

(2016) 03 GUJ CK 0028

In the Gujarat High Court

Case No : Special Civil Application No. 10420 of 2015

Minal Anurag Gupta

APPELLANT

Vs

Anurag Rameshbhai Gupta

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Citation : (2016) AIR(Gujarat) 124 : (2017) 1 CivCC 141 : (2016) 4 Civil LJ 777 : (2016) 2 DMC 834 : (2016) 2 GCD 1186 : (2016) 3 HLR 67

Hon'ble Judges : R.D. Kothari, J.

Bench : Single Bench

Advocate : Mr. C. B. Gupta, Advocate, for the Appellant; Mr. Sanjay R. Gupta, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Kothari, J. (Oral) - The petitioner challenges the order passed below Exh.22 in HMP No.45 of 2014. Exh.22 is filed by the defendant - wife seeking ""production and discovery" of documents from the plaintiff.

2. The plaintiff - husband has instituted a Family Suit No.4 of 2015 before the Family Court, Ahmedabad praying for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. In HMP, wife has filed interim maintenance application and pending the hearing of the said application, Exh.22 is filed by the wife. The parties have married in 2002. They are blessed with one son - Daksh. At one time, they both were serving at Singapore. The dispute started between them and wife came back to India and started living at parental home. She came back along with their son. The husband has filed reply to Exh.22.

3. In the present case, the petitioner had asked for (a) IT return of India and Singapore of the respondent and (b) bank's statement of the plaintiff of his personal as well as of joint account for last 5 years of bank at India and at Singapore. In reply, the respondent has contended that this application is not maintainable and otherwise, the plaintiff has disclosed his monthly income on the

basis of pay slip issued by the company. Further, it was contended that monthly income and expenditure is also stated by the plaintiff which is supported by affidavit. Therefore, for fair disposal of restitution Application, this application for production and discovery of document is not necessary.

4. Below Exh.22, initial order passed by the trial court was - fixed for hearing and thereafter, after hearing the learned advocates for the parties - the trial court has rejected the application. In the impugned order, the trial court has given mainly two reasons (i) the income of the petitioner is not in question in the petition and that being so, application for discovery and production cannot be allowed. Holding so, it concluded that such application is not maintainable and (ii) In Para.8, it is also mentioned that otherwise, there is material on record for deciding the interim maintenance application. These materials on record are; bank's statement for the period from 1.11.2013 to 27.1.2014, Mark 16/2 to 16/4 showing ownership of the properties of the parties; details of monthly earning and expenses of petitioner and the salary slip.

5. Heard learned advocates for the parties.

6. Learned advocate for the petitioner, during the course of hearing, has prayed for time to enable the petitioner to draw attention of the Court to relevant case law. Since the matter was heard, the Court has granted time and has briefly recorded the submissions made by learned advocates for the parties. The order dated 15.2.2015 reads, thus :

"1. Heard learned advocates for the parties.

2. Learned advocate for the petitioner prays for time to draw the attention of the Court to relevant judgment. Prior to this request, learned advocate for the petitioner has referred to the relevant documents on record and has submitted that the trial Court has wrongly rejected petitioner's applications for discovery and production and was drawn the attention of the Court to the relevant part of the order of the trial Court.

3. Learned advocate for the petitioner has submitted that trial Court seriously erred in rejecting the application on the ground that application is not maintainable.

4. Learned advocate for the respondent Mr. Sanjay R.Gupta has drawn the attention to reply filed by the present respondent to Number applicant's applications under Section 24 of the Hindu Marriage Act. On facts, learned advocate Mr. Gupta has drawn attention to couple of material facts i.e. payment of about 74 lacs to the wife, offer of payment of Rs. 30,000/- per month maintenance to the wife and lastly order dated 31.07.2015 in Special Civil Application No.9830 of 2015 pursuant to which the respondent is paying Rs. 3 lacs per year for education of minor child. In this regard, learned advocate for the petitioner submits that order passed by this Court is to pay Rs. 2,50,000/-. Learned advocate submits that though order is for Rs. 2,50,000/-, respondent is

claims to pay Rs. 3 lacs for education of minor child.

5. As to the payment of Rs. 74,00,000/- learned advocate for the petitioner submits that petitioner was serving at the relevant time and these amounts belong to the petitioner and as per the say of the petitioner amount to which petitioner is entitled is much more than the amount of Rs. 74 lacs.

6. Learned advocate for the respondent has also raised the plea that petition under Article 227 is not maintainable inasmuch as the order is an interlocutory order and secondly no jurisdictional error is committed by the trial Court. In support of this submission, it was submitted that in absence such error the Court should not interfere in exercise of power under Article 227 of the Constitution of India.

7. Mr. Sanjay R.Gupta, learned advocate for the respondent mentions that he has concluded arguments on merits and order in accordance with law may be passed.

8. To enable the learned advocate for the petitioner to produce the relevant documents in the case, adjourned to 19.02.2016."

