

(140) In the view I have taken on the 2nd question, the necessary result that follows, is that the writ petitions fail, and are accordingly liable to be dismissed.

*Order dated 16th May, 1996 passed by the Full Bench.*

As per majority (N. K. Sodhi, J. contra)—

(141) Under the peculiar circumstances of the case, the writ petitions are held maintainable.

As per majority (G. S. Singhvi and T.H.B. Chalapathi, JJ. contra)—

(142) Regulation 5 Chapter VII (ii) of the Panjab University Calendar Volume III is struck down being unconstitutional and *ultra vires* not in any manner affecting the service rights of the petitioners who are entitled to be considered for promotion along with others if otherwise eligible for promotion as such.

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R.N.R.

*Before Hon'ble Dr. Sarojnei Saksena, J.*

SUKHPAL SINGH,—*Petitioner.*

*versus*

SHINGAR KAUR.—*Respondent.*

C. R. No. 3927 of 1995.

19th April, 1996.

*Hindu Marriage Act, 1956—S. 24—Code of Civil Procedure, 1908—S. 115—Under Section 24 of Hindu Marriage Act, wife failed to allege that she has no independent income to support herself—Would not disentitle her to maintenance—Court is duty bound to decide question whether or not wife can or cannot support herself—Potential earning capacity of wife not to be taken into consideration—While granting maintenance separate income if any, can be taken into consideration.*

*Held, that no doubt in the petition filed under section 24 of the Act, petitioner-respondent-wife has not alleged that she has no*

independent income sufficient for her support and to bear the necessary expenses of the proceedings, but still in the reply the husband-respondent-petitioner has not averred that she has any independent source of income. Conversely, he has pleaded that she is 'able bodied girl' and can earn herself. This plea is not available to the respondent when such a petition is under consideration. If she has failed to aver so in the petition, the petition cannot be thrown out. The Court is duty bound to decide this question having regard to the circumstance of each case on the material placed before it by both the parties. The Court is required to decide that the wife has no such source of income to support herself and to bear the litigation expenses.

(Para 14)

*Further held*, that potential earning capacity of the wife should not be and cannot be taken into consideration. While granting maintenance to the wife separate income of the wife, if any, is also to be taken into account and such amount of maintenance is to be awarded to the wife, which will ensure reasonable needs and requirements of wife for such moderate living which the Court in the given case considers necessary and proper.

(Para 14)

B. S. Bhasaur, Advocate, for the Petitioner.

None for the Respondent.

#### JUDGMENT

*Dr. Mrs. Sarojnei Saksena, J.*

(1) This revision is filed by the husband-respondent-petitioner assailing the impugned order passed under Section 24 of the Hindu Marriage Act, whereby the lower Court has ordered the respondent-petitioner-husband to pay Rs. 350 per month as interim maintenance and Rs. 700 as litigation expenses to the petitioner-respondent wife.

(2) Respondent-petitioner's grouse is that in the petition filed under Section 24 of the Act, the petitioner-respondent-wife has not averred that she has no source of income to maintain herself or to bear the expenses of the proceedings and the husband's financial condition is better. Therefore, he should be ordered to pay her maintenance as well as litigation expenses. He drew my attention to the petition filed by the petitioner-respondent before the lower court supported by her affidavit. In this petition, she has averred that they were married in November, 1990. After the marriage, respondent-husband started taking intoxicants and started beating

her regarding which she has filed a petition under Section 13 of the Act seeking divorce. In para 3 of the petition, she has alleged that the respondent has four buffaloes and by selling milk, he earns Rs. 3,000 per month. He also works as Palledar and earns Rs. 2,000 per month from it. He takes agricultural land on rent and thus does farming as well. Thus, he can pay Rs. 1,000 per month as maintenance and Rs. 3,000 as litigation expenses to her. In para 4 she has averred that according to law, it is the duty of the respondent that he should maintain the petitioner. She filed her affidavit also in support thereof wherein identical averments were made.

(3) Thus, according to the respondent-petitioner's learned counsel since in the petition filed under Section 24 of the Act, petitioner-respondent wife has not alleged that she has no source of income, the lower Court had no jurisdiction to award her interim maintenance or litigation expenses.

