to the tune of 52 days. No doubt, originally the Apex Court in **Ram Lal Vs. Rewa Coalfield** AIR 1962 SC 351 had held that while seeking condonation of delay under Section 5 of the Limitation Act the application must not only show as to why he did not file the appeal on the last day of limitation but he must explain each days delay in filing the appeal. The later judgments of the Apex Court have considerably diluted this requirement of explaining each days delay by a party. The latest trend and the ratio cases which the Apex Court has laid down in the judgments is that the Court must adopt a liberal approach rather than pedantic approach while doing so. It must see the bonafides of the person who is preferring the appeal rather than seeing the quantum of delay which has been occasioned. Reliance in this regard can be placed on **Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors.** AIR 1987 SC 1353

15. Coming back to the facts of the present case the quantum of delay which is occasioned in the instant case is just 52 days. The Jyotsana Sharda/wife has given her reason for delay as misplacing of the papers and lack of communication with the counsel. The learned Additional Sessions Judge has rejected this explanation by observing that the explanation which has been given by the Jyotsana Sharda is contradictory and secondly Jyotsana Sharda had spoken to her counsel on telephone and got the appeal prepared afresh and got it filed in Court. With utmost respect to the impugned order I feel that it is not the job

of the Court to advise as to what ought to have been done or ought not to have been done by a party. The Court has to only see as to whether the explanation which is furnished by a party for approaching the Court in after a delay whether the explanation given by him is genuine one or not and secondly the Court must not adopt an approach to defeat the substantive right of a party and ignore the consideration of the merits of the appeal on flimsy technicalities because procedural laws should not be resorted to defeat the rights of the parties to get their appeal considered on merits. In the light of these facts, I am of the opinion that the learned Additional Sessions Judge was not correct in rejecting the appeal of the Jyotsana Sharda/wife against the order of the learned Magistrate whereby the maintenance has been be denied to her own self and to that extent the impugned order is set aside.

16. Normally speaking after holding that the appeal was wrongly dismissed by the learned Additional Sessions Judge on the ground of limitation, the matter would have been remanded to the learned Appellate Court for consideration of the appeal afresh. However, I feel in the instant case that will be a futile exercise on account of the fact that much time has elapsed between the order passed by the learned Magistrate denying the ground of interim maintenance to Jyotsana Sharda and the present order, therefore, in case the Jyotsana Sharda/wife has been able to maintain herself for such a long period it would be worthwhile to wait for the outcome by the learned Magistrate on

the merits of the case rather than pass an interim order which will result in further multiplicity of litigation. Accordingly, the revision petition of Jyotsana Sharda/wife stands allowed and the impugned judgment of the learned Additional Sessions Judge rejecting the appeal of the appellant to that extent is set aside but no order for reconsideration of the matter is passed by the Appellate Court as a time bound direction is given to the learned Magistrate to dispose of the main matter itself.

17. So far as the revision petition of Gaurav Sharda/husband is concerned, admittedly what has been ordered against him is that he must pay an interim maintenance of Rs.10,000/- for the benefit of his child by the learned Magistrate vide order dated 01.02.2008. The said order has also been upheld by the learned Additional Sessions Judge. The husband/Gaurav Sharda feeling aggrieved by the said order has preferred to challenge the same before this Court. A question was put to Gaurav Sharda as to how the present criminal revision petition by him is maintainable against the interim maintenance order passed in favour of his son which is in the nature of interlocutory order and which cannot be subject matter of revision petition because of the bar imposed by Section 397(2) Cr.P.C.

18. The learned counsel for the husband/Gaurav Sharda has referred to the case titled **Amarnath & Ors. Vs. State of Haryana** AIR 1997 SC 2185 wherein it has been contended that any order which substantially effects the right of the accused or decides certain rights of the parties cannot be said to be an

interlocutory order so as to bar the revision petition to the High Court against the said order.

