

15.1.2024
106
Ct. no. 652
sb

CO 4147 of 2019
with
CAN 1 of 2022
CAN 2 of 2023

Jayanta Chatterjee
Vs.
Nila Chatterjee

Mr. Anjan Ganjan
Mr. Akash Dutta ...for the Petitioner

Mr. Dhiman roy
Mr. Firojuddin Islam
Mr. Dip Chanda ...for the Opposite party

Being aggrieved by the order no. 74 dated 2.11.2019 passed by the Additional District Judge, 1st Court, Sealdah in Matrimonial Suit no. 90 of 2011, present application under Article 227 of the Constitution of India has been preferred.

The present case has got a chequered history. The husband/petitioner herein filed a suit for dissolution of marriage before the court below which was registered as MAT suit no. 90 of 2011. In the said suit, the wife/opposite party herein filed an application under Section 24 of the Hindu Marriage Act, 1955 on 14.9.2012, wherein she has prayed for pendente lite maintenance of Rs. 40,000 per month and litigation cost of Rs. 20,000/-. Learned court below by an order dated 07.7.2014 was pleased to

grant interim maintenance of Rs. 5000/- per month along with lumpsum litigation cost of Rs. 10000/-

Being aggrieved by that order, the petitioner preferred an application being C.O. 2696 of 2014 before this court. While disposing the said revisional application, this court was pleased to allow the revisional application and was pleased to set aside the aforesaid impugned order dated 7.7.2014 passed in aforesaid MAT suit no. 90 of 2011. However, this court directed to dispose of the said application under Section 24 of the Act of 1955 afresh within a period of four months from the date of receipt of copy of the order. Thereafter, the trial court had taken up the said application under Section 24 of the Act of 1955 and by the order dated 16.9.2015, came to the conclusion that the husband/opposite party is presently jobless due to physical ailments and wife also did not describe her present earnings and as such the court below rejected the wife's prayer for pendente lite maintenance which was made under Section 24 of the Hindu Marriage Act, 1955.

Being aggrieved by that order, the wife preferred a Revisional Application before this court being C.O. 4507 of 2015. While dealing with said application, this court directed the Head of the Department of Neurology and Ophthalmology, Calcutta Medical College to submit a report about the physical

ailments allegedly suffering by the husband/petitioner. Thereafter, this Court by an order dated 29.1.2016 observed that the husband/opposite party having impaired vision and it is not possible for him to lead normal life at present and accordingly, directed the employer of the Petitioner/husband to submit a report by way of an affidavit disclosing, letter of appointment, salary certificate, service benefits and all other details of his employment since his date of joining in the company within a sealed cover and directed the Registrar General of this court to communicate the order to the employer of the husband/opposite party. By that time, the Trial Court had taken up the aforesaid suit being MAT 90 of 2011 for ex parte hearing and the suit was decreed ex parte on 7.12.2017. However, on the basis of the prayer made on behalf of the petitioner, the ex parte decree was set aside by this court vide order dated 17.7.2018 in FAT 59 of 2018, with a direction to try the suit on contest. However, this court while disposing aforesaid C.O. 4507 of 2015 was pleased to direct the court below to dispose of the wife's application under Section 24 of the Act of 1955 afresh within a period of 60 days from the date of communication of the order and thereby set aside the aforesaid order dated 16.9.2015 passed by the court below.

On the basis of aforesaid direction made by this court, the court below disposed of petitioner's application under Section 24 of the Hindu Marriage Act, 1955. The court below, this time by the impugned order, came to the conclusion that the wife is a distress lady and at present, she has no income and accordingly, he directed the husband to pay maintenance of Rs. 5,000/- per month since 7.7.2014 till 7.12.2017. It is submitted by the learned counsel for the opposite party that the said order was subsequently modified and husband was directed to pay maintenance till disposal of the suit.

Being aggrieved by the order impugned, learned counsel for the petitioner has drawn my attention to the order no. 69 dated 27.9.2019 passed by the court below in MAT suit no. 90 of 2011 wherefrom it appears that the opposite party made a prayer before the court below to examine Neurologist as OPW-3 after completion of the examination of the Ophthalmologist as OPW-2. However, the learned court below rejected the said prayer made by the husband/opposite party on the ground of mandate and direction passed by this court in this context in C.O. 4507 of 2015.

Now Ms. Banerjee on behalf of the husband/opposite party submits that main contention of the husband/opposite party is that he

is a Neuorological patient and is not in a position to lead his normal life. Accordingly, he cannot be called as “able bodied person” or “capable of earning” for the purpose of payment of maintenance to the wife. He further contended that the evidence of Neurologist is very much important for the purpose of determination as to whether the husband/opposite party is an “able bodied person” or “capable of earning” or not. He further contended that learned court below has passed the order of maintenance without ascertaining as to whether the husband has at all any earnings or not nor did he consider whether wife is able to maintain herself or not. Accordingly, he has prayed for setting aside the order impugned.

Learned counsel for the opposite party raised strong objection and contended that since the date of filing the application under Section 24 of the Act, the husband/opposite party has not paid any amount of maintenance to his wife. Furthermore, the doctor who has been examined as OPW-2 has opined that husband/opposite party is not 100% handicapped and as such it cannot be said that he is not an “able bodied person” or that he is not capable of earning. Accordingly, the court below was justified in passing the order impugned which does not call for interference by this court.

I have considered the submissions made by both the parties and I have also perused the order impugned. It appears from the report that in terms of **Rajnesh Vs. Neha & Another, 2021 (2) SCC 324**, the learned court below had not directed either of the parties to file affidavit of assets and liabilities in support of their respective contentions regarding income. Before coming to the conclusion, the court below ought to have asked the parties to file affidavit of assets and liabilities for the determination of the income of the respective parties. Furthermore, when the husband has sought for examining the Neurologist in support of his contention that the husband/opposite party is not an “able bodied person”, learned court below ought not to have hurriedly closed the evidence and ought to have given an opportunity to the husband/opposite party to bring the said witness before the court below in order to prove the report given by that Neurologist. Instead of that he has abruptly assessed the amount of maintenance to the tune of Rs. 5,000/- without disclosing in the order as to what is the basis of ascertainment of the said amount.

In such view of the matter, the order impugned is set aside. The learned court below is directed to give an opportunity to the husband/opposite party to bring the Neurologist as OPW-3 and he is further

directed to ask both the parties to file affidavit of assets and liabilities in terms of **Rajnesh judgment (supra)** in support of their respective contentions about earnings and to dispose of the application under Section 24 of the Hindu Marriage Act afresh preferably within a period of three months from the date of communication of this order. However, the petitioner is directed to pay Rs. 10,000/- towards litigation cost and @ Rs. 5,000/- per month towards interim maintenance for the period from 7.2.2017 to 7.12.2017 within a period of three months from the date of communication of the order.

The court below will pass an order afresh in connection with application under Section 24 of the Act, after considering the affidavit of assets and liabilities of the parties as well as evidence adduced and/or to be adduced by the parties.

C.O. 4147 of 2019 is accordingly disposed of. Connected applications are also disposed of.

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

(Ajoy Kumar Mukherjee, J.)