
(1973) 02 BOM CK 0001
In the Bombay High Court
Case No : A.F.O. No. 32 of 1971

Louise Dinshaw Cambata

APPELLANT

Vs

Dinshaw S. Cambata and Another

RESPONDENT

Date of Decision : 15-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Special Marriage Act, 1954 — Section 36

Citation : AIR 1974 Bom 82 : (1973) 75 BOMLR 532 : (1973) MhLj 1051

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Advocate : B.R. Zaiwalla, instructed by Smetham Byrne Lambert and Dubash Attorneys, for the Appellant; V.G. Mehta, for the Respondent

Judgement

1. This is an appeal from an order passed by Judge Mehta of the Bombay City Civil Court on 24th July 1970 dismissing a Chamber Summons taken out by the petitioner-wife on the 24th of April 1970 for payment pendent lite of a sum of Rs. 17,000/- in respect of her expenses of the proceeding, and for deposit of a further sum of Rs. 30,000/- towards the further costs of the proceeding.

2. The short facts necessary for the purpose of disposing of this appeal are that the parties were married in Bombay on the 10th of May 1952 under the Special Marriage Act, 1872, which u/s 51(2)(a) of the Special Marriage Act, 1954, must be deemed to have been a marriage solemnised under the latter Act. There are four children of the said marriage. On the 14th of November 1968, the petition out of which the present proceeding arises for divorce on the ground of desertion since the beginning of 1965, On a Notice of Motion taken out by her for interim custody, alimony, pendent lite maintenance of the children and provision for her residence in a separate part of the matrimonial home. His Honour Judge Suresh of the Bombay City Civil passed an order on the 20th of December 1963 by which he, inter alia, ordered the respondent to pay to the petitioner a sum of Rs. 500/- to cover the costs of the petition. It is not disputed that the said amount

has been paid by the respondent to the petitioner in compliance with that order. The petitioner has thereafter taken out the present chamber Summons on the 24th of April 1970 for the reliefs already set out above. The petitioner's case in support of the Chamber Summons is that, after the said order of Judge Suresh, there has been considerable correspondence and numerous proceedings between the parties and considerable expense has been set out in detail in paragraphs 6 to 16 of the affidavit filed by the petitioner in support of the chamber Summons. In his order dated 24th July 1970 dismissing the chamber Sumons, Judge Mehta stated that, in view of the quantified party-and-party costs of the present proceedings which are fixed at Rs. 125/- under the Rules applicable to the Bombay City Civil Court, the practice has developed to grant, pendent lite, to the wife in matrimonial petitions in that Court only a sum of Rs.125 or Rs. 150 by way of the expenses of the proceedings. Judge Mehta distinguished the cases that were cited before him by the learned counsel for the petitioner as being governed by a different law. He further held that there had been no change in circumstances which would justify him in granting expenses in excess of what had been fixed by Judge Suresh by his order dated 20th December 1968. It is from that order of Judge Mehta that the petitioner-wife has preferred the present appeal which was admitted by me on the 4th Feb, 1971. In the view which I take, a very important event has occurred since the filing of this appeal which must be mentioned here, and that is, that the main petition itself has already been dismissed by the Bombay City Civil Court on the 23rd of January 1973, which would be just before the present appeal was heard by me.

