



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.S.A.No.11 of 2016

Gandhimathi .. Appellant/Respondent/Petitioner

Vs.

Balasundharam .. Respondent/Appellant/Respondent

Prayer: This Civil Miscellaneous Second Appeal is filed under Section 28 of the Hindu Marriages Act 1995, r/w Section 100 of C.P.C., to set aside the fair and decreetal order dated 14.08.2015 made in C.M.A.No.2 of 2014 on the file of the Principal District & Sessions Court, Tiruvarur reversing the Judgment and Decree passed in H.M.O.P.No.26 of 2012 on the file of the Sub Court, Mannargudi dated 12.09.2013.

For Appellant : Mr.R.Murugabharathi

For Respondent : Mr.U.Karunakaran

J U D G M E N T

(The matter is heard through "Video Conferencing/Hybrid Mode".)

This Civil Miscellaneous Second Appeal is filed to set aside the fair and decreetal order dated 14.08.2015 made in C.M.A.No.2 of 2014 on the file of the Principal District & Sessions Court, Tiruvarur reversing the Judgment and Decree passed in H.M.O.P.No.26 of 2012 on the file of the Sub Court, Mannargudi dated 12.09.2013.

2.The appellant is wife and respondent is husband. The respondent filed H.M.O.P.No.68 of 1996 on the file of the Principal Sub Court, Nagapattinam seeking divorce against the appellant. By the exparte decree dated 06.02.1997, divorce was granted. Pending said H.M.O.P., the appellant filed O.S.No.45 of 1997 on the file of the Principal Sub Court, Nagapattinam seeking maintenance for herself and her son under Hindu Adoptions and Maintenance Act, 1956. In the said suit, the learned Judge granted a sum of Rs.1,000/- per month for the appellant and Rs.500/- to minor son towards maintenance. The



respondent filed appeal in A.S.No.41 of 1999 on the file of the Principal District Court, Nagapattinam challenging the said order. The said appeal was dismissed by the learned Principal District Judge, Nagapattinam by the judgment and decree dated 23.09.1999. Meanwhile, H.M.O.P.No.68 of 1996 filed by the respondent was allowed and marriage between the appellant and respondent was dissolved by the decree dated 06.02.1997. After order of divorce, the appellant filed suit in O.S.No.55 of 2008 on the file of the Principal District Munsif Court, Thiruthuraipoondi, claiming a sum of Rs.3,000/- each for herself and minor child towards maintenance. The said suit was dismissed in respect of maintenance for appellant and decreed granting a sum of Rs.2,500/- per month as maintenance for minor son till he attains majority. The respondent filed appeal in A.S.No.72 of 2010 on the file of the Sub Court, Mannargudi. The appellant filed cross appeal for her maintenance. Both the appeal in A.S.No.72 of 2010 and cross appeal were dismissed on 05.01.2012. Subsequently, the appellant filed the present H.M.O.P.No.26 of 2012 under Section 25 (2) of the Hindu Marriage Act, claiming a sum of Rs.5,000/- per month as maintenance i.e., Rs.4,000/- towards additional maintenance along with Rs.1,000/- which was already ordered. According to appellant, the respondent is working in Government School as P.G. Assistant and is earning more than Rs.30,000/- per month and due to raise in cost of living, she prayed for enhancement of maintenance.

3.The respondent filed counter and resisted the said H.M.O.P. The learned Judge framed point for consideration. The learned Judge considering the pleadings, point for consideration, by order dated 12.09.2013 allowed the H.M.O.P.No.26 of 2012 by granting a sum of Rs.2,500/- per month towards maintenance to the appellant from the date of filing of the petition till her life time. The respondent filed C.M.A.No.2 of 2014 before the Principal District & Sessions Court, Thiruvarur, challenging the said order. The learned Principal District & Sessions Judge, Thiruvarur considering the pleadings, oral and documentary evidence and order of the learned Judge, by the judgment dated 14.08.2015 allowed the appeal by setting aside the order of the learned Judge dated 12.09.2013 made in H.M.O.P.No.26 of 2012.

4.Against the said judgment dated 14.08.2015 made in C.M.A.No.2 of 2014, the appellant has come out with the present Civil Miscellaneous Second Appeal.

