B. Ratan Chand vs Mst. Kalawati on 16 December, 1954

Equivalent citations: AIR1955ALL364, AIR 1955 ALLAHABAD 364

JUDGMENT

Gurtu, J.

1. This is an appeal by the defendant-husband. The suit was brought by the respondent-wife and she claimed to recover Rupees 900/- as arrears for past maintenance and claimed future maintenance at Rs. 50/- per month. She alleged her husband's cruelty and she also alleged that he had remarried on or about July, 1935.

2. The husband denied cruelty.

3. The trial court framed an issue on cruelty and also an issue on the question whether the plaintiff was entitled to live separately and to get maintenance. On the issue of cruelty, the trial court came to the conclusion that the entire story that the husband was guilty of cruelty towards the wife was totally false. The trial court, however, held that since the husband had remarried, the wife was entitled, under the Hindu Married Women's Right to Separate Residence and Maintenance Act (Act No. XIX of 1946), to live separately and to receive maintenance. Accordingly, the suit was decreed for future maintenance at the rate of Rs. 25/- per month. The rest of the suit was dismissed.

4. Cross-appeals were filed and the lower appellate court has endorsed the finding of the trial court that the allegation of legal cruelty had not been made out. It held that the plaintiff was not entitled to past maintenance, though it held that the Hindu Married Women's Right to Separate Residence and Maintenance Act (Act No. XIX) 1946 was applicable and she was entitled to future maintenance. Both the appeals were, therefore, dismissed.

5. The husband has preferred this appeal. It is contended on his behalf that the wife was not entitled to separate residence or maintenance under the Hindu law merely on the ground of remarriage of the husband.

6. On behalf of the husband, reliance is placed on Mulla's Principles of Hindu Law, 11th edition, Section 555 and Mayne on Hindu Law and Usage, 10th edition, paragraph 688 for the contention that no separate right of residence and maintenance comes into existence under Hindu law merely because the husband has taken a second wife. Attention was invited, in this connection, to the case of -- 'B. Naganna Nayudu v. B. Rajya Lakshmi Devi', AIR 1928 PC 187 (A). The contention of learned counsel for the husband appellant is correct that under pure Hindu law, the mere second marriage of a husband does not entitle the wife to separate residence and maintenance.

7. Learned counsel for the husband appellant then argued that inasmuch as the second marriage took place in or about 1935, the wife could not claim the benefit of Act XIX of 1946 which was not in force in 1935. That Act sets out, among other grounds for claiming separate residence and maintenance, a ground in the following words :

> "(4) If he marries again (The reference is to the marriage of the husband)."

It is contended that Act XIX of 1946 will only apply to a case where the second marriage has been solemnised after the coming into force of Act XIX of 1946 and not to a case where the marriage was solemnised before the coming into force of that Act. This contention of learned counsel is supported by the Division Bench case of -- 'Laxmibai Wamanrao v. Wamanrao Govind-rao', AIR 1953 Bom 342 (B). There it was held that Sub-clause (4) of Section 2 of the said Act was remedial in character and imposed a new liability on one party and conferred fresh rights on another and it was not retrospective. It was held that the words "If he marries again" meant "If he marries again after the Act comes into force".

8. The same view was taken in -- 'Mt. Sukhri-bai v. Pohkalsing', AIR 1950 Nag 33 (C).

9. In the Madras High Court, there is a difference of opinion. In -- 'Lakshmi Animal v. Narayanaswami Naicker', AIR 1950 Mad 321 (D), the opposite view was taken, but this decision did not find favour with the learned Judg 5 of the same court who decided the case of --'Sidda Setty v. Muniamma', AIR 1953 Mad 712 (E).

10. The matter has also been discussed in --'Anjani Dei v. Krushna Chandra', AIR 1954 Orissa 117 (F). Mr. Justice Mohapatra, who was one of the members of the Division Bench in that case, did not express himself on the question whether Section 2, Sub-clause (4) would apply to a case where the husband had married for the second time before the Act came into operation because the finding of both the learned Judges was that the husband had been guilty of abandonment for , unjustifiable cause, and his conduct even otherwise would amount to cruelty in law which entitled the wife to separate residence and maintenance. The learned Chief Justice, Panigrahi, C. J., however, did consider the question whether Section 2, Sub-clause (4) of the Act applied in the case of a second marriage solemnised before the Act. He seemed to be of the view that the view expressed in the Nagpur High Court as quoted hereafter was not correct. Their Lordships of the Nagpur High Court in" AIR 1950 Nag 33 (C), had remarked as follows:

> "It is obvious that before this Act was passed neither Hindu custom nor statute law, nor the dicta of Judges allowed the wife to live separate from her husband if he married a second time."

The learned Chief Justice expressed his inability to accept this statement of the position as made by their Lordships of the Nagpur High Court and he thought that the contrary was established by the cases referred to in his own judgment. It appeals that none of the cases so referred to by the learned Chief Justice are pure cases merely of a husband remarrying. There-fore, the learned Chief Justice's observation that "The Hindu Women's Right to Separate Residence and Maintenance Act 1946,

merely gave statutory recognition to the previous dicta of Judges who had on several occasions applied this principle to the facts of individual cases", does not with all respect seem to be quite accurate.

The relevant discussions in Mulla's Principles of Hindu Law and Mayne on Hindu Law and Usage have already been referred to by me. Moreover, since the decision in the Orissa case was based on another point, the observations of the learned Chief Justice in regard to the retrospective nature of Section 2, Sub-clause 4 of the Act appear to be in the nature of an 'obiter dictum'.

11. In -- 'Baijnath Dharamdass v. Hiraman Ram Rasik', AIR 1951 Vindh-P 10 (G), a view, opposite to that taken by the Bombay High Court, has been taken. Reliance was placed on the Madras High Court's case of AIR 1950 Mad 321 (D).

12. As pointed out earlier, this latter view hias not found favour with another learned Judge of the Madras High Court in AIR 1953 Mad 712 (E).

13. In my view, with respect, the reasoning of the Bombay High Court, in AIR 1953 Bom 342 '(B), is sound, and it must be held, upon a construction of Act XIX of 1946, that the words "If he marries again" have reference to a marriage which is solemnised subsequent to the passing of the Act.

14. On behalf of the wife respondent, it was urged that even if a second marriage prior to the Act could not be availed of under Section 2, Sub- clause (4) of the Act such a re-marriage did constitute a 'justifiable cause'. On the other hand, it is contended that when the Legislature enacted that only a second marriage subsequent to the coming into force of the Act would afford a ground for claiming separate residence and main-tenance, then it must be held that a second marriage prior to the coming into force of the Act by itself would not be a 'justifiable cause' for granting the wife separate residence and maintenance. There seems to be force in this contention. Section 2, Sub-clause (7) of the Act must be read keeping in view the other Sub-clauses of that section. Further as I have already pointed out, pure Hindu Law did not give the wife a right of separate residence and maintenance in a case where the husband had remarried. The contention of learned counsel for the wife respondent must, therefore, be rejected.

15. The result, therefore, is that I allow this appeal and set aside the judgments and decrees of the courts below and dismiss the suit. In the circumstances, parties will bear their own costs throughout.

16. I consider that this is a case in which leave to file a special appeal should be granted and I order accordingly.