

Bombay High Court

Panditrao Chimaji Kalure vs Gayabai Panditrao Kalure on 27 February, 2001

Equivalent citations: AIR 2001 Bom 445, 2002 (2) MhLj 53

Bench: S Radhakrishnan

JUDGMENT

1. The brief facts are that the appellant in Second Appeal No. 88/1984 viz. Gayabai w/o Panditrao Kalure (original plaintiff) had claimed that she was a legally wedded wife of Panditrao Chimaji Kalure (original defendant). Gayabai had filed a Regular Civil Suit No. 193/1969 for grant of maintenance from Panditrao Chimaji Kalure and also claimed maintenance for the previous three years. In the said Regular Civil Suit, Gayabai had contended that they have been married for 11 years and that she has been living with her husband for a period of five years and eight months. In the year 1963, Panditrao Kalure had obtained a job as a teacher and he had declined to take her with him at the place of service at village Bhogalwadi. Gayabai had alleged that Panditrao Kalure, had ill-treated her. It appears that said Gayabai had also filed an application for maintenance under Section 488 of Criminal Procedure Code. In the said proceedings Panditrao Kalure had produced a Divorce Deed, mentioning that the said marriage was mutually dissolved between the parties by consent on 5/5/1967. The Criminal Court had accepted the said Divorce Deed and had rejected the application of Gayabai for maintenance, in the aforesaid suit, Gayabai had contended that she had never given such a divorce and there, was no customary practice in her community to enter into any such Divorce Deed and also contended that the said Divorce Deed was a false and fabricated document, as such, same ought to be declared as null and void.

2. The main contention of Gayabai was that her husband was not maintaining her and that she was being maintained by her parents. She had also alleged that Panditrao Kalure receives a monthly salary of Rs. 200/- and that he is a member of a joint family which owns 45 acres of land and out of which 10 acres are irrigated land. Under these circumstances, Gayabai had claimed Rs. 100/- p.m. as maintenance and Rs. 3,600/- as past maintenance. She had also prayed for a declaration that the Divorce Deed dated 5/5/1967 to be declared null and void, being a false and fabricated document. She had also sought a declaration that she is a legally wedded wife of Panditrao Kalure.

3. The defendant Panditrao Kalure had filed his Written Statement contending that as per the prevailing custom, he had divorced his wife Gayabai by executing Divorce Deed on 5/5/1967. He had also contended that the marriage had taken place almost 15 years back when both of them were minors. He had strongly disputed that Gayabai was residing with him for five years and eight months, On the contrary, he had contended that Gayabai hardly resided with him for a period of two years or so after their marriage. Panditrao Kalure had strongly disputed that he had ever ill-treated Gayabai and he had strongly denied that he had ever deserted her and driven her out of the house.

4. Panditrao Kalure had contended that Gayabai very rarely came to his house at Ramwadi while the marriage was subsisting and in fact, her brother and other person used to bring her and she would not come on her own and she was very unwilling to come to the residence of Panditrao Kalure. Even the parents of Gayabai were not willing to send her, when Panditrao Kalure was living at Ramwadi, In view of this behaviour of Gayabai, finally, Gayabai and her parents had decided to take a divorce

from Panditrao Kalure. The defendant Panditrao Kalure had contended that accordingly a special messenger by name Ramrao s/o Danreddy, r/o Yellamwadi was sent seeking a divorce from the defendant. Panditrao had contended that the Divorce Deed in favour of Panditrao Kalure was scribed by the brother of Gayabai viz. Ramrao Narsingrao Tandre and the said Divorce Deed was also attested by some witnesses. Panditrao Kalure contends that the Divorce Deed was executed as per the existing and prevailing custom in (heir community).

5. The trial Court, after hearing the panics had held that the plaintiff Gayabai had proved ill-treatment and also had proved that Panditrao Kalure had neglected and refused to maintain her. Accordingly, the trial Court had held that Gayabai was entitled to receive maintenance @ Rs. 60/- p.m. and also had granted, past maintenance for a period of three years.

