

Madras High Court

Winfred Dhanraj Samuel vs Betsy Ratnakumari on 10 January, 1992

Equivalent citations: II (1992) DMC 219, (1992) IIMLJ 106

Author: Lakshamanan

Bench: Lakshamanan

JUDGMENT Lakshamanan, J.

1. Winfred Dhanraj Samuel, plaintiff in O.M.S No. 21 of 1988 is the petitioner in Application Nos. 4108 and 4109 of 1991. Application No. 4108 of 1991 has been filed by him to review my order. dated 7-5-1991 in the main O.M.S.

2. His case is that the respondent's mental condition is idiocy within the meaning of Medical Jurisprudence. Her mental faculties, her behaviour as a child, poor memory and absence of will power, emotions, or initiative of any kind, etc., would go to show that she had always been an idiot both before and during the time of marriage and continued to be so thereafter. His consent for the marriage was obtained by the suppression of this material fact. He is therefore entitled to a decree declaring his marriage with respondent as null and void.

3. This Court, while dismissing the petition passed an order on 7-5-1991 as under :

"In the result, the suit is dismissed. I direct the plaintiff to pay a sum of Rs. 800/- (Rupees eight hundred only) per month to the defendant towards the maintenance of the defendant and her child from the date of filing of this petition till he takes the respondent and the child. It is further directed that in view of the dismissal of this suit, the plaintiff should take back the defendant and her child immediately. But, however, there will be no order as to costs."

4. To review the said order, Application No. 4108 of 1991 has been filed. Application No. 4109 of 1991 has been filed to stay the petition of the order giving direction to the petitioner to take back the respondent and to pay maintenance to her. Stay was granted.

5. Mr. V. Sridevan, learned Senior Advocate, appearing for the petitioner/husband has contended that the only question that arose for consideration was whether the petitioner was entitled to divorce as prayed for. There was no issue as to whether the petitioner should take back the respondent. There was no suit for restitution of conjugal rights. He has further submitted that this Court has erred in granting maintenance to the wife, which according to the learned Senior Counsel is beyond the scope of Section 36 and 37 of the, Indian Divorce Act. Mr. Sridevan further contended that while under Section 36 the Court has power to grant maintenance pending suit, under Section 37 it has power to order maintenance only when a decree is made absolute declaring a marriage to be dissolved or a decree of judicial separation obtained by the wife.

6. Thus, according to Mr. Sridevan, the direction to the husband to take back the wife and to pay maintenance till she is taken back after dismissing the suit for divorce is beyond the scope of the suit. In any event the order of this Court directing the petitioner to take back the respondent is not sustainable. Hence, the case has got to be reviewed.

7. Mr. Lenin, learned Senior Counsel appearing for the wife resisted the application. He said that the jurisdiction of this Court exercising the matrimonial jurisdiction is very wide and that this Court is justified in passing the order that has been made. He has further urged that when the wife has expressed her desire to join her husband, he was not willing to take her back, and has unjustly deserted her and refused to maintain her. He is bound to maintain her and in fact she has claimed maintenance in her written statement filed in this suit.

8. I see much force in the contention of Mr. V. Sridevan.

9. Section 36 & 37 which are relevant sections are reproduced hereunder:

"Section 36. Alimony pendent lite-In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just;

Provided that alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next proceeding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage until the decree is made absolute or is confirmed as the case may be.

Section 37. Power to order permanent alimony. The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife.

and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any) to the ability of the husband and to the conduct of the parties it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties."

10. The conditions precedent to satisfy the requirements of Section 37 of the Indian Divorce Act are two fold :

(i) there must be a decree absolute declaring the marriage to be dissolved and

(ii) a decree of judicial separation obtained by the wife;

11. In that event Court can grant permanent alimony. In the instant case, the suit filed by the husband has been dismissed by me and hence in my view, the grant of maintenance ordered by me

is irregular, Section 36 of the Indian Divorce Act provides that the wife may present a petition for alimony pending the suit. The Court on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just. Section 15 of the Indian Divorce Act also provides that in any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such suit instituted by a husband, of his adultery, cruelty, or desertion without reasonable excuse, or in case of such suit instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion. Thus, it is seen that the Court has power to grant maintenance pending suit under Section 36 of the Indian Divorce Act and has power to order maintenance under Section 37 of the Indian Divorce Act only when a decree is made absolute declaring the marriage to be dissolved, or on any decree of judicial separation obtained by the wife.

13. The points on the issue is covered by two decisions of our High Court, one by a Division Bench consisting of Krishnan and Ramesam, JJ. reported in *Devasahayam v. Devamony*, (1923) 17 L.W. 90 and another by K.M. Natarajan, J. reported in *Ranganathan v. Shyamala*, 1989 1 L.W. 342. *Devasahayam's* case [17 L.W. (1923) 90] was a case filed by the husband against his wife against the decree of the District Judge, Madurai in a suit brought by him for dissolution of his marriage with his wife on the ground of her adultery with the second defendant as the co-respondent. The District Judge, who tried the case after hearing the evidence came to the conclusion that the plaintiff had failed to prove the adultery alleged and dismissed the suit. Further he passed an order granting permanent maintenance to the wife at the rate of Rs. 10/- a month. The husband filed an appeal before this Court stating that permanent alimony can be granted under the Indian Divorce Act only under Section 37 of the Act and that the circumstances, justifying such a grant have not arisen in that case, the suit for dissolution of marriage having been dismissed. The Counsel for the respondent wife however argued that under Section 15 of the Act, it was open to the Court to grant maintenance on finding that the wife had been treated cruelty and had been driven out of the house. The Division Bench of this Court in their Judgment, dated 16th October, 1922 held as under:

"It is perfectly clear that this refers to a petition which could have been filed under the Indian Divorce Act. Thus she might, in answer to her husband's suit, claim if there are circumstances, which justify such a relief, a decree, for judicial separation or for dissolution of marriage. In case such a decree is passed at her instance, the Court would be in a position to act under Section 37. It is, not contended that a bare application for maintenance can be put in by the wife against the husband under the Indian Divorce Act. If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Criminal Procedure Code. The order therefore granting maintenance to the wife is ultra vires. It must therefore be set aside. In the result, we vary the decree of the lower Court by striking out the order for maintenance and otherwise dismiss the appeal with costs."

