BOMBEY HIGH COURT

Modilal Kalaramji Jain

Vs.

Lakshmi Modilal Jain

First Appeal No. 140 of 1988

(A.A. Desai, J.)

07.03.1991

JUDGMENT

A.A. Desai, J.

1. This appeal raises a question as to whether a spouse having failed to secure a matrimonial relief is entitled to a claim of permanent alimony under sub-section (1) of Section 25 of the Hindu Marriage Act 1955 (hereinafter referred to as "the Act of 1955").
2. The trial Judge, in a proceeding initiated by the respondent-wife under Section 9 of the Act of 1955 rejected the claim of the restitution of conjugal rights. However, the learned Judge by the impugned order dated 27-1-1988 granted permanent alimony in favour of the respondent-wife. The respondent- wife did not question the correctness or legality of the order refusing to grant her restitution. However, the appellant-husband by instant appeal, challenged the order granting permanent alimony in favour of the respondent- wife.

3. This Court on 24-2-1988 admitted the appeal as presented by the husband. The main submission as canvassed in the instant appeal is that the term 'any decree' as incorporated under sub-section (1) of Section 25 envisages only affirmative decree and the decree refusing to grant matrimonial relief is not inclusive. Agarwal. J. heard this matter. His Lordship summarized views expressed by the various Benches of this Court as thus :

> In die case of *Shantaram Dinkar Karnik v. Malti Shantaram, reported in*[1] Shah, J. has held that the expression 'passing of any decree', only refers to the passing of any of the decrees 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 Act.

In another decision, *Shantaram v. Hirabai, reported in*[2] Patwardhan, J. had observed that the

husband-petitioner withdrew the matrimonial petition before hearing and if there is no decree, then this ancillary relief of permanent alimony and maintenance under Section 25(1) will not be available to the wife. In the case of *Manilal v. Bhanumati, reported in*[3] Vaze, J. has held that the spouse is entitled to a claim of maintenance even if the petition

[1] AIR 1964 Bom 83 [3](1987)1 DMC 205

[2](1961)63 Bom LR 676

of the husband for divorce is dismissed. The Division Bench of this Court consisted of Vaidya and Lentin, JJ. in the case of *Shakuntalabai v. Sahebrao, reported in*[4] while considering the provisions of Section 18 of the Hindu Adoption and Maintenance Act, 1956 (the Act of 1956) observed that the word 'decree' could only mean a final order of adjudicating upon the rights of the parties to a petition under the Act of 1955 and, therefore, includes a decree dismissing the petition. Another Division Bench consisted of Nathwani and Naik, JJ. in the case of *Chandrakant v. Nandana in*[5] relying on the decision of Shah; J. in the case of Shantaram cited (supra), held that Section 25(1) requires an application for permanent maintenance to be made by a party and an order for the same can be made at the time of or subsequent to the passing of a decree. The Division Bench has observed that such a decree must be one granting substantive relief and not one dismissing the petition.

His Lordship Agarwal, J. also made a reference to the decisions in the case of *Vinod Chandra v. Rajesh Pathak, reported in*[6] *Kadia Harilal v. Kadia Lilavati*[7]*, Smt. Sushma v. Satish Chander*[8]*, Purshottma Kowalia v. Smt. Deoki*[9]*,* and *Akasam Chinna Babu v. Akasam Parbati*[10]*,* His Lordship Agarwal, J. has expressed that there has been a conflict of views in respect of the construction of a term "any decree" under Section 25(1) of the Act of 1955. His Lordship, therefore, by an order dated 15th June, 1988 made a reference to the larger Bench.

4. The matter was then placed before the Division Bench consisting of Sawant and Kolse Patil, JJ, 'The Division Bench in the reference, observed that the question involved in the instant appeal was not before the Division Clenches for determination. The observations made by the Division Bench cited in the reference, according to the Divisional Bench, were clearly an obiter dicta, and as such there was no conflict. The Division Bench, therefore, referred back the matter. I thereupon heard the matter.

