

# RAJASTHAN HIGH COURT

Surendra Kumar Bhansali

Vs.

The Judge, Family Court

S.B. Civil Writ Petition No. 318 of 2004

(Sunil Kumar Garg, J.)

20.04.2004

## JUDGMENT

**Sunil Kumar Garg, J.**

1. This writ petition under Articles 226 and 227 of the Constitution of India has been filed by the petitioner husband against the respondents on 23.1.2004 with the prayer that by appropriate writ, order or direction, order dated 20.11.2003 (Annex.2) passed by the respondent No. 1 Family Court, Udaipur by which the application filed by the respondent No. 2 Smt. Kailash-wife in the proceedings under Section 25 of the Hindu Marriage Act, 1955 (hereinafter referred to as "The Act of 1955") was allowed in the manner that the petitioner-husband would pay Rs. 5000/- to the respondent No. 2 Smt. Kailash-wife as counsel fee and litigation expenses, be quashed and set aside.

2. The case of the petitioner-husband as put forward by him in this writ petition is as follows:

The petitioner-husband filed a divorce petition in the year 1998 before the respondent No. 1 Family Court, Udaipur seeking divorce against the respondent No. 2 Smt. Kailash (wife) and that divorce petition was registered as case No. 183/1998 and the respondent No. 1 Family Court through judgment and decree dated 13.7.2001 decreed the divorce petition of the petitioner- husband and passed a decree of divorce against the respondent No. 2 Smt. Kailash (wife).

The further case of the petitioner is that the respondent No. 2 Smt. Kailash (wife) preferred an appeal against the judgment and decree dated 13.7.2001 passed by the respondent No. 1 Family Court before this Court and the same is pending before the Division Bench of this Court.

The further case of the petitioner is that after the decree of divorce dated 13.7.2001 was passed by the respondent No. 1 Family Court in favor of the petitioner husband, the respondent No. 2 wife filed an application (Annex. 3) on 4.9.2001 under Section 25 of the Act of 1955 for granting permanent alimony and maintenance and that application was registered as case No. 241/2001 and the same is pending before the respondent No. 1 Family Court.

The further case of the petitioner-husband is that during the pendency of the said application Annex. 3, both the parties were granted permission to prosecute their cases through their respective advocate and therefore, the respondent No. 2 (wife) moved an application (Annex. 1) on 7th August, 2003 claiming advocate's fee and litigation expenses and that application Annex. 1 was allowed by the respondent No. 1 Family Court through impugned order Annex. 2 dated 20.11.2003 and the petitioner was directed to pay Rs. 5000/- to the respondent No. 2 Smt. Kailash (wife) as advocate fee and litigation expenses. This order Annex.2 has been challenged by the petitioners in writ petition on various grounds.

The main contention of the petitioner's husband is that even the main application Annex. 3 under Section 25 of the Act of 1955 was itself not maintainable as the appeal of the respondent No. 2 wife against the decree of divorce granted by the respondent No. 1 Family Court in favour of the petitioner husband through judgment and decree dated 13.7.2001 is pending before the Division Bench of this Court and since the main application Annex. 3 was not maintainable, therefore, the application Annex.1 filed during the pendency of main application Annex. 3 is also not maintainable and thus, the impugned order Annex. 2 dated 20.11.2003 cannot be sustained and is liable to be quashed and set aside.

A reply to the writ petition was filed by the respondent No. 2 wife and it was submitted that the application Annex.1 was rightly decided by the respondent No. 1 Family Court through impugned order Annex. 2 dated 20.11.2003 and therefore, no interference is called for with the same and this writ petition deserves to be dismissed.

3. I have heard the learned counsel for the petitioner and the learned counsel for the respondent No. 2 and gone through the materials available on record.
4. The question for consideration is when a decree of divorce has been granted by the

respondent No. 1 Family Court through judgment and decree dated 13.7.2001 in favour of the petitioner-husband and appeal of the respondent No.-2-wife against the decree of divorce dated 13.7.2001 is pending before the Division Bench of the Court, whether during the pendency of that appeal, the application Annex. 3 filed by the respondent No. 2 wife under Section 25 of the Act of 1955 before the respondent No. 1 Family Court for permanent alimony and maintenance was maintainable or not.

