
(1972) 07 BOM CK 0005

In the Bombay High Court

Case No : Civil Rev. Application No. 163 of 1971

Madhukar Trimbakrao Ghisad

APPELLANT

Vs

Malti Madhukar Ghisad and Another

RESPONDENT

Date of Decision : 25-07-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2), 28
Hindu Marriage Act, 1955 — Section 21, 24, 28

Citation : AIR 1973 Bom 141 : (1973) 75 BOMLR 311 : (1973) ILR (Bom) 1003 : (1973) MhLj 204

Hon'ble Judges : Dharma-Dhikari, J; Chandurkar, J

Bench : Division Bench

Advocate : K.H. Deshpande, for the Appellant; V.Y. Pradhan, for the Respondent

Judgement

Chandurkar, J.—The question which is referred to the Division Bench by Gatne J. is whether an order made u/s 24 of the Hindu Marriage Act, 1955, is appealable or can only be challenged in revision. The applicant in this revision application is the original plaintiff who has filed a petition in the Court of the Second Civil Judge, Senior Division, Nagpur, u/s 12(1) (b) and (c) of the Hindu Marriage Act, 1955, hereinafter referred to as the Act, asking inter alia for a declaration of nullity of his marriage with the opponent No.1. In the proceedings before the trial Court the opponent No.1, who is the wife of the petitioner, filed an application for grant of interim maintenance u/s 24 of the Act and claimed Rs. 200/- on account of monthly allowance, Rs. 2,000/- on account of Court expenses and Rs. 400/- on account of costs of defence, because, according to her, at the relevant time she was residing at Ahmednagar. This claim was contested by the petitioner-husband, but directed the petitioner to pay Rs. 100/- per month to the opponent No.1 from the date of the application for her maintenance and Rs. 300/- were directed to be paid in order to enable her to meet her Court expenses.

2. the petitioner-husband was aggrieved by this order and he, therefor, filed a

revision application u/s 115 of the CPC in this Court. When the matter came before Gatne, J. for hearing he found that there was a conflict of views in 2 decisions of this Court on the question whether an order u/s 24 could be challenged by a revision application. In *Prithvirajsinghi v. Bai Shivprabhakumari* AIR 1960 Bom 315 Gokhale, J. had taken the view that an order u/s 24 of the Act was not an appealable order and the same could be challenged only by a revision application. A contrary view was taken by Abhyankar, J. in *Sakharam v. Parvati*, (1965) Mah LJ 107 in which he held that an order u/s 24 was an appealable order. Abhyankar J. found support in the decision of the Allahabad High Court in *Smt. Sarla Devi Vs. Shri Balwan Singh*, and another decision of Full Bench of Andhra Pradesh High Court in *Kode Kutumab Rao Vs. Kode Sesharatnamamba*, . In view of the conflict in the two decisions of this Court this reference was made to a Division Bench.

3. We have heard Shri K. H. Deshpande, who appears on behalf of the petitioner-husband and according to him, on a proper construction of Section 28 of the Act that Section cannot be said to have provided for a right of appeal itself, but that the right of appeal must be governed by the provisions of Section 96 of the Code of Civil Procedure. It is contended that only orders which are in the nature of decrees as defined in Section 2(2) of the CPC could become the subject-matter of appeal and an order for interim maintenance made u/s 24 of the Act had no finality, and therefore, it did not partake of the nature of a decree and therefore could not be challenged by way of an appeal and the only remedy, according to him, open to a person who is aggrieved by an order u/s 24 of the Act was to challenge it by a revision application under 115 of the Code of Civil Procedure. On the other hand, it is contended by Shri Pradhan appearing for the opponents that the only manner in which an order u/s 24 of the Act can be challenged is by filing an appeal because Section 28 of the Act gives a right of appeal though the forum and the procedure governing this right of appeal is to be decided with reference to the law which may be in force for the time being like the Bombay Civil Courts Act and the Code of Civil Procedure. In order to decide these contentions it is necessary to refer to certain provisions of the Act.

