

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 457 OF 2017
WITH
WRIT PETITION NO. 11989 OF 2016

Jayesh Trilokumar Shah .. Petitioner
VS.
Julie Jayesh Shah .. Respondent

Ms T. F. Irani for Petitioner.
Mr. R. T. Lalwani with Ms S. I. Jaikar – Lalwani i/b. MR. Prakash Mahadik for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 24 January 2017

Date of Pronouncing the Judgment : 17 February 2017

JUDGMENT :-

1] Heard learned counsel for the parties. At their request and with their consent, these two writ petitions are being disposed of finally. Learned counsel for the parties agree that these two writ petitions can be disposed of with a common judgment and order.

2] In Writ Petition No. 11989 of 2016, the challenge is to the order dated 9 September 2016 made by the Family Court at Bandra in Civil Miscellaneous Application No. 218 of 2014 awarding the interim maintenance at the rate of Rs.90,000/- per month to the respondent – wife and Rs.10,000/- per month to the minor son from the date of filing of the application i.e. 26 September 2015. In addition, the petitioner-husband is also directed to bear the educational expenses to the minor son.

3] In Writ Petition No. 457 of 2017, the petitioner husband challenges order dated 25 November 2016 below Exhibit 21 in Civil Miscellaneous Application No. 218 of 2014. Exhibit 21, in turn, had urged the dismissal of Civil Miscellaneous Application No. 218 of 2014 taken out by the respondent – wife for restoration of her Petition No. A-2585 of 2012 on the ground that the respondent – wife had violated and disobeyed orders made by the Family Court, particularly in the matter of custody and access to the minor son.

4] The petitioner and the respondent were married as per Hindu Rites and Rituals on 16 November 1997. Their son was born on 7 July 2000. As there developed differences between the petitioner and the respondent, including *inter alia* in the matter of custody and access to the minor son, the petitioner on 22 May 2012 instituted a Petition No. D-35 of 2012 before the Family Court, seeking custody of the minor son. During pendency of such proceedings, the respondent wife instituted Petition No. A-2585 of 2012, seeking divorce, exclusive custody of the minor son and ancillary reliefs in the Family Court. Several interim orders were made by the Family Court, both, in the matter of custody / access as well as maintenance.

5] On 26 September 2014, the Family Court, made the following order in both the petitions, which were being taken up together.

“1] The petitioner – husband and his advocate Mrs Anagha Nimkar present. In spite of repeated calls, the respondent-wife and her advocate absent though the petition was specifically adjourned today at 2.45 p.m. Advocate Shri R. T. Lalwani not found anywhere in the Family Court. The present petition is filed for custody of the minor son Parshva. It is experienced that the respondent has committed repeated defaults and has not allowed the petitioner to avail the access. It be as it is.

2] *On 20/09/2014 vide order below Ex. 20 in Petition No. A-2585 of 2012, the respondent was directed to deposit exemplary costs of Rs.5000/- with the Children's Complex of this court by today. I am told that till today even the said order is not complied with.*

3] *Today issues are already framed in the present petition at Ex. 109, so also in the wife's Petition No. A-2585 of 2012 at Ex. 23. The petitioner's applications at Ex. Nos. 42, 44, 71, 72, 73 and 103 in Petition No. A-2585 of 2012 are to be heard, but in view of absence of the respondent and her advocate, the petition time and again stands just as a statue. Considering the fact that the respondent is having no regard for the Court and its orders, I am constrained to strike of the respondent's defence in Petition No.D-35 of 2012 and also to dismiss her Petition No. A-2585 of 2012.*

4] *No order as to costs in Petition No. A-2585 of 2012.*

5] *All the Misc. Applications except amendment application Ex. 42 in Petition No. D-35 of 2012 to be heard with the main petition. Hence the petition to proceed for hearing on Ex. 42 and evidence."*

6] On 1 December 2014, the respondent - wife filed Civil Miscellaneous Application No. 218 of 2014, seeking for recall of order dated 26 September 2014 and the restoration of her Petition No. A-2585 of 2012. Ordinarily, such application should have been disposed of expeditiously and in any case, by now. However, it appears that the parties are leading oral evidence, in relation to some of the averments in Civil Miscellaneous Application No. 218 of 2014 seeking restoration of the respondent's Petition No. A-2585 of 2012. Therefore, till date, Civil Miscellaneous Application No. 218 of 2014 is pending. On 26 September 2015, i.e. after a period of one year since the dismissal of Petition No. 2585 of 2012 and after period of almost nine months since the respondent filed Civil Miscellaneous Application No. 218 of 2014, seeking restoration of Petition No. A-2585 of 2012, the respondent filed application under section 24 of the Hindu Marriage Act, 1955 (said Act) seeking *inter*

alia interim maintenance.

