

Rattan Chand *v.* The Deputy Commissioner, Gurdaspur, etc. (Narula, J.)

is the period for which the licence is held by the defaulter, and any order for suspending a licence during a period for which no licence has been granted is without jurisdiction and outside the scope of rule 15. I accordingly hold that the order of respondent No. 1, dated November 23, 1965 (Annexure 'C'), in so far as it purports to suspend the licence of Rattan Chand, petitioner, for the period beyond 31st December, 1965, is void and without jurisdiction.

This writ petition is, therefore, partially allowed. The validity of the impugned order is upheld only for the period ending 31st December, 1965, and the impugned orders in so far as they purport to suspend the petitioner's licence for the period 1st January, 1966, to 22nd November, 1966, are set aside and quashed. In the circumstances of the case, there will be no order as to costs.

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B.R.T.

APPELLATE CIVIL

*Before S. B. Kapoor and H. R. Khanna, JJ.*

P. C. JAIRATH,—*Appellant*

*versus*

MRS. AMRIT JAIRATH,—*Respondent*

F.A.O. No. 40-D of 1966

July 22, 1966

*Hindu Marriage Act (XXV of 1955)—S. 28—Appeals against orders passed in proceedings under the Act—How far competent—Order refusing to stay proceedings of a case under S. 10, Code of Civil Procedure—Whether appealable.*

*Held*, that the orders under sections 24, 25 and other similar sections of the Hindu Marriage Act, 1955, are appealable under section 28 of the Act. The effect of taking an opposite view would be that no appeal would be maintainable even against the decrees granted in proceedings under sections 9 to 13 of the Hindu Marriage Act. Those decrees would not answer to the definition of the term "decree" as given in the Code of Civil Procedure. Decrees under that Code are granted in regular suits instituted by the filing of plaints and not by the filing of petitions. The language of section 28 also makes it clear that decrees under the Hindu Marriage Act are not decrees under the Code of Civil Procedure, for

it is stated therein that decrees under the Hindu Marriage Act shall be enforced in like manner as decrees of a Court on its original civil jurisdiction. This necessarily implies that though the decrees under the Act are by a statutory fiction treated for the purpose of enforcement as decrees under the Code, they in fact are not such decrees. It was also not the intention of the Legislature while giving a right of appeal under section 28 of the Hindu Marriage Act, to make that right indefinite and more or less illusory by providing that the appeal under that section would be competent only if a provision for that purpose exists in some other law in force for the time being and not otherwise, Section 28 should be regarded as self-contained so far as appeals against decrees and orders under the different provisions of the Hindu Marriage Act are concerned and for this purpose it should not be necessary to look to other laws. The words in section 28 "and may be appealed from under any law for the time being in force" have reference only to the forum of appeal and the procedure to govern such appeals.

*Held*, that the appeals contemplated by section 28 of the Hindu Marriage Act are against the decrees and orders made under the specified provisions of that Act. Where, however, an order is made on an application under the Code of Civil Procedure and not on an application under some provision of the Hindu Marriage Act, even though it be in the course of proceedings under that Act, the question as to whether the order is appealable or not would have to be answered by reference to the provisions of the Code. The reason for that is that section 21 of the Act makes the Code of Civil Procedure applicable to the proceedings under the Hindu Marriage Act and if an application is made during the course of those proceedings under the Code, it is to that Code that is to be looked to, to determine as to whether the order made under the Code is appealable or not. It is not the effect of section 28 of the Hindu Marriage Act that even though an order on an application under section 10 of the Code of Civil Procedure be not appealable, an appeal against it would be competent if it is made in the course of proceedings under that Act. The only effect of section 28, is to give a right of appeal to an aggrieved party against decrees and orders for which an express provision is made under the Hindu Marriage Act, and it would not be a correct construction of the section to hold that it enlarges the right of appeal and makes appeals competent even against those orders under the Code of Civil Procedure which are otherwise not appealable. The appealability of the orders made under the Code of Civil Procedure would have to be determined with reference to the provisions of the Code itself. As admittedly no right of appeal is provided in the Code of Civil Procedure against an order made on an application under section 10 of the Code, it would follow that no appeal is competent against such an order.

