In The High Court At Calcutta

Civil Appellate Jurisdiction

Appellate Side

CO 2168 of 2013

Manoj Kumar Kedia

-Vs.-

Manisha Kedia

Present : The Hon'ble Justice Arijit Banerjee

For the petitioner : Mr. Om Narayan Rai, Adv.

Mr. Prashant Agarwal, Adv.

For the respondent : Mr. Debanjan Mukherjee, Adv.

Mr. Surita Agarwal, Adv.

Heard On : 08/01/2015 & 13/02/2015

Judgment On : 24/02/2015

Arijit Banerjee, J.:

(1) The petitioner before this Court is the husband who filed Mat Suit No. 45 of 2007 for dissolution of his marriage with the opposite party/respondent in the 8th Court of Additional District Judge at Alipore. In the said suit the opposite party/wife filed an application under Section 24 of the Hindu Marriage Act praying for alimony for maintenance of herself and two daughters born from the marriage.

(2) By an order dated 30th April, 2009 the Ld. Trial Court allowed the said application and directed the petitioner to pay Rs. 8,000/- per month towards maintenance of the wife and the two daughters and Rs. 6,000/- per month for

the education of the daughters from the date of the filing of the petition i.e. 2nd August, 2005. Thus, in all, the petitioner was directed to pay Rs. 14,000/- per month to the opposite party/wife as current alimony and also to pay the arrear alimony at the rate of Rs. 5,000/- per month along with the current alimony. The petitioner was also directed to pay Rs. 10,000/- to the wife towards litigation cost.

(3) The petitioner/husband challenged the said order by filing a revisional application before this Court being CO 1791 of 2009. The said application was disposed of by an order dated 30th November, 2012, the operative portion whereof is set out hereunder:-

"Now without going deep into the matter the present revision is disposed of as follows:-

The petitioner/husband shall go on making payment by the 7th of every month an amount of Rs. 4,000/- to the opposite party/wife for herself and Rs. 3,000/- each for two daughters, i.e. in all Rs. 10,000/- per month as alimony.

The Ld. Trial Court below is directed to make an endeavour for disposal of the suit as quickly as possible preferably within a period of six months."

(4) In the mean time, the opposite party/wife had filed a petition dated 4th February, 2012 before the Ld. Trial Court praying for stay of the matrimonial suit on the ground that the petitioner/husband had not paid to the wife the arrear

alimony and litigation cost. On 26th March, 2013 the opposite party/wife filed another petition before the Ld. Trial Court praying for a direction on the petitioner/husband to pay the entire amount of arrear alimony as also the litigation cost as had been directed by the Ld. Trial Court by its order dated 30th April, 2009.

(5) By an order dated 17th April, 2013, the Ld. Trial Court rejected the wife's petition for stay of matrimonial suit and allowed the wife's application by directing the husband to pay the entire arrear alimony and litigation cost. The operative portion of the Ld. Trial Court's order dated 17th April, 2013 is quoted hereunder:-

"The petitioner/husband in plaint of this mat suit Manoj Kedia is directed to pay up the arrear litigation cost and alimony pendente lite from the period and to the time as reflected in Annexure B of this petition at the earliest and to go on paying the current alimony pendente lite towards respondent and her two daughters to the respondent as determined in the order of Hon'ble High Court dated 30th November, 2012 passed in CO No. 1791 of 2009 accordingly until further order."

(6) Aggrieved by the aforesaid quoted portion of the order dated 17th April, 2013 the petitioner/husband is before this Court by way of the instant revisional application.

(7) Appearing on behalf of the petitioner, Ld. Counsel submitted that the order dated 30th April, 2009 passed by the Ld. Trial Court merged with the order dated 30th November, 2012 passed by this Court in CO 1791 of 2009 which was the revisional application preferred by the respondent against the order dated 30th April, 2009. By the order dated 30/11/2012 this Court only directed the petitioner/husband to go on paying Rs. 10,000/- per month as alimony to the opposite party/wife. The said order of this Court does not mention anything about the arrear alimony or the litigation cost and that part of the Trial Court's order dated 30th April, 2009 must be deemed to have been set aside. Hence, according to the Ld. Counsel, The Ld. Trial Court erred in directing the petitioner to pay the arrear alimony and the litigation cost by the order impugned.