5.The following substantial question of law was framed at the time of admission:



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"Whether the Court below has committed an error in holding that a petition for enhancement of maintenance under Section 25 (2) of the Hindu Marriage Act, 1955 after divorce is not maintainable."

6.The learned counsel appearing for the appellant contended that the First Appellate Judge erroneously allowed the appeal, holding that the appellant cannot seek maintenance under Section 25 (2) of the Hindu Marriage Act without considering the scope of Section 25 of the Hindu Marriage Act and claim made by the appellant mechanically allowed the appeal as if the appellant is seeking enhancement of maintenance under Section 25(2) of the Hindu Marriage Act without considering the fact that appellant is seeking permanent alimony under Section 25 after divorce in addition to earlier order of maintenance of Rs.1,000/-, which is permissible in law. The learned Judge erred in holding that appellant cannot seek maintenance after disposal of divorce petition without seeking any interim maintenance. The learned Judge erred in holding that once decree of divorce is passed dissolving the marriage of the parties to the marriage they ceased to be husband and wife and subsequently they will not have any right and obligation against each other which they had during the subsistence of their marriage. The learned Judge failed to consider that appellant can seek permanent alimony or maintenance under Section 25 of the Hindu Marriage Act at any time subsequent to passing of decree for divorce and she is not seeking any enhancement of maintenance under Section 25(2) of the Hindu Marriage Act. In support of his contention, the learned counsel appearing for the appellant relied on the following two judgments and prayed for allowing the appeal.

(i) Judgment of this Court dated 02.03.2018 made in C.M.A.No.3335 of 2017 [R.Jegathesan vs.Kalpana]:

"10.The main grievance expressed on the side of the appellant is that he is not having sufficient means to pay permanent alimony of Rs.5 lakhs.

.....

12.Considering the fact that the respondent/wife has already attained age of 48 and there is no scope of conducting remarriage and also considering that the appellant is having sufficient immovable properties, this Court is of the view that the trial Court has rightly directed the appellant to pay permanent alimony of Rs.5 lakhs. In view of the discussion made earlier,



this Court has not found any force in the contention put forth on the side of the appellant and altogether, the present Civil Miscellaneous Appeal deserves to be dismissed."

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(ii) Judgment of this Court dated 19.03.2021 made in C.M.A.No.1167 of 2017 [R.N.Senthilkumar vs. Subashini]:

"9. It is, at this stage, learned Counsel for the respondent wife fairly stated that his client respondent herein was granted permanent alimony on the ground that at that time, she was unemployed and she was not able to eke out her livelihood. But during the pendency of this appeal, she got engaged with one Ramachandran Srinivasan and remarried him on 10.04.2019 and also settled down at USA. However, learned Counsel for the respondent requested us to consider granting some reasonable amount at the rate of Rs.30,000/- p.m. for the interregnum period between the order and decree of the trial court granting dissolution of the marriage between the parties dated 07.10.2016 and the date of remarriage of the respondent wife on 10.04.2019 i.e. for 30 months towards permanent alimony.

10. Agreeing to the fair submission made by the learned Counsel for the respondent-wife since the respondent wife got remarried on 10.04.2019 and settled down at USA and also having a female child, in view of the subsequent development took place during the pendency of the appeal, this Court thought it fit to invoke Section 25(2) of the Hindu Marriage Act, 1955, by which this Court can modify the permanent alimony ordered by the trial court. In this regard, it is relevant to extract Section 25 (2) of the Hindu Marriage Act, 1955 here under:

25. Permanent alimony and maintenance:

(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 the either party, vary, modify or rescind any such order in such manner as the Court may deem just."



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7. Per contra, the learned counsel appearing for the respondent contended that the appellant filed H.M.O.P.No.26 of 2012 under Section 25(2) of the Hindu Marriage Act for enhancement of maintenance. No maintenance was granted to the appellant under Section 25(1) of the Hindu Marriage Act and hence, she is not entitled to any enhancement under Section 25(2) of the Hindu Marriage Act. The learned First Appellate Judge has rightly held that compensation can be awarded under Hindu Adoptions and Maintenance Act only during subsistence of marriage. Once decree of divorce is granted, relationship of husband and wife ceases and appellant is not entitled to maintenance under Section 25(2) of Hindu Marriage Act. The learned First Appellate Judge has rightly allowed the appeal filed by the respondent and appellant is not entitled for any maintenance. He further contended that both Hindu Adoptions and Maintenance Act and Hindu Marriage Act are complete code and operates in different sphere and level. An application filed under one Act for maintenance cannot be interchanged to the other Act and Court cannot convert the application filed in one Act to other Act and grant maintenance. There is no substantial question of law arisen and prayed for dismissal of the appeal. In support of his contention, the learned counsel appearing for the respondent relied on the judgment reported in 2002 (2) MLJ 53 [Panditrao Chimajo Kalure vs. Gayabai], wherein the relevant portion is extracted as follows:

