

(1971) 08 GUJ CK 0002
In the Gujarat High Court
Case No : Second Appeal No. 617 of 1967

Lallubhai Keshavram Joshi

APPELLANT

Vs

Nirmalaben Lalluram Joshi

RESPONDENT

Date of Decision : 03-08-1971

Acts Referred:

Hindu Marriage (Amendment) Act, 1958 — Section 24, 28
Hindu Marriage Act, 1955 — Section 23, 24, 25

Citation : AIR 1972 Guj 174 : (1972) GLR 626

Hon'ble Judges : A.A. Dave, J

Bench : Single Bench

Advocate : I.C. Bhatt, for the Appellant;

Judgement

1. This appeal raises a very important question of law. In order to appreciate the implications involved in this appeal it will be worth-while to state the facts giving rise to this appeal in a nut-shell.

2. The appellant before this court is the husband of the present respondent Nirmalaben. The appellant had filed a petition No. 8 of 1966 u/s 9 of the Hindu Marriage Act for a decree for restitution of conjugal rights on the ground that she had withdrawn herself from the society without any reasonable cause. During the pendency of the said petition, the present respondent gave an application u/s 24 of the Act for getting maintenance pendente lite and expenses of the proceeding. The learned trial Judge held that the present respondent had proved that she had no income of her own and that her husband was earning Rs. 100 to 125/- per month. In the opinion of the learned trial Judge, therefore, she was entitled to receive Rs. 25/- per month as maintenance and Rs. 50/- as costs of the proceeding. However, the learned trial Judge dismissed the application of the respondent for interim maintenance on the ground that she was disentitled to receive the same on account of her conduct. Against the said order of the learned trial Judge, an appeal was preferred in the district Court and the learned District Judge allowed the appeal and set aside the order of the trial Court. He

ordered that the present respondent should receive Rs, 25/- as monthly maintenance and Rs.50/- as expenses for defending herself in the main proceeding. Against the said order of the learned District Judge, the present has been preferred to this court.

3. Mr. I. C. Bhatt, learned Advocate for the appellant submitted that the learned District Judge had no jurisdiction to entertain an appeal against the order passed by the Court u/s 24 of the Hindu Marriage Act. In support of his say he referred to the case of Prithvirajsinhji Mansinghji v. Shivprabhakumari. AIR 1962 Bom 315. In order, therefore, to understand the implication it will be necessary to refer to Sections 24 and 28 of the Hindu Marriage Act. Section 24 says-

"Where in any proceeding under this Act, it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding it may, on the application of the wife or the husband, order respondent to pay the petitioner the expenses of the proceeding, and monthly during the proceeding, such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

Thus whenever any proceeding under the Hindu Marriage Act is pending before the court, it is competent for that court to pass interim with regard to the maintenance and expenses of the proceeding of either party, if the court came to the conclusion that the husband or wife as the case may be, had no independent income sufficient for his or her support. Apparently, this section is independent of other provisions of the Act and is not controlled by Section 23 thereof. Even the learned trial Judge negated the contention of the learned advocate for the present appellant that Section 24 was controlled by the provisions of Section 23. Curiously, however, the learned Judge observed that the conduct of the wife is borne out from her own evidence which prevents her from getting any relief under Sec. 24 of the Act and taking into consideration her conduct, the learned trial judge dismissed the application for maintenance pendente lite. The learned district Judge who heard the appeal against the said order was of the opinion that provisions of Section 24 of the Act were not controlled by Section 23 or any other section and ordered the present appellant to pay Rs. 25/- per month as maintenance pendente lite and Rs. 50/- towards the expenses of the proceeding in my opinion, the view taken by the learned District Judge is correct. Provisions of Section 24 as seen from the wordings of the section itself clearly indicate that they are not controlled by the provisions contained in any other section of the Act. In order to award maintenance pendente lite to the wife or the husband as the case may be, the court has merely to consider whether he or she has any independent income sufficient for his or her support. If the court from the evidence before it holds that he or she had no independent income for his or her support, the court is competent to pass an order for maintenance pendente lite u/s 24 of the act, conduct of either party is immaterial. In fact, Section 24 of the Act does not entitle the court to look into the conduct of the either party at all

before passing any such order. If the conduct of a party was to be taken into consideration for passing any order, there would have been appropriate provisions in the Section itself as is found in Section 25 of the Act. Section 25(1) states-

"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".

