

ivan Erasmus Vs. Mrs. Zena Erasmus

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Court : Allahabad

Decided On : Jan-11-1982

Reported in : AIR1982All194

Judge : Deoki Nandan, J.

Acts : [Divorce Act, 1869](#) - Sections 36 and 41; [Hindu Marriage Act, 1955](#) - Sections 24 and 26; Allahabad High Court Rules, 1952 - Rule 6

Appeal No. : First Appeal Nos. 362 and 449 of 1981

Appellant : ivan Erasmus

Respondent : Mrs. Zena Erasmus

Advocate for Pet/Ap. : P.N. Khare, Adv.

Judgement :

Deoki Nandan, J.

1. This and the connected appeal both arise from an order dated 29th Sept., 1981 of the court of the IVth Add), District Judge, Allahabad awarding maintenance pendente lite to the respondent wife at the rate of Rs. 600 per month under Section 36 of the [Divorce Act, 1869](#) (hereinafter referred to as the 'Act') in a suit for divorce instituted by the appellant against the respondent. The suit was filed on 13th Dec. 1978 and the application for maintenance pendente lite was made on

14th Jan. 1979. The order under appeal declares that the respondent is entitled to recover the sum of Rs. 19,800 by way of alimony pendente lite from Jan. 1978 up to Sept. 1981, on 29th day of which the order under appeal was passed. The year, 1978 specified in the order appears to be a mistake for the year 1979, for the amount of Rupees 19,800 works out to be maintenance for 33 months at the rate of Rs. 600 per month and that would cover the period Jan. 1979 to Sept. 1981 both inclusive.

2. The husband, who is the petitioner for divorce in the lower court is the appellant in this court in the main First Appeal No. 362 of 1981. After service of notice of that appeal the respondent wife has preferred the connected First Appeal No. 449 of 1981 claiming that in fixing the amount of maintenance the court below has ignored the requirement for maintenance of the minor daughter Nancy and that the order under appeal may be modified by enhancing the amount of maintenance to Rs. 1,000 per month which was the amount claimed in the application for maintenance in the court below, and also to award special costs.

3. A stay application was made when the appeal was presented before me. While directing issue of notice of the appeal and the stay application I had fixed 16th of Dec., 1981 for the hearing of the appeal as well as the stay application and had passed the following interim order :--

'In the meanwhile, the execution of the order appealed from shall remain stayed provided the appellant remits by crossed bank draft payable to the respondent at her address, the sum of Rs. 3,600 within one month from today and continues regularly to pay the sum of Rupees 300 per month for the period commencing (from) 1st Oct., 1981 by the 15th day of the month following that for which it is due, by money order directly to the respondent during the pendency of the divorce proceedings between the parties. In case of default in compliance with either of these conditions, the stay order shall stand discharged automatically and the divorce proceedings in suit No. 177 of 1978 of the District Court, Allahabad shall remain stayed so long as the above conditions are not complied with by the appellant.'

4. Having heard learned counsel for the parties and having examined the material on the record I have come to the conclusion that the said interim order should be made absolute not only for the duration of the appeal in this Court but also as the proper order which should have been passed under Section 36 of the Act by the trial Court for the duration of the divorce suit before it.

5. I must at the outset make it clear that an order under Section 36 of the Act, does not decide the rights of the parties. It is meant only to enable an indigent wife to maintain herself until final orders are passed on the original petition for divorce or judicial separation or other matrimonial relief. The object is to enable the wife to live, and to defend and prosecute the case until the rights of the parties are finally decided by the court. The order is of a summary nature and meant to advance the cause of justice as an order passed in aid of the final orders adjudicating the rights of the parties on the original petition for divorce or Judicial separation or other matrimonial relief. An order under Section 36 of the Act is an interim order which lapses with the final decision of the original suit, An order of similar nature passed under Section 24 of the Hindu Marriage Act is not even appealable under Section 28 of that Act as it now stands after the amendments made by the Matrimonial Laws (Amendment) Act, 1976, although under the [Divorce Act, 1869](#), the order continues to be appealable under Section 55 thereof.

