

(2011) 12 CAL CK 0018

Calcutta High Court

Case No: C.O. No. 2127 of 2008

Achintya Sekhar Rarhi

APPELLANT

Vs

Debutta Rarhi

RESPONDENT

Date of Decision: Dec. 23, 2011

Acts Referred:

- Hindu Marriage Act, 1955 - Section 24

Citation: (2012) 2 CHN 34

Hon'ble Judges: Harish Tandon, J

Bench: Single Bench

Advocate: Haradhan Banerjee, Sudip Ghosh and Asish Kumar Dutta, for the Appellant;
Sabyasachi Bhattacharya, for the Respondent

Final Decision: Allowed

Judgement

Harish Tandon, J.

This revisional application is directed against an order dated 29.5.2008 passed by 1st Additional District Judge, Alipore in Misc. Case No. 9/2005 by which an application under section 24 of the Hindu Marriage Act, 1955 is disposed of. This is a third round of litigation before this Court against an order disposing of an application for maintenance u/s 24 of the Hindu Marriage Act, 1955.

2. Shorn of fact, the parties married according to Hindu rituals and customs on 24.1.1996 and have one male child. It is alleged by the petitioner herein that the opposite party of her own deserted him and started living along with said son at her parental house at 42/6/1, Bose Pukur Road, Calcutta- 39. It is further alleged that on 6.7.1999 the opposite party along with parents and other associates forcibly trespassed her into the matrimonial house and is living therein.

3. The petitioner thereafter filed a Matrimonial Suit being 27/1999 praying for decree of divorce on the ground of cruelty. In the said proceedings the opposite party filed an application u/s 24 of the Hindu Marriage Act, 1955 claiming

maintenance for herself only.

4. The petitioner/husband opposed the said application by contending that the opposite party is unauthorisedly living in the matrimonial house which compelled the petitioner to live elsewhere. It is further denied that the monthly income of the petitioner is Rs. 15,000/- . The amendment of the said application was sought by the opposite party for incorporating the factum of the bank accounts and the money lying therein belonging to the husband and insertion of the claim of maintenance of the said son. The said application was eventually allowed.

5. The parties adduced evidence in support of their respective pleadings and claims and the Trial Court disposed of the said application u/s 24 of the Hindu Marriage Act on 21.7.2006 in granting a sum of Rs. 4,000/- per month as alimony pendente lite to the opposite party and the son.

6. Assailing the said order dated 21.7.2006 the petitioner herein filed the revisional application being C.O. 3296/2006, the first round of litigation before this Court, which came up for final disposal on 13.11.2006 and the Hon"ble Single Judge set aside the said order and directed the Trial Court to reconsider the said application afresh, if necessary, after giving an opportunity to the parties to lead evidence.

7. The opposite party thereafter was recalled and further evidence was adduced wherein she has categorically asserted that the income of the petitioner is Rs. 15,000/-/Rs. 18,000/- per month.

8. It is further averred that the petitioner is also an examiner and his earning is more than Rs. 5,000/- per month. She also produced a letter dated 25.9.2006 by which a part time service as Computer Teacher has been terminated and the said letter of termination was marked as exhibit 9.

9. During the course of the proceedings, the petitioner applied for issuance of the summons of the headmistress of the school, who issued the said certificate by which the part time service of the opposite party is terminated. The headmistress instead of appearing in the said suit sent certain xerox copies of vouchers of the school through her learned Advocate, which was accepted by the Trial Court.

10. Challenging the said order by which the aforesaid xerox copies of the school was accepted, the petitioner filed revisional application No. C.O. 1390/2007, the second round of litigation, which was disposed of on 8.10.2007 with the direction upon the Trial Court to issue summons directing the headmistress of the said school either to appear before the Court personally or to send any of a competent authorized representative in order to prove the certificate issued by her and also to produce relevant vouchers and school register from the month of October, 2006 to September, 2007.

11. Pursuant to the said order the summons was issued upon the said headmistress, who instead of giving evidence personally, sent an authorized representative i.e.

Accountant Assistant to depose in the matter.

12. By the impugned order the Court once again disposed of the said application u/s 24 of the Hindu Marriage Act and allowed the monthly maintenance of Rs. 4,000/- to the wife and Rs. 2,500/- for the said son commencing from the month of November, 1999 when the said application was filed.

