

CIVIL MISCELLANEOUS

Before Inder Dev Dua, J.

DR. TARLOCHAN SINGH,—Appellant

versus

MOHINDER KAUR,—Respondent.

Civil Miscellaneous No. 936 of 1961.

in

First Appeal From Order No. 20-M of 1961.

1962
 August 3rd.

Hindu Marriage Act (XXV of 1955)—S. 24—Maintenance for the wife fixed during the trial of the application under section 10—Whether enures during the pendency of the appeal as well—Wife making application for maintenance during the pendency of the appeal—Date from which maintenance to be allowed.

Held, that the operative duration of order providing maintenance to the wife passed during the trial of the application under section 10 of the Hindu Marriage Act, 1955, is confined to the proceedings in the trial Court only and terminates with the termination of the trial proceedings. It is, however, open to the wife to apply to the appellate Court under section 24 read with section 21 of the Act and section 107 of the Code of Civil Procedure for maintenance *pendente lite* in so far as the appellate proceedings are concerned and the date from which the maintenance will be allowed is the date on which the application is made.

Application on behalf of the respondent under section 24 of the Hindu Marriage Act, praying that the appellant be directed to pay to the respondent, in the above said F.A.O. 20-M of 1961, expenses of the proceedings and monthly maintenance during the proceeding under section 10 of the Hindu Marriage Act.

D. R. MANCHANDA, ADVOCATE, for the Appellate.

TIRATH SINGH MUNJRAL, ADVOCATE, for the Respondent.

ORDER

DUA, J.—This application has been filed on behalf of Shrimati Mohinder Kaur, respondent in this Court, under section 24 of the Hindu Marriage Act for expenses of the proceedings and maintenance *pendente lite*. It is alleged that Dr. Tarlochan Singh filed an application for judicial separation under section 10 of the Hindu Marriage Act in the Court of Shri Charan Singh Tiwana, Senior Subordinate Judge, Amritsar, which was dismissed on 19th November, 1960 against which order the present appeal has been preferred by the said Tarlochan Singh. Shrimati Mohinder Kaur petitioning respondent has since been served with a notice of the appeal and has to make arrangements for defending her case. Her only source of income is her salary from Shazadanand Primary School, Amritsar, which amounts to Rs. 60 per month. Having no other movable or immovable property from which she can meet the expenses and live according to her status in life, she has asked for a sum of Rs. 1,000 as expenses and reasonable monthly maintenance during the pendency of these proceedings. It has been mentioned that Dr. Tarlochan Singh was ordered to pay Rs. 200 as counsels fee and Rs. 50 as monthly maintenance during the pendency of the proceedings in the trial Court under section 24 of the Act. In para 6 it is stated that Dr. Tarlochan Singh, according to his own admission in the proceedings for judicial separation, has been earning not less than Rs. 300 per month from medical practice and also owns about four houses in Amritsar. As the litigation is a protracted one, she has stated that she requires the assistance of a good lawyer and would also have to come to Chandigarh for the purposes of proper conduct of these proceedings which would obviously involve a certain amount of expense.

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Her petition is supported by her own duly sworn affidavit.

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In opposing this petition on behalf of the husband, it has been contended that the wife has her own resources from which she can meet the expenses of the appeal and can also maintain herself. In this connection it is noteworthy that in the trial Court the learned Senior Subordinate Judge ordered Dr. Tarlochan Singh on the 23rd December, 1959 to pay maintenance to the wife *pendente lite* at the rate of Rs. 80 per month from 28th May, 1959 onwards and also to pay Rs. 200 as expenses of the litigation. The husband came to this Court on appeal against the said order (First Appeal from order No. 6/M of 1960), and a learned Single Judge of this Court observed that the litigation expenses could not be considered to be either excessive or unreasonable; on the other hand this provision erred on the side of meagreness. In so far as the question of maintenance was concerned, after considering the means of the husband the amount was reduced to Rs 50 per month. This order was passed by D. K. Mahajan, J., on 2nd May, 1960. It has not been shown on behalf of the husband by any cogent material that the means of the husband have undergone any change or that any thing material has happened justifying reduction of the amount fixed by this Court in the previous proceedings. Mere assertion on behalf of the husband during the course of arguments by his counsel that his income has gone down, does not, in my opinion, constitute a sufficiently cogent ground for reducing the amount. It would thus appear that the rate of Rs. 50 per month cannot be said to be, by any means, excessive.

