

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.146 OF 2008

Mr. Dasharath Laxman Rahate.

.. Appellant

Vs

Mrs. Vanita Dasharath Rahate.

.. Respondent

—

Ms. Deepti Nayan Wadkar along with Mr. harsh Parte for the Appellant.
Shri V.K. S. Nazir for the Respondent.

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CORAM : A.S. OKA & A.A.SAYED, JJ

DATED : 30TH JUNE 2016

ORAL JUDGMENT : (PER A.S.OKA, J)

1. The Appellant is the husband and the Respondent is the wife. By the judgment and decree dated 12th May 1998 in Petition No.A-1639 of 1996, the learned Judge of the Family Court dissolved the marriage by passing a decree of divorce under Sub-section (1) of Section 13 of the Hindu Marriage Act, 1955 (for short “the Hindu Marriage Act”). The judgment and decree of the Family Court records that despite the service of notice by way of substituted service, the wife failed to appear and, therefore, there was no contest by the wife. The wife moved an Application for setting aside the ex parte decree. Apart from making the said Application, the wife applied under Section 18 of the Hindu Adoption and Maintenance Act, 1956 (for short “the said Act

of 1956”) for grant of maintenance. She also filed an Application under Section 125 of the Code of Criminal Procedure, 1973 (for short “CrPC”) for grant of maintenance. The Application for setting aside the ex parte decree filed by the wife was dismissed. While dismissing the said Application, the learned Judge of the Family Court observed that the Petition being Petition No.C-72 of 1998 filed by the wife under Section 18 of the said Act of 1956 shall be treated as an Application for maintenance under Section 25 of the Hindu Marriage Act. We may note here that there was an interim order passed in the Application under Section 125 of the CrPC directing the husband to pay monthly maintenance of Rs.1,200/-. We may note here that while passing an ex parte decree of divorce, the learned Judge of the Family Court protected the wife by directing that the husband shall not drive the wife from the matrimonial home unless he makes a suitable arrangement for residence of the wife. This part of the decree along with a decree of divorce has become final.

2. By the impugned judgment and order dated 18th August 2006, the learned Judge of the Family Court finally disposed of the Petition No.C-72 of 1998 and the Petition under Section 125 of the CrPC. The learned Judge of the Family Court fixed the permanent alimony at the rate of Rs.5,000/- per month under Sub-section (1) of Section 25 of the Hindu Marriage Act and also directed the husband

either to acquire a residential accommodation for the wife in the area of Dadar in Mumbai or to pay a sum of Rs.3,00,000/- towards the permanent residential accommodation. In view of this decree passed in the Petition which was treated as the one under Section 25 of the Hindu Marriage Act, the Petition under Section 125 of the CrPC was disposed of.

3. The first submission made by the learned counsel appearing for the Appellant husband is that there is already a finding recorded by the Family Court while passing the decree of divorce that the wife is guilty of adultery. She submitted that though the Application for setting aside the ex parte decree filed by the wife was dismissed, the matter was not carried further. Hence, the said finding recorded by the Family Court has become final. The learned counsel appearing for the husband relied upon a decision of the learned Single Judge of Kerala High Court in the case of ***Raja Gopalan v. Rajamma***¹. After the learned counsel appearing for the wife pointed out that the said decision was subsequently overruled, the learned counsel for the Appellant did not rely upon the said decision. She also relied upon a decision of the learned Single Judge of Delhi High Court in the case of ***Smt. Anubha v. Shri Vikas Aggarwal and others***,². Her submission is that in view of the finding recorded by the Family Court while granting

1 AIR 1967 Ker 181

2 I(2003)DMC 139

a decree of divorce that the wife was unchaste, she was not entitled to maintenance under Section 25 as per the principle incorporated in Sub-section (3) of Section 25 of the Hindu Marriage Act. She relied upon paragraph 32 of the decision of the learned Single Judge of the Delhi High Court. She submitted that as far as the evidence of income of the husband is concerned, it is a case of no evidence. She submitted that the wife admitted in the cross-examination that the husband was earlier carrying on business of selling Vada Pav and he is no longer carrying on the said business. She submitted that though a copy of the disability certificate of the husband is placed on record, the same could not be proved. But nevertheless, the decree for maintenance could not be passed as from the year 2002, the husband has become handicapped and is not capable of earning. She urged that only in view of the report of the Court Commissioner who noted that certain equipment used in catering business was lying in the premises of the husband, the Court cannot jump to the conclusion that he was doing catering business. Her submission is that the house at Dadar in fact does not stand in the name of husband and that the husband has nothing to do with the same. She would urge that considering the conduct of the wife as reflected from the decree of divorce and considering the fact that she never bothered to look after the children, at this stage, when the husband has lost his earning capacity, he is not expected to pay maintenance to the wife. She submitted that there is evidence on record to show that the wife

was working as a maid-servant and was earning a sum of Rs.5,000/- to Rs.7,000/- per month. Without prejudice to the aforesaid submissions, she submitted that at highest, the amount which is required for bare survival could have been granted by way of maintenance.

