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**(1971) 04 DEL CK 0034**

**In the Delhi High Court**

**Case No : First Appeal No. 119 of 1969**

Ashok Ratilal Trivedi

APPELLANT

Vs

Anjani Madhusudan Oza

RESPONDENT

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**Date of Decision :** 06-04-1971

**Acts Referred:**

**Citation :** (1971) ILR Delhi 97

**Hon'ble Judges :** P.N. Khanna, J

**Bench :** Single Bench

**Advocate :** K.N. Kataria, J. Lal, T.P.S. Chawla and R.P. Kapur, for the Appellant;

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## **Judgement**

P.N. Khanna, J.

(1) The parties to this appeal were married on May 14, 1964. On April 26, 1965 their marriage was annulled by a decree of nullity, at the instance of the respondent-wife, who had applied for that purpose, on the ground of the appellant-husband's impotency. The petition for permanent alimony and maintenance was then filed by the respondent-wife on June 9, 1966 on the allegations that she had no independent income sufficient for her maintenance and support. The appellant was holding the rank of a Major in the Indian army drawing a salary of Rs. 1350.00 per month and was said to be a wealthy man, possessed of moveable and immovable properties of the value of several lakhs of rupees. He was further alleged to be a member of the joint Hindu family, which owned extensive properties in the States of Gujarat and Maharashtra. The respondent Therefore, claimed a maintenance allowance of Rs. 1000.00 per month, a.s Ions as she remained unmarried or in the alternative a sum of Rs. 1.20,000.00 in lump sum for her maintenance and support.

(2) While contesting the respondent's claim, the appellant stated in his written statement that he was holding the rank of a Major in the Indian Army at a substantive salary of Rs. 900.00 per mensem and that his father had gifted to him a sum of Rs. 1.00,000.00. which he had invested in the Government of

India. Conversion Loan yielding a gross return of Rs. 3,000.00 per annum. He, however, denied that he had any share in the joint Hindu family property. On the other hand, according to him, he was separate from the family and had no interest in the family property. The respondent was admitted to have no income on the date of the filing of the written statement on December 3, 1966, but she was holding a Masters Degree of the University of Delhi, and was, therefore, said to be in a position to earn her own living. She was said to be preparing already for the competitive examination for entry to the Indian Administrative Service. The respondent in her rejoinder admitted that she had appeared in the Indian Administrative Service competitive examination in her attempt to get over the matrimonial tragedy. She, however, stated that the appellant's impotency and depravity had told heavily on her mind, body and health as a result of which she had been reduced to a complete nervous wreck.

(3) The learned Additional District Judge, Delhi, found that the respondent-wife had been appointed to the Indian Revenue Service with effect from July 15, 1967 and had a monthly income of Rs. 603.00 as salary and allowance; but had no income from June 9, 1966, the date of the application, until July 15, 1967. It was also found that she did not own any moveable or immovable property except jewellery worth about Rs. 900.00 which she had purchased after her appointment to the Indian Revenue Service.

(4) The appellant, according to the learned Additional District Judge, was earning a gross income of Rs. 2000.00 P.M. including salary of about Rs. 1000.00 per month. He admittedly received a gift of about Rs. 1,00,000.00 from his father. The appellant had tried to conceal his income. The respondent was held entitled to an allowance of Rs. 700.00 per month; and as she had no income of her own from June 9, 1966 to July 15, 1967, she was entitled to recover Rs. 9,100.00 from the appellant as arrears of maintenance for the said period, at that rate. As against the respondent's income of Rs. 600.00 per mensem, it was considered just and reasonable to give to the appellant-husband the benefit of Rs. 500.00 per month only, for the purpose of calculating, the amount payable by him. The respondent was thus considered entitled to recover at least Rs. 200.00 per month from July 15, 1967 onwards. The case was, however, considered fit for a lump sum award to the wife. She was thus held entitled to a gross sum of Rs. 16,000.00 to which was to be added Rs. 9,100.00 as the arrears of maintenance, making a total of Rs. 25,000.00 lump sum, and costs of the proceeding.

(5) The learned counsel for the appellant submitted that the basis of calculation adopted by the learned Additional District Judge was wrong. The net receipt of salary by the appellant was said to be Rs. 998.44.00 to which was to be added a sum of Rs. 250.00 per month, being the interest on the sum of Rs. 1,00,000.00, making a total monthly income of Rs. 1,248.00. The wife's income of Rs. 602 per month was to be added to this, making a total of Rs. 1,850.00. One-third of this amount was Rs. 616.00; and as the respondent was already receiving Rs. 603.00 per month, inclusive of dearness allowance, towards her salary, the

shortfall was Rs. 13.00 per month only, which was hardly worth considering. So far as the period before her employment was concerned, she could be entitled to one-third of Rs. 1248.00. This would give her Rs. 5408.00 as arrears of maintenance for 13 months, calculated at the rate of Rs. 416.00 per month. He further contended that the respondent was likely to marry soon and was, therefore, not going to enjoy any monthly allowance from the appellant for a long time. She should, therefore, be awarded, if at all, only monthly payments. There was no justification to award her a lump sum amount for future maintenance.