4. The several provisions of the Hindu Marriage Act, 1955, show that under this Act new rights and remedies have been created which were hitherto unknown to Hindu Law. Section 9 provides for a decree for restitution of conjugal rights. Section 10 provides for a decree for judicial separation of the grounds specified in that section. These two sections in terms make reference to decrees which may be passed. Section 12 also makes a reference to a decree of nullity. Section 13 makes a reference to a decree of divorce. Apart from the decrees which are contemplated by the above mentioned provisions of the Act there are certain provisions of the Act which empower the Court to pass certain orders as distinguished from decrees. u/s 24 the Court is empowered to make an order directing the respondent to pay to the petitioner the expenses of the proceedings and to make monthly payments during the pendency of the proceedings having regard to the petitioner's own income and the income of the respondent. Section

25 gives power to the Court to make an order either at the time of passing any decree or at any time subsequent thereto requiring the respondent to pay to the applicant while the applicant remains unmarried some amount for her or his maintenance and support for a term not exceeding the life of the applicant having regard to the respondent's own income and other property, if any, and the income and other property of the applicant and the conduct of the parties. u/s 26 the Court has jurisdiction to pass interim orders from time to time in the matter of custody, maintenance and education of minor children. Under this section the Court has the power to make a provision in the decree with respect to certain property which may belong jointly both to husband and wife. To other provisions which must be noticed are those contained in Sections 21 and 28 of the Act. Section 21 which provides that the proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908, is as follows :

"21. 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."

Then there is Section 28 which is as follows :

"28. Enforcement of, and appeal from decree and orders.

All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court make 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."

It is different construction which is placed on these provisions in the two decisions referred to above that the necessitated this reference.

5. While construing the words "under any law for the time being in force" Gokhale J. in AIR 1960 Bom 315 has taken the view that the question whether an appeal lies from an order passed by the Court under the Act must be determined by the provisions of the CPC and that the legislature having already provided in Section 21 that the CPC was to govern all proceedings under the Act by referring to "any law for the time being in force" what the legislature intended was that the appealability of the decrees and orders should be determined by the provisions of the CPC and that Section 28 of the Act does not provide for an appeal against every order made by the Court in the proceedings under the Act, but appeal lies only against such orders as can fall within the definition of decrees u/s 2(2) of the Code of Civil Procedure, or with regard to which an appeal is provided under the Code. He also held that the order passed by a Court granting interim maintenance u/s 24 of the Act will have to be distinguished from an order granting permanent alimony and maintenance which the Court can pass u/s 25 and that such an order cannot amount to a decree as defined in Section 2(2) of the Code of Civil Procedure, and therefore, would not be appealable as a

decree. Abhyankar J. has not, whoever, given any reasons when he gave his decision in Sakharam's case, 1965 Mah :J 107 and the only observations which are relevant in that order are as follows :

"The order is passed by the trial Court u/s 24 of the Hindu Marriage Act. u/s 28 of that Act all decrees and orders of the Court made in exercise of original civil jurisdiction may be appealed from under any law for the time being in force. This is an order directing payment of interim maintenance u/s 24 of the Hindu Marriage Act and is one of the orders referred to in Section 28. In my opinion, therefore, this order could be challenged by an appeal to the same forum to which appeals normally lie from the decisions of the Court which passed this order. Instead of filing an appeal the applicant has filed a revision petition to this Court. Obviously, no revision is tenable against an order from which an appeal lies." We do not, therefore, have the advantage of any reasoning in the judgment of Abhyankar J.

6. We have heard the counsel for the parties at considerable length and on a proper construction of provisions of Section 28 of the Act we are inclined to take the view that the right of appeal against a decree or an order made in a proceeding under the Act is given by the proceeding under the Act is given by the provisions of Section 28 itself. The first part of Section 28 relates to the enforcement of decrees and orders made by the Court in a proceeding under the Act. It provides that decrees and orders made by the Court in a proceeding under the Act are to be enforced in the same manner as the decrees and orders made by that Court in the exercise of its original civil jurisdiction are enforced. The second part of Section 28 which reads as "and may be appealed from under any law for the time being in force" is the clause which has to be construed. There is some divergence of judicial opinion with regard to the construction of this clause. This clause has been construed by some High Courts to mean that this clause itself gives a right of appeal while the form for the appeal, the nature of the appellate jurisdiction and the powers to the appellate Court are to be determined with reference to the relevant law, while some High Courts have taken the view that Section 28 does not independently give any right of appeal, but the right of appeal in respect of an order under the Act must be found in some other law which is in force for the time being and the CPC is on such law which is in force for the time being and the CPC is one such law which provides for a right of appeal. Omitting the words which deal with the enforcement of orders and decrees, the section along with the proviso would read as follows :

"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 :

Proceeded that there shall be no appeal on the subject of costs only."

