ask the Zila Parishad to send up the names under rule 10 but did not follow it up properly. It is quite evident that nobody realized that the appointment of a temporary Secretary could not be continued beyond six months and that the person to hold that office should be a duly-qualified person in accordance with rule 5 and 6 of the rules. The result has been that an un-qualified person has held this office for nearly three years and even now before me his appointment has been sought to be justified. It means that the Government itself is not willing to enforce the rules framed by it. If the Government felt any helplessness and considered that an amendment of the rules was necessary as suggested by the Chairman of the Zila Parishad, it should have taken steps to amend the rules. But if it did not follow that course, the rules as existed should have been strictly enforced and not relaxed or waived as has been done in the instant case. Surely it was not open to the Government to suggest ways and means to perpetrate a fraud on the statutory rules as framed by itself. It is admitted that respondent 4 did not possess the academic qualifications prescribed in rule 6 and was above the age of 40 years when he was appointed as temporary Secretary in November, 1966.

(17) For the reasons given above, this petition is accepted with costs and writ of *quo warranto* is, therefore, issued directing respondent 4 to vacate his office and a writ of *mandamus* is at the same time, issued against respondent 2, the Zila Parishad, Rohtak, requiring it to remove respondent 4 from the office of officiating Secretary, Zila Parishad, Rohtak, and a direction is also issued to the State of Haryana and the Zila Parishad, Rohtak, Respondents 1 and 2, to make the appointment of the Secretary of the Zila Parishad, Rohtak, in accordance with the Act and the rules in the light of the observations made above. Counsel's fee Rs. 200 to be paid by Respondents 1 and 2 equally.

R. N. M.

APPELLATE CIVIL

Before Prem Chand Pandit and C. G. Suri, JJ.

RAM PIARI,—*Appellant.*

versus

PIARA LAL,—*Respondent.*

First Appeal from Order No. 32-M of 1967

September 10, 1969

Hindu Marriage Act (XXV of 1955)—Section 25—Grant of alimony under—Existence of un-satisfied decree for restitution of conjugal right—Such decree—Whether a bar to such grant—Arrears of alimony—Date from which payable—Court—Whether has discretion to fix.

Held, that the existence of an unsatisfied decree for restitution of conjugal rights against the wife or the husband does not disentitle them to the grant of permanent alimony under section 25 of the Hindu Marriage Act, 1955. Such a decree may be a circumstance enabling the Court to judge the conduct of the parties for fixing the quantum or rate of alimony but it is not a complete bar to his or her claim for permanent alimony or maintenance. (Paras 3 and 4)

Held, that it is the discretion of the Court in the matter of fixing the date from which the alimony is to be paid. It is not incumbent on the Court to allow arrears of alimony from the date of application for the same. However, the conduct of the parties has to be kept in mind while fixing the date of payment of arrears. (Para 8)

Case referred by the Hon'ble Mr. Justice A. N. Grover, on the 6th December, 1967, to a larger Bench for decision of an important question of law involved in the case. The Division Bench Consisting of the Hon'ble Mr. Justice Prem Chand Pandit and the Hon'ble Mr. Justice C. G. Suri finally decided the case on 10th September, 1969.

Regular First appeal from the order of Shri Raghbir Singh, Additional District Judge, Amritsar, dated the 23rd February, 1967, holding that both the applications u/s. 24 and 25, Hindu Marriage Act, 1955, of the petitioner for the grant of maintenance fail and therefore, dismissing these applications.

Application for permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955.

H. R. AGGARWAL AND B. S. KAMTHANIA, ADVOCATES, for the Appellant.

BAHADUR SINGH, ADVOCATE, for the Respondent.

JUDGMENT.

SURI, J.—This first appeal is directed against the order, dated 28th February, 1967 of Shri Raghbir Singh, Additional District Judge, Amritsar, whereby an application for alimony filed by the appellant, under section 25 of the Hindu Marriage Act, 1955 (hereinafter briefly referred to as 'the Act') against the respondent Piara Lal, P.C.S., Sub-Divisional Officer at Tarn Taran, was dismissed with costs on the findings, *inter alia*, that a decree for restitution of conjugal rights had been passed against the appellant on the petition of the respondent and that this decree had remained unsatisfied and that the contrary conduct of the appellant disentitled her to alimony. This appeal had come up before Grover, J., but it was felt that there were conflicting decisions of Single Bench of this Court on the points of law involved and that the conflict might lead to certain

difficulties for the subordinate Courts and that it was desirable that the appeal should be disposed of by a Division Bench. It may be pertinent to reproduce here the order of reference which runs as follows :—

