

**In The High Court At Calcutta
Constitutional Civil Jurisdiction
Appellate Side**

Present :

The Hon'ble Justice Harish Tandon.

C.O. 2777 of 2015

**Ashrukana Das
-Vs-
Raj Kumar Das**

For the Petitioner : Mr. Partha Pratim Roy,
: Mr. Tanmoy Mukherjee.

For the Opposite Party : Mr. Subrata Kumar
Roy Karmakar.

Judgment on : 19.08.2015

Harish Tandon, J. :

The point emerged in this revisional application is whether the wife is entitled to maintenance under Section 36 of the Special Marriage Act having independent source of income which is grossly in disparity with the income of the husband.

Both the parties are at variance on the language employed under Section 24 of the Hindu Marriage Act, 1955 and Section 36 of the Special

Marriage Act. According to the learned Advocate for the petitioner, the expressions “maintenance” and “support” appeared in Section 36 of the Special Marriage Act are indicative of legislative intent that if the income of the wife is grossly despaired with the income of the husband, she is entitled to the maintenance from the husband to maintain and keep herself with the status of the husband in the society. On the other hand, the learned Advocate for the opposite party submits that the wife has an independent source of income, sufficient to support and maintain herself cannot be awarded maintenance under Section 36 of the said Act.

Admittedly the wife is working and earns at present Rs. 20,000/- per month from her salary. The husband who was associate Professor in a renowned educational institution was getting a sum of Rs. 58,000/- & odd per month and attained a superannuation on and from 1st April, 2011. The information received under Right to Information Act reveals that he would get a sum of Rs. 29,000/- & odd as pension and decided to commute 40% thereof. Apart from the same, he will get a sum of Rs. 18,78,492/- towards provident fund and Rs. 6 lakhs as gratuity. In addition thereto, he would receive a further sum of Rs. 9,32,510/- for leave salary. According to the husband, except the leave salary, he has not received any amount indicated in the said information as on this date.

There is a distinction between the language of Section 24 of the Hindu Marriage Act and Section 36 of the Special Marriage Act discernible therefrom which are quoted herein below:

“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.”

36. Alimony pendente lite.- Where in any proceeding under Chapter V or Chapter VI it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband’s income, it may seem to the Court to be reasonable.”

Section 24 of the Hindu Marriage Act recognizes the right of both the wife and the husband having no independent income sufficient for her or his support and the necessary expenses of the proceeding. Section 36 of the Special Marriage Act entitles the wife having no independent income sufficient for her support and necessary expenses to be paid such amount which the court thinks reasonable. The distinction which could be deciphered therefrom is that in case of Section 24 of the Hindu Marriage Act, both the wife and the husband can claim the maintenance

against each other but Section 36 of the Special Marriage Act restricts the claim to the wife. Section 24 of the Hindu Marriage Act has two part, the first relates to the entitlement of both the husband or the wife having no independent income sufficient for her support and necessary expenses of the proceeding to make an application to the Court; the later part is relatable to the quantum of maintenance which appears to the Court to be reasonable having regard to the income of the petitioner and the income of the respondent. In Section 36 of the Special Marriage Act awarding the compensation to the wife is to be determined on the basis of husband's income which the Court thinks reasonable and sufficient for her support and necessary expenses of the proceeding.

The expression "support" has been interpreted by the Supreme Court in case of **Rajesh Burman -v- Mitul Chatterjee (Burman)** reported in **(2009) 1 SCC 398** to mean providing money for a person to live on. The Apex Court further noticed the expression "maintenance" and "support" and held that both are synonymous. In both these sections, the expressions "no independent income" is qualified with the subsequent word "sufficient" conveying the intention that even if, the wife has some income but if the same is not sufficient for her support and to make the necessary expenses of the proceeding should be entitled to a maintenance. The expression "maintenance" is neither defined under the Hindu Marriage Act or under the Special Marriage Act. The meaning

of the expression can be borrowed from Section 3 of the Hindu Adoption and Maintenance Act, 1956 to include;

- (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment:
- (ii) in case of unmarried daughter also the reasonable expenses of and incident to her marriage.

It is, therefore, clear that even if, there is some difference in the expression used in both the sections but achieved the same object and goal and to be interpreted in like manner and not differently. Even in case of Section 36 of the Special Marriage Act, the expressions “no independent income”, “sufficient” & “support” are to be interpreted harmoniously and the maintenance is to be awarded to the wife having some income but not sufficient for her sustenance.

The question as to what income is sufficient for the support of the wife would have to be determined with reference to the class, she and her husband belong to. It would be opposed to the legislative intent to continue the wife maintenance in case of patent disparity in the salaries. What may not be sufficient for the support of the wife who works as Lower Division Clerk being the

wife of a high salaried big officer. The quantum of maintenance varies and depends upon the various factors like ability of the husband, needs of the wife, the social status and other requirements etc. Therefore, the quantum of maintenance is dependent upon the various factors and is not abridged and/or squeezed with the outer ceiling limit.