4. The learned counsel appearing for the husband submitted that in fact the decree of divorce is not on the ground of adultery inasmuch as the ground of adultery was not pleaded and the only ground pleaded was of cruelty.

5. We have given careful consideration to the submissions. We have perused the judgment dated 12th May 1998 passed by the learned Judge of the Family Court granting a decree of divorce. In paragraph 5 of the judgment, there is a finding recorded that all the allegations made by the husband not only amount to cruelty but also adultery which is a grievous offence. As there was no contest by the wife to the Petition filed by the husband, by accepting the case made out by the husband, the learned Judge proceeded to pass a decree of divorce.

6. There is no dispute that the Petition bearing Petition No.C-72 of 1998 in which impugned decree was passed was treated as an Application filed by the wife under Sub-section (1) of Section 25 of the

Hindu Marriage Act. Therefore, it is necessary to make a reference to Section 25 of the Hindu Marriage Act which reads thus:

“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.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just].”

(The portion in bracket was inserted by the Act No.68 of 1976 in place of the words “it shall rescind the order”).

7. Sub-section (1) of Section 25 provides that a matrimonial Court exercising the jurisdiction under the Hindu Marriage Act may at the time of passing a decree or at any time subsequent thereto on an Application made to it, order the Respondent to pay maintenance. Thus, a power is conferred on the Matrimonial Court to grant permanent alimony and maintenance on the basis of a decree of divorce passed under the Hindu Marriage Act even subsequent to the date of passing of the decree on the basis of an Application made in that behalf. In the present case, while passing the ex-parte decree of divorce, the Family Court did not pass a decree under Sub-section (1) of Section 25 of the Hindu Marriage Act. Hence, an Application made by the wife subsequent to the passing of the decree of divorce was maintainable under Sub-section (1) of Section 25 of the Hindu Marriage Act. Sub-section (2) of Section 25 confers a power on the Court to vary, modify or rescind the order made under Sub-section (1) of Section 25 in case of change in circumstances. The power under Sub-section (3) of Section 25 is an independent power. The said power can be exercised if the Court is satisfied that the wife in whose favour an order under Sub-section (1) of Section 25 of the Hindu Marriage Act is made has not remained chaste. In such event, at the instance of the other party, the Court may vary, modify or rescind the order under Sub-section (1) of Section 25 of the Hindu Marriage Act. We may note here that an amendment has been brought to Sub-section (3) of Section 25 of the

Hindu Marriage Act by the Act No.68 of 1976 with effect from 27th May 1996. Earlier, it was provided under Sub-section (3) of Section 25 that if the Court was satisfied that the party in whose favour an order has been made has not remained chaste, it shall rescind the order. The words “it shall rescind the order” appearing in Sub-section (3) of Section 25 were replaced by the said amendment by the words “it may at the instance of the other party vary, modify or rescind any such order”. The legislature in its wisdom by the said amendment has provided that after the facts stated in Sub-section (3) of Section 25 of the Hindu Marriage Act are established, the Court may vary, modify or rescind any such order under Sub-section (1) of Section 25 of the Hindu Marriage Act. Thus, after 1976, there is a discretion conferred on the Court by Sub-section (3) of Section 25 of the Hindu Marriage Act of declining to rescind, vary or modify the order under Sub-section (1) of Section 25 thereof, even if on an Application made by the husband, it is established that the wife has not remained chaste after the decree of maintenance is passed under Sub-section (1) of Section 25. A Division Bench of this Court in its decision in the case of ***Gulab Jagdusa Kakwane v. Smt. Kamal Gulab Kakwane***³, in paragraph 4, has held thus:

“4. The scheme and provisions of S. 25 as we have analysed above, show that an applicant is entitled to maintenance under sub-s.(1) thereof notwithstanding the kind of matrimonial decree that is passed and the ground on which it is passed. A decree passed against

the applicant on the ground of unchastity is no bar to his or her claiming maintenance either at the time of passing such decree or any time subsequent thereto. The Court has ample discretion to grant or refuse maintenance, and the extent to which to grant the same, depending on the facts and circumstances of each case. The legislature did not intend to lay down a rule that in all cases where the claimant has been proved to be unchaste, he or she should be denied maintenance.”

