Delhi High Court
Sushma vs Satish Chander on 24 May, 1983
Equivalent citations: AIR 1984 Delhi 1, 1983 (5) DRJ 305, 1983 RLR 724
Author: D Kapur
Bench: D Kapur, S Ranganathan
JUDGMENT D.K. Kapur, J.

(1) This appeal has been referred to a larger Bench as per the reference order dated 21st January, 1982. The facts of the case were that the husband Shri Satish Chander, had applied for divorce against his wife Shrimati Sushma ; this was successful and on 4th October, 1979, the Additional District Judge granted the divorce. The wife filed an appeal to the High Court which succeeded and so, the divorce was set aside. During the pendency of the divorce proceedings as well as the appeal, maintenance pendente lite was granted at Rs. 225.00 per month to the wife.

(2) After the proceedings were over in the High Court, the wife applied for permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955. This application was rejected by Miss Usha Mehra, Additional District Judge, on the ground that such permanent alimony and maintenance can only be granted in case divorce is granted and not if the marriage subsists.

(3) When this matter came before the learned Single Judge in appeal by the wife, he was of the view that there was some ambiguity in the wording of the Act which required the matter to be decided by a larger Bench.

(4) The relevant Section in which the ambiguity occurs is Section 25 of the Hindu Marriage Act, 1955. It reads as follows : "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 seen 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 favor 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 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 ambiguity is created by the words "at the time of passing any decree or at any time subsequent thereto" which occur in this Section. The contention of learned counsel is that even if a divorce is not granted, there is a decree. This is on the contention that even if a suit is dismissed, a decree is passed and even if a suit succeeds, then also a decree is passed. But, we are of the view that the judgments mentioned in the learned Single Judge's referring order, namely, Kadia Harilal

Purshottam v Kadia Lilavati Gokaldas, ; Shantaram Gopalshet Narkar v. Hirabai w/o Shantaram GopalshetNarkar and another, : Minarani Majumdar v. Dasarath Majumdar, : Shantaram Dinkar Karnik v. Malti Shantaram Karnik, , Akasam Chinna Babu v. Akasam Parbati and another, A.I.R. 1962 Orissa 163; Purshotam Kewalia v. Smt. Devki, and Darshan Singh v. Mst. Daso, , have taken the right view and the passing of the 'decree' in this context means the passing of the decree of divorce, restitution of conjugal rights or judicial separation and not the passing of a decree dismissing the petition.

(5) In order to explain the reason for the word 'decree' having this limited meaning, there are three points of view which have to be examined. Firstly, there is a significance to the words 'permanent alimony' as understood in ordinary parlance. This may be described as the commonsense view. Secondly, there is the language specifically used in the Hindu Marriage Act, 1955, itself and, thirdly, which is perhaps the most important is the historical evolution of the law of divorce.

(6) Taking the commonsense view first; A marriage relationship subsists in law, till the law says that it has come to an end. This may be by the grant of a decree for divorce or nullity in which case the relationship comes to an end ; or it may be by restitution of conjugal rights on judicial separation, in which case there is some alteration in the parties' matrimonial rights. Normally, alimony on a permanent basis is maintenance given to an ex-spouse of the marriage by the other ex-spouse. However, the law may visualise the grant of such maintenance even when the matrimonial tie is subsisting and this is possible when the decree is for restitution of conjugal rights or judicial separation. If a petition fails, then the marriage still subsists unaltered by the intervention of any decree. Then the normal rights of the parties inherent in the legal system under which they are married has to prevail. There is no question of alimony being granted in such case, because the matrimonial rights of the parties are to be found in the legal system which operates, requiring one of the parties to support the other and if there is failure to do so, then the other partner can seek maintenance by recourse to the Civil or Criminal Court. There is no question of granting alimony in such cases. It has to be maintenance simpliciter as per Section 18 of Hindu Adoption and Maintenance Act. Furthermore, the section shows as per Sub-section (3), that alimony has to end on the re-marriage of the ex spouse. How can there be a remarriage if the first marriage is still subsisting ? Similarly, the same Subsection (3). provides that alimony can end on proof of sexual relations with another partner or unchastity. All this, and the entire context shows that the matrimonial tie must determine before an order for alimony can be passed.

(7) Now, taking the second point of view mentioned earlier, we have to analyze the language used in the Act itself. This is a question of interpretation. The word 'decree' as used in Section 25 cannot be understood in a sense different from that, in which it is used in other provisions of the Act. No doubt, the Code of Civil Procedure gives a different definition to the word 'decree' than that in this Act. For instance, if we turn to Section 9, we find that if there is a withdrawal from the society by one of the partners to the marriage, then the aggrieved party may apply for restitution of the conjugal rights, in which case a decree for restitution of conjugal rights may be granted, If such a claim fails, then no decree refusing restitution has to be passed. Similarly, in Section 10, the successful party can get a decree for judicial separation but, if an applicant fails, then no decree denying judicial separation is to he passed. Similarly, under Section 11 a decree of nullity is to be passed under

certain conditions. However, if the applicant fails, then there will be no decree refusing nullity, and finally, under Section 13, a decree of divorce may be passed on the grounds set out in the Act. In all these four cases, if the petition succeeds, a decree for restitution of conjugal rights, judicial separation, nullity or divorce has to be passed. But if the petition fails then no decree is passed i.e. the decree is denied to the applicant Accordingly the words in Section 25 to the effect alimony can be granted when a decree is passed do not operate. The word 'decree' is used here in the sense in which it is used in the sections just referred to. It is when a decree is passed that the rights of the matrimonial parties are altered and it is then only that it becomes necessary for the Court to award alimony or maintenance to the party entitled to the same.

