

Hashish Sharma Vs. Sushma Sharma

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Court : Rajasthan

Decided On : Sep-19-1995

Reported in : I(1996)DMC303

Judge : Mohini Kapur and; M.A.A. Khan, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 25

Appeal No. : Civil Misc. Appeal No. 272 of 1987

Appellant : Hashish Sharma

Respondent : Sushma Sharma

Advocate for Def. : None

Advocate for Pet/Ap. : J.K. Jain, Adv.

Judgement :

Mohini Kapur, J.

1. The Judge, Family Court, Jaipur, on an application moved by the husband, for declaring that his marriage with the respondent, wife was a nullity on the ground that the wife was impotent and, therefore, the marriage was voidable under Section 12(1)(a) of the Hindu Marriage. Act, passed a decree as prayed. At the same time, the Judge, Family Court has allowed a sum of Rs. 400/-per month by

way of maintenance to the respondent-wife till such time as she should marry or starts earning her own income. The appellant-husband preferred an appeal against this judgment and decree dated 11th August, 1987 as he is aggrieved by the award of maintenance. The wife has preferred a separate appeal as she is aggrieved by the findings of her impotency and consequentially declaration of the marriage as nullity.

2. In this appeal filed by the husband-appellant, we are concerned with the grant of maintenance only and the question is whether maintenance to the wife can be granted in the case of voidable marriage.

Section 25 of the Hindu Marriage Act reads as under:-

'25. Permanent alimony and maintenance : 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.'

3. This provision of law governs with the grant of maintenance. It provides that at the time of passing any decree or at any time subsequent thereto the Court may make an order granting maintenance to the wife or to the husband after fixing a sum payable, having regard to the income and property of the parties. This section does not make any distinction between the cases where the marriage is void or voidable or divorce has been granted on any other grounds.

4. Learned Counsel for the appellant has contended that when the marriage itself was a nullity then the relationship of the husband and wife did not come in existence and when the parties were not husband and wife then the maintenance cannot be allowed to the wife. For this purpose he placed reliance on the case of *Bhaiyalal v. Phoohvati Bai*, 1993(2) D & M Cases 398. In this case it was held that when there was no relationship between the husband and wife at any time, as the marriage was declared null and void under Section 11 of the Hindu Marriage Act, then the Court has no jurisdiction to grant maintenance under Section 25 of the Act. He has also placed reliance on the case of *Ishwvar Singh v. Smt. Hukam Kaur*, AIR 1965 All. 464. In this case it has been held that where the marriage was proved to be illegal, the wife was not entitled to receive any maintenance. This case refers to marriages which are void by virtue of Section 11 of the Act. Under Section 11 of the Hindu Marriage Act, it has been provided that any marriage which contravenes the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Act, can be declared to be null and void by a decree of nullity. These grounds are, (i) neither party has a spouse living at the time of the marriage, (ii) the parties are not within the degrees of prohibited relationship, and (iii) the parties are not sapindas of each other. The marriages which are voidable have been provided in Section 12 of the Hindu Marriage Act, and one of the grounds on which a marriage can be annulled by a decree of nullity is that the marriage has not been consummated owing to the impotence of the respondent. A voidable marriage has to be regarded as good for all purpose until annulled by a decree of nullity the Court. It is the option of the parties to the marriage whether they want to declare the marriage a nullity or not. A voidable marriage means that it was valid at the time it takes place but subsequently, it becomes a nullity on certain facts coming to the notice of one of the parties to the marriage and then that party can get a declaration to the effect that the marriage is an nullity. It cannot be said that the

marriage was a nullity from the very inception so as to say that the relationship of husband and wife did not come into existence. When once the relationship of husband and wife is to be accepted then either party can be granted maintenance in accordance with provisions of Section 25 of the Hindu Marriage Act. In the case of Smt. Rajesh Bai and Ors. v. Smt. Shantiabai, AIR 1982 (Bombay) 231, the issue about the validity of marriage arose before the Civil Court in some other proceedings and it was held that the question could be decided and the provisions of Hindu Marriage Act, could not be a bar and at the same time it was also held that in appropriate cases, the relief of maintenance can be granted to a wife from the estate of her deceased husband even on its findings that the marriage was void.

5. The view taken in the case of Bombay High Court differs from the views taken in the cases of the Allahabad and M.P. High Courts. However, we are not concerned with the void marriage but with voidable marriage and in case of voidable marriage, the marriage cannot be said to be a nullity at the time when it took place but it is a subsequent stage that the marriage is found to be voidable and the party effected may get it declared a nullity. When once the relationship of husband and wife exists then under Section 25 of the Hindu Marriage Act, maintenance could be awarded to the party claiming it.

6. The husband has moved an application stating therein that the wife has since been employed and is having her own income. He has also produced a certificate showing that she has been employed as a Teacher from 21st February, 1990 and her salary on appointment was Rs. 1,410/- in the pay-scale of Rs. 1200/- to Rs. 2050/-. This fact has not been controverted by the wife. The learned Judge, Family Court has imposed a condition while granting maintenance that this maintenance shall be stopped if the respondent-wife shall re-marry or start having her own income. In view of this, the respondent can get maintenance only till the month of February, 1990 and thereafter, it will be stopped. There is a provision in Section 25 of the Hindu Marriage Act, itself, that due to subsequent events the order of granting maintenance may be modified. Thus, in view of the order passed by the Judge, Family Court, it is ordered that the respondent shall pay maintenance upto February, 1990 and thereafter, the respondent-wife shall not be entitled to any

maintenance.

7. In the result, the appeal is partly allowed to the extent as mentioned above.

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