5. Mr. Soochak, the learned Counsel appearing for the appellant-husband urged that under the scheme of the Act of 1955, maintenance or alimony is an ancillary relief. It is incidental to a decree of matrimonial relief. In the event the matrimonial relief is declined, a spouse is not entitled to a relief of maintenance. He reiterated that the term 'any decree' under Section 25(1) of the Act of 1955 comprehends only an affirmative decree granting matrimonial relief. As such a decree refusing to grant matrimonial relief is not within the ambit of the term. In the instant case, the respondent-wife having been declined the relief of restitution of conjugal rights was not entitle to the grant of permanent alimony under Section 25(1) of the Act. To construe that even a negative decree is also inclusive in the term 'any decree', would lead to an analogous situation of granting the permanent alimony to a losing spouse who failed to secure of matrimonial relief. I am unable to accede the argument as advanced. At any rate, grant of permanent alimony could

not be a relief ancillary to the matrimonial claim. Even otherwise, as considered, the Act of 1955 is a social piece of legislation. It aims to provide a solace to either of the spouses when their marriages have been in turmoil. A wife resisting a claim of divorce put forth by a husband, even on her failure is entitled to claim a maintenance. The right of either spouse in this regard is not made dependent on success or failure of the parties. Under the scheme of Section 25(1) if read in a right spirit according to me, the claim of maintenance could not be consequential to the result of the matrimonial claim as envisaged under

[4]1976 Mah LJ 512 [6] AIR 1988 All150 [8] AIR 1984 Delhi page 1
[5] L.P.A. No. 118 of 1973 decided on 16th August, 1974 [7] AIR 1961 Guj 202
[9] AIR 1973 Raj 3 [10] AIR 1967 Ori 163

Section 9 to 13 of the Act of 1955.

6. Mr. Soochak then made a submission that Shah, J. in the case of Shantaram cited (supra) has specifically laid down that a decree negativing the matrimonial claim is not inclusive in the term 'any decree' under Section 25(1). The ratio as tendered has neither been reversed or overruled by any of the judicial decisions. According to the learned Counsel, as a rule of precedent and as a matter of judicial discipline, the ratio has a binding force over the coordinate Benches. However, he pointed out that Vaze, J. in the case of Manilal cited (supra), Manohar, 1, in the case of *Meenakshi v. Ashok Dhirajlal, reported in*[11] and Daud, J. in the case of *Sadanand v. Sulochana, reported in*[12] took a contrary view. These Benches have held that a decree refusing the matrimonial claim is also inclusive in the term 'any decree' and as such even the losing spouse is entitled to claim of maintenance under Section 25(1). Mr. Soochak made a submission that the subsequent decisions since not followed the ratio as rendered by Shah, J. in the case of Shantaram, have rendered themselves per incuriam and as such they lose their binding force. The submission is, this Court has to follow as a rule of precedent, the decision of Shah, J. in Shantaram. The alternate submission is, in case this Bench does not agree, then the only recourse for this Bench is to make a reference to the larger Bench.

7. The Term 'decree' has not been defined under the Act of 1955. However, it is commonly understood that the decree is an expression of a result of judicial adjudication between the competing claims. An order refusing to grant a matrimonial relief is a decree for all purposes including the appeal under Section 28 of the Act of 1955. The term 'any decree" as used under Section 25 of the Act of 1955 does not suffer from any limitation or restriction or ambiguity or vagueness. The term is also not susceptible to different interpretation or construction. Shah, J. in case of Sharttaram having held that technically speaking dismissal of a petition may be called as decree but not inclusive in the term 'any decree', according to me, would be not in consonance with the letters of law. Anv decision which is a contrary to the letters of law loses its binding effect. The term 'any decree' since not succeptible to any different interpretation clarification or explanation, the same as used with its grammatical connotation is to be accepted. Any decision which is rendered in ignorance of law or with a knowledge of law, but without, making any reference, is *per se* per incuriam. Similarly the Court may know of the existence of the statute and not appreciating its relevance to the matter, the decision rendered as such is again incuria

which vitiates the decision. In the decision Shah, J. has adverted to the term 'any decree'. The decision has shown the consciousness of the term. However, there is a omission to appreciate the relevance of the term. The decision rendered as such has resulted in being per incuriam. The ratio, therefore, ceased to have a binding force.

