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**(2008) 07 CAL CK 0055**

**Calcutta High Court**

**Case No:** C.O. 349 of 2008

Subhankar Mukherjee

APPELLANT

Vs

Rakhi Mukherjee Nee Banerjee

RESPONDENT

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**Date of Decision:** July 1, 2008

**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Hindu Marriage Act, 1955 - Section 11, 24, 26, 5, 5(1)

**Citation:** AIR 2009 Cal 5 : (2009) 1 CALLT 101

**Hon'ble Judges:** Biswanath Somadder, J

**Bench:** Single Bench

**Advocate:** Kamlesh Jha and Jayanta Lahiri, for the Appellant; Hiranmoy Bhattacharya and Mrinal Kanti Ghosh, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

Biswanath Somadder, J.

Heard the learned advocates appearing on behalf of the parties.

2. This is an application under Article 227 of the Constitution of India directed against an order, being Order No. 13 dated 10th January, 2008 passed by the learned Additional District Judge, 2nd Court, Burdwan in Miscellaneous Case No. 20 of 2007.

3. The petitioner herein was the respondent in the said miscellaneous case which was filed by his wife claiming alimony pendente lite under provision of Section 24 of the Hindu Marriage Act, 1955.

4. By the order impugned, the learned Court below was pleased to allow the wife's application and directed as follows:

that the instant Misc. Case arising out of the application u/s 24/26 of the Hindu Marriage Act is allowed on contest without any order as to cost with direction upon the O.P. Subhankar Mukherjee to pay Rs. 14,000/- per month to the petitioner Rakhi Mukherjee Nee Banerjee of which Rs. 8,000/- for the petitioner herself and Rs. 6,000/- for her child towards alimony pen-dente lite and maintenance of the child. The O.P. is further directed to pay Rs. 4,000/- to the petitioner towards litigation cost.

The order will take effect from the date of filing of the instant application.

The payment shall have to be made by 12th of each succeeding month.

The Misc. Case is, thus, dispose of.

5. The specific plea of the husband/petitioner in the instant application is that, in fact, there was no existence of any marriage between him and his wife, since, at the time of solemnization of marriage, the wife had an existing marriage with another person and, therefore, the latter marriage was void ab initio. In this context, the learned advocate for the petitioner submitted that the factum of the earlier marriage was suppressed by the wife at the time of solemnization of the subsequent marriage with his client. "

6. He refers to paragraph 7 of the petition filed u/s 11 of the Hindu Marriage Act, 1955. He submits that since the marriage between his client and the respondent herein is void ab initio, there was no question of the learned Court below passing an order u/s 24, Hindu Marriage Act, 1955, granting alimony pendente lite. In order to substantiate his submission, he relies on the judgment of the Hon"ble Supreme Court, in the case of [Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another](#), . Relying on the aforementioned judgment, he submits that the question of maintenance in such a case would not arise, since the necessary condition for a lawful marriage, as laid down u/s 5(1)(i) of the Hindu Marriage Act, 1955 is that neither party should have a spouse living at the time of marriage. He submits that in such a case, that marriage has to be ignored as not existing in law at all if and when such a question arises. He submits that in the facts of the instant case there was no marriage between his client and the respondent and the solemnization of the marriage was void ab initio.

7. Learned advocate for the petitioner also relies on a Single Bench judgment of the Rajasthan High Court, in the case of [Smt. Sunita Vs. Puneet Ram Chandani and Others](#), . Relying on the Rajasthan High Court's judgment, learned advocate for the petitioner submits that if it is an admitted position that there was an earlier existing marriage, in that event, the wife was not entitled to claim interim maintenance under the provision of Section 24 of the Hindu Marriage Act.

