

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **21.02.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD Nos.2873 and 2908 of 2016
and
C.M.P.Nos.14575 and 14860 of 2016

K.S.Vimaleswaran .. Petitioner in both
CRPs.

vs

C.P.S.Charumathi .. Respondent in both
CRPs.

Prayer: Civil Revision Petitions filed under Article 227 of the Constitution of India against the fair and decreetal orders dated 29.06.2015 passed by the learned Subordinate Judge, Tambaram in I.A.Nos.508 and 507 of 2014 in HMOP No.320 of 2011.

For Petitioner : Ms.Sudha Ramalingam
in both CRPs

For Respondent :Mr.T.C.S.Raja Chockalingam
in both CRPs.

COMMON ORDER

The petitioner/husband in a matrimonial proceedings, being aggrieved by the orders passed by the Court below, has preferred these revisions.

2. Heard both sides.

3. The brief facts of the case for the disposal of these civil revision petitions would run thus:

(i) The petitioner/husband herein filed HMOP No.320 of 2011 under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955 seeking divorce as against the wife on the ground of cruelty. Pending HMOP, the respondent/wife has filed two applications, viz., I.A.No.508 of 2014 seeking interim maintenance to her and the minor child in a sum of Rs.2,50,000/- per month and a sum of Rs.30,000/- towards

litigation expenses and I.A.No.507 of 2014 seeking a direction directing the revision petitioner to undergo medical examination by a competent Psychiatrist to find the truth about his wilful refusal to have normal consummation.

(ii) It is the case of the respondent/wife that immediately after the marriage, they both lived in United Kingdom and they begot a female child. However, it is alleged by the wife that the petitioner/husband is incapable of having normal sexual conduct with her and that he is having a psychological dysfunction in sex. Hence, she has filed the above application to subject the husband for examination by a competent Psychiatrist. The other application was filed by her seeking maintenance.

(iii) The applications were contested by the revision petitioner/husband denying all the allegations. It is also stated that after the filing of the original petition by the husband for divorce, the wife also has filed another petition for restitution

of conjugal rights. The petitioner/husband was also mutually alleging that the wife was not normal and directed her to undergo psychological test. The petitioner had alleged that the wife had mood swings and always got easily irritated and angry. In fact, she used to abuse the husband physically. Despite such mutual allegations, a female child was born to them. Therefore, the petitioner/husband sought for dismissal of the aforesaid applications.

(iv) The learned Subordinate Judge, Tambaram allowed the application in I.A.No.507 of 2014 based on Ex.P1-E-mail, which is an article titled as "Vindhuvu Magimai" sent by the petitioner/husband to the respondent/wife and I.A.No.508 of 2014 was allowed by directing the petitioner/husband to pay a sum of Rs.1,00,000/- to the wife and Rs.75,000/- to the minor child.

4. Challenging both the orders, the above two Civil Revision Petitions have been filed by the husband.

5. Heard both sides and perused the orders passed by the Court below.

6. Merely because an article has been sent by the husband to the wife does not mean that the husband is having psychological dysfunction in sex. He could have thought that it would be useful for her to know about the same. The respondent/wife herself has filed a petition for restitution of conjugal rights subsequent to the filing of the divorce petition by the petitioner/husband. The wife seems to have filed a petition with a least intention of joining the matrimonial home, which is evident from her attitude in directing the petitioner to subject himself for medical examination without any basis. It is not in dispute that a child also has been born to the respondent through the petitioner. While so, the allegation, especially, after having filed an application to join her husband, is

unwarranted. It is only to humiliate the husband, who has filed an application seeking divorce, the wife has filed such an application.

7. In matrimonial matters, already the parties are at logger heads and their feelings are subjective. While so, the Courts have to go slow in ordering these kinds of applications, by weighing the circumstances in favour of the parties, who have approached the Court. Mechanically allowing such applications would only further widen the gap between the spouses, who are at logger heads. The intention of the Court should be only to unite the couple. Therefore, before ordering these kinds of applications, the Court has to assess the pros and cons of ordering the same. However, the Court below has allowed the application without application of mind.

8. In this regard, the learned counsel for the petitioner cited the judgment of the Hon'ble Apex Court reported in **(2003)4 SCC 493 [Sharda vs. Dharmpal]**, wherein it is held

as follows:

"83. It is, however, axiomatic that a Court shall not order a roving enquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of Section 115 of the Code of Civil Procedure and/or Article 227 of the Constitution of India. Abuse of the discretionary power at the hands of a Court is not expected. The Court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order."

9. In the present case, when the marriage is consummated, which is evidenced by the fact that a female child is born out of the wedlock, the Family Court ought not to have allowed the application. An article Ex.P1, which is sent by e-mail to the wife during the course of the matrimony, does not show or attribute any dysfunction on the part of the petitioner. In the given circumstances, allowing of such application, will not serve any purpose and it will be only violative of the privacy of

the petitioner. As it is the husband, who has filed the petition for divorce on the ground of cruelty and the attitude of the wife in filing such an application and the same being allowed by the Court, without any application of mind, would only aggravate the situation and will not improve the same.