3. The first question that arises therefore is whether an order for payment pendent lite of the expenses of the proceeding can be made u/s 36 of the Special Marriage Act, 1954, after the substantive petition for divorce has itself been disposed of. It is the contention of Mr. Zaiwalla that the order of the appellate court must relate back to the date of the passing of the order by the trial Court. This contention of r. Zaiwalla derives support from the decision of the Privy Council in the case of *Kristo v. Rajah Burrodacaunt Roy*. (1872) 14 Moo Ind 465 in which it was laid down, as far back as 1872, that the function of an appellate Court is to determine what decree the Court below ought to have made and to affirm, reverse or vary the decree under appeal (at p. 490). Mr. Zaiwalla contended that the order sought on the present Chamber summons can, therefore, be made by me, even though the main petition has been disposed of the main petition has been disposed of by now. As a general proposition, no exception can be taken to Mr. ZaIwalla's proposition. Indeed, as far as alimony pendent lite is concerned, the substantive law goes further and provides that such alimony is usually payable from the date of the service of the main petition (Latey on divorce, 14th Edn. p. 233) or from the date of service of the application, but may be made payable from a later date if so ordered or if the parties agree (Latey. p. 900). Having regard to the very nature of the provision contained in Section 36 of the Special Marriage Act, 1954 the Court is. however, bound to take into account all subsequent events which may be relevant to the

making of an order under that section. The heading to Section 36 which, it may be stated, is part and parcel of what was enacted by the legislature itself, is, "alimony pendent lite," and it is under that heading that the section provides both for an order for payment of the expenses of the proceeding life," and it is under that heading that the section provides both for an order for payment of the expenses of the proceeding to the wife, as well as for a periodic payment of the expenses of the proceeding to the wife, as well as for a periodic payment for her support. This would, in my opinion, indicate, that the legislature has regarded the expenses of the proceeding as being part of alimony pendent lite on the footing that what the wife needs for her support and what is necessary for the expenses of her proceeding must both be provided for, pending that proceeding. This practice originated with the Ecclesiastical Court and was obviously just and necessary in view of the legal position that prevailed in England in those days, under which the wife on marriage ceased to have any legal right to property and all her property vested in her husband, but "still prevails, despite the change which has taken place in the social and economic relations of the sexes during the present century" (Latey. p. 228). The whole object of the provision in Section 36 is that the wife should not be at a disadvantage in contesting the proceeding as against her husband but should be put in a position in which she would be able to contest the proceeding effectively, or to use the words of Lord Merrivale in the case of *M.V. M.* which will be cited in detail later on in this judgment, to secure "that the wife should be heard in the case." Having regard to that object, in my opinion, no order for payment of the expenses of the proceeding can be made u/s 36, once the proceeding itself has come to an end, for it cannot thereafter sub-serve the purpose for which it was intended viz., to enable the wife to contest the proceeding. This view which I have taken, having regard to the object of the provision therein contained, happily finds support from authority. In *Latey or Divorce* 14th Edn. at p.900 it is stated that where a petition of the wife is dismissed, the suit ends, and no order for alimony pendent lite "could of course be made." It is further stated there (also at p. 900) that no such order can be made after a final decree has been pronounced, even if the proceedings were initiated before such decree, and in support of that proposition, the case of *M.v.M.* 1928 P. 123 has been cited there. The facts of the case were that the wife filed a petition for judicial separation on 26th March 1927, alleging adultery on the part of the husband, which was denied by him. The case was heard and a decree for judicial case was heard and a decree for judicial separation was pronounced, with costs, on 2nd November 1927, giving the wife the custody of the only child of the marriage. Earlier in the proceedings, the wife had filed her petition for alimony pendent lite, but that petition was heard pendent lite, but that petition was heard by the Registrar only on 11th January 1928, which would be more than two months after the disposal of the main petition. The Registrar made no order on the petition, except in regard to costs, and the wife appealed from that order to the Judge in chambers who adjourned it into Court for argument. Confirming the Registrar's order and refusing the application. Lord Merrivale observed (at p. 126) that the rules of practice in question must