8. On the other hand, learned advocate appearing on behalf of the respondent, being the wife of the petitioner herein, refers to certain facts that have been averred to, in the pleadings filed before the learned Court below. In this regard, he draws this Court's attention to the written statement of his client wherein the allegations made in paragraph 7 of the husband's application u/s 11 of the Hindu Marriage Act, 1955, have been dealt with, amongst others. He particularly, refers to paragraph 11 of the written statement which, in my view, is required to be set out:

Paragraph 11 - The allegations in reference to Para-7 of the petition to the effect that during course of living as husband and wife by the petitioner with the respondent, he received the alleged information of the respondent's marital status with another person namely Sujit Das or he learnt about the divorce proceeding as alleged in the Burdwan Court or about the ex parte decree of divorce ordered on 10th May, 2005 or there was at all any marriage of the respondent on 24th August, 2004 or the respondent as alleged had ever suppressed about her marriage with Sujit Das or that the marriage between the parties contravened the provisions of Hindu Marriage Act, 1955 are absolutely baseless, incorrect, contrary to the real state of affairs and misleading to the legal provision of the Act referred to in the petitions. In this connection it should be noted the petitioner deliberately have not disclosed the date of his knowledge about the proceeding nor has disclosed his agency of information about it and this suppression in fact is to mislead the Court and to misdirect the issue raised by the petitioner to take an undue advantage in the present proceeding of his own fraudulent act which this respondent craves leave to disclose hereinafter in a separate paragraph.

9. Learned advocate for the respondent also submits that the ratio of the decision of the Hon"ble Supreme Court is not applicable in the facts of the instant case, since the same was delivered while the Hon"ble Supreme Court considering the aspect of grant of maintenance under provision of Section 125 of the Code of Criminal Procedure, 1973.

10. Insofar as the judgment of the Rajasthan High Court is concerned, learned advocate for the respondent cites another judgment of the Rajasthan High Court, which was pronounced by a Division Bench in the case of [Virendra Kumar Vs. Smt. Santoshi Devi](#), . Relying on this judgment, he submits that the latter decision of the Rajasthan High Court, which has been referred to by the learned advocate for the petitioner herein, does not take into consideration the Division Bench pronouncement of that Court. He submits that the Division Bench of that Court, in the case referred (supra) inter alia held that an application filed u/s 24 of the Hindu Marriage Act, cannot be rejected, until and unless denial of the factum of marriage, is proved by the husband before the learned trial Court.

11. After taking into consideration the submissions made by the learned advocates appearing on behalf of the parties and upon perusing the instant application and the impugned order, I find that the learned Court below was called upon to decide

an application filed by the wife for grant of alimony pendente lite, under the provision of Section 24 of the Hindu Marriage Act, 1955 and was never called upon to decide on the factum of marriage, as is the case made out by the husband, in his application u/s 11 of the Hindu Marriage Act. It is not, as if, the learned Court below, while allowing the application u/s 24 of the Hindu Marriage Act, was not alive to this issue. In this regard, it may not be out of place to extract relevant portions of the order impugned and reproduce the same here in below

I have already heard both sides at length on 7-1-08 over the aforesaid matter.

The Id. Advocate appearing on behalf of the petitioner contended that denial of factum of marriage cannot be a bar to get maintenance pendente lite as the marriage is admitted and birth of the child is admitted in the wedlock of the parties. In support of his contention a decision of Rajasthan High Court reported in [Virendra Kumar Vs. Smt. Santoshi Devi](#), was placed on behalf of the petitioner.

The Id. Advocate appearing on behalf of the O.P. herein submitted that the petitioner herein is not entitled to get alimony pendente lite because she is not a legally married wife of the O.P., that the petitioner was married to the O.P. on 2-3-05 while her previous marriage with one Sujit Das was existing, that Divorce Proceeding against the previous husband was also pending and that the marriage held between the parties was void ipso jure since it was done in contravention of one of the conditions laid down u/s 5 of the Hindu Marriage Act. To rely his contention two decisions of Hon"ble Courts - one of which reported in AIR 1996 Cal 310 (sic) and another reported in [Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another](#), , are placed.

I have gone through the instant application, written objection filed against it and the counter-affidavit filed on behalf of the petitioner against the written objection as also the reported decisions of the Hon"ble Courts referred to above carefully.

Considered the submissions of the Id. Advocates of both the sides anxiously.

Admittedly, the petitioner and the O.P. got married on 2-3-05 and such marriage was also registered under the Hindu Marriage Act, they lived together as husband and wife and in their wedlock a male child namely Souradeep was born.

The papers filed on behalf of the O.P. with a firisti are nothing but copies of documents, but they are not certified copies.