7] The petitioner – husband, filed his reply opposing the application for grant of interim maintenance *inter alia* on the grounds of maintainability as well as on merits. By impugned order dated 9 September 2016 however, the Family Court, has been pleased to order interim maintenance at the rate of Rs.90,000/- per month to the respondent – wife and Rs.10,000/- per month to the minor son. It is this order dated 9 September 2016, which is challenged by the petitioner husband in Writ Petition No. 11989 of 2016.

8] The petitioner husband had also filed application dated 28 July 2016 (Exhibit 21) in Civil Miscellaneous Application No. 218 of 2014, urging dismissal of Civil Miscellaneous Application No. 218 of 2014 on the ground that the respondent – wife had violated and disobeyed orders made by the Family Court in the matters of custody and access to the minor son. By impugned order dated 25 November 2016, the Family Court, has dismissed the application at Exhibit 21. It is this order which is impugned in Writ Petition No. 457 of 2017.

9] Ms Irani, learned counsel for the petitioner – husband has basically made the following submissions in support of the two petitions :-

(A) That the respondent's application seeking maintenance under section 24 of the said Act was not maintainable, since, main proceedings being Petition bearing No. A-2585 of 2012 stood dismissed by order dated 26 September 2014. Civil Miscellaneous Application No. 218 of 2014, is only an

application seeking restoration of Petition No. A-2585 of 2012 and unless the same is allowed and Petition No. A-2585 of 2012 is restored, there was no question of the Family Court entertaining any application for interim maintenance under section 24 of the said Act;

(B) Assuming that such an application for interim maintenance was maintainable, in the facts and circumstances of the present case, there was no warrant for award of any interim maintenance to the respondent wife. Ms Irani submitted that order dated 26 September 2014 dismissing Petition No. A-2585 of 2012 was made because of wilful and deliberate disobedience of the orders made by the Family Court by the respondent – wife. Pending recall of such order as well, the respondent – wife has continued to wilfully and intentionally disobey the orders made by the Family Court in the matter of custody and access of the minor son. To reward the respondent – wife with interim maintenance, for her own defaults, is quite unreasonable and unjustified in the facts and circumstances of the present case;

(C) Without prejudice, Ms Irani submitted that the award of interim maintenance at the rate of Rs.90,000/- per month to the respondent – wife is totally excessive and not at all justified in the facts and circumstances of the present case;

(D) Without further prejudice, Ms Irani submitted that even if any award of interim maintenance at the rate of Rs.90,000/- per month could be made, such order should have accompanied with further orders for revival of access and custody orders in operation during the pendency of Petition

No. A-2585 of 2012. Ms Irani submits that this is only because the petitioner – husband, for no fault of his, cannot be saddled with the liability for payment of interim maintenance and at the same time, be deprived of the access and custody orders, which were, in operation when Petition No. A-2585 of 2012 was pending.

(E) Ms Irani further submitted that in this case the respondent – wife continues to wilfully and deliberately disobey orders relating to custody and access to the minor son. In such circumstances, the respondent wife ought not to have been allowed to proceed with her Civil Miscellaneous Application No. 218 of 2014. The Family Court in dismissing the petitioner's application at Exhibit 21, has therefore, seriously erred.

10] Mr. Lalwani, learned counsel for the respondent wife, whilst disputing all the aforesaid contentions submitted that on one hand the petitioner – husband is bent upon delaying the disposal of Civil Miscellaneous Application No. 218 of 2014 and on the other hand, the petitioner – husband is denying interim maintenance, which was already awarded to the respondent – wife during the pendency of Petition No. A-2585 of 2012. Relying upon certain decisions, Mr. Lalwani submitted that an application for interim maintenance is very much maintainable even pending consideration of an application seeking restoration of the main petition.