> "The marriage between the parties took place before the partition of the country in 1947. It is common ground that two children were born of the wedlock but they died. In 1956 the husband became a member of the P.C.S. According to the wife, he deserted her and she had to file an application under section 488 of the Criminal Procedure Code in the Batala Courts. That was dismissed on the ground of lack of jurisdiction. On 20th March, 1965, the husband filed application for restitution of conjugal rights in the Amritsar Courts. On 30th August, 1965, a decree for restitution was passed. The husband took out execution but on the date of hearing the wife absented herself. The explanation given by her was that she had to attend another Court in some other case. It appears that the wife made an application on 15th October, 1965 in the Court of Shri H. K. Mehta, Additional District Judge, that she was ready and willing to comply with the order for restitution of conjugal rights and that the Court Nazir be directed to escort her to the house of her husband. Notice of that application was given to the husband who opposed it on the ground that it was not maintainable under the law. It was dismissed on 24th November, 1965. Meanwhile the wife had filed an application under section 25 of the Hindu Marriage Act for grant of alimony and maintenance. That application has been dismissed by the Additional District Judge, Amritsar, and the wife has come up in appeal against his order. One of the matters which engaged the attention of the Court below was whether the wife was entitled to maintenance in the presence of the decree for restitution of conjugal rights against her. The Court felt that the decisions of this Court barred the grant of any maintenance but proceeded to examine the matter on the assumption that an order for maintenance could be granted. After discussing the evidence, it has been held that discretion should not be exercised in her favour owing to her persistent contumacious and recalcitrant attitude. It has been found that

the wife does not genuinely intend to live with her husband. In *Karam Singh* v. *Daljit Kaur,* (1) P. C. Pandit, J., took the view that under section 25 of the Hindu Marriage Act the power to grant permanent maintenance could be exercised after the passing of a decree either for restitution of conjugal rights or for judicial separation or for divorce. The argument that maintenance could be granted only when there was a decree for judicial separation or divorce was not accepted. The further contention that a decree for restitution of conjugal rights having been obtained by the husband against the wife, the latter could not make an application under section 25 of the Act, was not accepted. Shamsher Bahadur, J., in *Surjit Kaur* v. *Pargat Singh,* (2), held that the Court was bound in the first instance to make an order for permanent alimony to a wife who had been granted divorce against her guilty spouse, so long as she remained unmarried. The only circumstances which a Court could consider for fixing the alimony was the financial condition of the parties concerned. This case has been sought to be used by counsel for the wife in the present case as an authority for the proposition that under section 25, the Court is bound to grant permanent alimony or maintenance. If the judgment is read as a whole, I do not think that it would support any such view. In *Surjit Kaur alias Bibo* v. *Gurdev Singh,* (3), the wife made an application under section 25 of the Hindu Marriage Act for grant of permanent alimony. The husband had obtained a decree for restitution of conjugal rights against her. It was contended on behalf of the husband before Jindra Lal, J., who disposed of that case, that the husband having obtained a decree for restitution of conjugal rights on the ground that the wife had withdrawn from the society of the husband without any reasonable excuse, it was not competent for her to make an application for maintenance. The learned Judge was of the view that in any case the wife was not entitled to any maintenance. This is what he said—

'A decree for restitution of conjugal rights was granted against her on the finding that she had no reasonable

(1) I.L.R. (1963) 1 Pb. 575.

(2) I.L.R. (1964) 2 Pb. 100.

(3) F.A.O. 55-M of 1962 decided on 1st October, 1964.

excuse for staying away from her husband. If such a decree was pending, then it appears to me that no Court should grant her relief by way of maintenance, because that would defeat the very object of the decree for the restitution of conjugal rights. If, on the other hand, as is urged by her, the appellant did go and live with the respondent, then also the decree having been complied with, there is no decree pending and, therefore, permanent alimony cannot be granted under section 25 of the Hindu Marriage Act of 1955.'

Now, the language of section 25 shows that it is within the discretion of the Court to make an order for maintenance irrespective of the nature of the decree which has been passed and with great respect to Jindra Lal, J. I am unable to agree that merely because a decree for restitution of conjugal rights has been passed in favour of the husband against the wife on the ground that she had withdrawn from the society, she should not be granted maintenance. The Court under the law will have to look to all the facts and circumstances and then exercise judicial discretion in the matter both of grant and quantum of maintenance nor can the other view which has been sought to be pressed on certain observations made by Shamsher Bahadur, J. in *Surjit Kaur's case* (2) be accepted that the Court is bound to grant maintenance under section 25 irrespective of the entire facts and circumstances. As the observations which have been made by the learned Judges in the aforesaid two cases might lead to certain difficulty for subordinate Courts, I consider that it is desirable that this appeal should be disposed of by a Division Bench for the constitution of which necessary orders may be obtained from the Chief Justice. Counsel for the husband has agreed to pay a sum of Rs. 200 as expenses by the end of January, 1968. It will be desirable that the appeal be disposed of as expeditiously as possible thereafter because it is represented by the counsel for the wife that she is in very straitened circumstances."

