

Loganayaki Vs. V.Sivakumar

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Court : Chennai

Decided On : Mar-21-2013

Judge : S.Nagamuthu

Appellant : Loganayaki

Respondent : V.Sivakumar

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

21. 03.2013 CORAM THE HONOURABLE MR. JUSTICE S.NAGAMUTHU Civil Revision Petition [PD] No.3252 of 2011 and M.P.No.1 of 2011 Loganayaki .. Petitioner -Versus- V.Sivakumar .. Respondent Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order dated 28.03.2011 made in I.A.No.39 of 2010 in HMOP No.119 of 2009 on the file of the learned Subordinate Judge, Ranipet, Vellore District. For petitioner : Mr.S.Mukunth For respondent : Mr.D.Prabhu Mukuth ORDER An important question as to whether an order for maintenance pendente lite passed under Section 24 of The Hindu Marriage Act, by a civil court [other than Family Courts constituted under The Family Courts Act, 1984] is appealable or not, has come up for consideration in this revision petition.

2. The petitioner is the wife of the respondent. The respondent has filed HMOP No.119 of 2009 on the file of the learned Subordinate Judge, Ranipet, Vellore District, for divorce. Pending the said case, the petitioner filed an interlocutory

application in I.A.No.39 of 2010 seeking maintenance pendente lite at Rs.6,000/- per month and litigation expenses of Rs.15,000/- from the respondent. The learned Subordinate Judge, by his order dated 28.03.2011, dismissed the same. Aggrieved over the same and contending that the said order is not appealable, the petitioner has come up with this revision under Article 227 of the Constitution of India.

3. I have heard the learned counsel on either side and perused the records carefully.

4. At the outset, the learned counsel for the respondent raised a preliminary objection in respect of the maintainability of this revision. According to him, an order made under Section 24 of The Hindu Marriage Act, 1955 [hereinafter referred to as The HM Act], is appealable under Section 28 of The HM Act and, therefore, the present revision is not maintainable. In support of his contention, the learned counsel for the respondent has relied on a number of judgements of various High Courts about which I would make reference hereinbelow.

5. Contrary to that, the contention of the learned counsel for the petitioner is that as against an order made under Section 24 of The HM Act, either allowing or dismissing an application for maintenance pendente lite, there is no appeal remedy available under Section 28 of The HM Act. According to him, there is conscious omission of an order made under Section 24 of The HM Act in sub-section (2) of 28 of The HM Act.

6. Since an objection regarding the maintainability has been raised, I deem it appropriate to deal with the same, at the first instance. Section 28 of The HM Act, upon which much reliance has been placed by the learned counsel for the respondent, deals with decrees and orders against which appeals would lie. The said provision reads as follows:- 28. Appeals from decrees and orders. - (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub- section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction. (2) Orders made by the court in any proceeding

under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction. (3) There shall be no appeal under this section on the subject of costs only. (4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

7. A plain and comparative reading of sub-section (1) and (2) of Section 28 of The HM Act would make it apparent that sub-section (1) provides for appeals against decrees, whereas sub-section (2) provides for appeals against orders. Under Sections 9, 10, 11, 12, 13, 13(A) and 13(B) of The HM Act, a civil court has been empowered to pass a decree of the nature envisaged in the respective provision. Under Sections 24, 25 & 26, a civil court has been empowered to pass orders. Thus, in respect of any decree passed under any of the provisions under Sections 9, 10, 11, 12, 13, 13 (A) and 13(B) of The HM Act, the aggrieved has got right of appeal under Section 28(1) of The HM Act. So far as orders passed under Sections 25 and 26 of The HM Act are concerned, if the order is not an interlocutory order, the aggrieved has got right of appeal under Section 28(2) of The HM Act. But, a close reading of sub-section (2) of Section 28 would make it ipso facto clear that the legislature has consciously omitted an order made under Section 24 of The HM Act from the purview of sub-section (2) of Section 28 of The HM Act. Therefore, an order, either granting or denying maintenance pendente lite or litigation expenses, passed under Section 24 of The HM Act by a civil court is not at all appealable.

