

DELHI HIGH COURT

Sushma

Vs.

Satish Chander, (Delhi)

F.A.O. No. 132 of 1981.

(D.K. Kapur and S. Ranganathan, JJ.)

24.5.1983

JUDGMENT

D.K. Kapur, J.

1. This appeal has been referred to a larger Bench as per the reference order dated 21st January, 1982. The facts of the case were that the husband Shri Satish Chander, had applied for divorce against his wife Shrimati Sushma; this was successful and on 4th October, 1979, the Additional District Judge granted the divorce. The wife filed an appeal to the High Court which succeeded and so, the divorce was set aside. During the pendency of the divorce proceedings as well as the appeal, maintenance *pendente lite* was granted at Rs. 225/- per month to the wife.

2. After the proceedings were over in the High Court the wife applied for permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955. This application was rejected by Miss Usha Mehra, Additional District Judge on the ground that such permanent alimony and maintenance can only be granted in case divorce is granted and not if the marriage subsists.

3. When this matter came before the learned Single Judge in appeal by the wife, he was of the view that there was some ambiguity in the wording of the Act which required the matter to be decided by a large Bench.

4. The relevant section in which the ambiguity occurs is Section 25 of the Hindu Marriage Act, 1955. It reads as follows:

"25. *Permanent alimony and maintenance* - (1) Any Court exercising jurisdiction under this Act may, at the time of passing 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 respondent shall, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the 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 the Court may deem just.

(3) If the Court is satisfied that the party in whose favor an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

The ambiguity is created by the words, "at the time of passing any decree or at any time subsequent thereto" which occur in this section. The contention of the learned counsel is that even if a divorce is not granted, there is a decree. This is on the contention that even if a suit is dismissed, a decree passed and even if a suit succeeds, then also a decree is passed. But we are of the view that the judgments mentioned in the learned Single Judge's referring order, namely, *Kadia Harilal Purshottam v. Kadia Lilavati Gokaldas*,¹ *Shantaram Gopalshet Narkar v. Hirabai w/o Shantaram Gopalshet Narkar and another*,² *Minarani Majumdar v. Dasarath Majumdar*,³ *Shantaram Dinkar Karnik v. Malti Shantaram Karnik*,⁴ *Akasam Chinna Babu v. Akasam Parbati and another*,⁵ *Purshotam Kewalia v. Smt. Devki*,⁶ and *Darshan Singh v. Mst. Daso*,⁷ have taken the right view and the passing of the 'decree' in this context means the passing of the decree of divorce, restitution of conjugal rights or judicial separation and not the passing of a decree dismissing the petition.

5. In order to explain the reason for the word 'decree' having this limited

meaning, there are three points of view which have to be examined. Firstly, there is significance to the words permanent alimony as understood in ordinary parlance. This may be described as the common sense view. Secondly, there is the language specifically used in the Hindu Marriage Act, 1955, itself and, thirdly, which is perhaps the most important is the historical evolution the law of divorce.

6. Taking the commonsense view first; a marriage relationship subsists in law, till the law says that it has come to an end. This may be by the grant of a decree for divorce or nullity in which case the relationship comes to an end; or it may be by restitution of conjugal rights or judicial separation, in which case there is some alteration in the parties' matrimonial rights. Normally, alimony on a permanent basis is maintenance given to an ex-spouse of the marriage by the other ex-spouse. However, the law may visualize the grant of such maintenance even when the matrimonial tie is subsisting and this is possible when the decree is for restitution of conjugal rights or judicial separation. If a petition fails, then the marriage still subsists unaltered by the intervention of any decree. Then the normal rights of the parties inherent in the legal system under which they are married has to prevail. There is no question of alimony being granted in such case, because the matrimonial rights of the parties are to be found in the legal system which operates, requiring one of the parties to support the other and if there is failure to do so, then the other partner can seek maintenance by recourse to the Civil and Criminal Court. There is no question of granting alimony in such cases. It has to be maintenance simpliciter as per Section 18 of Hindu Adoption and Maintenance Act. Furthermore, the section shows as per sub-section (3), that alimony has to end on the re-marriage of the ex-spouse. How can there be a remarriage if the first marriage is still subsisting? Similarly, the same sub-section (3), provides that alimony can end on proof of sexual relations with another partner or unchastely. All this, and the entire context shows that the matrimonial tie must determine before an order for alimony can be passed.

7. Now, taking the second point of view mentioned earlier we have to analyze the language used in the Act itself. This is a question of interpretation. The word 'decree' as used in Section 25 cannot be understood in a sense different from that in which it is used in other provisions of the Act. No doubt the Civil Procedure Code gives a different definition to the word 'decree' than that in this Act. For instance, if we turn to Section 9 we find that if there is a withdraw

from the society by one of the partners to the marriage, then the aggrieved party may apply for restitution of the conjugal rights, in which case a decree for restitution of conjugal rights may be granted. If such a claim fails, then no decree refusing restitution has to be passed. Similarly, in Section 10, the successful party can get a decree for judicial separation but, if an applicant fails, then no decree denying judicial separation is to be passed. Similarly, under Section 11 a decree of nullity is to be passed under certain conditions. However, if the applicant fails, then there will be no decree refusing nullity, and finally, under Section 13, a decree of divorce may be passed on the grounds set out in the Act. In all these four cases, if the petition succeeds, a decree for restitution of conjugal rights, judicial separation, nullity or divorce has to be passed. But if the petition fails then no decree is passed i.e. the decree is denied to the applicant. Accordingly, the words in Section 25 to the effect alimony can be granted when a decree is passed do not operate. The word 'decree' is used here in the sense in which it is used in the sections just referred to. It is when a decree is passed that the rights of the matrimonial parties are altered and it is then only that it becomes necessary for the Court to award alimony or maintenance to the party entitled to the same.

