SC GV 93 018

6101-02136

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AUROVINDO CHOUDHURY

PETITIONER

- and -

MITA PAUL

RESPONDENT

Application to vary interim spousal support order. Granted

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife Northwest Territories, December 29, 1992

Judgment filed: 1 April 1993

The Petitioner appeared in Person
Counsel for Respondent: J.D. Brydon

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REASONS FOR JUDGMENT

This is an application by the Petitioner husband to vary an interim spousal support order.

The parties were married in Calcutta, India, on February 3, 1990. They co-habited for approximately one month before the Petitioner, who was a permanent resident of Canada, returned to Canada. On October 27, 1991, the Respondent arrived in Canada as a result of her husband's sponsorship. The parties lived together in Yellowknife for approximately three months. For various reasons, the Respondent left the marriage on January 8, 1992, and moved to Toronto. In March she returned to Yellowknife, but only because, as she claims, immigration authorities would not give clearance for her to work in Toronto. This claim is not explained further.

On January 29, 1992, the Petitioner filed a Petition for Divorce seeking only a divorce judgment. The Respondent filed a Counter-Petition on September 11, 1992, seeking a divorce judgment, support, and a division of matrimonial property (although the property is not specified). At the same time the Respondent filed a motion seeking interim support.

On October 13, 1992, the Petitioner's solicitor filed a Notice of Seeking to Act.

The application for interim support came on in Chambers on October 19, 1992. The Petitioner was not present and he was not represented. The presiding Judge in Chambers issued an order requiring the Petitioner to pay interim support of $500 per month with the proviso that the Petitioner could apply to vary or set aside the order. A motion to set aside the order was filed by the Petitioner personally on November 27, 1992.

This application came on for hearing before me in Chambers on December 29, 1992. The Petitioner appeared in person to argue his case. The Respondent was represented by counsel. After hearing submissions I determined that there was a need for further and up-to-date financial information. Both parties were given until February 28, 1993, to file and exchange such information. The lengthy delay was due to the Respondent's absence on a trip back to India.

The Petitioner bases his application to set aside the interim order on two grounds: (a) the Respondent waived any claim to support by a pre-marital agreement; and (b) he has no means to pay support.

The pre-marital agreement referred to by the Petitioner is a document entitled "Affidavit" signed by the Respondent in Calcutta on January 16, 1990. It was apparently signed before a Notary as it has what purports to be a Notary's seal and signature on it. The legal significance of signing the document before a "Notary", or the legal status of a "Notary", in Indian law was not explained to me but I think I can assume it to be the equivalent of a solemn declaration under Canadian law.

The "Affidavit" is in the English language. In it, the Respondent states: "That on the event of my marriage with Mr. Aurovindo Choudhury, a resident of Canada, I shall be governed by following terms and conditions ..." and then are listed various terms. In the event of separation or divorce, the Respondent waives all claims to support and all rights and privileges as a Canadian resident. Finally, the Respondent states: "I declare and solemnly swear this Affidavit ... and do so with sound mind of my own free will and wish and consent and cannot be challenged in any Court of Law/Justice anywhere in the world."

The Respondent, in her affidavit filed in response to this application, says that she signed the pre-marital "Affidavit" only because the Petitioner told her that if she

did not then he would be unable to marry her. She says she trusted the Petitioner; that she did not understand the Affidavit; that she had difficulty with the English language; that she did not receive independent legal advice; and, that only the Petitioner was present when she signed it.

Whatever may be the status of this "Affidavit" under Indian law -- and I have been provided with no information on that point -- I am satisfied that its legal effect, if any, is to be determined under Canadian law. The parties are resident in this country; they exhibit no present intention to return to India; the Petitioner has placed himself before this court seeking a divorce; and the document itself makes specific reference to the Respondent's rights under Canadian law.

I find that, for purposes of this application, the pre-marital "Affidavit" has no legal effect. Insofar as it attempts to regulate matters of support after a marriage breakdown then it can be over-ridden by this court. The "principle that parties cannot by contract oust the jurisdiction of the court in matters of spousal maintenance, is an established tenet of Canadian law": **Pelech v Pelech** (1987), 7 R.F.L. (3d) 225 (S.C.C.) at page 269.

I therefore reject any claim to set aside the interim order on the basis of the pre-marital agreement.

With respect to the lack of means of the Petitioner, I am not satisfied that I have been given complete disclosure of assets. But since this is only an interim matter, complete disclosure may have to await the discovery process of the action.

5 The Petitioner, who is 54 years old, has been unemployed since February, 1992. Before that he was employed in Yellowknife as an engineer with a gross annual income of $40,000. When he lost his job he moved to Edmonton. He receives unemployment insurance benefits of $1,392 (net) per month. He lists his monthly expenses as $1,465. There are, however, some questionable and likely unnecessary expenses such as $200 per month on alcohol and tobacco and $200 per month on telephone calls. He lists assets of $3,050 of which $3,000 is an R.R.S.P. He lists liabilities of $4,850. I am, however, given no information as to the Petitioner's employment prospects or how diligently he is seeking employment.

6 The Respondent's claim for support is based on a number of factors, not the least of which are her own financial needs. She also says, however, that her current financial problems are causally connected to the marriage because she gave up security and stability, both in her work and in her lifestyle, by coming to Canada. She was trained as a school teacher in India but she cannot pursue that profession in Canada. She also has further demands on her financial resources since she, as is customary in the Hindu religion, sends money to her elderly parents in India.