8. Mr. Vashi, the learned Counsel appearing for the respondent-wife, rightly urged that after the decision of Shah, J. in the case of Shantaram the scheme of Section 25 has undergone a substantial change. Mr. Vashi pointed out that in the initial scheme of Section 25 the entitlement was extended till the applicant remained unmarried. However, this condition by the Amending Act of 1976 has been deleted. So taking the position prior to amendment it may perhaps suggest that 'any decree' as contemplated by Section 25 could be one of divorce or annulment. Only after passing such decree, the parties were at

[11](1989)15 Bom CR 156

[12](1989)1 Bom CR 495

liberty to remarry. It is, therefore, urged that ratio laid down by Shah, J. does not express the correct position of law as it stands after amendment. It is rightly submitted ratio in case of Shantaram has no binding force after the amendment of 1976. Besides divorce or nullity there could be a decree of judicial separation or restitution of conjugal rights. Such decree since does not bring an end to the marital tie, the parties are not at liberty to remarry. As such, the view that position of law prior to amendment might indicate any decree u(S.25(1) means only affirmative was also not possible. The same even otherwise could not at any rate be fetched any longer after the amendment of 1976. Mr. Vashi made a submission that the subsequent decisions of Vaze, J., Daud, J. and Manohar, J. have been rendered after 1976 and they have laid down the ratio taking into consideration the position of law as prevailing to-day. These decisions therefore need to be followed. I agree.

9. Mr. Soochak then urged before me that after refusal of matrimonial relief, the entitlement for a maintenance simpliciter would be covered by Section 15 of the Maintenance and Wards Act, 1956 (Sic. Hindu Adoptions and Maintenance Act, 1956 Ed.) (the Act of 1956). According to him, this Act of 1956 is a complete Code in itself, and any spouse claiming such relief of maintenance simpliciter could take resort to the provisions under the Act of 1956. The claim for maintenance in exclusion of the matrimonial relief as such could not be resorted to under Section 25(I) of the Act of 1955. He pointed out that under sub-section (2) of Section 18 of the Act of 1956, the wife is entitled to live separately from her husband under certain contingencies including those referred to in clauses (d) and (e).. As such in his submission Section 25 of the Act of 1955 has no application to the present claim. I am unable to agree with this submission. The Act of 1955 and the Act of 1956 have a different sphere and the field. Any spouse claiming the matrimonial relief coupled with the permanent alimony cannot take resort to the Act of 1956. Such spouse has to approach the Court under the Act of 1955. Moreover a spouse in a proceeding initiated by other spouse for matrimonial relief can set up a claim for maintenance. Under the Act of 1956 the wife who is entitled to be maintained by the husband, she in a contingency as enumerated entitled to live separately. Without making any grievance on

matrimonial dispute or without claiming any matrimonial relief she can approach the Court under the provisions of the Act of 1956 to claim maintenance.

It is then contended by Mr. Soochak that the provisions of Section 25 which guarantee the permanent alimony in a matrimonial proceeding are without any guidelines. According to him, in absence of guidelines, the Court has to import either the principles or norms from Section 18 of the Act of 1956. It is clear that the scheme of Section 25 speaks about the grant of permanent alimony and maintenance, after the culmination of the matrimonial proceedings. Section 25 of the Act of 1955 lays down that the Court can direct the non- applicant to pay maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant, having regard to the respondent's own income and other property, if any, the income and other proper tie applicant. (Emphasis supplied). It further lays down that the trial Court also to take into account the conduct of the parties and other circumstance of the case. These provisions have been incorporated in Section 25 by the Amending Act of 1976. Now taking into account the amount necessary to support, its periodical payment, regard to the income of the applicant as well as nonapplicant and the conduct of the parties and other circumstances pertinent thereto, in my opinion, provide sufficient guidelines to adjudicate the claim of maintenance. Sub-section (2) also provides for the modification of revocation of the order passed under sub-section (1) in case of change in the circumstances of the party which were prevailing at the time of passing the initial order. Sub-section (3) further provides another contingency when the trial Court can interfere with the intial order of granting maintenance. Taking these aspects together, I find sufficient guidelines. I am, therefore, unable to agree with the submission of Mr. Soochak.

Mr. Soochak then made a submission that an issue relevant to entitlement of the respondent-wife to live separately and her justification to claim maintenance was not specifically framed and tried by the Court. The grievance of the learned Court is that the only issue framed by the learned trial Judge which reads thus

> "Whether the petitioner proved that the respondent has without reasonable cause withdrawn from the Society of the petitioner."

This issue, according to the learned Counsel, is not exhaustive. Moreover, the issue was tried only for the purposes of relief of conjugal rights. As such the parties were not at trial for the claim of grant of permanent alimony or maintenance under Section 25(1). He, therefore, urged that the matter needs to be remanded to the trial Court for framing an appropriate issue and trial thereof.

