

Before G. C. Mital, J.

SUDERSHAN KUMAR KHURANA,—Petitioner.

versus

SMT. DEEPAK,—Respondent.

Civil Revision No. 2947 of 1980.

March 2, 1981.

*Hindu Marriage Act (XXV of 1955)—Sections 9, 24 and 26—Petition filed under section 9 for restitution of conjugal rights—Application under sections 24 and 26 for maintenance pendente lite Proceedings under section 9 concluded—Application for maintenance pendente lite—Whether could continue—Order granting maintenance pendente lite—Whether would operate till the conclusion of proceedings under sections 24 and 26.*

*Held*, that merely by the decision of the main petition under sections 9, 10, 12 or 13 of the Hindu Marriage Act, 1955, the jurisdiction of the court to decide the application for maintenance pendente lite under sections 24 and 26 of the Act is not taken away and the court can continue to proceed with the said application thereafter. (Paras 3 and 5).

*Held*, that an order granting maintenance pendente lite would operate from the date of the filing of the petition under section 24 of the Act till its conclusion. (Para 8).

*Revision under Section 115 C.P.C. praying that the impugned order dated 14th October, 1980 passed by Smt. Bakshish Kaur Sub-Judge, 1st Class, Amritsar be set aside and the revision petition be accepted with costs and the application filed by the respondent/wife under Section 24 of the Act be dismissed as not maintainable.*

A. P. S. Ahluwalia, Advocate, for the Petitioner.

Ashok Bhan, Advocate, for the Respondent.

#### JUDGMENT

(1) The parties were married on 10th December, 1974, and a female child was born on 13th September, 1975. Thereafter differences arose between them. On 28th January, 1978, the wife filed

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a petition under section 9 of the Hindu Marriage Act (hereinafter called the Act), for restitution of conjugal rights and on 31st January, 1978, she filed an application under section 24 of the Act for grant of litigation expenses and maintenance *pendente lite* for herself and the child. Notice of both the applications was served on the husband on 21st March, 1978, for 28th April, 1978. Before deciding the petition under section 9, the Court called upon the parties to lead evidence on the application under section 24. The wife concluded her evidence on that application on 25th March, 1979. A reading of the impugned order shows that the wife had to put in great efforts in bringing on record documentary evidence to prove the income of the husband. On 14th September, 1979, the husband filed a written statement in the main case and on 20th September, 1979, he made a statement that the petition of the wife for restitution of conjugal rights may be allowed. When the husband made this concession before the Court below, the wife represented that the proceedings under section 9 of the Act could not be concluded because the petition under section 24 was yet at the stage of evidence to be produced by the husband. The Court below, by detailed order dated 20th September, 1979, came to the conclusion that even if proceedings under section 9 are concluded, the petition under section 24 of the Act could be continued and, therefore, allowed the petition under section 9 of the Act and granted her a decree for restitution of conjugal rights. In spite of the decision of the main petition under section 9, the proceedings under section 24 of the Act continued and the husband concluded his evidence on 4th April, 1980. By order dated 14th October, 1980, the Court below allowed to the wife and the child a total sum of Rs. 700 per mensem as maintenance *pendente lite* and Rs. 2,000 as litigation expenses. The Court below relied on a decision of Shri S. C. Jain, Additional District Judge, Delhi, between the parties, wherein for the wife and the child maintenance at the rate of Rs. 700 per mensem was allowed, besides relying on other evidence brought on the record. Against the aforesaid order the husband has come to this Court in revision.

2. Notice of motion was issued to the wife and after hearing the counsel for the parties, I am of the view that the award of maintenance at the rate of Rs. 700 per mensem granted to the wife and the child by the Court below under section 24, read with section 28 of the Act, is well-based. It is admitted on behalf of the husband

that in 1978, Shri S. C. Jain, Additional District Judge, Delhi, in the dispute between the parties, awarded maintenance *pendente lite* to the wife and the child at the rate of Rs. 700 per mensem and the husband filed a revision in the Delhi High Court which was ultimately withdrawn by him. The husband is a Chartered Accountant and he passed out in 1973. For some time he served in a private company but later on gave up service and started his private practice as a Chartered Accountant. When the decision was given by Shri S. C. Jain, Additional District Judge, Delhi, even at that time the husband was doing private practice as a Chartered Accountant. Although his income-tax returns show a very nominal income from the profession of Chartered Accountant but from a large number of dealings, in respect of which documentary evidence has been brought on the record, it is clearly established that the petitioner is very well to do and his income is sufficient enough out of which Rs. 700 per mensem can easily be allowed to the wife and the child. Accordingly, the decision of the Court below in this regard is upheld. Moreover, it is not shown that since the decision of the Delhi Court, the income of the husband has gone down.