Again, I am not satisfied that complete disclosure has been made of the Respondent's circumstances. There are a number of unanswered issues which may be relevant. For example, the Respondent says that while she was in Toronto, in response to her request for financial assistance, the Petitioner sent her a one-way airplane ticket to India. There is no mention of what the Respondent did with this or why. There is no discussion of why or if the Respondent wishes to remain in Canada. Again these are matters that will have to be left to the trial of this action.

The Respondent, who is 36 years old, has been employed for several months as a chambermaid at a local hotel. She lives in staff accommodations. This obviously causes her discomfort due to a lack of privacy but she says she cannot afford private accommodations.

In 1992 the Respondent had gross income of $17,094.48 from her work as a chambermaid. She had additional income of $2,283.84 from a second cleaning job. Currently she works only as a chambermaid. Her net monthly income is $1,121 while she claims monthly expenses of $1,345. Included among these expenses is the sum of $250 which the Respondent says she sends for her parents' support.

It seems apparent that at least for the foreseeable future the Respondent, if she stays in Canada, will be relegated to menial employment. Her husband, on the other hand, is a professional who, if employed, should have the ability to earn a significant

income. At this time, however, based on the limited information I have seen, neither one of them has assets or income of any significance.

The Respondent's entitlement to support is based on the Divorce Act. In making a support order, the court must take into consideration the condition, means, needs, and other circumstances of each spouse. As a general rule, this applies to both permanent and interim support applications. Also, as a general rule, an applicant for interim support should satisfy the court that maintenance would likely be ordered at trial: **Potschka** v. **Potschka** (1987), 5 R.F.L. (3d) 225 (Man.Q.B.); **Weppler** v. **Weppler** (1988), 15 R.F.L. (3d) 279 (Ont.H.C.J.); **Murray** v. **Murray** (1991), 35 R.F.L. (3d) 449 (Alta.Q.B.).

But there is an emphasis at the interim stage on the means and needs of the parties as opposed to other factors: **Sharpe** v. **Sharpe** (1986), 3 R.F.L. (3d) 298 (Ont.D.C.). While there must be at least some arguable causal connection between an applicant's need and the marriage, there is no onus on an applicant to establish such a connection as an absolute condition before interim relief can be given. There must be a balance, however, between the need for economic assistance of one spouse and the right of the other spouse not to be unduly burdened for something that was not caused by the marriage: **Doncaster** v. **Doncaster** (1989), 21 R.F.L. (3d) 357 (Sask.C.A.).

Generally speaking, the courts consider that there should not be any responsibility for financial support in a marriage of short duration: **Linton v. Linton** (1990), 30 R.F.L. (3d) 1 (Ont.C.A.). But there are numerous cases where support has been awarded in situations similar to the one before me. Those situations usually are ones where a spouse leaves her homeland, gives up job security or family stability to do so, usually on the promise of a new and better life in Canada, and then the marriage quickly turns for the worse, leaving the immigrant spouse alone in a strange land. In those cases support has been awarded albeit sometimes by way of a lump sum or for a limited duration. See **Weichholz v. Weichholz** (1987), 81 A.R. 236 (Q.B.); **Babek v. Babek** (1988), 15 R.F.L. (3d) 168 (Ont.H.C.J.); **Polgari v. Polgari** (1991), 36 R.F.L. (3d) 369 (B.C.S.C.); and **Sadilkova v. Sadilkova** (1991), 38 R.F.L. (3d) 441 (B.C.S.C.).

In this case the Respondent has at least an arguable case for some permanent support at trial. But, as I noted before, there are some unanswered questions which will have to await the trial. At this interim stage I am left with examining the present means and needs of the parties.

The order of October 19, 1992, was made without any information about the Petitioner's circumstances. Now that current information has been provided I am satisfied that the requirement to pay $500 per month should be set aside. I am not convinced, however, that the Petitioner should pay nothing. Considering the fact that

he brought the Respondent to Canada, and the fact that she left behind professional standing in doing so as well as the support system that could be provided by her family, I have concluded that he has an obligation to provide some interim support at least until all of the relevant facts can be examined at a full trial. At this point the best I can do is try to achieve some rough form of parity.

I therefore order as follows:

1. The order of October 19, 1992, is varied to provide that the Petitioner shall pay to the Respondent as interim support the sum of $150 per month.

2. This order is retroactive to November 1, 1992. Therefore, the sum of $150 per month is due from November 1, 1992, and is to be paid on the first day of each month by the Petitioner to the Respondent through her solicitors.

3. If the Petitioner has made any of the $500 payments ordered earlier, those shall be credited to the amounts due under this order.

4. The Petitioner shall notify the Respondent's solicitors immediately if and when he obtains new employment. He shall also, at that time, provide an updated financial statement outlining his income and expenses.

5. Either party may apply to vary this interim order if there is a substantial change

in circumstances.

I emphasize the fact that this is an interim order only and does not in any way bind the trial judge. Therefore it is in the best interests of both parties to bring this matter to a trial as expeditiously as possible, especially now that the parties would be entitled to a divorce on the basis of one year's separation.

In the circumstances, there will be no costs.

John Z. Vertes
J.S.C.

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