

**Debnarayan Halder Vs. Anushree Halder**

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**Court :** Kolkata

**Decided On :** Jun-08-2005

**Reported in :** AIR2005Cal251,2005(3)CHN575

**Judge :** P.K. Samanta and ;P.N. Sinha, JJ.

**Acts :** [Hindu Marriage Act, 1955](#) - Sections 9, 13 and 24; ;[Indian Majority Act, 1875](#); ;Code of Criminal Procedure (CrPC) - Section 125 and 125(5)

**Appeal No. :** F.A. 35 of 2005

**Appellant :** Debnarayan Halder

**Respondent :** Anushree Halder

**Advocate for Def. :** S.S. Manna, Adv.

**Advocate for Pet/Ap. :** Haradhan Banerjee and ;Nilanjan Chatterjee, Advs.

**Judgement :**

ORDER

1. This is an application under Section 24 of the [Hindu Marriage Act, 1955](#) filed by the wife-respondent in connection with First Appeal No. 35 of 2005 pending in this Court. The said appeal has been filed by the husband-appellant against the judgment and decree passed on 4-9-2003 by the family Court whereby the Matrimonial Suit No. 128 of 2002 filed by the husband-appellant for a decree of

divorce under Section 13(ia)(ib) of the said Act was dismissed.

2. The facts, as it appears in relation to the above application, are somewhat extensive.

Admittedly, the parties were married on 24-2-1985 and the only male child was born out of their wedlock on 14-1-1987. It is the ease of the wife-respondent that, within 15 days of the said marriage the husband appellant started torturing her both mentally and physically alleging that he is not satisfied with the meagre dowry brought by her and her appearance appeared to him to be ugly. According to the wife-respondent, the appellant is quarrelsome by nature and has the habit of causing annoyance and disturbances to her for petty reasons. He did not give her respect due to a wife and treated her like a maid servant. It is her case that she tolerated such cruel treatment meted on to her for several years but ultimately she had no other alternative than to leave the matrimonial home on 11-3-1997 with her child being threatened by her husband with her life and security. Since then she is living in the care and custody of her father who is now a pension-holder.

3. It appears from the records of this ease that the wife-respondent soon after leaving the matrimonial home on 11-3-1997 filed an application under Section 125 of the Code of Criminal Procedure before the learned Magistrate for maintenance allowance for herself and her minor son. On the said application the learned Magistrate allowed interim maintenance but subsequently upon contested hearing of the same by an order dated 15-2-2000 the said application under Section 125 of the Code of Criminal Procedure was allowed in part by directing payment of maintenance allowance only for the minor son at the rate of Rs. 1,500/- per month till he attains majority and by refusing to make any order for payment of maintenance allowance by the husband-appellant to the wife-respondent upon finding that the wife-respondent did not have any just ground for refusal to stay with the husband in the matrimonial home. The said order dated 15-12-2000 as passed by the learned Magistrate as above was challenged in a revisional application before this Court. The said revisional application was registered as CRR No. 973 of 2001 which was disposed of by an order dated 26-11-2001 whereby the High Court allowed the revisional petition preferred by the respondent

wife by directing the husband-appellant to pay a sum of Rs. 1,500/- per month by way of maintenance to the respondent-wife in addition to the order for payment of maintenance made in favour of the minor son at the rate of Rs. 1,500/- per month. The said order of this Hon'ble Court was further challenged in Special Leave Petition (Crl) No. 4047 of 2002 by the husband-appellant which was subsequently registered as Criminal Appeal No. 1059 of 2003 (reported in : 2003 CriLJ4470 ) before the Hon'ble Supreme Court.

