

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

% **Date of decision: 11th July, 2018**

+ **CM(M) 756/2018, CM No.26980/2018 (for directions), CM No.27024/2018 (for stay) & CM No.27029/2018 (for summoning record of CM(M) No.890/2016)**

ARJUN THAPAN

..... Petitioner

Through: Ms. Francesca Kapur, Adv.

Versus

ANITA THAPAN

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.27028/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM(M) 756/2018

3. This petition under Article 227 of the Constitution of India impugns the order [dated 20th April, 2018 in Execution No.37/2012 of the Court of Principal Judge, District South, Family Court, Saket Courts, New Delhi] of dismissal of objections filed by the petitioner / husband to the execution sought by the respondent / wife of order of payment of maintenance and of issuance of warrants of arrest of the petitioner / husband, ordered to be executed through the Indian Embassy in Philippines.

2. I have at the outset, enquired from the counsel for the petitioner / husband, whether or not appeal against the impugned order lies before the Division Bench.

3. The counsel for the petitioner / husband draws attention to Section 19(1) of the Family Court Acts, 1984 which provides for an appeal from every judgment or order, not being an interlocutory order, of a Family Court, to the High Court, both on law and facts and for the said appeal to be heard by a Bench consisting of two or more Judges of the High Court.

4. I have wondered whether the impugned order qualifies as an interlocutory order, for an appeal under Section 19 to not lie thereagainst. For the said purpose, the nature of the order will have to be seen.

5. The objections preferred by the petitioner / husband, to the execution filed by the respondent / wife of the order of payment of maintenance, were (i) that the respondent / wife at the time of passing of the order of maintenance concealed from the Court that she had sufficient financial support; (ii) that she did not file her income and assets affidavit before the Court in terms of law laid down in ***Puneet Kaur Vs. Inderjit Singh Sawhney*** (2011) 183 DLT 403; (iii) that the respondent / wife holds a Doctorate degree in French Literature and was working as a Yoga Teacher; (iv) that the respondent / wife is also a Director in Chinmaya Mission; (v) that on the contrary, the petitioner / husband, who was an Officer of Indian Audit and Accounts Service, has since retired and is permanently settled in Manila, Philippines and is a pensioner and does not have any regular income; (vi) that the pension of the petitioner / husband could not be attached in terms of the ***Union of India Vs. Wing Commander R.R. Hingorani*** (1987) 1 SCC 551; and, (vii) that the High Court vide

order dated 18th October, 2016 in CM(M) No.890/2016 preferred by the petitioner / husband had granted an opportunity to the petitioner / husband to seek modification of the order of the Family Court granting maintenance at the rate of Rs.1,25,000/- per month and though the petitioner / husband had filed an application for modification but the same had not been heard.

6. The Family Court, in the impugned order, with respect to the aforesaid objections held that till the order of payment of maintenance was modified or operation thereof stayed, it was liable to be executed and the petitioner / husband, in execution, could not challenge on merits the order of which execution was sought.

7. I have considered, whether the order to the aforesaid extent qualifies as an interlocutory order.

8. All the orders made in the course of execution or even if adjudicating objections under Section 47 of the CPC have not been conferred the status of a decree. The definition of a decree in Section 2(2) of the CPC does not include such an order. Though Section 2(2) of the CPC, as it stood prior to the amendment of the CPC of the year 1976, included in the definition of decree the determination of any question within Section 47 of the CPC but vide amendment of the CPC of the year 1976, determination of any question within Section 47 is no longer a decree. Else, Order XXI only in Rules 46H, 58 and 103 makes the orders specified therein appealable as a decree. Against such orders, conferred status of decree, appeal under Section 19 supra would lie. However, the objections aforesaid of the petitioner / husband did not qualify as under Rules 46H, 58 or 103 of Order XXI

and thus order of dismissal of such objections would be an interlocutory order.

9. I am thus of the view that this petition is maintainable.

10. I may however record that after full hearing and after I have made my mind known to the counsel for the petitioner/husband, she sought to withdraw this petition with liberty to approach the Division Bench. However, having found the petition to be maintainable and having heard the counsel, it is not deemed appropriate to now permit withdrawal of the petition, for another Bench of this Court to be burdened therewith.

11. The counsel for the petitioner / husband started her arguments on merits by contending that the Principal Judge, Family Court, while proceeding with the execution, has not heard the application filed by the petitioner / husband for modification of the order fixing the quantum of maintenance. However, the counsel for the petitioner / husband agrees that that is not the subject matter of challenge in this petition and states that she will take up that aspect separately.

12. Else, no error is found in the reasoning in the impugned order, of the Executing Court being not entitled to re-consider the order of which execution is sought or to go behind the same. Thus, no merit is found in the petition to the extent dismissing the objections to the execution preferred by the petitioner / husband.

13. With respect to the other part of the order, issuing warrants of arrest of the petitioner / husband, the impugned order records that the respondent / wife had moved an application under Order XXI Rule 11A of the CPC; that arrears of maintenance ordered to be paid had

accumulated to Rs.1.28 crores; that the petitioner/husband, though had capacity to pay the same out of GPF, Leave Encashment, Gratuity etc. received upon his retirement from Indian Audit and Accounts Service and from his pension, but had chosen not to pay the same; that the presence of the petitioner / husband could not be procured without exercise of coercive measures.

14. The aforesaid order also would qualify as an interlocutory order and no appeal lies thereagainst to the Division Bench.

15. The impugned order does not direct execution of the order of maintenance by detention of the petitioner / husband in civil prison but merely directs issuance of warrants of arrest for production of the petitioner / husband before the Executing Court.

16. The counsel for the petitioner / husband, with respect to the aforesaid part of the order, has argued that the petitioner / husband and the respondent / wife are owners in equal shares of a plot of land outside Bangalore and steps should have been first taken for attachment and sale of the said property of the petitioner / husband before seeking production of the petitioner / husband before the Family Court.

17. I have enquired from the counsel for the petitioner / husband, whether the petitioner / husband before the Family Court offered to transfer his 50% right / title in the aforesaid land to the respondent / wife or sale of the same in payment of maintenance.

18. Though the counsel for the petitioner / husband states that it was so done and there are orders to that effect but the same are not before this Court.

19. However, upon being asked to show the title documents and to tell the value of the aforesaid plot, no answer is forthcoming and it is stated that there are no instructions today in this regard.

20. It is quite obvious that the petitioner / husband, though capable of paying maintenance, is arranging his affairs in a manner to avoid compliance of the order of payment of maintenance. The respondent / wife, stated to be staying in Delhi, cannot be compelled to go to the competent Court where the land is situated for realization of the maintenance awarded to her.

21. If at all the petitioner / husband had any intention to pay maintenance by liquidation of his share in the aforesaid plot, the petitioner / husband should have stated so before the Executing Court on 20th April, 2018 and which is not found to have been done.

22. No error can thus be also found in the conclusion drawn by the Family Court, of the petitioner / husband, by contending pension to be not attachable and by not disclosing his other assets, having arranged his affairs in a manner to defeat the execution.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

JULY 11, 2018

‘gsr’..