

RAJASTHAN HIGH COURT

Darahan Singh

Vs.

Daso

Civil Misc. Appeal No. 126 of 1978

(M.C. Jain, J.)

03.08.1979

JUDGEMENT

M.C. Jain, J.

1. This is an appeal against the judgment dated 17-10-1978 passed by the District Judge, Sri Ganganagar, whereby the appellant's petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act"), was dismissed and the petitioner-appellant was ordered to pay maintenance to the non-petitioner-respondent for herself and her daughter to the tune of Rs. 300/- per month.

2. The appellant's case was that the parties were married about seven years ago according to Hindu rites. They lived as husband and wife at Chak 3 M.D., Tehsil Anupgarh, and a daughter was born out of the wedlock. About three years ago, the non-petitioner left the company of the petitioner without any reasonable excuse and went to her parents. Despite several efforts, she did not return to her matrimonial home. The non-petitioner admitted the other facts as averred by the petitioner. She, however, denied the allegations made against her with regard to leaving the company of the petitioner without any reasonable excuse. After traversing these allegations, it was averred by her that the petitioner in her absence married one Mst. Puni about 3-4 years ago without her consent and when her father came 90 leave her at the petitioner's house, the petitioner refused to accept her. The non-petitioner had no alternative, but under compulsion had to go back with her father. It was also averred that in the presence of the second wife, it will not be in her interest to live with the petitioner and she will have to suffer Physical and mental torture and she will be deprived of her matrimonial rights. She also claimed maintenance 300/- per month from the petitioner for herself and her daughter.

3. The learned District Judge framed as many as four issues and recorded the evidence of the parties. After hearing arguments the learned District Judge dismissed the petition for restitution of conjugal rights and awarded maintenance @ Rs. 300/- per month. The learned District Judge found that the petitioner married the second wife and there was reasonable excuse for the non-petitioner for not living with the petitioner.

4. Dissatisfied with the judgment, decree and order of the learned District Judge, the petitioner has preferred appeal.

5. I have heard Sri M.L. Garg, learned counsel for the petitioner-appellant and Sri S.N. Sharma, learned counsel for the non-petitioner-respondent.

6. As regards the relief of restitution of conjugal rights, Sri Garg has not seriously contested the appeal and in my opinion, rightly so. The finding of the learned District Judge on issue No. 1, relating to second marriage by the petitioner, is unimpeachable. The petitioner has led no evidence and as such there was no escape for the learned District Judge except to hold that the petitioner married a second wife and on that basis further it has been found that there was reasonable cause for the non-petitioner not to live with the petitioner. The statement of Mst. Daso and her father Jangirsingh (D.W. 3) were to the effect that the non-petitioner was turned out from the house and not accepted by the petitioner in view of his second marriage, although Mst. Daso stated that she is still prepared to live with the petitioner, provided she is kept with love. There are no reasons to differ from these findings arrived at by the learned District Judge.

7. The main attack of Sri Garg is on the order awarding maintenance to the non-petitioner. Sri Garg urged that when the petition for restitution of conjugal rights was dismissed, then under Section 25 of the Act, no alimony could be awarded. Section 25 of the Act would be attracted only when any decree is passed granting any relief under Sections 9 to 13. The order awarding maintenance under Section 25 in the present case, according to Sri Garg, is without jurisdiction, as, such an order can only be passed "at the time of passing any decree or at any time subsequent thereto". Sri Garg in support of his contention placed reliance on a decision of this in *Purshotam Kewalia v. Smt. Devki*¹