6. Looking at the nature of the order under Section 36 of the Act and the object of passing it the first thing which struck me was that the order of the lower court directing the husband to pay Rupees 19,800 as arrears of maintenance pendente lite tended to defeat rather (than) to advance the object for which it was passed. The object and the purpose of an order under Section 36 of the Indian Divorce Act is not to settle old scores between the parties but to advance the cause of justice and to put an indigent wife into funds for a speedy and proper adjudication of the dispute raised by the original petition for divorce or judicial separation or other matrimonial relief, Instead of advancing that object or purpose, the direction to pay Rs. 19,800 tends to obstruct it, for, the appellant husband's say is and there is evidence in support of his assertion, that he is out of regular employment and cannot possibly pay that amount. Non-payment of the amount of maintenance pendente lite by the husband normally leads to a stay of the original petition for

divorce or judicial separation or other matrimonial relief, where the husband is the petitioner. It may even lead to execution proceedings for recovery in case the husband is recalcitrant. Thus, although a court has the jurisdiction to order payment of maintenance pendente lite from the 'date of the making of an application for the same, the court should, before fixing the date from which the amount of maintenance pendente lite is to be paid, take a reasonable and practical view of things rather than to act mechanically. One consideration in directing the payment of arrears is the indebtedness of the wife for necessities obtained by her during the pendency of such an application. In a case where it is not shown that the wife had to borrow money for obtaining the necessities of her life, an order for past maintenance pendente lite should not normally be passed. In the present case there was nothing to show that the wife had run into debts for obtaining the necessities of life during the long period of 33 months which elapsed between the making of her application and the passing of the order for maintenance pendente lite. It is regrettable that court proceedings even of this nature do some times take all this long to be disposed of by our courts, but even in a case where the blame for the delay could be put on a party, justice in these matters had to be remedial and not retributive; and in a case where the blame for the delay cannot be put on either of the parties but has to be put on the system, and must, therefore, be shared by the court also, a party cannot be loaded with an order for payment of a large sum of the kind that was passed in this case, simply because the wife's application for maintenance pendente lite took the long period of 33 months to be disposed of. The amount of Rs. 3,600 which was fixed by me by my interim order dated 16th Oct., 1981 was required to be paid by bank draft to the respondent wife within one month from the date of its passing. I am informed that the amount has been paid. This leads me to think that the amount fixed was such as the husband could reasonably pay.

7. As to the amount of monthly maintenance fixed by the lower court, it appears that the sum of Rs. 300 per month was fixed for the wife's own maintenance and the sum of Rs. 150 per month each for the maintenance of the two minor sons Terrance and Kavin. So far as Section 36 of the Act itself is concerned, it does not provide for payment of maintenance pendente lite for the children. It speaks of payment of alimony pendente lite to the wife only. So far as children are

concerned a provision for their custody, maintenance and education etc., could be made under Section 41 of the Act. So far as the daughter Nancy is concerned, it was said in the application that she was studying in La Martinier Girls School at Lucknow as a boarder and it appears that the expenses of her education and board were being met by the husband when the application was made in the lower court. From the wife's affidavit filed in support of an application made in this Court and in support of the connected appeal praying for enhancement of the maintenance allowance, it appears that the husband did not put Nancy back into the School in Jan. 1979, nor did he assure payment for the continuance of her education, although the husband's mother paid Rs. 25 towards the fee, and in response to a letter received from the School, the wife met the principal of La Martinier Girls School, Lucknow, and was able to persuade her to grant free-ship to Nancy. From the other facts stated in the affidavit it does not appear that the wife has to pay for the maintenance or the education of Nancy.

8. As for the two sons Terrance and Kavin for whom payment of the allowance of Rs. 150 each was ordered by the court below, it was stated in the affidavit filed in support of the stay application in this Court that Terrance was getting education and maintenance in Don Bosco School at Bombay and was being financially assisted by the husband's mother and that the other son Kavin was also being maintained by the husband's mother by sending Rs. 200 per month. In the counter-affidavit, it is said that the husband sent Rs. 200 per month in the year 1980 for the maintenance and the education of the two sons and that in January, 1981 Terrance was lodged in the Don Bosco School at Bombay. In this way the sending of Rs. 200 per month by the husband's mother to the wife for the maintenance of the boys has not been denied.