(8) From this analysis, it would follow that alimony can be granted on a proper construction of the Act only when a decree has been passed of the type mentioned earlier, if a decree is refused, then no order for alimony can be passed. The word 'decree' is used in matrimonial cases in a special sense different from that in which it is used in the Code of Civil Procedure. This accounts for the reasons which have prompted the reference to the Bench. In our view. on a proper construction of the Act, there is no doubt that alimony cannot be granted in a case where a decree for divorce or other decree is refused because in such a case the marriage still subsists.

(9) Turning to the last point of view-the historical perspective, it. will be found that this throws quite a lot of light on the reason the word 'decree' is used in its particular significance and that it has a different meaning in the law relating to marriage and divorce. Marriages can be based on contract or, they can be based on sacrament. No doubt, marriage as understood in civilized society was mostly based on religious customs. Religion treated marriage as a sacrament. Marriages were made in Heaven and, therefore, not capable of being brought to an end by human beings. This almost universal idea prevailed for a long. period in Man's history. The concept of divorce existed even in Roman times and was certainly accepted by the Quran. However, it was unknown to Hindu Law and it was also unknown to Christian Law. A decree of divorce was originally granted by the Pope in the form of divorce a vinculum matrimonii. No Court whatsoever, either Civil or Criminal or Ecclesiastical could grant such a decree. King Henry Viii of England was anxious to divorce his wife who was the sister of the King of Spain. The Pope refused to oblige him, so Henry was forced to form his own Church called the Church of England and was able to get a divorce to marry Anne Boleyn. This divorce eventually led historically to the concept of the Ecclesiastical Courts granting a divorce which was generally known as a divorce a mensa et thero. For a long time in English legal history, a divorce could only be granted by the Ecclesiastical Courts and not by the ordinary Courts. The form of the divorce was a (10) T.P.S, Chawla, J.- This case is the tale of a man who lost his balance of mind due to financial difficulties, and has thereby posed a nice legal problem. Harendralal Bhattacharyya was born on 1st September, 1921. He is a displaced from what was formerly East Pakistan, and is now Bangla Desh. On 10th August, 1949 he was appointed a stenographer in the office of the Comptroller and Auditor General of India. In 1958, he qualified for the Subordinate Accounts Service. Shortly afterwards, in 1959, he was promoted to the post of Accountant. In the course of time, he rose to be a Senior Personal Assistant in 1974. 2. On account of being a displaced person, Bhattacharyya was able to obtain the allotment of a plot of land from the Rehabilitation Department of the Government of India in 1971. This became the cause of all his woes. The plot was situated in Chittaranjan Park. New Delhi, and measured 160 sq, yds By the terms of allotment he

was required to construct a house there on within 2 years. He had very little money of his own. So for raising the necessary funds he sought loans from the Government. He was advanced Rs. 3,840.00 for the purchase of the land, and Rs. 36,560.00 for constructing the house. Latter, on his urgent requests, he was advanced another sum of Rs. 10,400.00 to complete the building. 3. Naturally, for recovering the amounts advanced, the Government began to make monthly deductions from Bhattacharayya's salary. There were also deductions on other accounts. This left very little for him to take home. Despite the sympathetic attitude of his superiors, and their attempts to accommodate him as much as they could, he received in hand only Rs. 98.53 as his salary for the month of March, 1976, and Rs. 65.79 for April. It was clearly impossible for him to support his family on such sums. Understandably, he was driven to desperation and lost his mental equilibrium. 4. In order to cope with the situation, he seems to have thought that if he retired from service and commuted his entire pension, he would be able to pay off the loans he had taken from Government. He also seems to have had the expectation that he would be able to obtain a job in some Public sector organisation. Nothing seems to have been fully and carefully worked out, but these were the lines on which his mind was functioning. 5. In this frame of mind, he wrote a letter dated 4th May, 1976 to the Comptroller and Auditor General of India. After describing his state of misery ('Yesterday we were without food .....'), he said :

(11) It is therefore desirable that I should retire from Government service so that all my problems may be solved. He, then, proceeded as follows: "I, therefore, propose to retire from Government service on 19th August 1976 a little over 3 months still to run. This may kindly be taken as notice from my side, I request that my Section 26 lust quoted, shows that the Court has power to pass interim orders regarding the custody of children. When the case is decided and a decree is passed, then an order regarding the maintenance of the children and their education has to be passed. This can only happen when the decree determines the matrimonial ties and not if the application is dismissed. There is no necessity to pass any such order if the relationship of the husband and wife remains the same as before.

(12) Section 27 also shows that if a decree is passed, then the order regarding property can also be passed. Clearly, the context in which this occurs shows that the decree must be one granting divorce and not one refusing the same.

(13) Finally, Section 23 has to be referred to. This Section sets out a number of safe guards which have to be satisfied before a decree can be granted. Obviously, these safeguards are only to be satisfied if the application for divorce or other relief is granted and a decree is passed and not if the application is dismissed.

(14) Having referred to the terminology of the entire Act, and the way in which the term 'decree" has been used in various parts of the Act, there can be no doubt that the Additional District Judge was right in holding that the Court had no jurisdiction to grant alimony to the appellant, when her husband's petition for divorce had been dismissed. We accordingly dismiss this appeal. We, however, leave the parties to bear their own costs.