

Amit Kumar Sharma Vs. ViThe Additional District and Sessions Judge, Bijnor and Others

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Court : Allahabad

Decided On : May-08-1998

Reported in : 1998(4)AWC490; II(1998)DMC608

Judge : D.K. Seth, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13, 24, 25 and 26; [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 20; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125

Appeal No. : C.M.W.P. No. 13330 of 1998

Appellant : Amit Kumar Sharma

Respondent : ViThe Additional District and Sessions Judge, Bijnor and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : V. Singh and ;J.P. Chauhan, Adv.

Judgement :

D.K. Seth, J.

1. Mr. V. Singh. learned counsel for the petitioner in this writ petition, has raised a very Interesting question of law. According to him. Section 24 of the Hindu Marriage Act does not postulate grant of maintenance to any person other than the wife of the husband. According to him, the very scheme of the Section indicates that the maintenance is available either to the wife or to the husband, as the case may be. according to the provisions contained therein. This cannot be stretched to grant maintenance in a proceeding under Section 24 of the Hindu Marriage Act to the children.

2. Secondly, he contended that the provision of Section 24 cannot be referred to for the purposes of obtaining maintenance for the mother-in-law of the respondent wife on an application under Section 24 of the Hindu Marriage Act. According to him by no stretch of imagination, mother of the husband could be brought under the purview of Section 24 of the said Act filed by the wife for the purposes of grant of maintenance.

3. For the purpose of deciding the issue, it is necessary to mention the following facts giving rise to the present writ petition- The petitioner-husband filed O.S. No. 60 of 1995. under Section 13 of the Hindu Marriage Act against the opposite party No. 3. wife, for divorce before the Additional Civil Judge (Senior Division), II, Bijnor. In connection with the said proceedings, the wife had filed an application under Sections 24 and 25 of the Hindu Marriage Act claiming maintenance for herself and two minor children aged about 3-1/2 years and 6 years and ailing mother of the husband on the ground that she is looking after the mother of the husband and spending around Rs. 1.200 per month on account of her treatment. This application was allowed by an order dated 25th January, 1997 in Misc. Case No. 44 of 1996.

4. The said order dated 25th January. 1997 was challenged by means of appeal being Misc, Appeal No. 26 of 1997. By an order dated 30th May, 1997 the Additional District Judge. VIIIth Court. Bijnor, had dismissed the said appeal and the order of learned Additional Civil Judge, Senior Division II passed on 25th January, 1997 was affirmed. These two orders are being challenged in this writ petition.

5. A reading of the order passed by the learned Civil Judge. Senior Division shows that the maintenance of sum of Rs. 3,000 was granted along with cost of litigation of Rs. 1,500 for the maintenance of the wife, two children and her mother-in-law. The appellate court had affirmed the said order which included the maintenance of mother of the husband.

6. The wife had alleged that the husband has been working in the Police Department and drawing a salary of Rs. 4,200 per month and he is also owner of a Maruti Car No. DL 2-C 3108 which is operated as Taxi by the husband by which he earns about Rs. 7,000-8,000 per month therefrom. She also alleges that the husband is also owner of a truck from which he earns about Rs. 17,000-18,000 per month. Thus he earns more than Rs. 21,000 per month. On these allegations the Courts had come to the finding that a sum of Rs. 3,000 should be granted as maintenance. Both the Courts have found that the husband did not disclose his own income and did not controvert the allegations made by the wife.

7. [have heard Shri Singh at length and have also heard Sri V. K. Rai brief-holder appearing for the learned standing counsel who assisted the Court since this matter involves questions of law.

8. Learned counsel for the petitioner Mr. Singh did not dispute the finding by both the Courts that the husband did not disclose his income nor, had disputed the factual allegations made by the wife in the application under Section 24 of the said Act. However, he has insisted on legal proposition as indicated above.

9. Mr. Singh also contended that no application under Section 25 could be maintained and no order under Section 25 could be made during the pendency of the proceedings. Such order can only be made at the time of passing the decree. Therefore, according to him, the Courts below could neither invoke the provisions of Section 25 nor the wife could file the application under Section 25.

