

CALCUTTA HIGH COURT

Minarani Majumdar

Vs.

Dasarath Majumdar

Civil Revn. Case No. 4346 of 1960

(R.S. Bachawat and U.C. Law, JJ.)

11.02.1963

JUDGMENT

Bachawat, J.

1. This rule was obtained by the wife against an order refusing to allow her maintenance under Section 25 of the Hindu Marriage Act, 1955. The opposite party husband filed a petition under Section 13 of that Act praying for a decree of divorce. The petition was dismissed on 1/-3-1960. Thereafter on May, 9, 1960, the petitioner wife launched an application praying for an order for her maintenance under Section 25. By an order dated August 12, 1950 the learned Judge dismissed the application on the ground that it was not maintainable. This rule is directed against the order dated August 12, 1960.

2. On behalf of the opposite party husband it is urged that since the payment of maintenance under Section 25 of the Hindu Marriage Act, 1955 must be limited to the period "while the applicant remains unmarried", the applicant under the section must satisfy the condition that she or he is "unmarried", and as the petitioner has not obtained a decree of divorce or nullity, she is not unmarried, being still the married wife of the opposite party, and consequently her application under Section 25 is not maintainable. I am unable to accept this contention. An order for separate maintenance under Section 25 may be passed in favor of a married woman living apart from her husband, e.g. on the passing of a decree of judicial separation or of the passing of a decree for restitution of conjugal rights in the event of the decree not being complied with. The expression "any decree" in Section 25 is broad enough to cover any decree of divorce or nullity or of judicial separation or for restitution of conjugal rights. The heading and the body of the section refer to "maintenance", "permanent alimony" and "payment of periodical sums" which under the English practice are respectively the names of allowances granted after the passing of a decree of divorce or nullity, a decree of judicial separation and a decree for restitution of conjugal rights, see Matrimonial Causes Act, 1950, Sections 19, 20 and 22 and Rayden on Divorce, 8th Edition, page 707. The scheme of Sections 24, 25 and 26 of the Hindu Marriage Act, 1955 appears to be that the Court is vested with the power of passing orders for maintenance of a spouse and for the custody, maintenance and education of minor children of the marriage during the pendency of any proceeding as also on the passing of any decree under Sections 9 to 14 of

the Act. In a proper case the Court has, therefore, the power under Section 25 to pass an order for maintenance in favor of an applicant who is a married woman. The condition that the maintenance is to be paid "while the applicant remains unmarried" is attached to every order for maintenance passed under Section 25. In the context of Section 25 (1) the condition means "while the applicant is not remarried." This condition recalls to our mind the clause "dum sola et casta vixerit" which means "while she remains chaste and unmarried". Under the English practice, formerly, it was usual to attach those conditions to an order for maintenance of the wife after a decree of divorce or nullity, see *Fisher v. Fisher*¹, but now the insertion of either condition has become the exception rather than the rule, Halsbury's Laws of England, Articles 983, 984 and Rayden on Divorce, 8th Edition, pages 742-43. The rigid policy of Section 25 of the Hindu Marriage Act, 1955, however, is that a party in whose favor an order for maintenance is passed cannot claim any maintenance under the order if subsequently the party has re-married or has become guilty of sexual immorality; the Court has no discretion in the matter, upon the party's re-marriage the maintenance ceases and the Court must rescind the order. The Court is also bound to rescind the order on the party becoming guilty of sexual immorality as mentioned in the section. The word "unmarried" has several meanings. An interesting discussion of its meaning will be found in the case of *Soleman Bibi v. East Indian Railway*², The popular mean of the word is "never having been married." Its dictionary meaning is "not married". Now the word "unmarried" in Section 25 (1) cannot mean "never having been married", because the applicant must have been a husband or a wife and therefore must have been married nor can it mean "not married"; for an order under Section 25 may be passed in favor of a married woman on the passing of a decree of judicial separation or for restitution of conjugal rights. In the context of Section 25 (1) the word means "not re-married", for this reason Section 25 (3) provides inter alia for rescission of the order if she has re-married, the reason for attaching the condition "while the applicant remains unmarried" to an order for maintenance passed in favor of a married woman after a decree of judicial separation or for restitution of conjugal rights may be that the order will remain effective though she subsequently obtains a decree of divorce or nullity and becomes free to marry again. The petitioner not having re-married was for purposes of Section 25 "unmarried" and her application cannot be dismissed on the ground that she was not unmarried.

