

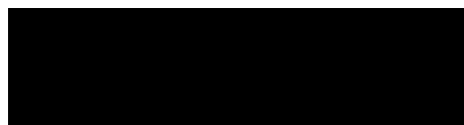


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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on:07.06.2023*

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..... Petitioner

Through: Mr. J. H. Jafari, Mr. Shabeena Khan
and Dr. Dinkar Tiwari, Advocate

versus



..... Respondent

Through: Mr. Jitender Mehta, Advocate.

**CORAM:
HON'BLE MR. JUSTICE GIRISH KATHPALIA**

ORDER

% **07.06.2023**

[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J. (ORAL):

CRL.M.A. 16346/2023 (Exemption)

1. Exemptions allowed subject to just exceptions.

CRL.M.C. 4349/2023 & CRL.M.A. 16345/2023 (Stay)

2. By way of this petition under Article 227 of the Constitution of India, the petitioner husband, facing proceedings under the Protection of Women from Domestic Violence Act, 2005, has assailed order dated 03.05.2023 of the learned Additional Sessions Judge, whereby in the course of appellate challenge to the magisterial order of interim maintenance to be paid to child of the parties, request for stay on the operation of the interim maintenance



order was rejected. On service of notice of this petition, the respondent wife entered appearance through counsel. In view of settled legal position and for expeditious disposal, learned counsel for both sides kindly consented to address arguments today itself. I heard learned counsel for both sides.

3. For the sake of convenience, the relevant portion of the impugned order is quoted as follows:

“Learned counsel for petitioner has prayed for stay on order of interim maintenance passed by the learned MM.

Stay is objected to by learned counsel for respondent. Learned for respondent has relied upon judgment passed by Hon’ble Delhi High Court in case titled as **Rajeev Preenja vs Sarika & Ors., 2008, Delhi High Court**. Relevant observations are:

“It is accordingly directed that when a revision is filed by husband in the court of learned ASJ against an order of interim maintenance passed by a learned MM in favour of the wife, the said revision petition will not be entertained by learned MM upto the date of filing of the revision petition is first deposited in the court of the learned ASJ. The respondent wife and child if any, should be permitted by the learned ASJ to withdraw whole or part of the said sum, upon such terms and conditions as may be determined by the learned ASJ” (*sic.*)

In view of the above law laid down by the Hon’ble Delhi High Court, this court is not inclined to grant any stay on the operation of the impugned order”.

4. The short question involved in this petition is as to whether during pendency of appeal under the Protection of Women from Domestic Violence Act, denial of stay on the operation of interim maintenance order solely on the basis of judgment of this Court in the case of **Rajeev Preenja vs Sarika**, reported as (2009) 159 DLT 616 is sustainable in the eyes of law.



5. On behalf of petitioner husband, it was argued by the learned counsel that judgment in the case of **Rajeev Preenja** (supra) no more holds the field as the same stands overruled. It was argued that the petitioner has legally sound case to be granted interim relief against the order of interim maintenance impugned by him before the Additional Sessions Judge, so rejection of stay application on the basis of overruled judgment is not sustainable. On the other hand, learned counsel for respondent wife supported the impugned order of the learned Additional Sessions Judge, though did not dispute that the law laid down in the case of **Rajeev Preenja** (supra) does not hold field anymore.

6. It would be apposite to recapitulate the legal position on the issue involved in this dispute.

7. The judgment in the case of **Rajeev Preenja** (supra) came out in the following circumstances. An order passed by the magisterial court in proceedings under Section 125 CrPC, thereby directing the husband to pay interim maintenance at a rate of Rs.2000/- per month to his wife and Rs.1500/- per month to his minor son till disposal of the maintenance petition was affirmed by the court of Additional Sessions Judge exercising revisional jurisdiction in the challenge brought by the husband. The said order of learned Additional Sessions Judge was further assailed by the husband before this Court under Article 227 of the Constitution of India. On the very first date of hearing, learned Single Judge of this Court directed the husband to continue to pay interim maintenance as awarded by the trial



court during pendency of the petition, but despite two adjournments thereafter under the pretext of financial incapacity, the husband did not comply with the direction to continue to pay the awarded interim maintenance. By way of detailed order the learned Single Judge dismissed the petition, observing that the interim maintenance applications are likely to take a year for being disposed of and the payment to the wife is likely to be made only thereafter, so it is just and fair that the revisional court should insist on the deposit in court of the interim maintenance as awarded in the order under challenge as a pre-condition to entertaining the revision petition, otherwise a recalcitrant husband can, despite suffering an adverse order, defeat that order merely by filing a revision petition and not being burdened with the responsibility of complying with it.

