

16.03.2017

C.O.No.2486 of 2016
with

C.O. 2913 of 2016

Mr. Prantik Ghosh

**...for Soumya Majumder (Husband-
Petitioner in item no.19 and the
Opposite party in item No. 20.)**

Mr. Pramit Bag

Mr. Sounak Bhattacharya

Mr. A. Sarkar

**...for Shrestha Dhar Majumder (Wife-
Opposite party in item no.19 and
the Petitioner in item No. 20.)**

(1) C.O. 2913 of 2016 filed by the wife Shrestha Dhar Majumder, respondent and C.O. 2486 of 2016 filed by the husband Soumya Majumder, as plaintiff of the Matrimonial Suit No.107 of 2014 have assailed the same Order No. 34 dated 30th May, 2016 passed by learned Additional District Judge, 3rd Court, Barasat, North 24 Parganas disposing of the application dated 8th February, 2016 submitted by the wife for enhancing the amount of maintenance *pendente lite* revisiting earlier order dated 24th April, 2015 under Section 24 of the Hindu Marriage Act.

(2) Since both the revisional applications have been directed respectively by the parties referred to above, upon consent, both the applications are taken up for hearing and disposal by recording one and single order which shall find place in the record of C.O. 2913 of 2016.

(3) The matrimonial suit for divorce is filed by the husband. The impugned application had proposed enhancement in the amount of maintenance *pendente lite* after about six months of grant of maintenance *pendente lite* amount on 24.02.2015 payable by the husband @ Rs. 9,000/- for the wife. Admittedly they have no issue. Litigation cost of Rs. 5,000/- also was provided along with direction for making payment of arrears @ Rs. 1,000/- per month. The impugned application, of course, was pressed by the wife for enhancement taking opportunity of the liberty granted by this Court in CRAN 831 of 2016 in connection with CRR 3775 of 2015. The relevant portion of order of this Court in CRAN 831 of 2016 is set out:-

“It is submitted by learned counsel for the wife that application for enhancement has already been filed. Therefore, the learned Trial Court is directed to dispose of the application if filed, for enhancement of the alimony pendente lite as expeditiously as possible in view of the observation made herein above.”

(4) Mr. Prantik Ghosh, learned advocate for the husband argued that within the Hindu Marriage Act, 1955 there is no provision for enhancement of the amount once granted by the learned Trial Court towards maintenance *pendente lite*. The impugned order dated 30th May, 2016 however indicates enhance in amount of maintenance *pendente lite* to the tune of Rs. 15,000/- per month of course clubbing also the amount of maintenance

payable by the husband @ Rs. 5,000/- under order of Section 125 of the Code of Criminal Procedure including Rs. 1000/- as arrear.

(5) Mr. Ghosh relying upon the case of *Chitra Sengupta-vs-Dhruba Jyoti Sengupta* reported in 1987 (1) CHN 450 and the case of *Rina Sen-vs-Alok Kumar Sen* reported in 1994(2) CLJ 103 concluded his argument that there being no provision in the Act for enhancing the amount towards maintenance *pendente lite* and to grant such amount also exceeding 1/5th of the salary of the husband, the impugned order should be set aside by allowing the revisional application no. 2486 of 2016.

(6) Mr. Bag, representing the wife referring Clause 21 of General Clauses Act, 1897 and also relying upon a decision of the Madras High Court in the case of *J. Anitha-vs-J. Prakash* delivered on 18th September, 2009 and another decision of the Division Bench of this Court in the case of *Bipasha Bhowal vs. Biplab Bhowal* reported in 2011(1) CHN (Cal) 239 per contra submitted that the application was filed before learned Trial Judge for enhancing maintenance amount to the tune of Rs. 25,000/- in view of increase in the salary of the husband. Further submitted that though the provision within the Hindu Marriage Act, is silent about enhancing maintenance *pendente lite*, but in view of the judicial pronouncement apart from being empowered under Clause 21 of the General Clauses Act the court can very well exercise the

judicial discretion in determining the appropriate amount taking note of increase in the salary of the husband. According to Mr. Bag, learned trial court failed to apply judicial mind in granting such maintenance at an enhanced rate appropriately.