6. Panditrao being aggrieved by the order of the trial Court, filed a Regular Civil Appeal No. 88/1975 in the Court of District Judge, Beed. The learned District Judge, Beed, had allowed the appeal and remanded the matter to the trial Court for a decision on an important issue, as to whether the marriage between the parties was subsisting on the date of filing of the suit and if the Deed of Divorce, produced by the appellant Panditrao Kalure was held to be proved, the relationship of husband and wife between the parties would come to an end and consequently, Gayabai would not be entitled to claim any maintenance. Thereafter, the plaintiff Gayabai had preferred an appeal against the said order of the District Judge, Beed, in Regular Civil Appeal No. 88/1975, before this Court in Appeal No. 205/1978. This Court, after upholding the order of remand of the District Court, Beed, directed the trial Court to record the evidence of the finger print expert and send the matter to the lower Appellate Court for its consideration. The trial Court had recorded the evidence of the finger print expert and had sent the same to the District Court. Under these circumstances, the lower Appellate Court viz. the District Judge, Beed, took up this matter and had framed the following points:--

(1) Does the Defendant prove that there was a divorce between the parties ?

(2) Does the Plaintiff prove that she was ill-treated and driven out by the defendant and that he has neglected or refused to maintain her ?

(3) Is she entitled for maintenance and if so, what should be the quantum ?

(4) If yes, whether she is entitled for back maintenance ?

(5) What orders ?

The learned District Judge, Deed, has answered first point in affirmative, second point in negative and so far as the third point is concerned, it was held that the Plaintiff Gayabai was entitled to receive maintenance and that she would be entitled to get Rs. 60/- p.m. by way of maintenance. So far as point no. 4 is concerned, the learned District Judge, Beed, has held that the Plaintiff Gayabai was not entitled for any back maintenance.

7. The learned District judge, after the aforesaid remand and the evidence of the finger print expert Shri A.N. Mujumdar, by a detailed examination of the same, by a cogent and proper reasoning, came to a conclusion that the thumb impression on the said document i.e. Divorce Deed was that of Gayabai. Accordingly, the finding was that the defendant Panditrao Kalure had proved the thumb impression on the Divorce Deed (Exh. 50) was that of Gayabai, accordingly there was a divorce between the parties as per the customary practice.

8. It appears that there was a contention raised by the learned counsel appearing for Gayabai that the said thumb impression on the Divorce Deed (Exh. 50) was not a voluntary one. The learned District Judge holds that all throughout Gayabai had contended that her brother had not obtained her thumb impression, whereas, it was sought to be argued that the thumb impression was not a voluntary one, which contention was rejected as the same was totally contradictory to each other, in the sense, if the case of Gayabai was that she had never given her thumb impression on the said Divorce Deed, then there was no question of her thumb impression being not a voluntary thumb impression. Ultimately, the learned District Judge, upholds the contention of Panditrao Kalure that the Divorce Deed was executed and Gayabai had affixed her thumb impression on the same.

9. The learned District Judge has, after appreciating all the evidence on record, came to the conclusion that Gayabai had failed to prove that her husband Panditrao Kalure was ill-treating her or that he had deserted or neglected her. On the contrary, the learned District Judge holds that Gayabai had agreed to a divorce on her own and that there was no ill-treatment. Finally, the learned District Judge holds that the Divorce Deed between Gayabai and Panditrao Kalure was established and proved.

10. The learned District Judge, thereafter, went into the issue of grant of maintenance. The learned District Judge after referring to the provisions of Section 25 of Hindu Marriage Act, 1955 as well as Section 18 of the Hindu Adoptions and Maintenance Act, 1956 and also a judgment of this Court in the case of Govindrao Ranoji Musale v. Anandibai Govindrao Musale and Anr., 1977 Mh.LJ. 144 and also ,another judgment of this Court in the case of Smt. Rajeshbai and Ors. v. Smt. Shantabai, ; holds that in view of Section 25 of the Hindu Marriage Act, 1955 and in view of the provisions of Section 151 of Code of Civil Procedure, the Court had the right to grant maintenance, that is to say, the learned Judge had considered aforesaid judgments and had concluded that the petition for maintenance under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 can be considered even under Section 25 of the Hindu Marriage Act, 1955 for grant of maintenance. To put in other words, the learned District Judge is of the view that even if Gayabai is held to be divorced, she is still entitled to claim maintenance, in view of Section 25 of Hindu Marriage Act, 1955 r/w Section 151 of Code of Civil Procedure. Accordingly, the lower Appellate Court had allowed the appeal filed by Gayabai and had directed Panditrao Kalure to pay Rs. 60/- p.m. from the date of institution of the suit. However, that part of the order of the trial Court, wherein, it was held that Gayabai was entitled to recover the back maintenance for the last three years, was set aside.

11. Aggrieved thereby, Panditrao had filed a Second Appeal No. 73/1984, before this Court challenging the direction of the lower Appellate Court, directing Panditrao to pay Rs. 60/- p.m. from the date of institution of the suit.