8. Sri S.N. Sharma, learned counsel for the non-petitioner-respondent, on the other hand, submitted that dismissal of the petition is not simply an order of dismissal, but it also amounts to a decree. The expression "decree" should be given its well accepted connotation. Where there has been a formal expression of an adjudication conclusively determining the rights of the parties whereby granting relief or refusing relief, such formal expression should be taken to be decree. If such a meaning is not given to the expression "decree" dismissal of the petition under Sections 9 to 13 of the Act would not be appealable. The provision of Section 25 may be read along with the provision of Section 25 of the Act. If the two provisions are read together it would be clear that where petition is dismissed, such a dismissal would also amount to a decree, else it would not be appealable. Sri Sharma urged that under Section 28 of the Act, as it stood prior to its amendment, by Marriage Laws (Amendment) Act, 1976 (hereinafter referred to as "Amending Act"), all decrees and orders made by the court in any proceedings under the Act were appealable and it presented no difficulty if the dismissal of the petition is considered to be a decree or an order, but after amendment of Section 28, under Sub-Section (2) of Section 28, only orders under Sections 25 and 26, which may not be interim orders, are appealable and no other orders are appealable. Under the amended Section 28, dismissal of the petition, if not taken to be a decree, would not be appealable and such could not be the intention of the Parliament that finality may be attached to the adjudication made by the District Judge dismissing the petition. Sri Sharma, therefore, submitted that the view expressed in Purshotam Kewalia's case (supra) needs reconsideration and in the light of the provision contained in Section 28, the expression "passing of any decree" under Section 25 of the Act should be construed. He urged that with regard to the interpretation of the expression "decree made by the Court in any proceeding under this Act" under the amended Section 28, there is no decision holding that dismissal of the petition also amounts to a decree, but there have been series of decisions where appeals have been preferred against dismissal of the petitions after amendment of Section 28, whereby it can be said that all concerned impliedly accepted the view that dismissal of the petition under the Act also amounts to a decree, though the controversy did not arise at all in those cases. Sri Sharma further urged that if narrower view of the word "decree" is taken so as to exclude the dismissal of the petition then the petitioner's appeal against the dismissal of his petition, is not maintainable.

9. Having heard the learned counsel for the parties, in my opinion the controversy has

become serious and needs deeper consideration after amendment of Section 28 of the Act. The provisions of Sections 25 and 28 have to be so construed so that they may reflect the real intention of the legislature. For the proper appreciation of the controversy, the scheme of the various provisions. of the Act, needs to be examined and after examining the scheme, it has also to be noticed as to how the two provisions came to be interpreted.

10. Section 9 provides for a petition for restitution of conjugal rights and it lays down that if there is no legal grounds why the application should not be granted, the court may decree restitution of conjugal rights. Similarly, under Section 10 of the Act the petition is presented for a decree for judicial separation. Sub-section (2) of Section 10 uses the expression "passing of a decree for judicial separation". Similarly Sections 11 and 12 provide for passing of a decree of nullity of marriage and under Section 13 of the Act marriage may be dissolved by a decree of divorce. Thus, these five Sections. contemplate granting of decrees for the various kinds of reliefs, which may be prayed under these provisions. Section 23 of the Act makes a provision as to when decree granting relief can be passed under Sections 9 to 13. Under Sub- Section (1) of Section, 23 the court is required to be satisfied with regard to the matters enumerated in clauses (a) to (e) and after such satisfaction the court is required to decree the relief. The expression "decree" further occurs under Sections 26 and 27 of the Act. It would appear that the expression "decree" in these two Sections would mean decree granting a relief as provisions are required to be made in such decrees for the custody of children or for disposal of property. Section 25, thus, has to be construed in the light of the scheme of the provisions referred to above. I may read Section 25 of the Act to the extent, which is relevant in this case :-

"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."

The above provision came to be interpreted by the various High Courts in India and the expression "passing any decree" has been given a meaning of decree whereby relief has been granted, a decree as contemplated in Sections 9 to 13 and this expression has not been given a meaning so as to include the dismissal of the petitions contemplated under Sections 9 to 13. Such a view has been taken by the Bombay High Court and this view has further found favour with the Gujarat, Calcutta High Courts and this Court as well has adopted the same view in Purshotam Kewalia's case (supra). The first case on the subject is a decision of Gujarat High Court in *Harilal Purshottam v. Lilavati Gokaldas*². In this case the, application for restitution of conjugal rights made by the husband was dismissed by the learned District Judge anti while dismissing the application, he awarded maintenance under Section 25 of the Act to the wife. The learned Judges of the High Court observed as under :-

"The words 'at the time passing any decree or at any time subsequent thereto in Section 25 mean at the time of passing any decree of the kind referred to in the earlier provisions of the Act and not at the time of dismissing the petition for any of the reliefs provided in those Sections or any time subsequent thereto. The expression "any decree does not include an order of dismissal. The passing of an order of dismissal of a petition cannot be regarded as the passing of a decree within the meaning of this Section".

The above excerpt is quoted in Purshotam Kewalia's case (supra). Further this view has been expressed in subsequent cases, namely in *Shantaram Gopalshet v. Hirabat*,³ *Minarani. v. Dasarath*,⁴ and *Akasam Chinna v. Parbati*,⁵ This view has also been expressed in *Shantaram Dinkar v. Malti Shantaram Karnik*,⁶ If the view taken by the High Courts in India was not in accordance with the intention of the Legislature, the Legislature would have suitably amended Section 25 as well at the time when substantial amendments were made by the Parliament, while passing the Amending Act. In "The Construction of Statutes by Crawford (1940 Edition) at page 308, Note 184 it is stated as under :-

"184. Effect of Construction or interpretation on the Law - Stare Decisis. The construction placed upon a statute by the courts becomes a part of the statute, and hence part of the law thereby enacted. If the legislature, after ample opportunity to change a construction by the enactment of an amendment, fails to

do so, it gives its approval of the construction placed on the enactment by the courts".

