

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(Civil Revisional Jurisdiction)
APPELLATE SIDE**

Present:

THE HON'BLE AJOY KUMAR MUKHERJEE

C.O.65 of 2024

Dilip Sharma

Versus

Puja Agarwala @ Puja Sharma

For the petitioner :

Mr. Arnab Saha

For the opposite party :

Mr. Milindo Paul
Mr. Nabankur Paul
Ms. Sutopa Sen Paul
Ms. Bedashruti Bose
Mr. Subham Das

Heard on

:

04.07.2024

Judgment on

:

25.07.2024

Ajoy Kumar Mukherjee , J.:

1. Assailing order dated 12th December, 2023 passed in connection with Misc. Case no. 05 of 2023 under Section 24 of Hindu marriage Act, 1955, arising out of Matrimonial Suit no. 146 of 2018 passed by Additional District Judge, 2nd Court Siliguri, present Application has been preferred.

By the order impugned learned Court below passed an order of alimony pendent lite of Rs. 30,000/- from the date of appearance of the petitioner in favour of wife/opposite party herein. It is submitted on behalf of the petitioner that the petitioner and the opposite party herein were wedded in accordance to law on 02.05.2014 and thereafter the said marriage was consummated. However the matrimonial pursuit did not last long. It is further stated by the petitioner that within 27 days of the solemnization of the said marriage, opposite party herein voluntarily left her matrimonial house without any intimation on 29th May, 2014. Along with her she also carried away all the gold ornaments, personal belongings, that were provided to her in the marriage, from the family of the petitioner.

2. The petitioner further submits that he lodged missing diary and thereafter he also discovered from the mobile phone of the opposite party that she was earlier married with one Prabin Agarwala, hailing from Biratnagar, Nepal on 23rd January, 2013 and suppressing the said marriage, she had married the petitioner for the second time without dissolving the earlier one. Petitioner initiated criminal proceeding under Section 494/420/120B of IPC and the charge sheet has also been submitted in the said case. The petitioner herein filed a suit for declaration of marriage as void but said suit was dismissed exparte on the ground of want of jurisdiction. The petitioner herein thereafter filed present Matrimonial Suit, i.e. Mat Suit No. 146 of 2018 under Section 11 of the Hindu Marriage Act seeking for a declaration that the marriage between the parties is void ad initio.

3. In the said proceeding the opposite party herein/wife appeared and filed an application under Section 24 of the Hindu Marriage Act which is registered as Misc. Case No. 5 of 2023. As per direction of the Court both the parties filed affidavit of assets and liabilities and the Court below by the impugned order directed the petitioner to pay alimony pendent lite at the rate as stated above.

4. Mr. Saha, learned counsel appearing on behalf of the petitioner submits that the respondent/wife kept pestering the purported marriage between the petitioner and herself for ulterior monetary gain after 10 years of her leaving matrimonial house and also when the petitioner has filed the present suit for declaring the marriage as nullity. It is further alleged that the Court below did not pay any serious heed into it nor carried out any effective examination thereof in passing of the order impugned. He further submits even the present matrimonial suit was filed in the year 2019 and after 4 years, she has filed the present application under Section 24, which clearly suggests that she is not at all serious in her claim of maintenance and she is capable enough to maintain herself. Moreover petitioner is not the husband of opposite party in view of section 5(1) (i) of the Hindu Marriage Act and as such petitioner is not legally obliged to maintain the opposite party. Mr. Saha further contended that the court below did not consider the income of petitioner/husband and also did not consider that the wife/opposite party voluntarily left her matrimonial house. Above all wife/opposite party is not remediless as she is entitled to claim maintenance from husband of her first marriage which is still subsisting. Relying upon a judgment reported in **(1998) 8 SCC 447 (Santosh Vs.**

Naresh Pal) petitioner contended that in such proceeding, the court is expected to pass appropriate order after being prima facie satisfied about the marital status of the parties. In support of his contention that second wife is not entitled to maintenance until first marriage subsisting, petitioner relied upon **Vimal Vs. Veeraswanit** reported in **(1991) 2 SCC 375, A.M. Subba Reddy Vs. Padmamma AIR 1999 AP 19, Y.A. Adhav Vs. A.S. Adhav & others, AIR 1988 SC 644**. Petitioner further submits that in view of aforesaid facts and circumstances of the case, when the very entitlement of the opposite party is impeachable and absolutely inequitable in nature, so the impugned order does not stand on its merit. Accordingly he has prayed for setting aside of the order impugned.