The issue as to whether the petitioner herein is legally married wife or not is sub judice pending final hearing and disposal of the instant suit after taking evidence therein. At this stage there is hardly any scope to take such decision without any evidence as to the question raised with regard to the main issue as to whether the petitioner herein is the legally married wife of the O.P.-respondent or not. But the facts remain that both the parties lived together as husband and wife after their marriage as discussed above and a male child was born in their wedlock and that

the instant suit was filed by the O.P., who is the petitioner in the Main Suit, against the respondent, who is the petitioner in the Misc. Case, for declaration that the marriage of the petitioner with the respondent is null and void.

12. On a plain reading of the above extract from the impugned order, it is patently clear that the learned Judge could not have decided, without any evidence, the question raised before him, with regard to main issue in the matrimonial proceeding - i.e., whether the petitioner in the Section 24 application was the legally married wife of the opposite party or not.

13. The judgment of the Hon"ble Supreme Court relied on by the petitioner was rendered in an entirely different factual context. The point involved in that case was whether a Hindu woman, who was married, after coming into force of the Hindu Marriage Act, 1955, to a Hindu male, having a living lawfully wedded wife, could maintain an application for maintenance u/s 125 of the Code of Criminal Procedure, 1973. In answer to this issue, the Hon"ble Supreme Court while considering the provision of Section 125 of the Code of Criminal Procedure, 1973, also looked into the status of a Hindu woman marrying a Hindu male with a living spouse under the provisions of Hindu Marriage Act, 1955. It was in this context that the Hon"ble Supreme Court delivered its judgment observing, inter alia, that Section 125 of the Code of Criminal Procedure, 1973 has been enacted in the interest of a wife, and who intends to taken benefit under Sub-section (1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned.

14. The Hon"ble Supreme Court went on to observe that this issue can be decided only by a reference to the law applicable to the parties and it was only where an applicant establishes her status on relationship with reference to the personal law, that an application for maintenance could be maintained. The above observation makes it clear that the judgment of the Hon"ble Supreme Court has no manner of application at all in the facts of the instant case, which arises out of an order passed by a Court, not in an application u/s 125 of the Code of Criminal Procedure, 1973, but in a proceeding u/s 24 of the Hindu Marriage Act, 1955 for grant of alimony pendente lite. Moreover, in the instant case, denial of the factum of marriage by the husband, is yet to be finally decided by the learned trial Court.

15. The very concept of maintaining an application for grant of alimony pendente lite presupposes a pending matrimonial litigation. In the facts of the instant case, this pending litigation has been initiated by the husband wherein he has denied the factum of marriage with his wife on the ground that his wife had a spouse living from an existing earlier marriage. This allegation of the husband has been denied by the wife in paragraph 11 of her written statement, which has been reproduced hereinabove.

16. The judgment of the Rajasthan High Court, reported in AIR 2005 Raj 290, which has been relied on by the learned advocate for the petitioner, was also rendered in a

completely different fact situation, where the admitted position was that the husband and wife were within the degrees of prohibited relationship. In fact, the Rajasthan High Court in paragraph 9 of the judgment, held as follows:

In peculiar facts of the case if petitioner wants to take benefit then she should first place on record certain material to convince the Court that the marriage is not void. If there is sufficient material available on record to demonstrate that the marriage is void then she cannot get any maintenance u/s 24 of the Hindu Marriage Act.

17. In my view, the judgment of the Rajasthan High Court cannot be said to be applicable in the facts of the instant case, where there is no unequivocal admission on the part of the wife, with regard to the existence of a valid marriage, at the time of solemnization of her marriage with the petitioner herein. Moreover, this judgment of the Rajasthan High Court does not take into consideration the earlier Division Bench judgment of the same High Court, which has been relied on by the learned advocate for the respondent and has already been discussed above.

18. For the foregoing reasons, I am unable to accept the contention of the learned advocate for the petitioner that the order of the learned Court below granting alimony pendente lite to the wife/opposite party, under the provision of Section 24 of the Hindu Marriage Act, 1955, is not sustainable in law. I am of the view that there is no infirmity of reasoning or error of law in the order impugned, which would warrant interference of this Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

19. The instant application, therefore, stands dismissed with cost assessed at 200 G.Ms.

20. Urgent xerox certified copy of this order, if applied for, be given to the parties.

21. Immediately after the pronouncement of the order in Court, the learned advocate for the petitioner prays for stay of order for four weeks. After taking his submission into consideration, I am inclined to grant stay of this order for six weeks from date.