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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CM(M) 1344/2011 & CM No. 20851/2011

Judgment delivered on: 18th November, 2011

CHITRA

..... Petitioner

Through: Mr. Vineet Mehta, Adv.

versus

PANKAJ KASHYAP

..... Respondent

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

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

KAILASH GAMBHIR, J.(Oral):

1. By this petition filed under Article 227 of the Constitution of India, the petitioner seeks to challenge the order dated 1.9.2011 passed by the learned Family Court, whereby the

application of the petitioner under Section 24 of the Hindu Marriage Act to seek interim maintenance during the pendency of the divorce petition was dismissed.

2. Arguing for the petitioner, learned counsel Mr. Vineet Mehta submits that the learned Family Court has dismissed the said application of the petitioner only on the ground that the petitioner in her application has nowhere stated that she is not earning anything or the income earned by her is not sufficient for her to support herself. Counsel submits that the learned family court also observed in the impugned order that the petitioner was even silent about whether she is getting any income out of any job or any profession and she was also silent about the expenses which she has to bear for her sustenance. The contention raised by the counsel for the petitioner is that in para 5 of the application under Section 24 of the Hindu Marriage Act, the petitioner clearly disclosed that the respondent husband has neglected and refused to maintain her and malafidely never provided any kind of maintenance allowance to her. Counsel further submits that in the divorce petition under section 13(1)(ia), the petitioner in para 36 has clearly disclosed that she is financially dependent on her parents after she was ousted from her matrimonial home. The submission of the counsel for the petitioner is that merely because

the petitioner in her application did not specifically plead that she was not having any independent income for her sustenance, it should not have deprived the petitioner for the grant of maintenance amount as the total reading of the averments made by her in the divorce petition as well as in her Section 24 application it was manifest that the petitioner has stated that she is financially dependent on her parents which would clearly mean that the petitioner has no independent source of income. Counsel also submits that in the absence of any specific averments made by the petitioner in her application, the learned Family Court could have given a fresh opportunity to the petitioner to file a better affidavit or could have taken statement of the parties under Order X of CPC so as to know the correct financial status of the parties, instead of dismissing the application of the petitioner by adopting such a hyper technical approach.

3. I have heard learned counsel for the petitioner at considerable length and gone through the impugned order passed by the learned Family Court.

4. In the present case, the petitioner had filed a divorce petition under Section 13(1) (ia) of the Hindu Marriage Act to seek dissolution of her marriage with the respondent. Simultaneously, the petitioner had also filed an application under section 24 of the HMA

seeking Rs.75,000/- towards interim maintenance and Rs.22,000/- as litigation expenses. In para 36 of the divorce petition, the petitioner has clearly averred that for her sustenance she was dependent upon her parents after she was ousted from her matrimonial house and in para 5 of the application under section 24, the petitioner had clearly averred that her husband has neglected and refused to maintain the petitioner and in fact had deliberately and malafidely never provided any maintenance allowance to her. She has also stated that the income of the respondent is Rs. 1.5 per month and that she is also entitled to maintain the same standard of living as maintained by the respondent and the respondent is legally, socially and morally bound to maintain the petitioner and the respondent has no other liability except to maintain the petitioner. In reply to the said application the respondent has taken a stand that the petitioner is B.A and is earning an income to the tune of Rs.35,000/- per month and is thus not entitled to the grant of interim maintenance.

5. The learned trial court has dismissed the application of the petitioner merely on the ground that the petitioner has nowhere stated in the application that she is unable to maintain herself and is thus not entitled to maintenance. No doubt the petitioner ought to have made a specific averment in the application to plead

that she has no independent source of income in terms of the requirement of Section 24 of the Hindu Marriage Act, but nevertheless a mere omission on the part of the petitioner cannot deny her the said relief of interim maintenance. The language of Section 24 of the Hindu Marriage Act is quite clear as it envisages that where in any proceeding under this Act, it appears to the court that either the wife or the husband has no independent source of income sufficient for her or his support, the court may pass order granting interim maintenance to the applicant spouse. Although, the said provision uses the word *may* which does not bind the court to grant maintenance to the applicant but through judicial pronouncements the courts have set a judicial trend regarding the manner in which Section 24 applications are decided, the factors to be taken into account in granting maintenance, the quantum, the date of grant of maintenance, etc. which have attained a crystalised legal position.

