

Gujarat High Court

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Ashokkumar Kantilal Rathod vs Bhavnaben Ashokkumar Rathod on 16 December, 1999

Equivalent citations: I (2001) DMC 87, (2000) 4 GLR 677

Author: S Keshote

Bench: S Keshote

JUDGMENT

S.K. Keshote, J.

1. Challenge has been made by petitioner-husband to the order of the Civil Judge (S.D.), Gandhinagar, dated 18th June 1999 in Hindu Marriage Petition No.30 of 1998 under which, by way of pendete-lite, alimony of Rs.1,000/= and Rs.2000/= as costs of expenses of litigation were granted to the respondent-wife. Translation of this order reads as under: It is hereby ordered that the opponent shall pay to the applicant Rs.1,000/= (Rupees One Thousand Only) every month till the final disposal of the case.

It is further ordered that the applicant be paid Rs.2,000/= by way of expenses of advocate.

2. The learned counsel for the petitioner submits that this order has been passed by the learned trial court without hearing the learned counsel for the petitioner. It has next been contended that the amount of Rs.1,000/= awarded towards maintenance to the wife is towards higher side. Lastly it is contended that the petitioner is ready even today to keep the wife with him but she is not ready and willing to stay with the petitioner. Therefore, she is not entitled to claim any maintenance from the petitioner.

3. On the other hand, the learned counsel for the respondent supported this order.

4. Having given my thoughtful consideration to the submissions made by learned counsel for the parties, the first grievance of the petitioner that the order has been passed without hearing is wholly devoid of any substance. The blame lies with his counsel. Notice of this application was given to the petitioner but if the counsel does not remain present when the case is called I fail to see how far the petitioner is justified to make such a complaint before this court. It is the counsel who is responsible and not the court. It is not the case where the court has not given opportunity of hearing to the petitioner but it is a case where this opportunity was not availed of by petitioner. This order otherwise also is difficult to appreciate. The wife in a litigation under Hindu Marriage Act cannot be taken to be a chattel. Equally it is also not a matter of grant of some charity to the wife by the courts by way of interim maintenance. Section 24 of the Hindu Marriage Act confers statutory right upon the spouse to apply for interim maintenance and this claim of the petitioner has to be decided on its own merits rather than as if what the court is granting some charity to him or her, that is what precisely it has been done by the learned trial court in this case. If the respondent has not put appearance, still the court has to decide what amount is to be awarded to the wife keeping in view the income of the husband towards interim maintenance. The learned trial court has not given any reason whatsoever why it has felt satisfied and contended to award only Rs.1,000/= as interim maintenance to the wife where the income of the husband was stated to be Rs.22,000/= p.m. Normal rule is of grant of 1/3rd of the net income of the husband as interim maintenance to the wife. This aspect has not been looked into and considered. The learned trial court has not taken care of and kept in mind what are the points to be considered to arrive at a reasonable amount of interim maintenance to be granted to the wife under Section 24 of the Hindu Marriage Act. It is to be stated for guidance of the court subordinate that first the court has to consider whether the wife has any sufficient means to maintain herself and then it has to consider what is the amount to be taken as net income of the husband in accordance with law for fixation of the amount of interim maintenance of the wife and lastly the court has to reach to a sum which has to be awarded as interim maintenance per month to the wife.

5. So far as it relates to the claim of wife for litigation expenses, I am constrained to observe that the learned courts subordinate are not correct in their approach. Aims and objects of the Act, 1987 are as follows: "An Act

to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organise Lok Adalats to secure that the operation of the legal system promotes justice on the a basis of equal opportunity." Section 12 of the Act, 1987 reads as under:

12. Every person who has to file or defend case shall be entitled to legal services under this Act if that person is:

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking inhuman beings or begar as referred to in article 23 of the Constitution;

(c) a woman or a child;