10. Section 25 of the Hindu Marriage Act clearly lays down that the Jurisdiction under Section 25 can be exercised 'at the time of passing any decree or at any time subsequent thereto'. The very expression referred to above indicates that no application under Section 25 could be decided except at the time of passing of the

decree. However, this section does not make the provision attracted during the pendency of the proceedings but the Court assumes jurisdiction to decide such application only at the time of passing of the decree. The Court may exercise its jurisdiction even after the decree is passed if such an application is made for such purposes either by the wife or by the husband. Therefore, Section 25 can be Invoked only at the time of passing the decree or thereafter.

11. Now the application which was described as an application under Section 24 and Section 25 of Hindu Marriage Act can very well be treated to be .under Section 24 till the time of passing the decree and so far as the claim made in the said application with regard to Section 25 is concerned, the same can be determined at the time of passing the decree. The said application can be segregated into two phases. Inasmuch as before the decree is passed. It is not necessary that an application has to be made before the Court for such purpose though it is mandatory that such an application is to be made after the decree is passed. But then it is not necessary to go into this question. Still it is open to the wife to make such application even before the decree is passed and which may be decided accordingly. Therefore, it is not necessary to go into the question at this stage whether the disposal of the application under Section 24 and Section 25 of the said Act could prevent the petitioner's wife from making such an application, since the Court has no jurisdiction to decide such an application except at the time of passing the decree. In that event, the dismissal of such an application cannot affect the question of Section 25 that might crop up at the time of passing the decree. Thus scope of Section 25 is still open to the wife if she is so advised.

12. It is a settled principle of law that any description of the petition does not determine the character of the petition. It is the content and the substance and the relief sought will determine the character of an application. In this case wife had prayed for maintenance during the pendency of proceedings for herself, minor children and her mother-in-law (mother of the husband). Therefore, the Court did not commit any illegality in deciding the said application as an application under Section 24 of the said Act and treating the same as such.

13. Now the question whether the mother can be brought into the purview of Section 24 of the said Act may be taken up first. Section 24 provides as follows :

'Where in any proceeding under this Act it appears to the Court that either the wife or the husband as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner, the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.'

14. A plain reading of the Section shows that it contemplates maintenance either to the wife or to the husband. It does not include maintenance either for the children or the mother of the husband. Whether the children would be entitled or not would be examined later on. At the moment, it is clear from Section 24 that the provisions thereof apply for the purpose of securing maintenance to the wife or the husband. The maintenance under the Hindu Marriage Act is available to the parties to the proceedings with regard to the lis involved. The lis is confined to the extent of marriage between the wife and the husband. There cannot be any lis for the mother in respect of the proceedings between the husband and wife Involving their marriage. The mother is in no way connected with the lis relating to the marriage between the husband and the wife and, therefore, the provisions of Section 24 can never be stretched to include the maintenance of the mother in a proceedings under Section 24 of the Hindu Marriage Act.

15. Admittedly Section 125 of the Code of Criminal Procedure is available to the parents against a neglecting child. Thus a mother can enforce her right of maintenance through Section 125, Cr. P.C. She is also entitled for maintenance through Section 20 of the Hindu Adoptions and Maintenance Act, which also provides a right to the parent to recover maintenance from neglecting children. Both Sections 125. Cr. P.C. and Section 20 Hindu Adoptions and Maintenance Act are regarding maintenance of parents by neglecting children. There is an alternative remedy available, the Hindu Marriage Act being non-applicable in respect of securing such maintenance by parent, the maintenance of the mother-

in-law (mother of the husband) cannot be brought under the purview of the Section 24 of the said Act.

16. However, Mr. P. K. Rai tried to stretch the meaning of Section 24 by seeking to make out a point that the maintenance of the wife would include the maintenance for the mother-in-law on the ground that they are living together, the wife cannot allow the mother-in-law to starve while feeding herself. Similarly the wife cannot deprive the children from education while maintaining herself alone with the maintenance provided by the husband. The child is a part of the mother's own existence and similarly she cannot allow the ailing mother-in-law to die without treatment while keeping herself alive.

