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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 31.07.2019

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MAT.APP.(F.C.) 149/2018

R D

..... Appellant

Through: Ms. Susmita Mahal, Advocate.

versus

B D

..... Respondent

Through: Mr. Trilok Chand, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. The present appeal arises out of an interim order dated 18.04.2018 passed by the Family Court whereby two applications filed by the appellant-wife; one under Section 24 of the Hindu Marriage Act (hereinafter referred to as 'HMA') seeking maintenance for herself and the second application under Section 26 of HMA seeking custody of the two minor children have been dismissed.
2. The brief facts of the case to be noticed for the disposal of the present appeal are that the marriage between the parties was solemnized on 20.02.2006 at Delhi. Two children were born out of the said wedlock, who are aged about 9 years and 11 years respectively. The parties are living separately since the year 2015. On 04.02.2017, a petition under Section 9 of HMA was filed by the appellant-wife before Family Court seeking restitution of conjugal rights which is pending.

3. The appellant-wife is aggrieved by the impugned order passed by the Family Court on two grounds; *firstly* the application filed by her seeking maintenance under Section 24 of HMA has been rejected on the ground that the maintenance has already been fixed @ Rs. 2000/- per month in the proceedings initiated by the appellant-wife under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'DV Act'). *Secondly*; the custody of the children was declined to the respondent-wife and submits that the custody of the minor children should be given to the appellant-wife which is necessary for the proper growth of the children including physical as well as mental development, and thus, the counsel prays the impugned order be set aside.
4. Ms. Susmita Mahal, learned counsel for the appellant-wife submits that the Court in proceedings arising out of the DV Act has only granted interim maintenance and she is unable to sustain herself with a meager sum of Rs. 2,000/- per month.
5. Mr. Trilok Chand, learned counsel for the respondent-husband has opposed this appeal on the ground that the appellant-wife is a housewife and totally dependent upon the respondent-husband for her day to day needs and thus, she is not in a position to bring up her children in view of her poor financial condition. The counsel prays that the impugned order is a well reasoned order and there is no infirmity in it.
6. Vide order dated 12.11.2018, we had appointed Mr. Prabhjit Jauhar as *amicus curiae* in the matter to assist this Court on the question as to

whether maintenance can be awarded in other proceedings once the interim maintenance has already been granted under proceedings arising out of Section 125 of Cr.P.C. or DV Act.

7. We have heard learned counsel for the parties and have also given our thoughtful consideration to the matter. We may note that the Family Court has rejected the application filed by the appellant-wife under Section 24 of HMA solely on the ground that maintenance of Rs.2,000/- per month already stands fixed in the proceedings arising out of the DV Act. The Family Court while deciding the application has placed reliance on the decisions rendered in the case of ***Rachna Kathuria Vs. Ramesh Kathuria*** reported at ***2010 SCC OnLine Del 2929*** and ***Renu Mittal Vs. Anil Mittal and Ors.***, reported at ***2010 SCC OnLine Del 3390***, wherein the learned Single Judge of this Court held that the proceedings under Section 125 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') and the DV Act are parallel proceedings for seeking interim maintenance and once interim maintenance has been granted in one of such proceeding, the same cannot be re-agitated in the other proceedings.
8. The first issue which arises for our consideration is as to whether maintenance can be awarded in other proceedings once the interim maintenance has already been granted under proceedings arising out of Section 125 of Cr.P.C. or DV Act.
9. At the outset, we deem it appropriate to extract Section 20 of DV Act which reads as under:

“20. Monetary reliefs:

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.”

(Emphasis Supplied)

10. At this stage, it would be necessary to re-visit the law governing maintenance under different statutes.
11. In the case of ***Manish Jain vs. Akanksha Jain*** reported at ***II (2017) DMC 106 (SC)***, the order passed by this Court whereby interim maintenance of Rs. 60,000/- per month was granted to the respondent-

wife under Section 24 of HMA in addition to Rs. 10,000/- per month which the appellant-husband was already paying by way of interim maintenance to the respondent-wife in the proceedings under the DV Act was challenged before the Supreme Court of India. The Apex Court while reducing the quantum of maintenance under Section 24 of the HMA Act held that the maintenance *pendente lite* granted under HMA would be in addition to the amount paid under the proceedings of DV Act.

12. In the case of ***Rajat Johar Vs. Divya Johar*** reported at **2017 SCC OnLine Del 11790**, a learned Single Judge of this Court held that '*the monetary relief as provided under the DV Act is different from maintenance, which can be in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law, and can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence.*'
13. Similarly, the High Court of Bombay in the case of ***Prakash Babulal Dangi vs. The State of Maharashtra and Ors.*** reported at **2017 SCC OnLine Bom 8897** held that maintenance can be awarded both under the DV Act as well as under Section 125 of Cr.P.C. The relevant para 7 and 8 read as under:

"7. Now both the proceedings being independent, both the orders will stand independently and, hence, husband will have to pay not only the maintenance awarded under the Domestic Violence Act, which was of an interim nature and taking into consideration that maintenance only, the wife was awarded the maintenance under Section 125 of Cr.P.C. only from the date of

the order. It has to be held that this order under Section 125 of Cr.P.C. stands independently and in addition to the maintenance awarded under the Domestic Violence Act.

8. It has to be held so in view of Section 20(1)(d) of the Domestic Violence Act, which clearly provides that, 'in proceedings under the D.V. Act, the Magistrate may direct the Respondent to pay the maintenance to the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law for the time being in force'. Therefore, the power to award maintenance under D.V. Act is in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law for the time being in force. Section 36 of the D.V. Act makes the things further clear by providing that, 'the provisions of the D.V. Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force'. Therefore, it follows that the amount of maintenance awarded under the D.V. Act cannot be substituted to the order of maintenance under Section 125 of Cr.P.C.'"