(8) In support of his contention that the Ld. Trial Court's order dated 30th April, 2009 stood merged with this Court's order dated 30th November, 2012 passed in the revisional application, Ld. Counsel relied on the decision of the Hon'ble Supreme Court in the well-known case of *M/s. Gojer Brothers (P) Ltd.-vs.-Shri Ratan Lal Singh reported in AIR 1974 SC 1380*. In paragraph 18 of the said judgment the Hon'ble Apex Court observed that the fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the Appellate Court is that in such cases the decree of the Trial Court is merged in the decree of the Appellate Court. In course of time, this concept

which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit, came to be gradually extended to other proceedings like revisions and even to proceedings before quasi judicial and executive authorities. Ld. Counsel also relied on the decision of the Hon'ble Supreme Court in the case of *Kunhayammed-vs.-State of Kerala reported in (2006) 6 SCC 359*. Ld. Counsel relied on paragraphs 10, 11 and 12 of the said judgment. In paragraphs 10 and 11 the Hon'ble Supreme Court discussed its earlier judgments including that in the case of M/s. Gojer Brothers (supra). Paragraph 12 of the judgment is reproduced hereunder:-

"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior

forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

(9) Relying on the aforesaid judgments Ld. Counsel submitted that the Ld. Trial Court's order dated 30th April 2009 having merged with this Court's order dated 30th November, 2012 passed on revision. Hence, there can be no question of the petitioner/husband paying arrear alimony or litigation cost to the opposite party/wife and the Ld. Trial Court acted with material irregularity in directing such payment to be made by the impugned order, warranting interference by this Court.

(10) Appearing on behalf of the opposite party/wife, Ld. Counsel submitted that the order dated 30th November, 2012 passed by this Court in CO 1791 of 2009 was so passed without going into the merits of the case. The said order was passed only as an ad hoc interim measure. This Court while passing the said order addressed only the issue of current alimony and did not touch the issues of arrear alimony or litigation cost that had been directed to be paid to the wife by the Ld. Trial Court by its order dated 30th April, 2009. He submitted that unless the superior Court's order is passed on merits, the doctrine of merger has no application. In this connection, he relied on a decision of the Hon'ble Apex Court in the case of *Stata of Kerala-vs.-Kondottyparambanmoosa reported in (2008) 8 SCC 65*. In paragraph 25 of the said judgment the Hon'ble Supreme Court observed that the doctrine of merger would only apply in a case

when a higher forum entertains an appeal or revision and passes order on merit and not when the appeal was dismissed on the ground that delay in filing the same is not condoned.

(11) Ld. Counsel further referred to paragraph 10 of the judgment in the case of Gojer Brothers (supra) wherein it is observed that the juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time more than one operative order governing the same subject matter. Ld. Counsel submitted that the Trial Court's order dated 30th April, 2009 and this Court's order dated 30th November, 2012 did not govern the same subject matter. The Trial Court's order pertained to current alimony, arrear alimony and litigation cost whereas this Court's order pertained to current alimony only. This Court in its revisional jurisdiction reduced the rate of alimony from Rs. 14,000/- per month to Rs. 10,000/- per month but left untouched the Trial Court's direction to the petitioner/husband to pay arrear alimony and litigation cost. Hence, according to Ld. Counsel, the Trial Court did not commit any irregularity or illegality by directing the petitioner/husband to pay the arrear alimony and litigation cost to the wife.

(12) Ld. Counsel also referred a decision of this Court in the case of *Smt. Jayanti Basu-vs.-Partha Basu reported in 2012 (1) CLJ (Cal) 296,* wherein it was observed that the grant of maintenance either from the date of initiation of the original action or from the date of an application for maintenance or from a

period subsequent thereto is within the discretion of the Court. Such discretion should be exercised with sound reason and logic in the facts and circumstances of each case. Unless such discretion is found to have been exercised irrationally or illegally, the superior forum should be slow and circumspect to interfere with the discretionary order.