*First Appeal from the order of Shri Mahesh Chandra, Sub-Judge, 1st Class, Delhi, dated 11th February, 1966, dismissing the application, under section 9 of the Hindu Marriage Act.*

F. C. BEDI, ADVOCATE, for the Appellant.

B. N. KIRPAL AND M. K. KAUL, ADVOCATES, for the Respondent.

P. C. Jairath *v.* Mrs. Amrit Jairath (Khanna, J.)

JUDGMENT

KHANNA, J.—The following question has been referred to Division Bench in pursuance of the order of Narula, J. :—

“Whether an order refusing to stay the proceedings of a case under the Hindu Marriage Act, under section 10 of the Code of Civil Procedure is appealable under section 28 of the Hindu Marriage Act or not” ?

The facts giving rise to the above reference are that the appellant P. C. Jairath, on getting a notice from his wife Mrs. Amrit Jairath, respondent, filed a petition under section 9 of the Hindu Marriage Act, for restitution of conjugal rights against the respondent in the District Court at Calcutta on 18th June, 1965. The respondent thereafter filed a petition under sections 10 and 25 of the Hindu Marriage Act on 28th August, 1965, in the District Court at Delhi for judicial separation and payment of maintenance against the appellant. The appellant made an application, dated 8th October, 1965, under sections 10 and 151 of the Code of Civil Procedure in the Court of Subordinate Judge, Delhi, to whom the petition for judicial separation and payment of maintenance had been allotted, for stay of the Delhi petition on the ground that his earlier petition for restitution of conjugal rights was pending in the District Court at Calcutta. According to the appellant the matter in issue in the two petitions in the District Court at Calcutta and the Delhi Court was substantially the same and as the proceedings at Calcutta had been initiated earlier the proceedings in Delhi Court were liable to be stayed. The appellant's application for stay was resisted by the respondent and was dismissed by the learned Subordinate Judge, 1st Class, Delhi, as per order, dated 11th February, 1966. It was held that it was not a fit case in which the proceedings in the suit pending in the Delhi Court should be stayed under section 10 or section 151 of the Code of Civil Procedure. The husband then came to this Court in appeal against the above order of the trial Court refusing to stay the proceedings.

At the hearing of the appeal a preliminary objection was raised on behalf of the respondent about the maintainability of the appeal on the ground that no appeal lay against the order under appeal. The learned Single Judge felt that the matter was of importance and not free from difficulty. Note was also made of the fact that divergent views had been expressed by the Courts. The matter was consequently referred to the Division Bench.

Before dealing with the respective contentions of the parties it would be pertinent to briefly refer to some of the provisions of the Hindu Marriage Act having a bearing. Section 9 of the Act gives the circumstances under which a decree for restitution of conjugal rights may be awarded. Section 10 prescribes the grounds for a decree for judicial separation. Sections 11 and 12 enumerate the grounds for granting a decree for nullity of marriage, while section 13 reproduces the circumstances under which a marriage may be dissolved by a decree for divorce. Section 24 of the Act makes provision for an order by the Court to the respondent to pay to the petitioner the expenses of the proceedings and maintenance *pendente lite* as may seem to the Court to be reasonable. Section 25 empowers the Court to make an order for permanent alimony and maintenance under section 26 of the Act the Court may from time to time pass orders in respect of the custody, maintenance and education of the minor children of the parties in proceedings under the Hindu Marriage Act. Orders about the property presented, at or about the time of marriage, which may belong jointly to both the husband and wife, can be made by the Court under section 27 of the Act. According to section 21 of the Act, subject to the other provisions contained in the Act and to such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908. Section 28, with which we are directly concerned, reads as under:—

“All decrees and orders made by Court in any proceedings under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of the original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force:

Provided that there shall be no appeal on the subject of costs only.”