manifestly be construed with due regard to the subject - matter of the law relating thereto, that under the practice of the Ecclesiastical Courts, two distinct powers existed in respect of the enforcement of the husband's duty to maintain his wife, viz. pending suit the coercive authority of the tribunal was available to secure to the wife means of subsistence and necessary money for costs; and when the question between them had been determined by a decree, the wife. If she was successful, might obtain a decree to ensure permanent maintenance according to her husband's means. Lord Merrivale went on to state that the interlocutory processes for alimony and costs were coercive means of "securing that the wife should be heard in the cause" and that those processes were "purely transitory." the taxation of her costs from day-to-day. It was further laid down in the judgment in the said case (at p. 127) that the practice of the Court as illustrated by previous orders rested upon the fact that the process resorted to before decree was "a privileged procedure limited by the necessities of the case and not the exercise of a substantive right such as gives a cause of action." It was held that the necessity which could be so dealt with ceased when the decree was granted. Lord Merrivale observed that to give a direction at that stage for the wife's maintenance during the period prior to the decree viz., March to November 1927, while the litigation was proceeding, would involve "mischievous consequences." Though the decision in 1928. P. 123 actually related to alimony pendente lite, it is clear from the observations of Lord Merrivale referred to by me that the provision pendente lite of necessary money for costs stands on an identical footing and the same principles must apply to it as to alimony pendente lite. It may here be observed that in England there is no statutory provision expressly providing for payment pendente lite of the expenses of the proceeding to the wife, but under Rule 65 (1) of the Matrimonial Causes Rules, 1950, a wife may apply for security for her costs upto the hearing, and of and incidental to the hearing, and the Registrar after taking all the circumstances into account may order the husband to pay the sum so ascertained or some portion of it into court, or to give security therefore, and may direct a stay of the proceedings until that order is complied with. Curiously enough, in our Special Marriage Act, 1954, there is, however, no provision for deposit in Court or for security of costs, but there is only the provision that is to be found in Section 36 for payment pendente lite of the expenses of the proceeding to the wife. The provisions for alimony pendente lite as well as for payment pendente lite of the expenses of the proceeding to the wife are to be found in the same section viz., Section 36: are intended to subserve the same object viz., to use the words of Lord Merrivale in the case of M.v.M. (at p. 126), "that the wife should be heard in the cause;" and are governed by the same historical background; and must, therefore, be governed by the same principles. Indeed, the decision in 1928 P 123 places them on the same footing. The view taken in England in the case of M.v.M. finds support in the decision of a Division Bench of the Andhra Pradesh High Court consisting of Subba Rao C. J. and Viswanath Sastri J. in the case of Subba Rao v. Anasuyamma AIR 1957 And Pra 170 in which, on the basis of the provision in Section 5(7)(a) of the Madras

Hindu (Bigamy Prevention and Divorce) Act, 1949, which as similar to Section 36 of the Special Marriage Act, 1954, an application was made by the wife for payment, of the expenses, not only during the pendency of the appeal, but also for the period during which the petition had been pending in the Court below. It may be mentioned that u/s 5 (7) (e) of the said Act the appellate Court was empowered to exercise the powers conferred on the trial Court u/s 5 (7) (a) thereof. In his judgment Subba Rao, C.J. stated as follows (Para 4):

"As we stated, the object of the subsection was only to provide for a wife to conduct the proceeding fairly and well and that object will be achieved by giving to the wife the necessary means to conduct the proceeding then pending. The clause either expressly or by necessary implication does not confer power on the appellate Court to make a provision retrospectively."

I, therefore, hold that it is not competent to me to pass the order sought on the present Chamber Summons, having regard to the dismissal of the main petition on the 23rd January 1973.

