

Rishi Dev Anand Vs. Devinder Kaur

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Court : Delhi

Decided On : Sep-28-1984

Reported in : AIR1985Delhi40; 1985(8)DRJ30

Judge : Charanjit Talwar, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 24

Appeal No. : Civil Revision Appeal No. 22 of 1984

Appellant : Rishi Dev Anand

Respondent : Devinder Kaur

Advocate for Pet/Ap. : Maehswar Dayal and; M.C. Anand, Advs

Judgement :

Charanjit Talwar, J.

(1) By this petition Sh. Rishi Dev Anand seeks setting aside of an order passed by Sh. Jaspal Singh Additional District Judge, Delhi whereby on an application under Section 24 of the [Hindu Marriage Act, 1955](#) (hereinafter referred to as the Act) by Smt. Devinder Kumar, it was directed that maintenance pendente lite @ Rs. 300.00 per month and also litigation expenses amounting to Rs. 550.00 be paid to her with effect from September 6, 1980, the date of filing of the application.

(2) The husband, petitioner herein, obtained an ex parte decree for divorce under Section 13 of the Hindu Marriage Act, on February 16, 1977. On August 25, 1980, the wife, respondent herein, moved an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside that decree.- During its pendency on September 6, 1980, she moved an application under Section 24 of the Hindu Marriage Act seeking maintenance pendente lite and expenses of proceedings. During the pendency of the present Revision Petition the application for setting aside the decree has since been decided by an order passed on August 27, 1984. That application has been dismissed by Shri R.P. Gupta Additional District Judge, Delhi. The challenge before me is to the earlier order passed on November 9, 1983. In the said order it has been noticed that maintenance pendente lite is to be paid only up to June 3, 1982, because admittedly from the said date the wife is getting maintenance pendente lite under orders of Punjab & Haryana High Court in another proceeding pending inter se between the parties. It is admitted by the respondent that she had been granted Rs. 500.00 per month as maintenance pendente lite and Rs. 1,000.00 towards litigation expense) in those proceedings.

(3) The learned trial court dismissed the objection of the husband that after the passing of the decree of divorce on February 16, 1977, there were no proceedings pending under the Hindu Marriage Act before it and as such the application under Section 24 of the Act was not maintainable. The learned Court after analysing various judgments cited before it by the counsel for parties concluded that none of those authorities was applicable in the present case. However, it was observed that an application under Order 9 Rule 13 of the Code of Civil Procedure is maintainable in view of Section 21 of the Act, and, therefore, the proceedings during its pendency are proceedings under the Act. Mr. Maheshwar Dayal on behalf of the petitioner has contested this proposition. The further submission made by him is that since the petitioner was on medical leave without pay from November 4, 1979, to April 29, 1982, he could not have been directed to pay interim maintenance and litigation expenses as he had no income whatsoever during the relevant period. It was further urged that the dismissal of the application under Order 9 Rule 13 of the Code of Civil Procedure on August 27, 1984, reinforces the fact that proceedings under the Act has culminated on February 16, 1977, and as such the ex-wife, was not entitled to maintenance pendente lite for

the period thereafter.

(4) I have gone through the judgments noticed by the learned trial court which judgments were also cited before me. I agree with the observation that none of them directly deals with the proposition that on an application moved by a spouse for setting aside the ex parte decree for divorce, the proceedings till that application is decided are 'proceedings' under this Act. The word 'proceedings' used in Section 24 is a word of wide import and cannot be said to have a restricted meaning. It has been held in various authorities that the term 'proceedings' in Section 24 is not confined only to substantive proceedings like restitution of conjugal rights, judicial separation, annulment of marriage and divorce proceedings. An application under Section 24 of the Act has been held to be maintainable even in proceedings under Section 25 thereof for permanent alimony and maintenance. It is also maintainable in execution proceedings.

(5) Under the Act no provision has been made for setting aside the ex parte decree. Necessarily, therefore, recourse has to be taken to the provisions of the Code of Civil Procedure for this purpose. If a spouse has to make an application after a decree under the Act has been passed, provisions of Order 9 Rule 13 of the Code in view of Section 21 of the Act are attracted. The question is whether such a spouse, who has no means, is entitled to receive interim maintenance and litigation expenses during the pendency of the application.

