IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

C. O. No. 1023 of 2021

Swapan Kumar Chakraborty

-Vs.-

Rita Chakraborty

For the petitioner	:	Mr. Tanmoy Mukherjee, Advocate Mr. Emon Bhatacharya, Advocate Mrs. Pampa Dey (Dhabal), Advocate Ms. Pooja Sah, Advocate Mr. Rudranil Das, Advocate
For the opposite party	:	Mr. Rahul Karmarkar, Advocate Mr. Abir Lal Chakraborty, Advocate
Heard on	:	01.10.2021
Judgement on	:	01.10.2021

Hiranmay Bhattacharyya, J.:

The instant application is at the instance of the husband and is directed against the order dated February 8, 2021 passed by the learned Additional District Judge 4th Court at Alipore in Misc. Case No. 27 of 2005 arising out of Matrimonial Suit No. 31 of 2005.

By the order impugned, the husband was directed to pay a sum of Rs. 22,97,687/- towards the arrear alimony till January 2021 less the amount already paid. The husband was further directed to pay *alimony pendente lite* at the rate of Rs.11,000/- per month till disposal of the suit. Being aggrieved, the husband preferred the instant Civil Order.

Mr. Mukherjee, learned Advocate appearing for the husband/petitioner herein contends that the learned Trial Judge directed the husband to pay 1/3rd of the retirement benefit by totally misinterpreting the order passed by a co-ordinate Bench of this Court in CO 768 of 2018. He further submits that the application for enhancement of alimony was filed sometimes in the month of September 2010 but the learned Trial Judge, by the order impugned, directed the husband to pay the enhanced maintenance with effect from January 2010. He contends that the learned Trial Judge calculated the arrear maintenance for the period from January 2010 to January 2016 at the rate of 1/3rd of the gross salary without appreciating that alimony is to be calculated on the net salary after allowing the admissible deductions from the gross salary. He submits that the amount of alimony calculated for the period from February 2016 is also excessive.

Per contra, Mr. Karmakar, learned Advocate for the opposite party submits that the learned Trial Judge was justified in directing the husband to pay 1/3rd of the retiral benefits including gratuity, leave encashment and other benefits as a co-ordinate Bench of this Court in CO 768 of 2018 already fixed the rate at which the husband has to pay maintenance. He further submits that the husband cannot now take the plea that maintenance is to be calculated on 1/3rd of the net salary and not on gross salary as such issue has already been settled by this Court in the earlier Civil Orders. He submits that the learned Trial Judge after taking into consideration the salary, pension as well as the retiremental benefits received by the husband directed the husband to pay maintenance both current as well as arrears in tune with the directions passed in the earlier Civil Orders. Thus, according to Mr. Karmakar, the order impugned calls for no interference by this Hon'ble Court under Article 227 of the Constitution of India.

I have heard the learned Advocates for the parties and perused the materials on record.

This case has a chequered history. On an application filed by the wife under Section 151 of the Code of Civil Procedure for enhancement of *alimony pendente lite,* the learned Trial Judge by an order dated August 29, 2017 held that the wife will get Rs.4,000/- per month as enhanced maintenance *pendente lite* with effect from April 2014 after adjustment with maintenance award passed in other cases between the same parties. The wife challenged the said order by filing CO No. 768 of 2018 which was disposed of by a co-ordinate Bench on February 18, 2019 by setting aside the impugned order. The co-ordinate Bench directed the learned Judge of the Court below to decide the matter afresh on the basis of the settled principles of grant of maintenance which is roughly 1/3rd of the salary amount. The learned Judge was further directed to take into consideration for the purpose of calculation of arrears of maintenance payable to the wife on and from year 2010 along with all revisions until January 31, 2016 till such time the husband superannuated from service. The learned Judge was further directed to recalculate the maintenance amount both in arrears as well as the current enhanceable of maintenance amount payable on the basis of the pension and retirement benefits received including gratuity and leave encashment payable and other benefits to the husband.