4. The Supreme Court dealt with the matter in detail and upon contested hearing allowed the appeal by setting aside the judgment and order passed by this Court so far as it related to the direction for payment of maintenance allowance by the husband-appellant to the wife-respondent. We have gone through the judgment of the Supreme Court with care and attention. The Supreme Court upon thorough scrutiny of the evidence adduced by the parties before the Learned Magistrate came to the conclusion upon concurring with the findings of the learned Magistrate that there was no just ground for the wife-respondent for refusing to stay with her husband in the matrimonial home. The Supreme Court thus restored the order passed by the learned Magistrate granting payment of maintenance allowance to the minor son only at the rate of Rs. 1,500/- per month and set aside the order made by this Court directing payment of monthly maintenance allowance to the wife-respondent at the rate of Rs. 1,500/- by the husband-appellant.

5. It is not in dispute that the husband-appellant is paying such monthly maintenance allowance for the son since after the order was made by the learned Magistrate. Although at the hearing of the present application it has been alleged that there are certain shortfalls in making payment of the same, but we are not inclined to go into the details of the same as the learned Advocate appearing on behalf of the husband-appellant has fairly submitted before this Court that if there be any shortfalls either in payment of monthly allowance at such rate for the son or on account of deduction of postal charges in sending such monthly allowances, the same shall be paid upon necessary calculation.

6. It also appears from the records of this case that, while the proceeding under Section 125 of the Code of Criminal Procedure was pending before the learned

Magistrate, the husband-appellant instituted a proceeding for restitution of conjugal rights under Section 9 of the [Hindu Marriage Act, 1955](#) on 15-12-1997 before the District Judge. Alipore (South 24-Parganas). The said proceeding was initially registered as Matrimonial Case No. 1481 of 1997 and upon transfer to the 6th Court of Additional District Judge at Alipore, it was re-numbered and registered as Matrimonial Case No. 1 of 2000. In the said suit the wife-respondent made an application under Section 24 of the said Act for alimony pendente lite for herself alone. The learned Court by an order dated 24-3-2000 passed an order for payment of alimony pendente lite to the wife-respondent by the husband-appellant at the rate of Rs. 2,000/- per month from the date of filing of the said application. The said order was again modified by an order dated 20-8-2001 by splitting up the amount of Rs. 2,000/- between mother and the child, Rs. 1,500/- by way of alimony pendente lite in favour of the wife and Rs. 500/- towards the cost of maintenance for the only male child. However, after the aforesaid order was made, on an application filed by the husband-appellant, the said suit was withdrawn. The fact remains that since after the withdrawal of the said suit the husband appellant did not pay any alimony pendente lite to the wife-respondent pursuant to the aforesaid orders passed in the above Matrimonial Suit but payments were continued to be made towards the maintenance cost of the son as per the order passed by the learned Magistrate which stood affirmed by the order of the Supreme Court.

7. In these facts and circumstances, while the wife-respondent has pressed the above application under Section 24 of the said Act upon contention that she has no independent source of income to maintain herself and she is living since after she left the matrimonial home on 11-3-1997 in the care and custody of her father who has no sufficient means to maintain her being an old pension-holder and it is incumbent upon the husband-appellant to provide alimony pendente lite for maintenance of herself pending disposal of the appeal in this Court, the husband-appellant has strongly contested the above application upon reference to the observations made by the Supreme Court in the aforesaid Criminal Appeal No. 1059 of 2003 (reported in : 2003 CriLJ4470 ) whereby and whereunder the Supreme Court upon thorough scrutiny of the evidence of the parties had come to the specific finding that the allegations made by the wife-respondent against the

husband-appellant disclosing the reasons for her leaving the matrimonial home were not proved to the hilt and therefore concluded that the wife-respondent did not have any just ground for refusing to stay with her husband. Accordingly, it has been seriously contended on behalf of the husband-appellant that having regard to the findings made by the Hon'ble Supreme Court and considering the facts and circumstances of this case as also the nature and conduct of the wife-respondent, she is not at all entitled to alimony pendente lite on the above application filed by her in this Court.

