

(2000) 07 OHC CK 0058
In the Orissa High Court
Case No : Civil Revision No. 68 of 1997

Artatrana Panigrahi

APPELLANT

Vs

Sarina Panigrahi

RESPONDENT

Date of Decision : 28-07-2000

Acts Referred:

Hindu Marriage Act, 1955 — Section 13, 24, 25, 26, 28

Citation : (2000) 90 CLT 391

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : S.D. Das, A. Mohanty, L. Samantray, H.S. Satpathy, B.K. Sinha, D. Dhal and B. Pattnaik, for the Appellant; L. Panigrahi, B. Jena and S.N. Sukla, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This revision has been filed challenging the judgment and order dated 10-2-1997 passed by the learned Additional District Judge, Bhubaneswar, allowing the appeal.

2. The opposite party is the wife of the Petitioner. The marriage between the parties took place on 6-12-85 and they lived together as husband and wife till 1990. A daughter was born to the parties in February, 1988. The Petitioner filed a suit u/s 13 of the Hindu Marriage Act (the Act", for short) in the court of the learned Subordinate Judge, Sonapur, for a decree of divorce on the ground of insanity of the opposite party. The said suit was transferred to the court of the Civil Judge (Senior Division), Bhubaneswar, by order of this Court and was registered as T.S. No. 277 of 1992-1: During pendency of the said suit an application was filed u/s 24 of the Act which was numbered as Misc. Case No. 438 of 1993, by the opposite party claiming maintenance at the rate of Rs. 1,500/- per month for self and Rs. 500/- per month for the child as well as Rs. 5,000/- towards expenses of the proceeding. The said application was resisted by the Petitioner and after hearing the parties, the learned Civil Judge (Senior

Division) directed payment of maintenance at the rate of Rs. 600/- per month to the opposite party and Rs. 400/- per month to the minor child and also directed payment of Rs. 1,000/- towards litigation expenses.

3. The aforesaid order was challenged by the opposite party in appeal before the learned Additional District Judge, Bhubaneswar, and the lower appellate court allowed the appeal and directed the Petitioner to pay maintenance @ Rs. 1,000/- per month to the opposite party and Rs. 400/- per month to the child, and also directed payment of Rs. 3,000/- to the opposite party towards expenses of the proceeding. The said order passed by the lower appellate court has been challenged in this revision.

4. Shri L. Samantaray, appearing on behalf of the Petitioner, contends that the application was filed u/s 24 of the Act and no appeal lies against an order passed u/s 24. Therefore, the appeal was not maintainable before the lower appellate court. In spite of such an appeal being barred, the lower appellate court construed the application to be one not only u/s 24 of the Act but also u/s 26 thereof and held that the appeal was maintainable.

5. Learned Counsel appearing for the opposite party on the other hand, contends that even though the application was filed u/s 24 of the Act, prayer had also been made for grant of maintenance for the child and therefore, the application could have also been construed as one u/s 26 of the Act and therefore, an appeal lay against the said order.

Learned Counsel for Petitioner has not raised any other question except the maintainability of the appeal before the lower appellate court.

6. Section 24 of the Act provides:

24. Maintenance pendente lite and expenses of proceedings-Where in any proceedings 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 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.

Section 26 of the Act runs as follows:

26. Custody of children-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, and may, after the decree, upon application by Petitioner for the purpose, make from time to time, all such orders and provision with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were

still pending, and the court may, also from time to time revoke, suspend or vary any such orders and provisions previously made.

It is clear from both the provisions that Section 24 is confined to maintenance and expenses of the proceedings so far as the wife; husband is concerned, whereas Section 26 relates to custody, maintenance and education of the minor children. Section 28(2) of the Act specifies that orders made by the court in any proceeding under the Act, u/s 25 or Section 26 shall, subject to the provisions of Sub-section (3), be appealable, if they are not interim orders and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction. In view of such clear provision in Section 28(2) of the Act, no appeal lies against an order passed u/s 24 of the Act. But as it appears from the petition filed before the trial court the application was not only for self but also for the minor child. Since a prayer was made for grant of maintenance to the minor child also, the application may be construed as an application u/s 26 of the Act so far as maintenance for the minor child is concerned. I, therefore, do not find any illegality in the finding of the lower appellate court that the application should be treated and construed as one under Sections 24 and 26 of the Act. The lower appellate court while considering the claim of the opposite party, allowed the appeal and enhanced the amount of maintenance. In my view, this was not permissible since the appeal at the instance of the opposite party was not maintainable; whereas the appeal was maintainable at the instance of the minor child. Therefore, the direction of the court below to enhance the maintenance of Rs. 600/- to Rs. 1.000/-per month so far as the opposite party is concerned cannot be sustained, as no appeal at the instance of the opposite party was maintainable as per the Section 28 of the Act. The direction to enhance the expenses of the proceedings also cannot be sustained as Section 26 does not provide for any expenses to be awarded for the proceeding.

7. I, therefore, set aside the order of the lower appellate court on the ground that the appeal was not maintainable before the lower appellate court.

Revision allowed.