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Court : Gujarat

Decided On : Aug-29-1977

Reported in : (1978)19GLR29

Judge : A.N. Surti, J

Appellant : Bai Ramilaben, D/O Ambalal Jinabhai

Respondent : K. Antilal Shankerlal

Judgement :

A.N. Surti, J.

1. The question of considerable importance affecting a woman's right to obtain an order of maintenance and against whom a decree for judicial separation is passed under Section 10 of the Hindu Marriage Act, 1955 is raised in this revision application.

2. In order to appreciate the point canvassed before me, a few relevant facts may be stated.

3. The petitioner Bai Ramilaben daughter of Ambalal Jinabhai and wife of Kantilal Shankerlal of Baroda is the lawfully wedded wife of the opponent-husband. The marriage was performed on June 10, 1971 at Baroda as per Hindu religious rites and ceremonies. After the marriage, the petitioner-wife resided with her husband at Bombay. It was alleged that the opponent-husband's behaviour towards her was not good as her father had given less amount as 'Kariawar' at the time of the marriage. The opponent-husband was residing in a joint family along with his brother and sisters who used to mentally torture the petitioner-wife in regard to the amount of 'Kariawar' amount. Suffice it to state, that the entire family of the husband was cruel to the petitioner-wife, and she was being mentally tortured. The petitioner-wife went on tolerating the cruel treatment given to her by the husband's family for about 2 to 3 months, and thereafter, the opponent-husband sent the petitioner to her parents. The petitioner stayed at her parent's house for 2 months, and thereafter, with a hope of having a happy home, she went to the opponent-husband's house, but again, the whole family harshly taunted her, and within a period of one month thereafter, she was driven out from the husband's house. The petitioner was taken to her parent's house by the husband's sister. Under the circumstances when she filed the present application on July 2, 1975 in the Court of the learned Judicial Magistrate, First Class, Baroda, being Miscellaneous Application No. 47 of 1975 she was residing with her parents. She stated in her application that the husband was earning about Rs. 700/- per month and that she was unable to maintain herself. She also stated that she was willing to go and stay with the opponent-husband but the opponent No. 1 had deserted her. Under the circumstances, she claimed Rs. 150/- per month as the amount of maintenance.

4. The opponent-husband resisted the application filed by the petitioner-wife and submitted his written statement Ex. 8 and inter alia contended that the contents of the maintenance application were false. The opponent-husband admitted that there was the legal marriage between the parties, however, he denied the

wife's allegations of ill-treatment and desertation. In substance, his defence was that the petitioner-wife had left his house without any fault on his part. He also stated that his monthly income was Rs. 263/-. He also brought to the notice of the learned Magistrate that he had filed (a) H.M.P. No. 1161 of 1975 on February 6, 1975 in the City Civil Court at Bombay for a decree for judicial separation, and the same was granted, and hence, the maintenance application filed by the petitioner-wife was not maintainable.

5. The husband in course of the proceedings before the learned Magistrate gave a separate application. Ex. 11, and requested the learned Magistrate to dismiss the maintenance application on the ground that the City Civil Court at Bombay had passed the decree for judicial separation on the ground of 'desertion by his wife', and hence, under Section 125(4) of the Code of Criminal Procedure, 1973 the maintenance application filed by the petitioner-wife was not maintainable.

6. The learned Judicial Magistrate, First Class, Baroda, rejected the application filed by the petitioner-wife placing reliance on Section 125(4) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'New Code') with no order as to costs. The learned Magistrate in substance, took the view that the City Civil Court at Bombay in H.M.P. No. 1161 of 1975 held that the husband is entitled to get a decree for judicial separation under Section 10 of the Hindu Marriage Act, 1955 on the ground of 'desertion by the wife to the husband', and hence, the petitioner-wife was not entitled to maintenance for living separately from her husband.

7. In support of his aforesaid conclusion, the learned Magistrate placed reliance on the decision of the Gujarat High Court in *Dahyalal v. Madhukanta* : AIR1965Guj247 . He also placed reliance, on the reported decision in *Baldev Raj v. Pushparani* .

8. In the opinion of the learned Magistrate as there was a decree for judicial separation in favour of the opponent-husband on the ground of desertion by the wife to the husband, she is not entitled to claim any maintenance.

9. It is under these circumstances that the present revision application is filed in this Court by the wife.

10. Mr. K.C. Shah, the learned advocate appearing on behalf of the petitioner-wife, at the very outset, told me that the learned Magistrate erred in placing reliance on the aforesaid two judgments which were delivered by the High Courts prior to the coming into force of the New Code. Mr. Shah submitted that Section 125 of the New Code provides inter alia that any wife who is unable to maintain herself is entitled to obtain an order for maintenance, if any person having sufficient means neglects or refuses to maintain his wife. Explanation to Section 125 in clearest terms confers a statutory right even on a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried to obtain an order of maintenance in her favour.