(Underlines added)

8. Hence, the law is that even if a decree is passed against the Applicant wife on the ground of unchastity, that itself is no bar for her to claim maintenance under Sub-section (1) of Section 25 after the decree is passed. Therefore, while exercising the power under Sub-section (1) of Section 25 of the Hindu Marriage Act, the Court has a power to pass a decree for permanent alimony and maintenance even if while deciding the Petition for divorce, the allegation of adultery is held as established against the wife who has made the Application under Sub-section (1) of Section 25 of the Hindu Marriage Act. In any case, Sub-section (3) of Section 25, on its plain reading, is applicable only when the wife ceases to remain chaste after an order of alimony or maintenance is passed under Sub-section (1) of Section 25. Hence, the argument made by the learned counsel appearing for the husband based on Sub-section (3) of Section 25 of the Hindu Marriage Act is of no significance at all as in the present case, the said allegation is made at the stage of hearing of the Application made under Sub-section (1) of Section 25. The argument will become available only if the wife does

not remain chaste after an order under Sub-section (1) of Section 25 is passed. Even assuming that Sub-section (3) of Section 25 of the Hindu Marriage Act is applicable, as held by the Division Bench of this Court in the case of *Gulab Jagdusa Kakwane v. Smt. Kamal Gulab Kakwane*, the Court is not powerless to grant permanent alimony. What is material to note is that it is not even the case of the husband that any time after the decree of divorce was passed, the wife was involved in any conduct which can be termed as unchaste. Therefore, the first argument made by the learned counsel appearing for the husband based on Sub-section (3) of Section 25 deserves to be rejected.

9. Now we come to the challenge to the decree of maintenance on merits. The wife was cross-examined by the Advocate for the husband. In response to the question which was recorded in Paragraph 22, she stated that after her marriage, the husband was carrying on business of selling Vada Pav which he continued to carry on till the date of deposition. Relevant part of the cross-examination of the wife reads thus:

“Ans: Yes. I voluntarily say that he is carrying on this business even today. It is true that the respondent was running tours and travels business. I voluntarily say that he is running the said business even today. It is not true that after operation in 2001, he has closed both the businesses and at present he has no source of income. It is not true that whole the day he remains idle at home.”

(Underline added)

10. Thus, in the cross-examination of the wife made by the Advocate for the husband, it is brought on record that the husband was also doing Tours and Travels business. At this stage, we must refer to the documents on record. Exhibit-14 is a letter on the letter head of Amit Tours and Travels and Caterers which is dated 13th April 1995. On the letter head, the name of the husband is shown as the Proprietor. Thus, in 1995, he was carrying on a business of Tours and Travels. In fact, number of such documents written on the letter heads are part of Exhibit-14.

11. Now, we may turn to the affidavit in lieu of the examination-in-chief and the cross-examination of the husband. In paragraph 8 of the affidavit in lieu of the examination-in-chief, he has stated that "I am a Vada Pav Vendor and occasionally supplies snacks during the religious pilgrimages". Though he has denied that his daily income was of Rs.2,000/-, he has not at all disclosed as to what was his precise income from the business which he was admittedly running. In paragraph 12, he deposed that he was doing retail business of catering. After he was confronted with the statement in paragraph 8, he stated that he was not doing Vada Pav business now. He pointed out that he has a business card in the name of his business. He stated that it is of the year 1997-1998. In the cross-examination, he contended that all

documents pertaining to the business relate back to the year 1997-1998. Though he admitted that he was having savings bank accounts with Cosmos Bank and Abhyudaya Co-operative Bank, admittedly the pass books of the said accounts were not produced. Though it is claimed that the husband had become disabled, there is no evidence adduced to prove the said allegation.

12. There is one more important aspect. In paragraph 12 of the impugned judgment, the Family Court has referred to the Commissioner's Report at Exhibit-24. The Commissioner's Report records that the husband was residing in Room No.2, Chokshi Chawl, Tithalwadi, R.K. Vaiday Road, Dadar, Mumbai, which is located in the lane opposite to Plaza Cinema in the heart of Dadar area. A judicial notice will have to be taken of the fact that Dadar is one of the most prominent places in the island city of Mumbai. From the location of the house of the husband, it can be said that the same is in a prime locality in the Central Mumbai. Apart from the residential room, one more room was shown to the Commissioner by the Appellant husband in which material required for catering business was stored.

13. If the entire evidence is considered, the finding of the Family Court that the income of the husband will be around Rs.30,000/- per month cannot be faulted with at all.

14. As far as the alleged income of the wife is concerned, at highest, what is brought on record is that earlier she was working as a maid-servant. There was nothing brought on record to show that the wife continued to work as a maid-servant.

15. The learned counsel appearing for the husband tried to rely upon a writing of the husband. However, the same has not been proved at all and what is produced is not the original but a photocopy thereof. Therefore, we find absolutely no error in the impugned judgment and decree passed by the learned Judge of the Family Court. After finding that the monthly income of the husband was around Rs.30,000/-, the learned Judge granted monthly maintenance of only Rs.5,000/- to the wife.

16. Even assuming that the husband has become handicapped, considering the nature of his business, the husband could have continued the same business by employing servants. The Court is concerned with the earning capacity of the husband. Therefore, there is no merit in the Appeal and the same is accordingly dismissed with no orders as to costs.

17. The pending Civil Applications do not survive and the same are disposed of.

(A.A. SAYED, J)

(A.S. OKA, J)