Thus, while passing an order for maintenance u/s 25 of the Act, it would be open to the court to take into consideration the conduct of the parties. Section 24 does not include any such words. Therefore, while passing an order for maintenance pendente lite, the court cannot look into the question of conduct of the parties. As stated earlier, only while passing an order for maintenance u/s 25 of the Act conduct of the parties would be relevant. In my opinion, therefore, the learned trial Judge was clearly in error in refusing to pass an order for maintenance pendente lite and expenses of the proceeding on the ground of alleged conduct of the wife.

4. Mr. Bhatt, however, urged that if the order of the learned trial Judge was wrong, it was open to the wife to file a revision petition before this court. He urged that no appeal to the district court was provided against an interim order under the Act, and therefore, the order passed by the learned District Judge was clearly without jurisdiction. Made by Mr. Bhatt, it will be profitable to refer to Section 28 of the Act which says-

"All decrees and orders made by the courts in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force:

Provided that there shall be no appeal on the subject of costs only". Section 28, therefore, envisages that all decrees and orders under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction. Similarly, it envisages that all decrees and orders made by the court in any proceeding under this Act may be appealed from under any law for the time being in force. The only restriction is that no appeal shall lie on the subject of costs only. The learned Advocate for the appellant, however, submitted that it is not that each and every order made by the court in a proceeding would be appealable but only such order which was under any law for

the time being in force would be appealable. He submitted that the words "under any law for the time being in force" would indicate Civil Procedure Code. Therefore, he submitted that the interim order passed by the court in any proceeding cannot be the subject-matter of an appeal, unless it came within the provisions of Section 104 or Order 43, Rule 1 of the Civil Procedure Code. In my opinion, the construction put upon Section 28 of the Act by Mr. Bhatt is very narrow and unwarranted. The CPC would be applicable only with regard to the procedure governing an appeal and has nothing to do with the right of an appeal. Section 21 of the Act says-

"Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908".

In my opinion, therefore, the applicability of the CPC to the proceedings under this Act will be only for laying down procedure and no more. The CPC does not contain any provision for a right to appeal under any other law. The right to appeal under the Hindu Marriage Act is provided in Section 28. It clearly says that all decrees and orders may be appealed from under any law of the time being in force. In my opinion, the words "under any law for the time being in force" would mean that the procedure governing an appeal will be the procedure laid down in the CPC and the law for the time being in force for determining the forum of appeal is the Bombay Civil Courts Act. In the case of Gangadhar Rakhamaji Vs. Manjulal Gangadhar, , the question about the interpretation of the words "law for the time being in force" arose, and the division bench of the Bombay High Court after considering Section 28 of the Act, observed as follows:--

"..... "law for the time being in force" for determining the forum of appeal is the Bombay Civil Courts Act. u/s 8 of that Act an appeal from the decree or order of a Civil Judge, Senior Division, lies to the District Court except in the case of decision in suits where the amount or value of the subject-matter exceeds ten thousand rupees. Under the Bombay Civil Courts Act, a District Court is presided over by a District Judge and is the principal court of original civil jurisdiction in the district within the meaning of the Code of Civil Procedure. In the present case, the decree having been passed by the court of the Civil Judge Senior Division of Ahmednagar, in a petition under the Hindu Marriage Act, the appeal should lie to the District Court of Ahmednagar".