13. Mr. Haradhan Banerjee, the learned Senior Advocate appearing for the petitioner, submits that the Trial Court could not have relied upon the affidavit of the headmistress of the said school which was produced by the said authorized representative. He further submits that the affidavit should be tendered by a deponent himself/herself and not through the authorized representative. He further contends that the Trial Court has not arrived at the finding relating to the monthly income of the petitioner while awarding the quantum of maintenance. He lastly submits that the opposite party could not prove that her service is terminated and it could be inferred that she has her independent source of income and thus, is not entitled to claim maintenance.

14. Mr. Banerjee relied upon the following judgments:

1. [Parekh Brothers Vs. Kartick Chandra Saha and Others,](#)
2. [Sudha Devi Vs. M.P. Narayanan and Others,](#)
3. [Ashit Mukherjee Vs. Smt. Susmita Mukherjee \(Nee Roy\) and Another,](#)
4. [Om Prakash Berlia and Another Vs. Unit Trust of India and Others,](#)
5. [L.I.C. of India and Another Vs. Ram Pal Singh Bisen,](#)

15. Mr. Sabyasachi Bhattacharya, learned Advocate appearing for the opposite party, opposes the submission of the petitioner in contending that it would be evident from the evidence of the authorized representative of the headmistress of the school that the petitioner is no longer in service. He further submits that in an earlier writ application the Court permitted the headmistress or her authorized representative to adduce evidence and as such it cannot be said that the said authorized representative was not competent to depose in the matter. Lastly he contends that the point urged by Mr. Haradhan Banerjee, learned Counsel appearing for the petitioner, was not at all argued in the Trial Court and as such this Court should not allow him to make such submission for the first time before it.

16. Undisputed, the petitioner is living separately with the opposite party. It is also undisputed that the petitioner is a Cost Accountant and is working in the public limited company.

17. The point hinges on as to what is the monthly income of the petitioner/husband and whether the opposite party has no independent source of income so as to entitle her to claim the maintenance from the petitioner. There is no dispute to the

proposition that the child/children are the responsibility of the parents, in case both of them are employed, the collective financial responsibility and in case of only one of the spouse being employed, his responsibility together with the responsibility towards the other spouse.

18. It is unfortunate to notice from the evidence of the petitioner where he candidly admitted to have not parted with a single farthing of his income to his said son since the date of so-called disassociation.

19. By this legal battle between the parties the only child is not only deprived of association of his father but have been deprived further from the financial support from the earning parents.

20. Initially when an application for maintenance u/s 24 of the Hindu Marriage Act was taken out, the opposite party claimed maintenance for herself only but by amending her pleading she claimed maintenance for the said male child who, admittedly, is living with the opposite party/petitioner.

21. The Trial Court previously disposed of the said application by awarding the maintenance of Rs. 4,000/- for the wife and the said child but the said order was set aside by this Court in revision as the Trial Court did not take into consideration as to the income of the petitioner/husband as well as the factum of opposite party being employed in a school.

22. On reconsideration in terms of the order of this Court, the Trial Court permitted the opposite party to adduce evidence on recall when the opposite party produced the letter of termination which was marked as exhibit 9 with objection.

23. To corroborate such statement and documentary evidence the petitioner applied for issuance of summons upon the headmistress of the said school which was allowed but the headmistress instead of adducing evidence herself sent certain photostat copies of the documents through her lawyer which was accepted by the Trial Court. Since the rule of evidence does not permit any documents to be taken on record in such fashion, this Court after setting aside the order of acceptance of those documents directed the headmistress and her authorised representative to adduce evidence.

24. On perusal of the evidence of the authorized representative it is noticed that the said witness apart from other statements produced an affidavit affirmed by the headmistress and tendered the same in evidence.

25. Mr. Haradhan Banerjee opposes the acceptance of an affidavit by the Trial Court. According to him when the author and the scribe or the deponent of the said affidavit is competent to adduce evidence unless she tendered the same, such affidavit should not be taken on record and be marked exhibit.

