

BOMBAY HIGH COURT

Shantaram Gopalshet Narkar

Vs.

Shantaram Gopalshet Narkar

Appeal No. 245 of 1959. against decision of City Civil Court at Bombay, in M.J. Petn. No.253 of 1959

(Patwardhan, J.)

22.03.1961

JUDGMENT

Patwardhan, J.

1. The appellant before me, in this appeal from order, is the husband. He had made an application in the City Civil Court of Bombay under Section 10(1)(b) of the Hindu Marriage Act asking for judicial separation from his wife on the ground of cruelty and desertion. The notice of the application was served on the wife and she appeared through counsel, but before the husband led evidence in support of his petition for judicial separation, the husband applied to the learned trial Judge for permission to withdraw his petition which he had filed under Section 10(1)(b) of the Hindu Marriage Act. The learned trial Judge heard the wife to show cause why permission to withdraw may not be granted. On hearing the parties the learned trial Judge allowed the husband to withdraw the Petition which he had made for judicial separation. This order was made on the 10th of August, 1959. Thereafter the wife made an application under Section 25 of the Hindu Marriage Act asking for a provision for her maintenance and the maintenance of the children of herself and her husband. The husband raised a preliminary objection to the entertainment of this application under Section 25(1) on the ground that the learned trial Judge had no jurisdiction to pass any orders under Section 25 as the original application under Section 10(1)(b) was already allowed to be withdrawn and was withdrawn by the husband. The learned City Civil Court Judge took the view that though he had permitted the original application for judicial separation to be withdrawn, he could still deal with the matter under Section 25 of the Hindu Marriage Act. He therefore made an order in favour of the wife and the children asking the husband to make monthly payments to the wife and the children to provide for their maintenance. This order was made by the learned Judge on the 12th September 1959. This appeal is directed against the order by which the husband has been called upon to make certain payments to the wife and the children for their maintenance.

2. The first point taken by Mr. Kadam on behalf of the appellant husband is that the learned Judge of the City Civil Court had no jurisdiction to grant maintenance or permanent alimony to the wife and the children as there was no decree at all giving judicial separation to the husband. He contended that Section 25 merely provided ancillary relief and that relief could follow only after the decree has been passed for judicial separation. As no decree has been passed and as, in fact, the very application for judicial separation has been allowed to be withdrawn, nothing remains which could be dealt with under section 25. Under Section 10(1)(b) the petitioner asked for a decree for judicial separation. No decree has been passed in his favor and as no decree has been passed in his favor no occasion arises asking him to provide maintenance to his wife and children. Section 25(1) is in these terms :

"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, while the applicant remains unmarried, 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 and the conduct of the parties, 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."

On a plain reading of the section, it is clear that the Court will have jurisdiction to pass orders for permanent alimony and maintenance under Section 25(1) either at the time of passing any decree or at any time subsequent thereto. This order can be made a part of the decree itself or this order may be passed at any time after the passing of the decree. But before an order under Section 25(1) may be passed, first and foremost, there must be a decree. But if there is no decree then the Court will have no jurisdiction to pass any order under Section 25(1). In order to confer jurisdiction upon the Court to proceed under Section 25(1), first, there must be a decree as contemplated under the Hindu Marriage Act and one of such decrees can be under section 10(1)(b). In the instant case no decree has been passed in favor of the husband for judicial separation and if no such decree has been passed, obviously the learned Judge of the City Civil Court had no jurisdiction to pass any order directing the husband to pay maintenance to the wife and the children under Section 25(1). The existence of a decree is a condition precedent to the exercise of jurisdiction under Section 25(1). If there is no decree, then this ancillary relief which could follow the decree will not be available and the order for maintenance made by the learned Judge in favor of the wife and children is without jurisdiction.

3. This is undoubtedly a very unfortunate result. The conduct of the husband is blameworthy, in that, he is not making any provision for the maintenance of his wife, his children and his aged mother. Even if it is so, since the Court has no jurisdiction to grant maintenance under Section

25(1) in the absence of a decree, the order made by the learned Judge is to be set aside. The result is that the order passed by the learned Judge on the 12th September 1959 in M.J. Petition No.253 of 1959 directing the husband to pay alimony for his wife and minor children at a certain rate mentioned in that judgment is set aside. I did not have the benefit of the arguments by the advocate who appeared for the wife. I had specially kept back the matter in order to see whether the learned Advocate would appear and assist me in the disposal of this appeal. The learned Advocate who appeared for the wife did not remain present.

4. The result is that the appeal succeeds. The order of the trial Court is set aside but under the circumstances there will be no order as to costs.

Appeal allowed.