8. We have carefully considered the respective submissions of the parties in connection with the above application. Although the observations made by the Supreme Court in the aforesaid Criminal appeal go to show in clear terms that the wife-respondent failed miserably to establish the allegations made by her as being the reasons for leaving the matrimonial home, but in our view such ground alone is not germane for deciding the above petition under Section 24 of the said Act against the wife-respondent. The matter before the Supreme Court was in relation to the proceedings under Section 125 of the Code of Criminal Procedure, the provisions of which read as under :

'Section 125. Order for maintenance of wives, children and parents.---

(1) If any person having sufficient means neglects or refuses to maintain --

(a) his wife, unable to maintain herself,

or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not 'being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation .-- For the purposes of this chapter.

(a) 'minor' means a person who, under the provisions of the [Indian Majority Act, 1875](#) (19 of 1875) is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due :

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this Section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation -- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason who refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.'

9. It is apparent on the language of the aforesaid provisions that a wife being unable to maintain herself would be entitled to a monthly allowance for maintenance of herself upon proof of such neglect or refusal by the husband having sufficient means to do so provided the wife is not living in adultery or has not refused to live with her husband without any sufficient reason and also they are not living separately by mutual consent. In view of the aforesaid criteria laid down in the provisions of Section 125 of the Code of Criminal Procedure, the Supreme Court took pain to go into the details as to whether the wife-respondent had any sufficient reason for refusing to live with the husband-appellant. In the context and particularly in view of Sub-section (5) of Section 125 of the Criminal Procedure Code, the Supreme Court made a thorough scrutiny of the evidence of the parties and came to the conclusion that the wife-respondent did not have any sufficient reason for refusing to live with the husband-appellant. Upon such conclusion the Supreme Court affirmed the order of the learned Magistrate passed as above and set aside the order of this Court by which the maintenance allowance was allowed in favour of the wife-respondent in addition to the maintenance allowance granted in favour of the minor child by the learned Magistrate. Therefore the said order of the Supreme Court cannot have any impact whatsoever on the provisions of Section 24 of the [Hindu Marriage Act, 1955](#) which read as under :

'Maintenance pendente lite and expenses of proceedings-- 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.'

10. Upon bare perusal of the above section it appears that the same provides for support to be given by the earning spouse in favour of non-earning spouse during the pendency of the matrimonial proceeding before the Court without making any condition precedent or laying down any stipulation for receiving such alimony pendente lite by the non-earning spouse from the earning spouse. It is rather clear, upon reading of the said Section, that if 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, then on the application of the wife or the husband, as the case may be, the Court would order the respondent to pay to the petitioner a monthly alimony pendente lite and the expenses of the proceeding pending disposal of the same as may seem to the Court to be reasonable, of course, regard being had to the income of the petitioner, if there be any, and the income of the respondent. No stipulation has been provided for in the said Section that either, the wife or the husband, as the case may be, for being entitled to the alimony pendente lite and expenses of the proceeding will have to prove that he or she has the just ground and/or the sufficient reason for living separately from the other or that he or she cannot claim alimony pendente lite if he or she has no reason whatsoever to leave the matrimonial home.

11. Independently it may be observed that the husband-appellant filed the present matrimonial suit, No. 128 of 2002 for a decree of divorce on 20-8-2002 which having been dismissed the present appeal arises. The above application has been filed in this appeal: On the face of such fact which goes to show that the parties are litigating over the matrimonial dispute and while it was observed by the

Supreme Court that in spite of its efforts to conciliate between the parties, no conciliation between them was possible, we do not find any reason for holding that both the parties should share the same roof even now as the wife-respondent had no sufficient reason to leave the matrimonial home as far back as on 11-3-1997. Therefore as discussed as above, it cannot be said on the findings and observations made by the Supreme Court and upon reading of the provisions of Section 24 of the [Hindu Marriage Act, 1955](#) that the wife would not be entitled to an alimony pendente lite on her application at this stage during the pendency of this appeal in this Court. The feeble argument advanced on behalf of the husband appellant that the wife-respondent did not pray for payment of alimony pendente lite during the pendency of the matrimonial suit before the trial Court, in our view, would not debar the wife-respondent to claim such alimony pendente lite at this stage during the pendency of this appeal in this Court because the earning spouse being under legal obligation to maintain non earning spouse during the pendency of the matrimonial proceeding, such obligation becomes a continuing obligation. Such payment having not been sought for during the pendency of the proceeding before the Trial Court cannot be construed as an estoppel and waiver of the right by the non-earning spouse to claim such alimony pendente lite at any subsequent stage of the proceeding. The above Section 24 of the Hindu Marriage Act makes it clear that such alimony pendente lite would be payable from the date of making of the application and not from any date earlier to that. Thus in consideration of all the aspects of this matter, we are of the view that the wife-respondent would be entitled to no alimony pendente lite on her above application filed in this appeal.

