

(1988) 02 MP CK 0007
In the Madhya Pradesh High Court
Case No : L.P.A. No. 51 of 1987

Raghvendra Singh Choudhary, Jabalpur	APPELLANT
Vs	
Seema Bai Choudhary	RESPONDENT

Date of Decision : 01-02-1988

Acts Referred:

Hindu Marriage Act, 1955 — Section 13, 24

Citation : (1988) MPJR 1 : (1988) MPLJ 450

Hon'ble Judges : P.C. Pathak, J;C.P. Sen, J

Bench : Division Bench

Advocate : P.D. Tiwari with V.S. Choudhary, for the Appellant; P.D. Pathak, for the Respondent

Final Decision : Allowed

Judgement

C.P. Sen, J.

This is an appeal by the appellant/husband under clause 10 of the Letters Patent against the order granting pendente lite maintenance @ Rs. 250/- p.m. to the respondent/wife by the learned single judge u/s 24 of the Hindu Marriage Act, 1955, in First Appeal No. 31/87.

The appellant filed a petition for divorce u/s 13 of the Hindu Marriage Act before the Additional District Judge, Narsinghpur. The respondent moved an application u/s 24 of the Act in that petition for grant of maintenance pendente lite. The trial court, after recording the evidence adduced by the parties, granted maintenance @ Rs. 100/- p.m. from the date of the order. The decree for divorce was granted to the appellant by the trial Court and aggrieved by the decree, the respondent has preferred F.A. No. 31/87, which is pending in this Court. She also moved an application u/s 24 of the Act for payment of pendente lite maintenance @ Rs. 100/- p.m. It appears that the application was not opposed by the appellant, but the learned single judge granted maintenance @ Rs. 250/- p.m. besides Rs. 500/- towards the litigation expenses.

According to the appellant, the respondent having herself claimed maintenance @ Rs. 100/- p.m., the learned single judge could not have awarded the maintenance at the higher rate of Rs. 250/- p.m. The amount awarded is without any material on record and is not rational to the income of the appellant. According to the respondent this letters patent appeal is not maintainable against the interlocutory order for that purpose. She relied on the decisions of this Court in Kunwarji Sonkar vs. Nirmalchand Sonkar, L.P.A. No. 151/85; decided on 17-1-1986 and Chhunilal vs. Agrawal & Co., 1987 M.J.P.L.J. 165. In the first case this Court by relying on a Full Bench decision of this Court in Manohar vs. Baliram, AIR 1952 Nag. 357 and Punjab Soap Works Vs. Hindusthan Liver Ltd., , held that no letters patent appeal lies against the interlocutory matter since it does not amount to a judgment. Relying on the judgment in the second case, this Court held that no letters patent appeal lies against the interlocutory order passed by a single judge in appeal but letters patent appeal is maintainable against such order passed in original proceedings by the single judge.

We are of the view that the two decisions of this court cited above, do not lay down the correct law. In Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York, it was held as under:--

In finding out whether the order is a judgment within clause 15 it has to be found out that the order effects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out of the court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability. AIR 1935 Ran 267 (FB) Manohar vs. Baliram case (supra), overruled.

Therefore, it is clear that in the first decision of this Court cited above, this Court wrongly relied on the overruled decision Manohar Baliram case (supra) and came to conclusion that against interlocutory matters, no letters patent appeal lies. Again in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , the Supreme Court further held as under:--

An order of the Trial Judge refusing to appoint a receiver or to grant an ad interim injunction is undoubtedly a judgment within the meaning of the Letters Patent both because O.43, Rule 1 applied to internal appeals in the High Court and apart from it such an order even on merits contains the quality of finality and would therefore a judgment within the meaning of Cl. 15 of the Letters Patent.

This decision has been distinguished in the aforesaid second decision of this Court by saying that it is essentially on the basis of the provision contained in Order 43, Rule 1 read with Section 104 CPC and applies to internal appeals in the High Court against the judgment of a single judge in exercise of original jurisdiction. Though reference has also been made to the corresponding provision of Clause 15 of the Letters Patent of the Bombay High Court but the decision of the Supreme Court was independent of the provisions contained in clause 15. It

may be mentioned here that Clause 10 of the Letters Patent of the Nagpur High Court is similar to the aforesaid Clause 15 of the Bombay High Court. The Supreme Court has clearly mentioned in the judgment that refusing to appoint a receiver or to grant an ad interim injunction is undoubtedly a judgment within the meaning of the Letters Patent. So the earlier view has been reiterated. However, in the aforesaid second decision of this Court it has wrongly been held that no letters patent appeal lies against the interlocutory order passed in appeal by the single judge of this Court, by referring to the aforesaid decision in Shah Babulal Khimji (supra) the Supreme Court made it applicable in cases of interlocutory orders passed in original proceedings by the single judge. Though that was a case arising out of the interlocutory order in the original jurisdiction of the Bombay High Court, the Supreme Court has not laid down that no appeal lies against the interlocutory order passed in appeal. Therefore, an appeal will lie against an interlocutory order if it is a judgment. Clearly the order passed u/s 24 of the Hindu Marriage Act is a judgment as it decides the question of maintenance during the pendency of the suit and therefore, there is final adjudication so far this question is concerned and an appeal lies against such an order. We are fortified by the view taken by the Bombay High Court in Dinesh Gijubhai Mehta Vs. Usha Dinesh Mehta, , that pendente lite maintenance u/s 24 of the Hindu Marriage Act, 1955, raises controversy independently of the suit and decision thereon concludes controversy finally between parties and as such letters patent appeal is maintainable.

Regarding quantum of maintenance, the respondent claimed maintenance only @ Rs. 100/- p.m. and this was not opposed by the appellant. The trial court has fixed maintenance after recording the evidence. It held that the appellant was then receiving Rs. 450/- p.m. and 1/3rd of the amount should be given as maintenance to the wife. It is not disputed that since then prices have increased and the salary has also been revised upwards. Usually pendente lite maintenance is granted at 1/5th of the husband's average net income after deducting the wife's income, if any. No material has been placed by either of the parties to show what is the present income of the appellant. We can safely assume it Rs. 750/- p.m. and therefore, 1/5th of the amount will come to Rs. 150/- p.m. So the order of the learned single judge is modified by reducing the maintenance from Rs. 250/- p.m. to Rs. 150/- p.m.

Accordingly, the appeal is partly allowed. In the circumstances of the case, there shall be no orders as to the costs.