

(2003) 11 CAL CK 0045

Calcutta High Court

Case No: C.O. No"s. 897 and 900 of 2002 and R.V.W. 361, 626 and 627 of 2003 and C.A.N. No"s. 2379 and 2380 of 2003

Mallar Mukherjee

APPELLANT

Vs

Ruby Mukherjee

RESPONDENT

Date of Decision: Nov. 20, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1, Order 9 Rule 13, 114, 151
- Hindu Marriage Act, 1955 - Section 21B, 9
- Limitation Act, 1963 - Section 5

Citation: (2004) 2 CHN 26

Hon'ble Judges: Narayan Chandra Sil, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Narayan Chandra Sil, J.

As many as three review applications along with two petitions u/s 5 of the Limitation Act are under consideration before this Court. All those matters arose out of the Civil Revisional Case Nos. C. O. No. 897 of 2002 and C. O. No. 900 of 2002.

2. The revisional application being R.V.W. 361 of 2003 has been filed by the wife while the other two review applications namely R.V.W. 626 of 2003 and R.V.W. 627 of 2003 have been filed by the husband and in those two review applications filed by the husband two separate petitions being C.A.N. 2379 and C.A.N. 2380 both of 2003 have been filed respectively u/s 5 of the Limitation Act.

C. A. N. 2379 of 2003 & C. A. N. 2380 of 2003

3. I shall first take up the applications for limitation. The ground taken in both the applications for condonation of delay are identical. It is stated there that both the revisional applications were disposed of on 19th December, 2002. The applicant

applied for obtaining the urgent certified copy on 24.01.2003 which was delivered on 5th February, 2003. Thereafter the clerk of the constituted attorney fell ill and he came round only on 10th March, 2003. The medical certificate has been annexed. The grounds of the delay in filing the application are not challenged by the wife either by filing any written objection or in course of argument. Accordingly, both the applications are hereby allowed and the delay in filing the applications are also condoned hereby.

4. It is pointed out to me by Mr. Saktinath Mukherjee, the learned Senior Counsel appearing for the husband that as there were two revisional applications, two review applications were required to be filed for technical reasons.

R.V.W. 361 of 2003

5. I shall now take up the review application filed by the wife. Mr. Jayanta Mitra, Bar-at-Law, the learned Senior Counsel appearing for the wife has drawn my attention to the provisions of the Order 47 Rule 1 of the Code of Civil Procedure. It is pointed out by him that the said provision demands the existence of three situations namely (i) discovery of new and important matter, or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made, or (ii) on account of some mistake or error apparent on the face of the record, or (iii) any other sufficient reasons. Mr. Mitra has confined his submission on the ground of error apparent on the face of the record. Thus, Mr. Mitra has taken me through my order passed on 19.12.2002 at page 13 four lines from the bottom wherein it is described that the MAT Suit No. 17/96 was for declaration that the marriage is subsisting and also for restitution of the conjugal rights u/s 9 of the Hindu Marriage Act. It is then submitted by him that actually MAT No. 17/96 was u/s 9 of the Hindu Marriage Act for restitution of conjugal rights. I have verified the plaint of the suit being MAT No. 17/96 and it appears that the said suit was actually u/s 9 of the Hindu Marriage Act for restitution of conjugal rights. Accordingly, it is required that the part of the sentence appearing there to the effect that the declaration in MAT No. 17/96 was that the marriage is subsisting should be deleted. Mr. Mitra has drawn my attention at the top of page 14 of the said order wherein it is stated that Title Suit No. 73/96 was for declaration that the marriage is subsisting and that the Court failed to understand as to why two suits were instituted for the same declaration by the wife. It is pointed out by Mr. Mitra that the said title suit was actually for declaration (a) that the decree dated 6.9.1995 passed by the Adelaide Court is bad etc., and (b) that the status of the parties remains unaffected and the marriage is still subsisting etc. And that being the position the relevant lines at the top of page 14 are required to be recast, I have verified the copy of the Plaint of the Title Suit No. 73/96 filed before me and it appears to have supported the submission of Mr. Mitra. This position is also admitted by the learned Advocate for the husband and thus the prayer of the wife is liable to be allowed.