The husband filed an application for review being RVW 77 of 2019 for review of the order dated February 18, 2019 passed in CO 768 of 2018. The said review application was dismissed by an order dated August 5, 2019 with costs assessed at Rs.11,000/- and such amount was directed to be included in the amounts payable by the husband to the wife.

Mr. Karmakar, learned Advocate for the wife submits that the husband has not paid the aforesaid amount of Rs.11,000/- till date.

Pursuant to the order passed in CO 768 of 2018, the learned Trial Judge passed an order on September 2, 2019 directing the husband to pay a sum of Rs.10,07,962/- on account of the arrears for the period from January 2010 to January 2016. For the period from February 2016, the husband was directed to pay a sum of Rs.11,000/- per month till the disposal of the suit. However, the learned Trial Judge held that the claim of the wife as 1/3rd of the retirement benefit of Rs.18,89,183/- cannot be entertained.

Being aggrieved against the aforesaid order dated September 2, 2019 the husband preferred Civil Order No.3635 of 2019 which was disposed of by an order dated December 24, 2020. By the said order, the Civil Order was allowed by setting aside the order dated September 2, 2019 and remanding the matter to the learned Judge of the Court below with a direction to decide the application afresh in the light of the directions contained in the order dated August 29, 2017 passed in CO 768 of 2018. It was observed in the said order that the learned Trial Judge while recalculating the maintenance amount acted contrary to the directions passed in CO 768 of 2018 inasmuch as the retirement benefits received including gratuity, leave encashment and other benefits were not taken into consideration for the purpose of recalculating the maintenance amount. By the said order, the husband was directed to pay a sum of Rs.10,000/- per month as an interim arrangement on account of the *alimony pendente lite* starting from January 2021 till the disposal of the said application.

After remand, the impugned order was passed. It is not in dispute that the application for enhancement of maintenance was filed sometimes in the month of September 2010. It is well-settled that the amount awarded towards enhanced alimony has to take effect from the date of filing of such application and not from any date prior thereto. Since the application for enhancement of alimony was filed sometimes in the month of September 2010, the enhanced maintenance amount shall be effective only from the month of September 2010 and not from any date prior thereto. Thus this Court is of the considered opinion that the wife is entitled to alimony at the enhanced rate with effect from September 2010 and not from January 2010 as directed by the impugned order.

The co-ordinate Bench in CO 768 of 2018 has specified that the maintenance is to be calculated roughly on $1/3^{rd}$ of the salary amount. However, the rate at which the maintenance amount is to be calculated on the retirement benefits as well as pension has not been specified in the order impugned. Since the husband retired on superannuation with effect from February 1, 2016 and from February 2016 he was only entitled to pension and the amount of pension receivable by the husband is less than the salary which he used to earn during the period of his service, the co-ordinate Bench in CO 768 of 2018 directed the maintenance amount to be recalculated on the basis of pension and retirement benefits received including gratuity and leave encashment payable as well as other benefits. Pension is a fixed sum which a retired employee is paid by his employer as a retirement benefit per month. Since pension is received by the husband per month the rate at which maintenance was directed to be paid on salary is to be applied in case of pension also.

However, the dispute lies as to whether the husband should be directed to pay 1/3rd of the retirement benefits or an amount calculated on income earned out of such retirement benefit.

Mr. Karmakar, learned Advocate for the wife submits that the wife is entitled to 1/3rd of the retirement benefits as per the direction passed in CO 768 of 2018 which is vehemently opposed by Mr. Mukherjee. The purpose for grant of maintenance *pendente lite* is that the wife can sustain herself during the pendency of the matrimonial proceeding. It is well settled that a wife is to be maintained according to the status of her husband. Since husband has in the meantime retired from service, at present the wife is to be maintained according to the status of a retired employee and not like the status of husband while in service. However, while fixing the amount of maintenance, the Court shall have to take into consideration several factors including the amount which is necessary for the support of the wife as well as the income of the husband.

