

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.5 of 2018****Order reserved on :14.01.2019****Order delivered on: 06.02.2019**

Smt. Rashmi Tiwari, W/o Dr. Sanjeev Tiwari, aged about 40 years, R/o D-6, Shailendra Nagar, Raipur, Tahsil & District Raipur (CG) Present Address C/o Late Ravishankar Mishra, Plot No.761, Adarsh Chowk, Sunder Nagar, Raipur (CG)

---- Petitioner**Versus**

Dr.Sanjeev Tiwari S/o Late S.K. Tiwari, aged about 44 years, R/o D-6, Shailendra Nagar, Raipur, Tahsil & District Raipur (CG)

---- Respondent

For Petitioner	:	Mr.Sourabh Sharma, Advocate
For Respondent	:	Mr.Anis Tiwari, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Order**

1. Taking exception to the order granting interim maintenance under Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act of 1955"), this writ petition has been preferred by the petitioner/wife questioning the quantum of maintenance granted to the extent of ₹ 11,000/- per month stating that the husband's income is more than ₹ 8 lacs per month, therefore, the quantum of interim maintenance be enhanced appropriately as per income of the respondent-husband by granting the writ petition.
2. Mr.Sourabh Sharma, learned counsel for the petitioner, would submit that the petitioner has stated the income of the respondent/husband to be more than Rs. 8 lacs per month, which

the Family Court has ultimately recorded as ₹ 1,10,000/- per month, but only granted ₹ 11,000/- per month, which is contrary to the principle of law laid down by the Supreme Court in the matters of Dr.Kulbhushan Kumar v. Raj Kumari and Another¹ and Kalyan Dey Chowdhury v. Rita Devi Choudhery². He would further submit that pathology labs are being run by the respondent/husband in different places. He would also submit that a Division Bench of this Court in Anil Mishra v. Sakshi Mishra³, decided on 22.2.2017 has already held that against the order granting or rejecting application under Section 24 of the Act of 1955, the writ petition would be maintainable and first appeal would not be maintainable, which is binding to this Court.

3. On the other hand, Mr.Anis Tiwari, learned counsel for the respondent, would submit that the writ petition as framed and filed would not be maintainable and first appeal under Section 19(1) of the Act of 1955 would lie. He relied upon the judgment of the Supreme Court in the matter of Shah Babulal Khimji v. Jayaben D. Kania and another⁴, the judgment of the Delhi High Court in the matter of Manish Aggarwal v. Seema Aggarwal and Ors.⁵, the judgment of the Uttarakhand High Court in the matter of Rahul Samrat Tandon v. Smt.Neeru Tandon, the judgment of the Rajasthan High Court in the matter of Kavita Vyas v. Deepak Dave⁶, the judgment of the Madras High Court in the matter of P.T.

1 (1970) 3 SCC 129

2 (2017) 14 SCC 200

3 AIR 2017 Chhattisgarh 108

4 AIR 1981 SC 1786

5 (2013) ILR Delhi 210

6 AIR 2018 RAJ 72

Lakshman Kumar v. Bhavani⁷, the judgment of the Madhya Pradesh High Court in the matter of **Shailendra v. Smt. Deepika** (W.P.No.6108/2017), decided on 18.5.2018 and the judgment of the Allahabad High Court in the matter of Smt. Pushpa @ Pooja @ Bhawna v. State of U.P., District Judge and Shiv Kumar Gautam⁸. He would further submit that the respondent has resigned from the hospital in which he was working, as such, income has not been established by the petitioner/wife.

4. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the record with utmost circumspection.
5. At this stage, I would first take up the preliminary objection raised on behalf of the respondent-husband with regard to maintainability of the present writ petition on the ground that the writ petition against an order partly rejecting the application under Section 24 of the Act of 1955 is not maintainable as the remedy is to file appeal under Section 19 (1) of the Family Court Act, 1984 and relied upon the decision of the Rajasthan High Court in the matter of Kavita Vyas (supra) and decision of the Uttarakhand High Court in the matter of Rahul Samrat Tandon (supra) and therefore, the matter be referred to larger bench for consideration. However, Mr.Sourabh Sharma, learned counsel for the petitioner-wife, would submit that since decision of Division Bench of this Court is binding in which appeal has been held to be not maintainable in law, therefore,

7 2013(3)CTC 166

8 AIR 2005 All 187

preliminary objection deserves to be dismissed.