(7) Mr. Bag also invited attention of this Court to the relevant paragraph of earlier C.O. 1319 of 2015 disposed of on 7th July, 2015 which is set out herein:-

“In course of the arguments it came out that the wife is further provided with the maintenance of Rs. 5,000/- per month in a proceeding under Section 125 of the Code of Criminal Procedure. From the length and breadth of the impugned order it does not appear that the quantum of maintenance awarded by the Trial Court includes the maintenance awarded in a proceeding under Section 125 of the Code of Criminal Procedure. Once Court is silent on the above aspect, it necessarily implies that the Court awarded the maintenance separately irrespective of the quantum of the maintenance awarded in another proceedings. Taking into account the aforesaid fact, it does not appear to this Court that the quantum of maintenance awarded in the impugned order is too meagre and not in commensurate with the actual income of the husband.”

(8) I have gone through the cases as well as Clause 21 of the General Clauses Act as cited at the bar.

(9) There is no doubt that under the Hindu Marriage Act, 1955, to provide maintenance *pendente lite* and litigation cost, Section 24 is always in the aid of either of the spouses, so that, she/he may not face any financial crisis during pendency of the proceeding of the

matrimonial suit to meet the expenses of the proceeding as well as her own maintenance during pendency of the suit. It is also pertinent to mention that in the event of tendering any such application seeking maintenance *pendente lite* and litigation cost its appended proviso formulates that the same “shall as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband as the case may be.” The provision for grant of alimony *pendente lite* under the Special Marriage Act, 1954 is also in the same tune and language.

(10) In the case of *J. Anitha vs. J Prakash* of the Madras High Court, decided on 18th September, 2009, the Single Bench observed that 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 praying for enhancement of maintenance. Said application having not been processed the wife had filed a fresh application. The Hon’ble Bench held,

*“The Matrimonial Court was given jurisdiction to grant maintenance during the pendency of the proceedings. When the Court was having jurisdiction to grant maintenance under Section 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.*

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 under

Section 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 under Section 24 of the Act, provisions of the General Clauses Act would come into play”,

The Hon'ble Bench of Madras High Court in the penultimate portion before departure from the case finally held,

“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 the case the petitioner is granted maintenance at the rate of Rs. 8,000/- per month.”

Accordingly the respondent/husband in that case was directed to pay maintenance *pendente lite* at the enhanced rate of Rs.8,000/- per month.

(11) I should not miss the *lis* of the case on hand, because the question of maintainability of a second application proposing enhancement in the amount of maintenance *pendente lite* is under challenge. Mr. Bag though cited the case of *Bipasha Bhowal Vs. Biplab Bhowal* of our High Court wherein this High Court observing no unreasonableness in the order passed by learned Trial Court attending the wife's prayer for enhancement of alimony *pendente lite* had rejected the revisional application affirming that order of enhancement. But the question of

maintainability of an application for enhancement in the amount of maintenance *pendente lite* under provision Section 24 of the Hindu Marriage Act or Section 36 of the Special Marriage Act, 1954 was not attended thereto. Therefore, the jurisdiction to record an order of approving order of enhancement in the amount of maintenance *pendente lite* by the learned Trial Court, or, passing order of enhancement modifying the order of maintenance *pendente lite* even by this Court is to tested in the light of the provision of law. Merely on being approached without attending the point of maintainability the order of modification in the amount may be precedent if it is found otherwise maintainable under the provision of law. But if not, then modification or alteration by enhancement or otherwise in the order of maintenance *pendente lite* either by the Trial Court, or, by the High Court has to be tested in the yardstick of the prevalent law in the field.