Mr. Bedi, on behalf of the appellant has argued that section 28, reproduced above, gives a right of appeal against all decrees and orders made by a Court in any proceedings under the Hindu Marriage Act, and as the impugned order was made in the course of proceedings under section 10 of the Hindu Marriage Act, the appellant has a right of appeal against that order. The impugned order, it is further contended, affected the jurisdiction of the Court

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to try the petition under section 10, and as the order was made after hearing arguments and was not of a mere formal nature, the appellant is entitled to assail the same by means of appeal.

As against the above Mr. Kirpal on behalf of the respondent has argued that the appealability of decrees and orders has to be determined by reference to the provisions of the Code of Civil Procedure. Whatever might be the position with respect to decrees and orders made under the specified provisions of the Hindu Marriage Act, so far as the orders on applications under the Code of Civil Procedure are concerned, according to Mr. Kirpal, the right of appeal would only be there if it is provided by that Code.

It would at this stage be useful to advert to the authorities which have been cited at the bar. In *Sunder Singh v. Shrimati Manna Sunder Singh* (1), Gosain, J., held that an order awarding maintenance *pendente lite* and expenses of proceedings on a wife's application under section 24 of the Hindu Marriage Act is appealable under section 28 of the Act. Argument was advanced before the learned Judge that the words "under any law for the time being in force" show that every order is not made appealable and that reference has to be made to the Civil Procedure Code to find whether such an order is a decree as defined in the Code or whether such an order is made appealable under any provision of the Code of Civil Procedure. This contention was rejected and it was observed—

"It is difficult to conceive that the Legislature left the matter of maintainability of appeals on wholly uncertain grounds and that for finding whether a particular order under this Act was or was not appealable the Legislature intended to leave the parties to have recourse to the provisions of other laws."

Reliance was placed by Gosain, J., on *Shrimati Sobhana Sen v. Amar Kanta Sen* (2), *Rukhmanibai v. Kishanlal Ramlal* (3). Reference was also made to two Single Bench cases of Lahore High Court *Robert Cameron Chamarette v. Mrs. Phyllis Ethel Chamarette* (4), and *Noble Millicans v. Mrs. Gladus Millicans* (5). The two Lahore

(1) A.I.R. 1962 Punj. 127.

(2) A.I.R. 1959 Cal. 455.

(3) A.I.R. 1959 M.P. 187.

(4) A.I.R. 1937 Lahore 176.

(5) A.I.R. 1937 Lahore 862.

cases were under the Divorce Act. In the case of *Robert Cameron Chamarette*, question arose about the paternity of children in matrimonial proceedings. It was held that an order in that respect made by the Court could be appealed against under section 55 of the Divorce Act, the provisions of which were analogous to those of section 28 of the Hindu Marriage Act. In the case of *Noble Millicans* it was held that an appeal lies from an order of the Court fixing amount of maintenance under section 41 of the Divorce Act. In *Shrimati Sobhana Sen v. Amar Kanta Sen* (supra), a Division Bench of Calcutta High Court, held that an appeal lies against an order of the District Judge on an application by the wife for maintenance *pendente lite* and expenses of divorce proceedings started by the husband under the Hindu Marriage Act. Das Gupta, J., as he then was, who spoke for the Bench, observed—

“(5) The question before us is one of construction of the words used by the legislature in this section. Two rival constructions require consideration. One is that by this section the legislature has provided that an appeal will lie against all decrees and orders made by the court in any proceedings under the Act and that the forum and other matters in connection with the hearing of the appeal would be decided in accordance with the laws that may be in force for the time being. The other construction which is suggested is that this section does not say anything positive itself as regards appealability of decrees and orders, but merely says that if an appeal lies against decrees and orders made in any proceedings under this Act, under some law that may be in force at that time, then an appeal will lie and not otherwise.

(6) In my opinion, the first construction should be preferred to the other construction that has been suggested. In the first place, it seems to me unreasonable to hold the legislature guilty of leaving the matter of appealability entirely at large, as it would be, if appealability was to depend on any law for the time being in force. It is much more reasonable, in my opinion, to think that when the legislature took upon itself the task of making provisions as regards appeals, it intended to make definite provisions.”

