Bombay High Court
Gulab Jagdusa Kakwane vs Kamal Gulab Kakwane on 17 July, 1984
Equivalent citations: AIR 1985 Bom 88, 1985 (1) BomCR 82, (1983) 86 BOMLR 662
Author: Sawant
Bench: Sawant, Tated
JUDGMENT Sawant, J.

1. This is a revision application referred by the learned single Judge to the Division Bench. The only question of law involved in this petition is whether under S. 25(1), Hindu Marriage Act, 1955, the wife against whom a decree for divorce has been passed on the ground of adultery can claim maintenance against her husband. The relevant facts leading to the present petition are as follows :-

The petitioner-husband and the respondent were married on 24-12-1972. According to the petitioner, the respondent deserted him on 26-9-1973 and he had no access to her since then. It is during the period of desertion, that she gave birth to a female child on 16-9-1974. She filed an application for maintenance both for herself and the child under S. 125, Cr. P.C. That application was dismissed and the revision application filed against the said order was also dismissed. The petitioner thereafter filed a matrimonial petition for a decree of divorce on the ground of adultery. That petition was decreed on 14-2-1978 and the appeal filed by the respondent against the said decree was dismissed on 30th June, 1979. It is thereafter that on 27-2-1980, the present petition was filed by the respondent under S. 25(1), Hindu Marriage Act, claiming maintenance for herself. The trial Court by its order D/- 2-1-1982 awarded maintenance at the rate of Rs.60/- per month. The appeal filed by the petitioner against the said order was dismissed on 7-8-1982. Hence, the present revision application.

2. Shri Phadkar, the learned counsel appearing for the petitioner, contended that the scheme of S. 25 is clear enough to disentitle a woman to maintenance when a decree of divorce is passed against her on the ground of adultery. In this connection, he invited our attention to the language of sub-ss. (1) and (3) of S. 25. He submitted that sub-s. (1) states that while deciding an application under the said section, the Court has to take into consideration the conduct of the parties and other circumstances of the case. "The conduct of the parties and other circumstances of the case" would include moral conduct of the claimant, and if at the time of passing the decree itself, the Court could not have passed an order of maintenance in favour of a claimant who was living in adultery or who had a child out of adulterous intercourse, then it is impermissible for the Court to make such an order after the decree has been passed. The provisions of sub-s. (3), according to him, reinforce this interpretation of sub-s.(1) inasmuch as they declare that if a wife in whose favour an order for maintenance under sub-s. (1) is made, does not remain chaste, the order is liable to be varied, modified or rescinded. This further shows, according to Shri Phadkar, that in no circumstance a wife against whom a decree of divorce has been passed on the ground of adultery can claim maintenance under sub-s. (1).

In support of this proposition he relied upon the very same decisions which were pressed into service in the lower Court. The first is the decision of the Calcutta High Court Sachindra Nath Biswas v. Sm. Benamala Biswas. In that case, a decree of judicial separation was passed against the wife on the ground that she was living in adultery with the co-respondent. While passing the decree, the District Judge had made an order for maintenance in favour of the wife under S. 25(1). After referring to the facts of the case, the Calcutta High Court pointed out that there was unrebutted evidence to the effect that the wife was living in adultery with the co-respondent even at the time when the case was being heard, and hence, the leaned District Judge should not have made any order for maintenance in favour of wife. It is against the background of the said facts that the learned Judges observed as follows (at p. 576):

"Unchastity on the part of a woman (and also sexual intercourse by a man with a woman, outside wedlock) are sins against the ethics of matrimonial morality in this country. Moral law, it is true, is not the positive Civil law of a country, but there are many instances where law and morality meet. In our opinion, such a meeting place of law and morality is S. 25, Hindu Marriage Act. or for the matter of that S. 18, Hindu Adoption and Maintenance Act. In the exercise of judicial discretion, expressly vested in Court of law under S. 25(1), Hindu Marriage Act, a Judge should, unless there be very special grounds of proved unchastity or adultery, to the resources of her immorality and deny her the lawful means of support, by passing a decree for maintenance in her favour."