"18. Mr. N.H. Patil, learned counsel for Gayabai brought to my notice a Judgment of the Apex Court in the case of [Chand Dhawan v. Jawaharlal Dhawan](#), 1993 Mh.L.J. 1731. In this judgment, in paragraph No. 25, the Apex Court has very categorically held that by Court's intervention under the [Hindu Marriage Act](#), affecting or disrupting the marital status has come about, at that juncture, while passing the decree, undoubtedly has the power to grant permanent alimony or maintenance, if that power is invoked at that time. The Apex Court has further held that without affectation or disruption of the marital Status, a Hindu wife sustaining that status can live in separation from her husband and whether she is living in that state or not, her claim to maintenance stands preserved in codification under [Section 18\(1\)](#) of the Hindu Adoptions and [Maintenance Act](#), 1956. The Apex Court in very clear and unambiguous terms has held that the Court is not at liberty to grant relief of maintenance simpliciter obtainable under one



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Act in a proceedings under the other. The Apex Court also has held that as is evident, both the statutes are codified as such and are clear on their subjects and by liberality of interpretation inter-changeability cannot be permitted so as to destroy the distinction of the subject of maintenance. Mr. N.H. Patil, learned counsel, very fairly conceded that the aforesaid judgment of the Apex Court in Chand Dhawan's case (supra) very squarely covers the case of Panditrao Kalure.

19. Mr. N.H. Patil, learned counsel, also referred to and relied on a judgment of Gujarat High Court in the case of [Chand Dhawan v. Jawaharlal Dhawan](#), 1993 Mh.L.J. 1731 [Vihalal Mangaldas Patel v. Smt. Maniben Vihalal Patel](#), of the said judgment, it is held that even a divorced wife can claim maintenance under Hindu Adoptions and [Maintenance Act](#), 1956. The learned Single Judge of the Gujarat High Court has concluded that even a divorced wife can claim maintenance under Hindu Adoptions and [Maintenance Act](#). However, it may be noted here that in that case it was not brought to the notice of the learned Single Judge of the Gujarat High Court, the aforesaid judgment of the Apex Court in the case of Chand Dhawan (supra). In view of the very categorical ruling on the interpretation of Hindu Adoptions and [Maintenance Act](#) and [Hindu Marriage Act](#), 1955 by the Apex Court, the judgment of the Gujarat High Court in the case of Vihalal Mangaldas Patel (supra) holding that even a divorced wife can claim maintenance under [Section 18](#) of the Hindu Adoptions and [Maintenance Act](#), 1956, is per incuriam and cannot be sustained in law.

.....

23. I have heard both the learned counsel at length, with regard to the aforesaid two substantial questions of law raised by Mr. Milind Patil, appearing on behalf of the appellant in Second Appeal No. 73/1984. The judgment of the Apex Court in the case of Chand Dhawan (supra) makes it abundantly clear that [Section 18](#) of the Hindu Adoptions and [Maintenance Act](#) operates in a different level and the marriage has to be subsisting and in that case, the marriage was



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subsisting. In any event, in view of the judgment of the Apex Court in the case of Chand Dhawan (supra), there is absolutely no ambiguity. There is no question of interchangeability, the same cannot be permitted so as to destroy the distinction on the subject of maintenance. Therefore, once a wife is divorced, her remedy to seek maintenance is at the time of divorce in a matrimonial petition or subsequent thereto is only under [Hindu Marriage Act](#), 1955 and she cannot have any recourse under Hindu Adoptions and [Maintenance Act](#), 1956, inasmuch as, the precondition for application of Hindu Adoptions and [Maintenance Act](#), 1956, for a wife to seek maintenance is that the marriage must be subsisting. Under these circumstances, I answer the first substantial question of law to the effect that a divorced wife cannot claim any maintenance under Hindu Adoptions and [Maintenance Act](#), 1956, and her only remedy is under [Hindu Marriage Act](#), 1955."

8. Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the respondent and perused the entire materials on record.

9. The appeal is challenging the order of First Appellate Court made in C.M.A.No.2 of 2014. By the said judgment, the First Appellate Court allowed the appeal filed by the respondent challenging the order passed by the learned Subordinate Judge, Mannargudi in H.M.O.P.No.26 of 2012. From the materials on record, it is seen that the appellant has filed the said H.M.O.P.No.26 of 2012 under Section 25(2) of the Hindu Marriage Act. According to the appellant, earlier she filed O.S.No.45 of 1997 under Hindu Adoptions and Maintenance Act, 1955 and a sum of Rs.1,000/- per month was granted as maintenance to her, pending H.M.O.P.No.68 of 1996 filed by the respondent seeking for divorce against the appellant. Subsequently, H.M.O.P.No.68 of 1996 filed by the respondent was allowed and the marriage between the appellant and respondent was dissolved by the order dated 06.02.1997. Subsequent to said order, the appellant filed another O.S.No.55 of 2008 under the provisions of Hindu Adoptions and Maintenance Act seeking maintenance for herself and her minor son. The said suit was dismissed on the ground that appellant is no longer wife and therefore, she is not entitled to maintenance as per the provisions of Hindu Adoptions and Maintenance Act and only minor son is entitled to



maintenance as per the proceedings of the said Act. In the said suit, a sum of Rs.2,500/- per month was granted as maintenance to the minor son. The respondent filed appeal in A.S.No.72 of 2010, challenging the maintenance granted to the minor son. In the said Appeal, the appellant filed Cross-Appeal. Both the appeal and Cross-Appeal were dismissed on 05.01.2012. After dismissal of appeal and Cross-Appeal, the appellant filed H.M.O.P.No.26 of 2012 for enhancement of maintenance under Section 25 (2) of the Hindu Marriage Act.

10(a). The Trial Court, considering the pleadings, oral and documentary evidence, granted a sum of Rs.2,500/- per month as maintenance to the appellant. In C.M.A.No.2 of 2014 filed by the respondent, the First Appellate Court set aside the order passed by the Trial Court in H.M.O.P.No.26 of 2012. From the judgment of the First Appellate Judge, it is seen that the First Appellate Court allowed the appeal on the ground that appellant ought to have filed application under Section 25 (1) of the Hindu Marriage Act, holding that when the appellant did not claim permanent alimony or maintenance in the H.M.O.P. when the same was pending, she is not entitled to claim enhancement of maintenance under Section 25 (2) of the Hindu Marriage Act, subsequent to decree of divorce, as relationship of husband and wife ceased on the decree of divorce being granted. The learned Judge also held that since no order was passed under Section 25 (1) of the Hindu Marriage Act for permanent alimony and maintenance, the appellant cannot seek for enhancement of maintenance under Section 25 (2) of the Hindu Marriage Act. The reason given by the Appellate Court is erroneous.

10(b). For easy reference, Section 25 of the Hindu Marriage Act is extracted hereunder:

"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 ⁵⁵ [***] 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 ⁵⁶ [, the conduct of the parties and



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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 subsection (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]."

10(c). As per Section 25 (1) of the Hindu Marriage Act, either wife or husband can claim maintenance pending H.M.O.P., or even at any time subsequent thereto. This Section makes it clear that even after disposal of proceedings before the Court, the party can claim maintenance on application for permanent alimony or maintenance. There is no ambiguity in the Section and there is no prohibition for the party to file application for permanent alimony or maintenance after disposal of H.M.O.P. for divorce. On the other hand, Section 25 (1) of the Hindu Marriage Act gives a right to either party to file an application even after disposal of H.M.O.P. for permanent alimony or maintenance. The learned First Appellate Judge, without properly considering Section 25 (1) of the Hindu Marriage Act and scope of said Section, erroneously held that only during pendency of proceedings, an application for permanent alimony or maintenance can be maintained.

