Gujarat High Court
Patel Dharamshi Premji vs Bai Sakar Kanji on 13 April, 1967
Equivalent citations: AIR 1968 Guj 150, (1967) GLR 888
Author: Bhagwati
Bench: P Bhagwati, A Nakshi
JUDGMENT Bhagwati, J.

(1) This appeal raises a short but interesting question of construction of Section 25 of the Hindu Marriage Act, 1955. The question is whether a husband or wife can apply to the Court for permanent alimony under Section 25 after the passing of a decree for divorce. There is a decision of Raju J in Gunvantray v. Bai Prabha, AIR 1963 Guj 242 where the view has been taken that such an application cannot be made as the decree for divorce puts an end to the relationship of husband and wife and thereafter an application made to the Court cannot be said to be an application by the husband or the wife as required by Section 25. The validity of this view is questioned in the present Second Appeal. The question raised is a pure question of law depending on the construction of Section 25, but it is necessary to state briefly a few facts giving rise to the appeals as they are relevant to the alternative contention urged on behalf of the appellant.

(2) The appellant and the respondent were married according to Hindu writs and one son was born of this marriage. The appellant and the respondent, however, soon fell out and the respondent left the appellant and went away to her father's house. The appellant thereupon filed a petition against the respondent under Section 9 for restitution of conjugal rights. The respondents resisted the petition on the ground that she was treated with cruelty when she was living with the appellant and she was, therefore, entitled to stay away from the appellant. The respondent, failed to establish cruelty by cogent evidence and a decree for restitution of conjugal rights was, therefore, passed against her by the Court on 28th February 1958. The respondent did not comply with the decree for a period of two years and the result was a petition for divorce by the appellant against the respondent. There was little defence to this petition and a decree for divorce was ultimately passed in the petition on 23rd February 1961 dissolving the marriage between the appellant and the respondent. The respondent thereafter preferred Civil Miscellaneous Application No. 26 of 1961 under Section 25 claiming permanent alimony at the rate of Rs. 75 per month from the appellant. The application was opposed by the appellant and one of the grounds of opposition was that the application was not tenable as the respondent was the erring spouse and it was by reason of the refusal of the respondent to carry out the decree for restitution of conjugal rights that a decree for divorce had to be obtained against her. The trial Court in view of the express language of Section 25 rejected this ground and after considering all the facts and circumstances of the case awarded a sum of Rs. 20 per month as and by way of permanent alimony to the respondent. There were two appeals against this order, one by the appellant and the other by the respondent. The lower appellate Court dismissed the appeal, of the appellant and allowed the appeal of the respondent in part by increasing the amount of permanent alimony to Rs. 28 per month. The appellant thereupon preferred the present Second Appeal in this Court.

(3) Before we proceed to examined the merits of the appeal, it will be convenient to first dispose of the cross-objections filed on behalf of the respondent against the order of the lower appellate Court.

The respondent claims by the cross-objections that a larger amount should have been allowed to her by way of permanent alimony. But, it is now well settled by a decision of this Court in Umiyaben v. Ambalal, (1965) 6 Guj LR 714 : (AIR 1966 Guj 139) that the right of second appeal conferred by Section 28 is limited to the grounds set out in section 100 of the Code of Civil Procedure and can, therefore, be exercised only on questions of law and not on questions of fact. What should be the quantum of the amount of permanent alimony on a consideration of the factors set out in Section 25 is essentially a question of fact and no Second Appeal can lie to challenge the determination of the amount of permanent alimony made by the lower appellate Court unless the complaint be that the lower appellate Court has failed to take into account any factors set out in Section 25 or taken into account any extraneous or irrelevant factors. The cross-objections do not allege any such defect in the determination of the lower appellate Court and they must, therefore, be rejected as incompetent.