6. The Division Bench of this Court in the matter of Anil Mishra (supra) while considering the question whether an order passed by the Family Court granting application under Section 24 of the Act of 1955, is amenable to appeal under Section 19(1) of the Act of 1984 answered the issue as under:-

“21. Thus, we are of the considered opinion that the order granting maintenance *pendente lite* by granting application under Section 24 of the Act of 1955 by the Judge, Family Court would be an interlocutory order within the meaning of Section 19 (1) of the Act of 1984 and would not be a judgment, therefore, would fall outside the scope of Section 19 (1) of the act of 1984.”

Thus, the Division Bench of this Court has clearly held that against the order granting maintenance, appeal would not be maintainable under Section 19(1) of the Act of 1984, as such, the writ petition under Article 227 of the Constitution would be maintainable.

7. The judgments of the High Courts have persuasive value to the other High Courts. The principle of *stare decisis* is not strictly applicable when the High Court is considering the judgment of another High Court, on same issue. These judgments are treated with respect. The High Court is however not obliged in law to follow them or to refer it to larger bench if they take a different view, as such, the judgment of a Division Bench of this Court in **Anil Mishra** (supra) is binding to this Court and the writ petition is held to be maintainable in law.

8. In the instant case, the Family Court after having held that income of the respondent-husband is ₹ 1,10,000/- per month has only

awarded ₹ 11,000/- per month to the petitioner-wife.

9. The question for consideration would be whether the quantum so quantified by the Family Court is in accordance with law ?

10. The question of quantum of interim maintenance is no longer res-integra. The Supreme Court in the matter of Dr.Kulbhushan Kumar (supra) has granted 25% of the total income to the wife by holding as under:-

“21. A sum of Rs.250/- per month for the maintenance of the wife of a person occupying the position of the appellant cannot be said to err on the liberal side. The High Court in our opinion very rightly fixed that sum making it subject to the limit of 25 percent of the income as found by the income-tax authorities. We have no reason to take any different view. Subject to our observation as to the determination of the income of the appellant, the appeal against the wife is dismissed with costs.”

11. The principle of law laid-down in the matter of Dr.Kulbhushan Kumar (supra) was followed with approval recently by Their Lordships of the Supreme Court in the matter of Kalyan Dey Chowdhury (supra). Para-15 of the report states as under:-

“15. The review petition under Order 47 Rule 1 CPC came to be filed by the respondent wife pursuant to the liberty granted by this Court when the earlier order dated 2-2-2015 awarding a maintenance of Rs.16,000/- to the respondent wife as well as to her minor son was under challenge before this Court. As pointed out by the High Court, in February 2015, the appellant husband was getting a net salary of Rs.63,842/- after deduction of Rs.24,000/- on account of GPF and Rs.12,000/- towards income-tax. In February 2016, the net salary of the appellant is stated to be Rs.95,527/-. Following Dulbhushan Kumar v. Raj Kumari (supra), in this case, it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the respondent wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay

maintenance. Maintenance is always dependant on the factual situation of the case and the court would be justified in moulding the claim for maintenance passed on various factors. Since in February 2016, the net salary of the husband was Rs.95,000/- per month, the High Court was justified in enhancing the maintenance amount. However, since the appellant has also got married second time and has a child from the second marriage, in the interest of justice, we think it proper to reduce the amount of maintenance of Rs.23,000/- to Rs.20,000/- per month as maintenance to the respondent wife and son.”

12. Reverting to the facts of the present case in the light of principle of law laid-down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that income of the respondent-husband has been held by the Family Court to be ₹ 1,10,000/- per month, which is disputed by learned counsel for the respondent, but the fact remains that income assessed by the Family Court as ₹ 1,10,000/- per month has not been questioned by the respondent-husband by filing separate petition or otherwise, as such, taking income as ₹ 1,10,000/- per month as accepted by the Family Court, the Family Court ought to have granted 25% of the total income as interim maintenance to the petitioner-wife, which comes to ₹ 27,500/-, which the petitioner-wife is entitled from the date of grant of application i.e. 21.11.2017 by the Family Court. The respondent is directed to deposit arrears of interim maintenance within four weeks from today.
13. Accordingly, the writ petition is allowed in part and it is held that the petitioner-wife would be entitled for interim maintenance of ₹ 27,500/- per month from 21.11.2017.
14. The writ petition is allowed to the extent indicated

hereinabove. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-