Yamunabai Anantrao Adhav

Vs

Anantrao Shivram Adhav and Another

Criminal Appeal No. 475 of 1983

(Ranganath Misra, L.M. Sharma JJ)

27.01.1988

JUDGMENT

SHARMA, J. –

1. The point involved in this appeal is whether a Hindu woman who is married after coming into force of the Hindu Marriage Act, 1955 to a Hindu male having a living lawfully wedded wife can maintain an application for maintenance under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code). The appellant Smt. Yamunabai was factually married to respondent 1 Anantrao Shivram Adhav by observance of rites under Hindu law in June 1974. Anantrao had earlier married one Smt. Lilabai who was alive and the marriage was subsisting in 1974. The appellant lived with respondent 1 for a week and thereafter left the house alleging ill-treatment. She made an application for maintenance in 1976 which was dismissed. The matter was taken to the Bombay High Court, where the case was heard by a Full Bench and was decided against the appellant by the impugned judgment.

2. Section 125 of the Code by sub-section (1) which reads as follows clothes the "wife" with the right to receive maintenance in a summary proceeding under the Code :

> 125(1) If any person having sufficient means neglects or refuses to maintain -
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> (a) his wife, unable to maintain herself, or
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> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
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> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
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> (d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :

> Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate

is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation. - For the purposes of this Chapter, -

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

According to the respondent the term 'wife' used in the section means only a legally wedded wife, and as the marriage of the appellant must be held to be null and void by reason of the provisions of the Hindu Marriage Act, 1955, she is not entitled to any relief under the section.

3. For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act. 1955 (hereinafter referred to as the Act) have to be examined. Section 11 of the Act declares such a marriage as null and void in the following terms :

11. Void marriages. - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

Clause (1)(i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that such a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to Section 12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in section 4, no aid can be taken of the earlier Hindu law or any custom or usage as a part of that law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnised in violation of Section 5(1)(i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect :

16. Legitimacy of children of void and voidable marriages. -

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall

be legitimate, whether such child is born before or after the commencement of Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Sub-section (1), by using the words italicised above clearly implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by Section 12, sub-section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Sections 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception.

4. The question, then arises as to whether the expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife not covered by Section 11 of the Act. The word is not defined in the Code except indicating in the Explanation its inclusive character so as to cover a divorce. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the parties, subject to the Explanation (b), which is not relevant in the present context.

5. It has been contended on behalf of the appellant that the term 'wife' in Section 125 of the Code should be given a wider and extended meaning so as to include therein not only a lawfully wedded wife but also a woman married in fact by performance of necessary rites or following the procedure laid down under the law. Relying upon the decision of this Court in Mohd. Ahmed Khan v. Shah Bano Begum ((1985) 3 SCR 844 : (1985) 2 SCC 556 : 1985 SCC (Cri) 245), it was argued that the personal law of the parties to a proceeding under Section 125 of the Code should be completely excluded from consideration. The relationship of husband and wife comes to an end on divorce, but a divorcee has been held to be entitled to the benefits of the section, it was urged, and therefore applying this approach a woman in the same position as the present appellant should be brought within the sweep of the section. We are afraid, the argument is not well founded. A divorce is included within the section on account of clause (b) of the Explanation. The position under the corresponding Section 488 of the Code of 1898 was different. A divorcee could not avail of the

summary remedy. The wife's right to maintenance depended upon the continuance of her married status. It was pointed out in Shah Bano case ((1985) 3 SCR 844 : (1985) 2 SCC 556 : 1985 SCC (Cri) 245) that since that right could be defeated by the husband by divorcing her unilaterally under the Muslim Personal Law or by obtaining a decree of divorce under any other system of law, it was considered desirable to remove the hardship by extending the benefit of the provisions of the section to a divorced woman so long as she did not remarry, and that was achieved by including clause (b) of the Explanation. Unfortunately for the appellant no corresponding provision was brought in so as to apply to her. The legislature decided to bestow the benefit of the section even on an illegitimate child by express words but none are found to apply to a de facto wife where the marriage is void ab initio.

6. The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled. The section has been enacted in the interest of a wife, and one who intends to take benefit under sub-section (1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status on relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the section is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by the reference to the appropriate law governing the parties. In our view the judgment in Shah Bano case ((1985) 3 SCR 844 : (1985) 2 SCC 556 : 1985 SCC (Cri) 245) does not help appellant. It may be observed that for the purpose of extending the benefit of the section to a divorced woman and an illegitimate child the Parliament considered it necessary to include in the section specific provisions to that effect, but has not done so with respect to women not lawfully married.

7. Lastly it was urged that the appellant was not informed about the respondent's marriage with Lilabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provision of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party.

8. We, therefore, hold that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is not entitled to the benefit of Section 125 of the Code. The appeal is accordingly dismissed. There will be no order as to costs. During the pendency of the appeal in this Court some money was paid to the appellant in pursuance of an interim order. The respondent shall not be permitted to claim for its refund.

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