6. Section 24 is a discretionary relief to be given by the court. This discretion has to be exercised on sound judicial principles and reasoning and not in an arbitrary manner. It is a common tendency for the parties to hide their actual income to escape the liability of paying maintenance amount to the totally dependent spouse and it is then the court has to satisfy itself and call for proof

in case of rival claims of the parties. The learned Family Court in the present case has adopted a hyper technical approach by dismissing the petition on the ground that the petitioner had not stated that she did not have any independent source of income whereas in the reply the respondent has claimed that the petitioner has a monthly income sufficient to support herself. The learned court should have dug a little deeper in calling for the rejoinder of the petitioner or affidavit or further proof required to be adduced so as to be able to decide the application on merits rather than dismissing it on procedural niceties. Here it would be relevant to the judgment of the Punjab & Haryana High court in the case of ***Smt.Satish Bindra vs. Surjit Singh Bindra AIR1977P&H383*** wherein the court held as under:

"3. Mr. Gurbachan Singh, who appears for the petitioners, has laid particular emphasis on the fact that a copy of an agreement executed earlier between the parties was on the record of the case before the trial Court in which the husband had agreed to pay to the petitioner Rs. 700 per mensem on account of maintenance. The factum of the copy of the agreement being on the record of the trial Court is denied by the learned counsel for the husband. Be that as it may, it is clear that the trial Court has not passed any order in accordance with law on the application of the petitioner. If the averments of the petitioner contained in her affidavit were not considered enough, she should have been afforded an opportunity to give supplementary affidavit or affidavits on any point required by the Court or if the Court so required even to lead evidence in the course of a summary inquiry, at the end of which proper order should have been passed. Since the order is not supported by any reason and does not discuss the pros and cons of the rival versions of the parties relating to the quantum of income of the husband, I have to set aside the order of the trial Court."

In the present case as well, the order is not supported by any

reasons and the application has been dismissed in an obscure manner. Even if the learned Family Court had felt that there was some averment lacking in the application, then it should have given fresh opportunity to the petitioner to file a fresh affidavit disclosing her income and her exact financial status and even the court has ample powers to take the statements of the parties under Order X of the CPC and even the parties could have been directed to file affidavit in terms of Form No.16-A Appendix E under Order XXI Rule 41(2) of the CPC. No such recourse was adopted by the Family Court and instead has dismissed the application of the petitioner denying her the right of interim maintenance and also forcing her to approach this court to file present petition.

7. The power of the High Court under Article 227 of the Constitution of India is to keep the inferior courts and tribunals into their bounds and see that they have exercised their duty in a legal manner. The High court can interfere in the orders of erroneous assumption, errors apparent on the face of record, arbitrary or capricious exercise of discretion, a patent error in procedure or arriving at a finding based on no material. The court finds the present case fit to exercise its jurisdiction under Article 227 and if not exercised it would lead to a grave miscarriage of justice. This court is constrained to observe that the approach adopted by the

learned Family Court is totally insensitive which is not expected of a court discharging the functions of a family court, where more humane and sensitive approach is required. The injudicious approach of the learned Family Court is not appreciated.

8. In the light of the foregoing, this Court is of the view that the facts of the case do not necessitate directing notice upon the respondent. The matter is accordingly remanded to the learned Family Court for fresh decision on the application of the petitioner. The petitioner is directed to file a better affidavit disclosing her correct financial status in the said affidavit. The learned Family Court shall decide the said application of the petitioner on its merits.

9. With the aforesaid directions, the petition stands disposed of.

KAILASH GAMBHIR,J

NOVEMBER 18, 2011
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