6. Mr. Mitra has been taken me at page 4 of my order and pointed out two words (or was?) in the second line of the first paragraph of that page. Mr. Mitra tries to impress upon me that it is the consistent case of the wife that the marriage is subsisting and she is still the wife of Mallar Mukherjee. But, here I cannot agree with Mr. Mitra, for, those two words refer and imply the case of the other side i.e. the husband who claims that Ruby is no longer his wife as Mallar has obtained a decree of divorce from the foreign Court. The situation has been reflected, of course in my view, having the existence of those two words as quoted above within bracket. Accordingly, I do not find any justification to concede to the prayer of Mr. Mitra to delete those two words as quoted above and hence it is liable to be rejected. It may be mentioned here that Mr. Mitra has not pressed any other matters to be reviewed from my order in question.

R.V.W. 626 & 627 of 2003

7. Now, I shall take up the case of the husband, Mallar Mukherjee for consideration. Mr. Mukherjee, the learned Senior Counsel for the husband has argued mainly on the miscalculation of the conversion rate of Australian Dollar with Indian Currency. Thus, it is pointed out by him from page 15 of my order that before the learned lower Court the husband stated that his annual income was \$ 36,424 but through oversight the said figure was shown as monthly income of the husband. Mr. Mukherjee is absolutely correct as in the self-same sentence

the rough monthly income of the husband was calculated by this Court as \$ 300 per month. In such situation Mr. Mukherjee seeks that the word namely "month" against the figure \$36,424 may be replaced as "annum".

8. Then Mr. Mukherjee has taken me to a word "her" used in 5th line from the bottom at page 15 of my order and submits that it should be "his". Mr. Mukherjee is again correct and definitely the said word appeared there through inadvertence at the time of typing and so the same must be replaced by the word "his".

9. Mr. Mukherjee then argues that from the order itself it is candid that this Court took a sum of \$ 364 into consideration as the monthly deduction of the husband towards the redemption of the mortgage amount for his residential house in Australia. In fact that was done in my order and so the monthly income of the husband was taken as (\$ 3000 - \$ 364) \$ 2636. From that figure this Court patently came to the conversion to the Indian Currency and took the income of the husband around Rs. 1,00,000/- per month. Both the parties admitted that the conversion made by the Court was in terms of U.S. Dollar. Mr. Mukherjee has shown me some papers taken from the internet relating to the conversion rate of the Australian Dollar and it appears that the same was at the relevant point of time around Rs. 26/- per one Australian Dollar in the year 2002. From that point of view the monthly income should come (\$ 2636 x 26) Rs. 68,536/-. Mr. Mukherjee has then pointed out that this Court at the time of fixing the pendente lite alimony of the wife had also

considered expenses of his one son and one daughter by his first wife. Mr. Mitra, the learned Senior Counsel for the wife made his calculation and came to a figure of Rs. 58,672/- as the monthly income of the husband. But Mr. Mukherjee has not pointed out that this Court took the fact of the increase of the income of the husband after about 8 years, for, the income as shown by the husband as \$ 36,424 per annum was for the year 1994-95.

10. Mr. Mukherjee, the learned Senior Counsel for the husband has referred to some case laws in order to substantiate the position of law that in determining the alimony the standard of living of the parties is required to be taken into consideration. He has tried to impress upon me that the Indian standard of living is much less than that of the standard of living prevalent in Australia. Mr. Mukherjee has also argued that the standard of 1/5th income of the husband to be given as alimony to the wife has been universally accepted in different Courts of India. Thus, he has referred to the ratio decided in the case of Rina Sen v. Alope Kumar Sen 1994(2) CLJ 510. In the said case it was held that though u/s 36 of the Divorce Act, 1869 and u/s 39 of the Parsi Marriage and Divorce Act, 1936 maintenance pendente lite could be awarded to the extent of 1/5th of the husband's net monthly average income in Section 24 of the Hindu Marriage Act, 1955 no such ceiling has been fixed. The Division Bench of this Court also held as below :

"Even though 1/5th is the rule ordinarily laid down for one head that is the wife who is living separate from the husband if we calculate for two heads we cannot fix 1/5th to be the ultimate ceiling. The legislature in its discretion has not fixed any guideline in this regard as in the case of Indian Divorce Act or the Parsi Marriage and Divorce Act and here we are always to be guided by the wide discretion vested by the statute on the Court itself."

Mr. Mukherjee has also referred to the ratio decided in the case of Udayan Saha v. Srabani Saha 1995(1) CHN 260. The similar principle of ceiling of 1/5th of the net income of the husband was talked in the said judgment.