8. But, the learned counsel for the respondent would rely on a Judgement of Madhya Pradesh High Court in Raghvendra Singh Choudhary v. Smt. Seema Bai, AIR 198.MP 25, wherein the Division Bench has held that an appeal will lie against an interlocutory order, if it is a judgement and that the order passed under Section 24 of The Hindu Marriage Act is a judgement as it decides the question of maintenance during the pendency of the suit, therefore, there is a final adjudication.

9. Nextly, the learned counsel would rely on a Full Bench judgement of Allahabad High Court in Kiran Bala Srivastava v. Jai Prakash Srivastava, 2005(23) LCD 1 wherein the Court has held that an order made under Section 24 of The HM Act has got the trappings of a judgement and therefore, such an order is appealable under Section 19 of The Family Courts Act.

10. The learned counsel would lastly rely on a Division Bench judgement of Uttarakhand High Court in Rahul Samrat Tandon v. Smt. Neeru Tandon, MANU/UC/0781/2010 wherein also the court went on to hold: It is necessary that a broad meaning to the word judgement must be assigned and therefore, we hold that the impugned order dated 20-03-2010 was in the nature of a judgement and the instant special appeal preferred by the appellant is maintainable under Section 19(1) of the Family Courts Act, 1984.

11. But, a contrary view has been taken by a Full Bench of Orissa High Court in Swarna Prava Tripathy Vs. Dibyasingha Tripathy, AIR 199.Orissa 173 wherein in para 8 the Full Bench of Orissa High Court has held as follows:- 8. In view of the law laid by the Apex Court, the inevitable conclusion is that an order passed under Section 24 or 26 of Marriage Act is an interlocutory order and as such, no appeal would lie in terms of Section 19(1) of the Act.....

12. Similar view has been taken by a Full Bench of Patna High Court in Neelam Kumari Sinha Vs. Shree Prashant Kumar, 2011 (1) CTC 753.

13. Similarly, a Division Bench of Bombay High Court in Sunil Hansraj Gupta v. Payal Sunil Gupta, AIR 199.Bom 423 :

1992. (1) APLJ 3 DNC (BOM) in para 6 has held as follows:- 6. Thus the legal position that emerges is that under sub- section (2) of section 28 no appeal shall lie to the High Court against interim orders passed under sections 24, 25 or 26 of the Act. Under this sub-section reference to section 24 is purposely omitted and this is a pointer to hold that legislature wanted to expressly bar an appeal against any order passed under section 24 of the H. M. Act.

14. So is the view of a Division Bench of Andhra Pradesh High Court in Narendra Kumar Mehta v. Smt.Suraj Mehta, AIR 198.Andhra Pradesh 100(1) wherein it has been held in paras 13 & 14 as follows:- 13. As discussed above, the provision with regard to appeal contained in Section 28 of the Act, as amended, does not expressly confer any right of appeal against the order made under S. 24 or an interim order made under S. 26 of the Act. Consequently, these two appeals are not maintainable.

14. However, the court which made the order is the II Additional Judge, City Civil Court, Hyderabad. It is a civil proceeding disposed of by a court subordinate to the High Court. The High Court has powers of superintendence in respect of matters pending before the civil courts both under Art. 227 of the constitution of India as well as under S. 115 of the Code of Civil Procedure. Section 115 of Civil P. C. enables the High Court to exercise revisional jurisdiction in all civil matters pending or disposed of by a court subordinate to it wherever that subordinate court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, provided no appeal lies. As no appeal lies against an order under s. 28, of the Hindu marriage Act, the High Court may exercise its revisional jurisdiction under s. 115 of the Civil P. C. We, therefore, proceed to consider both these appeals as if they are revision petitions filed in this Court by the respective parties. These two appeals shall be numbered as Civil revision Petitions.