11. In Statutes and Statutory Construction by Surtherland, Volume 2, Third Edition (1943) at page 523, in Note 5109, it is stated as under :-

"Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded presumptively the correct interpretation of the law. The rule is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment"

12. Now the question arises whether in view of the amendment of Section 28 of the Act, the construction placed on Section 25 at all needs any consideration ? For examining this question, it will have to be seen as to how the amended Section 28 is to be construed, that is, whether the construction placed by Sri Sharma on Section 28 is correct, so as to mean that only decrees granting relief would be appealable or where the petitions are dismissed, they will also amount to a decree and so would be appealable. Though, there are some observations made in Purshotam Kewalia's case (supra), but on the basis of those observations, it cannot be said that it is the ratio of that case. It has been observed in Purshotam Kewalia's case, after taking into consideration the definition of the expression "decree" under Section 2 of the Civil Procedure Code that where a suit has been dismissed after trial, such dismissal is a decree within the meaning of Section 2. Civil Procedure Code, but dismissal of an application under the Act will not amount to a decree. It was further observed in that case that the provisions of the Act show that it is only when the relief claimed is decreed that the adjudication of the court will amount to the passing of any decree within the meaning of Section 25 of the Act; and thereafter the learned Judge stated that the provisions of Section 25 of the Act are analogous to the provisions of Section 37 of the Indian Divorce Act; and reference was made to a decision under the Indian Divorce Act holding that it was not competent for the court dismissing the husband's petition for dissolution of marriage to award maintenance to the wife under Section 16 or 37 of the Indian Divorce Act. It may be stated that the learned Judge was not laced with the situation with which I am confronted in the present case, so this observation

of the learned Judge only appears to be obiter that dismissal of the application under the Act will not amount to a decree.

13. For the proper appreciation of the controversy I may read Section 28, as it stood prior to the amendment of 1976 and after its, amendment in 1976 :-

"28. Enforcement of, and appeal from, decree and orders. - All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force :

Provided that there shall be no appeal on the subject of costs only".

"28. Appeals from Decrees and Orders -

(1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of Sub-Section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decision of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or Section 26 shall, subject to the provisions of Sub-Section (3), be appealable if they are not interim order, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no, appeal under this Section on the subject of costs only.

(4) Every appeal under this Section shall be preferred within a period of thirty days from the date of the decree or order.

14. A bare reading of the provisions of Section 28 before and after its amendment makes it amply clear that prior to its amendment all decrees or orders were appealable, whereas after amendment all decrees made in any proceedings under the Act have been made appealable. The word "passed" has not been made use of in Section 28. The word "made" has been used. Where in the other provisions, namely, Sections 10, 23 and 25 the word "passed" is used, which reflects the intention of the legislature in the sense of "granting relief", whereas the words "making any decree" may mean in both the senses "granting of any relief or refusing any relief". The provision of Section 28, as it stood prior to amendment or after amendment, is analogous to the provision contained in Section 55 of the Indian Divorce Act. Though prior to the amendment,

Section 28 appears to have been adopted from Section 55 of the Indian Divorce Act and after amendment the other part of it has been placed under Sub-Section(2) of Section 28. Section 55 of the Indian Divorce Act came to be interpreted by courts in India and it has been construed that dismissal of a petition would amount to a decree and would be appealable. It has been so held in *Moagan v. Morgan*⁷ Such a view has further been taken in *E.C. Palmer v. C.M. Palmer*⁸ and *Holland v. Holland*,⁹ appearing in the commentary of Section 55 of the Indian Divorce Act by S.C. Manchanda (1969) Third Edition, at page 483, Foot Note 3).

15. In Shantaram Dinkar Karnik's case (supra) it has been observed in para 3 that 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. It would appear from these observations that for purpose of Section 25 dismissal of the petition does not amount to a decree and granting of relief alone may be termed as a decree, but for purposes of Section 28, dismissal of a petition may be considered to be a decree.

16. In Black's Law Dictionary, Fourth Edition, at page 498, it is stated as under :-

"The judgement of a court of equity or admiralty, answering for most purposes to the judgement of a court of common law. A decree in equity is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit, according to equity and good conscience".