10. The issue, as framed, certainly Involves the trial between the parties as regards the reasonable cause of the respondent-wife to withdraw from the company of the husband viz., the appellant, and entitlement to separate residence. As such I am unable to agree with Mr. Soochak that the issue was not exhaustive and relevant for the purpose of permanent alimony. The respondent in her petition made a positive case assigning the reason of a cause for her withdrawal from the company of the husband. She specifically stated that she has been residing with her brother. On

these substances of the pleadings, she claimed restitution of conjugal rights. While dealing with the issue the parties were certainly at trial on the question whether there was justification or reasonable cause for the respondent-wife to live separately or away from her matrimonial home. As apparent from record, the parties in their pleadings as well as in evidence have adverted themselves on this aspect. The grievance as such factually or otherwise could not be sustained. The issue squarely covers the aspects which are relevant for the adjudication of the claim under section 25 of the Act.

11. Mr. Soochak then made a grievance that the trial Court has not properly appreciated the evidence on record before granting relief under section 25(1) of the Act of 1955. According to him, the respondent-wife has not satisfactorily established her claim for permanent alimony. It is not disputed on record that the parties were married on 22-2-1969. Respondent delivered first child Vinod on 27-4-1971, second child Dinesh on 13-6-1974 and daughter Rajkumari on 21-8-1975. According to the respondent wife, the appellant-husband has affairs with one lady named Sunita. Subsequently the appellant-husband brought Sunita in the premises adjacent to the block where she had a matrimonial home. She further averred that by opening a door in between the two blocks, the separation was removed. She, therefore, left the house along with her children and took a shelter at the, place of her brother in Matunga. On 8-4-1983 she presented the instant petition for a claim of restitution of conjugal rights coupled with permanent alimony. The trial Judge discussed this aspect in para 8. He also recorded a conclusion that in a situation as prevailing, tire respondent-wife was justified in withdrawing the company of the appellant-husband. Taking into consideration the evidence and pleadings, the respondent-wife was forced to leave the company of her husband. As such she was entitled to a matrimonial relief of restitution of conjugal rights. However, in her deposition as reproduced in para 8 of the impugned judgment, she has said that "1 am not willing to stay with the respondent because he has kept that girl with him. If she is no longer in the house, I am ready to go and stay with the respondent." Taking into account this testimony of the respondent-wife, the learned Judge thought it not expedient or appropriate not to direct the restitution of conjugal rights. Considering the situation as then prevalent at the time of passing of decree, the trial Judge has declined to grant the relief. However, it is apparent that it was not the failure on the part of the respondent-wife to substantiate her claim for grant of restitution. The restitution was declined as it was not expedient in a situation which was then prevailing. The trial Court, according to me, was justified in declining to grant the restitution of conjugal rights taking into consideration the situation as reflected from the evidence as reproduced hereinabove. The trial Judge also adverted to the position about the affairs of the appellant with the said Sunita. He has discussed this aspect in paras 10 and 11 of the impugned judgment. With the assistance of the learned Counsel, I have gone through the reasoning and findings as recorded. I do not find any material illegality or irregularity in recording the findings.

12. The learned Judge thereafter for quantifying the amount of maintenance took into consideration the various aspects including the income of the parties and their resources as

required by sub-section (1) of Section 25. He had discussed this aspect in paras 14 to 17. After screening this aspect carefully, the learned Judge arrived at the conclusion in para 17 that three children who are with the respondent-wife would be entitled to Rs. 500/- each per month and the wife Rs. 1500/- per month. In the circumstances as prevailing as on the date of the order i.e. 27-1-1988 looking into the act of circumstances, requirements of the children who are taking education and the social status and the standard of living of the parties, I do not find that the amount as granted is exorbitant or excessive. In the result, the appeal must fail. The appeal is hereby dismissed. The appellant shall pay Rs. 3000/- by way of costs of this appeal to the respondent-wife.

7th March 1991

13. However, later on by consent of parties as filed by them on 7-3-1991, the following order as regards the stay of the decree passed by the trial Court. Stay to the judgment and decree of the trial Court is granted for a period of 12 weeks from to-day on appellant making payment of Rs. 50,000/- towards the arrears of maintenance to the respondent-wife or her Counsel on or before 21st March 1991 and depositing Rs. 50,000/- in the trial Court on or before 17th April 1991. The respondent-wife shall be at liberty to withdraw the amount so deposited in the Court after furnishing security to the satisfaction of the trial Court. In case of breach of any of the conditions, the respondent-wife shall be at liberty to recover the entire amount of arrears of maintenance in accordance with the law.

Order accordingly.