11] Mr. Lalwani further submitted that out of the interim maintenance of Rs.90,000/-, an amount of Rs.70,000/- is required to be expended towards the rent of the premises itself. Mr. Lalwani also submitted that interim maintenance under section 24 of the

said Act cannot be denied unless it is established that the wife has independent income sufficient for her maintenance. Mr. Lalwani also submitted that the application at Exhibit 21 filed by the husband, was only to delay disposal of Civil Miscellaneous Application No. 218 of 2014, even though, evidence has already commenced in the said application. Mr. Lalwani submits that there is no case made out to interfere with the impugned orders in both the petitions.

12] The rival contentions now fall for determination.

13] Section 24 of the said Act reads thus :

“24. Maintenance pendente lite and expenses of proceedings.- *Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.*

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]

14] The phraseology employed by the legislature in enacting section 24 of the said Act is '*any proceedings under this Act*'. There is no doubt whatsoever that Petition No. A-2585/12, instituted by the wife seeking divorce, custody and allied reliefs, qualifies to be regarded as '*proceedings*' under the Act. In this case, Petition No. A-2585 of 2012 came to be dismissed on 26 September 2014. On

1 December 2014, the wife has filed Civil Miscellaneous Application No. 218 of 2014 seeking recall of order dated 26 September 2014 and consequently, the restoration of Petition No. A-2585 of 2012.

15] Taking into consideration the object behind the enactment of the provision like section 24 of the said Act, it will not be appropriate to hold that the phrase '*any proceedings under this Act*' excludes from its sweep an application like Civil Miscellaneous Application No. 218 of 2014 seeking restoration of Petition No. A-2585 of 2012. Therefore, it would not be appropriate to give a restricted meaning to the phrase '*any proceeding under this Act*' and to exclude from its sweep, proceedings for restoration of the main petition, particularly when the main petition has not been dismissed on merits as such, but on grounds of default on the part of a party or his advocate. The question as to whether any interim maintenance or expense of proceedings should be awarded or not is a matter which will have to be considered based upon the facts and circumstances of each case. However, to say that once the main petition stands dismissed, any proceedings for restoration of the main proceedings, do not even qualify to be regarded as '*any proceedings under this Act*', is not a proposition which can be easily accepted.

16] In ***Vinod Kumar Kejriwal vs. Usha Vinod Kejriwal***¹, this court has held that pending an application under Order IX Rule 4 of the CPC for restoration of the petition filed by the husband for divorce, the wife can initiate proceedings under section 24 of the said Act for maintenance *pendente lite* and expenses of the proceedings.

17] Ms Irani learned counsel for the husband however seeks to

1 1992 (2) Bom. C.R. 648

distinguish this judgment by submitting that, if maintenance *pendente lite* were to be denied to the wife on the ground that the husband's main petition stands dismissed for default, pending the husband's application seeking restoration, then, it would amount to the husband taking advantage of his own wrong. She submits that the facts and circumstances of the present case, are just reverse. In this case, the wife's petition seeking divorce has been dismissed. Therefore, pending application for restoration of such petition, the wife cannot take any advantage of her own wrong and seek maintenance *pendente lite* under section 24 of the said Act. On the aspect of maintainability of the wife's application under section 24 of the said Act, the distinction sought to be drawn by Ms Irani, cannot be accepted. The question as to whether a party is taking advantage of its own wrong, is a question, which will assume importance in deciding whether any maintenance *pendente lite* ought to be paid or not. However, it cannot be said that such an application is not at all maintainable and must be dismissed for want of jurisdiction.