(6) The learned counsel for the respondent on the other hand, contended that the amount of maintenance as awarded by the trial Court, heavily leaned towards the appellant-husband. He referred to the conduct of the appellant during the proceedings in Court from which it was evident that he had deliberately concealed from the Court his true income, which was much more. It was, therefore, not possible to know his exact income except by relying on whatever un rebutted evidence was available of his spending power. He further contended that the grant of maintenance at the rate of one-third of the total income of the parties as adopted by the trial Court was not always correct, for there are cases where the rule of one-half had been adopted. It has to be according to the justice of the case, that the rule of one-half or one-third or any other rule would be applicable for determining the maintenance. There in fact, could be no hard and fast rule. submitted the learned counsel.

(7) The appellant, it is observed, did not step into the witness box to make a statement on oath and give an opportunity to the respondent wife to cross-examine him in order to elicit information about his income. Nor did he give any other clear information to determine his financial status. All this information is only within his special knowledge. Even the interrogatories served on the appellant on behalf of the respondent on April 10, 1967, were not replied for one reason or the other till May 15, 1968: and the reply itself when filed was found to be evasive and withholding important information. On a further application by the respondent the appellant was directed to file proper replies, which he ultimately did on August 3, 1968. Even this time the appellant did not give answers to material interrogatories aimed at eliciting information about his income and Income Tax, wealth tax, or other taxes assessed on him for the accounting years 1963 and thereafter. He replied that the Income Tax was paid by him through the State Bank of India, Bombay, and he himself was not in possession of the particulars of the taxes paid on his behalf from year to year. His salary as a Major in the Indian Army being Rs. 1100.00 as on April 1, 1968 was not disputed. The trial Court's estimate that he was drawing approximately Rs. 1200.00 per month at the time of the passing of the order was, therefore, not unjustified. He had admitted that he received a sum of about Rs. 1,00,000.00 from his father. He was not exact about the amount. The trial Court, therefore, was rightly of the opinion that this amount was more than a lakh. The respondent had further admitted that he was insured for a total sum of Rs.

40,000.00. The appellant's father had stated in the witness box that the appellant lives well and entertains well". From one of the Bank accounts of the appellant. copy exhibit P.I. it appears that his withdrawals from 1960 to 1967 had been sometimes more and sometimes less. hut on a rough average in the order of about Rs. 2000.00 per month. It was urged on behalf of the appellant that as this account had always been running into a debit balance, it afforded no guidance. This contention is not acceptable. The over-draft in this account must have been allowed by the Bank on some substantial security, may be on the security of the substantial sum lying to the appellant's credit in fixed deposits. It. is significant that the debit balance in the account remained almost the same. when examined over a long period of years. It did not show any appreciable increase. The withdrawals, Therefore, have almost been corresponding to the deposits or credits in the account. The .spending has thus been more or less equal to the income. All other evidence having been deliberately withheld by the appellant, the inference drawn by the learned Additional District Judge, from the evidence about the appellant's spending power, even though it may be only a part of his such power, cannot be said to be unjustified. in J. v. J. 1955 (2) All E.R. 617. Hodson L.J. of the Court of appeal observed, "where a husband by means of bank loans, is enabled to maintain a consistent standard of living over a substantial period. The standard here is, in my opinion, a proper and, indeed, the only guide to be followed by the court in making provision for the maintenance of the wife." The approach of the learned Additional District Judge was. Therefore, correct.

(8) The court has been given the discretion u/s 25 of the Hindu Marriage Act. to order payment to the applicant for her maintenance and support such gross sum or such monthly or periodical sums as, "it may seem to the Court to be just", having regard too "the respondent's own income and other property, if any. the income and other property of the applicant and the conduct" of the parties." The income and property of the parties in this case has been considered as above. The conduct of the parties remains to be considered, in order to determine, which way the Court should incline favorably. The appellant was found at the time of trial during the nullity proceedings. to be guilty of exceptional depravity towards the respondent. inspire of his impotency at the time of the marriage, as established, in the said earlier proceedings, he allowed the marriage to go through and thus spoiled the respondent's life. The allegations made in the petition for decree of nullity as were found to be duly proved, showed that the appellant was caught by the wife one night, while indulging in carnal intercourse against the order of nature with his orderly who was the active agent. He then tried to compel the respondent to subject herself to sexual intercourse with the said orderly, and this brought about the final break, when she left the matrimonial home and went back to her parent's house. This conduct of the appellant was kept in mind by the trial Court, while fixing the amount of maintenance for the respondent.