3. On behalf of the opposite party husband it is next contended that as his petition under Section 13 for a decree of divorce was dismissed and as no decree as contemplated by Section 25 has been passed the application under Section 25 was not maintainable. This contention is sound and should be accepted. The power of any Court exercising jurisdiction under the Act to pass an order for maintenance arises "at the time of passing any decree or any time subsequent thereto". In the context of Section 25 the expression "any decree" means any of the decrees referred to in the earlier provision of the Act, i.e., any decree for restitution of conjugal rights, or of judicial separation, or of nullity of marriage, or of divorce passed under Sections 9 to 14 of the Act. When the main petition is dismissed and no substantive relief is granted under Sections 9 to 14 there is no passing of a decree as contemplated by section 25 and the jurisdiction to make an order for maintenance under the section does not arise. I notice that the Gujarat High Court came to a similar conclusion in *Harilal v. Lilavati*³,

¹(1861) 2 Sw. and Tr. 410

³AIR 1961 Guj 202

²37 Cal WN 453 : (AIR 1933 Cal 358)

4. On behalf of the petitioner wife it is argued that in substance a petition presented under Section 13 is a plaint, a proceeding under it is a suit and consequently in view of Section 21 of

the Act read with Section 2 (2) of the Code of Civil Procedure an order dismissing the petition is a decree. For the purposes of this case it is sufficient to say that an order dismissing a petition under Section 13 is not a decree within the meaning of Section 25 of the Act. The broad question whether for other purposes such an order may be regarded as a decree and whether such a petition and proceeding may be regarded as a plaint and a suit respectively does not arise in this case and need not be decided.

5. It is interesting to notice that Bhagawati J. came to a similar conclusion on the construction of section 40 of the Parsi Marriage and Divorce Act, 1936 which authorises the Court to direct payment of permanent alimony "at the time of passing any decree under this Act or subsequently thereto". See *Hormusji M. Kalapesi v. Dinbai H. Kalapesi*⁴. In that case the wife sued the husband for divorce on the ground of desertion and the husband counter-claimed and prayed for divorce on the ground of desertion by the wife. The wife's suit was dismissed, but the husband's counter claim succeeded and the husband was granted a decree of divorce. The wife then made an application for permanent alimony in her suit but Bhagawati J. held "no application for alimony could lie in the suit since the suit had been dismissed". He however observed that the wife could, if so advised, apply in the counterclaim. The wife then applied for permanent alimony in the counter claim and as the husband had obtained a substantive relief in the counter claim it was held that the second application was maintainable and it was open to the Court in the counter claim to award alimony to the defaulting or guilty wife. It may be noted that under the Parsi Marriage and Divorce Act, 1936 matrimonial suits may be instituted and decrees may be passed therein and by Section 45 of the Act the provisions of the Code of Civil Procedure apply to proceedings in the suits instituted under the Act.

6. For the reasons given above we are satisfied that the learned Judge rightly dismissed the application.

7. In conclusion I should notice a matter on which no arguments were advanced at the Bar. It seems to me that the order refusing to allow maintenance under section 25 is an appealable order and on this ground alone the present rule appears to be misconceived. But as we have not heard any argument, on the question of the appeal ability of the order, we prefer to discharge the rule on the merits.

8. The rule is discharged. There will be no order as to the costs of the rule.

Law, J.

9. I am of the same opinion and I only add a few words because of the manifest importance of this case both as regards the construction of Section 25 of the Hindu Marriage Act, 1955 (to be called hereafter as the Act) which cannot be said to be an artistic piece of legislation and also as to the applicability of this section to cases such as the one before us.