4. In the event of my being wrong in the view which I have taken above, I would hold that the order sought in prayer (a) of the present Chamber Summons should be granted. The only contentions urged by Mr. Patel in opposing this Chamber Summons were, (1) that the present application is barred by principles analogous to res judicata by reason of the decision of Judge Suresh awarding a sum of Rs. 500 to the petitioner in respect of the expenses of the proceeding, having regard particularly to the fact that there is no provision in Section 36 for change of circumstances such as is to be found in sub-section (2) of Section 37 of the Act: and (2) that the petitioner's solicitors to proceed with the present application for their own benefit. I am afraid, there is no substance in either of these contentions of Mr. Patel. There is nothing in the terms of Section 36 to bar a fresh application for alimony pendente lite or for payment pendente lite of the expenses of the proceedings to the wife, and that being so, the English practice in regard to the same ought to be followed. As stated in *Latey on Divorce* 14th Edn. at p.777, the Judge can at any stage of the hearing make an order for the provision of such further security for costs as may be necessary in the circumstances of the case, if such circumstances have materially altered since the original application, as for instance, where the case becomes defended. It is not difficult to understand why a provision for variation of the order had to be made in Section 37, but was not thought necessary by the legislature as far as Section 36 was concerned. Section 37 provides for an order for permanent alimony and in the absence of an express provision for variation it might, therefore, well have been contended that an order made under that section would operate to fix the alimony for all time, and that once the Court had exercised the power conferred by that section, it would be functus officio. The legislature had, therefore, to make an express provision in sub-section (2) of that Section for variation of such an order, whenever there was a change in the circumstances of either party. As far as Section 36 is concerned, on the other

hand, since the order made under it would be *pendente lite* and the Court still continued to be seized of the proceeding, it would always have the power to vary its own interlocutory order at any time till the final decree was passed. The absence of an express provision in Section 36 cannot therefore be of any assistance to Mr. Patel in regard to his argument that the present chamber Summons is barred by principles analogous to *res judicata*, in view of the decision of Judge Suresh, and that no fresh application of the nature now made can lie. That contention of Mr. Patel must, be rejected.

5. The second contention of Mr. Patel is also without any foundation. It is not disputed that when the main petition reached hearing on the 23rd of January 1973, the petitioner had already left India, that her attorneys applied for adjournment, that on the same being refused they withdrew appearance, and that the petition was thereupon dismissed. For the sake of completing the facts it may be recorded that the husband then withdrew his Counter-Petition. In the case of *Nusserwanjee Wadi v. Eleconora Wadia* ILR 38 Bom 125 : AIR 1914 Bom 211 the facts were that a Parsi had married a Christian Lady in London who filed a petition under the India Divorce Act for restitution of conjugal rights which was dismissed on the ground that this Court had no jurisdiction to try it. The attorney for the petitioner-wife then applied to the Court for an order directing the Prothonotary to retain the moneys paid by the respondent as security for the petitioner's costs, pending taxation of his costs, and to pay to him his taxed costs out of those moneys. The same question that was raised before me by Mr. Patel was raised in answer to that application, in so far as it was contended on behalf of the respondent that the solicitor had no *locus standi* in the matter. It was held (at p. 150) that contention was not tenable in view of the English practice under which such applications by solicitors in regard to their costs had repeatedly been entertained. After referring to the English authorities on the point, it was further held (at p. 152) in the said case that the petitioner's attorney was justified in his contention that the fund paid in was for the benefit of the petitioner's attorney and that the petitioner was entitled to have it so applied whatever result of the petition, provided of course that the attorney was in no way to blame, as for instance, when he takes up a hopeless case. Though *Nusserwanjee Wadia's* case was a case under the Indian Divorce Act, the same principles would apply to Act, the same principles would apply to the present case also and I have no hesitation in holding that the petitioner's attorneys can in the present case prosecute this Chamber Summons, even though the petitioner herself has left India, may be, for good. It may be mentioned that it was stated to me in the course of the arguments that the petitioner's attorney has incurred costs to the tune of Rupees 33,000 in the present petition, out of which about Rs. 6,7000 are in the nature of out- of-pocket expenses, against which he has received only a sum of Rs. 500 till now. As laid down by this Court in the case of *Payne and Co. Vs. Pirojshah Nusserwanji Patel*, whatever be the fate of this application, the petitioner's attorneys would certainly be entitled to proceed against the husband in a separate suit for necessities supplied to the

wife viz., the costs of the defending this petition.