(d) a mentally ill otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987; or (h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court. They know very well that under Section 12 of the Legal Services Authorities Act, 1987 women are entitled to free legal aid. Where a woman approaches to the court, first and foremost stand of the court should have been to inform her that she is entitled for free legal aid and the court has further, where she prays for the same, expeditiously deal with the application and provide free legal aid to her where it has authority or to send the application to appropriate authority. Though free legal aid is there for women but what I am seeing everyday in the court that all the matters of this class of the litigants are coming up through the advocates and different sorry stories are being told by these lady litigants when they are called for conciliation in the chamber. It is a fact that in almost all the cases, advocates are charging their fees. A woman who gets hardly Rs.1,000/= per month as interim maintenance she has to pay heavy amount towards litigation expenses though she is eligible for free legal aid. But she is not aware of it or she was not made known of it. In the High Court, she reaches at a very later stage. At grass-root level, i.e. at the trial court level, the duty is of both, the advocates and the courts, to bring to her notice that she is entitled to free legal aid. Though it is not necessary, but to be stated here for the information of the courts below that in a case, during the course of conciliation, I particularly asked one woman as to why she has not gone to the Legal Aid Services Committee for taking free legal aid, she has shown her total ignorance of the programme. Then she stated that the advocate which she engaged is very reasonable and good advocate. He is not charging anything from her. As it was difficult to accept further question was put to her specifically, whether he will not charge anything? Then she said, "no, he will charge something". To my question, what he will charge, she said that it is not certain, but on further questioning she admitted that she paid in instalments to the advocate by now Rs.6,000/=. This is the only stage where Section 24 application was under consideration. By the time the matter would come to an end in the trial court, we can just imagine what amount this lady has to pay to the advocate who gets a very nominal amount of interim maintenance from her husband. Whatever amount of expenses are awarded to the litigants is hardly of any substance and within that amount the lady will not be able to meet out those expenses of litigation, what to say of the amount of fees to be paid to the advocates. In our system, of which I am also a part, there is something lacking which

is clearly borne out from the fact that in all such matters irrespective of the fact as to what is the income of the lady, she is entitled for free legal aid, they are coming in the courts through advocates. Lapse lies to send this message to this mass of litigants by our system. Whatever may be the reason and cause it is a fact that this class of litigants are not knowing about their this valuable right. At the grass root level, these litigants first come in contact with the advocate. The advocate instead of providing services, may be free of costs, to inform her that she is entitled for free legal aid. To many of the advocates, I talked in the chamber or even in the court also as and when I had the occasion in the literacy camps or Lok Adalats or judicial academy workshop, and almost all the advocates are in agreement that they are not informing to the women of their this right of free legal aid. Similar is the case with the judicial officers at the grass-root level. One of the reason may be that they are heavily burdened with the matters but it is part of our duty also to make this class of litigants known of their right of free legal aid. But this is also not done. There may be other reason that they may not like to displease the advocates. It is not our concern. Though the advocate is a professional, but looking to our system in the country, it is in fact their main source of livelihood also and if we talk of and give advise to the litigants to take free legal aid, certainly it may affect to certain extent their income also. So to certain extent, personally for advocates, it is understandable that they may not inform about this right to women litigants. But it cannot be a reason with judicial officers. They are there to see that this programme is implemented and this class of the litigants get free legal aid. In fact, to implement this programme, we are holding literacy camps etc. They should not have any fear or be afraid of that the advocates will take otherwise if they so advise to the litigants of this class. It is not only the duty of the court to enforce the law or protect the rights of the citizens but also to make them known of their rights also where it is necessary.

6. Under Section 24 of the Hindu Marriage Act, 1956, though there is a provision where the court may direct the husband to bear the expenses of litigation of the wife, but that Act is of the year 1956 and at that time, this free legal aid to women was not there. After the Act of 1987, when this free legal service is available to women, otherwise also it is very harsh to direct husband to pay expenses of litigation. Normally this litigation is of middle or lower class of the society in the courts and in addition to monthly interim maintenance to be paid to wife this amount of expenses is additional burden on husband. Where the wife is entitled for free legal aid and when this programme is there what for the husband has to be burdened with these expenses of litigation. This is another reason for which it is for the courts and advocates to make known to this class of litigants of their right of free legal aid. Invariably in all cases of this nature the courts are directing the husband to pay the litigation expenses which include fees of advocate incurred by the wife.