The language of section 24 of the Act does not offer any difficulty, but this cannot be said of section 25. The construction of certain portions of the last mentioned section have exercised the mind of the

learned Judges in a number of cases and it would not, therefore, be out of place to reproduce section 25 of the Act also—

"25. (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the Court to be just, and any such payment may be secured if necessary, by a charge on the immovable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has remarried or, of such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any women outside wedlock, it shall rescind the order." „

The argument has very often been advanced that the words 'while the applicant remains unmarried' in section 25 of the Act imply that permanent alimony or maintenance can be awarded to the applicant only in cases where the marriage stands dissolved by a decree of divorce or nullity of marriage or judicial separation and that permanent alimony cannot be awarded where the applicant continues to be in the married state even after passing of the decree referred to in the opening part of this section. This contention was rightly repelled by my learned brother Pandit, J. in *Karam Singh* v. *Daljit Kaur,* (1) and there are a number of cases of other High Courts in India in support of the view taken by him. *In Minarani Majumdar* v. *Dasarath Majumdar,* (4) it was laid down that an order for

(4) A.I.R. 1963 Cal. 428.

separate maintenance under section 25 could be passed in favour of a married woman living apart from her husband after the passing of a decree for divorce or nullity or judicial separation or for restitution of conjugal rights even though the decree remains uncomplied with. The condition that the maintenance was to be paid while the applicant remains unmarried was supposed to be attached to every order for maintenance and in the context of section 25(1) the condition only meant that the applicant had not been remarried. Similarly, in *Kadia Harilal Purshottam* v. *Kadia Lilavati Gokaldas*, (5), it was held that the expression 'while the applicant remains unmarried' was not intended to limit the scope of section 25 and that the intention of the legislature was that order for permanent alimony could be passed on or after the passing of any of the reliefs referred to in the earlier sections of the Act. These words were held not to restrict the application of section 25 to only those cases where a party was in a position to contract a second marriage or where the marriage bond stood dissolved or severed. This condition was supposed to govern the conduct of the parties in future and the maintenance order could be taken advantage of by the applicant only as long as he had remained unmarried meaning thereby that inspite of his being in a position to do so, the applicant had not contracted another marriage.

(2) In *Surjit Kaur* v. *Paragat Singh* (2), a ruling mentioned in the order of reference, Shamsher Bahadur, J. took the view that the Court is bound in the first instance to make an order for permanent alimony to a wife who has been granted a divorce decree against her guilty spouse. Her right to alimony was described to be absolute and it was incumbent on Courts to make an order that the husband shall pay to the wife on her petition such sum as can be awarded on the circumstances of the case. The only condition imposed on the wife was that she should remain unmarried when she made the prayer for permanent alimony. The financial condition and the conduct of the parties were circumstances which were relevant only for fixing the quantum or rate at which maintenance was payable.

(3) In *Amar Kanta Sen* v. *Sovana Sen and another*, (6), Datta, J. of the Calcutta High Court held that even an unchaste wife had an absolute right to a starving allowance for her maintenance and that this right would be enforceable even where the wife had been

(5) A.I.R. 1961 Gujrat 202.
(6) A.I.R. 1960 Cal. 438.

divorced on the ground of her adultery. This provision is intended to prevent the wife's starvation and where she has an income of her own, her right to this bare subsistence disappears. A similar view has been taken in *Dr. Hormusji M. Kalapesi* v. *Dinbai H. Kalapesi,* (7), a case under the Parsi Marriage and Divorce Act, which has, strange to say, been cited by the respondent's counsel. Section 30 of that Act may appear to be in *Pari materia* with section 25 of the Hindu Marriage Act except for the fact that the chastity of the wife besides her unmarried state have been given as the requisite conditions entitling her to permanent alimony after the passing of any decree under the Act. In paragraph (8) at page 416, reference is also made to the Bombay Hindu Divorce Act which has been enacted in substantially similar terms. The Hon'ble Judges observed that so far as they were aware it had been the consistent practice of the Court to entertain applications for alimony even in the case of defaulting or guilty wives and to deal with them on merits. An application made for alimony had, so far as the Hon'ble Judges were aware, never been thrown out on the preliminary ground that the petition had been made by a guilty wife. English case law was discussed and it was found that it was never intended that a guilty wife should be turned out on the streets to starve. Cases were contemplated where under certain circumstances a wife, who had been divorced on the ground of adultery could be awarded maintenance or alimony. The existence of an unsatisfied decree for restitution of conjugal rights against the wife may not, therefore, seem to disentitle her to permanent alimony. With great respect I may say that the learned Judge, who decided the case of *Surjit Kaur alias Bibo,* (3), mentioned in the order of reference had not cited any cases in support of his views.

