

(1976) 03 BOM CK 0057
In the Bombay High Court
Case No : A.F.A.D. No. 93 of 1976

Govindrao Ranoji Musale

APPELLANT

Vs

Sou. Anandibai and Another

RESPONDENT

Date of Decision : 24-03-1976

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 18
Hindu Marriage Act, 1955 — Section 23(1), 25(1)

Citation : AIR 1976 Bom 433 : (1977) 79 BOMLR 73 : (1977) MhLj 144

Hon'ble Judges : Kania, J

Bench : Single Bench

Advocate : M.L. Pendse, for the Appellant; K.J. Abhyankar, for the Respondent

Judgement

1. This is an appeal by the husband, who has been unsuccessful in both Courts below. Very few facts are necessary for appreciation of the controversy arising in the appeal. Both the principal parties viz. the appellant and respondent No. 1, as well as respondent No. 2, are Hindus governed by the Hindu Law. In 1934 the appellant was married to respondent No. 2 according to Hindu rites and they lived as husband and wife. The appellant did not have any child by respondent No. 2. On 24th May 1959 the appellant went through a ceremony of marriage according to Hindu rites with respondent No. 1. At the time when this ceremony was gone through by the parties, respondent No. 2 was alive and she is still alive; and the marriage between the appellant and respondent No. 2 was subsisting then and is still subsisting. There is no dispute at this stage that the facts found show that in March 1963 the appellant and respondent No. 2 drove away respondent No. 1 and since then she has been residing with her parents. The averments in the pleadings and the evidence on record show that respondent No. 1 continued for five or six years to live with her parents in the hope that she would be again taken back by the appellant. In 1969 respondent No. 1 gave a notice to the appellant and demanded maintenance and thereafter filed a suit, being Regular Civil Suit No. 1. The appellant gave a notice to respondent No. 1 and demanded maintenance and thereafter filed a suit, being Regular Civil Suit No.

204 of 1970, in forma pauperis, for maintenance under the provisions of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "the Act of 1956"). The appellant resisted the suit and, inter alia, disputed the factum of marriage and status of respondent No. 1 as his wife and contended that the said marriage being void she was not entitled to any maintenance under the Act. Sometime in 1972 the appellant adopted a son and there after, on 11th December 1972, respondent No. 1 filed a petition being Hindu Marriage Petition No. 17 of 1972 in the Court of Civil Judge, Senior Division, Kolhapur, for a declaration that the marriage between her and the appellant was null and void and for maintenance at the rate of Rs. 150/- p.m. The appellant resisted the claim for maintenance made in this petition on the ground that the marriage purported to have been performed between him and respondent No. 1 was void as at the time when the said marriage was performed, respondent No. 2, who was his suppose, was living and contended that, in view of this, respondent No. 1 could not be said to be his wife and was not entitled to any maintenance. He also contended that the petition was barred by limitation.

2. The learned Civil Judge held that the marriage between the appellant and respondent No. 1 was null and void as contravening the provisions of Section 5(1) of the Hindu Marriage Act, 1955. He further held that respondent No. 1 was entitled to permanent alimony at the rate of Rs. 125/- p. m. He rejected the contention of the appellant that respondent No. 1 had disentitled herself to relief on the grounds mentioned in Cls. (a) or (d) of sub-section (1) of Section 23 of the Hindu Marriage Act, 1955. IN view of this petition having been allowed the learned Civil Judge dismissed the aforesaid suit No. 204 of 1970. Being aggrieved by the judgment and order of the learned Civil Judge in aforesaid petition, the appellant preferred an appeal in the District Court at Kolhapur being Civil Appeal No. 338 of 1973. This appeal was disposed of by the learned Assistant Judge, Kolhapur, who confirmed the decree and order passed by the learned trial Judge with a slight modification with which I am not concerned in this appeal. The present appeal is directed against the said judgment of the learned Assistant Judge.

3. As the arguments in this appeal turn, to a large extent, on some of the provision of the Hindu Marriage Act, which came into force on 18th May 1955, it may not be out of place to take notice of the same at this stage. Section 11 of this Act runs as follows:

"Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in Cls. (i), (iv) and (v) of Section 5".

Section 5 lays down the conditions which have to be fulfilled in order that a marriage may be solemnised between any two Hindus. One of these conditions, as provided in Clause (i) of that section, is that neither party has a spouse living at the time of the marriage. Sub-section (1) of Section 25 of the Hindu Marriage

Act, on which this case mainly turns, runs 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, while the applicant remains unmarried, 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 and the conduct of the parties, 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." The material portion of Section 23 runs as follows:

"(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that---

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) XX XX

(c) XX XX (d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) XX XX then, and in such case, but not otherwise, the Court shall decree such relief accordingly."