(9) From the side of the appellant, husband, no evidence was produced except

the oral statement of the appellant's father. The only other evidence in the case consisted mainly of the statement of the respondent herself and the copy of one of the bank accounts of the appellant, referred to above. So far as the oral statements are concerned, its appreciation by the trial court cannot be easily disturbed in appeal. As was held in *Sarjn Persluui Ranuleo Sahu v. Jwaleshari Pratap Narain Singil D and others* Air 1961 Sc 120 . "the rule is-and it is nothing more than a rule of practice-that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence Of a particular witness which has escaped the trial Judge's notice, or there is sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact." (Also see *W. J. Rees Vs. John Young*, . The conclusion drawn by the learned trial Judge, Therefore, that the appellant's, income should be considered to ze Rs, 2000.00 per mensem was not unjustified and cannot be interfered with, especially when the facts of the case are examined in the light of the copy of the appellant's bank account, which has been produced. For the purpose of fixing the amount of maintenance for the wife, sometime one-third of the husband's income has been allowed, although one-half has also been considered as the correct figure. No hard and fast rules are fixed. In para 11 on page 808 of *Raydon on Divorce* (Tenth edition), the learned author writes : "Although, in fixing the amount of permanent alimony to be allowed lo an innocent wife, the court sometimes follows the practice in certain cases of the Ecclesiastical Courts of allowing one-third of the husband's income, or, where the wife has an income of her own, of making up the wife's income to one-third of the joint incomes, this is not a hard and fast rule, and the Court has a discretion to fix the amount according to circumstances; sometimes awarding less than one-third, and occasionally as much as one-half." Section 25 of the Hindu Marriage Act leaves the matter to the discretion of the Court to fix such amount as it may seem to it "to be just". Fixation of this amount at Rs. 700.00 per month by the trial Court, Therefore, hardly calls for any interference by this Court. The appellate Court would interfere only if it is satisfied that the trial Court's decision is wrong and not merely because it is not satisfied that it is right. The Supreme Court in *S.M. Banerji Vs. Sri Krishna Agarwal*, observed: "The appellate court has no doubt an unquestioned right to review or modify the order made by & subordinate Court; but it is undesirable to do so when the subordinate Committee made an order in the exercise of its discretion without exceeding the limits of its power, unless it acted perversely or unless the view taken by it is clearly wrong."

(10) The learned trial Court in the circumstances of this case, has exercised its discretion in a proper manner, and the amount of Rs. 700.00 per month fixed as the maintenance allowance for the respondent has been correctly fixed. So far as the income of the wife is concerned, she is earning Rs. 603.00 per month. But allowance is not to be given of her entire income, while fixing a maintenance

allowance for her, as she is entitled to have some discount applied to it. In *Ward v. Ward*, 1947 (2) All. E.R. 713 . it was observed :

"I take the view that the wife is not under an obligation in the circumstances to go out and earn, and that if she does obtain employment the husband is not entitled to have the whole amount of what she earns taken into account in any calculations which affect maintenance. On the other hand, I propose to assume that she will work when she can and that there should accordingly be some "discount" applied to whatever amount would otherwise be ordered against the husband as regarded maintenance."

Applying the principles as laid down in the above authorities, the learned trial Court rightly considered it just and reasonable to give to the appellant the benefit of a sum of Rs. 500.00 (as against Rs. 603.00) per mensem as the wife's monthly income for the purpose of calculating the amount of alimony. In this way, he came to the conclusion that the respondent was entitled to recover at the rate of Rs. 700.00 per month with effect from June 9, 1966 to July 4, 1967 and at least Rs. 200.00 per month from July 15, 1967 onwards, to ensure the standard of living commensurate with the appellant's means and duty towards her. This decision of the learned trial Court is correct and is maintained.

(11) Instead of awarding periodical maintenance, it is indeed a fit case in which the wife should be allowed a gross sum roughly calculated on the basis of the capitalised value of the monthly allowance. The dilatory tactics adopted by the appellant during the trial of these proceedings is enough justification for the apprehension of the respondent that in order to recover maintenance every month she will be subjected to untold " harassment. Furthermore, the appellant is possessed of enough liquid resources, out of which to make a lump sum payment will be no difficulty for him. It is, Therefore, appropriate in this case that the parties should put an end to this unfortunate episode once for all by the husband paying the gross sum calculated in lieu of all further maintenance. The gross sum of Rs. 16,000.00 fixed as lump sum payment towards all maintenance, with effect from the period after July 15, 1967, is, therefore. fully justified. the respondent has been held entitled to Rs. 9.100 as the arrears of maintenance for the period before July 15, 1967. In total she is entitled to Rs. 25.000.00 as a lump sum towards her maintenance and support.

(12) The trial Court has not made unreasonable approach to the question before it. There, is. Therefore, no merit in this appeal and the same is dismissed with costs. Counsel fee Rs. 300.00