Now, one thing which is clear is that the proviso provides that no appeal shall lie only on the subject of costs.

7. It must be noticed that S. 28 does not deal with decrees alone. Section 28 also refers to orders and as already pointed out the provisions of Sections 24, 25 and 26 contemplate that a Court in a given case has power to pass orders under those provisions. It is difficult to see how the provisions of Section 2(2) of the Code of Civil Procedure which define a "Decree" could be imported in Section 28 of the Act so as to equate the orders passed under the Act with the decrees contemplated by Civil Procedure Code. The CPC does not contain any provision relating to a right of appeal under any other law. In our view a right of appeal against decrees and orders passed under this Act is given by the provisions of Section 28 itself. There has to be some law to which one can look for the appeal can be filed. The CPC does not provide for forum though it may provide for the procedure to be adopted while deciding the appeal. Section 21 of the Act, in our view, does not really become material while construing the provisions of Section 28. Section 21 no doubt provides that subject to the other provisions contained in the Act and to such rules as the High Court may make all proceedings under the Act were to be regulated, as far as may be, by the Code of Civil Procedure, 1908. When Section 21 refers to the proceedings being regulated by the Code of Civil Procedure, there must be first a proceeding which can be regulated by the Code of Civil Procedure. The different provisions of the Act provide for the manner in which the proceedings are to be initiated and it is only after the proceedings will fasten themselves on those proceedings. The provision in Section 21 which regulates the proceeding under the Act is not material for deciding the question whether Section 28 itself gives a right of appeal or not. It also appears to us that the legislature having given a right of appeal in Section 28 it also provided in the latter part of that section for the procedure for filing the appeal and the forum for the appeal as also the jurisdiction and power of the Court in dealing with the appeal filed, by enacting the latter part of Section 28 using the words "under any law for the time being in force." The forum for the appeal should be governed by the Bombay Civil Courts Act and if that law had to be brought into picture it could only be done by making a general provisions that the appeal would be under any law for the time being in force and the procedure would also then be governed by the Code of Civil Procedure. We may at this stage make a reference to a decision of the Division Bench of this Court reported in *Gangadhar Rakhamaji v. Manjulal Gangadhar*, AIR 1960 Bom 42. In *Gangadhar's* case the Division Bench held that where in a petition under the Hindu Marriage Act a decree is passed by the Court of the Civil Judge, Senior Division, of Ahmednagar, which Court was notified by the State Government as having jurisdiction in respect of matters dealt with in the Act, the appeal lay to the District Court of Ahmednagar and not to the High Court. While deciding that case the Division Bench observed that Section 28 of the Hindu Marriage Act leaves the forum of appeal to be determined under the law for the time being in force which, in that case, was the Bombay Civil Courts Act and that the forum of appeal from the order or decree of the Court of the Civil Judge, Senior Division, under the Bombay Civil Courts Act was the Court of District Judge of the District, and therefore, the appeal against the decision of the Civil Judge, Senior Division,

lay to the Court of the District Judge. When this case was cited before the learned Judge who decided Printhvirajsinghji's case AIR 1960 Bom 315 it was observed that the decision was not of any assistance to the counsel for the opponent in that case who had raised a preliminary objection regarding the maintainability of the revision application. That decision, in our view, lays down that the "law for the time being in force" referred to in Section 28 determines the forum for the appeal. Since Section 28 is a self contained provision regarding the right of appeal, the forum for and the procedure applicable to such an appeal, we are not inclined to agree with the observations made in Prithvirajsinghji's case, AIR 1960 Bom 315 that having already made a reference in Section 21 of the Act to the Code of Civil Procedure, accepting the argument of the opponent's Counsel in that case, would mean that the legislature again emphasis in Section 28 that the procedure governing the appeal would be that under the CPC which the legislature did not intend to do. Where a right of appeal is given by one law but the other matters regarding the forum and the procedure or the nature and the extent of the powers of the Court are to be determined with reference to the relevant law for the time being in force, the appeal does not cease to be one under the latter law because the appeal is still governed by that law.

