

**HIGH COURT OF MADHYA PRADESH :
JABALPUR**

1	Case No.	Writ Petition No. 17973/2016
2	Parties Name	Mohd. Hasan Vs. Kaneez Fatima
3	Date of Judgement	05/07/2018
4	Bench Constituted on Hon'ble Justice..... and Hon'ble Justice.....	Single Bench
5	Judgement delivered by Hon'ble Justice.....	Hon'ble Ms. Justice Vandana Kasrekar
6	Whether approved for reporting	Yes
7	Name of counsels for parties	Shri Ishteyaq Husain, learned counsel for the petitioner. Shri Ashok Kumar Gupta, learned counsel for respondent No. 1.
8	Law laid down	"Whether a Mulsim Women is entitled to get maintenance under Section 24 of the Hindu Marriage Act" Held - No.
9	Significant paragraph numbers	6 and 7

HIGH COURT OF MADHYA PRADESH : JABALPUR
SINGLE BENCH : JUSTICE MS.VANDANA KASREKAR

WRIT PETITION NO. 17973/2016

Mohd. Hasan

Vs.

Kaneez Fatima

Shri Ishteyaq Husain, learned counsel for the petitioner.

Shri Ashok Kumar Gupta, learned counsel for respondent No. 1.

ORDER

(05.07.2018)

The petitioner has filed the present petition, under Article 227 of the Constitution of India, challenging the order dated 20.08.2016 passed by 2nd Civil Judge Class-I, Sirmour, District Rewa in Civil Suit No. 64-A/2015 whereby the trial Court has allowed the application preferred by the respondent under Section 24 of the Hindu Marriage Act.

2. The petitioner/plaintiff filed a civil suit for restitution of conjugal rights before the Civil Judge Class-I, Sirmour, District Rewa. During the pendency of the said civil suit, the respondent/non-applicant filed an application under Section 24 of the Hindu Marriage Act without specifying the enactment for grant of maintenance *pendente lite* during the pendency of the case and also for legal expenses. The petitioner filed reply to the said application raising plea that the parties are governed by the Muslim Law and, therefore, the provisions of Section 24 of the Hindu Marriage Act is not at all applicable in the present case. The trial Court vide order dated 20.08.2016 has allowed the said application. Being aggrieved by that order, the petitioner has filed the present petition.

3. Learned counsel for the petitioner argues that the trial Court has erred in allowing the application filed by the respondent under Section 24 of the Hindu Marriage Act when the parties are governed by the Muslim Law. He further submits that there is no provision like Section 24 of

the Hindu Marriage Act under the Muslim Law for claiming the interim maintenance during the pendency of the matrimonial proceedings, therefore, the trial Court has travelled beyond its jurisdiction in allowing the application under Section 24 of the Hindu Marriage Act. He further argues that the trial Court has further erred in invoking the provision of Section 151 of the C.P.C while allowing the application under Section 24 of the Hindu Marriage Act. He submits that the Code of Civil Procedure is a procedural law and did not provide for any substantive rights like one for claiming maintenance. Thus, the impugned order passed by the trial Court is perverse and liable to be dismissed. He further submits that the Family Court has allowed the Cr.R. No. 1444/2017 preferred by the respondent under Section 125 of the C.P.C. and in which she has already getting the maintenance an amount of Rs.2,500/- per month. Learned counsel for the petitioner relied on the judgment passed by the **High Court of Bombay in Criminal Appeal No. 727/1984**, decided on

August 24, 1984 in the case of **Shabbir Ahamed Sheikh Vs. Shakilabanu w/o Shabbir.**

4. On the other hand, learned counsel appearing on behalf of the respondent supports the order passed by the trial Court and submits that the order passed by the trial Court is just and proper. He further submits that the trial Court has inherent power under Section 151 of the C.P.C for granting such relief to the respondent. He further relied on the judgment passed by the **High Court of Judicature at Bombay, Nagpur Bench in W.P. No. 3232/2010.**

5. Heard learned counsel for the parties and perused the record.

6. From perusal of the record, it reveals that the petitioner as well as the respondent are belongs to the Muslim community. They entered into the marriage, however, due to some dispute between them the respondent started residing separately from the applicant. The petitioner, therefore, filed a suit for restitution of conjugal rights before the Civil Judge Class-I Sirmour, District

Rewa. The respondent/non-applicant filed an application under Section 24 of the Hindu Marriage Act for grant of maintenance *pendente lite* during the pendency of the case. The petitioner filed reply to the said application and submits that the parties are Muslim and are governed by their respective personal law and, therefore, the provisions of Section 24 of the Hindu Marriage Act is not at all applicable in the present case. The trial Court vide impugned order has allowed the application preferred by the respondent under Section 24 of the Hindu Marriage Act and awarded the maintenance of Rs.2,500/- per month to the respondent. Being aggrieved by this order, the petitioner has filed the present petition. Admittedly, both the parties are Muslim and are governed by their personal law. Under the Muslim law, there is no provision for awarding the maintenance *pendente lite*, it is only provided under the Hindu Marriage Act. However, if the respondent wants the interim maintenance, then she is entitled to file an application under Section 125 of the Cr.P.C before the

Family Court.

