

(2005) 06 MP CK 0029
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2480 of 2005

Smt. Janki Bai

APPELLANT

Vs

Prem Narayan Kushwaha

RESPONDENT

Date of Decision : 22-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 227
Hindu Marriage Act, 1955 — Section 13, 13(1), 24, 25
Penal Code, 1860 (IPC) — Section 328

Citation : AIR 2006 MP 1 : (2005) ILR (MP) 794

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : Arvind Singh, for the Appellant; Ashok Lalwani, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.—The respondent-husband filed an application for divorce u/s 13 of the Hindu Marriage Act, 1955 (for brevity "the Act") and the petitioner-wife initiated civil action u/s 24 of the Act before the learned 4th Additional District Judge, Chhatarpur forming the subject-matter of H.M. Case No. 13-A/2003. During the pendency of the said proceedings the wife-petitioner filed an application u/s 24 of the Act for grant of interim maintenance and litigation expenses. The learned District Judge by order dated 25-4-2003 granted maintenance allowance at the rate of Rs. 500/- per month and Rs. 1000/- towards litigation expenses.

2. After the said order was passed as per Annexure-P/1 the respondent filed an application u/s 151 of the CPC (for short "the CPC) on 15-9-2003 highlighting that the behaviour of the wife/non-applicant was extremely cruel to him and in fact, she had tried to extinguish his life spark by administering poisonous substance to the wheat. The husband lodged an FIR at the concerned Police Station which registered a crime u/s 328 of the Indian Penal Code (in short "the

IPC) and got her arrested. The learned Sessions Judge by judgment dated 5-9-2003 passed in Sessions Trial No. 271/2002 convicted her for the offence and sentenced her to undergo rigorous imprisonment for three years and ordered her to pay a fine of Rs. 1000/-. It was contended as conviction has been recorded against the wife she would not be entitled to maintenance and, therefore, the order of interim maintenance should be vacated and he be discharged from paying maintenance allowance.

3. The petitioner filed a reply on 7-10-2003 to the application filed u/s 151 of the CPC and controverted the allegation. It was put forth that an appeal against the order of conviction has been preferred before the appellate Court and the said appeal has been admitted. She has been enlarged on bail and hence, the order granting maintenance allowance by the Court below has to be confirmed and there was no justification or warrant to recall the order. The learned Trial Judge took note of the conviction and allowed the application of the husband-respondent as per impugned order dated 13-11-2003 contained in Annex-ure-P/4. The Court below allowed the application directing stoppage of grant of maintenance allowance from the date of order but did not overturn the order as per the grant of litigation expenses.

4. It is contended in the petition that the order passed by the learned 4th Additional District Judge, Chhatarpur is vitiated as the said order clearly exposit non-application of mind. It is the stand in the petition that the petitioner had been enlarged on bail during trial and also after conviction and hence, it would not be presumed that she is innocent, on that ground the maintenance allowance should not be stopped.

5. I have heard Mr. Arvind Singh, learned counsel for the petitioner and Mr. Ashok Lalwani, learned counsel for the respondent.

6. Mr. Singh, learned counsel appearing for the petitioner has propounded that the learned Family Judge has grossly erred by recalling the order since the subsequent factum that has been taken note of does not really come within the ambit and sweep of change that would have any kind of effect or import on grant of maintenance allowance as envisaged in Section 24 of the Act. It is propounded by him that the concept of discretion has been broadened by the Court below beyond the statutory provision which is impermissible and hence, the order has to pave the path of vitiation.

7. Mr. Lalwani, learned counsel appearing for the husband-respondent, submitted that if the language of Section 24 is read in the proper perspective, it would go a long way to show that in every case the Court is not obligated to grant maintenance allowance and the power invested with the Court is discretionary. Pyramiding the aforesaid submission, it is canvassed by him that the conditions precedent with regard to the finding of insufficiency of income in an independent manner for the purpose of maintaining oneself and to fight the litigation is not in absolute terms and, therefore, the conduct of a party is to be taken note of for

grant of the same and as in the instant case, the wife has tried to poison the husband, she does get herself incurably disentitled to get the benefit as engrafted under the statute. The learned counsel further submitted that Sections 24 and 25 of the Act should be read in a conjoint manner to understand the legislative intent and, therefore, the concept of conduct in its conceptual eventuality and connotative expanse cannot be totally ostracised or its effect absolutely modernized as that would tantamount to frustrating the basic imperative of grant of maintenance.