"The words "judgement" and "decree", however, are often used synonymously; *Finnell v. Finnell*, especially near that the Codes have abolished the distinction between law and equity; *Henderson v. Arkansas* 11

17. In Stroud's Judicial Dictionary Fourth Edition, it is stated as under :-

"A decree is the final Order of a Court in a suit, e.g. prior to the Judicature Act 1873 (c. 66), a chancery decree; "Decree" closely resembles, but is not identical with, "judgment", "The final decision of a divorce proceeding is termed a 'decree' the proceeding itself is usually styled a 'cause', or 'suit'.."

18. Decree in its ordinary connotation may mean formal expression of adjudication determining the rights of the parties in any cause. It may be stated that Section 21 of the Act makes the Civil Procedure Code so far as may be applicable to proceedings

under the Act subject to the provisions of the Act and Rules of the High Court. The definition of the word "decree" as is given in Section 2(2) of the Civil Procedure Code may be applicable so far as may be to the expression "decree" in Section 28 of the Act. It is true that the same meaning cannot be assigned to the word "decree" as is found in its definition in the Civil Procedure Code, but to this extent the definition can be made applicable that dismissal of the petition is nothing, but formal expression of an adjudication determining the rights of the parties in a cause. In this sense if the expression is interpreted in Section 28, it would include not only decree granting relief, but also decree dismissing the petition. Had this been not the intention, the legislature could have used the same expression that all decrees granting relief or decrees passed under the provisions of the Act, would be appealable. In the mind of the legislature passing of any decree was to mean granting any relief and making of any decree was to mean granting and refusing any relief. It is in this way that the two provisions can be construed respecting the real intention of the legislature, or it cannot be conceived that refusing of relief by dismissal of a petition would be made non-appealable. The legislative intent had been so read by all concerned and it has been impliedly accepted that where the petitions are dismissed, such dismissal would amount to a decree and dismissal would be appealable. Appeals against dismissal of the petitions have been filed after amendment of Section 28 of the Act and they have been heard and disposed of by various High Courts in India. Reference in this connection may be made to *Gurucharan Singh v. Sukhdev Kaur*,¹² in husband's petition for divorce; *Ravishanker v. Smt. Sharda Vishwakarma*,¹³ a joint petition by the spouses under Section 13-B of the Act inserted after the Amending Act, dismissed; *Chander Dev Chadha v. Smt. Rani Bala*,¹⁴ the husband's petition for restitution of conjugal rights dismissed; *Nandkishore v. Smt. Munnibai*,¹⁵ the husband's petition for nullity under Section 12(1)(d) of the Act, dismissed. When have not been raised under the amended Section 28 of the Act it can legitimately be taken that Section 28 of the Act, even after amendment, has been understood to mean that the dismissal of the petitions amount to decrees made under the provisions of the Act and hence and appealable.

19. From the above discussion I am clearly of the opinion that expression "passing of any decree" under Section 25 of the Act would mean decree granting relief of the nature stated in Sections 9 to 13 of the Act and the expression "decrees" made under the provisions of the Act, would mean decrees granting relief and refusing relief and it cannot be the intention of the legislature to attach finality to the orders of the District

Judges regarding the dismissal of the petitions under Sections 9 to 13 of the Act. Thus, I hold that the present appeal against the dismissal of the petition under Section 9 of the Act, is maintainable and I further hold that as relief of restitution of conjugal rights has not been granted, award of maintenance under Section 25 of the Act was without jurisdiction and the, award of maintenance cannot be sustained in the light of the case law discussed above.

20. In the result, this appeal is allowed in part. The decree of the learned District Judge dismissing the appellant's petition for restitution of conjugal rights shall stand. However, the order granting maintenance is set aside. Under the circumstances of the case the parties shall bear their own costs of this appeal.

Appeal partly allowed.

Cases Referred.

1. (1972) 5 WLN 654
2. (AIR 1961 Guj 202)
3. (AIR 1962 Bom 27)
4. (AIR 1963 Cal 428)
5. (AIR 1967 Ori 163)
6. (AIR 1964 Bombay 83)
7. ((1882) ILR 4 All 306)
8. (1917) ILR 41 Han 36)
9. (1918 P. 273: 87 LJP 142: 119 LT 266
10. 113 Okl. 269, 230 p. 912, 913
11. 71 Okl. 253, 176 p. 751, 753
12. (AIR 1979 Pun and Har 98)
13. (AIR 1978 Mad Pra44)
14. (AIR 1979 Del 22)
15. (AIR 1979 Mad Pra 45)