

(1966) 01 KAR CK 0010

In the Karnataka High Court

Case No : Executive Second Appeal No. 81 of 1962

Kashawwa

APPELLANT

Vs

Phadeppa Sangaum

RESPONDENT

Date of Decision : 21-01-1966

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 488
Hindu Married Womens Right to Separate Residence and Maintenance Act, 1946 —
Section 2, 2 (7)

Citation : AIR 1966 Kar 320 : (1966) 1 MysLJ 271

Hon'ble Judges : A. Narayana Pai, J

Bench : Single Bench

Judgement

(1) The appellant is the second wife of the respondent. She married him in 1946 when he already had a first wife living. This was before the coming into force of the Bombay Prevention of Hindu Bigamous Marriages Act of 1946. After the Bombay Hindu Divorce Act of 1947 was passed subsequently, the appellant filed against her husband Divorce Suit No. 31 of 1951 on the file of the Court of the First Joint Civil Judge Junior Division, Belgaum praying for a decree for judicial separation and permanent alimony. One of the grounds on which judicial separation could be granted u/s 4 of the Bombay Hindu Divorce Act of 1947 is that the husband had married again before the coming into force of the Bombay Prevention of Hindu Bigamous Marriages Act of 1946. The Bombay High Court in a decision reported in Laxmibai Wamanrao Vs. Wamanrao Govindrao, had taken the view that the benefit of this provision could be taken only by a first wife and not by a second wife. On account of this decision, the appellant's Divorce Suit No. 31 of 1951 came to be dismissed.

She appealed to the District Judge at Belgaum in Civil Appeal No. 93 of 1953. The District Judge, While holding that in view of the above decision the appellant could not be granted any relief under the Divorce Act, proceeded to examine her case in the light of the Hindu Married Women's Act of 1946 (Central Act 19 of 1946). On examination of the evidence he came to the conclusion that the

evidence did disclose justifiable cause within the meaning of sub-section(7) of Section 2 of the Central Act for the wife to be entitled to separate residence and maintenance. He allowed the appeal and made a decree in the following terms:--

"The Appeal is allowed. The decision of the lower Court is set aside and the plaintiff is granted a decree for judicial separation. The defendant shall pay to her Rs. 300 per year as permanent alimony from the date of suit and so long as the plaintiff remains chaste and unmarried."

The other terms of the decree are not relevant for our present purpose except the direction for payment of the appellant's costs of the proceedings by her husband respondent.

(2) This decree was passed on 23-5-1954. Something thereafter the appellant went back to her husband resumed cohabitation and bore him a daughter. Once again misunderstanding having arisen between the parties, the wife went away and put into execution the decree mentioned above in Regular Darkhast No. 443 of 1956 before the Court of the Civil Judge Junior Division Belgaum seeking to recover a sum of Rs. 1983 7-0 being arrears of alimony payable to her under the said decree by attachment and sale of moveables.

(3) The respondent pleaded that the decree has become annulled and therefore incapable of being executed by reason of the resumption of cohabitation after the decree. He also look out separate proceedings before the Deputy Commissioner under sub-section (2) of Section 8 of the Bombay Hindu Divorce Act of 1947 to obtain an annulment of the decree. In those proceedings he was not possible to make any order on the application made under sub-section (2) of Section 8 of Act. The learned Judge however, observed that it was open to the respondent to raise the plea in execution that the decree has ceased to be executable.

(4) The said plea is the only substantial plea that is pressed in the execution proceedings That plea has been accepted both by the executing Court as well as by the Deputy Commissioner on appeal. But whereas the executing Court dismissed the execution petition in toto, the lower appellate Court took the view that any rate so far as the direction for payment of costs is concerned the decree was executable. That part of the decision of the Deputy Commissioner is no longer in question in this appeal.

(5) In this Second Appeal by the wife the only contention pressed on her behalf is that the view taken by the Courts below is wrong in law.

(6) Both the Courts below have followed and applied the principles stated by a Bench of the Madras High Court in Vasantam Venkayya Vs. Vasantam Raghavamma, Mr. Mandagi, learned counsel for the appellant, concedes that if the principles stated in the said decision are to be applied, the decision of the Courts below would be right. He, however, contends that the view taken therein is open to question and points out that a different view has been taken by other High Courts like the High Courts of Calcutta, Orissa, Punjab, Bombay and Nagpur.

Mr. K.I. Bhatta learned counsel for the respondent contends that the view taken by the Madras High Court in the said case is the correct view to take and should be taken.

(7) Before proceeding to examine these arguments. I should say that in view of the discussion contained in the judgment of the District Court in the Wife's Civil Appeal No. 93 of 1953, it will be difficult to contend that the decree is a decree for judicial separation and permanent alimony under the provisions of the Bombay Hindu Divorce Act of 1947. The express finding of the Court is that the appellant was not entitled to any relief under that Act. The actual relief given to her is expressly u/s 2(7) of the Central Act 19 of 1946. The position therefore has to be examined on the footing that the decree is not a decree for judicial separation and alimony as such but a decree for separate maintenance under the Central Act of 1946.

(8) The facts of the case reported in *In Re: Kudiya Chandrasekhara Varaprasad* minor by mother and guardian *Swarnakumari Devi*, are similar to the facts of the present case in that case a Hindu wife had obtained a decree for separate maintenance and having thereafter resumed cohabitation and resided with her husband for sometime, left him again and put the decree into execution. The contention on behalf of the wife in that case was that the decree could at best be said to stand suspended during the period of cohabitation but could never be regarded as having been extinguished because the circumstances could not be said to bring about either an adjustment or satisfaction of the decree. This contention of the wife was rejected. The Court, after referring to certain English decisions expressed the view.