Admittedly the husband has received a sum of Rs.18,89,183/- under several heads, namely, retiring gratuity, commuted value of pension, leave salary, final payment of GPF and group insurance after his retirement from service. A reasonable person is not expected to keep his retirement benefits idle. It is reasonable to presume that the husband has also invested the amount which he received as retirement benefits and earning income on account of interest or otherwise on such amount. The income earned by the husband is within his special knowledge and it is his duty to disclose such income. The husband has, however, not disclosed his income from investment of the amounts which he received on account of the retirement benefits. It is also not the case of the husband that he is not earning any income out of the amount received as retirement benefits. The Court has no other option but to draw an adverse inference against the husband for not furnishing such income before the Court below.

Considering the prevailing market rate of interest and making a conservative calculation, it is presumed that the deemed income of the husband on investments of the amount received at the time of retirement is more than Rs.10,000/-per month. Accordingly this Court is of the considered view that the husband should be directed to pay a sum of Rs.3,500/- per month on account of the deemed income from investment of the amount of the retirement benefits amounting to Rs.18,89,183/-.

Now coming to the question of the entitlement of the wife from the amount receivable by the husband as pension, it appears that the amount of pension receivable by the husband varied between Rs.19,000/- as on March 2016 and Rs.32,000/- as on January 2021. It appears that the learned Trial Judge applied a flat rate of Rs.11,000/- per month on account of pension for the period from February 2016 to January 2021 without taking into consideration the amount of pension received by the husband during the aforesaid period. After taking into consideration the pension received by the husband for the period from February 2016 to January 2021, this Court is of the view that the amount of Rs.11,000/- per month directed to be paid from February 2016 to January 2021 is excessive and the husband should be directed to pay a sum of Rs.9,000/- per month on account of pension for the aforesaid period. Over and above the said amount of Rs.9,000/-, the wife shall be entitled to a further sum of Rs.3,500/- on account of deemed income from investment for the period from February 2016 till January 2021.

However, taking into consideration the amount received by the husband on account of pension as well as the deemed income from investments, this Court is of the view that a sum of Rs.(11,000+3,500), i.e., Rs.14,500/- per month shall be reasonable and just towards *alimony pendente lite* on and from February 2021.

Now this Court has to consider the argument of Mr. Mukherjee that the amount of alimony is to be calculated on net salary after allowing admissible deduction from gross salary. The petitioner did not raise such issue before the learned Judge of the Court below. As such the petitioner cannot be permitted to raise such issue at this stage. Accordingly, the impugned order insofar as the calculation of enhanced maintenance for the period from September 2010 to January 2016 is not interfered with by this Court.

The husband shall pay alimony for the period from September 2010 to January 2016 as per the rate directed to be paid by the impugned order. He shall also pay a sum of Rs.7,50,000/- for the period from February 2016 to January 2021. He shall pay a sum of Rs.(11,000+3,500), i.e., Rs.14,500/- per month with effect from February 2021 till the disposal of the suit. The husband shall be entitled to adjustment of the amounts which he has already paid to the wife either lump sum or monthly pursuant to the directions passed by this Court from the arrear maintenance amount payable by the husband to the wife in terms of this order. The arrear amount on account of alimony for the period from September 2010 to September 2021 at the rate/rates indicated hereinbefore after adjustments of the amounts already paid shall be paid by the husband to the wife in three equal monthly instalments and the first of such instalment shall be paid on or before October 11, 2021 and the next two instalments will be paid on or before November 10, 2021 and December 10, 2021. The husband shall go on paying *alimony pendente lite* at the rate of Rs.(11,000 + 3,500), i.e., Rs.14,500/-

per month on and from the month of October 2021 till the disposal of the suit and such amount is to be paid by the husband to the wife within the tenth of the next month for which it would become due.

In addition thereto, the husband shall pay a sum of Rs.11,000/- on account of the costs which was directed to be paid by an order dated August 5, 2019 in RVW 77 of 2019 on or before October 8, 2021.

The revisional application being CO 1023 of 2021 thus stands allowed. The order impugned stands modified only to the extent indicated hereinbefore.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

(Hiranmay Bhattacharyya, J.)

SUVAYAN GHOSH (ARCT)