(4) Another argument was that the conduct of the parties was relevant only on the question of fixing the quantum or rate at which the maintenance allowance or alimony was to be granted and that conduct was not relevant to establish the applicant's title to alimony or maintenance allowance. This argument may seem to find support from the language used in sub-section (1) of section 25 of the Act but, to my mind, the discussion is only of an academic interest. The first part of the sub-section, which lays down the conditions for the Court ordering the respondent to pay alimony to the applicant, provides, for the only condition that the applicant should have remained unmarried. The conduct of the parties has been mentioned in the

(7) A.I.R. 1955 Bom. 413 (D.B.).

later part of the sub-section after the Court is supposed to have entered upon the enquiry as to the gross sum or the rate of alimony payable to the applicant. Anyhow, even if the conduct is relevant only on the question of quantum or rate, the Court can, where the circumstances so justify, reduce the amount to such a nominal or low figure that it may be a negation for all practical purposes of the absolute title where it is found to have been established. The later sub-sections of section 25 provide for variation, modification and rescission of the order of maintenance in view of the changed circumstances of the case and the conduct of the parties could be considered under these sub-sections to negative a right even if found to be absolute at any stage. The conduct of the parties would always be relevant in such cases because the rights and obligations of the parties to a marriage are mutual and reciprocal and where a party claims that the right of maintenance, it is expected to discharge his or her marital obligations in a proper manner. A decree for restitution of conjugal rights against the petitioner may be a circumstance enabling the Court to judge the conduct of the parties, but there is no authority for the proposition that such a decree against the petitioner would be a complete bar to his or her claim for permanent alimony or maintenance.

(5) We have then to see whether the appellant's claim was such that she could be denied alimony or maintenance at a reasonable rate. Certain pleas can be taken in defence of a case for restitution of conjugal rights and the passing of a decree in such a case may seem to operate as constructive *res judicata,* as pleas which could or ought to have been taken in defence are to be deemed to have been taken and the matter could be said to have been directly and substantially in issue in such a suit. The decree for restitution of conjugal rights against the appellant may, therefore, imply that the pleas generally available in defence of such a claim for restitution of conjugal rights and justifying the wife in living separate from her husband had been decided against her. Anyhow, the circumstances of each case have to be taken into consideration in judging the claim for maintenance and in determining the quantum or rate of maintenance allowance.

(6) There is nothing to be said against the appellant's character and her conduct during the proceedings may also appear such that she is, in my opinion, entitled to past and future maintenance at a reasonable rate. The appellant was married to the respondent in Sialkot district, now a part of West Pakistan, before the partition of

the country about 23/24 years ago. The two had lived together as husband and wife for a number of years soon after the marriage and the appellant had borne the respondent two children who could have been helpful in bringing the parties together if they had been alive. The respondent, who was merely a clerk in the Postal Department, got into the Punjab Civil Service and puckered up his nose at his illiterate wife of a peasant family thinking that she would not fit into the higher circles in which the respondent may have to move after his stroke of luck. We have been taken through material portions of the lower Court's records and find that, in spite of the judgment of the lower Court, the appellant had all along been ready and willing to take up residence with the respondent and that her conduct is not in any way blame-worthy. She may appear to have been ill advised in putting up a weak resistence to her husband's petition for restitution of conjugal rights but she had suffered a decree copy exhibit P. 2, to be passed against her without examining any evidence whatsoever against her husband.

(7) Exhibit P. 1 is a copy of the written statement filed by the appellant in reply to the respondent's petition for restitution of conjugal rights and in paragraph 7 thereof the appellant had expressed her jubilation and satisfaction that her husband had evinced some interest in her and made a declaration of his love and affection for the appellant. It is stated that if the claim is sincere it puts an end to the entire dispute and that the appellant is prepared to accept the offer with all gratitude and submissiveness and assured the husband of her continued devotion in the discharge of her domestic, social and religious duties and service to the husband. Her failure to mention in the end whether she wanted the husband's claim to be decreed or dismissed led to the proceedings being prolonged and the trouble could have been nipped at that stage if the appellant had been better advised to draft her written statement to say in the end that she was prepared to satisfy the husband's claim. Within two months of the passing of this decree for restitution of conjugal rights, she put in two applications, copies exhibits P. 3 and P. 4, before the Court which had granted the decree for restitution of conjugal rights. In these applications, the appellant had stated that she had been going to her husband's house to resume cohabitation with him and that she had been abused, threatened and turned away by the respondent with the help of the police. She sought the Court's help in being rehabilitated in her husband's house. The respondent's position as a Magistrate may appear to have gained him a distinct advantage throughout these proceedings. If the respondent had really been