Now so far as the expenses for the present appeal (First Appeal from Order No. 20-M of 1961) are concerned, after hearing the counsel for the

parties, in my opinion, a sum of Rs. 200 can reasonably be allowed to the wife for the appeal including the expenses for the present petition (Civil Miscellaneous No. 936 of 1961) for which also she had to engage a counsel and spend money in its prosecution.

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The question with respect to maintenance arises as to from which date the sum of Rs. 50 per month should be ordered to be paid. It is common ground that maintenance at the rate of Rs. 50 per month has been paid up to 28th of June, 1960. After that date, however, the husband did not care to pay any amount though the proceedings in the Court below terminated as late as 19th November, 1960. This would mean that the husband had withheld the payment to the wife in accordance with the orders of this Court for nearly five months during the proceedings in the trial Court. On behalf of the respondent my attention has been drawn to the fact that the wife had unsuccessfully applied for realisation of the arrears on 31st October, 1960 in the Court below. This is true but as is clear from the record the learned Judge, instead of deciding that petition with due promptitude, deferred his decision on it till after the termination of the proceedings and then rejected it on the ground that the main proceedings having terminated no order for payment of arrears of maintenance could be made by him. In this connection it would be instructive to draw the attention of the Court below to the following observations by a Division Bench of this Court in *Shrimati Malkan Rani v. Krishen Kumar* (1):—

“Now section 24 of the Hindu Marriage Act empowers the matrimonial Court to

(1) I.L.R. (1960) 2 Punjab 566:1960 P.L.R., 575.

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make an order for maintenance *pendente lite* and for expenses of proceedings to a needy and indigent spouse. The object and purpose of this statutory provision obviously is to enable the Court to see that the indigent spouse is put in a financial condition in which the party concerned may produce proper material and evidence in the case. The intention of the Legislature in enacting this provision is to see that a party is not handicapped in or prevented from bringing all the relevant facts before the Court for decision of the case because of his or her poverty. Now in the Punjab no counsel can appear in Court without previously getting his fee or remuneration. Other litigation expenses have also to be incurred during the proceedings. Similarly *pendente lite* maintenance allowance is to be utilized during the pendency of the litigation and not afterwards. If these amounts are not made available to the applicant under section 24 of the Hindu Marriage Act immediately, then its object and purpose will stand defeated. The relations between the two spouses in a litigation under the Hindu Marriage Act are likely to be hostile and the spouse who has to pay litigation expenses is likely to be unwilling to pay these amounts and may even adopt dilatory tactics in the matter. In the circumstances it is obvious that realisation of this amount by taking execution proceedings in accordance with the provisions of the Code of Civil Procedure must plunge the indigent spouse into

another lengthy and unpleasant litigation and what is more, the matrimonial Court will find it difficult, if not impossible, to decide the case satisfactorily or expeditiously. It will result in denial of justice to the person in whose favour the order under section 24 of the Hindu Marriage Act has been made."

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A little lower down the Bench further observed as follows:—

"If the defaulter has moved the matrimonial Court for any relief, then it is an obvious step to adjourn the case or to stay further proceedings till he complies with the orders made under section 24 of the Hindu Marriage Act. In England the ecclesiastical Courts provided for such a maintenance and for costs of the defence (*vide Kemp Welch v. Kemp Welch and Crymes* (2)). These Courts take adequate steps including an order staying further proceedings in the case to compel the defaulter to comply with such an order. In *Clarke v. Clarke* (3), the matrimonial Court stayed further proceedings while in *Latham v. Latham and Gethin* (4), the Courts refused to make a *nisi* decree absolute. There is no reason why this power cannot be exercised in such circumstances in this country also."