(12) Mr. Bag however, could not produce any citation of this Court wherever any order of modification either in the form of enhancement or reduction in the amount of maintenance *pendente lite* where order was so passed after being tested with the yardstick of maintainability. Therefore, while the very point of maintainability of any such order passed by the learned Trial Judge enhancing the amount of maintenance *pendente lite* on a second application is assailed as not maintainable under Section 24 of the Hindu Marriage Act, and, argument and reply thereto have been advanced before this Court, then this Court

may not feel shy to give clear answer on such point on interpretation of the law on the subject. This Court does not want to mean that in the process of giving such answer the Court is sitting in appeal, but, interpretation of statute if yields something otherwise, its consequence ought to be prospective.

(13) Since Mr. Bag relied upon Clause 21 of the General Clauses Act, the same is set out:-

“21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws – *Where, by any [Central Act] or Regulation, a power to [issue notifications], orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any [notifications]’ orders, rules or bye-laws so [issued]”.*

Further let the comments available on interpretation of such Clause 21 also be set out:-

“A specific provision in a statute may be (i) wider than or (ii) co-extensive with or (iii) narrower than S.21 of the General Clauses Act; a wider provision would prevail over S.21; a co-extensive provision, would enable co-invocation of S.21; but in case of the narrower provision, S. 21 may be invoked if otherwise necessitated in the context, however, procedural formalities”

prescribed in the specific statutory provisions cannot be circumvented by resort to S. 21.”

(14) Thus, when the aid of the relevant provision of General Clauses Act, 1897 can be invoked even with its some limitation, it has been prescribed. At the cost of repetition let it be reiterated that if specific statutory provision is available in the field, then said statute adequately is to be applied by interpreting legislative intention.

(15) It has been observed that the amount of maintenance *pendente lite* and litigation costs, as are considered by the Trial Court upon hearing, is to lend assistance to the applicant seeking the relief which prevents the applicant from sufferance of financial crisis during pendency of the proceeding. Now in ordinary fallacy, if, for whatever reason may be, the Court allows one after another application(s) of either of the spouses for modification either to enhance, or, to reduce in the amount of maintenance *pendente lite* once granted by the Trial Court disposing of the purported application finally either under Section 24 of the Hindu Marriage Act, or, Section 36 of Special Marriage Act, then to the estimation of this Courts scope of lingering and multiplicity of proceedings would be made open instead of allowing the matrimonial suit disposed of within a reasonable period by Court of first instance. Question also may come that in the midst of proceeding if there remains scope of filing or entertaining any 2nd application for enhancing maintenance *pendente lite* allegedly

in the garb of any subsequent development, then why not again 3rd or 4th applications would not be entertained, or, even any further application of other side for cancellation of order of such maintenance *pendente lite* once granted upon hearing both sides disposing of the application under Section 24 of the Hindu Marriage Act would not be considered? or Section 36 of the Special Marriage Act! It is also obvious that on failure to obtain order of maintenance *pendente lite* to the satisfaction of the party, the aggrieved party may take recourse to move higher forum upto the Apex Court if it would be possible, and in that process the main suit, where the amount of maintenance *pendente lite* once granted upon hearing, by disposing of the application finally would be at halt. Has it been desired by the legislature in enacting the provision under Section 24 or Section 36 within the respective Acts under reference? To my firm view, it is not and never.

(16) The very following provision after Section 24 of the Hindu Marriage Act, 1955 or Section 36 of the Special Marriage Act, 1954 under the heading of “*permanent alimony and maintenance*” the legislature has enacted the provision vesting jurisdiction upon the Trial Court in seisin of the matrimonial suit to pass permanent alimony and maintenance for the divorcee spouse, of course, upon application. In the Special Marriage Act the same provision for permanent alimony is available within Section 37, whereas, under Hindu Marriage Act, it is available under Section 25 wherein