(4) Turning to the appeal there were two contentions urged by Mr. Vakharia on behalf of the appellant in support of the appeal. Of the two contentions the first was a more serious one, supported as it was by the decision of Raju J. In AIR 1963 Guj 242 (supra). The contention was that the application for permanent alimony made by the respondent was not maintainable under Section 25 as it was made after the passing of the decree for divorce so that at the date of the application the respondent was not the wife. The contention proceeded on the assumption that the Court can make an order for permanent alimony under Section 25 only on the application of a person who is a husband and wife at the date of the application and since the relationship of husband and wife is severed by a decree for divorce, no application for permanent alimony can be made under Section 25 after passing of a decree for divorce. This assumption is wholly unwarranted it is based on a misconstruction of Section 25. Section 25 as its marginal note indicates alimony and maintenance by one spouse to the other and it says:

"25. (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, while the applicant remains unmarried, 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 and the conduct of the parties, 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 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 remarried or, if such party is the wife, that she has not remained chaste or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it shall rescind the order"

The order contemplated by the Section can be made by any Court exercising jurisdiction under the Act either "at the time of passing any decree or at any time subsequent thereto." It is now settled by the decision of this Court in Harilal v. Lilavati, AIR 1961 Guj 202 that the words " any decree" are

sufficiently wide to include any decree passed by the Court under any of the earlier provisions of the Act and that every comprehend "any decree for restitution of conjugal rights, judicial separation, dissolution marriage by divorce or annulment of marriage on the ground that it was void or voidable." In the course of the arguments in this case an attempt was made to limit the applicability of Section 25 to cases where a decree for divorce or annulment of marriage is passed by the Court by relying on the words "while the applicant remains unmarried", but the Division Bench held that these words did not have the effect of limiting the applicability of Section. The Section, according to the Division Bench, applied in all cases whenever a decree was passed under any of the earlier provisions of the Act, the operation of the words "while the applicant remains unmarried" being confined only in those cases where a party was in a position to contract a marriage by reason of the marriage bond being dissolved or declared null and void by the Court. The words "any decree" therefore, clearly and indubitably apply to a decree for divorce passed by the Court in the exercise of jurisdiction under the Act. Now as the exercising jurisdiction under the Act can make an order under Section 25 at the time of passing any decree or at any time subsequent thereto and, therefore, it would seem that the Court exercising jurisdiction in relation to a petition for divorce can make an order under the Section either at the time of passing the decree for divorce or at anytime subsequent to the passing of the decree for divorce. The plain indisputable effect of the words "at the time of passing any decree or at any time subsequent thereto" is that even after the passing of the decree or divorce, the Court can make an order under Section 25. But, contended Mr. Vakharia, this effect is to obliterated by the following words, namely, "on application made to it for the purpose by either the wife or the husband." These words, according to Mr. Vakharia, impose a limitation o the power of the Court to make an order for permanent alimony by providing that such an order can be made only on an application made by the husband or the wife. The application by the husband or the wife, said Mr. Vakharia, is a condition precedent to the exercise of the jurisdiction of the Court to make an order for permanent alimony and the party making the application must, therefore, be the husband or the wife at the date of the application in former to invest the Court with jurisdiction to make the order. Where an application is made after the passing of a decree divorce, the party making the application, contended Mr. Vakharia, would no longer be a husband or wife and, therefore, no application for permanent alimony can be maintained under Section 25 after the passing of decree for divorce. This contention derives support from the decision of Raju J. In AIR 1963 Guj 242 (supra), but we do not think this contention is well-founded. It rests on too literal an emphasis on the words "wife" and "husband" and ignores the context in which these words are used and the object and purpose of the enactment of the section. If the Section is read as a whole keeping in mind the reason for the enactment of the provision and the object and purpose intended to be effectuated, the conclusion in our view, is inescapable that an application for permanent alimony can be made even after the passing of a decree for divorce. The section does not required that the party making the application must be husband or wife at the date of the application. The words "wife" and "husband" are used to denote the parties in the main proceeding in which the decree is passed by the Court. Our reasons for saying so are as follows.