8. Thus, the centripetal and the pivotal issue that arises for consideration in this writ petition preferred under Article 227 of the Constitution of India -- whether the learned Family Judge of Family Court at Jabalpur is correct and sound in recalling the order granting maintenance pendente lite, u/s 24 of the Act on the foundation that the wife has been convicted u/s 328 of the IPC for administering poison to the husband, who has sought divorce by filing an application u/s 13(1) of the Act?

9. To appreciate the rival submissions raised at the Bar, it is necessary to refer Section 24 of the Act which reads as under:

24. 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 allowance 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.

On a plain reading of Section 24, it is clear as crystal that the Court is required to see that either the wife or the husband has no independent income sufficient for her or his support and the necessary expenses of the proceeding and thereafter it has to fix the monthly allowance and the sum towards expenses of the proceeding which has to be done having due regard to the petitioner's own income and the income of the respondent. It needs no special emphasis to state that the reference to the petitioner's income and the income of the respondent has a connectivity with the person who has submitted the application. The applicant becomes the petitioner and the other party becomes the respondent. Two aspects have to be kept in view: first, if the applicant has no independent income to support himself or herself and the second, whether he has the means and the necessary expenses to contend the proceeding. To put it differently, one must have the capacity to fight the litigation. The "support" does mean an amount which is sufficient for subsistence and reasonable living. The submission of learned counsel for the respondent is that the Court has the discretion, inasmuch as the Legislature has used the words "it may" and, therefore, even if the two statutory conditions are satisfied, the Court may decline to grant maintenance allowance and litigation expenses. It is contended by him that,

while deciding an application u/s 24, if the Court is of the firm view that the wife has been living an unchaste life, she is not entitled to claim any maintenance pendente lite or expenses of litigation. It is also put forth by him that if material comes on record that an adulterer supports the wife, she being living in adultery, could not be entitled to maintenance. I may hasten to state here that none of the counsels questioned the correctness of the order relating to jurisdiction to recall and I am inclined to think rightly so, since it would be neither legal nor just and proper to limit the wide discretionary power conferred on the Court u/s 24 of the Act by holding that the Court, has no power to modify or vary its order awarding interim maintenance even on proof of changed circumstances. (See Laxmi Priya Rout Vs. Kama Prasad Rout, .

10. The real crux and thrust of the matter is whether the discretion to recall under changed circumstance would include a conviction. To elaborate: whether the Court can take note of any circumstances which is extraneous to the provision, it is a cardinal principle of law that if the provision is clear and unambiguous, it is to be interpreted as it is without adding any word to it. Be it noted here that in certain cases, namely, Surjit Kaur Vs. Tirath Singh, and in certain other cases it has been observed that, though the words "conduct of the parties" do not appear in the present Section, yet the conduct of the parties would not be ignored by the Court in making the order asked for or for assessing the amount of alimony. The matter is one for the Court to deal with as it thinks just, and reasonable in its unfettered discretion. It has been held that certain relevant circumstances including adultery and the wife who has brought cohabitation to an end for which the husband cannot be blamed, and the conduct of the erring spouse that has caused exceptional hardship to the other or, where the erring spouse is shown to have been guilty of exceptionally depraved, the Court may refuse to grant alimony pendente lite. Whether the discretion of the Court can be stretched to that extent at the stage of entertaining an application u/s 24 is to be seen.