feeling the wife's separation, he would not have taken any technical objections and would have readily accepted the wife's offer to come back to him. The order, copy exhibit P. 5, dismissing the appellant's petition on the ground that these were not competent because the petitioner was only a judgment-debtor may seem to disregard the provisions of section 47 and Order 21, rule 32 of the Code of Civil Procedure. If the judgment-debtor pleads that he or she had made attempts to satisfy, discharge or adjust the decree and had been prevented from doing so by obstructions placed in his or her way by the decree-holder, then the executing Court could assume jurisdiction under the above-mentioned provisions of the Code of Civil Procedure. If the executing Court was not inclined to send any official for escorting the wife to the husband's house, it could take some other measures to see that a decree passed by it was duly discharged and satisfied. It is not for the Court to stand in the way of a party trying to carry out the directions of the Court. A Court of law is supposed to help and encourage a party who offers in good faith to carry out the directions of the Court as made in its orders or decrees. In one or two reported cases cited before us by the parties, the Court had appointed a local Commissioner to supervise and to try to bring about rapprochement between the two willing parties to a marriage. The lower Court may appear to have ignored the substance and to have been pursuing a shadow by getting lost in the unsatisfactory and perjured statements of interested witnesses. It was also influenced in its decision by the fact that the appellant had failed to appear in the executing Court in spite of the service on her of a notice of a certain date of hearing. Notices of execution proceedings used to be issued only as steps in aid of execution to keep alive the period of limitation and there was no compulsion cast on the party served to appear on the date notified. The object of such process was only to notify the party that an execution application had been made. The seriousness or *bona fides* of the respondent in making this execution application may be judged from the fact that it was ultimately dismissed in default for non-prosecution. Copies of the executing Court's orders, exhibits R. 5 to R. 7, show in what half-hearted manner this execution application was being prosecuted by the respondent. Even in this Court there were attempts at reconciliation between the parties and according to an order recorded by Sarkaria, J. on October 5, 1967, the appellant's counsel had stated, without being controverted, that at the initial stages Grover, J. had asked the respondent to take back his wife, who was ready and willing to accompany him, but the respondent had curtly refused. It cannot, therefore, be said that in the present case the

appellant's conduct has been so blame-worthy that she could be denied alimony or maintenance at a reasonable rate.

(8) We have now to determine the rate of maintenance allowance and the date from which it should be made payable. The lower Court had fixed maintenance allowance at Rs. 75 per month more than 2½ years ago after taking into account the respondent's income and the prices then prevailing. It is common knowledge that prices have since increased and we have every reason to believe that in the meanwhile the respondent may also have earned a few increments if not some unexpected promotion. Considering the times and other circumstances, maintenance allowance of Rs. 75 per month for a wife, whose character is unblemished, may not appear very high. She is the wife of a gazetted officer of the Government and has been allowed less than a tithe of her husband's monthly income. I, therefore, accept this monthly rate of maintenance allowance as correct. The application for maintenance had been filed in lower Court in February, 1966 and the arrears from that date at the rate fixed may run into a few thousands. It may not be possible for a Government servant with a fixed monthly income to pay such heavy arrears. The appellant has been able to maintain herself somehow for the period of the last about 3½ years and the maintenance allowance can, therefore, be made payable from the date of filing the appeal in this Court. The fact that the Court has discretion in the matter of fixing the date and that it is not incumbent on it to allow arrears of maintenance from the date of application was recognised in *Dr. Tarlochan Singh* v. *Mohinder Kaur* (8), *and Smt. Hamibai, wife of Lokumal* v. *Smt. Kundibai, wife of Bhagwandas* (9), though it was observed that the conduct of the parties shall have to be kept in mind.

(9) I, therefore, accept this appeal and direct that the respondent shall pay the appellant alimony or maintenance at the rate of Rs. 75 per month and that this order shall take effect from the date of filing the appeal in this Court, i.e., April 24, 1967. Parties are left to bear their own costs throughout.

P. C. PANDIT, J.—I agree.

R.N.M.

(8) I.L.R. (1963) 1 Pb. 74.
(9) A.I.R. 1940 Sind 222.