

(2009) 09 MAD CK 0183

Madras High Court

Case No: C.R.P. (PD) No"s. 241 and 651 of 2009 and M.P. No"s. 1 and 2 of 2009

J. Anitha

APPELLANT

Vs

J. Prakash

RESPONDENT

Date of Decision: Sept. 18, 2009

Citation: (2009) 5 CTC 449 : (2011) 6 RCR(Criminal) 1679

Hon'ble Judges: K.K. Sasidharan, J

Bench: Single Bench

Advocate: V. Rangarajan, for the Appellant; K.P. Gopalakrishnan, for the Respondent

Final Decision: Allowed

Judgement

K.K. Sasidharan, J.

These two Revision Petitions are at the instance of the petitioner in I.A. Nos. 2597 of 2006 and 2178 of 2008 on the file of the learned Principal Family Court, Chennai, whereby and whereunder the Application in I.A. No. 2597 of 2006 filed for the purpose of enhancing the maintenance was allowed in part and the Application in I.A. No. 2178 of 2008 filed again for enhancing the maintenance was closed.

The Facts:

The proceedings in F.C.O.P. No. 1985 of 2002 was preferred by the respondent against the revision petitioner praying for a decree of dissolution of marriage under Sections 13(1)(ia) and 13(1)(iii) of the Hindu Marriage Act.

2. The marriage between the petitioner and the respondent was solemnised on 5.9.2001. According to the respondent, the petitioner has been suffering from such mental disorder and to such an extent that he cannot reasonably be expected to live with her. The respondent has also detailed the reasons which made him to file the Application for divorce, which according to him was the cause of action for initiation of the proceedings.

3. The Application was resisted by the revision petitioner by filing counter. It was her consistent case that she was not suffering from any kind of mental disorder so as to enable the respondent to obtain a decree for dissolution of marriage.
4. During the pendency of the divorce proceedings, the petitioner filed an Application in I.A. No. 468 of 2002 praying for interim maintenance. The said Application was allowed by the learned Trial Judge as per order dated 27.1.2005 and the respondent was directed to pay interim maintenance at the rate of Rs. 1500/- per month.
5. Subsequently the petitioner filed an Application in I.A. No. 2597 of 2006 seeking enhancement of the maintenance to Rs. 5,000/- per month. The Application was opposed by the respondent by filing counter. The said Application though filed as early as on 31.7.2006 was not taken up for final disposal.
6. While the matters stood thus, the petitioner filed another Application in I.A. No. 2178 of 2008 seeking enhancement of maintenance from Rs. 1500/- to Rs. 2,000/- per month. The respondent filed counter in the said Application also, opposing the maintenance claimed by the petitioner.
7. Even though the second Application in I.A. No. 2178 of 2008 was pending, the learned Trial Judge took up the Application in I.A. No. 2597 of 2006 and as per order dated 11.11.2008 enhanced the maintenance from Rs. 1,500/- to Rs. 2,000/- per month from the date of petition viz., 31.7.2006 with a further enhancement to Rs. 2,500/- from the date of order. The Application filed subsequently in I.A. No. 2178 of 2008 was closed in view of the enhancement made as per order dated 11.11.2008 in I.A. No. 2597 of 2006.
8. The order dated 11.11.2008 in I.A. No. 2597 of 2006 is the subject matter in C.R.P.(PD). No. 651 of 2009. The order dated 11.11.2008 in I.A. No. 2178 of 2008 closing the Application on account of the order in I.A. No. 2597 of 2006 is the subject matter in C.R.P. No. 241 of 2009.

Submissions:

9. The learned counsel for the revision petitioner contended inter alia thus:
 - (a) The Application filed by the petitioner in I.A. No. 2597 of 2006 as early as on 31.7.2006 was kept in cold storage by the Family Court Judge, which made her to file the subsequent Application in I.A. No. 2178 of 2008. Therefore when a subsequent Application was filed for the grant of substantial amount by way of maintenance, the learned Judge was obliged to take up the subsequent Application. However, very strangely the learned Judge took up the Application filed earlier wherein only a sum of Rs. 5,000/- was claimed as maintenance and awarded a sum of Rs. 2,500/- per month. According to the learned counsel, the subsequent Application contains further details, which includes the higher salary received by the respondent and as such the said Application should have been taken up instead of the earlier

Application.

(b) The learned Trial Judge granted a paltry sum of Rs. 2,500/- as maintenance though even as per the learned Judge, the monthly income of the respondent was Rs. 20,000/-.

(c) The learned Trial Judge was fully convinced that the petitioner was not able to maintain herself and she was job less. Therefore the learned Judge should have granted a reasonable sum as maintenance taking note of the standard of living as well as social background in which the petitioner was born.