4. In the case before me, it is common ground that the marriage between the appellant and respondent No.1 was null and void in view of the provision of Section 11 of the Hindu Marriage Act as the condition imposed by Clause (i) of Section 5 thereof was not fulfilled. The petition presented by respondent NO. 1 was for a decree declaring the marriage a nullity and for permanent alimony. That decree has been passed and there is no challenge here to the decree in so far as it grants a declaration of nullity in respect of the marriage purported to have been gone through by the appellant with respondent NO. 1. The only challenge in this appeal is to that part of the decree which award maintenance by way of permanent alimony.

5. The first submission of Mr. Pendse learned counsel for the appellant, was that Section 25 of the Hindu Marriage Act merely confers a remedy but does not confer any right and hence to obtain an order for permanent alimony respondent No. 1 must establish her right under some other provision of law. It was pointed out by Mr. Pendse that neither under the customary Hindu Law nor under the Act of 1956 can it be said that respondent No. 1 has any right, as the marriage between her and the appellant was null and void and hence she cannot take advantage of the remedy granted by Section 25 of the Hindu Marriage Act. In my view, this submission of Mr. Pendse must be rejected. In the first place, on a

plain construction of the language used in sub-section (1) of the Section 25 of the Hindu Marriage Act it is clear that a description is granted to the Court exercising jurisdiction under the Act at the time of passing any decree or thereafter, on application made to it either by the wife or the husband, to order that the respondent shall pay to the applicant such sum for her or his maintenance as set out therein. This power conferred upon the Court clearly creates a corresponding right in the wife or the husband to get maintenance provided the conditions laid down for the grant of the same are satisfied. It cannot, therefore, be said that Section 25(1) of the Hindu Marriage Act does not create any right at all. Secondly, it must be appreciated that a plain reading of this provision shows that it clearly contemplates that not only the wife but even the husband would in certain circumstance be entitled to get maintenance. Neither under the customary Hindu Law nor under the Act of 1956 is any right of maintenance given to the husband at all. Hence, if the submission of Mr. Pendse is accepted, it would mean that the provisions of sub-section (1) of Section 25 of the Hindu Marriage Act, in so far as they deal with the claim of the husband for maintenance, would be redundant; and such a construction should not normally be resorted to. Thirdly, it must be remembered that the Hindu Marriage Act is a codifying Act. It is well settled that the object of codification of a particular branch of law is that on any matter specifically dealt with by it, the law should be sought for in the codifying enactment itself. In view of this, the better construction of sub-section (1) of Section 25 of the Hindu Marriage Act seems to be that not only does it provide for a remedy but it also confers a right. Finally, it must be remembered that the Act of 1956 came into force after the Hindu Marriage Act and hence it could not have been the object of Section 25(1) of the Hindu Marriage Act to create a remedy for the enforcement of a right subsequently created by the Act of 1956.

6. The next submission of Mr. Pendse was that if the provisions of sub-section (1) of S. 25 of the Hindu Marriage Act are so construed as to entitle persons, who do not enjoy the status of a husband or wife, to get maintenance, such a construction would be inconsistent with the provisions of the Act of 1956 and in particular Section 18 thereof. It was pointed out by him that the Act of 1956 is a subsequent piece of legislation and under the provisions of Section 4(b) thereof any other law in force immediately before the commencement of that Act ceased to apply to Hindus in so far as it is inconsistent with any of the provisions contained in that Act. It was urged by Mr. Pendse that u/s 18 of the Act of 1956 the right to claim maintenance was given only to a lawfully wedded Hindu wife, and hence if a wider right is given by sub-section (1) of Section 25 of the Hindu Marriage Act, the provisions thereof would be inconsistent with the provisions of Section 18 of the Act of 1956. In my view, there is no inconsistency between the provisions of sub-section (1) of Section 25 of the Hindu Marriage Act and those of Section 18 of the Act of 1956. Assuming that on a true construction of Section 18 of the Act of 1956 a right is conferred only on a lawfully married Hindu wife to claim maintenance, it does not follow that the provisions of another statute

where by parties to a Hindu marriage even other than a lawfully wedded Hindu wife are granted rights of maintenance would be inconsistent therewith. Moreover, it is not as if a wider construction of Section 25(1) of the said Act of 1955 would render the provisions of Section 18 of the Act of 1956 redundant. Under sub-section (1) of Section 18 of the Act of 1956 of Hindu wife is entitled to claim maintenance from her husband even without filing any petition for nullity or divorce or judicial separation or restitution of conjugal rights. Whereas there is nothing either in the provisions of Section 24 or Section 25 of the said Act of 1955 which confers any such right. This submission of Mr. Pendse must also be rejected.