Mr. Bhatt, however, submitted that there was no direct question before the division bench whether the appeal would lie to the district court against the order passed by the court, u/s 24 of the Act. The point involved in that case was confined to the question whether an appeal against the question whether an appeal against the decree passed by the court should be in the district court or in the High Court. Mr. Bhatt agreed that an appeal against the decree passed by the court under the Hindu Marriage Act would lie in the district court or in the High Court according to the amount or value of the subject-matter of the appeal. In the instant case, there was no decree. The order and Section 24 was an interim

order and therefore, Mr. Bhatt submitted that only a revision application would lie to the High Court and no appeal could lie in the district court. In support of his say, he referred to the case of Prithvirajsinhji Mansinghji Vs. Bai Shivprabhakumari, , wherein Gokhale, J. observed that-

"What the Legislature intended by referring to the words "any law for the time being in force" in Section 28 was that the appealability of decrees and orders should be determined by the provisions of the Code of Civil Procedure. Thus Section 28 does not provide for an appeal against every order made by the court in the proceedings under the Act, but only such orders which can fall within the definition of decrees u/s 2(2) of the CPC or with regard to which an appeal is provided under the Code. An order granting interim relief u/s 24 has to be distinguished from an order granting permanent alimony and maintenance which the court can pass u/s 25. Such an order can not amount to a decree as defined in Section 2(2) of the CPC and, therefore would not be appealable as decree. Such an order does not fall also within Section 104 nor under Order 43 Rule 1 of the Code. It would not be, therefore, appealable under the Civil Procedure Code. Hence revision application will be maintainable against such order".

With great respect, I am unable to agree with this view. In my opinion, u/s 28 of the Act, all decrees and orders made by the court in any proceeding under the Act are made subject to an appeal. If it was not so, the words "all decrees and orders may be appealed from" would not have been used. Reference to "any law for the time being in force" seems to be for the purpose of prescribing procedure which would govern such appeals and forum where the appeal is to be preferred. The question whether an appeal lies against an order passed u/s 24 of the Act is not to be determined by reference to any law for the time being in force such as Civil Procedure Code. In fact, an appeal is already provided for by Section 28 itself and the procedure governing that appeal will be the procedure laid down in the Civil Procedure Code. In my view, the words "for the time being in force" seem to have been inserted only for determining the forum of an appeal and for regulating the procedure. In fact, the Bombay High Court in the earlier case impliedly was inclined to hold that an appeal was provided in Section 28 of the Act. In the case of Kamala Vs. Shama Rupchand and Others, the Bombay High Court considered the object of Section 24 of the Act in miscellaneous first appeal No. 197 of 1958 no doubt, no direct question arose before the High Court that an appeal against an order passed u/s 24 of the Act was not maintainable. but as stated earlier, the High Court impliedly was inclined to take a view that such an appeal would lie. The effect of Section 28 of the Act has been considered by a division bench of this court in the case of Bai Umiyabhen Vs. Ambalal Laxmidas, wherein it was observed that-

"A right of second appeal against an appellate decree made by the court in a petition for judicial separation u/s 10 of the Hindu Marriage Act cannot be found in the Civil Procedure Code.

The decrees and orders which form the subject-matter of legislation u/s 28 of the

Hindu Marriage Act, 1955 must include not only original decrees and orders but also appellate decrees and orders.

Section 28 of the Act undoubtedly confers a right of appeal by using the words "may be appealed from" but that right of appeal is to be exercised "under any law for the time being in force". The procedure for filing the appeal and the jurisdiction and power of the court in dealing with the appeal are governed by the law for the time being in force which would include inter alia the Civil Procedure Code. The words "under any law for the time being in force" provide not only the procedure for filing the appeal and the forum in which the appeal must be filed, but also the jurisdiction and power of the court in dealing with the appeal so filed. The right of appeal is conferred by the section but the nature and extent of the right which depend on the procedure, jurisdiction and powers of the court in dealing with the appeal are governed by the law for the time being in force which includes inter alia the Civil Procedure Code.

The right of second appeal conferred by Section 28 of the Hindu Marriage Act, 1955, is limited to the grounds set out in Section 100 of the CPC and therefore, can be exercised only on question of law and not on questions of fact".