8. From this analysis, it would follow that alimony can be granted on a proper construction of the Act only when a decree has been passed of the type mentioned earlier. If a decree is refused, then no order for alimony can be passed. The word 'decree' is used in matrimonial cases in a special sense different from that in which it is used in the Civil Procedure Code. This accounts for the reasons which have prompted the reference to the Bench. In our view, on a proper construction of the Act, there is no doubt that alimony cannot be granted in a case where a decree for divorce or other decree is refused because in such a case the marriage still subsists.

9. Turning to the last point of view the historical perspective, it will be found that this throws quite a lot of light on the reason the word 'decree' is used in its particular significance and that it has a different meaning in the law relating to marriage and divorce. Marriages can be based on contract or, they can be based on sacrament. No doubt, marriage as understood in civilized society was mostly based on religious customs Religion treated marriage as a sacrament. Marriages were made in Heaven and, therefore, not capable of being brought to an end by human beings. This almost universal idea prevailed for a long period in Man's

history. The concept of divorce existed even in Roman times and was certainly accepted by the Quran. However, it was unknown to Hindu Law and it was also unknown to Christian Law. A decree of divorce was originally granted by the Pope in the form of divorce or *vinculo matrimonial*. No Court whatsoever, either Civil or Criminal or Ecclesiastical could grant such a decree. King Henry VIII of England was anxious to divorce his wife who was the sister of the King of Spain. The Pope refused to oblige him so Henry was forced to form his own Church called the Church of England and was able to get a divorce to marry Anne Boleyn. This divorce eventually led historically to the concept of the Ecclesiastical Courts granting a divorce which was generally known as a divorce *a mensa et thoro*. For a long time in English legal history, a divorce could only be granted by the Ecclesiastical Courts and not by the ordinary Courts. The form of the divorce was a decree. The ordinary English Courts gave their decisions through Judgments, but there was no decree as is understood in Indian Law. The decision of the Court operated as enforceable decree. Even the Letters Patent issued by the King to create the Indian High Courts used the word 'judgment' and not the word 'decree'. Thus, it was a matter of historical evolution that the term decree was used in matrimonial decisions recorded by the Church; the 'decree' was a kind of edict, whereas the Civil Courts used the term 'judgment'. When the English legal system was reformed and the jurisdiction to deal with matrimonial cases was withdrawn from the Ecclesiastical Courts and given to the ordinary Civil Courts for historical reasons, the term 'decree' continued to prevail as far as divorces and judicial separations were concerned. When a person approached the Matrimonial Courts, what he sought was a decree for divorce or nullity, etc. If he got such a decree, the marriage came to an end. If he failed to get such a decree, then marriage subsisted.

10. The law evolved in such a way that the social system required some other order to be passed regarding the fate of the matrimonial parties after they were separated. There was the problem of the children and there was the problem of the maintenance of the wife. This led to further order being passed regarding the custody of the children and the grant of maintenance to the wife, or husband as the case may be.

11. Having examined the position before the Court from all possible angles, we have no doubt that the power to grant alimony contained in Section 25 of the

Act can only be exercised when the Court is faced with the problem of settling the mutual rights of the parties after the matrimonial ties have been determined or varied by the passing of the kind of decrees mentioned in Sections 9, 10, 11 and 13 of the Act and not in other cases.

12. For further justification of this view of the meaning of the word 'decree', Sections 26 and 27 of the Act can also be referred to with advantage :-

"26. *Custody of Children.* - In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes, wherever possible, and may, after the decree upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the Court may, also from time to time revoke, suspend or vary any such orders and provisions previously made".

"27. *Disposal of property.* - In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and wife."

Section 26 just quoted, shows that the Court has power to pass interim orders regarding the custody of children. When the case is decided and a decree is passed, then an order regarding the maintenance of the children and their education has to be passed. This can only happen when the decree determines the matrimonial ties and not if the application is dismissed. There is no necessity to pass any such order if the relationship of the husband and wife remains the same as before.

13. Section 27 also shows that if a decree is passed then the order regarding property can also be passed. Clearly, the context in which this occurs shows that the decree must be one granting divorce and not one refusing the same.

14. Finally, Section 23 has to be referred to. This section sets out a number of self-guards which have to be satisfied before a decree can be granted. Obviously, these safeguards are only to be satisfied if the application for divorce

or other relief is granted and a decree is passed and not if the application is dismissed.

15. Having referred to the terminology of the entire Act, and the way in which the term 'decree' has been used in various parts of the Act, there can be no doubt that the Additional District Judge was right in holding that the Court had no jurisdiction to grant alimony to the appellant, when her husband's petition for divorce had been dismissed. We accordingly dismiss this appeal. We, however, leave the parties to bear their own costs.

Appeal dismissed.

Cases Referred.

1. AIR 1961 Gujarat 202;
2. AIR 1962 Bombay 27;
3. AIR 1963 Calcutta 428;
4. AIR 1964 Bombay 83;
5. AIR 1967 Orissa 163;
6. AIR 1973 Rajasthan 3
7. AIR 1980 Rajasthan 102,