7. The next submission of Mr. Pendse was that the words "wife" and "husband" used in sub-section (1) of Section 25 of the Hindu Marriage Act must be construed in their strict grammatical sense and, so construed, would mean a lawfully wedded Hindu wife and a lawfully wedded Hindu husband. It was submitted by him that in the present case the ceremony of marriage gone through between the appellant and respondent No. 1 was null and void ab initio. It never created the relationship of husband and wife between the appellant and respondent No. 1. They were never husband and wife in the strict legal sense and hence and provisions of Section 25 cannot apply to them at all. It was urged by Mr. Pendse that just as in Section 11 of the Hindu Marriage Act, which I have cited above, the expression "party" has been used to refer to the parties to a void marriage, the same expression should have been used in sub-section (1) of Section 25 of the same Act if the intention was to confer rights even on such parties to claim maintenance. At the first blush, this submission undoubtedly appears a little attractive. But a closer analysis of the provisions of sub-section (1) of Section 25 shows that fallacy thereof. In the first place, the open in part of this sub-section shows that the discretion given to the Court of awarding maintenance is at the time of passing any decree and one of the decrees which the Court can pass under the said Act is a decree of nullity u/s 11 thereof. Hence if the strict interpretation propounded by Mr. Pendse were to be given to the words "wife" and "husband" the scope of the expression "any decree" used in this sub-section would have to be artificially cut down so as to exclude from its scope a decree for nullity passed u/s 11 of the Act. Secondly, it must be remembered that the Hindu Marriage Act, 1955 is a piece of social welfare legislation. One of the admitted aims of this legislation was to better the lot of women in Hindu society which it was felt by the legislature needed amelioration. It was with this end in view that certain rights were conferred on Hindu women by the Hindu Marriage Act as well as certain other measures, like the Act of 1956. When construing such a piece of legislation it would not be right to adopt a narrow pedantic approach. On the other hand, if the Court desires to gather the legislative intention from the provisions of such an act it must adopt a liberal and progressive approach keeping in mind that it was the liberal and progressive approach of the legislature which led to the enactment being passed. In the present case, it could not possibly have been the intention of the legislature that

even in a case where a Hindu woman had been duped into contracting a bigamous marriage with a man without knowing that there was already a subsisting marriage to which he was a party, even then, she should be deprived of her right to claim maintenance on obtaining a decree for nullity. If the construction propounded by Mr. Pendse were to be accepted, this result would necessarily follow, because whether the woman knew that the marriage she was entering into was bigamous or not, it would still be equally void. Lastly one cannot lose sight of the fact that if the words "wife" or "husband" used in sub-section (1) of Section 25 were to be construed in their strict grammatical sense, then they would refer only to parties to a subsisting marriage. A woman who has obtained a decree for dissolution of her marriage cannot, strictly speaking, be described as a wife. Similarly, a husband who has obtained a decree for divorce cannot be described as a husband. A Hindu male and a Hindu female who have entered into a marriage which is voidable and which has been annulled by a decree of nullity u/s 12 of the Hindu Marriage Act also cannot strictly be described as a husband and wife. Mr. Pendse had to concede that in a case of divorced persons and persons who have obtained a decree of annulment of marriage, they would be included within the scope of the words

"wife" and "husband" used in sub-section (1) of Section 25 of the Act. This makes it clear that these words have not been used in this sub-section in their strict grammatical sense. This only shows that the said section has been a little carelessly drafted and if this be so, it needs a liberal interpretation. If the words "wife" and husband used in subsection (1) of Section 25 have to be construed liberally so as to include a divorced wife of a divorced husband or those who have obtained a decree of annulment of a voidable marriage. I see no reason why these words should not be interpreted so as to include a man and women who as to include a man and a woman who have gone through a ceremony of a Hindu marriage which would have been valid but for the provision of Section 11 read with clauses (i), (iv) and (v) of Section 5 of the Hindu marriage Act. In other words, in my view the words "wife" and "husband" used in sub-section (1) of Section 25 of the Act would include within their scope a woman and a man professing the Hindu faith who have gone through a ceremony of marriage which would, in law have conferred the status of a wife or husband on them but for the provision of Section 11 read with Cls. (i) (iv) and (v) of Section 5 of the Act.