17. The submissions made by Mr. Rai is very attractive and is also supported by Indian Social Culture and Tradition. It is an admitted fact that the Indian social fabric involves maintenance of the parent with religious scruples and devotion but then the Court is called upon to interpret the law and not the religious and social duties. So far as the social or religious duties are concerned, the law provides therefor through Section 125, Cr. P.C. and Section 20 of Hindu Adoptions and Maintenance Act. Therefore, it is not a question of absence of law. When there is specific provision of law on the basis of religious scruples or social system, it would not be permissible to stretch Section 24 to the extent of taking the place of Section 125, Cr. P.C. and Section 20 of Hindu Adoption and Maintenance Act nor it can overlap the said section. As the observation made earlier. Section 24 does not postulate the scope of granting maintenance to the mother of the husband even when she is ailing and lives with the wife. Thus so far as the inclusion of mother-in-law of the wife within the ambit of grant of maintenance is concerned, cannot be sustained.

18. Now. the question with regard to maintenance of children may be taken up. Admittedly Section 24 does not postulate the maintenance of children specially within the scheme of the said section. A section cannot be interpreted out of context of the scheme of the Act itself. For the purpose of interpretation of the section, the scheme of the Act may be considered. Now admittedly if the children are minors and they are from out of the wed-lock. then it is within the lis of

marriage since the children are the out-come of the marriage. Therefore, it cannot be said that the children are out of the scope of marriage and cannot be contemplated as subject-matter within the lis with regard to their wellbeing. Section 26 provides for the custody, maintenance and education of the children. It is also one of the aspect that has been included within the ambit of the Act itself to provide for custody, maintenance and education of the child. Thus, in any proceeding relating to marriage, the questions of custody, maintenance and education of the children are very much part of the lis.

19. As rightly contended by Mr. Rai. the children are part of the existence of the mother, it is not only socially and culturally true but also medically and physically true. Inasmuch as the children really live in the womb of the mother for 9 months and the existence of the children is developed out of the own existence of the mother. So long the child is not born, it is part of the mother even physically. Even after the birth, the child cannot sustain without the mother. Thus, the baby remains the part of the mother. At the same time, it is preposterous to think that the mother would be feeding herself with the maintenance provided to her keeping the children unfed, starved and uneducated. It is the bounden duty of the mother to bring up the child as best as she could be able to do. It is also a psychological structure of the mental spirit of the mother to look after the wellbeing of the children before her own self. It is not unknown and is very common that the mother had sacrificed her own life for the sake of the children. It is preposterous for the mother' to think that if the law does not provide maintenance for the children, therefore, the mother should maintain herself without maintaining the children. Law is meant for the society and society is not meant for law. Law is meant for the wellbeing of the society itself. The Act itself has provided for the wellbeing of the child as provided in Section 26. Therefore. It seems that we can stretch Section 24 to what Mr. Rai wanted to stretch even without the existence of Section 26 of the Act. But then such an interpretation is supported by the very existence of Section 26 which itself goes to support the view as to why the wife should maintain the child as well. Keeping such a situation in view, the Legislature has provided in Section 26 for the custody, maintenance and education of child.

20. While reading Section 24 in the context of the scheme of the Act having regard to Section 26, it presupposes that the maintenance as contemplated under Section 26 can very well be Included and prayed for within the ambit of Section 24 of the said Act. Inasmuch as Section 26 provides two situations in which the same can be involved in the first phase. Section 26 postulates :

'In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible.....'

21. Thus, the above provision makes it clear that the Court has power to make provision for custody, maintenance and education of minor children either by way of interim order or by way of provision made in the decree. If the Court may have power by way of interim order, it can very well do it while deciding the application under Section 24 of the Act. Section 26 as far as this fact is concerned does not postulate that such order, interim or otherwise, can be made only upon the application being made for the purpose. The expression 'as it may deem just and proper' connotes that the Court may pass an order if it thinks just and proper, even by way of interim measure without requiring the necessity of making of an application for the purpose by any of the party. It is the duty of the Court to make such provision for the minor children as it may deem just and proper. It is also incumbent to look into the wellbeing of the children as far as possible. Section 26 makes it incumbent upon the Court to exercise such discretion on the basis of facts and circumstances of the case with regard to the custody, maintenance and education of the children.