10. The learned counsel appearing on behalf of the respondent would contend thus:

(a) The petitioner has not proved that the respondent was receiving a sum of Rs. 20,000/- per month as salary.

(b) The petitioner is the owner of a flat, which was let out to third parties on monthly rent basis.

(c) The petitioner is also a member of Hindu Undivided Family and as per the income tax returns filed by the Karta of the family, the income as on 31.3.2002 was a sum of Rs. 1,38,770/-. The petitioner being a member of the Hindu Undivided Family even as per the returns filed by the Karta, she was having the financial capacity to maintain herself during the pendency of the matrimonial proceedings. Therefore she is not entitled to monthly maintenance as claimed by her.

(d) The subsequent Application was not maintainable in view of the earlier order passed by the Court and as such the very Application was liable to be dismissed on the ground of res judicata.

(e) The divorce Petition is in part heard stage, posted for examining witnesses and as such instead of granting maintenance the very matrimonial proceedings could be taken up for final disposal.

Discussion:

11. The matrimonial proceeding initiated by the respondent against the petitioner for a decree of divorce is now pending on the file of the learned Family Court Judge, Chennai. In the said proceedings, the petitioner has invoked the provisions of Section 24 of the Hindu Marriage Act and a sum of Rs. 1,500/- was granted as interim maintenance. The order granting maintenance was passed as early as on 27.1.2005. When the petitioner found that she was not in a position to maintain herself with the amount awarded by the Trial Court, she filed an Application in I.A. No. 2597 of 2006 praying for enhancement of maintenance to Rs. 5,000/- per month. The said Application was filed on 31.7.2006. In the said Application, the respondent filed counter on 4.10.2007. The Application was not processed subsequently, which made the petitioner to file a fresh Application in I.A. No. 2178 of 2008. The application was filed on 1.8.2008. In the said Application the respondent filed his

counter on 22.8.2008.

12. When the Application in I.A. No. 2597 of 2006 was taken up for consideration, the Application already filed in I.A. No. 2178 of 2008 was pending before the learned Trial Judge. It is not as if, steps in the said Application was not completed by that time. In fact, counter filed in I.A. No. 2178 of 2008 by the respondent clearly shows the defence taken up by him against granting maintenance by way of enhancement. When a subsequent Application was filed and that too in a divorce proceeding invoking Section 24 of the Hindu Marriage Act, it has to be construed to be an Application in supersession of the earlier Application filed by the petitioner.

13. The Matrimonial Court was given jurisdiction to grant maintenance during the pendency of the proceedings. When the Court was having jurisdiction to grant maintenance u/s 24 of the Hindu Marriage Act, it was also permissible to enhance the maintenance amount during the currency of the proceedings. There is no question of applying the principle of res judicata in a matter like this.

14. It is true that no express provision was contained in Section 24 of the Hindu Marriage Act to revise the quantum of maintenance at a later point of time. However Section 127 of the Criminal Procedure Code permits the Magistrate to alter the maintenance granted u/s 125 of the Code on proof of change of circumstances. When there is no express provision in the Hindu Marriage Act to vary the maintenance granted u/s 24 of the Act, provisions of the General Clauses Act would come into play. As per Section 21 of the General Clauses Act, power to issue include power to add, amend, vary or rescind orders. Therefore the contention taken by the respondent that the subsequent Application was barred by the Principle of res judicata is devoid of merits. The learned Family Court Judge was within his jurisdiction to revise the order of maintenance subsequently.

15. The law makers have not anticipated that a matrimonial proceeding would be pending before the Trial Court for such a considerable time. Therefore, the provision regarding revision in the quantum of maintenance was not inserted in the Hindu Marriage Act though the provision for payment of maintenance was expressly provided under the said Act.

Concept of maintenance:

16. The term "maintenance" has not been defined in the Act. Therefore, the definition given to the term "maintenance" in the Hindu Adoption and Maintenance Act, 1956 assumes significance. Section 3(b) of the Hindu Adoption and Maintenance Act, 1956 gives an inclusive definition to the term "maintenance". As per the said definition, maintenance includes in all cases, provisions for food, clothing, residence, education and medical attendance and treatment and in the case of an unmarried daughter, reasonable expenditure incidental to her marriage.

17. The concept of maintenance as per Section 24 of the Hindu Marriage Act, 1955, pre-supposes that the party has no independent income sufficient for his or her support. Therefore, the primary requirement for granting maintenance u/s 24 of the Act is the absence of any income for the applicant to maintain himself or herself during the pendency of the proceeding. While deciding an Application u/s 24 of the Act, the Court was expected to consider the entire factual matrix, which includes the inability of the party to maintain herself or himself during the pendency of the proceeding as well as the income of the opposite party and a decision has to be arrived at to fix the amount of maintenance which should be just and reasonable. Therefore, this provision is a measure of social justice.