In my view, therefore, the Court below did not realize the importance of the payment of maintenance *pendente lite* to the wife and seriously erred in not insisting on payment before finally

(2) 1910 P. 233.

(3) 1891 P. 278.

(4) 164 E.R. 1011.

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disposing of the petition under section 10 of the Hindu Marriage Act. In any case, the order granting maintenance at the rate of Rs. 50 per month could also have been executed by the Court below by virtue of section 28 of the Act. In the Division Bench case just quoted, it was ruled that section 28 gives to a party a right to recover such an amount by taking execution proceedings but it does not affect the Court's power to exercise its jurisdiction equitably and in such a manner as to prevent abuse of its process. However, since the order dated 19th November, 1960 disallowing the wife's prayer has become final, as it was not appealed against, nothing more need be said about it.

Regarding the precise question before me, on behalf of the wife it has been urged that the amount of maintenance should be ordered to be paid from 28th of June, 1960 up to date. It is contended that the appeal being a continuation of the original proceedings, the operation of the order, dated 2nd May, 1960 continues in spite of the termination of the proceedings in the trial Court and should be ordered to be implemented by this Court in the present appellate proceedings in the same manner in which the Court passing the order would have done. On behalf of the husband, however, Shri Manchanda has contended that the previous order only lasted till the termination of the proceedings in the court of first instance. In support of his contention he has drawn my attention to *Mst. Mukan Kanwar v. Ajit Chand* (5), where it has been laid down by Modi, J., that an order for temporary alimony passed by the superior court under section 24 pending the suit of the wife in the trial Court enures during the life of the suit in the trial Court only and cannot survive it, and in case the wife files an appeal against the decision of the

trial Court in the suit against her, she must file an independent application for the grant of the relief of alimony which she seeks during the pendency of the appeal.

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I have devoted my most anxious thought to the arguments advanced at the Bar. In *Lachmeshwar Prasad Shukul and others v. Keshwar Lal Chaudhari and others* (6), it has been observed that under the procedural law of India the hearing of an appeal is in the nature of re-hearing, but this observation appears to me to have been made in support of the position that the appellate Court is entitled to take into account even facts and events which come into existence after the decree appealed against. Legislative changes, since the decision appealed against had been given, were on the basis of this view taken into account in the reported case. In *Mst. Rewati v. Chiranji Lal* (7), Manroe and Abdur Rahman, JJ., ruled that in India an appeal cannot be regarded to be a re-hearing of the suit itself, though an appeal may for certain purposes be considered to be a continuation of the suit. It may be stated that the learned Judges of the Lahore High Court were not unaware of the decision of the Federal Court in *Lachmeshwar Prasad's case* (6), for that decision seems to have been brought to their notice during the course of arguments. As at present advised, I think the real position is that an appeal is considered to be in the nature of a re-hearing or a continuation of the suit only for the purpose of moulding the relief to be granted on appeal, and it is only for this purpose that the appellate Court can take into account facts and events which come into existence after the decree appealed against, and indeed the legal position seems to have been so stated by the Supreme Court in *Chunilal Khushaldas Patel v.*

(6) A.I.R. 1941 F.C. 5.

(7) A.I.R. 1944 Lah. 29.

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H. K. Adhyaru and others (8). The Supreme Court also, in this connection, relied on the decision of the Federal Court in *Lachmeshwar Prasad's case* (6).

