

## **BOMBAY HIGH COURT**

Shantaram Dinkar Karnik

Vs.

Malti Shantaram Karnik

A.F.O.D. No. 426 of 1961. against decision of Judge, City Civil Court, Bombay, in Misc. Jud.  
Petrn. No. 3156 of 1958

(Shah, J.)

21.11.1962

### **JUDGMENT**

**Shah, J.**

1. This is an appeal by the husband against the order of the City Civil Court dismissing his petition for restitution of conjugal rights, and granting alimony to the wife at the rate of Rs. 40/- per month. The petition was made under the provisions of the Hindu Marriage Act, 1955, and the ground upon which it was based was that in spite of repeated requests, the wife had refused to go and live with him. In the written statement filed by the wife it was contended that she was constantly being ill-treated by her mother-in-law with the connivance of the husband and that she was ultimately driven out of the house. Accordingly, it was submitted that the husband's petition for restitution of conjugal rights be dismissed and that provision for her maintenance be ordered to be made. Both the wife as well as the husband led evidence in support of their respective contentions. The learned Judge after considering the evidence and the other circumstances of the case held that the allegations made by the wife in her written statement were true, that she had every justification to refuse to go back and live with the husband and that, therefore, no decree for restitution of conjugal rights could be passed. Accordingly, the husband's petition was dismissed. While dismissing the petition, however, the learned Judge passed an order that the husband shall pay to the wife permanent alimony at the rate of Rs. 40/- per month. The husband then filed the present appeal for alimony at the rate of Rs. 40/- per month. The husband then filed the present appeal for alimony at the rate of Rs. 40/- per month. The husband then filed the present appeal in this Court challenging the order of the learned Judge dismissing his petition as also the order granting alimony to the wife.

2. Before dealing with the contentions in this appeal, it is necessary to set out a few more facts relating to the marital relations of the parties. The parties to the petition were married on 12th

May 1952. After the marriage, they lived together for about three months, during which time, according to the wife, she was ill-treated both by the husband and his mother and eventually she was driven out of the house. In 1955, the husband presented a petition for nullity of marriage on the ground of impotency of the wife. In 1956, that petition was dismissed and an appeal to this Court against the dismissal of that petition was also dismissed. The husband was, however, ordered, to pay the costs of that petition and of the appeal to the wife. The wife did not take any immediate proceeding for the purpose of recovering these costs, but in 1958, she sent a letter to the husband demanding payment thereof. In reply to this letter, the husband by his letter dated 4th August 1958 asked her to go back and live with him and not to harass him. The wife thought it to be a trick on the part of the husband to evade payment of the costs and accordingly, she did not go back and live with him, nor did she send any reply to that latter. The husband then sent another letter to the wife dated 12th September 1958 once again asking her to go and live with him. The wife did not send any reply to that letter either nor did she go to live with him. Eventually, the husband filed the present petition for restitution of conjugal rights on 7th November 1958. As already stated, the husband failed to prove any desertion on the part of the wife. On the contrary, the learned Judge held that he was guilty of ill-treatment and cruelty to the wife and accordingly, his petition was dismissed and in addition he was ordered to pay Rs. 40/- per month as and by way of alimony to the wife.

3. Mr. Gandhi in support of this appeal did not seriously contend that the order dismissing the husband's petition for restitution of conjugal rights was in any way bad. What he vehemently contended was that the learned Judge in this case had no jurisdiction under Section 25(1) of the Hindu Marriage Act, 1955, to make an order for payment of alimony to the wife. According to Mr. Gandhi, the Court may grant alimony under Section 25(1) only in a case where any of the decrees specified in Sections 9 to 13 of the Hindu Marriage Act is passed. In other words, the Court would have jurisdiction under that Section to pass an order for alimony in favor of the wife or the husband, as the case may be, provided a decree for dissolution of marriage or for nullity of marriage or for judicial separation or for restitution of conjugal rights is passed. Such an order cannot be made where the petition for any of these reliefs is dismissed. Mr. Hemendra Saha, who was asked to appear *amicus curiae* contended that the expression "decree" as used in Section 25(1) would include both a positive as well as a negative decree and that, therefore, the Court would have jurisdiction to grant alimony to the husband or the wife, as the case may be, even where the petition for restitution of conjugal rights was dismissed. I am afraid, on a true construction of Section 25(1), it is difficult to accept the contention of Mr. Shah. Sub-Section (1) of Section 25 so far as it is material for the purpose of the present controversy is as follows :