11. There is no doubt that there is a patent mistake crept in the order at the time of making the conversion of Australian Dollar into Indian Currency. It appears from my order under review that taking the income of the husband in Indian Currency as Rs. 1,00,000/- per month the pendente lite alimony to the wife was granted as Rs. 25,000/- per month and in doing so the Court considered maintenance of one son and one daughter and the first wife of the husband and also the fact that in course of 8 years the salary of the husband must have increased. At this, Mr. Mukherjee, the learned Senior Counsel for the husband has gone to a meticulous calculation that the Court in the order under review granted in fact 1/4th of the total salary of the husband as the pendente lite alimony of Ruby and as such taking the salary of the husband as 1,00,000/- per month the pendente lite alimony was fixed at Rs. 25,000/- per month. In this connection I must say that although in different two decisions of the Division Bench of this Court it was observed that the ceiling of 1/5th

is a standard pendente lite alimony, the Division Bench was not at all forgetful about the discretion of the Court in this regard.

12. The scope of the review of any order or judgment is very limited as circumscribed by the provisions of Order 47 Rule 1 of the Code of Civil Procedure. That apart as I feel that matter of review when it is confined to the ground of error apparent on the face of the record is not a matter which may be called as between the learned Counsels of the parties and the Court but it is something between the order under review and the Court itself. The only limitation in this regard is that the review is to be initiated by any of the aggrieved party. From that point of view if the calculation of the monthly income of the husband according to Mr. Mukherjee is taken into consideration it comes to Rs. 68,000/- per month after deduction of the commitment of the husband towards the payment of the redemption value for his residential house.

13. Thus, in the quick-sand of this calculation scenario of monthly income of Mallar Mukherjee as made by the learned Senior Counsels of both the parties I find it justified taking the price hike and the increase of salary of the husband into reckoning that it would only meet the ends of justice if the quantum of pendente lite alimony of the wife is fixed at Rs. 18,000/- per month instead of Rs. 25,000/- per month. Except the above amount all other pecuniary terms of the order dated 19.12.02 shall remain unaffected.

14. Mr. Mukherjee has also pointed out to me that in terms of the provisions of Section 21B of the Hindu Marriage Act the Court is to dispose of the matter within the time limit stipulated therein and the said provision is applicable both to appeal and the petition under Order 9 Rule 13 of the Code of Civil Procedure. It is further pointed out by him that the appeal pending before the lower Court is against the ex parte decree passed by the Trial Court and unless the petition under Order 9 Rule 13 of the CPC is disposed of it would be absolutely cumbersome. It is further pointed out by him that the appeal pending before the learned lower Court was preferred by the wife particularly challenging the decision of the Trial Court that the child of the wife was not a legitimate one and begotten out of the wed-lock of Ruby with Mallar. It is also submitted by Mr. Mukherjee that in the said appeal the husband has filed a cross-appeal virtually against the ex parte decree; But at the same time, the husband has also filed one petition under Order 9 Rule 13 read with Section 151 of the CPC which was recorded there as Misc. Case No. 18 of 1999 with a prayer to set aside the order of ex parte decree dated 25.9.1997. In this backdrop Mr. Mukherjee has further submitted that if the appeal is disposed of first the Misc. Case under Order 9 Rule 13 will be infructuous and as such a direction may be given to the learned lower Courts for the disposal of the Misc. Case first and then to dispose of the appeal if such occasion arises. To this Mr. Mitra, the learned Senior Counsel for the wife does not appear to have any objection.

15. I have duly considered the submission of Mr. Mukherjee. In any case the disposal of any one of the matters i.e. to say either of the appeal or of the Misc. Case, the other matter may stand infractious but it is true that the situation may be otherwise from the legal point of view if the appeal preferred by the wife is disposed of first allowing the same in favour of the wife, for, in that case the decree passed by the learned Trial Court declaring the issue as an illegitimate one cannot be contested before the learned Trial Court, In such situation, I find substance in the submission of Mr. Mukherjee, the learned Counsel for the husband. Accordingly, the appeal pending before the learned Appellate Court will be taken up for disposal after the disposal of the Misc. Case being No. 18 of 1999. As regards the time of disposal of the matter both the Courts below shall follow the provisions of law.

16. Now, to sum up the matter, both the C.A.N. 2379 of 2003 and C.A.N. 2380 of 2003 are allowed. All the three review applications are disposed of in the manner and in the terms as stated above. The department is directed to make necessary corrections of the order dated 19th December, 2002 passed by this Court. Both the learned lower Courts are directed to follow the order as stated above,