15. The judgements in Raghvendra Singh Choudhary v. Smt. Seema Bai, AIR 198.MP 259.Kiran Bala Srivastava v. Jai Prakash Srivastava, 2005(23) LCD 1.Rahul Samrat Tandon v. Smt. Neeru Tandon, MANU/UC/0781/2010, Swarna Prava Tripathy Vs. Dibyasingha Tripathy and Neelam Kumari Sinha Vs. Shree Prashant Kumar cases referred to above relate to the right of appeal as against the orders made by the Family Courts. Section 19 of The Family Courts Act deals with right of appeal which excludes Section 28 of The HM Act from its operation in respect of the orders made by the Family Courts. In the present revision, I am of the view that I need not go into the question as to whether an order made by the Family Court under Section 24 of The HM Act is an interlocutory order or a final

order and as to whether an appeal under Section 19 of The Family Courts Act lies to the High Court against such order. I leave the said question open as it is unnecessary for the disposal of the present revision. Thus, the above judgements are not relevant for the purposes of this revision as, here the order under challenge is from a Civil Court of original jurisdiction and not from a Family Court 16. So far as an order made by a Civil Court [other than a Family Court] under Section 24 of The HM Act is concerned, the legislature has not made any provision for appeal in the HM Act. It need not be over emphasised that an appeal is a creature of statute and since no such appeal has been provided for in the HM Act, against an order made under Section 24 of The HM Act, there can be no difficulty in holding that the aggrieved has no remedy of appeal. Thus, I am in full agreement with the judgement of Bombay High Court in Sunil Hansraj Gupta's case cited supra and Andhra Pradesh High Court in Narendra Kumar Mehta's case cited supra. In view of the said legal position, the order impugned in this revision is not appealable and so, I hold that the present revision is maintainable.

17. Let me now examine, whether the order of the trial court impugned in this revision can be sustained. Admittedly, the petitioner had filed an application before the Judicial Magistrate at Alandur seeking maintenance under Section 125 of Cr.P.C. That petition was dismissed. The trial court took cognizance of the same and passed the order impugned in this revision, dismissing the claim for maintenance pendente lite under Section 24 of The HM Act. According to the trial court, the dismissal of the petition for maintenance under Section 125 of Cr.P.C. is an implied bar for the civil court to grant interim maintenance pending disposal of matrimonial dispute and litigation expenses. In my considered opinion, the trial court was not right in its said conclusion. It is well known that the standard of proof and considerations for grant of maintenance under Section 125 of Cr.P.C. are slightly different from the consideration for the grant of maintenance pendente lite and litigation expenses. Further, any finding recorded by a Magistrate in a proceeding under Section 125 of Cr.P.C. is not binding on the civil court. In this regard, we may refer to the judgement of the Hon'ble Supreme Court in Nagendrappa Natikar v. Neelamma [S.L.P. (C) No.11800 of 2013 dated 15.03.2013] wherein in para 10 the Hon'ble Supreme Court has held as follows:- "10. Section 125 of Cr.P.C. is a piece of social legislation, which provides for a

summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for full and final determination of the status and personal rights of parties, which is in the nature of a Civil Proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125 Cr.P.C. is tentative and is subject to final determination of the rights in a Civil Court. In view of the above settled position of law, in the instant case, the trial court was not right in dismissing the claim of the petitioner for maintenance pendente lite and for litigation expenses on the ground that the petition under Section 125 of Cr.P.C. was dismissed by the learned Magistrate.

18. Now turning to the claim of interim maintenance and litigation expenses, the learned counsel for the petitioner would submit that the petitioner has got no income to support herself, whereas the respondent is having landed properties from which he is deriving an annual income of Rs.1,00,000/- and he is a coolie by which he is earning a sum of Rs.6,000/- per month. But, there is no proof that the respondent is drawing any income from the immovable properties. Therefore, taking into account the normal income from doing coolie work and going by the normal standards of earnings of a man of the respondent's stature, I hold that he would be earning around Rs.4,500/- per month. Going by the said income and the status of the parties, I am of the view that directing the respondent to pay a sum of Rs.250/- per month from the date of interlocutory application in I.A.No.39 of 2010 till date and at Rs.1,000/- per month from 22.03.2013 until the disposal of HMOP No.119 of 2009 would meet the ends of justice.

19. In the result, the civil revision petition is partly allowed, the order of the trial court dated 28.03.2012 is set aside and the respondent/husband is directed to pay a sum of Rs.250/- per month from the date of interlocutory application in I.A.No.39 of 2010 till date [i.e., 21.03.2013] and at Rs.1,000/- per month from 22.03.2013 until the disposal of HMOP No.119 of 2009 as interim maintenance. He shall also make one time payment of Rs.1,000/- towards litigation expenses. No costs. Consequently, connected MP is closed. kmk To 1. The Subordinate Judge, Ranipet Vellore District