3. The point which was more seriously argued before me by Shri Ahluwalia on behalf of the husband was that since the main petition under section 9 of the Act was disposed of on 20th September, 1979, the Court below was devoid of jurisdiction thereafter to proceed with the application for grant of maintenance *pendente lite* because section 24 of the Act relates to grant of maintenance only during the pendency of litigation. The learned counsel placed reliance on two Single Bench decisions in *Smt. Chitra Lekha v. Ranjit Rai*, (1) and *Nirmla Devi v. Ram Dass*, (2). There can be no quarrel with the proposition that sections 24 and 26 of the Act were enacted to provide maintenance to the wife and the child *pendente lite* but a reading of the two sections does not show that if the main petition is disposed of the jurisdiction of the Court to award maintenance *pendente lite* by an order to be passed thereafter is taken away.

4. Prior to the amendment of 1976 brought about in the Act, an order under section 24 of the Act was appealable. In a given

(1) A.I.R. 1977 Delhi 176.

(2) A.I.R. 1973 Pb. & Haryana 48.

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case, if the husband or the wife was aggrieved by the grant of interim maintenance and took the matter in appeal and if during the pendency of that appeal the main proceedings were decided by the trial Court, then, according to the argument on behalf of the husband in this case, the appeal would become infructuous because the appellate Court will have no jurisdiction to deal with the matter of enhancement or reduction of the interim maintenance awarded by the Court below on the conclusion of the main petition. After amendment, against an order passed under section 24 of the Act a revision lies to this Court. If a revision is filed in this Court and before its decision the main petition is decided by the Court below, according to the learned counsel, the revision would become either incompetent or infructuous. This can never be the intention of the Legislature. This view of mine finds support from a decision of D. S. Tewatia, J., in *Amrik Singh v. Smt. Narinder Kaur*, (3). D. S. Tewatia, J., has distinguished the case of Suri, J., in *Nirmla Devi's case* (supra). I do not find myself in agreement with the view taken by B. C. Misra, J., in *Smt. Chitra Lekha's case* (supra) and dissent from the same.

5. There is one more additional reason in this case. When the husband conceded that the wife may be granted a decree for restitution of conjugal rights, the wife opposed the passing of the final judgment in that regard and took a clear stand that the decision of section 9 petition be postponed till the decision of proceedings for the grant of maintenance *pendente lite* and litigation expenses. However, it appears that the husband took a stand to the contrary and the Court below in order dated 20th September, 1979, specifically observed that in spite of the grant of decree for restitution of conjugal rights, the petition for grant of maintenance *pendente lite* could continue. The husband under the circumstances cannot be allowed to approbate and reprobate. Moreover, if the husband was aggrieved from the decision of the Court below dated 20th September, 1979, he should have challenged the same by filing an appeal or revision and instead produced his evidence thereafter in proceedings for grant of maintenance *pendente lite* and litigation expenses and raked the matter

at the time of arguments. Accordingly, in view of the aforesaid facts, the husband cannot be allowed to urge that the proceedings for grant of maintenance *pendente lite* and litigation expenses could not proceed after the decision of the main case. Accordingly, I hold that merely by the decision of the petition under sections 9, 10, 12 or 13 of the Act, the jurisdiction of the Court is not taken away to decide the application under sections 24 and 26 of the Act.

6. The next question which arises for consideration is whether the order granting maintenance *pendente lite* would operate till the decision of the main petition under section 9 of the Act, that is, till 20th September, 1979, or till the final conclusion of the proceedings under sections 24 and 26 of the Act between the parties. Council for the husband strenuously contended that the scope of sections 24 and 26 is to award maintenance during the pendency of the main litigation. As already observed, there can be no quarrel with this proposition because generally the petitions under sections 24 and 26 of the Act are decided first and should as a matter of fact be decided before the conclusion of the main petitions. The decided cases reveal that an order of maintenance *pendente lite* is always passed first. Not only that, if the husband is a respondent in the main petition and an order for maintenance *pendente lite* is passed and if he does not comply with the order, his defence is struck off. In cases where the husband is the applicant in the main petition and he fails to comply with the order, then the Courts refuse to proceed with the main petition till maintenance *pendente lite* and litigation expenses are paid to the wife. This clearly shows that the proceedings for maintenance *pendente lite* have to be concluded before the main petition is decided. However, the husband can snap the main proceedings while the application for fixation of maintenance *pendente lite* and litigation expenses is still pending, either by absenting from the proceedings in case he is the applicant in the main case and by getting the same dismissed in default and where the main petition is filed by the wife, by making a statement confessing judgment in favour of the wife. In the first case, when the husband absents in the petition, where he is the applicant the Court will have no option but to dismiss the petition in default but that would not mean that he can take away the right of the wife and the child given under sections 24 and 26 of the Act to continue with those applications and to have the amount determined. Similarly, if the husband is respondent in the main petition