8. Significantly, the learned Single Judge in the case of ***Rajeev Preenja*** (supra) explicitly ordered that directions issued in paras 16-19 of the judgment should be followed strictly by the courts of magistrates as well as sessions; copy of the judgment was sent to the District Judge for issuance of appropriate directions and for being circulated to all courts hearing matrimonial matters for information and compliance. It would be apposite to quote the said paras 16-19 of the judgment which is as follows:

“16. It is accordingly directed that when a revision petition is filed by husband in the court of the learned ASJ against an order of interim maintenance passed by a learned MM in favour of the wife, the said revision petition will not be entertained by the learned ASJ till the entire amount of interim maintenance due under the order of the learned MM up to the date of filing of the revision petition is first deposited in the court of the learned ASJ. The respondent wife and child, if any, should be permitted by the learned ASJ to withdraw the whole or part of the said sum, upon such terms and conditions as may be determined by the learned ASJ.



17. This Court has, in the decision of Gaurav Sondhi v. Diya Sondhi 120 (2005) DLT 426 in the context of an application for interim maintenance under Section 24 of the Hindu Marriage Act, 1955 („HMA“) issued certain guidelines. This Court finds that the said guidelines could be implemented by learned MM dealing with application under Section 125 CrPC seeking enforcement of orders awarding interim maintenance or maintenance. The relevant guidelines read as under:

"4. The matrimonial courts should follow the following procedure while granting interim maintenance/ maintenance:

(i) Whenever maintenance/interim maintenance is ordered, the Court will direct that it will be paid on or before 10th day of every month unless the Court finds that the nature of the employment of the husband and his manner of income makes such monthly payments impractical. In such a situation appropriate orders may be passed which shall take into account the circumstances of the husband which warrant departure from the time bound monthly payment directions contained in this order;

(ii) Whenever the wife has a bank account and indicates it, such payment may directly be deposited in such bank account every month before the 10th day of the month;

(iii) The payment shall be made to the wife/child and in case of any difficulty in receiving or tendering the payment, it should be made through counsel. The order of deposit in Court needlessly makes it difficult for the wife to withdraw sums from the registry of the concerned court, apart from adding unnecessarily to the burden of the Court's registry. If for good reasons upon finding difficulty in payment to a wife and her counsel the deposits in Court are made such deposits should be in the name of the wife by a draft/crossed cheques, which may be retained on the court file for retrieval by the wife without the time consuming process of deposit in the Court account and subsequent withdrawal by the recipient;

(iv) In case there is first default for payment of maintenance, the Court may condone it. However, in case of second default without justification, it will be open to the Court to impose a penalty up to 25% of the amount of monthly maintenance awarded;

(v) In case there is third or fourth default, the penalty may go up to 50% of the monthly amount of maintenance upon the court finding that the default was not condonable or contumacious in nature;

(vi) The Court must ensure that the orders of maintenance are not a mere rhetoric and are meaningful and effective and give real sustenance and support to the destitute wife and/or the child;

(vii) In case interim maintenance is being paid and adequate



litigation expenses have been awarded to the wife, it should be ensured that the written statement/reply is filed within a reasonable time;

(viii) However, in judging the nature of default the relative affluence of the husband and the regular nature of his occupation and income will be taken into account. Obviously husbands having irregular employment and/or daily wages or those having casual employment would be entitled to have their defaults viewed more liberally."

The above directions are reiterated and it is expected that the learned MMs dealing with applications under Section 125 CrPC will ensue their compliance.

18. In the context of the desired time limit for disposal of application for interim maintenance, *Radhika Narang & Ors. v. Karun Raj Narang & Anr* (decision dated 16th January 2009 in FAO (OS) No. 139 of 2006) the Division Bench of this Court has observed as under:

"14. in matrimonial disputes, the interim maintenance and custody issues deserve the most expeditious disposal. We are further of the view that maintenance and custody cases must take precedence over matters of property or money claims. The learned Single Judge in the above judgment had rightly recorded the expectation that period for award of interim maintenance to be one month from the date of filing the application. However, in view of the pressure of work on matrimonial courts due to proliferation of matrimonial disputes and considerable shortage of judicial manpower, a more realistic time frame has to be prescribed.