11. On a reading of the provision, there can be no scintilla of doubt that the Court has the discretion, but the discretion has to be used keeping in view judicial conscience and fair play and not in an arbitrary or capricious manner. The discretion that has been vested with the Court cannot travel beyond the statutory requirement. The Court cannot introduce a condition and conceive that the conduct of either of the spouses can be taken note of while awarding interim maintenance. The language in which Sections 24 and 25 are couched is quite different. The word "may" engrafted into the anatomy of the provision would not clothe the Court with the jurisdiction to take into any other facet which has a connectivity with the conception of "conduct". "Conduct is not a necessitous requirement for the purpose of grant of interim maintenance. The discretion that is vested with the Court has inseparable nexus with the conditions precedent and the reasonableness of the quantum. In this context, I may fruitfully reproduce a passage from the decision rendered in the case of Dwarkadas Gurumukhdas Agraval Vs. Bhanuben, :

2... In other words, is the Matrimonial Court entitled to negative the claim of maintenance pendente lite merely on the ground of the averments in the petition or the allegations against the wife? The answer to this question depends on the real nature of this right of a spouse to claim maintenance pending the proceedings. The right of a wife in general for maintenance is an incidence of the status of matrimony. The husband in general is under an obligation to defray the wife's costs of any proceedings and to provide her with maintenance and support during the pending legal proceedings under Hindu Marriage Act. Alimony strictly speaking is a maintenance allowance given to a wife by husband on separation. It is well recognised in civilised society that, a wife having no independent means of subsistence and maintenance is entitled to alimony pending matrimonial proceedings and costs thereof. It is this principle which has been incorporated in Section 24 of the Hindu Marriage Act. As a matter of fact the section goes beyond the classical concept of the doctrine of alimony inasmuch as it recognises the right even of a husband who has no sufficient means for his support to claim alimony pending the proceedings from a wife having means. The opening words of Section 24 invests a spouse lacking sufficient means for his or her support to claim maintenance pendente lite and the costs and expenses of the proceedings under the Act which includes, inter alia, for divorce or nullity of void or voidable marriage. On the plain reading of Section 24, alimony is a concomitant of a marriage in fact. On an admission or proof of a factum of marriage, alimony is a right of either of the spouses lacking means of his or her support. It would be no answer to such claim that the marriage is void or voidable. It would be imprudent on the part of the Court to ignore the principle that a de facto marriage necessarily carries a right to alimony pendente lite for an incapacitated spouse and the ultimate outcome of substantive proceedings cannot have a back-fire so as to negative such a right. If the allegation, or for that matter the conduct of the party claiming maintenance or expenses pending the proceedings is allowed to have such an over-bearing effect so as to negative such a claim it would be tantamount to prejudging the issues which is to be tried in the substantive proceedings.

12. In this context, I may very usefully refer to the decision rendered in the case of Mrs. Bijal Parag Dave Vs. Mr. Parag Labhashankar Dave, wherein it has been laid down as under:

While considering the application for maintenance pendente lite, the only consideration before the Court is inability of the spouse to maintain herself or himself for want of financial means or inadequacy of financial means to maintain at the level of social status of the other spouse from whom interim maintenance is sought and not the misconduct of the applicant spouse because in the matrimonial dispute between spouses, there would always be allegation of matrimonial offence or misconduct. If misconduct of the spouse seeking maintenance pendente lite could be a relevant factor, in no proceeding of divorce or dissolution of marriage or judicial separation, the opponent, spouse unable to maintain could seek interim maintenance since there would always be allegation

of matrimonial misconduct against him or her in such proceeding. This was never and is not legislative intention of Section 24. While enacting Section 24, the legislature has provided the interim measure to the spouse having no means or inadequate means to seek maintenance from the spouse who has means to pay the same since because of matrimonial dispute till its resolution by the Court, such affected party must be able to maintain herself or himself and contest the proceedings. The proceedings u/s 24 of Hindu Marriage Act are summary in nature and at this stage, the Court cannot embark upon the enquiry about the misconduct of the spouse claiming maintenance or commission of marital offence. It is that granting interim maintenance u/s 24 of Hindu Marriage Act is a matter of discretion but, like all other discretions exercisable by the Court, this discretion too has to be exercised judicially and in accordance with law. The consideration of a factor which does not flow from a statutory provision if taken into consideration while exercising discretion, such exercise of discretion cannot be said to have been exercised in accordance with law. In the instant case the trial Court has committed the mistake by taking into consideration the conduct of wife while considering application u/s 24 and therefore, the order impugned in the writ petition refusing to award maintenance pendente lite to the wife on the ground of misconduct cannot be sustained.