5. For Convenience, sub-section (1) of Section 25 of the Act of 1955 is as quoted here:

*"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".*

6. A bare perusal of the above provisions of Section 25 of the Act of 1955 makes the position clear that the application is maintainable at the time of passing of the decree or at any time subsequent thereto, meaning thereby if the decree has been passed, subsequent thereto, an application is maintainable.

7. The words "at the time of passing any decree or any time subsequent thereto" indicate that an order for permanent alimony or maintenance in favour of the wife or the husband can only be made when a decree is passed granting any substantive relief under the Act of 1955 and not where the main petition itself is dismissed or withdrawn.

8. In this case, since the divorce petition filed by the petitioner husband was decreed by the respondent No. 1 Family Court through Judgment and decree dated 13.7.2001 and marriage of the petitioner-husband and respondent No. 2 wife was dissolved through that decree of divorce dated 13.7.2001, therefore, the application Annex.3 filed by the respondent No. 2 wife under Section 25 of the Act of 1955 for permanent alimony and maintenance was maintainable before the respondent No. 1 Family Court, which passed the decree of divorce dated 13.7.2001, as such application could be filed

subsequent to passing of the decree.

9. It may be stated here that there was a controversy earlier on the point whether the application was maintainable even after the dismissal of the divorce petition or not, but that controversy has been set at rest by the Hon'ble Supreme Court in *Chand Dhawan v. Jawaharlal Dhawan*, <sup>1</sup>where the Hon'ble Supreme Court held that the words "decree" in the section refer to decrees under the provisions of Sections 9 to 14 of the Act of 1955 which result in disruption of the marital status of the parties. Thus, the view earlier expressed by this Court in *Darshan Singh v. Mst. Daso*, <sup>2</sup>was approved by Hon'ble Supreme Court in the case of Chand Dhawan (supra).

10. Thus, it is held that the present application dated 4.9.2001 (Annex.3), which was filed by the respondent No. 2 wife under Section 25 of the Act of 1955 for permanent alimony and maintenance before the respondent No. 1 Family Court, which passed the decree of divorce dated 13.7.2001 dissolving the marriage between the petitioner-husband and the respondent No. 2 wife, was maintainable, as such application could be presented even after passing of the decree.

11. The next question for consideration is when the appeal of the respondent No. 2 wife against the decree of divorce dated 13.7.2001 granted in favor of the petitioner husband is pending before the Division Bench of this Court whether the application Annex.3 filed by the respondent No. 2 wife under Section 25 of the Act of 1955 before the respondent No. 1 Family Court was maintainable or not.

12. In my considered opinion, when the words of Section 25 of the Act of 1955 are very much clear on the point that such application (Annex.3) can be filed after passing of the decree, therefore, mere fact that the appeal is pending in higher court would not affect the fate of the application, which was filed after passing of the decree before the respondent No. 1 Family Court, which passed the decree of divorce dated 13.7.2001. Furthermore, mere pendency of appeal before the Division Bench of this Court does not preclude the respondent No. 2 wife from filing application under Section 25 of the Act of 1955 for permanent alimony and maintenance before the respondent No. 1 Family Court, which passed the decree of divorce dated 13.7.2001, as such application could be presented at the time of passing decree or at any time subsequent to passing of the decree.

13. Therefore, the argument that since the appeal of the respondent No. 2 wife against the decree of divorce granted in favor of the petitioner on 13.7.2001 is pending before the Division Bench of this Court, therefore, the application Annex.3 before the

respondent No. 1 Family Court was not maintainable and it should have been filed before the Division Bench of this Court where the appeal is pending, is wholly untenable and stands rejected.

14. On merits of the case, it may be stated here that looking to the entire facts and circumstances of the case and the fact that the cost of living is very much high today, if Rs. 5000/- as advocate fee and litigation expenses were awarded by the respondent No. 1 Family Court through impugned order Annex. 2 dated 20.11.2003, no error or illegality has been committed by the respondent No. 1 Family Court in doing so. The amount of Rs. 5000/- awarded by the respondent No. 1 Family Court through impugned order in favor of the respondent No. 2 wife as advocate fee and litigation expenses cannot be said to be excessive and disproportionate. Hence, no interference is called for with the impugned order Annex. 2 dated 20.11.2003.

15. For the reasons stated above, there is no merit in this writ petition and the same deserves to be dismissed.

Accordingly, this writ petition filed by the petitioner is dismissed. No order as to costs.

Writ Petition dismissed.

Cases Referred.

1. (1993)3 SC 406
2. AIR 1980 Raj 102