11. The appellant has filed H.M.O.P.No.26 of 2012 under Section 25 (2) of the Hindu Marriage Act for enhancement of maintenance on the ground that already, a sum of Rs.1,000/- is granted to her under provisions of the Hindu Adoptions and Maintenance Act, 1956. On misconception, the appellant has filed H.M.O.P.No.26 of 2012 under Section 25 (2) of the Hindu Marriage Act, claiming enhancement of maintenance. A party can claim maintenance under the Hindu Marriage Act as well as under Hindu Adoptions and Maintenance Act. In the present case, under the provisions of the Hindu Marriage Act, the Court can consider the claim of party, namely wife herein, for claim of maintenance



under Section 25 of the Hindu Marriage Act, even after disposal of H.M.O.P. for divorce. While granting maintenance under provisions of one Act, the Court has to take into consideration the maintenance already granted under the provisions of other Act and grant proper maintenance under the Hindu Marriage Act. The appellant has filed H.M.O.P.No.26 of 2012 under Section 25 (2) of the Hindu Marriage Act, on misconception in view of maintenance already granted under the Hindu Adoptions and Maintenance Act, 1956. The Court has discretionary power to convert H.M.O.P filed under Section 25 (2) of the Hindu Marriage Act to Section 25 (1) of the Hindu Marriage Act. A Division Bench of this Court, in the judgment dated 19.03.2021 made in C.M.A.No.1167 of 2017, relied on by the learned counsel appearing for the appellant, in the facts and circumstances of the case, converted the proceedings filed under Section 25 (1) to 25 (2) of the Hindu Marriage Act and modified the compensation awarded by the Trial Court. In an appropriate cases, in the interest of justice, the Court can convert the wrong provision to correct provision and pass orders. In the present case, it is not in dispute that the respondent is working as a P.G. Assistant Teacher and was earning a sum of Rs.30,000/- per month at the time of filing of H.M.O.P. Due to passage of time and increase of salary granted by the authorities, the respondent will be getting more than Rs.30,000/- per month now. The respondent has not alleged and proved that appellant is having any independent income to maintain herself without support of the respondent. Hence, maintenance of Rs.2,500/- per month granted by the Trial Court is in order.

12.A wife, including a divorced wife, is entitled to maintenance from her husband. It is the duty of the husband to maintain his wife and maintenance amount must be paid in consonance with status of the parties and income of the husband. If wife has some independent income, that has to be taken into account while granting maintenance or rejecting the claim of maintenance. The husband cannot wriggle out of his duty and responsibility to pay maintenance to his wife, on the ground that he has to maintain his aged parents and that he is remarried and has to maintain his second wife and children through her. For the above reason, the substantial question of law is answered in favour of the appellant.

13.In the judgment of the Hon'ble Apex Court reported in 1993 MHLJ 1731 ([Chand Dhawan v. Jawaharlal Dhawan](#)), referred in the judgment reported in 2002 (2) MHLJ 53 (cited supra), relied on by the learned counsel appearing for the respondent, the



Hon'ble Apex Court held that the Hindu Adoptions and Maintenance Act operates in a different level and marriage has to be subsisting for granting maintenance under the Hindu Adoptions and Maintenance Act and Hindu Marriage Act. It is also held that remedy of divorced wife for maintenance is only under the Hindu Marriage Act. The Hon'ble Apex Court has held that there cannot be any interchangeable. In the present case, the appellant has filed H.M.O.P.No.26 of 2012 for maintenance under Section 25(2) of the Hindu Marriage Act and maintenance was granted only as per the provisions of the Hindu Marriage Act. The learned Judge did not interchange provision of one Act to another Act. In view of the same, the judgment relied on by the learned counsel appearing for the respondent does not advance the case of the respondent.

14.Considering all the above materials, this Court is of the view that the First Appellate Court has committed grave illegality in allowing the appeal. Hence, the erroneous judgment passed in C.M.A.No.2 of 2014 is liable to be set aside and is hereby set aside and order in H.M.O.P.No.26 of 2012 is restored to file. As per the order of the Trial Court dated 12.09.2013 made in H.M.O.P.No.26 of 2012, the respondent is directed to pay a sum of Rs.2,500/- per month as maintenance to the appellant.

With the above observations, this Civil Miscellaneous Second Appeal is allowed. No costs.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

gsa/krk

To

1.The Principal District & Sessions Judge,
Tiruvarur.

2.The Subordinate Judge,
Mannargudi.

+1cc to Mr.R.Murugabharathi, Advocate SR.No.2695

C.M.S.A.No.11 of 2016

VBM(CO)
GN(23/03/2022)