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

% **DECIDED ON: 20.11.2013**

+ **FAO 68/2013, C.M. APPL.2452/2013 & 11574/2013**

RUCHI RAI SEHMBEY Appellant
Through: Mr. Trideep Pais with Mr. Ashwarth
Sitaraman and Mr. Shivam Sharma, Advocates.

versus

SIMON JASON SEHMBEY @ HAMINDER SEHMBEY Respondent
Through: Ms. Malvika Rajkotia with
Mr. Vaibhav Vats, Advocates.

**MAT.APP.(F.C.) 22/2013, C.M. APPL.11525/2013,
11527/2013 & 15924/2013**

SIMON JASON SEHMBEY Appellant
Through: Through: Ms. Malvika Rajkotia with
Mr. Vaibhav Vats, Advocates.

versus

RUCHI RAI Respondent
Through: Mr. Trideep Pais with Mr. Ashwarth
Sitaraman and Mr. Shivam Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The present common judgment will dispose of two appeals - one preferred by the wife (FAO 68/2013) and the other by husband (MAT. APP. (FC) 22/2013).

2. By the impugned order, the Family Court directed the payment

of ₹50,000/- per month as *pendente lite* maintenance amount to the wife.

3. The brief facts are that the parties to the present litigation get married on 29.10.2006; a son Ivan Jason Sehmbey was born to them on 30.08.2008. It is not in dispute that the parties are living separately from 2009 and the wife filed proceedings for divorce under Section 13 (1) (ia) of the Hindu Marriage Act claiming that the husband had treated her with cruelty. She preferred an application for maintenance *pendente lite* under Section 24 of the Act on 8.10.2010.

4. In the application, the wife claimed maintenance at ₹100,000/- per month alleging that the husband was a man of considerable means; owner of a foundry worth Rupees 15 crores and owned ancestral residential property at G.T. Road, Goraya, (Punjab) and a flat at Central Park I, Sector 42, Gurgaon worth Rupees 1.8 crores, from which, it was alleged, he was earning ₹60,000/- since September, 2007.

5. The respondent contested these claims especially the allegation that he was earning to the tune of Rupees 2.56 lakhs per month over and above the rental income enjoyed by him. The Trial Court after considering the submissions of the parties and the materials brought on the record which included an affidavit filed by the parties as well as the other documents such as income tax returns, etc. was of the opinion that the maintenance to be fixed under Section 24 was ₹50,000/-. This amount was directed to be paid from the date of the application by the husband to the wife towards her up keep (assessed at ₹30,000/-) and ₹ 20,000/- per month for the minor son.

6. It was urged on behalf of the wife that the Trial Court did not correctly assess the true income of the husband. Mr. Pais, learned counsel for the wife relied upon the income tax statements and other materials to say that the average income which the husband reported for the period 2007-08 and 2011-12 was not less than Rupees 2.5 lakhs per month. It was submitted that the husband owned a 3.75 acres plot on which the foundry is located and is carrying on business on those premises. In addition, submitted counsel, the husband had revealed that he filed three returns - one reporting his business and rental income, second reporting his personal HUF income and the third as a member of his father's HUF. The Court cumulatively saw these aspects, i.e., the husband was enjoying more than Rupees 2.5 lakhs per month. Counsel also emphasized the fact that the husband had travelled abroad on numerous occasions – which too were noticed by the Trial Court but not given due weightage. Furthermore, submitted counsel, the husband had earned far more income than what was reported to the income tax authorities for the year 2007-08 and as a result of survey under Section 133A of the Income Tax Act a sum of Rupees 50 lakhs was added back to his income on which he paid additional tax and a penalty too. Counsel submitted that such being the circumstances, fixing of ₹50,000/- per month as maintenance *pendente lite* was too meagre. It was urged that the growing needs of the minor son in itself demanded fixation of not less than Rupees 30-35 thousand per month for this expense head only, as concededly, the wife was paying ₹20,000/- as tuition fee per month.

7. Ms. Malvika Rajkotia, learned counsel for the husband urged

that the Trial Court has fixed an unrealistic amount, i.e., ₹50,000/- per month which did not take into account the real facts. In this regard, it was submitted that even though the husband had reported gross profit. A close look at the income tax returns would reveal that in fact the net income in his hand was much lower and in the range of Rupees 60-70 thousand per month. It was submitted that so far as the value of his properties is concerned, the Court ought not to have been influenced by the same since concededly no income or rents were being received from it. Furthermore, argued the counsel, the Gurgaon flat ceased to fetch any rent for the past 1½ years even though prior to that period, the rent enjoyed by the husband was in the range of ₹70,000 per month.

8. Learned counsel submitted that the Trial Court fell into error in not giving any credence or weightage to the fact that the wife had worked earlier and is still capable of working and maintaining herself. She relied upon the judgment reported as *Mamta Jaiswal v. Rajesh Jaiswal* 2000 (3) MPLJ 100 to say that in determining whether an order fixing maintenance under Section 24 of the Act is to be made, the Court should take into consideration whether the spouse had the capacity of earning and as in the present instance, chose not to do so. In a similar vein, learned counsel relied upon the rulings reported as *Damanreet Kaur v. Indermeet Juneja* (Crl. Rev. P.344/2011) decided on 14.05.2012.