sub-sections (2) and (3) have been added by provisioning the eventualities to make alteration, modification or even to rescind any such order of permanent alimony granted under sub-section (1). But within the ambit of either Section 24 of the Hindu Marriage Act or Section 36 of the Special Marriage Act, the legislature did not vest any such jurisdiction upon the Court for any alteration in the amount of maintenance *pendente lite* which was directed to pay till disposal of the Matrimonial suit. This Court may recollect the land mark decision of *Nazir Ahmed Vs. King Emperor* where it was formulated, “..... that where a power is given to do a certain thing in a certain way, the thing must be done in that way, or, not at all .” Thus can we not interpret now what was the intention of the legislature to append Sub-Section (2) or Sub-Section (3) for alteration in the amount of permanent alimony and maintenance in both the marital Acts under reference in the given eventualities, and as to why Sections 24 or 36 of the respective Acts have been left alone without being added with any such likewise sub-sections of Section 25 or Section 37 (supra), or, any proviso to alter or modify the order once passed finally disposing of the application for maintenance *pendente lite*.

(17) Rather, the proviso either of Section 24 of the Hindu Marriage Act or of Section 36 of the Special Marriage Act has given the mandate upon the court to be reasonable as far as would be possible to dispose of such application for maintenance *pendente lite*

within sixty days from the date of service of notice upon either of the spouses. May be for several infrastructural inconveniences the application for maintenance *pendente lite* sometimes are not disposed of within such stipulated period. But as per the proviso, attempt would be always desirable for its disposal within a period of sixty days after service of notice, and if not, then obviously within a reasonable period. This proviso appended to Section 24(supra) or Section 36 (supra), has been created obviously to cut short the period of litigation, by which thereby it can never be said that order making alteration in the amount of maintenance *pendente lite* entertaining any further application for enhancement has got any legal sanction. Thus, which act is not sanctioned by the provision of law in the field, if done at any level, it becomes without jurisdiction, and in effect, any such further prayer for enhancement is not maintainable, far to speak of being “*permissible*”. Is there any indication anywhere in the Act, that once such an application of maintenance *pendente lite* is disposed of finally there is any further provision either like Section 25(2) or (3) of Hindu Marriage Act, or, Section 37 Sub-Section (2) or (3), or, Section 127 of the Code of Criminal Procedure or any other Act deciding the matrimonial affair? My answer is, no, since it is nowhere so far as maintenance *pendente lite*. At the cost of repetition I want to mean and make clear that this is the intention of legislature not to make any provision for modification in the amount of maintenance *pendente lite* once the same is

allowed by disposing of the application finally for its payment till disposal of the suit, so that there may not be any encouraging step to be taken by either of the spouses to go on filing application(s) in the name of enhancement in the order of maintenance *pendente lite* instead of allowing the matrimonial suit to arrive at the finality within a shortest possible period.

(18) Therefore, it is held that where also the embargo is inbuilt that any specific statutory provision cannot be circumvented by Clause 21 of the General Clauses Act, the said clause has no role to play to interpret the provision of Section 24 to any other direction since the specific statutory provision like Section 24 or Section 36 (supra) is noticed to be self-contained. Therefore, Clause 21 of the General Clauses Act, is not applicable and it cannot come in the aid of the wife for which Mr. Bag has made a great endeavour taking assistance of the case of J. Anitha vs. J. Prakash (supra).

(19) In view of above, the observation of the Madras High Court in the case of J. Anitha Vs. J. Prakash (supra) as quoted above in paragraph 9 of this order is noticed to have no sanction of law. As a result of which said decision bearing observation that since the Court was having jurisdiction to grant maintenance under Section 24 of the Hindu Marriage Act, so "*it was permissible to enhance maintenance amount during the currency of the proceedings*", is held per in curium, and thereby the enhancement as is proposed in the case on hand is not permissible. During

consideration of the application either under Section 24(supra) or under Section 36 (supra) the Court may either allow or reject the prayer, but those provisions do not vest power of enhancement of the amount, once decided finally during pendency of the suit.