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and he confesses judgment in favour of the wife, then two courses can be open to the Courts. One would be to dispose of the main petition on the consent of the husband and grant the decree to the wife but to continue to proceed with the petition under sections 24 and 26 of the Act for fixing maintenance *pendente lite*. The other would be if the Court comes to the conclusion that the petition under sections 24 and 26 of the Act cannot continue if the main petition stands disposed of, then to keep the main petition in abeyance and first to decide the petition under sections 24 and 26 of the Act for granting maintenance *pendente lite* and litigation expenses and thereafter to decide the main petition on the concession of the husband. If the second course is open to the Courts to follow, it would clearly mean that the liability of the husband to pay maintenance *pendente lite* would continue so long as the petition under sections 24 and 26 of the Act is pending. To my mind, following the first course is neither illegal nor against any provision of the statute and if that course is followed by the Courts then I do not find any justification for not awarding maintenance *pendente lite* to the wife even beyond the conclusion of the main petition till proceedings under sections 24 and 26 of the Act are finalised. The counsel for the petitioner had cited some decisions wherein it was held that the Court has no jurisdiction to proceed with petition under sections 24 and 26 of the Act after the main petition is decided. A reading of the facts of all those cases shows that either the husband absented in the main petition or confessed judgment in favour of the wife, in each case and that is how the main petitions stood disposed of while the proceedings under section 24 were pending. I will not countenance that the procedure of law or the course of justice can be moulded at the sweetwill of the husband in his favour and to the detriment of the wife.

7. The aforesaid view finds full support from the decision of D. S. Tewatia, J., in *Durga Dass v. Tara Rani*, (4). The facts of that case were that an order of divorce had earlier been passed between the parties and the wife was granted Rs. 50 per mensem as permanent alimony under section 25 of the Act. The husband did not pay the permanent alimony and the wife took out execution and the Executing Court ordered execution against some of the amounts due to the husbands as he was in service and held that some

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(4) E.F.A. 119 of 1970 decided on 17th November, 1970,

amounts due to the husband from service were not amenable to the jurisdiction of the Executing Court. The wife filed execution First Appeal No. 109 of 1970 to claim execution against the items of service dues which were held not amenable to execution and the husband filed Execution First Appeal No. 119 of 1970 regarding the portion which was held to be amenable to execution. In the husband's appeal, the wife filed an application under section 24 of the Act claiming maintenance and litigation expenses during the pendency of the appeal in this Court. That application was opposed by the husband on the ground that section 24 is applicable only to proceedings of divorce etc. under the Act and not to execution proceedings or appeals therefrom. This contention was rejected by this Court with the following observations:—

“Therefore, I am clearly of the opinion that the expression ‘proceedings under this Act’ shall cover the execution proceedings as well; recourse to which was made necessary by Shri Durga Dass by not complying with the order of maintenance passed under section 25 of the Act. Therefore, I order Shri Durga Dass to pay Rs. 200 to the applicant and Rs. 50 per month to her towards maintenance with effect from the date of the application.”

8. For the reasons recorded above, it is held that the respondent would be entitled to maintenance *pendente lite* for herself and her child from the date of filing of the petition under section 24 of the Act till its conclusion, that is, 14th October, 1980.

9. As regards litigation expenses, the counsel for the husband has urged that the award of Rs. 2,000 is much too excessive especially when the proceedings under section 9 of the Act were concluded on the basis of the concession made by the husband. I find that the main petition and the application for grant of interim maintenance were filed in January, 1979, and while the main petition continued for a year and a half, the application for grant of maintenance *pendente lite* continued for two years and nine months and there was great contest and the wife had to bring lot of documentary evidence on the record apart from examining witnesses. Therefore, for such a trial the award of Rs. 2,000 as litigation expenses, keeping in view the status of the parties, cannot be said to be exaggerated so as to call for interference in revisional jurisdiction of this Court.

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10. It was then urged that while disposing of the main petition under section 9 of the Act the trial Court had awarded costs of Rs. 250 to the wife against the husband and in this manner the husband will have to pay total expenses of Rs. 2,250 to the wife. Since the Court below has found that the wife is entitled to total expenses of Rs. 2,000 it is made clear that the litigation expenses of Rs. 2,000 awarded by the Court below by the impugned order would include the costs of Rs. 250 imposed against the husband in the main petition under section 9 of the Act.

11. For the reasons recorded above, this revision fails and is dismissed in *limini* with no order as to costs.

S. C. K.

Before M. M. Punchhi, J.

NAUSHERA and others,—Appellants.

versus

STATE OF HARYANA,—Respondent.

Criminal Appeal No. 737 of 1979.

March 10, 1981.

*Indian Penal Code (XLV of 1860)—Sections 399 and 402—Distinction—Accused tried under sections 399 and 402—Acquittal under section 399—Charge under section 402—Whether would fail automatically.*

*Held*, that though the offence falling in both the sections 399 and 402 of the Indian Penal Code, 1860 would probably involve similar ingredients, the only difference between the two would be that while under section 402 of the Code mere assembly without preparation is enough, section 399 of the Code would be attracted only when some additional step is taken by way of preparation. There can be cases where there may be an assembly for the purpose of decoity without even a fringe of preparation. Thus, there is a distinction between the two sections which is easily discernible and the mere fact that the accused were acquitted of the charge under section 399 of the Code would be no ground to knock off the charge under section 402 of the Code against them.

(Para 4).