19. I have gone through the said authority no doubt the Hon'ble Supreme Court in **Amarnath's** case has clearly laid down that any order which substantially affects the rights of the accused and decides certain rights of the parties cannot be said to be an interlocutory order but if that principle is applied to the case of the husband/Gaurav Sharda, I do not feel that this judgment is of any help to him in the instant case. The rights of the husband/Gaurav Sharda so far as the grant of maintenance is concerned, no doubt it effects his rights and imposes obligation on him to pay the maintenance but does not decide the rights of the husband/Gaurav Sharda once for all. It is only an interim arrangement which has been arrived at after seeing the documents by the learned Magistrate in order to prevent the child going into the vagrancy because of lack of funds. Moreover, the judgment which has been relied upon by the husband/Gaurav Sharda case was involving a factual situation not under Domestic Violence Act but under Indian Penal Code. It has been laid down by the Hon'ble Supreme Court in **Haryana Financial Corporation Vs. Jagdamba Oil Mills** 2002 (3) SCC 496 that while applying the principle of law laid down in a case the same should not be done in a mechanical manner. Obviously, the said judgment in **Amar Nath's** case does not help the husband/Gaurav Sharda in any manner whatsoever.

20. The second submission of the learned counsel for the husband/Gaurav Sharda is that the learned Magistrate vide impugned order dated 01.02.2008 has given the rights of residence in respect of the entire flat to Jyotsana Sharda/wife which is situated in Shushant Estate, Gurgaon. It was contended that it has been laid down by the Apex Court in **S.R. Batra Vs. Taruna Batra** AIR 2005 DELHI 270 that a property which is owned by the parents in law, then one cannot treat it as shared accommodation and consequently no right of residence can be given to anyone in the said principle. Similarly, proposition has been laid down by our own High Court in **Rajinder Singh Saluja Vs. Sarbjyot Kaur Saluja & Ors** 159(2009) DLT 629 (DB). It was contended that admittedly the flat in question is jointly owned by Gaurav Sharda and his mother, therefore, at best the wife Jyotsana Sharda has a right to live only in one half of the portion which falls to the share of the husband Gaurav Sharda while as the impugned order which has been passed by the learned Magistrate and upheld by the learned Additional Sessions Judge has prevented the Gaurav Sharda and his mother or any other member of the family to go into said accommodation. It was next contended by the learned counsel for the husband/Gaurav Sharda that the petitioner is prepared to hire an accommodation and the wife Jyotsana Sharda may shift to the said hired accommodation while as the husband would continue to pay the rent and other charges for the essential amenities or alternatively it was contended that the

petitioner Gaurav Sharda is even prepared to dispose of the said property and give one fourth share of the sale proceeds to Jyotsana Sharda for the purpose of hiring an accommodation rather than suffer the impugned order regarding rights of residence having been given to wife altogether as ordered by the learned Magistrate.

21. I have carefully considered the submission made by the learned counsel for the Gaurav Sharda. The learned counsel has on the statement of the husband Gaurav Sharda provided the right of residence in the Sushant Estate flat of the husband which is also jointly owned by his mother. Jyotsana Sharda had got an FIR registered against the Gaurav Sharda and his other family members on account of threat to dispose of the flat and also on account of subjecting her cruelty with a view to demand dowry. It was in those proceedings that they had undertaken before the police that they would not go to the flat in question and disturb the possession of the wife Jyotsana Sharda. So far as the plea of the husband Gaurav Sharda to the extent that the house is not a shared accommodation is concerned that is not correct because admittedly the house is owned in the proportion of one and half each by the mother and the son Gaurav Sharda, therefore, this is a 'shared accommodation' because Jyotsana Sharda was living in the said accommodation as a matrimonial before differences erupted. The contention of Gaurav Sharda to dispose of the property or to hire the property where the wife of Gaurav Sharda namely Jyotsana Sharda could shift that plea is

fraught with danger in as much as experience of cases of this nature shows that this is only ploy adopted by the husband invariably to divest the wife of their possession or right of residence in respect of shared accommodation. This offer has neither been accepted by the other side, i.e. Jyotsana Sharda, his wife nor approved by the Court even. The Court does not find that there is any infirmity in the impugned order by the learned Additional Sessions Judge upholding the order of the learned Magistrate both with regard to the payment of maintenance of Rs.10,000/- to the child of Gaurav Sharda or with regard to grant of right of residence to Jyotsana Sharda in the accommodation at Sushant Estate, Gurgaon. Both these arrangements are interim in nature, and therefore, cannot be varied at this stage.

22. For these reasons mentioned above, the criminal revision petition which has been filed by the husband Gaurav Sharda is without any merit and accordingly the same is dismissed.

23. Expression of any opinion hereinbefore shall not be treated as an expression on the merits of the case. It is further directed that the learned Trial Judge will try to expedite the matter.

V.K. SHALI, J.

December 22, 2009
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