

Mrs Aruna Basu Mullick

Vs

Mrs Dorothea Mitra

Civil Appeal No. 1997 of 1980

(P. N. Bhagwati, Ranganath Misra, A. N. Sen JJ)

02.08.1983.

JUDGMENT

RANGANATH MISRA, J.-

1. This appeal by certificate from the Calcutta High Court raises the question whether a decree for permanent alimony passed under Section 37 of the Special Marriage Act, 1954 (here after referred to as 'the Act'), is wiped out with the death of the husband judgment-debtor.

2. Respondent Dorothea and one Prafulla Kumar Mitra were married under the Special Marriage Act, 1872, in January 1952. Respondent asked for divorce in 1961 and obtained a decree on May 2, 1962, to the effect : "The petitioner's (Dorothea Mitra's) marriage with the respondent prafulla Kumar Mitra be dissolved by a decree of divorce. The petitioner do get Rs 300 p.m. as maintenance from the respondent to be paid by the first week of each month following for which it is due until she re-marries..". Respondent levied execution of the decree and the same was compromised and payment of the arrears was undertaken to be made in installments. Prafulla Kumar Mitra executed a will on March 31, 1965, but made no provision therein for satisfaction of the maintenance decree. He died on April 3, 1965, and the appellat who was the executrix under the will got it duly probated.

3. There is no dispute that the executrix paid the maintenance in December 1975 for a period after the death of Prafulla Kumar Mitra. But since no payment was made thereafter, respondent levied execution in Matrimonial Case No. 1 of 1977 claiming recovery of arrears of Rs 19,500. Appellant objected to the claim under Section 47 of the Code of Civil Procedure by pleading that the order of alimony not being charged, the death of Prafulla Kumar Mitra has extinguished the claim of the purported decree-holder. The executing court overruled the objection whereupon the appellat invoked the revisional jurisdiction of the High Court. A Division Bench agreed with the executing court but while dismissing the revision application, granted certificate of appeal to this court.

4. The sole controversy is whether the order for alimony got extinguished with the death of Prafulla Kumar Mitra. Admittedly, the order was made in exercise of powers under Section 37 of the Act. It provides :

37. Permanent alimony and maintenance.- (1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical

payment of money for a term not exceeding her life, as having regard to her own property, if any, her husband's property and ability and the conduct of the parties, it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it shall rescind the order.

5. The language of the section does not warrant the conclusion that there is extinguishment of the decree for alimony upon the death of the judgment-debtor husband. We have been told at the Bar that there is no decision on the point and, therefore, English decisions should be considered for deciding the matter.

6. Section 37 of the Act more or less corresponds to the provisions of Sections 19, 20 and 22 of the English Matrimonial Causes Act, 1950, except that there is no corresponding provision in the English Act for sub-section (3) of the Indian Act. A close look at sub-sections (2) and (3) of Section 19 of the English Act will indicate that maintenance can be required to be paid for a term not exceeding the life of the wife or during the joint lives of the husband and the wife. These two sub-sections of the English Act read thus :

(2) On any petition for divorce or nullity of marriage the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum for any term not exceeding her life, as having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, the court may deem to be reasonable.

(3) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section.

7. We have also been referred to some other English statutes where this distinction has been maintained. In case of a direction for payment during the joint lives, there can be no dispute that on the death of one of the spouses the obligation under the decree ceases. English courts have taken the view that even where a direction is for payment during the life of the wife, it abates with the death of the husband. In paragraph 891, Vol. 13, Halsbury's Laws of England, 4th Edn., it has been said that "in the absence of an order directing security for periodical payments the court has no jurisdiction to order a man's personal representatives to make payments for his children after his death". The decision in *Sugden v. Sugden*, of the Court of Appeal has been relied upon for this view. Lord Denning in the leading judgment said :

There is no difficulty in an ordinary action in determining when the right or liability accrued due; but there is more difficulty in proceedings in the Divorce Court. In that

court there is no right to maintenance, or to costs, or to a secured provision, or the like, until the court makes an order directing it. There is therefore no cause of action for such matters until an order is made. In order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments.

This view of proceedings in the Divorce Court is supported by the decision of Hodson, J. in *Dipple v. Dipple*, where he pointed out that "all that the wife had was the hope that the court would in its discretion order a secured provision..... In the present case, there was no right or liability subsisting against the father at the time of his death. He had paid everything up to that time. If there had been any arrears of maintenance payable by him at that time, then no doubt they would be payable by his estate after his death under Section 1 (1) of the Act of 1934; but there were no arrears. There was nothing, therefore, to come within the Act of 1934 at all. The right to maintenance after his death must come from the terms of the order itself or not at all". Under the order in *Sugden's case* the maintenance of 1s a year for the wife was payable by the husband during their joint lives. On the terms of the order, therefore, the liability was to come to an end upon the death of the husband.