Similar view was expressed by the Division Bench of the Madhya Pradesh High Court in *Rukhmanibai v. Kishan Lal-Ram Lal* (supra). The above-mentioned Calcutta and Madhya Pradesh authorities were

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also followed by Mahajan, J., in *Dr. Tarlochan Singh v. Shrimati Mohinder Kaur* (6) and it was held that an order upon an application made under section 24 of the Hindu Marriage Act was appealable. A Division Bench of Gujarat High Court in *Kadia Hari Lal Purshottam v. Kadia Lilavati Gokaldas* (7), and a Division Bench of Madras High Court in *D. S. Seshadri v. Jayalakshmi* (8), following the above-mentioned authorities and *Shrimati Sobhana Sen v. Amar Kanta Sen* (supra), held that an order on an application under section 25 of the Hindu Marriage Act was appealable under section 28 of the Act.

As against the above-mentioned authorities, the Andhra Pradesh and Bombay High Courts have taken the view in *Bhamidipati Saraswathi v. Bhamidipati Krishna Murthy* (9) and *Prithvi Raj Singhji Mansinghji vs. Baj Shiv Prabha Kumari and another* (10), that an order made on an application under section 24 of the Hindu Marriage Act is not appealable under section 28 of the Act. The learned Judges took the view that as the provisions of the Code of Civil Procedure are made applicable to proceedings under the Hindu Marriage Act and as under that Code there was no right of appeal against such an order the order could not be held to be appealable.

It would appear from the above that though there is a conflict of authority on the point as to whether an appeal is competent under section 28 of the Hindu Marriage Act against orders made under sections 24, 25 and other similar sections of the Hindu Marriage Act, the preponderance of view as expressed by the Punjab, Calcutta, Gujarat, Madhya Pradesh and Madras High Courts is that such an appeal is competent. After giving the matter my earnest consideration I agree with the above view because the effect of taking an opposite view would be that no appeal would be maintainable even against the decrees granted in proceedings under sections 9 to 13 of the Hindu Marriage Act. Those decrees would not answer to the definition of the terms "decree" as given in the Code of Civil Procedure. Decrees under that Code are granted in regular suits instituted by the filing of plaints and not by the filing of petitions. The

(6) A.I.R. 1961 Punj. 508.

(7) A.I.R. 1961 Guj. 202.

(8) A.I.R. 1963 Mad. 283.

(9) A.I.R. 1960 Andh. Prad. 30.

(10) A.I.R. 1960 Bom. 315.

language of section 28 also makes it clear that decrees under the Hindu Marriage Act are not decrees under the Code of Civil Procedure, for it is stated therein that decrees under the Hindu Marriage Act shall be enforced in like manner as decrees of a Court on its original civil jurisdiction. This necessarily implies that though the decrees under the Act are by a statutory fiction treated for the purpose of enforcement as decrees under the Code, they in fact are not such decrees. It was also not the intention of the Legislature, in my view, while giving a right of appeal under section 28 of the Hindu Marriage Act, to make that right indefinite and more or less illusory by providing that the appeal under that section would be competent only if a provision for that purpose exists in some other law in force for the time being and not otherwise. Section 28 should be regarded as self-contained so far as appeals against decrees and orders under the different provisions of the Hindu Marriage Act are concerned and for this purpose it should not be necessary to look to other laws. The words in section 28 "and may be appealed from under any law for the time being in force", as I read that section, have reference only to the forum of appeal and the procedure to govern such appeals.