7. So far as it relates to the demand of litigation expenses the court may in a given case award to the wife but it has to inform her that she is entitled for free legal aid and she may go to that forum. If she goes to that forum, this amount of litigation expenses awarded needs to be reviewed and cancelled.

8. To give effect to this programme, a national programme, and to see that beneficiaries of the same get benefit of it, on the Notice/ Summon which is issued to women litigants or children or litigants of SC/ST category etc., who are eligible for free legal aid, under Section 12 of the Act, 1987, irrespective of their income, it may be mentioned thereon in a visible form either by printing it on the Notice/ Summon or by affixing rubber stamp thereon in the regional language so that this category of litigants may know of his/her this right. This is to be put in the Notice or Summons on the top of it so that on receipt of it, the first attention is drawn of the litigants of this category to this their right. Secondly, the advocate who puts appearance in the Court in the litigation on behalf of this category of the litigant has to give a declaration along with his Vakalatnama that on his/ her approach to him, he/ she has made known to this class of litigant that he/ she may not engage him/ her as he/ she is entitled for free legal aid. Where this class of litigants, still after this information given by the advocate are not willing to go to the legal aid authority or committee, it is accordingly to be informed by the advocate to the court. It is better that he/ she may give this information before filing Vakalatnama and at this stage the court forthwith to talk to the litigant concerned and to make known him/ her of this beneficial scheme of the Government and accordingly where he/ she prays the legal aid may be provided. Even in case where the Vakalatnama has been filed this procedure has to be gone into and free legal aid where prayed for has to be accordingly provided and the Vakalatnama has to be taken to be

cancelled.

9. There may be some other mode or modality to make known of this programme to this class of litigants. Only small percentage of litigants of this class come up before this court and there only question arise of providing free legal aid to them and what it is suggested certainly in my opinion may provide an effective modality or method to make know and provide free legal aid to this class of persons.

10. It is really painful that though women are entitled for free legal aid, they have to bear heavy litigation expenses. Here I may make reference to a case where a simple matrimonial litigation which was started under Section 9 of the Hindu Marriage Act or may be some other provision of this Act, exactly it is not in my mind, culminated in eight or nine cases of different nature and the lady to whom I talked during the course of conciliation proceedings in the chamber, with tears in her eyes, narrated a very sad story. She told that for each new case the advocate charged from her a handsome amount and by now she has spent about fifty to sixty thousand towards litigation expenses in these matters. The court has put to her wherefrom she arranged this money and again a very sorry story has been told by her that this amount has been paid by her father from his retiral benefits which he got on his retirement. There are cases after cases and if I give reference to all of them, the judgment may run in hundreds of pages. What my anxiety is that this class of litigants should get benefit which is available to them and for which effective measures are to be taken so that the real beneficiaries may get the benefits of it. If we collect statistics, I have my own reservation that out of hundred cases of this class, in about 99% cases, these litigants are coming through their advocates, i.e. paid advocates and not through legal aid. Here reference may have to the decision of this court in Civil Revision Application No.1607 of 1999 (Coram: Mr. Justice S.K. Keshote) decided on 18.11.1999. From this judgment it comes out that this class of litigants are totally ignorant of this their right. In paragraph No.4 of this judgment, court said:

4. Otherwise also, in case this order is allowed to stand, it will not occasion any failure of justice or cause irreparable injury to the petitioner. On being asked by the court, the learned counsel for the petitioner stated that the petitioner is not in a position to engage the advocate and that is the reason the petitioner has approached the court below to permit her to appear and plead through her husband. The ground given for this indulgence to be granted to her is wholly misconceived and of no substance. If we go by the provisions of Section 12 of the Legal Services Authorities Act, 1987, a woman or child has to file a case in court . Reference may further have to the decision of this court in Civil Revision Application No.1665 of 1997 (Coram: Mr. Justice S.K. Keshote) decided on 9.12.99. In paragraph No.11, the court observed: "11. Now I may advert to the claim of the petitioner for litigation expenses. This claim has to be dealt with in two parts. First is the claim which has been made of Rs.23,350/= and second the claim for further expenses. The rejoinder affidavit has given shocking facts and really after going through the contents of this affidavit, it touches the conscience of the court that how the lady who has no source of income whatsoever and entitled for free legal aid under the Legal Services Authorities Act, 1987 has been exploited by an advocate. The shocking facts are of the claims for coming to Mahesana by the advocate, the claim for professional fees of an advocate per appearance, professional fees for drafting of reply to the original application including clerical and typing expenses and affidavit in rejoinder to the advocate, Mrs. Nayna V. Malkan, professional fees of drafting application for maintenance, professional fees for drafting affidavit in rejoinder, expenses incurred for obtaining property documents, car expenses and other expenses of appearance. I cannot do better than to reproduce all these items in the judgment. Rs.250/- Visit by Shri Anmol Sharon (Lumpsum amount, inclusive of Autorickshaw, Bus Fare To & Fro AbdMSN Tea, Snacks his stipend Dt. 28-11-96.

Rs.250/- Visit By Shri Anmol Sharon inclusive of a (lumpsum amount inclusive of Autorickshaw, Bus fare, To & Fro Abd-MSN Tea, Snacks inclusive his stipend Dt. 31-12-96)

Rs.1500/- My visit with my Mother and Lawyer from Vanadara to Mahesana in a private Car. Dt. 17-1-97.

Rs.500/- Tea, Snacks, Lunch for 5 persons.

Rs.5500/- Professional Fees of Jitendra Malkan for his appearance on that date.

Rs.3500/- Professional fees for drafting reply to original application including clerical and typing expenses. Affidavit in rejoinder to Advocate Nayna V. Malkan.

Rs.1500/- Professional fees for drafting application for maintenance u/s. 24 of the Act with clerical and typing expenses to be paid to Mrs. Nayna V. Malkan.

Rs.1500/- Professional fees drafting affidavit in rejoinder of reply to application u/s.24 of the Act to Nayna V. Malkan.

Rs.1000/- Expenses incurred for obtaining property documents.

Rs.1500/- Car expenses for my visit with my mother and Lawyer from Vanadhara to Mahesana in a private car on Dt. 24-2-97.

Rs.500/- Tea, Snacks, Lunch for 5 persons.

Rs.5500/- Professional fees of Jitendra Malkan for his appearance on Dt. 24-2-97.

Rs.350/- Professional fees to Advocate Ms. Prerana Vakharia for her visit to Mahesana (including and snacks on 7-2-97).

How this class is exploited it is clear from the order.

11. Though for the reasons stated aforesaid, the order of the learned trial court is not perfectly in order but I do not consider it to be appropriate and in the interest of wife to quash and set aside the same. It may be taken only to be an order of grant of ad-interim maintenance to the wife. The learned trial court is directed to decide the application of wife-respondent filed under Section 24 of the Hindu Marriage Act after hearing both the sides, if they so desire, in accordance with law, within a period of one month from the date of receipt of writ of this order. The court is to inform to the wife-respondent that she is eligible for free legal aid and where she desires to take free legal aid it may be arranged accordingly for her. Where she refuses to take free legal aid, the court below to keep this fact in mind while considering the question of awarding of litigation expenses to her and may not award the same to her. The civil revision application is dismissed subject to aforesaid directions. Rule discharged. Interim relief earlier granted by this court stands vacated. No order as to costs.