(13) Ld. Counsel submitted that no ground has been made out by the petitioner warranting interference with the impugned order in exercise of jurisdiction under Article 227 of the Constitution of India and the revisional application should be dismissed.

(14) I have considered the rival contentions of the parties. The short question that arises in this case is whether or not the order dated 30th April, 2009 passed by the Ld. Trial Judge merged with the order dated 30th November, 2012 passed by this Court in CO 1791 of 2009. If it be held that the Ld. Trial Court's order merged with this Court's order, then it must follow with the order of the Ld. Trial Court lost its independent identity and this Court's order dated 30th November, 2012 held fort. If it be held that no such merger took place, then it must follow that this Court's order only partially modified the Ld. Trial Court's order dated 30th April, 2009 and in that event one cannot find fault with the order of the Ld. Trial Court sought to be impugned in this application.

(15) From a reading of the judgments cited on behalf of the parties on the doctrine of merger, it is clear when a superior court entertains an appeal or a

revision from a lower Court's order and the superior Court passes a judgment *on merits*, the lower Court's order stands merged with the superior Court's order. Any and every order passed by the higher forum even without going into the merits of the case will not attract the doctrine of merger. In the case of *Chandi Prasad-vs.-Jagdish Prasad reported in (2004) 8 SCC 724* the Hon'ble Supreme Court observed that when a higher forum entertains an appeal and passes order *on merit*, the doctrine applies. The doctrine of merger is based on the principle of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification, or an order of affirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time. When an appellate court passes a decree, the decree of the Trial Court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the Trial Court.

(16) Both the decisions in Gojer Brothers (supra) and Kunhayammed (supra) dealt with decrees or orders which were final in nature. This is not to say that the doctrine of merger has no application at an interlocutory stage. Even at an interlocutory stage if a higher forum entertains an appeal or revision against an interlocutory order and passes a judgment and order *on merits* either confirming

or reversing or modifying the lower Court's order, the doctrine of merger will surely apply. However, if the higher forum passes an order without going into the merits of the case which has the effect of partially modifying the lower Court's order, in my opinion, the doctrine of merger will not apply.

(17) In the instant case, the order passed by this Court on 30th November, 2012 while disposing of CO 1791 of 2009 itself records that the order was passed without going deep into the matter. According to me, this can only mean that the order was passed without going into the merits of the case and only by way of an interim arrangement. The order did not decide anything finally. By the said order this Court neither set aside nor affirmed the order of the Ld. Trial Court in express words. This Court only modified the quantum of monthly alimony to be paid by the petitioner. This Court did not touch the remaining part of the Ld. Trial Court's order.

(18) I am unable to accept the contention of Ld. Counsel for the petitioner that by not expressly affirming the portion of the Ld. Trial Court's order regarding arrear alimony and litigation cost, this Court impliedly set aside the portion of the Ld. Trial Court's order. The arrear alimony and litigation costs are substantial benefits granted by the Ld. Trial Court in favour of the opposite party and had this Court intended to withdraw such benefits, in my opinion, it would have done so expressly. In my opinion, this Court's order dated 30th

November, 2012 only partially modified the Ld. Trial Court's order dated 30th April, 2009 without going into the merits of the case.

(19) For the reasons said above, I am of the view that the doctrine of merger does not apply in the facts of the present case. It cannot be said that the Ld. Trial Court's order dated 30th April, 2009 stood merged with this Court's order dated 30th November, 2012. The Ld. Trial Court's order dated 30th April, 2009 retains its identity as modified by this Court's order dated 30th November, 2012. In the premises, the Ld. Trial Court did not commit any error in passing the impugned order dated 17th April, 2013.

(20) In view of the aforesaid this application fails and is dismissed without any order as to costs.

(Arijit Banerjee, J.)