(5) Though Section 25 does not use the expression "permanent alimony" in any part of the enactment, the marginal note to the section clearly shows that the Section is intended to deal with permanent alimony. The concept of "permanent alimony" is not an indigenous concept grown on our soil as we did not have any law of divorce amongst Hindu in this country. But when the Act was

enacted providing inter alia for divorce amongst Hindus, the concept of "permanent alimony" was borrowed by the draftsmen of the Act from England. The history of the development of the law relating to permanent alimony in England so far as it is necessary for the purpose of deciding the present question may be found in the following passage in the book of Sir Dinshah Mulla on Hindu Law. Thirteenth Edition at page 735:

"Permanent alimony is the expression used under English law in the context of provision ordered to be made by the Court for a wife on her petition for judicial separation being granted. Behind the relevant statutory enactments in England is a historic development of law. Before the first divorce Act in England a wife could only obtain from the Ecclesiastical Court divorce a monsa at thiro (judicial separation) and the allowance allotted to her was named permanent alimony which was as a general rule one-third of the husband's Income. The operation of the rule was extended and the same principle was applied in cases decided under the successive Divorce acts in England when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage the view was taken that the wife who claimed maintenance after a decree of divorce in her favour would have pecuniary interest in seeking such relief and that would not accord with the policy of law. That view was discountenanced and it was ruled that the principles on which the Ecclesiastical Courts awarded permanent alimony in case of judicial separation should be applicable to cases where relief by way of divorce or nullity of marriage was granted although in cases under the latter category she ceased to be the wife or was declared not to have been the wife of the other party and relinquished her character as wife and the name of the husband."

In England a wife is entitled to a permanent alimony from the husband where a decree is passed granting relief by way of judicial separation, divorce or nullity of marriage. Such a decree may be passed in favour of the husband or the wife. That is not material to the question of permanent alimony, whether the decree be passed in favour of the husband or the wife the wife can ask for permanent alimony from the husband. The reason for awarding permanent alimony to the wife seems to be that if the marriage bond which was at one time regarded as indissoluble is to be allowed to be sere in the larger interests of society, the same considerations of public interest and social welfare also required that the wife should not be thrown on the street but should be provided for in order that she may not be compelled to adopt a disreputable way of life. The provision for permanent alimony is, therefore, really incidental to the granting of a decree or judicial separation, divorce or annulment of marriage and that also appears to be clearly the position if we look at the language of Section 25. Section 25 contemplates the making of a provision for permanent alimony at the time of passing the decree or at anytime subsequent thereto and it is, therefore, evident that the provision for permanent alimony is something which follows upon the decree granting substantive relief and is incidental to it. It was also so observed by a S. T. Desai C J., as he then was and my brother Bakshi J. In a decision given on 28th November 1960 in First Appeal No. 178 of 1960 (Guj) where it was said:

"We are of the opinion that the rule laid down in Section 25 relates only to ancillary relief which is incidental to substantive relief that ma be granted by the Court, though of course the incidental relief may be given to either party".

The last words of these observations point out what is peculiar feature introduced in the law of divorce by Section 25. In England, as pointed out above, the right to claim permanent alimony is conferred only on the wife but under Section 25 either spouse is entitled to claim permanent alimony from the other. But that apart, what is significant to note is that the relief of permanent alimony is a relief incidental to the granting of the substantive relief by the Court in the main proceeding. It is an incidental relief claimed in the main proceeding, though an application is necessary for claiming it. The application is an application, in the main proceeding for claiming an incidental relief consequent upon the granting of the substantive relief by the Court. This is abundantly clear on principle but there is also authority in support of it. Dealing with a case under S. 37 of the Divorce Act which contains a provision for making of an order for permanent alimony, Sir John Beaumont observed in J. G. Khambatta v. M.C. Khambatta, AIR 1941 Bombay 17;

"Under Section 37, Divorce Act, the Court can make an order for permanent alimony on making the decree absolute, although usually the order is made after the date. But if the circumstances justify it, the Court can make the order at once on making the decree absolute, and it is quite wrong to suppose that a petition presented afterwards is not a petition in the suit."