Two things emerge from this decision. In the first place, the learned Judges have nowhere stated that under S. 25(1), a wife who is divorced on the ground of proved unchastity is in no case entitled to maintenance. They have only referred to the exercise of judicial discretion in each case. Secondly, on the facts of that case they found that even at the time the case was being heard the wife was admittedly living in adultery and hence they held that the discretion ought not to have been exercised in favour of the wife in such circumstances. This case, therefore, does not lay down any general proposition of law that in all cases where a decree of divorce has been passed against the wife on the ground of her unchaste conduct, she is disentitled to maintenance. A learned single Judge of the same Court has in a decision reported at page 438 in the same volume Amar Kanta Sen v. Sovana Sen taken a view that a wife against whom a decree of divorce on the ground of adultery is passed is entitled to a bare subsistence allowance or starving allowance from her husband, when she has no source of livelihood. For this view, the leaned Judge relied upon the position of old law to which we will refer a little later. The next decision relied upon by Shri Phadkar is of a single Judge of the Kerala High Court Raja Gopalan v. Rajamma. This decision undoubtedly supports Shri Phadkar. For the learned Judge in this case has taken a view that the wife who has committed an adultery is disentitled to maintenances under S. 25(1), for S. 25(3) makes it mandatory on the part of the Court to revoke an order of maintenance made under S. 25(1), when the wife has not remained chaste. However, this view of the learned single Judge has been expressly overruled by a Division Bench of the same Court in a decision Kaithakulangara Kunhikannan v. Nellatham Veettil Malu. According to the learned Judges, S. 25(1) no doubt confers a discretion on the Court to award maintenance. But that does mot mean that the Court has no jurisdiction or its jurisdiction is in any way curtailed for awarding maintenance even in cases of proved adultery. According to the Court, the section does not contemplate a claim of a chaste wife alone and does not prevent a Court from granting maintenance

when judicial separation is granted on the ground that the claimant is living in adultery. According to the learned Judges the section is not intended as a punitive measure but is meant to reform the party against whom an order under S. 10(1)(f) or S. 13(1)(I) of the Act has been passed. The conduct of the parties can, however, be taken into consideration in fixing the quantum of maintenance. The learned Judges in this connection referred to the position of law before the Hindu Marriage Act and pointed out that the state of law regarding maintenance of a Hindu wife was that if the wife who left her home for purposes of adultery and persisted in following a vicious course of life, later on completely renounced her immoral course of conduct, her husband was liable to furnish with a bare or starving maintenance, that for life. The learned single Judge of the Calcutta High Court in (supra) has made a reference to this position in old law.

Shri Phadkar sought to distinguish this case on the ground that in this case the learned Judges of the Kerala High Court were called upon to decide a case where only a decree of judicial separation had been passed on the ground of unchastity of the wife. He submitted that where only a decree for judicial separation is passed the bond of marriage continues and the obligation of the spouse to support the other spouse does not come to an end, and hence it is possible to hold that the Court has powers to pass order for maintenance under S. 25(1). He also made a grievance that the reference to a case where a decree of divorce is passed under S. 13(1) in the said decision was uncalled for and the observation in the judgment so far as they relate to the grant of maintenance where a decree of divorce has been passed should be held as obiter. We see no reason to make this distinction in the reasoning of the learned Judges since they were interpreting the provisions of S. 25(1) as such, and were not distinguishing a decree of judicial separation from a decree of divorce. The last authority on which Shri Phadkar relied was that of the Jammu and Kashmir High Court reported in AIR 1970 J&K150 Sardari Lal v. Mst. Vishano. The Court there took the view which supports the contention advanced by Shri Phadkar that where a decree for dissolution of marriage is granted on the ground of unchastity of wife, and it is also proved that the child is not that of the husband, maintenance either in favour of the wife or the child cannot subsequently be granted under S. 25(1). The learned Judges there have reasoned, relying on the provisions of sub-s.(3) of S. 25, that if the unchastity of the wife subsequent to the grant of maintenance can form the basis of cancellation of an order of maintenance passed under sub-s. (1), a finding recorded during the judicial separation proceeding regarding unchastity of the wife must and should be taken into account even at the time of initially granting maintenance under S. 25(1). According to the learned Judges, otherwise it will lead to a very incongruous situation, namely, that it is only when a wife becomes unchaste after the order of maintenance that she would be disabled from continuing to receive the maintenance whereas she would get it even if she has been held guilty of unchastity in the main proceedings. For this proposition, the learned Judges relied upon and and distinguished which all decisions have been referred to above.

3. There is no authority of this Court on the point brought to our notice. We are, therefore, called upon to interpret the provisions of S. 25(1) for the first time in this Court. The provisions of S. 25 are as follows :

" Section 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 pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term nor 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-s. (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 women, 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)."

It is obvious from the provisions of sub-s. (1) that the section does not make any distinction between decrees and decrees, and particularly between decrees passed on the ground of unchastity of the parties to the marriage and those passed on other grounds. Under the sub-section, parties to the marriage entitled to maintenance whatever the nature of the matrimonial proceedings. The section further gives power to the court to grant maintenance to either of the parties not only at the time of the passing of the decree in the matrimonial proceedings but also at any time subsequent thereto. The sum to be awarded is for the "maintenance and support" of the applicant, and not a share in the income or property of the respondent, the idea being that the applicant must have enough to make both ends meet so long as the applicant lives. The amount awarded may be a gross sum or a periodical payment. The quantum of the amount has to be just taking into consideration not only the income and property of both the parties but also their conduct and other circumstances of the case. The court can also secure the payment of the amount, if necessity, by a charge on the immovable property, if any.