18. While fixing maintenance, the Court was also expected to consider the status of the parties, their minimum requirements for a decent living, their social background and other factors relevant to the issue. The petitioner was not expected to claim maintenance for the purpose of enjoying luxurious life. However the respondent cannot deny her a decent living in commensurate with her family status. The property owned by the petitioner was immaterial for the purpose of considering an Application u/s 24 of the Act. The consideration should be whether the petitioner was having independent income sufficient for her support. Merely because the petitioner was managing the affairs with the assistance of her parents or well wishers, it cannot be said that she was having the income sufficient for her maintenance. Sufficient income denotes actual income. The statutory right to receive maintenance during the currency of the matrimonial proceedings cannot be defeated on the ground of technicalities. The fight should be between two equal parties. In case one of the parties to the matrimonial proceedings was incapable of conducting the proceedings on account of poor financial condition, the resultant victory would be one without contest.

19. In [Smt. Jasbir Kaur Sehgal Vs. District Judge, Dehradun and others](#), the Supreme Court indicated the factors to be considered for the purpose of fixing the maintenance pendente lite thus:

No set formula can be laid for fixing the amount of maintenance. It has, in the very nature of things, to depend on the facts and circumstances of each case. Some scope for leverage can, however, be always there. The Court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate.

20. The respondent has not produced his salary certificate to prove that he was getting only a nominal income by way of salary. The learned Family Court Judge found that the respondent was receiving a sum of Rs. 20,000/- per month as salary. The learned Judge also rendered a factual finding that the petitioner is not able to maintain her and she is job less. Those findings remain unchallenged. When the respondent has not challenged the finding that the petitioner is not able to maintain herself, it is not permissible to contend for the position that the petitioner is able to maintain herself and as such she is not entitled to the grant of maintenance.

21. In the affidavit filed in support of the application in I.A. No. 2178 of 2008, the petitioner has contended that the respondent was receiving a monthly salary of Rs. 75,000/-. Though the respondent has denied the said contention, he has not produced his salary certificate before the Court to substantiate his contention that he was getting only a lesser sum. During the pendency of these Revisions, the petitioner has produced a report obtained from a detective agency to substantiate her contention that the respondent is employed in Cholamandalam DBS Finance Ltd., as a Treasury Manager on a monthly salary of Rs. 60,000/-. The respondent has not filed any objection to the said report.

22. While enhancing the maintenance to Rs. 2,500/- per month, the learned Trial Judge has not taken into consideration the cost of living in the city and other relevant factors. The learned Judge found that the petitioner was not in a position to maintain herself and she is jobless, quantified the monthly maintenance at Rs. 2,500/- per month. The respondent is a Chartered Accountant and in any case his income would be more than Rs. 20,000/- per month. Therefore the learned Trial Judge was not justified in fixing the monthly maintenance at Rs. 2,500/- per month.

23. There is nothing on record to show that the petitioner is having independent income sufficient for her support during the pendency of the divorce proceeding. The finding recorded by the learned Trial Judge with respect to the financial status of the petitioner still holds good.

24. The respondent is now stated to be working as a Treasury Manager in Cholamandalam DBS Finance Limited, Chennai on a monthly salary of Rs. 60,000/-. The learned Judge in the impugned order clearly observed that the respondent is earning Rs. 20,000/- per month and the cost of living in the city is going up every day and as such, the amount fixed in the year 2005 has to be refixed. The claim is related to the income of the earning spouse and as such, the determination of the maintenance must be on the basis of the income earned by the opposite party. Therefore, on a careful consideration of the matter, I am of the view that interest of justice would be sub-served in case the petitioner is granted maintenance at the rate of Rs. 8,000/- per month.

Disposal:

25. In the result, the Order dated 11.11.2008 in I.A. No. 2597/2006 and 2178/2008 are set aside. The Application in I.A. No. 2178/2008 is allowed and the respondent is directed to pay maintenance pendente lite at the rate of Rs. 8,000/- per month with effect from 1.8.2008. The respondent is further directed to pay the arrears after deducting the amount paid as per the order in I.A. No. 2597/2006 within four weeks from the date of Receipt of a copy of this order. In view of the order granting maintenance in I.A. No. 2178/2008, I.A. No. 2597/2006 is closed. The Revision Petitions are disposed of as indicated above. Consequently the connected M.Ps. are closed. No costs.