If the question of construction of Section 25 is approached in the context of this background, much of the difficulty which appears to beset the path of construction would disappear. Where the Court is exercising jurisdiction under the Act in relation to a proceeding before it one party would be the husband and the other party would be the wife and either the husband or wife would be claiming substantive relief against the other spouse. When, therefore, the Legislature provided in Section 25 for the making of an application for the incidental relief of permanent alimony, the Legislature spoke of such application as an application to be made by the wife or the husband. The words "wife" and "husband" were used by the Legislature for he purpose of describing the parties in the main proceeding. It was by reference to the position occupied by the parties in the main proceeding that the Legislature described them as "wife" and "husband". The nomenclature which described them in the main proceeding was used by the Legislature when providing for making an application for interim relief in the main proceeding. It is not possible to believe that the Legislature could have ever intended that the relationship of husband and wife should be subsisting between the parties at the date when the application for permanent alimony is made. That would be putting a too narrow and constricted interpretation on the words used by the Legislature. The legislative intent is sufficiently clear from the language used in Section 25 sub-section (1) but even if there were any doubt about it, it is completely laid at rest by the language of the provision enacted in Section 25 sub-section (3). That sub-section lays down the circumstances in which an order for permanent alimony already made can be rescinded and says that if the Court is satisfied that the party in whose favour an order has been made under Section 25 has remarried 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 shall rescind the order. The words "if such party is the wife" and similarly the words "if such party is the husband" when amplified would read 'if the party in whose favour the order is made is the husband." These words, in the context of the statutory provision enacted in sub-section clearly show that the words 'wife" and "husband" are used as descriptive of the parties in the main proceeding and they are not intended to convey that the party in whose favour the order is made must be the wife or the husband at the date when the condition for

rescission of the order is fulfilled for at any rate when the order is made. Such a construction would be absurd and the entire Section would be rendered meaningless on such a construction. There is, therefore, no doubt in our minds that when Section 25 sub-section (1) talks of an application by the wife or the husband, it does not mean that the party making the application must be the wife or the husband at the date of the making of the application. All that the sub-section requires is that an application must be made by the wife or the husband who is a party to the main proceeding if she or he wants the incidental relief of permanent alimony and such an application may be made in the main proceeding either before or at the time of passing the decree granting substantive relief or at any time subsequent to the passing of such decree.

(6) It is said that the consequences of a suggested construction do not alter the meaning of the statute but they certainly held to fix its meaning and let us, therefore, contemplate the consequences of the construction suggested on behalf of the appellant. If that construction were correct, the result would be that the Court would have power to grant permanent alimony if the husband or the wife makes an application a few minutes prior to the passing of the decree of divorce or annulment of marriage and such an order would grant permanent alimony to the husband or the wife which would continue right from the date of the decree upto the date the husband or the wife dies or remarries but if the husband or the wife makes an application a few minutes after the passing of the decree, the Court would have no power to make an order for permanent alimony. It is difficult to imagine as to why Legislature should have considered it a matter of such importance that an application for permanent alimony should be made prior to the passing of the decree for divorce or annulment of the marriage so that an application should not be maintainable after the passing of the decree. The relief of permanent alimony being an incidental relief, it should not be a matter of any consequence whether the application for it is made prior to the passing of the decree or subsequent to it. As a matter of fact the relief of permanent alimony being a relief incidental to the granting of substantive relief, it would be more consonant with reason that in application or such incidental relief should be maintainable after the passing of a decree granting the substantive relief. In England it has always been the law that an application for permanent alimony can be made after the passing of a decree for divorce or annulment of marriage. Section 19 of the Matrimonial Causes Act, 1950, contains an express provision saying that an order granting permanent alimony may be made by the Court "on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute." These words which we have quoted here were not in the corresponding Section 190 (1) of the Judicature (Consolidation) Act, 1925, which was the previous law on the subject but even so the Courts had consistently taken the view that an application for permanent alimony can be made by a party subsequent to the passing of the decree for divorce or annulment of the marriage and on such application the Court can make an order granting permanent alimony. When the Legislature imported the concept of permanent alimony from England and actually extended the scope and ambit of the provision relating to permanent alimony be providing, unlike England, that even a husband should be eligible for receiving, permanent alimony, it would be extremely difficult for us to believe that the Legislature intended to take away the right to apply for permanent alimony after the passing of the decree for divorce or annulment of marriage which the wife possessed under the English law. As a matter of fact when we turn to Section 37 of the Special Marriage Act, 1954, we find that even that Section contemplates making of an application by the husband or the wife after the passing of the decree for divorce or

annulment of marriage. There is therefore, no reason why we should place a narrow and limited construction on the words used in Section 25 by emphasising unduly and without reference to the context the words "husband" and "wife" used in the Section. We are, therefore, of the view that the application by the respondent for permanent alimony under Section 25 was maintainable notwithstanding the fact that it was made after the passing of the decree for divorce.