26. As has been held in the case of L.I.C. vs. Ram Pal Singh (supra), that mere admission of a document and evidence does not amount to its prove nor does it amount to the prove of the contend of document as the same is required to be proved either by the primary or the secondary evidence.

27. In case of Om Prakash Berlia and Anr. vs. Unit Trust of India & Ors. (supra), it is held that it is imperative on the part of the witness to say that the contents of the document given by some other persons has been seen by him and if the person does not give the evidence of the truth of the contents of the document merely by reason of having seen it, but of what he saw.

28. The Division Bench of this Court in case of M/s. Parekh Brothers vs. Kartick Chandra Saha & Ors. (supra), held that the affidavit per se can not become an evidence unless by consent of parties or where it is specifically authorized by a particular provision of law.

29. Let me examine whether apart from the affidavit of the had mistress there is other material or evidence on record from where it could be logically concluded that the opposite party is no longer working as a teacher of the said school.

30. In her examination-in-chief on recall the opposite party submitted the letter of termination of her service issued by the headmistress which was marked as exhibit 9 with objection. Although a suggestion was given as to the fabrication of the said letter in collusion with the headmistress but the same has been denied by the opposite party. She categorically stated that she is not continuing service in the said school. The authorized representative of the headmistress produced the salary register and the attendance register of the teaching and non-teaching staff and categorically stated that the opposite party is not working in the said school.

31. It is noticed from the cross-examination of the said authorized representative where he categorically stated that in attendance register, part time or casual employee is maintained by the school. It would be logically inferred that the name of the opposite party did not find place in the attendance register and the salary register in the teaching and non-teaching staff of the school.

32. Even if the contention of Mr. Haradhan Banerjee, learned Advocate for the petitioner, regarding the acceptance of an affidavit of the headmistress by the Court at the instance of the authorized representative being impermissible, is accepted, there is enough material as indicated above available on record in support of the contention of the opposite party that she is no longer in service. There is no justification to disbelieve the statement of the opposite party regarding the termination of the service as the petitioner could not satisfactorily produce any iota of piece of evidence which is counter productive.

33. The Trial Court while considering the other aspect regarding income of the husband held that the husband has concealed his present income. It is all along a

consistent case of the opposite party that the husband's income is above Rs. 15,000/- per month. It is her further case that the husband is an examiner of Company Secretary ship Examination and gets an honorarium of Rs. 5,000/- or above. Although the petitioner denied such statement but in cross-examination he admitted to have been engaged as examiner on honorarium basis. It further appears from exhibit 3 issued by the Government of West Bengal that the petitioner was offered a salary of Rs. 15,000/- and above. It is inconceivable and improbable that a person, who is offered three times the present salary, shall decline such offer and remain posted at a meager salary in a Private Limited Company.

34. The petitioner tried to prove his salary voucher through an employee of his company who categorically stated that the company does not maintain any salary register. In cross-examination the said witness stated that he does not look after the accounts matter as he is working as a clerk. This piece of evidence cannot be relied so as to the quantum of salary of the petitioner is concerned. There is no other conclusion which could be arrived in this revisional application but to that the petitioner has concealed his actual income and the Trial Court has rightly drawn the adverse inference.

35. There is considerable force in the submission of Mr. Haradhan Banerjee that the Trial Court should not have awarded the maintenance from the date of an application when admittedly the opposite party had her independent source of income till the date when she alleged that her service is terminated. Admittedly the opposite party cannot be said to be wholly dependent upon the petitioner as she had her own source of income from the honorarium which she received as the part time teacher of the said school till her removal/termination from service.

36. Thus the order impugned is modified to the extent that the petitioner shall pay the maintenance to the opposite party at the rate awarded by the Trial Court on and from the month of November, 2009. However, the petitioner shall pay the maintenance to the son as awarded by the Trial Court from the date of an application i.e. from the month of November, 1999, if not already paid.

37. The entire arrear of maintenance shall be paid by the opposite party in six (6) equated monthly installments on and from December, 2011. The petitioner shall pay the current monthly maintenance at the rate held by the Trial Court on and from the month of December, 2011 and such payment shall be made within 15 days.

38. The revisional application is allowed to the extent indicated above.

39. However, there shall be no order as to costs. Urgent photostat certified copy of this judgment, if applied for, be given to the parties on priority basis.