10. In such circumstances, the order dated 29.06.2015 passed by the learned Subordinate Judge, Tambaram in I.A.No.507 of 2014 in HMOP No.320 of 2011 is set aside and **CRP PD No.2908 of 2016 is allowed.**

11. Insofar as the application filed in I.A.No.508 of 2014 under Section 24 of the Hindu Marriage Act, 1955 is concerned, the wife had claimed a sum of Rs.2,50,000/- per month towards maintaining herself and for the maintenance of the minor girl child and Rs.30,000/- towards litigation expenses and also for future maintenance and the Court below had ordered a

sum of Rs.1,75,000/- as maintenance and Rs.30,000/- towards litigation expenses.

12. Initially, the petitioner/husband has filed the petition for divorce and as a counter blast to the same, the respondent/wife has filed a petition seeking restitution of conjugal rights and both the petitions are pending.

13. Before marriage, the petitioner/husband was employed in New Zealand and that he was a resident of that country. After marriage, both of them were residing in U.K for some time and later on, moved to New Zealand again. It is stated by the wife that the minor child is four years old and she is educating her. It is also stated that the husband is working as a Scientist in UK and drawing a salary of Rs.5 lakhs per month and leading a luxurious life. It is alleged that even though he is earning well, he has not been paying any money for her and her child's maintenance. Therefore, she has claimed maintenance in a sum of Rs.1,50,000/- for her and

Rs.1,00,000/- for the minor child along with the litigation expenses of Rs.30,000/-.

14. The petitioner/husband has resisted the said application and has stated that the parents of the respondent/wife are very rich and she is also a citizen of New Zealand. It is the wife, who has voluntarily deserted the husband and had taken the child away from him. It is further stated that he is only working as a Lecturer in Nutrigenetics at the University of Reading at United Kingdom. His earnings are just enough only to maintain himself in that country. However, he had stated that if the wife finds it difficult to spend for the child, he will take care of the same.

15. At this juncture, the judgment of the Hon'ble Apex Court reported in **(1997) 7 SCC 7 [Jabsir Kaur Sehgal v. District Judge Dehradun & Ors]** can be usefully referred to:

".....No set formula can be laid for fixing the amount of maintenance. It has, in very nature of things, to depend on the facts and circumstance of each case. Some

scope for leverage can, however, be always there. The Court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those; he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate.....”

16. On a perusal of the typed set of papers, it is seen that the petitioner/husband is working only as a Reader and even going, as per the Salary Certificate of the petitioner, which is annexed in page Nos.51 and 52 and produced by the respondent/wife, the husband may not be earning more than Rs.2,50,000/- per month. Living in a country outside India, he cannot be expected to part all the money in the name of maintenance. Therefore it would be appropriate to award maintenance in commensurate with the salary of the husband. When the husband himself is earning about Rs.2,50,000/- to

3,00,000/-per month, he cannot be expected to part with the entire amount to the wife and the child for their maintenance. He has also stated that the wife is employed as a teacher in a reputed school and is capable of earning. Whereas in para no.10 of the affidavit filed by the wife in support of the maintenance application, she has stated as follows:

"10. I submit that even though a social and moral obligation is cast upon the respondent to maintain us pendente lite, the respondent has failed to maintain us. "

17. In the aforesaid facts and circumstances, this Court is inclined to modify the order dated 29.06.2015 passed by the court below in I.A.No.508 of 2014 in HMOP No.320 of 2011 in awarding maintenance in a sum of Rs.1,75,000/- per month as follows:

(a) The petitioner/husband shall pay a sum of **Rs.50,000/-** [Rupees fifty thousand only] per month to the

respondent/wife instead of Rs.1,00,000/- per month as ordered by the Court below.

(b) The petitioner/husband shall also pay a sum of **Rs.25,000/-** [Rupees twenty five thousand only] to the minor child, per month instead of Rs.75,000/- per month as ordered by the Court below.

(c) In all, the petitioner/husband shall pay a sum of **Rs.75,000/-** [Rupees seventy five thousand only] per month, instead of Rs.1,75,000/- as ordered by the Court below. It is further made clear that the above amount shall be payable to the respondent/wife from the date of the petition and he shall continue to pay the same, till the disposal of the original petitions.

18. In the result,

(i) **CRP PD No.2873 of 2016** filed as against the order

dated 29.06.2015 passed in I.A.No.508 of 2014 is disposed of with the above modification.

(ii) **CRP PD No.2908 of 2016** filed as against the order dated 29.06.2015 passed in I.A.No.507 of 2014 is allowed by setting aside the order passed by the Court below.

No costs. consequently, the connected miscellaneous petitions are closed.

21.02.2017

vj2

Index: yes/No

Internet: yes

To

The Subordinate Judge, Tambaram

PUSHPA SATHYANARAYANA,J.,

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<http://www.judis.nic.in>