18] This court, in the case of *Vinod Kumar Kejriwal* (supra) has held that the expression '*any proceedings under this Act*' cannot be given narrow and restrictive meaning so as to exclude applications under Order IX Rule 13, Order IX Rule 9 or Order IX Rule 4 of the CPC seeking restoration of the main proceedings. The relevant observations in paragraph 21, read as follows:-

"21. In the first place, I have no doubt that the proceedings under [Section 24](#) of the Hindu Marriage Act can be initiated even during the pendency of the application either under Rule 13 of Order 9 or Rule 9 of Order 9 or Rule 4 of Order 9 of the Code of Civil Procedure. In the case of [Ramesh v. Savita](#), reported, in 3 MC 74 this Court was dealing with the question as to whether pending the application under Rule 13 of Order 9 the wife could maintain an application under [Section 24](#) of the Hindu Marriage Act. The learned Chief Justice answered

the question in the affirmative. Applying the same ratio and bearing in mind the object of the provisions contained in [Section 24](#) of the Hindu Marriage Act, I have no hesitation in holding that even pending the application made by the husband under Order 9, Rule 4 of the Code of Civil Procedure, the wife can initiate proceedings under [Section 24](#) of the Hindu Marriage Act. It should be borne in mind that, in general, the husband is bound to defray the wife's costs of the proceedings under the Act and to provide her with the maintenance and support pending disposal of the proceedings. Having regard to the object that is sought to be achieved by making provision for awarding maintenance pendente lite and for making provision for payment of expenses of proceedings, the expression "proceedings under the Act" appearing in [Section 24](#) cannot be given a narrow and restrictive meaning."

19] In the case of **Ramesh Dev Anand vs. Smt. Devinder Kaur**², the Delhi High Court has held that proceedings under Order IX Rule 2 of CPC for restoration are '*proceedings under the Act*'. This decision was cited with approval in the case of *Vinod Kumar Kejriwal* (supra).

20] In the peculiar facts and circumstances of the present case, it cannot be said that the wife is taking any advantage of her own alleged defaults. It is true that on 26 September 2014, her Petition No. A-2585 of 2012 came to be dismissed for reasons reflected in the order. However, within a reasonable period, i.e. on 1 December 2014, the wife has filed an application seeking recall of the order dated 26 September 2014. Normally, such applications are decided on basis of affidavits. However, in this case, on account of challenges raised by the petitioner – husband, parties are leading evidence and the Civil Miscellaneous Application No. 218 of 2014, remains to be disposed of till date. The respondent – wife did not, immediately apply for maintenance *pendente lite*, but, such

² AIR 1985 Delhi 40

application was made after a period of almost one year, perhaps realizing that the disposal of Civil Miscellaneous Application No. 218 of 2014, will take a considerable time and it is really not possible for the wife and the minor son to pull on, without any maintenance in the meanwhile. The impugned order has also awarded interim maintenance to the respondent – wife and the son only from 26 September 2015, on the ground that the respondent – wife 'delayed' in applying for interim maintenance. This means that the respondent – wife has been deprived of interim maintenance for the period between 26 September 2014 and 26 September 2015 i.e. for a period of almost one year. This amount would easily come to Rs.12,00,000/- or thereabouts. Thus construed, the respondent - wife has suffered substantially, on account of dismissal of her Petition No. 2585 of 2012. To deprive her and her son of interim maintenance any further, will neither be proportionate nor just in the facts and circumstances of the present case.

21] On the aspect of quantum, there is absolutely no merit in the submission of Ms Irani. The record indicates that the learned trial Judge, by order dated 26 May 2014 below Exhibit 10 had already made an order for payment of *ad hoc* interim maintenance at the very same rates, now reflected in the impugned order dated 9 September 2016. Such order was never challenged by the husband and it is to the credit of the husband that such order was even acted upon. By the impugned order dated 9 September 2016, the learned trial Judge has merely restored this order w.e.f. 26 September 2015. As noted earlier, the respondent wife and her son have been deprived maintenance for the period between 26 September 2014 and 26 September 2015. Ms Irani has however clarified that at no stage has the petitioner – husband, whatever may be the position in law, objected to payment of maintenance to

the minor son or objected to bear the costs towards his educational needs. Ms Irani stated that even in these petitions, it is not the intention of the petitioner to object to payment of any maintenance to the minor son or to deny finance his educational needs. Such approach on the part of the petitioner – husband is truly appreciated.