7. Learned advocate for the petitioner has submitted on last date of hearing that order of the trial court is apparently erroneous inasmuch as it has concluded that application is not maintainable. In view of this conclusion, alternate submission was to remand the matter to the trial court. As observed above in the order quoted above, learned advocate for the respondent has declared that he may be taken as heard. The matter was adjourned to 19.2.2016. On that day, two judgments were produced on behalf of the petitioner and no arguments were made.

8. At the time of dictation of this order, it came to the notice that present petition is at the stage of hearing of notice. In view of above, Rule.

9. On 19.2.2016, learned advocate for the petitioner has drawn attention to a decision of this Court in case of Kamalia Brothers and Co., Rajkot v. State of Gujarat, reported in 1992 (1) GLR 310 as also of Supreme Court in case of M.L. Sethi v. R.P. Kapur, reported in AIR 1972 SC 2379. In Kamalia's case (supra), this Court while allowing the Revision and setting aside the order of rejection of discovery, has held that the trial court has committed an error in rejecting the application on the ground that the documents which are asked for is not between the plaintiff and the defendant but, they are the documents between the officials of the defendant. It was held that only condition to be satisfied is, whether the documents are in possession and power of the defendant or not.

9.1 In M.L. Shethi's case, AIR 1972 SC 2379, the trial court had allowed discovery application, however, said order came to be challenged and the High Court reversed the order of the trial court. In further appeal, the Supreme Court restored the order of the trial court. In M.L. Shethi's case (supra), it was held in Para.5 as under :

"5. We think that the High Court was wrong in holding that since the application for discovery did not specify the documents sought to be discovered, the lower Court acted illegally in the exercise of its jurisdiction in ordering discovery. Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party ? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents? Order 11, Rule 12 provides :

"12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs".

When the Court makes an order for discovery under the rule, the opposite party is bound to make an affidavit of documents and if he fails to do so, he will be subject to the penalties specified in rule 21 of Order 1 1. An affidavit of documents shall set forth all the documents which are, or have been in his possession or power relating to the matter in question in the proceedings. And as to the documents which are not, but have been in his possession or power, he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them (see form No. 5 in Appendix C of the Civil Procedure Code). After he has disclosed the documents by the affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant."

9.2 Further, it was held in Para.6 as under :

"6. The High Court was equally wrong in thinking lb-at in passing the order for discovery, the trial Court acted illegally in the exercise of its jurisdiction as it deprived the respondent of his right to claim privilege for non production of his pass book and personal accounts, because the stage for claiming privilege had not yet been reached. That would be reached only when the affidavit of discovery is made. Order 11, Rule 13 provides that every affidavit of documents should

specify which of the documents therein set forth the party objects to produce for inspection of the opposite party together with the grounds of objection.

Nor do we think that the High Court was right in holding that the documents ordered to be discovered were not relevant to the inquiry. The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to 703 a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trail of enquiry which may have either of these two consequences. The word "document" in this context includes anything that is written or printed, no matter what the material may be upon which the writing or printing is inserted or imprinted. We think that the documents of which the discovery was sought, would throw light on the means of the respondent to pay court fee and hence relevant."

10. The trial court has seriously erred in holding that application is not maintainable because the income of the petitioner is not in issue in the main petition. It is true that in the main petition, husband's income is not in issue but, the Court was considering Exh.22 and not the main petition. For consideration of Exh.22, husband's income is very much relevant. But the question is whether such application can be moved for consideration of an application - distinct from relief claimed in the suit. To this, I may deal with in a moment. The other reasoning given by the trial court, namely, from the material on record, a presumption is possible to draw and thereby, decide the interim maintenance is good and this reasoning cannot be faulted with. But, while saying so, fairly broad scope of discovery and production stated in statutory provision is also to be borne in mind. If one assumes for the moment that such application can be moved also for consideration of any application then, the wide sweep of other essential of provision i.e. (a) any matter in question and (b) any document - hardly leaves much scope for other side or for the Court to disallow the application. Even the details sought for in the discovery application may be inadmissible in evidence [M.L. Shethi's case (supra)]. In other words, the document referred to in discovery and/or production application may not be admissible in evidence but, that by itself cannot be a ground to reject the application. In short, in respect of second reasoning the court has partly erred as sufficiency or insufficiency of material on record in respect of which the discovery is sought by the party, is not the test for consideration of discovery and production application.