But this apart, the precise question which arises for consideration before me is somewhat different. The question posed is: whether the order passed by a learned Single Judge of this Court on 2nd May, 1960, on appeal enures during the period of the present appeal as well? Now it is not disputed that the expenses allowed by the earlier order were only for the proceedings in the trial Court and they did not cover the expenses for the present appeal proceedings, and, as a matter of fact, the prayer made by the wife in this Court now also appears *prima facie* to support this view. If, therefore, the proceedings, of which the expenses are to be allowed by the Court, are the proceedings in the trial Court only and not of the proceedings on appeal, then the sum payable by way of maintenance "*pendente lite*" during the proceedings would similarly appear *prima facie* to relate and be confined to the proceedings in the trial Court only. The operative duration of the maintenance order would thus appear to terminate with the termination of the trial proceedings. It is, in my opinion, permissible to presume that in the interest of harmony and certainty the draftsman uses the same words in a section in the same sense unless there is a sufficiently plausible reason to hold to the contrary. No such reason has been suggested on behalf of the wife. The word 'proceedings' occurring more than once in section 24 should, therefore, in my view be held to have been used by the Legislature in the same sense with the result that in the instant case the sum of Rs. 50 per month should be held to be payable only during the pendency of the proceedings in the

(8) A.I.R. 1956 S.C. 655.

trial Court. It is, of course, open to the wife to apply to this Court under section 24 read with section 21 of the Hindu Marriage Act and section 107 of the Code of Civil Procedure for maintenance *pendente lite* in so far as the appellate proceedings are concerned, and indeed the wife has filed the present application for that purpose. The amount fixed by D. K. Mahajan, J., affords a safe basis or guide for fixing the same amount now; nothing convincing having been urged against it. The contention that the financial position of the husband has since changed has not been substantiated. Mere statement at the Bar, as already opined by me earlier is not enough.

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Shri Manchanda has then contended that this amount should only be ordered to be paid from the 2nd of May, 1961, the date of her application in this Court. It is emphasised that though her petition in this Court is dated 20th April, 1961, it was actually filed in the High Court on 2nd May, 1961. On behalf of the wife, except for the submission that the amount should be ordered to be paid with effect from 28th of June, 1960, a contention with which I have not been able, as at present advised, to agree, no other date has been suggested from which the payment of the amount of maintenance *pendente lite* on the present application should be ordered to commence. I would, therefore, direct that Dr. Tarlochan Singh should pay to Shrimati Mohinder Kaur the sum of Rs. 50 per month with effect from 2nd May, 1961, during the pendency of the present appeal (First Appeal from Order No. 20-M of 1961).

As laid down in *Shrimati Malkan Rani's case* (1), the amount of expenses as well as of maintenance up to date must be paid before the appeal is heard. As soon as the amount has been paid by

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Dr. Tarlochan Singh to Shrimati Mohinder Kaur, both the parties should inform the office about the payment, and then the appeal should be set down for hearing.

For the foregoing reasons this petition is allowed in the terms mentioned above. There would, in the circumstances, be no order as to costs of Civil Miscellaneous 936 of 1961.

B.R.T.

APPELLATE CIVIL

Before A. N. Grover, J.

BHARAWAN BAI AND OTHERS,—Appellants

versus

LILA RAM,—Respondent.

Regular Second Appeal No. 263 of 1957

1962

August, 6th

Hindu Marriage Act (XXV of 1955)—S. 4—Suit for restitution of conjugal rights—Whether lies in the Civil Court in the ordinary way.

Held, that the jurisdiction of the regular Civil Courts to entertain suits regarding matters which have been specially provided for in the Hindu Marriage Act, 1955, has been taken away under section 4 of the Act. Consequently a suit for restitution of conjugal rights is not entertainable by the Civil Courts in the ordinary way and that it can be instituted only in accordance with the provisions contained in the said Act and before the forum provided by that Act.

Second Appeal from the decree of the Court of Shri Madan Mohan Singh, Additional District Judge, Hissar, dated the 18th day of January, 1957, reversing that of Shri Ram Pal Singh, Sub-Judge, 1st Class, Hissar, dated the 31st July, 1956, and granting the plaintiff a decree for restitution of conjugal rights against Bharawan Bai, defendant