12. Gayabai had also filed a separate Second Appeal No. 88/1984, before this Court challenging the findings, mainly the finding given by the lower Appellate Court, to the effect that Panditrao Kalure had divorced Gayabai. The contention of Gayabai is that there was no divorce between Gayabai and Panditrao Kalure and (hat she had not executed the Divorce Deed at all and also that there was no customary divorce in their community.

13. Mr. Milind Patil, learned counsel, appearing for Panditrao Kalure appellant in Second Appeal No. 73/1984 has raised the following substantial questions of law viz.

(1) Once if the Court holds that there has been a divorce between husband and wife, whether a Court can grant maintenance under Section 18 of the Hindu Adoptions and Maintenance Act, 1956; and
(2) Even assuming under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, a divorced wife could seek maintenance, in this case, when it is clearly established that Gayabai could not prove the necessary conditions, as contemplated under Section 18(2) (a) or (b) or (g) of the said Act, can the lower Court still grant such a maintenance?

14. Mr. N.H. Patil, learned counsel appearing for Gayabai appellant in Second Appeal No. 88/1984, had referred a judgment of this Court in the case of Govindrao Ranoji Musale (supra). It is pertinent to note that in that case the marriage was subsisting. The provisions of Section 18 of the Hindu Adoptions and Maintenance Act of 1956 as well as Section 25 of Hindu Marriage Act, 1955 were analyzed in depth and the Court has come to a conclusion that there was no inconsistency between both the provisions. In the said judgment, this Court has held that as far as maintenance under Section 18 of Hindu Adoptions and Maintenance Act, 1956 is concerned, the marriage has to be subsisting. On the contrary, under Section 25 of the Hindu Marriage Act, 1955, the power of the Court to grant maintenance is when the Court is exercising its jurisdiction under the Hindu Marriage Act, 1955 either at the time of passing of any decree under the said Act or at any time subsequent thereof, it can grant maintenance. Therefore, the view is that Section 25 of the Hindu Marriage Act, 1955 can come into play only in proceedings under Hindu Marriage Act, 1955 are filed and not otherwise.

15. Mr. Milind Patil, learned counsel, also referred to and relied upon a judgment of this Court in the case of Smt. Rajeshbai (supra). In this case, the claim of the wife was that the marriage itself was void under Hindu Marriage Act, 1955 and that she was entitled to claim maintenance out of the assets of her deceased husband. Here again, it is pertinent to note that the petition was filed, under Hindu Marriage Act, 1955 seeking a declaration that the marriage itself was void and also for maintenance, that is to say it was again a petition under Hindu Marriage Act, 1955. Shri Milind Patil, therefore, strongly contended that Hindu Marriage Act, 1955 operates on a different level and Hindu Adoptions and Maintenance Act, 1956, operates in a different sphere. Essential difference, as pointed out by Mr. Milind Patil, is that as far as maintenance under Hindu Adoptions and Maintenance Act, 1956 is concerned, the marriage has to be a subsisting one and the wording of Section 18 Hindu Adoptions and Maintenance Act, 1956 itself makes it abundantly clear that the marriage has to be a subsisting one and not in the case of a divorcee. On the contrary, in any proceedings, filed under Hindu Marriage Act, 1955, Court is empowered to grant interim maintenance (pendente lite) under Section 24 of the said Act or permanent maintenance under

Section 25 of the Hindu Marriage Act, 1955. Therefore, Mr, Milind Patil, learned counsel, very strongly contends that once the Court, having given a categorical finding that a divorce had taken place between Panditrao and Gayabai, the Court could not, thereafter, exercise any powers and grant maintenance under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 and there is no question of exercising the inherent powers under Section 151 of Code of Civil Procedure, 1908, which has no application whatsoever, and the same is a procedural power.

16. Mr. Milind Patil, learned counsel, further contends that Section 151 of Code of Civil Procedure, 1908, can only be exercised if there is some lacunae in the Code of Civil Procedure and/to render justice, Court may resort to Section 151 of Code of Civil Procedure. But Section 151 of Code of Civil Procedure cannot be resorted to fill in any other lacunae or lack of any provision, in, Hindu Marriage Act, 1955.

17. Under these circumstances, Mr. Milind Patil, learned counsel, contend that the lower Appellate Court has completely misapplied the law and misconstrued the legal provisions, especially, in view of the finding that there has been a divorce between Panditrao Kalure and Gayabai, the Court could not have granted any maintenance in favour of Gayabai in a proceedings under Hindu Adoption and Maintenance Act, 1956.