(4) To appreciate this argument, the lower Court's record was summoned. The petitioner-respondent wife filed a petition under Section 13 of the Act seeking divorce on the ground of cruelty and desertion. In para 4 she has alleged that after taking intoxicants, petitioner used to beat her. She tolerated this torture holding that one day he will mend his ways, but he did not change his habits and behaviour. In the month of March, 1992, respondent beat her mercilessly and turned her out from the matrimonial home. In para 5, she has alleged that all dowry articles are lying with the respondent.

(5) In his written statement, respondent-petitioner has denied the allegations of alleged cruelty and desertion. During pendency of that petition, petitioner-respondent filed a petition under Section 24 of the Act in 'Gurmukhi' which is read over to me during arguments. Its English translation is filed by the respondent petitioner in the Court. The contents of this petition are reproduced above. Respondent-petitioner filed reply to this petition filed under Section 24 of the Act. He denied his own source of income as alleged by the wife and lastly, he contended that the petitioner is "able bodied girl" and can earn her livelihood.

(6) After considering the rival contentions made in the petition and the reply, the learned lower Court passed the impugned order whereby the respondent-petitioner is ordered to pay Rs. 350 per month as interim maintenance and Rs. 700 as litigation expenses to the petitioner-respondent-wife.

(7) To appreciate and understand the arguments advanced by the respondent-petitioner's learned counsel provision of Section 24 is extracted herein below in extenso :—

“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 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.”

(8) Learned counsel appearing for respondent-petitioner compared the provisions of Section 24 of the Act with the provisions of Section 125 of the Code of Criminal Procedure and argued with all persuasiveness at his command that under both these provisions the wife has to plead that “she is unable to maintain herself” under Section 125 of the Code of Criminal Procedure and that she has no source of income” under Section 24 of the Act. According to him, if the wife fails to plead these facts, her petition is liable and should be dismissed on that count alone.

(9) So far as Section 125 of the Code of Criminal Procedure is concerned, it is interpreted in various judicial pronouncements. In *Shobha Singh Yadav v. Dhankali and others* (1), a Single Bench of Allahabad High Court has held that when the wife claims maintenance for herself and for her children pleading that they are starving due to lack of food and financial support, the petition was resisted on the ground that since the petitioners have not pleaded specifically that they are unable to maintain themselves, the petition should be dismissed. N. J. Sharma, J., held that if the wife omits to make such a specific pleading in the application, that does not thwart her claim for maintenance. It is observed that there must be some averments in such a petition that the wife has no means to maintain herself but the petition need not be worded with the accuracy of a pleading in a civil suit.

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(1) 1984 (2) Crimes 702.

(10) In *Gyanabai v. Peetam* (2), a Single Bench of Madhya Pradesh High Court has considered this provision and has observed that the proceedings under Section 125 of the Code of Criminal Procedure are summary proceedings and are quasi-civil in nature. The rules of pleading are not strictly applicable. Wife's allegations in the application under Section 125, Code of Criminal Procedure, that with difficulty she is able to maintain herself by working as a labourer tantamount to saying that she is not in a position to maintain herself properly.

(11) This very provision was considered by a Single Bench of the Punjab and Haryana High Court in *Gurdeep Kaur and another v. Darshan Singh* (3), and it is held that non mention in the petition by wife that she is unable to maintain herself does not non-suit her. These very words are again interpreted in *Ansuiya Bai w/o Hawaslai v. Hawaslal son of Tulsiram* (4). It is held that "where the wife-applicant had not mentioned the words" unable to maintain herself "in her application, it will not debar her from claiming maintenance. On the mere fact that the wife had not pleaded the particular words "unable to maintain herself", it cannot be presumed that she is able to earn. Under Section 125, Criminal Procedure Code, the strict rule of pleadings does not apply. The assertion of the wife that she was not doing anything was sufficient to attract the provisions of Section 125, Criminal Procedure Code. The omission to state the words "unable to maintain herself" is not fatal. It is only a technical irregularity. Hence, her application could not be dismissed on that ground.