22] There is however, merit in the submission of Ms Irani that if, the order for interim maintenance made on 26 May 2014 during the pendency of Petition No. 2585 of 2012 is to stand revived by virtue of the impugned order dated 9 September 2016, then, there is no reason why, by the same logic, the interim orders for access made during the pendency of Petition No. 2585 of 2012 should not revive. Mr. Lalwani submitted that presently the son is preparing for the Std.X Examination and revival of access orders, is bound to affect his preparation. This may be correct. However, this only means that the access orders which were made during the pendency of Petition No. 2585 of 2012 need not be enforced until the conclusion of the son's Std. X examinations. However, respondent – wife, cannot, in the facts and circumstances of the present case, oppose the revival of the access orders, based upon the same logic which has been employed by the learned trial Judge in restoring the orders of interim maintenance in her favour. Accordingly, the orders of access made during the pendency of Petition No. A-2585 of 2012 are hereby revived. However, such access orders shall not be enforced by the petitioner until, the son completes his Std. X examination and for a period of one week thereafter. The impugned order dated 9 September 2016 is accordingly modified, so as to include the aforesaid direction.

23] In so far as order dated 25 November 2016, the subject matter of challenge in Writ Petition No. 457 of 2017, is concerned, again, there are no grounds made out to interfere with the same. The approach of the learned trial Judge has been reasonable, which is evident from the following observations at paragraph 14 of the impugned order:

“14. For the purpose of taking such a drastic action of dismissal of the application, the alleged act must be willful act. All the alleged acts do not seem to be contemptuous in nature. The petitioner is ready to share all the documents about trip of the child. Unless she is given an opportunity of proving her contentions and unless the respondent proves his allegations, the application is not liable to be dismissed. Thus I do not find breach of any order committed by the petitioner. Thus the application is liable to be rejected. In the result, following order is passed.

ORDER

The application at Ex. 21 is hereby rejected.”

24] There are allegations and counter allegations in the matter of compliances and non compliances with orders for access. It is possible to say that the material on record does indicate that the petitioner has not been able to obtain proper and sufficient access to his minor son, despite, several orders in his favour. This is no doubt quite unfortunate. However, it is rather premature at this stage to conclude that the access orders were frustrated solely on account of acts of omission and commission on the part of the wife. These are matters, which cannot be determined in such a summary manner. It is to be noted that the minor son, is now in Std. X. He is a teenager, and some allowances are required to be made to his position as well.

25] It is the case of the respondent – wife that she has not breached any of the access orders, but rather she has made her best efforts to persuade her son in the matter. Again, there is no

question of accepting such a defence at this stage. All these are matters which will require detailed examination. In such a situation, the application seeking dismissal of Civil Miscellaneous Application No. 218 of 2014, ought not to have been even made by the petitioner – husband. In any case, it cannot be said that the impugned order dated 25 November 2016, can really be faulted.

26] The impugned order is a discretionary order and the learned trial Judge, who is seized of the matter, has exercised his discretion in not entertaining such application, which would have deprived the wife of opportunity of even seeking restoration of her main petition. The exercise of discretion, in the facts and circumstances of the present case, cannot be said to be vitiated by any unreasonableness and / or perversity. Accordingly, no case is made out to interfere with the impugned order dated 26 November 2016.

27] These petitions are therefore, disposed of with the following order:

a] Writ Petition No. 11989 of 2016 is partly allowed. The award of interim maintenance to the wife and son as well as other directions with regard to finance of son's educational needs is not interfered with. However, the orders for access made during pendency of Petition No. A-2585 of 2012 are hereby revived. Such revived access orders shall however, not be enforced by the appellant, until his son completes his Std. X examination (some time in May / June 2017) and the period of one week thereafter. The impugned order dated 9 September 2016 is modified to this extent;

b] Writ Petition No.457 of 2017 is dismissed;

c] Learned trial Judge is directed to dispose of Civil Miscellaneous Application No. 218 of 2014 as expeditiously as possible and in any case, within a period of three months from the date of production of authenticated copy of this order; and

d] The interim orders, if any, stand vacated. The amount deposited in this court, is permitted to be withdrawn by the respondent.

e] Notwithstanding, the direction that revived access orders shall not be enforced by the petitioner until his son's completes his Std. X examination, liberty is granted to the petitioner to apply to the learned trial Judge for some limited access, since, it is submitted that the petitioner's – mother, who is quite aged has been detected with a serious ailments. Needless to add that such application as and when made, will be considered by the learned trial Judge on its own merits and disposed of the same in accordance with law as expeditiously as possible.

f] There shall, however, be no order as to costs.

Chandka

(M. S. SONAK, J.)