8. We have no difficulty in accepting the submission of Mr Ghosh for the appellant that matrimonial proceedings abate on the death of either party and legal representatives cannot be brought on record and the proceedings cannot be continued any further. Bowen, L. J. in *Stanhope v. Stanhope*, very appropriately said :

A man can no more be divorced after his death, than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives, unless it be dissolved sooner, and the court cannot dissolve a union which has already been determined. No person can dissolve a marriage which is dissolved by act of God. If a decree nisi is made, and the husband dies before it is made absolute, he dies while he is still at law a husband, and his wife becomes his widow. Thus how can a decree be made which would displace a dissolution of the marriage by death, and untie a knot that no longer exist? How can a woman, once a widow, be converted into a divorcee, unless there is some enactment enabling the court such a retrospective order ?

9. The question to ask at this stage is, while a matrimonial proceeding comes to an end with the death of either spouse, where the proceeding has terminated and a decree has emerged, would the decree also abate.

10. There can be no manner of doubt and it has also been fairly conceded before us that where maintenance has been made a charge on the husband's estate, the death of the husband would not at all affect the decree and notwithstanding such death, the estate can be proceeded against for realisation of the maintenance dues for post-death period.

11. Mr Ghosh had to concede that if there be a decree arising out of a civil action death would not result in wiping out the decree. If decree arising not out of a matrimonial dispute would not abate and the estate of the judgment-debtor would be liable for its satisfaction and a decree for alimony or maintenance would not abate when the same is charged upon the husband's estate, we asked Mr Ghosh to indicate the justification for his contention that a decree for maintenance or alimony not charged upon the husband's estate would abate with the death of the husband. Apart from relying on

the English decisions, Mr Ghosh was not able to find any legal principle in the cases placed before us except that the view taken in the English courts appears to be based on precedents. There is no rationality in the contention that a decree for maintenance or alimony gets extinguished with the death of the husband when any other decree even though not charged on the husband's property would not get so extinguished. A decree against the husband is executable against the estate of the husband in the hands of the heirs and there is no personal liability. In law a maintenance decree would not make any difference. The decree indicates that maintenance was payable during the lifetime of the widow. To make such a decree contingent upon the life of the husband is contrary to the terms and the spirit of the decree and the appellant has taken a stand that though the widow is alive. The decree obtained by her would become ineffective with the passing away of the husband.

12. The Special Marriage Act is a statute of 1954 made by the Indian Parliament after independence. For the interpretation of a provision of this statute there is no warrant to be guided by English decisions. There is no ambiguity in Section 37 for the interpretation of which it is necessary to go beyond the provision itself. It is one of the settled principles of interpretation that the court should lean in favour of sustaining a decree and should not permit the benefits under a decree to be lost unless there be any special reason for it. In incorporating a provision like Section 37 in the Act, Parliament intended to protect the wife at the time of divorce by providing for payment of maintenance. If the husband has left behind an estate at the time of his death there can be no justification for the view that the decree is wiped out and the heirs would succeed to the property without the liability of satisfying the decree.

13. We are inclined to agree with the view of the Calcutta High Court that the decree in the instant case was not extinguished with the death of Prafulla Kumar Mitra and the assets left behind by him are liable to be proceeded against in the hands of his legal heirs for satisfaction of the decree for maintenance.

14. Before the Calcutta High Court it had been contended that the phrase 'at the instance of either party' occurring in sub-section (2) of Section 37 would cover the husband and the wife and no one else and on this meaning given to the phrase, support was sought for the contention that the order of maintenance was intended to continue only during the life of the husband. This question was left open by the High Court. We, however, see no justification for the view that the phrase should be confined to the spouses. There is no dispute that the order for maintenance can be varied or rescinded with change of circumstances. Sub-section (3) clearly provides that on remarriage or on a finding that the wife is not leading a chaste life, the order of maintenance can be rescinded. Upon the husband's death his estate passes on to his legal heirs and the intention of the legislature being clear that upon remarriage or non-leading of a chaste life, the benefit conferred by the statute should expire and the estate should become free from the liability of satisfying the decree for maintenance, the application for varying, modifying or rescinding the order for maintenance can be made even by those who have succeeded to the husband's estate and the estate can be freed from the liability. There is nothing in the provision to support the view that the words 'either party' should be confined to the spouses. Examining the scheme of the statute and the purpose for which such a provision has been made, we are inclined to agree with the learned counsel for the respondent that the words 'either party' would also cover the legal heirs who have stepped into the shoes of the spouses under the law and such persons would also be competent to ask for variation, modification or rescission of the order for maintenance. That term would also include the holders of the estate with lawful title for the time being. Once such a meaning is given to the phrase, the support which Mr Ghosh wanted to draw by restricting the phrase to spouses and contending that it indicated the legislative intention that the order of maintenance should survive only until the lifetime of the husband, loses force.

15. We accordingly dismiss the appeal and confirm the order of the Calcutta High Court. The respondent shall be entitled to her costs throughout.

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