(Emphasis Supplied)

14. Also, the High Court of Punjab & Haryana in the case of **Sanjay Gulati Vs. Harsh Lata** reported at **MANU/PH/0323/2018**, while deciding the question as to whether maintenance can be claimed by the wife under the DV Act, in view of the fact that she is already receiving maintenance under Section 125 of Cr.P.C. It has been held that the provisions of DV Act are supplementary to the other laws. The relevant para 13 reads as under :

"13. Therefore, the upshot of the discussion would be that the respondent wife would be entitled to claim maintenance under Section 20 of the Domestic Violence Act, even though she is already getting maintenance under Section 125 of the Code of Criminal Procedure. There is no requirement for the aggrieved

person, the respondent herein, to file an application under Section 127 of the Code of Criminal Procedure seeking enhancement of maintenance and to prove that they are changed circumstances. An aggrieved person can institute a petition under the Domestic Violence Act, in addition to proceedings under Section 125 of the Code of Criminal Procedure. However, the courts, while deciding quantum of maintenance have to take into account the maintenance being awarded to the aggrieved person under other provisions of law, be it under Section 125 Code of Criminal Procedure, Section 24 of the Hindu Marriage Act or any other provisions applicable thereto, while awarding maintenance.”

(Emphasis Supplied)

15. A careful perusal of Section 20 of DV Act shows that it provides maintenance to the aggrieved person as well as her children, if any, which would be in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure or any other law for the time being in force. Further, Section 26 of DV Act stipulates that any relief available under Sections 18 to 22 of DV Act may also be sought in any legal proceedings before a civil court, Family court or a criminal court and such relief may be sought in addition thereto. Whereas Section 36 of DV Act clearly stipulates ‘Act not in derogation of any other law—The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.’
16. A conjoint reading of the aforesaid Sections 20, 26 and 36 of DV Act would clearly establish that the provisions of DV Act dealing with maintenance are supplementary to the provisions of other laws and therefore maintenance can be granted to the aggrieved person (s)

under the DV Act which would also be in addition to any order of maintenance arising out of Section 125 of Cr.P.C.

17. On the converse, if any order is passed by the Family Court under Section 24 of HMA, the same would not debar the Court in the proceedings arising out of DV Act or proceedings under Section 125 of Cr.P.C. instituted by the wife/aggrieved person claiming maintenance. However, it cannot be laid down as a proposition of law that once an order of maintenance has been passed by any Court then the same cannot be re-adjudicated upon by any other Court. The legislative mandate envisages grant of maintenance to the wife under various statutes such as HMA, Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as 'HAMA'), Section 125 of Cr.P.C. as well as Section 20 of DV Act. As such various statutes have been enacted to provide for the maintenance to the wife and it is nowhere the intention of the legislature that once any order is passed in either of the proceedings, the said order would debar re-adjudication of the issue of maintenance in any other Court.
18. Having regard to the law settled by the Hon'ble Supreme Court and various other High Courts to the facts of the present case, we find that the Family Court in different matters is placing reliance on the judgments of ***Rachana Kathuria*** (*supra*) and ***Renu Mittal*** (*supra*). In our view the impugned order passed by the Family Court needs to be tested on the anvil of the settled law and requires to be reconsidered. The law laid down in the aforesaid two judgments is not a good law and has been over ruled. Accordingly, the interim order dated

18.04.2018 arising out of the application under Section 24 of HMA is set aside.

19. The second question which arises for our consideration in this appeal is with respect to the grant of custody of two minor children as claimed by the appellant-mother. Admittedly, the parties are residing separately since the year 2015 and the children are in the care and custody of the respondent-father. Unhappy with such a situation, we had directed production of the children in the Court and have also fixed a time schedule vide order dated 06.02.2019 to enable the appellant-mother to meet the children at Alwar on each Sunday for two hours. We had also directed that the bus fare would be reimbursed by the respondent-father.
20. We had also requested Ms. Rosemary Raju, Advocate, who was present in the Court on 06.02.2019, to act as a mediator in the matter. We are informed that the children are happy meeting with the appellant-mother.
21. At this stage, counsel for the respondent-husband has submitted that his income is 6,000/- to 8,000/- per month but it is not denied that he is a painter and he also participates in *bhajan mandalis*. He volunteers to pay Rs.8,000/- per month as maintenance to the wife.
22. We set aside the order of the Family Court with regard to the custody of the children, for the reason that the Family Court has observed that the appellant-mother is not in a position to maintain the children and also that in case the care and custody is

transferred to the mother it may be traumatic for the children. Having regard to the tender age of the children, we are of the considered view that love and affection of both the parents is necessary for their upbringing.

23. Accordingly, we set aside the impugned order dated 18.04.2018 and remand the matter back to the Family Court. Parties will appear before the Family Court on 07.08.2019. During the interim period the arrangement arrived at and also directions passed in Contempt Case No. 602/2018 for the train expenses, etc. would also remain in force. The Family Court at the first instance will ensure that the appellant-mother meets the children and when the children are comfortable at that point of time the Family Court would consider what would be the best interest of the children. As far as maintenance is concerned, granting maintenance under Domestic Violence Act is not a bar.
24. We appreciate the efforts rendered by Mr. Prabhjit Jauhar and Ms. Rosemary Raju who acted as amicus curiae and mediator for rendering valuable contribution in the disposal of this matter.
25. Resultantly, the appeal is disposed of in the above terms.

G.S.SISTANI, J.

JYOTI SINGH, J.

JULY 31, 2019

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