

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO (OS) No. 278/2007, CM Nos.10094/2007 (for stay by the appellant); 13082/2007 (for stay by the respondent), 13083/2007 (cross-objections), 13084/2007 (condonation of delay in filing cross-objections) & 15652/2007 (for directions by the appellant)

Reserved on : 14.05.2009

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Date of decision : 21.05.2009

AJAY KUMAR JAIN APPELLANT
Through : Mr. Aman Lekhi, Sr. Adv. with
Mr. Jaspreet S. Rai, Advocate.

- V E R S U S -

BALJIT KAUR JAIN RESPONDENT
Through : Mr. Adhip Iyer & Ms. Mandira Mitra,
Adv. along with the Respondent.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

SANJAY KISHAN KAUL, J.

1. The respondent / wife filed a suit under Section 18, 23 and 28 of the Hindu Adoption and Maintenance Act, 1956 against the appellant / husband seeking grant of maintenance at the rate of Rs.50,000/- per month with

the declaration to have a right of residence in her matrimonial home on the first floor of D – 291, Defence Colony, New Delhi (hereinafter referred to as, 'the suit property') as also for restraining the appellant from dispossessing her from the said premises. The respondent also filed an application for interim maintenance of Rs.30,000/- per month as well as for interim relief in respect of the suit property. The suit and the interim applications were contested by the appellant. In terms of the impugned order dated 02.07.2007 apart from the admitted rental income of Rs.22,500/- per month of the respondent, the appellant was directed to pay a further sum of Rs.22,500/- per month as interim maintenance. A further direction was issued restraining the appellant from alienating or selling off his portion of the suit property though the order would not stand in the way of partition of the said property by metes and bounds in view of pendency of the partition suit between the appellant and his brother.

2. The appellant has impugned this order by filing the present appeal. The respondent has filed cross-objections. In the cross-objections, the respondent has sought to set up a case that her right of residence in the matrimonial home had been made contingent and subordinate to the appellant's right to affect partition of the suit property.

3. The dispute is an unfortunate one where the parties are well educated and have settled children, but do not seem to be able to live together. The appellant is stated to be 60 years of age while the respondent is 54 years old.
4. It is in view thereof that right from the inception of the appeal in the year 2007 itself, various Benches made an endeavour to see that an overall settlement could be arrived at. The matter was also referred for mediation. However, none of the proceedings for settlement proved to be successful. We may note that even after the mediation proceedings failed, endeavour was made for settlement, but even the same proved to be fruitless. On the other hand, we found on 04.05.2009 that in the middle of the process of an endeavour for settlement, there was a change of counsel by the respondent. We did not appreciate such conduct of the respondent and, therefore, found it appropriate to direct that the earlier counsel should also remain present, as he was in the know of what endeavour was made for settlement. On the next date of hearing, i.e., 13.05.2009, the earlier counsel appeared and the new counsel, who had been engaged, sought to be recused. Since no settlement was possible, we proceeded to hear the matter as the earlier counsel stated he would make the submissions. On the learned senior counsel for the appellant

concluding his submissions, learned counsel for the respondent again sought one day's accommodation to make his submissions with the objective of finding out if some settlement was possible. However, on 14.05.2009, we again found that the respondent was only vacillating and prevaricating and, thus, no settlement was possible. We, thus, asked the counsel for the respondent to proceed with the arguments. At this stage, learned counsel for the respondent stated that the respondent wanted to engage a Senior Advocate. We declined such a request for adjournment in the middle of the hearing as we considered the request inappropriate and only a dilatory tactic, which had resulted in the pendency of the appeal already for two years and reserved the judgment.

5. We have perused the pleadings and considered the submissions of the parties. At this interim stage, there are only two aspects, which require consideration :
 - (i) the extent of maintenance, which should be paid to the respondent to maintain her lifestyle in the manner she has been used to; and
 - (ii) the nature of protection necessary for the matrimonial home, which was stated to be in the suit property.
6. In so far as the aspect of maintenance is concerned, learned Single Judge has observed in para 8 of the impugned order that the respondent admitted to having

rental income of Rs.22,500/- per month. The offer of the appellant that he was willing to purchase another house was declined by the respondent and, thus, considering the residence available with the respondent and her rental income, an additional sum of interim maintenance of Rs.22,500/- per month was directed to be paid.

7. We were informed that the interim maintenance was being paid by the appellant to the respondent at the rate of Rs.12,500/- per month. Learned senior counsel for the appellant explained that the reason for the same was that even on the Original Side, endeavour was made by learned Single Judge to arrive at a settlement and it had been pointed out that some part of the rental income being received by the respondent appeared to have inadvertently escaped notice in the impugned order. In this behalf, the impugned order refers to the rental income of Rs.22,500/- per month of the respondent. This income relates to a shop in DLF City Centre let out for Rs.45,000/- per month, which is owned in equal share by the appellant and the respondent and both were getting equal share in the rent. The respondent actually had another 7% share in the rentals received in respect of commercial flat at Kanchenjunga Building of Rs.9,800/- per month (i.e., approximately Rs.10,000/-). It is in these circumstances that

Rs.12,500/- per month was being paid by the appellant after taking into account Rs.10,000/- per month being received by the respondent as rent from the flat in Kanchenjunga Building. Even the respondent has admitted in the plaint and in the interim application to be carrying out a tailoring business, though she claims that the same is not yielding any profits.