22. Therefore, when deciding the application under Section 24 of the said Act, the Court has every jurisdiction to include the children for their maintenance and education and make adequate provision for the purpose while granting maintenance to the wife under Section 24.

23. So far as the question that such provision can be made even when application is supported by reason of framing of Section 26 which deems a Stage subsequent to the decree. For the custody maintenance and education of the children is

concerned, it is for the Court to make provision even after the decree is passed. But such provision can be had only on the basis of an application. It is making two distinct and separate compartments with regard to the stage before the passing of the decree and subsequent thereto. It is evident by the two stages one up to the decree and other after the decree. So far as the stage prior to the decree, the Legislature did not indicate that the jurisdiction under Section 26 is to be exercised only upon an application. Whereas in respect of the stage after the decree, it had indicated that such provision can be availed of only through an application. When one section confers two stages. Legislature deliberately omitted the requirement of making application at one stage. Therefore, it cannot be said that exercise of jurisdiction under Section 26 till the decree is passed is dependent on an application as is the case after the decree is passed. This is also supported from the very expression used in Section 24 which is also invoked through an application as is expressed in the said section to express 'it may. on the application of wife or the husband'. Therefore, when Section 24 postulates making of an application and Section 26 is divided in two stages and required making of an application at the second stage, it can safely be interpreted that no application is necessary for the first stage.

24. If no application is necessary for the custody and maintenance of the children under Section 26 when it is within the first stage, then it can very well be exercised under Section 24, while making provision for the wife's maintenance which will include the maintenance and education of the children.

25. In the case of *Smt. Jasbir Kaur Sehgal v. District Judge, Dehradun and others*, 1997. (7) SCC 7, the Apex Court while dealing with similar question had held that under the Hindu Adoptions and Maintenance Act. 1956, it is the obligation of a person to maintain his unmarried daughter if she is unable to maintain herself. In this case since the wife has no income of her own. It is the obligation of the husband to maintain her and her two unmarried daughters, one of whom is living with his wife and one with him. Section 24 of the Act no doubt talks of maintenance of the wife during the pendency of the proceedings but this section cannot be read in isolation and cannot be given restricted meaning to hold that it is the maintenance of the wife alone and no one else. Since the wife is maintaining the

eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter. This fact has to be kept in view while fixing the maintenance pendente lite for the wife. We are aware of the provision and Section 26 of the Act providing for custody of minor children, their maintenance and education but that section operates in its own field.

26. The view taken by the Apex Court in the above case supports the view which I have taken in this case.

27. Therefore, I am unable to agree with the contention of Mr. V. Singh. In my view, the maintenance of the children could very well be included within the ambit of Section 24 of the said Act.

28. Mr. Singh had relied upon two decisions in support of his contention. The first one is Bankim Chandra Roy v. Smt. Anjali Roy. AIR 1972 Pat 80, while interpreting scope of Section 24. It has been held that the maintenance of children are not within the scope and ambit of Section 24. It had observed in paragraph 3 of the said judgment as follows :

'Coming to the merits of the orders. I find that the learned Judicial Commissioner has allowed maintenance to the wife not only for her support but also for the support of her three children all of whom are above the age of 10. Ordinarily she would not be entitled to their custody. But that apart let me read Section 24 of the Act-

'Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be has no Independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.' It would thus be seen that an order can be made if the petitioner has no independent Income sufficient for her or his support. No monthly allowance can be granted under Section 24 for the support of the children. That being so, the grant of monthly allowance of Rs. 325 not only for

the support of the respondent but also for the support of the three children is contrary to law and has been made by committing an illegality in exercise of the jurisdiction of the Court under Section 24 of the Act.'

29. A reading of said Judgment shows that the said judgment had proceeded only on the plain reading of the provision contained in Section 24 of the Act. It did not examine the scheme of the Hindu Marriage Act. Neither it had considered the Impact and implication of Section 26 of the Act. The mere reasoning given in support of the view taken is on the basis of a plain reading of Section 24 of the said Act. Be that as it may. In view of the discussions made above. I am unable to persuade myself to agree with the reason given in the said decision where it has been held that Section 24 does not Include maintenance of the children. The Judgment of the Patna High Court was delivered by a learned single Judge. Admittedly the decision of an other High Court has persuasive value but it is not binding.