(20) Now coming back to the impugned order under consideration in the case, I find that learned Trial Court has taken care of to adjust the amount of maintenance @ Rs. 5,000/- per month granted in favour of the wife under Section 125 of the Code of Criminal Procedure as well as the amount of maintenance *pendente lite* to the tune of Rs. 9,000/- along with further amount of Rs. 1,000/- payable as arrear. It is redundant to mention that in the similar nature of prayer a party should not be jeopardised. Therefore, while learned Trial Court though on the basis of prayer of the wife seeking enhancement in the amount of maintenance *pendente lite* recorded the order impugned accumulating a total sum of Rs. 15,000/- (i.e. taking Rs. 5,000/- as maintenance under Section 125 Cr.P.C + Rs. 9,000/- as already granted earlier as maintenance *pendente lite* + Rs. 1,000/- as arrear) w.e.f. the order of the Trial Court, then this Court does not find any legal reason to make any interference with the same, since in the ultimate decision making process attending the prayer of Section 24 of the Act, I find there no illegality or perversity. In effect by the impugned order there was no enhancement in the amount of maintenance *pendente lite*. Rather, the respective amount in the name of

maintenance which were here and there, the same was accumulated consolidatedly directing the husband to make its payment.

(21) Be it noted that the case of *Chitra Sengupta vs. Dhruba Jyoti Sengupta* (supra) is not applicable, since the point was dealt with therein as to whether an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure would apply to seek order of injunction in appeal preventing the respondent from contacting second marriage. The other point as was dealt on the grant of maintenance *pendente lite* to the extent of 1/5th of husband's net salary, which is no more required to test the impugned matter, since virtually the basic amount under Section 24 of the Act to the tune of Rs. 9,000/- did not exceed 1/5th amount of the husband's monthly salary.

(22) Thus by answering the point of maintainability about tendering even any second application to enhance or modify the amount already granted as maintenance *pendente lite* and litigation cost in the negative, and thereby, very strictly discouraging either of the spouses to stretch such type of interlocutory application keeping matrimonial suit at halt, the revisional application being C.O. 2486 of 2016 and C.O. 2913 of 2016 liable to be are disposed of with direction to the learned Trial Court to proceed with the matrimonial suit for its disposal as expeditiously as possible, provided the suit in the meantime has become otherwise ready for hearing.

(23) For convenience of all purposes and also to make such payment of maintenance including the amount granted under Section 125 of the Code of Criminal Procedure learned Advocate for the wife is directed to supply bank account number of the wife within ten days from this day to learned Advocate for the husband where the husband shall go on making deposit of the amount of such maintenance consolidatedly @ Rs. 15,000/- month by month within seven days of each succeeding month till disposal of the suit or until further order whichever shall be earlier, failing which the fate of the pending matrimonial suit may be at halt at the option of the wife.

(24) Be it further mentioned that learned Trial Court during final disposal of the matrimonial suit for divorce if it is decreed against the wife, learned Trial Court is desirable to exercise his jurisdiction vested under Section 25 of the Act, of course, upon application, or, in otherwise situation if the disposal of the suit yields result against the husband, learned Trial Court should take care so that the amount of maintenance provided under Section 125 of the Code of Criminal Procedure may remain as usual again w.e.f date of such dismissal of the matrimonial suit and in that situation the wife may opt for recourse under Section 127 of the Code of Criminal Procedure before the appropriate forum, if so advised, since making payment of maintenance *pendente lite* consolidatedly @ Rs. 15,000/- is supposed to be over with the final

disposal of the suit. Accordingly the revisional application C.O. 2486 of 2016 and C.O. 2913 of 2016 are disposed of. Stay order if any passed by this Court staying all further proceedings of the matrimonial suit no 107 of 2014 stands vacated.

(25) Urgent certified copy be supplied on priority basis if applied for.

(Mir Dara Sheko, J.)