Sub-section (2) empowers the Court to vary, modify or rescind the maintenance order already made, if there is a change in the circumstances of either party. In the context particularly of sub-s. (3), the " circumstances" here obviously mean the economic or financial circumstances of the parties.

Then follows the important provision of sub-s. (3). It provides for varying, modifying or rescinding of the order of maintenance in two eventualities, viz., the beneficiary of the maintenance order had remarried or has not remained chaste. Even in such cases the maintenance order is not necessarily to be varied, modified or rescinded but "may" be varied or modified or rescinded or only varied or modified instead of being rescinded and that too in such manner as the court may deem just. The history of the sub-section shows that prior to its amendment by Act 68 of 1976, for the words " 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 words were " it shall rescind the order". The deliberate change which the legislature has made in the language of the sub-section therefore shows that the Court is given a

wide discretion in the matter depending upon the facts of each case. It is necessary to emphasise this discretion vested in the Court since the decisions in and AIR 1970 J and K 150 discussed above, appear to us, with respect, to have proceeded on the assumption that this sub-section vests no discretion in the Court and the Court has to cancel the order of maintenance once unchastity of the party is proved. It has also to be remembered that these decisions were prior to the amendment of sub-s. (3)

4. The scheme and provisions of S. 25 as we have analysed above, show that an applicant is entitled to maintenance under sub-s. (1) thereof notwithstanding the kind of matrimonial decree that is passed and the ground on which it is passed. A decree passed and the against the applicant on the ground of unchastity is no bar to his or her claiming maintenance either at the time of passing such decree or any time subsequent thereto. The Court has ample discretion to grant or refuse maintenance, and the extent to which to grant the same, depending on the facts and circumstances of each case. The legislature did not intend to lay down a rule that in all cases there the claimant has been proved to be unchaste., he or she should be denied maintenance. On the contrary, the legislative approach on the subject appears to be liberal, reformative and conciliatory. The legislature had to be pragmatic on the subject since all acts of unchastity cannot be painted with the same brush. In one case, a single fall from virtue may brand a person unchaste while a persistent unchaste conduct in other case may remain unnoticed for a long time. Similarly, a person may become a victim of a helpless or an uncontrollable situation in one case while another case may reveal a defiant debaucherous conduct. There may be cases where the opponent is directly or indirectly a contributory party to the unchaste conduct of the applicant. The circumstances in which decree on the ground of unchastity are passed may also differ from case to case. No two situations are comparable much less similar. Life is complex and human behaviour inscrutable and complicated. What is mare, in a country like ours inhabited by social groups with diverse social mores, customs and practices, ethical norms, moral concepts and cultural patterns, no uniform standard of personal and social conduct including that of matrimonial fidelity can be laid down. Much less can such conduct be judged by a single norm. This consideration appears to have weighed with the legislature in refraining from being dogmatic on the subject, and in adopting a realistic approach in the matter. The deliberate change in the language brought about by the amendment amply proves the said intent. Hence, according to us, however repugnant or repulsive may appear the idea to a mind traditionally steeped in one set of moral code, the section does not disentitle a party to maintenance even if a decree is passed against him or her on the ground of unchastity.

5. The view which we are taking of the section gains support also from the law on the subject prior to the enactment of the Act. the statement of old law on the point appears in Mulla's Hindu Law, 13th Edition at page 547, para 556, and is as follows :

"A wife, who leaves her home for purposes of adultery, and persists in following a vicious course of life, forfeits her right to maintenance, even though it is secured by a decree. But it would seem that if she completely renounces her immoral course of conduct, her husband is liable to furnish her with a 'bare' (or what is also called 'starving' ) maintenance, that is, food and raiment just sufficient to support her life."

The view that we are taking of the provisions of S. 25(1) of the Act need not therefore oppress even the orthodox mind. If according to the old law, even a woman who had left her home expressly for living an adulterous life and had persistently led it for some time, was entitled to at least a bare subsistence after she renounced it, there is much to be said in favour of the view that a decree passed on the ground of unchastity will not by itself be sufficient to disentitle her to maintenance under the present provisions. It is common knowledge that the Act has been placed on the statute book to reform the old law by removing some of its oppressive, unjust and outworn provisions and introducing modern and progressive measures. It will therefore be against both the letter and the spirit of the Act to hold otherwise.