9. From the aforesaid facts, it appears to me that the education and maintenance of all the three children is being properly looked after by the husband and there was neither any occasion for placing either of the three children in the custody of the wife or to make an order for their maintenance and education. The direction for payment of Rs. 150 per month each for the maintenance of Terrance and Kavin who were, at the time when the application was made living with the wife, does not appear to be justified, at any rate on the facts as they stand at present. The

learned Judge of the court below, appears to have ignored the fact that the sum of Rs. 200 was being sent by the husband's mother for their maintenance. Now, Terrance is no longer living under the care of the respondent-wife. He is being educated and maintained by the appellant-husband directly. So far as Kavin is concerned, the amount of Rs. 200 per month sent by the appellant-husband's mother should be more than sufficient for his maintenance and education but in case there is any difficulty, there is nothing to prevent respondent-wife from asking the husband to take him away also if she cannot properly look after him. It also appears to me that an order for the maintenance and education of a minor child under Section 41 should not ordinarily be passed unless it is coupled with an order for the custody of the child.

10. In the application made for enhancement of amount of maintenance in support of the connected appeal a prayer was also made for an order directing the husband to pay Rs. 2850 as 'balance of fee of the counsel who has been conducting the suit since 1978' in addition to 'sufficient cost for conducting the two appeals' in this Court. It appears from the order under appeal that the sum of Rs. 1,500 had already been ordered to be paid and had been paid by the appellant husband to the respondent-wife for her expenses of the defence of the suit. And so far the only progress made in this suit appears to have been the disposal of the application for maintenance pendente lite. The claim of the learned counsel for Rs. 2,850 as fee is extraordinary and, if I may say so, exorbitant. The maximum fee which could be allowed to counsel on taxation of costs in matrimonial suits and appeals is, according to the Rules of Court, 1952, Chap. XVI, Rule 6, Rs. 200 in an undefended case, Rs. 375 up to the end of the first date of hearing in a defended case and Rs. 200 for each succeeding day or part of a day, such part being of not less than one hour's duration. The case does not appear to have been heard so far by the trial court and the appeal in this court is not an appeal from any decree but is merely an appeal from an order. The amount of Rs. 1,500 already paid in the court below for the expense of the proceedings is, in my opinion quite sufficient to cover the expenses properly incurred by the respondent-wife up to the end of the case. I may in this context observe that the making of repeated applications of the kind that have been made in this case in the court below only confound and delay the proceedings. The parties would be well advised to have

the main case heard and decided as early as practicable rather than to endlessly go on litigating on interim matters as they have been doing so far in the court below.

11. I have to add that the cases cited by the learned counsel for the wife, in this Court, were all of them besides the point and irrelevant in that sense, I have, therefore, not referred to or discussed them in this judgment.

12. In the result I allow the husband's First Appeal No. 362 of 1981 and set aside the order dated 29th Sept. 1981 of the court of the IVth AddX District Judge, Allahabad. Instead it is ordered under Section 36 of the Divorce Act that the appellant husband shall pay Rs. 300 per month from 1st Oct. 1980 as maintenance pen-dente lite to the respondent-wife during the pendency of the Matrimonial Suit No. 177 of 1978 of the court of the District Judge, Allahabad, at present pending trial in the court of IVth Additional District Judge, Allahabad. The First Appeal No. 449 of 1981 is dismissed. The application made on 2nd of December, 1981 by the respondent-wife for enhancement of the maintenance pendente lite is also dismissed. The amount of Rs, 3600 as maintenance pendente lite for the period of one year up to 30th Sept. 1981, has already been paid by the husband under the interim order of this Court dated 16th Oct., 1981. Maintenance for the subsequent period has been and shall continue to be paid in accordance with the directions contained in that interim order dated 16th Oct. 1981, which is quoted in the body of this judgment, during the pendency of Suit No. 177 of 1978 in the District Court.

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