(12) In *Girishchandra v. Sushilabai* (5), a Single Bench of Madhya Pradesh High Court has observed that "Section 125 is designed to prevent vagrancy and destitution and provides a summary and speedy remedy to get maintenance. Thus it has a social purpose to fulfil and in arriving at any finding in relation to an application thereunder, the courts must look to the substance rather than to the form, must avoid strict technicalities of pleading and proof and must make a realistic approach to the material on record so that the purpose aforesaid is not frustrated."

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(2) 1983 (2) Crimes 610.

(3) 1983 (1) Crimes 947.

(4) 1991 M.P.L.J. 436.

(5) 1987 Cr.L.J. 1815.

(13) No doubt, Section 21 of the Act provides that subject to other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908. Thus, it is obvious that the provisions of the Code of Civil Procedure are applicable when a petition is filed under the Act. But Section 24 of the Act has a social purpose. It is not only for the benefit of the wife, it is also for the benefit of husband as well. If the petitioner may be husband or wife, files a petition under Section 24 of the Act and it appears to the Court that he or she *has no independent income* sufficient for her/his support and to bear the necessary expenses of the proceedings, it may order the respondent to pay to the petitioner the expenses of the proceedings, and monthly during the proceedings 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 (Emphasis supplied). Thus, it is obvious that a party who files a petition under Section 24 of the Act should allege that he or she has no independent income sufficient to support her/him and to bear the necessary expenses of the proceedings and then the Court is required to pass an order having regard to the petitioner's own income and income of the respondent; meaning thereby that when a petition is filed under Section 24 of the Act, it is not necessary that the petitioner should have no income of her/his own. If the Court considers that income of the petitioner is not sufficient to support her/him and to bear the necessary expenses of the proceedings, the Court may order the respondent to pay to the petitioner monthly allowance to support her/him and also for litigation expenses. While passing such an order the Court is required to take into consideration the income of the petitioner as well as that of the respondent.

(14) No doubt in the petition filed under Section 24 of the Act, petitioner-respondent-wife has not alleged that she has no independent income sufficient for her support and to bear the necessary expenses of the proceedings, but still in the reply the husband-respondent-petitioner has not averred that she has any independent source of income. Conversely, he has pleaded that she is 'able bodied girl' and can earn herself. This plea is not available to the respondent when such a petition is under consideration. If she has failed to aver so in the petition, the petition cannot be thrown out. The Court is duty bound to decide this question having regard to the circumstances of each case on the material placed before it by both the parties. The Court is required to hold that the wife has no such source of income to support herself and to bear the litigation expenses. Instead of the wife proving the negative, the husband is to prove

that the wife is able to maintain herself as it is defence open to him, Potential earning capacity of the wife should not be and cannot be taken into consideration. While granting maintenance to the wife the separate income of the wife, if any, is also to be taken into account and such amount of maintenance is to be awarded to the wife, which will ensure reasonable needs and requirements of wife for such moderate living which the Court in the given case considers necessary and proper.

(15) In the main petition filed under Section 13 of the Act the wife has averred that she was mercilessly beaten and was thrown out from the matrimonial home. Her dowry articles are still lying in the matrimonial home. Thus, there was material before the lower Court to arrive at a conclusion that the wife has no independent income sufficient to support her and to bear the necessary expenses of the proceedings.

(16) Further the fact that she has filed a petition under Section 24 of the Act is indicative that she has no means of substance. If really she had any source of income the husband would have averred to that effect, but even he has not made any such allegation.

(17) Lastly in the social structure of Indian family life the husband is legally as well as morally and socially duty bound to maintain his wife if she is not possessed of sufficient means to maintain her.

(18) Considering all the aspects of the case, I am constrained to reject the prayer fervently advanced by Shri B. S. Bhasaur Advocate in his usual vehemence. Under these circumstances, in my considered view, the trial Court has not fallen into any error much less a legal one in passing the impugned order and awarding interim maintenance and litigation expenses to the wife petitioner-respondent.

(19) Revision, being meritless, is hereby dismissed with costs, which is quantified at Rs. 1,000.

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J.S.T.