9. This Court has considered the submissions of the parties. In the impugned order, the Trial Court took into consideration a decision of Division Bench of this Court in *Bharat Hegde v. Saroj Hegde* 140

(2007) DLT 16 which in turn outlined the various elements that the Courts ordinarily go into while deciding applications under Section 24. The Court then proceeded to record that the respondent/husband had sound financial status; the Court also took into account the fact that a penalty of Rupees 16 lakhs was imposed in the course of income tax survey, after he had reported a business income to the tune of ₹54,80,578/- for AY 2007-08. Nevertheless, the Court proceeded to fix the maintenance amount on the basis of the following reasoning: -

12. It appears that respondent has sound financial status. It has also come on record that during survey of Crystal Foundary, penalty of 16 Lacs was imposed upon the respondent. The Hon'ble Supreme Court of India in case titled as Nawab Husaini Begam Vs. Nawab Khwaja Muhammad Khan held that wife is entitled to "Kharcha-i-Pandan" and "Hath Kharch" (pin money). Though, she has nothing to spend on household goods still money is required to fulfil the other day-to-day needs including clothing, personal effects and entertainment too.

13. Looking into the financial status of the respondent and number of movable and immovable properties, as stated in the WS and also in the affidavit and the income derived from the immovable properties, the income of respondent may be assessed between Rs.1.5 lacs to Rs.2 lacs. I am of the opinion that a sum of Rs.50,000/- (i.e. Rs.30,000 per month for petitioner and Rs.20,000/- per month for Ivan, son of petitioner) for petitioner and her son would be adequate as maintenance to be paid by the respondent from the date of filing of the petition, i.e. 11.10.2010. Petitioner Ruchi Rai Sehmbe is entitled for maintenance from the date of the filing of the application i.e. 11.10.2010 except for the period w.e.f. 22.03.2011 to 21.09.2011 during which period, she remained employed and was capable of maintaining herself."

10. This Court had the benefit of looking into the income tax returns which were placed on the record of the Trial Court and are part of the record in the present proceedings. For the year 2007-08, the husband reported the gross personal income - from the foundry as well as rental as ₹54,80,578/-; the total income reported by him from all the sources was ₹59,62,260/-. In the next assessment year, the business income reported was ₹10,69,663/-; likewise the total gross income reported was ₹16,01,476/-. After the divorce proceedings was filed in 2009-10, the total business income reported for the year 2009-10 was Rupees 17.9 lakhs and the total gross income reported from all sources was Rupees 24.13 lakhs. For the next year, the financial income was shown to have fallen to ₹10,65,363/- whereas the total income was ₹17,59,007/-. Curiously, for the period 2011-12, the income tax returns placed before the Court showed that the business income was ₹16,53,340 and the total income was ₹24,21,472/-. However, the detailed computation based on the income and expenditure statement revealed an entirely different picture. The total business income was nearly Rupees 10 lakhs more, i.e., ₹26,05,849/- and the total income reported from all sources correspondingly increased to ₹34,64,381/-.

11. Having regard to these facts and the further circumstance that the husband had virtually being caught red-handed on account of under reporting of income for which he finally paid the balance differential tax as well as the penalty which was in excess of Rupees 16 lakhs, this Court is of the opinion that the evaluation of the

material by the Trial Court in the facts and circumstances of the present case is not correct. The materials on record bear out that the husband is possessed of income which is not less than at least Rupees 2.5 lakhs per month. This is without taking into account the income added back by the income tax authorities for the year in which the husband did not report his income fully. If that were to be taken in to consideration the average income for the past 4-5 years would be closer in the range of Rupees 3 lakhs per month. The Court is not delving into other aspects urged, i.e., the kind of vehicles that the husband owned, the facilities which he provides to his employees and the hobbies he is indulging in (it is alleged by the wife that at the time the petition was filed, the husband had purchased a Suzuki GSXR motor bike worth Rupees 13 lakhs.)

12. As far as the husband's submission with regard to the wife's capacity of earning is concerned, it is not in dispute that she does not earn any income; apparently she used to work before her marriage till 2006 for the British High Commission. In the opinion of the Court, employability and employment ought not to be misunderstood as being the same. That at a particular point of time, a spouse may have enjoyed the benefit of income might be a relevant consideration in the given set of circumstances as for instance the kind of remuneration he or she might have earned and capacity to save, etc. It is not in dispute that the wife is unemployed since her marriage and her employment with the British High Commission ended 7-8 years ago. There is no material on the record to say that she is likely to get employment in the near future and particularly of the nature of job she had earlier

when she would have perhaps been suitable for the job. It is a known fact that employability often reduces with advancement of age unless the candidate comes forth with greater skills and wider work experience. In the present instance such is not the case, since the wife has been a homemaker since her marriage. Indeed, now she has to single handedly take care of her son as well as maintain herself, having regard to the previous status that she earned in the matrimonial home.

13. In view of the above findings, the Court is of the opinion that the appropriate amount of *pendente lite* maintenance to be fixed is not ₹50,000/- but what was claimed by the wife, i.e., ₹ 1,00,000/-. The impugned order is set aside to such extent and direction to pay ₹50,000/- per month shall stand substituted by the direction to pay ₹ 1,00,000/- per month from the date of the Section 24 application. The husband shall pay the arrears within three months from today.

14. The appeals are accordingly disposed off in the above terms.

15. Nothing stated in this order shall be construed as an expression on the merits of the case in regard to the matters decided today. All rights and contentions of the parties are kept open in the pending divorce proceedings.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

NOVEMBER 20, 2013/vks/