5. Mr. Paul, learned counsel appearing on behalf of the opposite party submits that affidavit of assets and liabilities filed by the parties reflects that the wife opposite party herein does not have any monthly income. She is bringing up a child claimed to have born due to the marriage with petitioner herein and who is diagnosed with idiopathic generalized epilepsy. He further submits that the affidavit of assets and liabilities submitted by the petitioner herein, shows that annual turnover from his business is Rs.1,84,58,320/- and the amount of regular monthly withdrawal is Rs.74,654/-. Moreover he has his own flat, bike and also has huge bank balance and as such the amount awarded by the Court below towards pendent-lite maintenance is quite justified and does not call for interference, invoking writ jurisdiction of this Court under Article 227 of the Constitution of India.

6. I have considered submissions made by both the parties.

7. I am not unmindful to the fact that while this Court invoking its jurisdiction under Article 227 of the Constitution of India, is not supposed to interfere the order of the Court below, unless gross miscarriage of justice or failure of justice occurred or it is found that the Court below has failed to exercise its jurisdiction vested on it or it has exceeded its jurisdiction. Keeping the said principle in mind, when I have gone through the order I find that the Court below while considered the affidavit of assets and liabilities of both the parties, he relied upon the monthly expenditure of the wife/opposite party and monthly income of husband petitioner herein as claimed in the affidavit of asset by the petitioner/wife. On the contrary the Court below did not believe the annual income stated by petitioner/husband in his affidavit of assets and liabilities which is amounting to Rs.4,98,920/- i.e. Rs. 41,577/- per month. He also disbelieved monthly expenditure of the petitioner/husband which is Rs. 54,392/- as stated in the affidavit. In the relevant portion Court below observed that it is hard to rely that the opposite party is earning only about 2.7% from his annual turnover, considering the current business scenario especially when his withdrawal is about Rs. 74,654/- per month which amounts to Rs. 9,00,000/- per year. He also observed that the husband/petitioner has not disclosed the balance lying in his two bank accounts.

8. It is worthy to be mentioned that the statements given in the assets and liabilities column were made on oath and if any statement proved to have found as false, perjury proceeding always lie against statement maker. However, even if such statement created any suspicion in the mind of the

Judge about the credentiality of the statement in connection with monthly income of the petitioner, he could have called for income tax return or some other credible document of the opposite party, if any, to verify the truthfulness. Instead of judging the veracity about the claims of the petitioner including his monthly income stated on oath, he had abruptly calculated the monthly income of the petitioner, which in my opinion is not based upon reasoning or upon the documents available in the record.

9. Secondly, while considering the opposite party/wife's prayer for awarding litigation cost, the Court below held that he does not find justification for allowing litigation cost as the wife/petitioner being a female is entitled for Legal Aid service free of cost. Such finding of the Court below appears to be perverse in view of the fact that every woman is entitled to free legal aid under the Legal Services Authorities Act, but the legislature has not yet think it fit to struck down the provision for awarding litigation cost under Section 24 of the Act. This is simply because the wife has the liberty to select her legal representative at her own choice and she cannot be compelled to make her representation by a lawyer provided by Legal Service Authority, against her will. I also find that while making such observation the Court below has overlooked that the petitioner husband in his affidavit has stated that he has incurred expenses for this litigation, amounting to Rs. 10,50,000/- for last 5 years (column no. 24). In such circumstances if the wife is entitled to get equal status of her husband in all other respect, then it is not understandable why in case of incurring litigation cost, she will be compelled to take shelter before the Legal Services Authority.

10. Thirdly, in the order impugned I find that the Court below has awarded the maintenance amount with effect from the date of appearance of the petitioner wife in the said matrimonial suit. This is again contrary to the law what has been laid down by the Apex Court in ***Rajanish Vs. Neha (Supra) (Paragrah-102)*** In the said judgment it has been clearly pointed out that in all such cases the order of interim maintenance shall be awarded from the date of filing the application.

11. In view of aforesaid discussion I find in the impugned order a lot of anomalies, which ultimately caused failure of justice, while disposing wife's application under Section 24 of the Hindu Marriage Act and as such interference by this Court warranted in the present circumstances.

12. The order impugned dated 12th December, 2023 passed in Misc. case no. 5 of 2023 by additional District Judge, 2nd Court Siliguri is hereby set aside. The Court below is directed to hear wife/petitioner's application under Section 24 afresh after giving opportunity to both the parties to contest preferably within a period of 6 (six) weeks from the date of the order and to pass a reasoned order in the light of observations made herein. It is also made clear that both the parties will get opportunity to agitate all the points which have been agitated herein, before the court below at the time of hearing the Application afresh.

13. C.O. 65 of 2024 is thus disposed of

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)