11. Sub-section (2) of Section 125 of the Code postulates that the amount of maintenance shall be payable either from the date of the order, or, if so ordered, from the date of the application for maintenance.

12. Sub-section (3) of Section 125 of the Code provides that if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made; provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due; provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. The explanation to Sub-section (3) of Section 125 provides that if a husband had contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

13. Sub-section (4) of Section 125 is in the following terms:

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

13.1 Sub-section (5) to Section 125 postulates the cancellation of the orders for maintenance if it is proved that the wife is living in adultery, or that without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

13.2 Section 126 the Code provides for the procedure to be followed for obtaining an order for maintenance.

13.3 Section 127 of the Code postulates alteration in the amount of maintenance on proof of a change in the circumstances. It also provides for cancellation or variation of orders of maintenance in consequences of any decision of a competent Civil Court. It also provides for the cancellation of the order of the maintenance if the woman has remarried or the woman has received the whole of the sum which under any customary or personal law the woman is entitled to get as a result of the divorce.

14. A plain reading of Section 125 read with the explanation thereto clearly shows the legislative intention and its anxiety to assist the divorced women by statutory providing that if any person having sufficient means neglects to maintain even a woman who has been divorced or has obtained a divorce from her husband and has not remarried is also entitled to get a order for maintenance in her favour. This amended provision contained in Section 125 of the New Code is progressive and rational step on the part of the legislature to assist the suffering women in the society, and the subordinate Courts must administer to themselves a caution to see that while passing the orders in maintenance matters, either at the stage of witness action or the revisional stage, the aforesaid admirable object and anxiety of the legislature are not put on the shelf on some technical or flimsy grounds or because of perverse appreciation of evidence. It is absolutely necessary to make an observation of this type, as in many of such cases, it is possible that for want of sufficient funds or guidance, the suffering section of women cannot rush up to higher courts for asserting their statutory right for maintenance in aid of human existence. In the case before me, the learned Magistrate unfortunately took the view that as the opponent-husband has obtained a decree for judicial separating. On the ground of desertion by wife to the husband, and hence the is flat entitled to claim any maintenance.

15. Section 10 of the Hindu Marriage Act, 1955, provides for a decree for judicial separation on several grounds mentioned in the said section. Section 13(1)(A)(ii) of the aforesaid Act provides that either party to a marriage may present a petition for dissolution of marriage by a decree of divorce on the ground:

(i) That there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) That there has 'been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

16. From the aforesaid provisions contained in Sections 10 and 13 of the Hindu Marriage Act, 1955, it is clear that when a party against whom a decree for judicial separation is passed, it is unquestionably and merely a step-in-aid of getting a decree for divorce. In the case before me, a decree for divorce infavour of the husband is yet not passed. As stated above, explanation read with Section 125 of the Code clearly provides for an order of maintenance in favour of even a divorced wife. In view of what has been stated above, the aforesaid two judgments on which reliance was placed by the learned Magistrate for passing the impugned order have no bearing at all having regard to the provisions contained in Section 125 of the New Code.

17. As a result of the aforesaid discussion, I am convinced, that in the instant case the wife-a suffering

woman, a victim of cruelty and torture and who lost all the hopes of a happy home has been denied her statutory right to obtain an order of maintenance. The learned Magistrate obviously committed an error in law in rejecting the application filed by the petitioner-wife for obtaining an order of maintenance in her favour. Before the learned Magistrate, the petitioner-wife stated that the opponent husband's income is Rs. 700/- per month, whereas the opponent-husband stated that his monthly income is Rs. 263/-. Having regard to the fact that the wife had filed an application on July 2, 1975 about two years before this matter was taken up by me for disposal, the ends of justice can only be served, if I direct the opponent-husband to pay to the wife a nominal sum of Rs. 75/- per month from the date of the application till today by way of interim maintenance. I also direct the opponent to pay a sum of Rs. 75/- per month till the disposal of the maintenance application, which I propose to remand to the Court of the learned Magistrate. The opponent-husband will continue to pay a sum of Rs. 75/- per month till the learned Magistrate decides the maintenance application filed by the petitioner-wife in his Court. The opponent-husband is directed to carry out the aforesaid directions without any default.

18. In the result, I set aside the impugned order passed by the learned Magistrate, and direct the learned Magistrate to take on his file Miscellaneous Application No. 47 of 1975, and will decide the exact quantum of maintain to be paid to the petitioner-wife, and in light of his decision of the quantum of amount of maintenance, the learned Magistrate may suitably alter my order of interim maintenance in the light of his final decision on the quantum of maintenance. The revision application is allowed, and the rule is made absolute to the aforesaid extent.

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