(6) An order passed by Avadh Behari J. on an interim application where he took a prima facie view that proceedings under Order 9 Rule 13 of the Code are under the Act, has been brought to my notice. That order was passed in C.M. application No. 1938 of 1978 in a pending Civil Revision Petition No. 654 of 1978. The facts in the said case were that an ex parte decree for divorce on the ground of desertion was passed against the wife on May 7, 1977. The judgment-debtor filed an application on February 28, 1978, under Order 9 Rule 13 of the Code of Civil Procedure for setting it aside. She also filed an application under Section 24 of the Hindu Marriage Act. The trial Court while holding that the application was maintainable ordered the husband to pay a sum of Rs. 100.00 per month as alimony pendente lite and Rs. 200.00 as litigation expenses. The said order is

under challenge in that revision petition. On the application seeking stay of the operation of that order, after hearing counsel for the parties it was observed:

'After hearing .the parties I do not think I should suspend the order of the court below. The wife has made an application under 0.9 Rule 13 Civil Procedure Code for setting aside the ex parte decree of divorce. Under S. 24 of the Hindi Marriage Act, she has to be maintained by the husband. Prima facie I am of the view that this is a proceeding under the Act.....'

(7) I further find that this Court has held that an application under Section 24 of the Act is also maintainable in proceedings for restoration of an application under Section 25 of the Act. (See order passed in C.M. 494 of 1975 in F.A O. 187 of 1974 on April 15, 1975 (Meena Minocha v. H.L. Minocha).

(8) In the view that proceedings under Order 9 Rule 9 of the Code for restoration are proceedings under the Act, it can safely be held that proceedings for setting aside the ex parte decree are also proceedings under the Act. With respect I agree with the prima fade view expressed by Avadh Behari J. in C.M. 1938 of 1978.

(9) The first contention of Mr. Maheshwar Dayal that the application under Section 24 of the Act was not maintainable is thus rejected.

(10) The second contention, however, of the learned counsel has force. It has been found on facts by the learned Trial Court that the husband- petitioner herein who is a salaried person was on medical leave without pay from November 4, 1979, to April 29, 1982. The finding is :

'THE record, of course, goes to show that he was on medical leave without pay for the said period'. The learned Judge then poses a question and holds, 'Does it mean to say that for the period he cannot be burdened with an order under Section 24 The decree-holder husband admits that prior to proceedings on medical leave he was getting about Rs. 1000.00 as salary. He still continues to be employed. His earning capacity was thus Rs. 1000.00 per month.....'.

Mr. Maheshwar Dayal submits that earning capacity of the petitioner when he was on medical leave without pay cannot be made the basis that his income atleast for

that period was Rs. 1000.00 per month.

(11) As noticed above, the order under challenge makes it clear that it is effective for the period from September 6, 1980 i.e., the date on which the application was tiled up to June 3, 1982, the date from which the wife admittedly is getting maintenance pendente lite @ Rs. 500.00 per month under orders of Punjab & Haryana High Court. By this order the petitioner has been asked to pay maintenance @ 300.00 per month for the period he was not getting any salary. It is not the case of the wife-respondent herein that the husband had taken leave to defeat her plea for maintenance pendente lite as on her own showing she came to know about the passing of the decree only in August, 1980. The husband had fallen ill earlier. It was, thereafter, that she moved the application in question. In the present case the husband since June 3, 1982, is maintaining the respondent. It is further admitted that he is maintaining their daughter who is stated to be about 16 years old. His earning capacity has been found by the trial court at Rs. 1000.00 per month as that was his salary per month. But he did not receive that salary. The order directing him to pay for the period when he was ill and without any salary, it appears to me, is not proper. It does not refer to any independent income. Although it is true that normally it is the earning capacity of the husband which is to be kept in view, while granting maintenance pendente lite under Section 24 of the Act, as it is his moral as well as legal duty to maintain his wife, yet the fact that he was incapacitated for some period due to illness cannot be ignored. The fact that during his illness he was maintaining his daughter and also he must be incurring considerable medical expenses cannot be brushed aside. The court below has found that excepting for three months when the wife was away to England she had no sufficient income to support herself. Though I uphold that finding yet keeping in view that the wife has been getting maintenance with effect from June 3, 1982, from the petitioner and also keeping in view the fact that for the earlier period, the husband was on medical leave without pay, I hold that he is not to be burdened with an order to pay maintenance for the prior period.

(12) The result is that while upholding the direction that the wife is entitled to payment of pendente lite maintenance of Rs. 300.00 per month and also litigation expenses of Rs. 550.00 I set aside that part of the order, directing the husband to

pay maintenance for the earlier period, i.e., from September 6, 1980, to June 3, 1982. The expenses for litigation amounting to Rs. 550.00 however would have to be paid by the husband-petitioner herein to the respondent. I order accordingly.

(13) The revision petition is allowed to the extent indicated above. No order-as to costs.

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