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

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Date of Judgment: 15.03.2019

+ **MAT.APP.(F.C.) 77/2019 & CM APPL. 12299/2019**

S P D

..... Appellant

Through: Mr.Abhishek Kumar, Advocate.

versus

K D

..... Respondent

Through: Mr.Prabhjit Jauhar and Ms.Upasana
Goel, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

Caveat No. 263/2019

Since the learned counsel for the respondent-wife enters appearance,
the caveat petition stands discharged.

CM APPL. 12298/2019 (Exemption)

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

CM APPL. 12300/2019 (delay)

3. This is an application filed by appellant-husband seeking condonation
of delay in filing the present appeal.

4. Notice. Counsel for the non-applicant accepts notice. The prayer made in this application is not opposed. Accordingly, the delay in filing the present appeal is condoned.
5. The application stands disposed of.

MAT.APP.(F.C.) 77/2019 & CM APPL. 12299/2019 (Stay)

6. The appellant-husband is aggrieved by the decision rendered by the Family Court on an application filed by the respondent-wife under Section 24 of the Hindu Marriage Act (hereinafter referred to as 'HMA') seeking maintenance for herself and her 11 years minor daughter born out of the wedlock. Learned counsel for the appellant-husband submits that the Family Court did not call for the affidavits of the income from the parties before deciding the application seeking maintenance. Second submission of learned counsel for the appellant-husband is that the Family Court has failed to take into account the capability of the respondent-wife to earn. It is contended that the respondent-wife is Ph.D. in Sociology and further contended that prior to the year 2017, she was working with the NHRC. Learned counsel further submits that the Family Court has granted maintenance at the higher side. He submits that earlier by an order of 11.11.2013, Family Court had awarded maintenance @ Rs.8,000/- and there are no justifiable reasons to increase this amount from Rs.8,000/- to Rs.25,000/-.
7. The present appeal is opposed by Mr.Prabhjit Jauhar, learned counsel for the respondent. He submits that the respondent was employed with the NHRC on contractual basis. On the contract coming to an

end, she is unemployed. He further submits that despite best efforts, she is not being able to secure a job and moreover, she is spending her time in looking after their 11 years old daughter, single handedly. He submits that merely because the respondent is capable of earning, is not a ground alone to deny her maintenance. He submits that what the Court is to consider is whether she is actually earning or not. Reliance is placed on the observations of the Supreme Court in the case of ***Shailja & Anr. Vs Khobbanna*** reported at **2018 (12) SCC 199**. Paras 5 and 8 of the said judgment read as under:

“5. The High Court while considering the correctness of the order passed by the Family Court did not accept the contention of the respondent/husband that the appellant/wife was working. All that was held was that the appellant/wife was capable of earning and therefore maintenance was reduced to an amount of Rs.6000/- from Rs.15,000/- for her and Rs.6,000/- from Rs.10,000/- for the son.

8. That apart, we find that the High Court has proceeded on the basis that the appellant No.1 was capable of earning and that is one of the reasons for reducing the maintenance granted to her by the Family Court. Whether the appellant No.1 is capable of earning or whether she is actually earning are two different requirements. Merely because the appellant No.1 is capable of earning is not, in our opinion, sufficient reason to reduce the maintenance awarded by the Family Court.”

(Emphasis Supplied)

8. Learned counsel further submits that in the case of ***Rajpal Singh vs. Avleen Kaur @ Neetu*** reported at **257 (2019) DLT 690 (DB)**, in the absence of any documents, this Court had rejected the ground sought to be raised by the appellant-husband that the respondent-wife was actually gainfully employed.

9. We have heard learned counsels for the parties and also given our thoughtful consideration to the matter.
10. In the present case, the marriage between the parties was solemnized on 18.11.2005. Out of their wedlock, a daughter was born on 03.03.2008, who is in the care and custody of the respondent-wife. It is not disputed that in an earlier application filed by the respondent-wife under Section 24 of HMA, the Family Court had awarded maintenance @ Rs.8,000/- per month. However, at the relevant time when the said application was filed, admittedly the respondent-wife was gainfully employed on contract basis with the NHRC. Having lost her employment, she filed another application under Section 24 of HMA seeking variation/modification of the order dated 11.11.2013. While deciding the application seeking maintenance, the Family Court has taken into account the salary of the appellant-husband, who is employed with All India Institute of Medical Science (AIIMS) and is receiving a gross salary of Rs.57,899/- and net salary of Rs.43,321/- per month.
11. The First submission of learned counsel for the appellant-husband is that the Family Court has decided the application filed by the respondent-wife under Section 24 of HMA without calling upon the parties to file their affidavits of income as per the decision rendered by this Court in the case of ***Kusum Sharma vs. Mahinder Kumar Sharma*** reported at ***217 (2015) DLT 706***. We find no force in this submission of learned counsel for the appellant-husband. The purpose and objective of directing the parties to file affidavits of their income is to enable the Court to get a fair assessment of their income and