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 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,

20. Mr. N.H. Patil, learned counsel, thereafter, contended that the customary divorce, as sought to be alleged by Panditrao Kalure, was really not prayed. On a perusal of the reasoning of the lower Appellate Court, it is vital to note that the very deed was scribed by the brother of Gayabai and a number of instances pf customary divorce have also been given. It is pertinent to note that Gayabai has never taken a stand that she was forced, by fraud or coercion, to put her thumb impression, on the Divorce Deed. What was contended by Gayabai was that she had never put her thumb impression on the said Divorce Deed, whereas, by a detailed analysis, the lower Appellate Court has analyzed evidence pf the finger print expert, holding that Panditrao Kalure has been able to establish that the thumb impression on the said Divorce Deed was that pf Gayabai and in view of the customary divorce prevailing in that community, the Court had also come to the conclusion that Panditrao Kalure was able to establish that there was a customary divorce between Panditrao Kalure and Gayabai.

21. Mr. N.H. Patil, learned counsel, also relied upon a judgment of this Court in the case of Nemichand v. Basantabai, 1994 Mh.LJ. 1078, In this case, there was no independent evidence pf customary divorce at all produced by the plaintiff and as such, this Court was, of the view that the plaintiff had failed to prove that there was any customary divorce. On the contrary, in the present case a number of witnesses have been examined and a number pf customary divorces which had taken place in the said community, were also adduced to in the evidence.

22. Shri N.H. Patil, learned counsel, finally referred the another judgment of this Court in the case of Damyanti (Smt) Kirit Jani v. Kirit Lalubhai Jani, 1993 Mh.LJ. 752. This judgment deals with the provisions of Hindu Marriage Act, 1955, Sections 13-B(2) and 23(1)(bb) i.e. divorce by mutual consent, wherein, duty is cast on the Court to examine the parties and to be satisfied that the consent of the parties was not obtained by fraud or undue influence. I am afraid that this judgment will not be of any help to Mr. N.H. Patil, inasmuch as, this is not a case of parties approaching for a decree of divorce with mutual consent, whereas, the contention of Panditrao Kalure is that as per the custom prevailing in their community, Divorce Deed was executed and divorce had taken place. There is no duty cast on the Court, with regard to the customary divorce, as in the case of the divorce being granted by the Court under the aforesaid provisions. This judgment will have no application in the instant case.

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 Dhavan (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 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 inlerchangeability, 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.

24. The second substantial question of law raised by Mr. Milind Patil, learned counsel for the appellant is that even assuming that a divorced wife is entitled to claim maintenance under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, in the instant case, Gayabai had failed to establish any case under Section 18(2)(a) or (b) or (g) of Hindu Adoptions and Maintenance Act. On this issue, the lower Appellate Court has gone into the entire evidence and has given a categorical finding that the said Panditrao Kalure had not illtreated her, so as to compel her to live separately. The lower Appellate Court came to the conclusion that the Panditrao Kalure had not deserted Gayabai wilfully or otherwise. Gayabai has also not been able to justify any other cause for living separately. Those are the findings of the facts based on evidence arrived at by the lower Appellate Court. This Court, while deciding a Second Appeal, cannot re-appreciate the said evidence, and come to a different finding which is impermissible. The scope of the Second Appeal is very limited unless the findings are based on no evidence or the findings are totally perverse or contrary to law. The lower Appellate Court has given cogent reasons and has come to a conclusion that Gayabai had on her own left Panditrao Kalure and has been living separately. I do not find any ground whatsoever to interfere and disturb the same. I fully agree with Mr. Milind Patil that Gayabai had failed to make out any case under Section 18(2) (a) or (b) or (g) of Hindu Adoption and Maintenance Act.

25. Under these circumstances, the lower Appellate Court's decree and order dated 16/11/1983 passed in Regular Civil Appeal No. 88/1975 requires to be set aside, especially, the directions directing Panditrao Kalure to pay Rs. 60/-from the date of the institution of the suit, which cannot be sustained in law. Second Appeal No. 73/1984 is, accordingly, allowed, however, there shall be no order as to the costs.

26. As far as Second Appeal No. 88 of 1984 is concerned the same challenges only various findings of fact and there is no substantial question of law involved in the same. Hence the Second Appeal No. 88 of 1984 is devoid of any merit, hence stands dismissed however, there shall be no order as to costs.

27. Issue of certified copy is expedited.