On the conspectus of the above legal aspect, let me consider whether the application filed by the wife under Section 36 of the Special Marriage Act deserves rejection. The parties were married under the Special Marriage Act, 1954 on 15th January, 1982 from the said wedlock, a son was born on 18th January, 1984. Admittedly the parties are separated since the year 1990 and a proceeding under Section 125 of the Code of Civil Procedure was initiated by the wife before the jurisdictional Magistrate. It is undisputed that after the wife got a job as Lower Divisional Clerk, she showed her intention not to proceed with the said proceeding, though she was initially getting an interim maintenance. The husband filed the matrimonial suit no. 34 of 2011 for divorce wherein she took out an application under Section 36 of the Special Marriage Act. Undisputedly either on the date of the institution of

the suit or on the date of an application for maintenance, the husband was in active employment. According to the wife, the salary of the husband is Rs. 80,000/- or more per month and claims the maintenance of Rs. 20,000/- towards the litigation cost. The objection to the said application is filed on 18th February, 2012 denying the claim of the wife with categorical assertion that she is self-employed and getting monthly salary of Rs. 13,310/-. In course of an evidence, it has been brought to the notice of the Court which is undisputed that the husband retired with effect from 1st April, 2014. The Trial Court was swayed by the fact that once the wife abandoned her claim under Section 125 of the Code of Criminal Procedure, she cannot claim maintenance from the husband. The other factors which weighed to the Trial Court is that after the retirement, the salary which the wife is getting is almost the same that of the pension which the husband would get after retirement. The Trial Court overlooked the fact that the application was taken out at a relevant point of time when the husband was in gainful employment and it appears from the written objection of the husband that there is no specific denial of his income disclosed by the wife in her maintenance application.

It is no longer *res integra* that the maintenance is to be awarded either from the date of the institution of the suit or from the date of an application or from an order depending upon the attending facts and circumstances. There is no justification in rejecting an application for maintenance when at the time of its filing, there was a sharp disparity between the income of both the parties. In the written objection, the husband categorically asserted that the wife is getting a sum of Rs. 13,000/- & odd per month working as a Lower Divisional Clerk in Government of West Bengal. There is no specific denial of his income of Rs. 80,000/- & odd in the written objection. However, in the evidence, the husband admits to receive a sum of Rs. 50,000/- per month after deducting an amount on account of professional tax, teacher fund, group insurance and income tax. Furthermore, the son who is major is all along living with the wife and necessary expenditure for his upbringing and for his education have been shouldered from her income. It came out during the argument before this Court that the son is already married and is working in part time without having substantial income to support his family. Even if, the son's income as claimed in the petition is not taken into consideration, the income of the wife cannot be said to be sufficient to support her

sustenance, to maintain the dignity and status that of the husband. The income as a Lower Divisional Clerk may not be sufficient to maintain the status of the husband who admittedly was having a high status in the society as associate professor in a renowned educational institution. Even if, the version of the husband is accepted that he was getting Rs. 50,000/- per month at salary, the poultry sum of Rs. 13,000/- & odd cannot said to be sufficient. This Court cannot brush aside the subsequent facts that the husband has retired and is expected to get a pension in parity with the salary of the wife. The Trial Court ought to have awarded the maintenance which is reasonable to support the wife for the periods in which the husband was admittedly in gainful employment. The time consumed by the Court in deciding an application cannot stand in the way of the wife to get the maintenance from the date of filing of an application till the date when the husband admittedly retired. Furthermore, proviso to Section 36 of the Special Marriage Act was introduced with effect from 24.09.2001 providing the application for maintenance for payment of expenses of the proceeding to be disposed of within 60 days from the date of service of the notice of the husband. It would

be harsh on the wife to be denied maintenance or the expenses of the proceedings for delayed disposal of an application by the Court.

The order impugned is therefore set aside.

The wife is entitled to a sum of Rs. 10,000/- per month from the date of an application till the month of March, 2014 together with one time litigation cost of Rs.25,000/-. The quantum of maintenance awarded herein above is after considering the facts that the husband has to bear the responsibility of her old aged mother, divorced sister who are dependent upon him. The maintenance shall be paid by the husband within 4 weeks from date to the wife. The husband shall not be liable to pay the maintenance on and from the month of April, 2014 till the disposal of the said proceeding which this Court expects that the Trial Court would dispose of within six months from the date of the communication of this order.

It is, however, make abundantly clear that this order and the observation made herein are restricted to an application under

Section 36 of the Special Marriage Act and may not stand in the way of either of the parties in future claims.

With these observations, the revisional application is disposed of.

However, there shall be no order as to costs.

(Harish Tandon, J.)