30. For the foregoing reasons, I am unable to persuade myself to agree with the connection of Mr. Singh as discussed hereinbefore.

31. The next judgment relied upon is in the case of Puran Chand v. Mst. Kamla Devi. AIR 1981 J&K; 5, wherein similar view was taken by a learned single Judge. In the said judgment it was observed :

'Section 24 of the Hindu Marriage Act reads thus :

'Where in any proceeding under this Act it appears to the Court that either the wife or husband, as the case may be, has no Independent Income sufficient for her or his support and the necessary expenses of the proceeding. It may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as. having regard to the petitioner's own income and the Income of the respondent, it may deem to the Court to be reasonable.' On a plain Interpretation of this Section, a child born out of the wedlock between litigating husband and wife is not entitled to maintenance pendents lite. Such maintenance can be granted in favour of the wife or the husband as the case may be. The maintenance is to be allowed on

monthly basis 'during the proceeding'. The words 'during the proceeding' connote that the maintenance shall be admissible from the commencement till the conclusion of the proceedings in the trial court. The proceedings in the trial court would naturally commence from the date on which the Issues are framed, which is ordinarily known as the first hearing. In the view expressed above, the lower court was not justified in allowing maintenance. Pendente lite in favour of Raj an, the minor daughter of the parties. Nor even in allowing such maintenance in favour of the wife from the date of the filing of the petition.

The Court ought to have disallowed the request for maintenance pendente lite so far as Rajan was concerned, and allowed the same in favour of the wife from the date the issues were struck. Allowing this appeal, I modify the order accordingly. There shall be no order as to costs.'

32. For the reasons similar to one for which I have not been able to persuade myself to agree with the judgment of Patna High Court, I am unable to agree with the judgment of Jammu and Kashmir High Court.

33. Now turning to the merits of the case, it appears that both the Courts had concurrently found that the wife has alleged that the husband has an income of Rs. 4.200 from his salary and further a sum of Rs. 17.000 to 18,000 from his business of plying Taxi and Truck. Insplte of having been given an opportunity, the husband did not come forward denying the allegations and did not produce anything to show that the Income alleged by the wife was Incorrect. If both the Courts accept that the Income of the husband is above Rs. 20,000 since the same is not being controverted by the husband, this Court while sitting in writ jurisdiction cannot interfere with the finding of fact, therefore, the contention that normally 1/5 of the income is to be awarded as maintenance in a proceeding under Section 24 as laid down in various decisions cannot be sustained. Both the Courts below did not believe the income of the husband to the extent of Rs. 4.200. on the other hand both the Courts believed that the husband's income is above. Rs. 20,000 and. therefore. 1/5 of Rs. 20,000 comes to around Rs. 4.000. Whereas the award is only Rs. 3,000 which is less than 1/5th, therefore, it is not necessary to go Into that question. The point so raised by 'Mr. Singh is overruled.

34. Now admittedly if it is assumed that the husband has an income above Rs. 20,000 in that event Rs. 3,000 for the maintenance of the wife and two children is not at all towards the higher side. Having regard to the present cost of living Rs. 3,000 is not even sufficient for maintenance of the wife and the children. Even if the mother of the husband is excluded even then the sum of Rs. 3,000 cannot be reduced.

35. Therefore, I do not find any reason to interfere with the award of Rs. 3,000 as maintenance in the present case though however, the same would be meant for the wife and children and not for the mother of the husband. The order of both the learned Courts below is, therefore, modified to the extent that maintenance is granted for the wife and children to the extent Rs. 3,000 as granted by both the Courts below concurrently. It is open to the mother of the husband to apply for maintenance either under Section 125 or under Section 20 of Hindu Adoptions and Maintenance Act as the case may be or as she may be advised. If such steps are taken, that should be decided in accordance with law without being influenced by any observation made in this order.

36. With the above observation, this writ petition for the foregoing reasons, stands dismissed. However, there will be no orders as to costs.

37. Let a copy of this order be communicated to the Court below by the Registry within 7 days.

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