The ratio of this case clearly states that right of an appeal is conferred by the section. In my view, therefore, Section 28 confers a right of appeal against all decrees and orders passed by the court in the proceeding under the Hindu Marriage Act. The CPC of the Bombay Civil Courts Act is only for governing the procedure and determining the forum in which the appeal is to be preferred.

5. The view taken by the Bombay High Court in the case of Prithvirajsinhji Mansinghji Vs. Bai Shivprabhakumari, referred to above was not accepted by the division bench of this court in the case of Kadia Harilal Purshottam Vs. Kadia Lilavati Gokaldas, wherein it was pointed out that if those words were interpreted in the same meaning as the words decree and order used in the Civil Procedure Code, then none of the decrees and orders made under the Act would be appealable and the object of S. 28 would be rendered nugatory in so far as it deals with the questions of appeal from the decrees and orders. At p. 541, the following observations were made-

"No doubt, the language of the Section is not very happy. The words "may be appealed from under any law for the time being in force" are capable of bearing the meaning which Mr. Chhaya desires us to give. If we give such a meaning, to those words, the provisions relating to appeal are liable to be rendered nugatory. That could not possibly be the intention of the legislature. It could not be the intention of the legislature to confer a right of appeal against decrees and orders passed under the Hindu Marriage Act, 1955 by reference to the provisions of the Code of Civil Procedure. There is fact no provision in the Code or in any other law under which any appeal could be filed from any orders passed under the Hindu Marriage Act, 1955. It seems to us that the legislature intended to confer a right of appeal by the provisions of Section 28 itself by using the words "all decrees

and orders made by the court in any proceeding under this Act may be appealed from", and that the intention of the legislature was not to refer parties to any enactment for the purpose of ascertaining whether the decrees or orders passed under the Act were appealable or not. Having regard to the language used by the legislature which, we are painfully conscious is not very apt, some meaning has to be given to the words "under any law for the time being in force". Those words, on a true construction of the Act, are intended to provide for the forum before which the appeal is to be preferred. They may well relate to the procedure in connection with the appeal which may be filed u/s 28".

This case was referred to with approval in the case of Prahladbhai Sataramdas Vs. Ashabai Trikamji, , wherein, at p. 423, Miabhoy, J., observed as under:-

"As pointed out by the division bench in Kadia Harilal's case, the decrees which are to be passed by the matrimonial court do not satisfy the definition of the expression "decree" as used in the Civil Procedure Code. The Act itself provides for passing of specific decrees and specific orders, such as decrees and specify orders, such as decrees for restitution of conjugal rights, for judicial separation, for nullity of marriage, and for divorce, and orders for interim maintenance, for expenses of proceedings , for permanent alimony for permanent maintenance, custody of children and disposal of property. Therefore, for the purpose of enforceability of decrees and orders, it is quit clear that the Legislature has in mind these decrees and orders which are mentioned specifically in the Act and in respect of which jurisdiction has been conferred by the Act upon the matrimonial court. If once the meaning of the expression "decrees and orders" has been so ascertained, then, it is not difficult to answer the question as to which decrees and orders are made appealable under the Act. It will be noticed that the Legislature has made the same decrees and orders appealable, which have been made enforceable, which have been made enforceable in the manner in which decrees and orders of the court exercising original civil jurisdiction are enforceable. That appears to be the plain and grammatical meaning of the provision contained in Section 28 of the Act relating to the appealability of decrees".

Reliance was placed on the case in Anita Karmokar and Another Vs. Birendra Chandra Karmokar, .

6. With respect, I am in entire agreement with the view taken in both these cases. In my opinion, the view taken by the Bombay High Court in the case referred to above, therefore, cannot be accepted as good law. In my opinion , the district court was quite competent to hear an appeal filed against an order of the learned trial Judge u/s 24 of the Hindu Marriage Act.

7. In the result, the appeal fails and is dismissed.

8. Appeal dismissed.