In our view the interim maintenance applications in matrimonial disputes ought to be disposed of with dispatch and certainly should not take in any event more than 1 year at the highest. The very purpose of interim maintenance is defeated if it takes about 3 years, as in the present case as an interim application for maintenance filed on 23rd May, 2003 came to be disposed of only on 16th February, 2006. We therefore direct that all the Courts in Delhi, therefore, must keep the need for urgent disposal of such applications in mind, and ensure the disposal of the interim maintenance applications within one year from the date of filing of such applications in matrimonial matters."

19. Keeping in view the fact that interim maintenance applications are likely to take a year for being disposed of and that the payment to the wife is likely to be made only thereafter, it is only just and fair that the revisional court should insist on the deposit in Court of the interim maintenance payable in terms of the order under challenge as a pre- condition to entertaining the



revision petition. Otherwise a recalcitrant husband can, despite suffering an adverse order, defeat that order merely by filing a revision petition and not being burdened with the responsibility of complying with it”.

9. Subsequently, the issue of stay on operation of the interim maintenance order under the provisions of Protection of Women from Domestic Violence Act, 2005 in similar situation came up before another Single Judge of this Court in the case of ***Brijesh Kumar Gupta vs Shikha Gupta***, reported as 2015 SCC OnLine Del 7086. In the said case, the court of Additional Sessions Judge had decided to entertain the husband’s appeal under Section 29 of the Act subject to deposit of arrears of maintenance as awarded by the magisterial court, while permitting deduction of an amount from the amount due. Learned counsel for the respondent wife submitted that the provisions under Section 125 of the Code are *akin* to the provisions of maintenance under the Domestic Violence Act, so the dictum of ***Rajeev Preenja*** (supra) would squarely apply in the present case and as such there was no illegality in the appellate order, placing a pre-condition of deposit of entire arrears of awarded maintenance. The learned Single Judge rejected the contention, holding that there cannot be an absolute rider that the entire maintenance amount as granted by the trial court should be deposited prior to hearing the statutory appeal because it would otherwise leave the remedy of statutory appeal illusory.

10. The above mentioned conflicting views of co-ordinate benches of this Court came up to be tested before another Single Judge of this Court in a petition under Article 227 of the Constitution of India, filed by the wife. In



the said case, the wife, relying upon *Rajeev Preenja* (supra) challenged the appellate order which had preferred to rely upon *Brijesh Kumar Gupta* (supra), the latter being the subsequent decision. The learned Single Judge, taking note of the conflicting views of two co-ordinate benches made a Reference of the legal issue involved and the matter was placed before a Division Bench of this Court, which answered the Reference in judgment titled *Sabina Sahdev vs Vidur Sahdev*, reported as 2018 SCC OnLine Del 9747, thus :

“24. A perusal of *Rajeev Preenja* (supra) shows that the learned Single Judge, after dismissing the husband's petition on account of non-compliance of the interim maintenance, proceeded to issue general directions, including the one under consideration, suo moto with a view to remedy the plight suffered by the wife on account of the reluctance shown by the husband in complying with orders granting interim maintenance. The direction in question was not issued after due deliberation of the issues: whether such a general direction could, at all, be issued by the Court, and; whether such a general direction would work justly and fairly in all circumstances. The learned Single Judge was not seized of these issues as they did not arise for consideration in *Rajeev Preenja* (supra). The suo moto directions issued by the Court in *Rajeev Preenja* (supra), therefore, in any event, cannot be treated as a binding precedent, as the said direction does not constitute the ratio decidendi of the case.