6. The facts in the present case further show that to take the view canvassed by Shri Phadkar may result in injustice particularly to the weaker sex, in many cases. The judgment of the trial Court in the divorce proceeding has been produced in the present case at Ex. 18. It was the case of the petitioner-husband in the divorce proceeding that the respondent-wife had left his house on 23-9-73, and he had no access to her till 16-9-1974 when admittedly the child was born. As against this it was the case of the respondent-wife that she was residing with the petitioner till 4-1-1974 when she was driven out of the house by the petitioner. It was also her case that the child was of the petitioner. After she was driven out, she had filed a criminal complaint against the petitioner being Criminal Case No. 8 of 1974 alleging beating, wrongful confinement and criminal intimidation. She had also filed an application for maintenance under S. 125, Cri. P.C., both for herself and the child alleging therein that the child was of the petitioner. She did not succeed either in the criminal complaint or in the maintenance application. She is admittedly an illiterate woman. While giving her deposition in the maintenance application, she had stated that she was driven out of the house in the month of Kartik in the year 1973. The learned Judge while recording the finding in the divorce case referred to this deposition in the maintenance application and observed that the month of Kartik in the year 1973 was from 23rd October till 24th November of that year, and therefore, the child which was born on 16th September, 1974 after 280 days could not be that of the petitioner. It must also be remembered that in that case none was named as a co-respondent nor was it alleged that she was living an immoral life with any particular person as such. What is more, in the present case not a single suggestion has been made that she was living an unchaste life after the divorce decree. The entire cross-examination of the respondent was directed only to find out her income. Further, in the divorce case itself, the learned Judge has come to the conclusion that " the evidence on record made it difficult to infer that the respondent had left the matrimonial home on her own accord and against the wish of the petitioner. This ground appears to have been introduced with a view to avail benefit of S. 13(1)(1B), Hindu Marriage Act, as amended by Act 68 of 1976. In the absence of any cogent and credible evidence to prove desertion on the part of the respondent, this issue is answered in the negative." This shows that there was no finding against the respondent-wife that it was she who had deserted the petitioner-husband. This is yet another circumstances in favour of the respondent-wife in the present case. The decree of divorce was passed against her mainly on account of her statement that she was driven out of the matrimonial home in the month of Kartic of the relevant year and on account of her failure to prove the petitioner's access to her during the relevant period. We are, therefore, of the view that this was a fit case in which the discretion to award maintenance ought to have been used in favour of the wife, and the same in her favour. The order passed is, therefore, both valid and proper.

7. Shri Phadkar then contended that the Courts below had not taken into consideration the fact that the petitioner had a meagre income, and had granted maintenance Rs. 60/- per month which was on a higher side. The record shows that the respondent wife in her deposition has stated that the petitioner was a businessman and possessed of immovable property, and his monthly income from his grain-business was Rs. 2,000/-. He was also in receipt of rent to the tune of Rs. 200/- to Rs. 350/- per month. She had therefore claimed Rs.250/- as monthly maintenance. In the cross-examination, what was suggested to her was that the petitioner owned only a small shop, and that he received monthly income at the rate of Rs.100/- to Rs. 125/- only, from the said shop. She was also asked as to whether she had any extracts from the property register showing that the petitioner possessed any property. It was also suggested to her that he did not own any property. In reply to this suggestion, she stated that the property was transferred by the petitioner in the name of his mother. As against this, the petitioner in his deposition stated that his business was on a small scale and he earned Rs. 125/- per month from it. According to him, he had a shop in the village Sarade (whereas the respondent-wife claimed that the shop was in village Nampur). The population of Sarade was about 1500 and that of Nampur was about 20,000/-. He admitted that one house stood in the name of his mother, but stated that he did not get any rental from that house. It was his case that the respondent-wife was getting Rs. 5/- to Rs. 7/- per day as wages from a bidi factory. He admitted in his cross-examination that he had constructed a house at Nampur after purchasing a plot there. He also admitted that Nampur was a prosperous town. He further admitted that all his three brothers were graduates, but denied that he had spent any amount for their education. In cross-examination, he stated that his daily sale in his shop was to the tune of Rs.. 100/- to Rs. 125/-. He however added that he was not maintaining any accounts. He also further admitted that whatever he stated with reference to the income of the applicant from her service in the bidi factory was based on hearsay evidence. In this state of evidence, the trial Court came to the conclusion that the petitioner was in a position to pay Rs. 60/- per month as maintenance and awarded it. This quantum was confirmed by the Appeal Court as well. Apart from the fact that the quantum is fixed on the basis of the evidence on record and is a pure finding of fact, we are unable to appreciate what fault could be found with the said finding in the circumstances.

8. In the result, the petition fails and the rule is discharged with costs throughout.

9. Petition dismissed.