10.1 Whether the application for discovery and production can be moved for consideration of any application in the suit? The statutory provision for both refers to the suit and does not say that party can ask for the discovery and/or

production for any document which relates to any matter in question in suit or in an application. In other words, moving an application for discovery and production in respect of relief claimed in the suit, is a different thing, but whether such application can be considered for consideration of application, say for instance, application for interim maintenance? The statutory provision leaves room for argument that either of this provision cannot be invoked for consideration of any application. This question does not appear to have been directly considered so far. In this regard also considerable light can be derived from M.L. Shethi's case (supra). In that case, application for discovery was moved to ascertain the income of the plaintiff. The plaintiff has instituted a suit for compensation for malicious prosecution. Therein, the plaintiff had applied for grant of permission to sue in forma pauperis. Resisting a pauper application of plaintiff, the defendant has applied for discovery, so that income of the plaintiff may be brought on record. It may be borne in mind that at the time of consideration of pauper application, the suit is still-born and technically, it is not yet come into existence. Seeking permission to sue in pauper is an application or a proceeding but, certainly neither of it can be said to be in pending suit nor either of two can be called "suit". If an application for discovery can be successfully made in an application in still-born suit then, it can certainly be made in an application made in pending suit.

11. The documents asked for by the petitioner herein are referable to the income of the husband and income is relevant in deciding Exh.22 and therefore, rejection of the application is bad. In this regard, it hardly needs to be clarified that what weightage to be given to those documents (Exh.22) and how to appreciate them, is wholly a different matter.

12. Learned advocate for the respondent, Shri Gupta has also raised a plea that petition under Article 227 is not maintainable. Brief submissions made in this regard are referred in above quoted order dated 15.2.2016. This submission is difficult to accept. In the proceeding governed by Family Court Act, scope of Appeal is fairly circumscribed under Section 19 of the said Act. Besides that, interference in the impugned order is called for as the trial court has committed serious error by reaching to a wrong conclusion. In other words, no error in recording reasoning in Para.8 of its order and the said reasoning is good, however, the conclusion of rejecting the application is erroneous. Thus, by erroneously refusing to exercise the jurisdiction vested in it, the trial court has committed serious jurisdictional error. It is interesting to note that in M.L. Shethi's case (supra), the question of jurisdiction is also dealt with at some length and the Court has, in the process, relied on Anisminic Ltd.'s case - 1969 (2) AC 147. I may also observe that this plea was raised only as an ancillary plea. Attention was not drawn to any relevant case law on the point. In the facts of the present case, it would not be proper to reject the petition only on the ground that it is not maintainable.

13. In view of above discussion, present petition is allowed. In application

(Exh.22) in the prayer and in heading - "production and discovery" appears to be very casually stated. Both are distinct and independent. The party may not apply for both at a time and independently he may ask for each one. But, in that case, generally speaking, discovery would precede the production. If the documents are not in power and possession of the party then, no question of production of the same. Generally speaking, the party would apply for discovery of the document and if this application is allowed then, upon giving discovery of the document by the other side, the party may ask for production of the document. To remand the matter, only to hear discovery and production application would unnecessarily entail delay. The documents asked for by the petitioner are relevant and it would be just to ask the other side to give discovery of documents on oath (i) discovery of five years" Income-Tax returns preceding 2014 (including 2014) for the India and/or Singapore and (ii) the bank's statements of his personal as well as joint account i.e. (plaintiff's account with the respondent) for above five years of the bank at India and Singapore. The respondent shall file an affidavit in accordance with the Order 11, Rule 13 of the CPC. After filing of an affidavit by the respondent in compliance to discovery application, the trial court shall decide the production application in accordance with law.

14. Before parting with, I would like to observe that arguments were concentrated on amount of maintenance. This would be clear from bare reading of the order passed by this Court on 15.2.2016 which is quoted herein above. Quantum of maintenance is not in issue in this petition, yet the main argument turn on it. It was pointed out that the respondent has offered to pay Rs. 30,000/- to the petitioner as monthly maintenance. The ambitious claim of the petitioner is based on the holding of the Supreme Court that, "...sustenance does not mean bare survival...", Learned advocate for the petitioner has drawn attention to Shamima Farooqui's case - (2015) 5 SCC 705 and also to Bhuwan Mohan Singh's case - AIR 2014 SC 2875. In the former case, husband's monthly pay was Rs. 17,654/- and in the order that came up for consideration before the Supreme Court, an order to pay maintenance @ Rs. 2000/- per month was passed. While in a later case, maintenance amount claimed by the wife was Rs. 6000/- per month. Against that, the Court has granted Rs. 2500/- to the wife and Rs. 500/- to the children. On the basis of this case law, argument was advanced that wife is entitled to live in luxury to which she is used to. The petitioner claims monthly maintenance of Rs. 6,69,500/-. What is meaning of "maintenance" ? Going by dictionary meaning, word "maintain" came from Latin language and it originates from manu tenere which in turn literally means "to hold in one's hand. How much it is possible to hold in one's hand or how much one can hold in one's hand? In Bhuwan Mohan's case (supra), the Supreme Court has held, "...the concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else.." It would appear that to advance a plea of Rs. 6,69,500/- for monthly maintenance for wife, who resides

at Ahmedabad on the basis of holding in this decision, is almost absurd. This general observation apart, the trial court shall decide independently the quantum on the basis of material before it and in accordance with law.

15. Rule is made absolute to the above extent.