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27. We agree with the submission of Mr. Bahl that the concerns expressed by the learned Single Judge in paragraphs 15 and 20 of the judgment in *Rajeev Preenja* (supra), can be addressed by the Court dealing with the revision under Section 399 Cr.P.C., or with the appeal under Section 29 of the DV Act on a case to case basis, depending upon the facts and circumstances of each case. We may also make it clear, that there is no basis to conclude that mere filing of a revision against an order granting interim maintenance tantamount to a stay of the order under revision. The order passed by the learned MM granting interim maintenance would be enforceable, despite pendency of the Revision/Appeal, unless the operation of the same is stayed by the Revisional or Appellate Court, as the case may be. While considering any such application for stay of operation of the order granting interim maintenance, the appellate Court would, apart from examining the merits of the case, prima facie, also take into consideration



the decisions binding on it, including the decision in Shalu Ojha (supra), however the maintainability of the statutory remedy of revision/appeal, and the right to pursue the same, cannot be curtailed by imposing a condition of pre-deposit of the arrears of interim maintenance. By the Revisional/Appellate cannot be converted into an executing Court in respect of the order granting interim maintenance.

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30. Thus, we answer the reference by holding that the general direction issued in *Rajeev Preenja* (supra) in paragraphs 15, 16 and 20 are not sustainable. The said directions could not have been issued by the learned Single Judge as they seek to curtail the statutory remedy of revision available under Section 399 read with Section 401 of the Cr.P.C, and of appeal under Section 29 of the DV Act, against orders granting interim maintenance under Section 125 Cr.P.C. and Section 23 of the DV Act respectively. The direction in question over steps into the legislative field, which was impermissible for the Court to do. We agree with the view taken by the learned Single Judge in *Brijesh Kumar Gupta* (supra), that there cannot be an absolute rider that the entire maintenance amount, as granted by the Trial Court, should be deposited prior to the entertainment of the statutory remedy, because it would leave the remedy of statutory revision/ appeal illusory. Accordingly, we hold that a revision under Section 399 read with Section 401 Cr.P.C. and an appeal under Section 29 of the DV Act, against the order granting maintenance under Section 125 Cr.P.C. and under Section 23 of the DV Act respectively, would be maintainable, and would be entertained and heard without any pre-condition of deposit of the arrears of maintenance as ordered by the Ld. MM. We further hold that the pendency of such a Revision or Appeal- as the case may be, shall not operate as a stay of the operation of the order granting interim maintenance. The reference is answered accordingly”.

11. Thence, the legal position which emerges is that the general directions issued in the case of *Rajeev Preenja* (supra) to the magisterial and sessions courts are not sustainable in law. Since the learned Additional Sessions Judge in the impugned order refused to stay the operation of the interim maintenance order, solely relying upon the directions issued in *Rajeev Preenja* (supra), which directions were subsequently held not sustainable in



the eyes of law, the order of the learned Additional Sessions Judge, impugned in these proceedings, is liable to be set aside.

12. Going a step deeper, there is another aspect. While exercising the revisional scrutiny of an interim maintenance order passed in proceedings under Section 125 CrPC, the revisional court for yet another reason cannot impose as a pre-condition to grant of stay on operation of the assailed interim maintenance order, such general rider of deposit of the entire amount of awarded maintenance ignoring the overall circumstances of the case. The provision under Section 397 CrPC confers *suo motu* powers on the Court of Sessions and the High Court. Wherever the statute confers *suo motu* powers on any judicial authority, such powers are always implicitly accompanied with attendant duty to invoke the powers in order to meet the ends of justice. Once an illegality, incorrectness or impropriety in a judicial order is brought to the notice of the revisional court under Section 397 CrPC, the Court cannot justifiably refuse to entertain the challenge on the grounds of non-compliance with the order impugned before it. From that angle also, in my view, there cannot be generalized direction not to stay the operation of the interim maintenance order solely on the ground that the revisionist did not deposit the entire amount of awarded maintenance. Of course, if otherwise the factual and legal matrix justifies, grant of stay can be denied as well.

13. It is clarified that in the present case this court has refrained itself from analysing as to whether operation of the interim maintenance order facing appellate challenge is otherwise liable to be stayed or not. This issue



has to be considered by the learned Additional Sessions Judge on the facts and circumstances of the case in the backdrop of settled legal position.

14. In view of above discussion, the petition is allowed and accordingly the impugned order is set aside, consequently remanding the matter back to the learned Additional Sessions Judge to decide afresh as to whether the interim maintenance order passed by the magisterial court is liable to be stayed during pendency of the appeal.

15. Copy of this order be sent to the concerned court forthwith.

**GIRISH KATHPALIA
(VACATION JUDGE)**

JUNE 7, 2023/as