8. We find that learned Single Judge has taken note of rental income of Rs.22,500/- per month. Learned Single Judge has found that an additional amount of Rs.22,500/- per month should be paid by the appellant. The rent from Kanchenjunga Building approximately Rs.10,000/- appears to have escaped notice and the total rent being realized is Rs.22,500/- + Rs.9,800/-, which is equal to Rs.32,300/-. This appears to be also the reason that on perusal of the suit file, it is found that on 29.01.2009, a direction has been issued that the appellant would continue to pay interim maintenance of Rs.12,500/- per month. There is, of course, an allegation made during the court proceedings by the respondent that the tenant of the shop in Gurgaon is absconding. If the complete rent is taken into account, then the interim maintenance to be paid should be Rs.12,500/- per month and we order accordingly.
9. The real bone of contention is the suit property. The respondent is adamant that the same is her matrimonial

home and she is not willing to shift to another place. On the other hand, it has been pointed out by learned counsel for the appellant that a suit for partition in respect of the said complete property had been filed by the brother of the appellant as both the appellant and his brother own 50% share each and preliminary decree had been passed. The question of the mode of division or sale of property was pending consideration before the competent court and it was in view thereof that the appellant had offered to shift the respondent to another house.

10. Learned Single Judge in the impugned order has laid great emphasis on the fact that both the appellant and the respondent had been originally residing in the suit property being the first floor. We, however, feel that a matrimonial home is a place where both the parties seek to reside and the object of protecting the same is that the wife should not be left homeless by any action of the husband. We are in agreement with the submission of learned counsel for the appellant that the wife cannot have a right of living in a particular property and the same cannot become a clog on the property denying the right of the appellant to deal with the property when he is willing to provide an alternative matrimonial home. It has to be appreciated that the claim of the respondent is not to any title, but of

residence in the home. The appellant and his brother seek separation. The brother of the appellant cannot be denied his right to realize the best value for his share of the property or get enjoyment of a demarcated share. The brother of the appellant owes no obligation to the respondent. We are, thus, unable to agree with the conclusion of learned Single Judge that there should be a blanket injunction against the appellant restraining him from alienating or selling the suit property other than partitioning it by way of metes and bounds. In fact, there is no merit in the cross-objections in this behalf of the respondent.

11. We feel the appropriate order to be passed is that the rights of the appellant and his brother have to be determined in the suit for partition and if the eventuality arises that the complete property consisting of the plot and the superstructure raised thereon has to be sold, so be it so long as there is proper accommodation made available to the respondent for her residence. The appellant cannot be worse off than the respondent and, thus, if both the appellant and the respondent are unable to live together, then the proceeds from the sale of the said property should be dealt with in such a manner that 50% of the said proceeds should be utilized to purchase a flat by the appellant in his name, but for the benefit of the respondent. The appellant has 50%

share in the said property and, thus, if the plot and the structure raised thereon are sold for 'X' price, then the share of the appellant would be 'X/2". The appellant, thus, must make available accommodation, i.e., a residential flat of a value of 'X/4' for the benefit and occupation of the respondent and the respondent should not be dispossessed from the said property at the first floor till such alternative arrangement is made. The respondent cannot, however, insist on residing in the suit property alone. It is no doubt true that a flat, which could be purchased for the total price to be realized by the appellant, would be a larger and better located flat than of half the value. That is, however, an inevitable result of the strained relationship between the appellant and the respondent where they would like to live in separate accommodation and, thus, our direction will ensure that 50% of the amount realized by the appellant in case of sale is utilized for purchase of an immovable property by the appellant for the benefit of the respondent, though the title would remain with the appellant. The flat can be in any South Delhi colony.

12. We may notice at this stage that on 28.01.2009, it was pointed out to us that there were certain other properties including a property at Kasauli, which was owned by other colaterals of the appellant, but the respondent had keys of the same. Learned counsel for

the respondent on instructions from the respondent present in Court had stated that there was no difficulty in depositing the keys. The keys were subsequently deposited, but it transpired that the property at Kasauli continued to be occupied by the mother of the respondent, though neither the respondent nor her mother had any right to occupy it or title to the same. This was found to be clearly in violation of the understanding and undertaking given by the respondent and learned counsel for the respondent had stated that necessary corrective measures would be taken. We expect that the corrective measures would have been taken by now. The keys deposited should be placed in the Original Side file for necessary directions by the learned Single Judge.

13. The appeal is accordingly allowed to the aforesaid extent and the impugned order stands modified and the cross-objections, the application for condonation of delay in filing cross-objections and the interim application stand disposed of.

14. Parties are left to bear their own costs.

SANJAY KISHAN KAUL, J.

May 21, 2009
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SUDERSHAN KUMAR MISRA, J.