(7) That takes us to me next contention urged by Mr. Vakharia on behalf of the appellant. That contention is directed against the merits of the order pased by the lower appellate Court fixing the amount of permanent alimony at Rs. 28 per month. There were two limbs of the contention: one was that the lower appellate Court ought not to have awarded any permanent alimony to the respondent since the respondent was the erring spouse and it was by reason of the refusal of the respondent to comply with the decree for restitution of conjugal rights that the appellant was constrained to obtain a decree for divorce against her and the second was that in even the lower appellate Court was in error in increasing the amount of permanent alimony from Rs. 20/- per month to Rs. 28 per month by taking into account the needs and requirements of the son. The first limb of the contention is clearly unsustainable since it is now well-settled that even an erring spouse can be awarded permanent alimony when a decree for judicial separation or divorce is passed against her. There is no rule which says that there a decree for judicial separation or divorce is passed against a wife on the ground that she is guilty of a matrimonial offence. She should not be entitled to receive any permanent alimony from the husband. In England in Sydenham v. Sydenham and Illingworth, (1949) 2 All ER 196, speaking of the English statute, Denning, L. J. said sufficiently clearly so as to leave no scope for doubt:--

"There is nothing in the statute to say that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing it about discretion being exercised in favour of one side for the other or about a compassionate allowance. All it says it that on a decree of divorce the Court may award maintenance to the wife. This includes a guilty wife as well as an innocent one, but in awarding maintenance the Court must have regard of course, to the conduct of the parties. . . . . ' These observation of Denning, L. J. Were quoted with approval by Hidson, L. J. In Clear v. Clear, (1958) 2 All ER 353, and after quoting them, the learned Lord Justice said:-

"As it stands now, the record of the court shows that the wife has committed adultery. It shows that the she has by that action at any rate forfeited her common Law right to be maintained, becuase her adultery was not condoned or connived at, and that she could not get any maintenance in a court of summary jurisdiction. It is only by virtue of divorce legislation that she is enabled to get maintenance at all, and in such cases the court will consider whether she ought to have maintenance."

What has been said in these passages in regard to the English statute applies with equal force of our Act. On a parity of reasoning we hold that under Section 25 permanent alimony can be granted even to an erring spouse and the mere fact that the respondent did not comply with the decree for restitution of conjugal rights and that was the cause for passing of a decree against her cannot by itself disentitle her to claim permanent alimony under the Section. The fact that the she was the guilty spouse, guilty in the sense that she did not comply with the decree for restitution of conjugal

rights would certainly be a relevant factor to be taken into account in assessing the conduct of the parties but that, we find from the judgment of the lower appellate Court, has been taken into account in determining the amount of permanent alimony. The lower appellate Court, however, seems to have committed an error in taking into account the needs and requirements of the son in determining the amount of permanent alimony to be awarded to the respondent. We do not think that in fixing the amount of permanent alimony the lower appellate Court was entitled to take into consideration the amount of maintenance which would be necessary for the purpose of meeting the needs and requirements of the son and in doing so, the lower appellate Court clearly took into account an extraneous or irrelevant factor. This is not to say that the respondent would not be entitled to claim maintenance for the minor son from the appellant but the needs and requirements of the son could not be taken into account of permanent alimony to be awarded to the respondent. The order of the lower appellate Court increasing the amount of permanent alimony from Rs. 20 to Rs. 28 per month was, therefore, vitiated by an error of law. The order of the lower appellate Court would consequently have to be set aside and the order of the trial Court restored.

(8) We, therefore, allow the appeal in part and modify the order of the lower appellate Court by directing that permanent alimony be awarded to the respondent at the rate of Rupees 20 per month instead of Rs. 28 per month. The appellant will pay the costs of the appeal to the respondent. The Cross-objections will be dismissed. There will be no order as to costs of the cross-objections.

(9) Appeal partly allowed; cross-objection dismissed.