"A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation. There being no difference in principle I can see no reason why the English authorities should not be applied."

Among the English authorities referred to by the Madras High Court the important ones were the decision of Lord Eldon in *Bateman v. Countess of Ross*. (1813) 1 Dow 235 ER 684 and another of Hawkins, J. in *Haddon v. Haddon* (187) 18 QBD 778 In the former case Lord Eldon held the general doctrine to be clear that a reconciliation after a separation entirely did away with the effect of the separation. In the latter Hawkins J stated:--

"It is impossible to suppose that the Legislature, in giving Magistrate power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from, and resume cohabitation with her husband when and as often as she should think fit, and compel her husband to maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation."

(9) The Madras High Court has followed this decision subsequently both in regard

to ordinary decrees for separate maintenance and also in regard to orders u/s 488 of the Code of Criminal Procedure. We are not directly concerned in his case with orders under the Criminal Procedure Code, and I want to make it clear that I do not propose to examine the position with regard to the same or to express any opinion thereon.

(10) Among the subsequent cases dealing with maintenance decrees. I should refer to a decision of Krishnaswami Nayudu, J. Reported in *Perundevi Ammal Vs. Amavasikan and Others*, . In that case his Lordship pointed out that the application of English doctrine by the previous Bench that resumption of cohabitation would render the previous order for alimony ineffective must be considered to be based on principles of equity and justice equally applicable in cases of Hindu being a sacrament and not a mere contract, when there is resumption of co-habitation after separation, it should be held that the previous conduct of the husband and the differences between the spouses which had led to their separation have been wiped out and that therefore any decree passed on a cause of action flowing from such conduct or differences must be deemed to have ceased to exist because a decree for future payment must be taken to be dependent upon the continuance of the cause of action on the strength of which it had been made.

(11) The opposite view and the cases expressing the same are found fully discussed in *Kasinath Panda Vs. Padambati Debi*, and in *Laxman Gajju Vs. Sitabai Laxman and Another*, Because these two decisions contain a statement of principles and refer to most of the decided cases, it is not necessary to refer in particular to other cases.

(12) Both these cases dealt with orders u/s 488 of the Code of Criminal Procedure. As I do not propose to express any derivations peculiarly thereto is also not called for

(13) The two important reasons stated against accepting the principle laid down by the Madras High Court are, firstly, that the decision proceeds upon certain rulings of the English Courts interpreting English statutes and that even in England there have been some subsequent amendments of those particular statutes.

(14) Once it is accepted, as it has to be that English statutes do not apply in India, a change in the view taken by the English Courts consequent upon an amendment of statute is a matter of no consequence to us in India. Hence the only question is whether it is correct to say that the view of the Madras High Court proceeds exclusively on any provision of English statute or purports to apply in India provisions of English statute. With respect to the learned Judges who have taken the view that such is the effect of the Madras decision, it appears to me that it is inaccurate to say that the Madras High Court in *Vasantam Venkayya Vs. Vasantam Raghavamma*, applied the English statute itself in India. The learned Judges have clearly stated that there is no difference

in principle between the position as under the English Statute and the position in regard to a decree for separate maintenance passed by Indian Courts in a suit by a Hindu wife against her husband. Krishnaswami Nayudu. J in *Perundevi Ammal Vs. Amavasikan and Others*, has clearly stated that the said doctrine of English law should be applied in India on the principles of justice, equity and good conscience. With respect, it appears to me that that is the correct view to take.

(15) The normal expectation of Hindu Law of marriage,--for that matter any matrimonial law,--is that the husband and wife should live together. Not only the objects of the institution of marriage but also the interests of society at large require that there should be no separation between husband and wife. The duty of the husband to maintain his wife is not to be equated to mere payment of money for her subsistence. The maintenance of a wife connotes a composite notion of living or residing with her with the object of bringing up a family and attending to all her needs, physical as well as spiritual, appropriate to her status as a wife. The right to reside away from the husband and receive maintenance from him in the shape of money or material goods, it is at best an inadequate substitute for maintenance in the sense explained above.

(16) In this view, it is clear that the right to live away cannot arise until the conditions stipulated therefore continue to exist unless those conditions continue to exist. The right to receive maintenance in cash or material goods is closely and wholly dependent on the right to reside away from the husband. Hence a decree for payment of separate maintenance proceeds upon the footing that the said conditions exist and when it provides for future payment of such maintenance, it must be taken to proceed on the assumption that the conditions then proved to exist will continue to exist so as to entitle the wife to receive maintenance.

(17) When there is resumption of cohabitation, the original normal state of matrimonial life is restored and the parties are put back in the position they occupied at the time of their marriage. It is on account of this that Madras High Court pointed out that all previous conduct or differences of opinion leading to separation must be taken to be wiped out and with them the decree for separate maintenance obtained on that basis. To take the view that resumption of cohabitation after a decree for separate maintenance merely suspends, the decree but does not extinguish it would be wholly opposed to accepted notions of Hindus in regard to matrimonial status and interests of society and public policy as explained in telling terms by Hawkins J in (1887) 18 QBD 778 already cited. If the wife once again seeks separate maintenance, she should obtain a fresh decree by proving the circumstances justifying the passing of such a decree.

(18) I am therefore clearly of the opinion that the view taken by the Madras High Court in *Vasantam Venkayya Vs. Vasantam Raghavamma*, is correct and should be followed.

(19) The Second Appeal therefore fails and is dismissed with costs.

(20) Appeal dismissed.