other assets so as to reach to a conclusion with regard to grant of maintenance and to enable the court to decide the application under section 24. It is often seen that the matters are sometimes adjourned endlessly to await such affidavits. At times, incomplete affidavits are filed, in which case the matter is adjourned to await necessary information from the respondent. In our view, there cannot be a straitjacket formula to be followed by any Court to endlessly await the affidavits of income and more so in those cases where one of the spouses is a Government servant or employed in a private sector, where there is no element of cash payments being received as remuneration. In those cases, to await compliance of directions of ***Kusum Sharma*** would lead to traversity of justice and would deprive the spouse from maintenance, which would be an immediate necessity at least in some cases. The aim and objective of the directions rendered in the case of ***Kusum Sharma*** (supra) were also on account of the fact that there is a tendency of spouses to hide their true and correct income, which was considered and highlighted by the Supreme Court in the case of ***Jasbir Kaur Sehgal vs. District Judge, Dehradun & Ors.*** reported at ***1997 (7) SCC 7***. It is also common knowledge that on account of marital discord, there is a tendency of spouses to divert their income, funds and sometime even property to deprive the other spouse of his/her rightful entitlement of maintenance. It is for this reason that the Court in its wisdom felt that an exhaustive procedure in the form of affidavit would go a long way in securing information which would help the Court to make a fair assessment of income and expenditure of a spouse. The procedure of filing affidavits should be

followed as far as possible, but in cases like the present, where the appellant-husband works in AIIMS and his salary slips are matter of record, to simply await the income and expenditure affidavit, in our view would have been futile and moreover perusal of reply filed by the appellant-husband would show that a detailed reply was filed and the Family Court was confident that based on the reply, the court would be able to arrive at a fair assessment of maintenance to be awarded. Nor it is the case of the appellant that the wife has concealed her true income or is working at present.

12. We may add that the Family Court in suitable cases where filing of the affidavit is being delayed may deem it appropriate to record the statement of the parties. By this method, the Court would be able to secure the necessary information and the matter would also not get delayed.
13. Second ground which has been urged by the learned counsel for the appellant-husband is that the respondent-wife is a highly and well qualified person and merely because she is not working cannot be a ground to grant her maintenance. Learned counsel further submits that in fact she is better qualified than the appellant-husband, who is a mere graduate. We find no force in the submission of learned counsel for the appellant-husband as there cannot be a blanket rule that a well qualified spouse would not be entitled to maintenance.
14. In the present case, when the respondent-wife was gainfully employed, this fact was considered by the Family Court in its order dated 11.11.2013 and the maintenance was granted only for the daughter. However, subsequently in the year 2018, due to change of

circumstances, another application was filed by her bringing subsequent events on record, the respondent-wife on an affidavit deposed that she had lost her job where she was employed on contract basis and hence, she was entitled to maintenance. The Supreme Court in the case of *Shailja (supra)* has observed that the Court must not only consider the capability of earning of spouse but what is to be considered is as to whether the spouse is actually earning. While we are of the considered view that in case one of the spouse is able to establish that other spouse has deliberately or intentionally resigned from the job or although being capable of seeking employment, is making no efforts to get employment, the court can, in those special circumstances and after recording reasons, deprive the spouse from maintenance. While doing so, the Court must take into account other factors as well, as to whether the spouse is bringing up a minor child; what are the family circumstances; whether she is in a position to live with her family members; whether the child would remain in a secure environment during her absence; Is the child of special needs and requires constant care and monitoring; whether she is willing to take up the job and further as to whether the salary received by her would be enough to meet the requirements of leaving the child at a crèche or arranging a help during her absence. Thus, it cannot be said that merely because the spouse is capable of earning, that by itself is a ground to deprive her of maintenance.

15. Thus, in our view, there cannot be absolute rule in this regard and would depend on the facts and circumstances of each case. In the present case, despite the marital discord the respondent-wife continued

to work till the year 31.03.2017. We do not find that she resigned voluntarily as she continued to work up to 31.03.2017, till her contract ended. Nothing has been placed on record that the respondent-wife is unemployed out of her own choice.

16. Third ground which has been urged before us is that the Family Court has granted higher amount for maintenance when the appellant-husband is only earning Rs.43,321/- per month. We are also unable to accept this submission raised by the learned counsel for the appellant-husband. While the appellant-husband is maintaining only himself, the respondent-wife has maintained and is maintaining herself and her 11 years old daughter. In addition, the respondent-wife has urged that the appellant-husband is also working as a part time stenographer. Since there is no prima facie evidence to support this, the Family Court has not considered the same. We therefore do not delve into this issue.
17. The aim and objective of Section 24 has been taken into account by the Hon'ble Supreme Court in the case of **Chaturbhuj vs. Sita Bai**, reported at **(2008) 2 SCC 316** whereby it was held that it is the duty of a man to maintain his wife, children and parents when they are unable to maintain themselves. The Apex Court further interpreted the phrase "*unable to maintain herself*". The relevant para 6 reads as under:

"6. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take

within itself the efforts made by the wife after desertion to survive somehow....”

(Emphasis Supplied)

18. In view of what have been stated above, we do not find any infirmity in the order of the Family Court, which would require interference.
19. Accordingly, the appeal along with pending application is dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

MARCH 15, 2019

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