14. The Division Bench therefore held that granting maintenance to the wife by the Lower Court is ultra vires and the decree of the Lower Court was varied by striking out the order for maintenance.

15. Ranganathan's case, 1989 1 L.W. 342 is one arising under Section 25 of the Hindu Marriage Act filed by the husband against the wife. Learned Single Judge after considering the various decisions relied on by the learned Counsel for the husband arising under similar circumstances held as under :

"On-going through the ratio laid down in the above decisions which is supported by convincing reasons, I am of the view that the word, "passing of any decree," has been properly interpreted. I am also in respectful agreement with the decisions rendered by the various High Courts that the passing of a decree under Section 25 of the Act means the passing of the decree of divorce, restitution of conjugal rights or judicial separation and not the passing of a decree through which the petition itself is dismissed and therefore, it is clear that alimony cannot be granted in a case where a decree for divorce is refused."

16. In my opinion, permanent alimony and maintenance can only be granted in case divorce is granted and if the marriage between parties subsists. If the petition by the husband as in the instant case fails, then no decree is passed, i.e., the decree is denied to the husband. Alimony, cannot, therefore in my view be granted in a Case where a decree for divorce is refused. Ultimately alimony on a permanent basis as maintenance, is given to an exspouse and if a petition fails, then the marriage still subsists unaltered by the intervention of any decree and the normal rights of the parties to be found in the legal system under which they are married has to prevail. There is no question of granting alimony in such cases, 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. The word "decree" is used in matrimonial cases in special sense different from that in which it is used in Civil Procedure Code.

17. The Delhi High Court is also of the view that the power to grant alimony contained in Section 25 of the Hindu Marriage Act can only be exercised when the Court is faced with the problem of setting the mutual rights of the parties after the matrimonial ties have been determined or varied by the passing of the kind of decree mentioned in Section 9, 10, 11 and 13 of the Act and not in other cases. The Delhi High Court has taken this view in the decision reported in Smt. Sushama v. Satish Chandra, .

18. In this context, it is worthwhile to quote Section 25 of the Hindu Marriage Act, which reads as follows :

"(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 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 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 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."

19. The said section in my view is not identical to Section 37 of the Indian Divorce Act. It is clear from Section 37 of the Indian Divorce Act that only in a case where the Court passes a decree absolute declaring a marriage to be dissolved or any decree of judicial separation is obtained by the wife, on its confirmation an order is made on the husband for payment to the wife of a monthly or weekly maintenance. But that is not the case in so far as Section 25 of the Hindu Marriage Act is concerned. Section 25 of the Hindu Marriage Act only contemplates passing of any decree and it does not further proceed to say about a decree for either dissolution, nullity of marriage. resolution of conjugal rights, or judicial separation. This is the distinction, I am able to see between Section 25 of the Hindu Marriage Act and Section 37 of the Indian Divorce Act.

20. It is therefore clear from the above two provisions that what is contemplated under Section 37 of the Indian Divorce Act is materially different from the language used in Section 25 of the Hindu Marriage Act. In the decision reported in *Vinod Chandrashanna v. Rajesh Pathak*, it was held as follows :

"Where an application for divorce, is dismissed there is no decree passed. Obviously, alimony cannot, therefore, be granted in a case where a decree for divorce is refused because in such a case the marriage will subsist. The power to grant alimony contained in Section 25 has to be exercised when the Court is called upon to settle the mutual rights of the parties after the marital ties have snapped by determination or variation by the passing of the decree of a type mentioned in Section 19, 11 and 13 of the Act, read with Section 23, 26 and 27 of the Act, a decree can be assumed to have been passed when an application for divorce or similar other relief is granted but merely not when the application is dismissed.

21. The Allahabad High Court has also relied on the decision reported in *Smt. Sushma's* case referred to by me *supra*.

22. Mr. V.M. Lenin, learned Senior Counsel appearing for the respondent at the time of hearing the Review Application sought permission of this Court to represent the petition filed by the wife claiming maintenance during the pendency of the main suit. It appears that the said application filed during the pendency of the suit was returned by the office for certain compliance and that the same has not been represented at all. Hence, this Court had no occasion to consider whether any alimony can be granted to the wife during the pendency of the proceedings. It was also not brought to the notice of this Court when the main suit was taken up for trial. It is now too late on the part of

the wife to make a request to permit her to represent the same. Such a request, in my view, cannot at all be granted. Hence, the said request is rejected.

23. In the result, Application Nos. 4108 and 4109 of 1991 are ordered as prayed for. My earlier order granting maintenance to the wife and the further direction to the husband to take back the wife, being beyond the scope of the suit, I have no hesitation in setting aside that part of the order. In all other respects the order will hold good.

24. In my view, this Court has its inherent jurisdiction and has power to recall or modify an order or decree. If it was passed irregularly without complying with the requirements of Section 37 of the Indian Divorce Act. Hence, I feel justified in setting aside that portion of the Order, granting maintenance to the wife and directing the husband to take back the wife.

25. However, the wife is given liberty to take appropriate proceedings before the proper forum claiming maintenance and for other relief, if any in accordance with law. No costs.