13. In the case of Amarjit Kaur Vs. Harbhajan Singh and Another, , their Lordships while dealing with the order of the High Court where a condition was imposed while granting maintenance and litigation expenses directed the Court below to order for conducting the DNA test of the male child which is in custody of the petitioner with the further rider that if the test goes against, the petitioner therein, should not be entitled to get any maintenance pendente lite for herself, but would get maintenance for the girl child which was fixed at Rs. 1,000/- per month. In that context it was contended before the Apex Court that in the matter of grant of maintenance, there is no impediment for the Court to impose a condition of the nature and no exception could be taken to the course adopted by the High Court. Their Lordships in Paragraph 8 held as under:--

8. Section 24 of the Hindu Marriage Act, 1955 empowers the Court in any proceeding under the Act, 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, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the petitioner and the respondent. Once the High Court, in this case, has come to the conclusion that the appellant wife herein has to be provided with the litigation expenses and monthly maintenance, it is beyond comprehension as to how, de hors the criterion laid down in the statutory provision itself, the Court could have thought of imposing an extraneous condition, with a default clause which is likely to defeat the very claim which has been sustained by the Court itself. Considerations as to the ultimate outcome of the main proceeding after regular

trial would be wholly alien to assess the need or necessity for awarding interim maintenance, as long as the marriage, the dissolution of which has been sought, cannot be disputed, and the marital relationship of husband and wife subsisted. As noticed earlier, the relevant statutory consideration being only that either of the parties, who was the petitioner in the application u/s 24 of the Act, has no independent income sufficient for her or his support for the grant of interim maintenance, the same has to be granted and the discretion thereafter left with the Court, in our view, is only with reference to reasonableness of the amount that could be awarded and not to impose any condition, which has self-defeating consequence. Therefore, we are unable to approve of the course adopted by the learned Single Judge, in this case.

From the aforesaid pronouncement, it is evincible that their Lordships while scanning the basic requirement of Section 24 of the Act have laid down that the relevant statutory consideration being only that either of the parties who was the petitioner in the application u/s 24 of the Act has no independent income sufficient for her or his support for the grant of interim maintenance, the same has to be granted and the discretion therefore left with the Court is only with reference to the reasonableness of the amount that would be awarded and not to impose any condition which has self-defeating consequence. It is worth noting here that in Paragraph 9 of the said judgment their Lordships dealt with the condition imposed, i.e. conducting a DNA test and expressed no opinion on the legality and propriety of the Court undertaking consideration at the appropriate stage. Their Lordships only confined to the limited aspect to the stage of awarding interim maintenance. It may look that imposition of a condition while granting maintenance allowance can affect the provision thereof distinguishing features but a pregnant one, which their Lordships have categorically and unequivocally expressed the opinion with regard to the requirement of statutory conditions. Their Lordships have used the words "the relevant statutory conditions being only..." and in view of the aforesaid I am disposed to think that no other condition can be read into the provision to be added as a futuristic conditional one or a conviction. Their Lordships have restricted the discretion to quantum, not to entitlement if the conditions precedent are proved. The submission made by the learned counsel for the respondent that the conduct is a relevant fact and has to be taken into consideration is de hors the provision, as Section 25 has been couched in a different language than Section 24. Section 25 uses the phraseology "... conduct of the parties and other circumstances of the case". Such wordings are absent in the provision and in the absence of the same, it would be encroaching in the field of legislation to add the said concepts to it on the basis that the Court has a discretion, more so, when the Apex Court has expressed the view with regard to the limited discretion the Court has. In view of the constricted and restricted discretion on, the broader expanse that has been built up and the edifice that is sought to be pyramided by the learned counsel for the respondent have no legs to stand upon and bound to collapse.

14. Consequently, the inevitable conclusion would be quashment of the

impugned order which I direct. The petitioner shall be entitled to the maintenance allowance and litigation expenses as per the earlier order and the amount that has fallen due by virtue of quashing of the impugned order shall be paid to the wife petitioner within a period of three months. There shall be no order as to costs.