⁴ ILR (1955) Bom 856 at p. 858 : AIR 1955 Bom 413 at p. 415

10. Section 25 of the Act provides for payment of permanent alimony and maintenance and confers to the Court jurisdiction to grant it to either party to the marriage. It provides that

"any Court exercising jurisdiction under this Act may, at the time of passing of any decree or at any time subsequent thereto on application made to it for the purpose by either the

wife or the husband, as the case may be, order that the opposite party shall pay to the applicant

11. Thus it appears that either the wife or the husband can apply to the Court under this section at the time of the passing of any decree or at any time subsequent thereto for payment of maintenance.

12. It was contended on behalf of the petitioner that although her husband's petition for divorce under section 13 was dismissed, the order of dismissal was nonetheless a decree in view of Section 21 of the Act read with Section 2 (2) of the Code of Civil Procedure and as such the petitioner was entitled to apply for maintenance under Section 25 of the Act.

13. As against this contention it was urged on behalf of the opposite party that as his, the husband's petition under Section 13 of the Act was dismissed there was no decree within the meaning of Section 25 of the Act and therefore the wife's application under Section 25 was not maintainable. The question is what is the meaning of the words "any decree" which occur in the first part of Section 25 of the Act?

14. It cannot be controverted that maintenance can be granted under the Act to either party to the marriage at the time or after passing of a decree for restitution of conjugal rights or for judicial separation or for nullity of marriage or divorce. These are the four Kinds of decree that are passed under the Act. In my opinion the words "any decree" occurring in the section refer and can only refer to decrees passed under the Act granting substantial relief under Sections 9 to 13. But where the petition for the relief is dismissed and no relief is granted under the aforesaid sections, the order of dismissal cannot be regarded as passing of a decree within the meaning of Section 25 of the Act. In such cases the Court would have no jurisdiction to pass an order for maintenance under Section 25 of the Act. A similar view was also expressed in AIR 1961 Gujarat 202. On the facts of this case and for reasons above-mentioned it is not necessary to decide as to whether an order of dismissal of a petition under the Act may be regarded as a decree for other purposes. It is enough to say that it is not a decree within the meaning of Section 25 of the Act. Thus in the absence of a decree as contemplated under Section 25 the Court cannot exercise any jurisdiction under this section and the application must be held to be not maintainable.

15. This, alone is sufficient to dispose of this Civil Rule, but I wish to say a few words of my own also with regard to other contention made before us.

16. It was contended on behalf of the opposite party that in Section 25 (1) of the Act there is a pre-condition that the applicant must remain "unmarried" at the time of the application as the payment of maintenance under this section is limited to the period "while the applicant remains unmarried"; but the petitioner being still the married wife of the opposite party she was not "unmarried" and as such her application was not maintainable. I must at once say, there is no substance or merit in this contention. The word "unmarried" cannot possibly mean "not married" because the Act only deals with husband and wife. The word "unmarried" in the context must necessarily mean "not re-married". This again is made abundantly clear by sub-section (3) of Section 25 which provides "if the Court is satisfied that the party in whose favor an order has

been made under this section has re-married.....it shall rescind the order". Therefore it seems reasonable to hold that the word "unmarried" as used in sub-section (1) of Section 25 really means "not re-married".

17. This conclusion is further supported, as under the Act the Court can grant maintenance to either party to a marriage in cases of judicial separation and also where there is a decree for restitution of conjugal rights when the marriage still subsists. The words "while the applicant remains unmarried" cannot also mean that the applicant must be in a position to re-marry at the time of the application because in that event these words could only operate where there is a divorce or a decree for nullity thus limiting the scope of the section. In my opinion the word "unmarried" in sub-section (1) of Section 25 means "not re-married". Therefore it cannot be said that the petitioner being still the married wife of the opposite party her application under Section 25 is liable to be dismissed on that ground alone. In my opinion the position is that the petitioner not having re-married must be deemed to be "unmarried" within the meaning of Section 25 (1) of the Act.

18. Thus we are satisfied that the learned Judge of the Court below rightly dismissed the application.

19. The Rule is discharged. There will be no order as to costs.

20. It may be noted that we have discharged the rule on the merits as no arguments were made before us on the question of appeal ability of the order refusing maintenance under Section 25 of the Act.

Rule discharged.