7. In the present case, as the parties are Muslim, therefore, provisions of Hindu Marriage Act would not be applicable in the present case. So far as, Section 151 is concerned, it provides only for the procedural law and not for the substantive rights and, therefore, no order of maintenance can be passed under Section 24 read with Section 151 of the C.P.C.

8. The Bombay High Court in the case of **Shabbir Ahamed Sheikh (supra)** in paragraphs 4 & 8 has held as under:-

“4. It would be clear from reading Article 278 reproduced above that the right to sue for maintenance is given to the wife under the Mahomedan Law only if her husband neglects or refuses to maintain her without any lawful cause. Why I am emphasising this aspect is because under the Hindu Law before or after its codification in section 18 of the Hindu Adoptions and Maintenance Act the wife by her status

as such had a right of being maintained by her husband which in other words was her vested or substantive right. However, under the Mahomedan Law there is no such vested or substantive right of maintenance which is clear from the fact that the wife can get maintenance only on determination of the circumstances mentioned in Article 278 by the competent Court and also from the fact that the Court is not entitled to pass any decree for past maintenance unless there is an agreement between the parties to that effect.

With this background I may proceed to examine the cases which are relied upon by the parties before me. The learned counsel for the wife has relied upon the cases of Calcutta High Court, viz., Smt. Gouri Gupta Chaudhury vs. Tarani Gupta Chaudhury (: AIR 1968 Cal. 305), Nemi Chand Jain vs. Smt. Lila Jain (: AIR 1968 Cal. 405), and Tarini Gupta

Choudhari vs. Smt. Gouri Gupta Choudhary (AIR 1968 Cal. 567). He has also relied upon the decision of the Mysore High Court in Ramappa Parappa Khot vs. Courawwa (AIR 1968 Mys. 270). However, he heavily relies upon the decision of this Court reported in Sushilabai Chhotelal Gupta vs. Ramcharan Hanumanprasad Vaishya and another (: 1976 Mh. LJ. 82).

8.....However, the claim in the instant case is different. The plaintiff/husband sues the wife for restitution of conjugal rights on the ground that she has deprived him of cohabitation without any reasonable or probable cause. The defence raised by the wife is that she was driven out by the husband and that she was ill-treated by him. As I have already as I had pointed out under the Mahomedan Law the right conferred upon the wife is to sue for maintenance and unless she establishes that her husband has neglected her or refused to maintain her without any

reasonable cause she is not entitled to a decree for maintenance. Further it has to be seen that she is not entitled at all to a decree for past maintenance, unless the claim is based on a specific agreement. All these things have to be proved in a suit properly filed for maintenance by the wife. Unless these are proved under the Mahomedan Law a wife is not entitled to maintenance. It is open to doubt whether the wife governed by Mahomedan Law would be entitled to interim maintenance unlike under the Hindu Law even in a suit for maintenance itself. Here in the instant case she is a respondent in a suit for restitution of conjugal right. Section 24 of the Hindu Marriage Act is a special provision made in the said Act where in any proceedings under the said Act the petitioner is entitled to claim interim maintenance from the respondent. In my view the same right cannot be carved out by reference to section 151 of the Civil Procedure Code in regard to the

matrimonial cases which are not covered by section 24 of the Hindu Marriage Act.”

According to the said judgment, the Bombay High Court has held that the Section 24 of the Hindu Marriage Act is a special provision made in the said Act where in any proceedings under the said Act the petitioner is entitled to claim interim maintenance from the respondent. It has further been held that the same right cannot be carved out by reference to Section 151 of the Civil Procedure Code in regard to the matrimonial cases which are not covered by Section 24 of the Hindu Marriage Act.

9. Thus, the provisions of Hindu Marriage Act being a special provision would not be applicable in the present case. Therefore, the trial Court has exceeded his jurisdiction in granting maintenance to the respondent under the proceedings initiated by the applicant for restitution of conjugal rights as per Mahomedan Law.

petition is allowed. The impugned order dated 20.08.2016 passed by the trial Court is hereby set aside.

11. There shall be no order as to costs.

(Ms.Vandana Kasrekar)
Judge

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