8. In support of his contention Mr. Pendse relied on the decision of a Division Bench of the Madras High court in A.P.K. Narayanaswami Reddiar Vs. Padmanabhan and Others, . The question there related directly to the provision of Section 4(1) of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, with which I am not concerned here. There are, however, observations in this decision to the effect that Section 25 of the Hindu Marriage Act cannot be construed in such a manner as to hold that notwithstanding the nullity of the marriage the wife retains her status for purposes of applying for alimony and maintenance. In the first place, these observations are admittedly obiter. The provisions of Section 25 of the Hindu Marriage Act were not before the Madras

High Court for consideration nor were they considered in any detail. This appears clear from the observations to the effect that the proper construction; of Section 25 would be that were a marriage was admittedly a nullity, that section would have no application; but where the question of nullity is in issue and is contentious, the Court has to proceed on the assumption until the contrary is proved that the applicant was the wife. With respect, Section 25 of the Hindu Marriage Act deals with the stage at which a decree has been passed by a Court exercising jurisdiction under that Act or subsequent there to. Assuming that the question whether the marriage was a nullity or not might have been contentious before the decree was passed, once the decree was passed, it would no longer be the contentious question. Hence, with great respect, one fails to see the relevance of the above mentioned observation in construing the provisions of Section 25(1) of the said Act. This is only to show that the provision of this subsection never came up directly for construction before the Madras High Court in this case, I may make it clear that with respect, I am unable to agree with the observation of the Division Bench of the Madras High Court which I have referred to above. ON the other hand. I find that the view, which I have taken has also been taken by a Single Judge of the Punjab High Court in Dayal Singh Vs. Bhajan Kaur, where it has been observed that the Hindu Marriage Act has not been very carefully drafted and that the language of Section 25 has to be liberally construed.

9. The next submission of Mr. Pendse was that respondent No. 1 should not have been granted permanent alimony in view of the provisions of Section 23(1)(a) of the Hindu Marriage Act set out above, as she was taking advantage of her own wrong for the purpose of obtaining the relief of maintenance. It was urged by him that respondent no. 1 knew fully well at the time when she entered into the marriage with the appellant that there was a previous subsisting marriage between the appellant and respondent No.2 and hence her applying for maintenance amounted to taking advantage of her own wrong in having knowingly contracted a bigamous marriage. It is true that respondent No. 1 did enter into the marriage with the appellant knowing that there was a subsisting marriage between the appellant and respondent No.2. The record, however, shows that it was the poverty and dire financial condition of respondent No. 1 which made her to take this course. Moreover it was not as if she entered into this marriage against the protests or wishes of the first wife viz respondent No. 2. Nor can it be said that respondent No. 1 entered into this marriage, because for several years she stayed with the appellant and respondent No. 2. and it was only when she was driven out in March 1963, that she went to live separately with her parents. In view of these circumstances. I do not see any reason to hold that in claiming the relief for maintenance respondent No. 1 is taking advantage of her own wrong.

10. The final submission of Mr. Pendse was that in view of the provision of Clause (d) of sub-section (1) of Section 23 of the Hindu Marriage Act, respondent No. 1 was not entitled to any relief as there was unnecessary and improper delay in the

filling of the petition by respondent No.1. It is pointed out that respondent No. 1 was driven out of the matrimonial home, by the appellant in March 1963. It was only after several years viz., on 6th September 1969, that she filed a civil suit for maintenance, and it was as late as on 11th December 1972 that she filed the petition under the Hindu Marriage Act, 1955, for a decree declaring the marriage between her and the appellant null and void and for maintenance by way of permanent alimony. The real question which has to be considered is regarding the period between March 1963 and September 1969, because in September 1969 respondent No. 1 did file a civil suit for the same relieves as she is claiming in the petition. In connection with this delay, one cannot lose sight of the fact that respondent No. 1 is a poor woman. She left the appellant's house only when she was driven out in March 1963 and thereafter stayed with her parent for several years waiting in vain for the appellant to take her back. It was only when she lost hope that she filed the suit. In view of these circumstances, I am inclined to take the view that there was no such unnecessary or improper delay on the part of respondent No. 1 in filling the petition as to deprive her of the right to get relief by way of maintenance. It must also be appreciated that the question as to whether there has been unnecessary or improper delay has to be determined by the Court in the light of all the facts and circumstances, and to a certain extent the Court has a discretion in the determination of this question. Both the Courts below have exercised their discretion, in a sense, in favour of respondent No. 1 and held that there has been no unnecessary or improper delay on her part so as to debar her from the relief claimed and as I see no reason to take a different view.

11. In the result, the appeal fails and is dismissed with costs.

12. Appeal dismissed