12. Now on the question of quantum of alimony pendente lite that should be granted in favour of the wife-respondent, we find that in the earlier Matrimonial Suit No. 1 of 2000, the learned trial Court came to the specific finding that the gross income of the husband was at the rate of Rs. 12,600/- per month. Upon such finding the learned Counsel granted alimony pendente lite to the wife-respondent at the rate of Rs. 2,000/- per month. The said order was not challenged by the husband-appellant, even upon contention that the finding as to the monthly gross income of the husband was wrong. More than five years have passed in the meantime, since the said order was passed. It is not in dispute that the husband is still in employment under the same employer. In the trial the husband-appellant

admitted in his evidence that his present salary was at the rate of Rs. 14,000/- plus even on 20-5-2003. Although the husband-appellant has in his affidavit-in-opposition contended and/or alleged that the wife respondent has an independent income of about Rs. 5,000/- per month but no cogent, document and/or material has been disclosed in his affidavit-in-opposition to support such contention. We are also not ready to accept such contention on behalf of the husband-appellant particularly when alimony pendente lite was granted to the wife-respondent in the earlier Matrimonial Suit as above upon holding that the wife-respondent has no independent source of income to maintain herself which order was never challenged by the husband appellant.

13. Having regard to the aforesaid facts and the quantum of salary drawn by the husband-appellant as admitted by him and also by taking into consideration the present market index, we are of the view that both the wife and the son together would be entitled to an alimony pendente lite at the rate of Rs. 5,000/- (Rs. 2,000/- for the son and Rs. 3,000/- for the wife) per month from the date of making of the above application. We hold so by considering the fact that the son has in the meantime passed the Secondary Examination in First Division with star marks. The said male child certainly needs all possible support and facilities for pursuing his higher studies. It may be recorded that Mr. Haradhan Banerjee, learned Advocate appearing on behalf of the husband-appellant has candidly submitted before this Court that his client is ready and willing to bear all necessary expenses for bringing up his only son with good care and education. We, therefore, hold that the aforesaid sum of Rs. 5,000/- for the present would be a reasonable sum both for the maintenance of the wife-respondent and her son who is living with her. It is made clear that the aforesaid sum of Rs. 5,000/- would be paid both to the wife respondent and her son being inclusive of the amount already granted under Section 125 of the Code of Criminal Procedure. The husband-appellant will therefore not be required to pay separately the sum of Rs. 1,500/- pursuant to the order passed in the proceeding under Section 125 of the Code of Criminal Procedure. It is further directed that all current monthly alimony pendente lite at such rate both for the wife-respondent and her son should be paid by 7th of each month for that very month. First of such payment shall be for the month of June, 2005 which shall be paid by 15th of June, 2005 and thereafter for every month by

7th of each month. Since the above application has been made on 31st March, 2005, so the wife-respondent shall be entitled to the above alimony for the months of April and May, 2005 which shall be paid by the husband-appellant to the wife-respondent by two equal instalments within a period of 31st July, 2005. The husband-appellant will further pay a lump sum litigation cost of Rs. 15,000/- to the wife-respondent which shall be paid by 31st August, 2005.

14. This application is thus disposed of.

15. If urgent xerox certified copy of this order is applied for by the parties, the same should be given expeditiously.

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