"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.....",

In view of the use of the expression "passing any decree" in this sub-section, the question would arise as to whether there are any provisions in the Act which contemplate the passing of any particular type of decree in a proceeding taken under the Act, and the answer to this question would seem to be provided by Sections 9 to 13 of the Act which make provisions for different kinds of decrees which may be passed on a petition presented by a husband or a wife. Section 9(1) of the Act empowers the Court to pass a decree for restitution of conjugal rights and it runs as follows :

"When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the Court, on being satisfied or the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly." Section 10 provides for a decree for judicial separation and it says :

"(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the ground that the other party .....

(2) where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent....."

This section specifically refers to the petition for and passing of a decree for judicial separation. Likewise, section 11 of the Act provides for a decree of nullity of marriage and it says that any marriage solemnized after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto, 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. This section also speaks of passing of a decree of nullity of marriage. Section 12 also refers to a decree for nullity of marriage on any of the grounds stated in that section and Section 13 refers to a decree for dissolution of marriage on any of the grounds stated in Sub-Section (i) thereof. Thus, it will be clear that Section 25(1) of the Act which provides for alimony or maintenance to a husband or a wife, as the case may be, when it uses the expression "passing of any decree", only refers to the passing of any of the decree provided for in Sections 9 to 13 of the Act. Although technically speaking, dismissal of a suit or a petition may be called a decree, such decree is not contemplated by Section 25(1) of the Hindu Marriage Act. Accordingly, the Court in my opinion, will not have any jurisdiction to make an order for payment of alimony or maintenance in favor of a husband or a wife in the event of a petition for any of the decrees mentioned in Sections 9 to 13 of the Act being dismissed.

4. In this connection, a reference may be made to a recent decision of the Gujarat High Court in *Kadia Harilal Purushottam v. Kadia Lilavati Gokuldas*<sup>1</sup>, and also to a decision of our Court in *Shantaram Gopalshet Narkar v. Hirabai Shantaram Narkar*<sup>2</sup>, Precisely the same question, which I am called upon to decide in this case, had arisen before the Gujarat High Court in the case

referred to above, and the Court held that the words "any decree" occurring in Section 25(1) of the Hindu Marriage Act contemplated any of the decrees provided for in Sections 9 to 13 of that Act, and that it was only in the event of any such decree being passed that the Court would have jurisdiction to order payment of alimony in favour of the husband or the wife, as the case may be. The learned Judges who decided that case expressed a definite view that the Court would not have any such jurisdiction if the petition for any of those decrees was dismissed. In the case decided by this Court, the husband had filed a petition for judicial separation against the wife. At the hearing of the petition, however, the husband withdrew that petition. Sometime thereafter the wife made an application for alimony and maintenance under Section 25 of the Act. The City Civil Court to which that application was made passed an order for alimony in

<sup>1</sup>(1961) 2 Guj LR 536

<sup>2</sup>63 Born LR 676

favor of the wife. Against that order the husband filed an appeal in the High Court. It was contended on behalf of the husband that since his petition for judicial separation was withdrawn and no decree for judicial separation was passed, the Court had no jurisdiction to pass any order for alimony or maintenance. Patwardhan, J. who heard that appeal construed Section 25(1) and held that the existence of any of the decrees referred to in Sections 9 to 13 was a condition precedent to the exercise of jurisdiction under Section 25(1) of the Hindu Marriage Act, 1955, The learned Judge observed that if there was no decree of any of the kinds provided for in those sections, then the ancillary relief for permanent alimony or maintenance under Section 25(1) would not be available to the applicant. In my opinion, therefore, there is no doubt that on a true construction of Section 25(1) of the Hindu Marriage Act, 1955, unless and until a decree of any one of the kinds mentioned in Sections 9 to 13 of the Act is passed on a petition either by a husband or a wife, the Court would have no jurisdiction to make any order for alimony passed by the learned Judge in the present case cannot be upheld.

5. In the result, the appeal is partially allowed, the order of the trial Court for payment of alimony is set aside and the rest of its order is confirmed. There shall be no order for costs in this appeal. Appeal partially allowed.