6. I will turn next to the main contention of Mr. Zauwakka that the learned judge in the Court below was in error in taking the view that he could not award to the petitioner-wife anything in excess of the fixed party-and-party costs to which she might be entitled at the final hearing of the petition, if an order for costs was made in her favour at the time of the passing of the final decree or order on the main petition. In support of that contention, Mr. Zailwalla relied strongly on the fact that the word used in Section 36 is "expenses" and not "costs". In my opinion, Mr. Zailwalla is right in that contention in so far as the word "expenses" is a word of wider connotation and includes "costs", but is not limited to the costs that would be payable on a party-and-party taxation under the rules of the Court. This view which I take on the plain meaning of the word "expenses" used in Section 36 is supported by the very object of the provision that is to be found in that section which is to enable the wife to contest the proceeding without being at the disadvantage of suffering from want of means. That object would not be served if the word "expenses" in Section 36 is construed as limited to the amount that would be payable by way of costs on a party-and-party taxation in my opinion, having regard both to the language of the section as well as its object, the Court has power u/s 36 to order payment pendente lite of all or such part of the attorney and client costs incurred by the wife as it may consider to be reasonable. This view which I have taken apart from authority is directly supported by the decision of a Division Bench of the Andhra Pradesh High Court consisting of Subba Rao, C.J. and Viswanatha Sastri, J., in AIR 1957 And Pra 170 to which I have already referred above in a better context. That was a case arising under the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. The petitioner in the said case (the appellant before the High Court) filed a petition against his wife for divorce on the ground of desertion. Section 5 (7) (a) of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1954, with which I am concerned in the present case. Pending that petition, the respondent wife applied under the said section for maintenance and for giving her some amount towards her expenses for defending the petition. The learned subordinate Judge heard that petition along with the main petition and dismissed both of them together. The husband appealed against the order dismissing the main petition and, pending the appeal, the wife once again applied for making provision for her maintenance and for other expenses, not only for the period when the petition was pending in the Court below, but also during the pendency of the appeal. A contention which was identical with the view taken in the present case by the learned Judge of the lower Court was taken before the High Court in Subba Rao's case viz., that in fixing the sum to meet the expenses necessary for prosecuting or defending the appeal, the Court could give only the taxed costs. It was observed in the judgment (para 5) that no case had been placed before the Court nor did the provision of the section sustain such a contention. It was further observed in the judgment in the said case as follows:

"The quantum can only be fixed in each case having regard to the circumstances

of that case. The only limitation on the Court's power is that the amount fixed towards the expenses must be necessary for prosecuting or defending the petition..... Having regard to the life of an appeal in the High Court, the number of times a party may have to travel from his native place to the High Court, the reasonable fee that may be fixed to an advocate and the other out-of-pocket expenses that a client has to increase during his stay in the city, we cannot say that the sum of Rs. 250 fixed is not reasonable".

It is clear from the judgment in Subba Rao's case with which I am in complete agreement, that the amount that could be awarded by the Court pendente lite by way of the expenses of the proceeding to the wife is not limited to party-and-party costs that she might get at the final hearing of the petition. The view taken by the learned Judge in the Court below which was based on the practice that has been followed in that Court was, therefore, erroneous, and if the present petition had not been finally disposed of before the making of this order, in view of the facts stated in paragraphs 6 to 16 of the affidavit in support of this Chamber Summons, I would have granted to the petitioner the relief claimed in prayer (a) of the Chamber Summons. In the view which I have taken above, that question does not, however, arise.

7. In the result, I dismiss this appeal. As far as costs are concerned, as the respondent - husband has succeeded on a point which was not taken at all by the learned counsel appearing for him, there is no reason why the ordinary rule applicable to matrimonial cases should not be followed in the case of the present appeal. I set aside the order for costs passed by the learned Judge in the Court below and order that the respondent do pay the appellant's costs, both of this appeal as well as the Chamber Summons in the lower Court.

8. Appeal dismissed.