I, therefore, agree with the view that the orders under sections 24, 25 and other similar sections of the Hindu Marriage Act are appealable under section 28 of the Act. This would not, however, solve our difficulty in the present case because the question, with which we are concerned is whether an order made on an application under section 10 of the Code of Civil Procedure in proceedings under the Hindu Marriage Act is appealable under section 28 of the Hindu Marriage Act. In this connection I am of the view that the appeals contemplated by section 28 of the Hindu Marriage Act are against the decrees and orders made under the specified provisions of that Act. Where, however, an order is made on an application under the Code of Civil Procedure and not on an application under some provision of the Hindu Marriage Act, even though it be in the course of proceedings under that Act, the question as to whether the order is appealable or not would have to be answered by reference to the provisions of the Code. The reason for that is that section 21 of the Act makes the Code of Civil Procedure applicable to the proceedings under the Hindu Marriage Act and if an application is made during the course of those proceedings under the Code, it is to that Code that we shall have to look to determine as to whether the order made under the Code is appealable or not. It is not the effect of section 28



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of the Hindu Marriage Act that even though an order on an application under section 10 of the Code of Civil Procedure be not appealable, an appeal against it would be competent if it is made in the course of proceedings under that Act. The only effect of section 28, in my view, is to give a right of appeal to an aggrieved party against decrees and orders for which an express provision is made under the Hindu Marriage Act, and it would not be a correct construction of the section to hold that it enlarges the right of appeal and makes appeals competent even against those orders under the Code of Civil Procedure which are otherwise not appealable. No authority has been cited at the bar in support of the view that an order, not made under some express provision of the Hindu Marriage Act, but on an application made under the Code of Civil Procedure in proceedings under the Hindu Marriage Act, would be appealable even though the Code gives no right of appeal against such an order. On the contrary I find that there are authorities which fortify me in the view I am taking of the matter. In *Shrimati Anita Karmokar and another vs. Birendra Chandra Karmokar* (11), it was held that by the expression "orders" mentioned in section 28, only orders made under the Act are meant by the Legislature and no other orders. The orders passed under the Act are the orders contemplated by sections 24, 25 and 26 of the Act. In the aforesaid case an application under section 151 of the Code of Civil Procedure for stay of further proceedings in matrimonial action was rejected. It was held that the order rejecting the application was not an order made under the Act and was not appealable under section 28. Although an attempt has been made on behalf of the appellant to argue that the view expressed in the above case of *Shrimati Anita Karmokar and another* is in conflict with the view expressed by Division Bench of Calcutta High Court in *Shrimati Sobhana Sen's* case, I find no warrant for the correctness of this submission. Both the above-mentioned Calcutta cases were followed by Madras High Court in the case of *D. S. Seshadri* (supra). Agreeing with the observations in the case of *Shrimati Anita Karmokar and another*, the learned Judges of Madras High Court observed.

"We agree with the learned Judge that the orders contemplated by section 28 are orders passed under the Act, but it cannot be said that there would be no right of appeal against any interlocutory order at all. There may be interlocutory

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(11) A.I.R. 1962 Cal. 88.

orders like an injunction, etc., or orders relating to execution, satisfaction and discharge in execution of decrees under the Act. Those orders will be orders passed under the provisions of the Civil Procedure Code and it appears *prima facie* that they will be subject to right of appeal granted under that very Code which is made applicable to the proceedings under the Act."

The above observations make it plain that the appealability of the orders made under the Code of Civil Procedure would have to be determined with reference to the provisions of the Code itself. As admittedly no right of appeal is provided in the Code of Civil Procedure against an order made on an application under section 10 of the Code, it would follow that no appeal is competent against such an order.

Some authorities have also been cited before us to show that an order on an application under section 10 of the Code of Civil Procedure amounts to a judgment for the purpose of a Letters Patent Appeal, but we need not go into those authorities as the question before us is not of a right of appeal under the Letters Patent, but under section 28 of the Hindu Marriage Act.

I would, therefore, answer the question referred to the Division Bench in the negative. The case shall now be sent back to the learned Single Judge for disposal. As regards costs, I direct that they shall abide the event.

S. B. CAPOOR, J.—I agree.

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CIVIL MISCELLANEOUS

*Before S. K. Kapur, J.*

OM PARKASH BHARDWAJ,—*Petitioner*

*versus*

THE UNION OF INDIA,—*Respondent.*

Civil Writ No. 28-D of 1963

July 25, 1966

*Air Force Act (XLV of 1950)—Ss. 18 and 19—Air Force Officer—Whether can be dismissed without a trial by a Court Martial or enquiry after complying*