8. We may usefully refer to a decision of the Madras High Court where the Court took the view that an appeal, the procedure with respect to which is governed by the CPC may rightly be spoken of as an appeal under the Code. In Ramasami Pillai v. Deputy Collector of Madura, ILR Mad 51 = AIR 1920 Mad 407 it was observed :

"There seems to be no good reason for saying that an appeal under the CPC means only an appeal the right to prefer which is conferred by the Code itself. On the other hand it would not be straining the language of the Article too much to hold that an appeal the procedure with respect to which from its inception to its disposal, is governed by the Civil Procedure Code, may rightly be spoken of as an appeal, under the Code

That also tends to show that what is meant by the legislature is appeals, the hearing and disposal of which is governed by the rules of procedure laid down in the Civil Procedure Code."

We may also refer to a decision of the Supreme Court in Vidyacharan Shukla Vs. Khubchand Baghel and Others, in which the Supreme Court was concerned with the construction of the phrase "under the Code of Civil Procedure" used in Article 156 of the Indian Limitation Act, 1908, in relation to appeals and Ayyangar J. referred with approval to the decisions of the various High Courts in which a view was taken that in order to attract the provisions fo that Article it was sufficient if the CPC regulated the procedure for filing an appeal and the powers of rate judgment Subba Rao J. (as he then was) dealing with the meaning of the Clause "appeal under the Code of Civil Procedure" referred with approval to the following observations of the Calcutta High Court in Agra Mohd. Hamdani v. Cohen, ILR (1886) Cal 221 :

"The Limitation Act, Schedule II, Article 156, when it speaks of the CPC is on the face of it, speaking of not ordinarily deal with substantive rights, and the natural meaning of an appeal under the CPC appears to us to be an appeal governed by the CPC so far as procedure is concerned." Thus Subba Rao J. concluded that the expression "appeal under the Code of Civil Procedure" in Article 156 of the Limitation Act means an appeal governed by the CPC so far as procedure is concerned. It thus appears to us that when Section 28 refers to all "all decrees and orders may be appealed from under any law for the time being in force", it was not contemplated by the legislature that the right of appeal must be found in some other law like the CPC but what was contemplated was that the right of appeal was given by the Act itself though the other matters in respect of those appeals were regulated such other laws as may be in force and as may be relevant. In other words, it meant that the right of appeals conferred by Section 28 had to be enforced in accordance with the law regulating procedure, forum and other allied matters in accordance with the relevant laws. We also cannot forget that the Hindu Marriage Act, 1955, is self-contained enactment and the different provisions thereof confer certain new rights and prescribe certain remedies for the enforcement of those rights. Normally, therefore, remedy by way of an appeal against orders passed under the Act would be provided in the Act itself and the legislature would not allow uncertainty to prevail in the matter of a right of appeal against decrees or orders passed under the Act.

9. We may also usefully refer to the provision of the proviso to Section 28. The proviso provides that no appeal shall lie on the subject of costs only. It is now well settled that a proviso deals with a topic which would, but for the proviso, have fallen into the main provisions of the section. The proviso to Section 28 also indicates that the legislature intended to carve out certain orders in respect of which no right of appeal was given. IF the effect of the proviso is that no right of appeal was to be given in respect of the subject of costs, then construing the proviso and the main section together it must be held that if the proviso was not there a right of appeal could be exercised even in respect of an order with regard to costs. This could only be done if the substantive provision in Section 28 itself gave a right of appeal. Where there is some ambiguity about the meaning of the words of the main provision, it is permissible to look to the proviso to ascertain its meaning. In *Hindustan Ideal Insurance Co. Ltd. Vs. Life Insurance Corporation of India*, the Supreme Court observed :

"There is no doubt that where the main provision is clear its effect cannot be cut down by the proviso. But where it is not clear the proviso, which cannot be presumed to be a surplusage, can properly be looked into to ascertain the meaning and scope of the main provision."

In enacting the proviso to Section 28 the intention of the legislature was that an order with regard to costs was not to be the subject-matter of an appeal. The proviso also, therefore, indicates to us that Section 28 gives a substantive right of appeal in respect of decrees or orders passed under the Act.

10. The phraseology which is adopted by the legislature by making a provision that "all decrees and orders may be appealed from under any law for the time being in force" is analogous to the provisions of Section 55 of the Indian Divorce Act, 1869, and the marginal heading of Section 55 is also the same as that of Section 28 of the Act. Section 55 of the Indian Divorce Act reads as follows :

"55. Enforcement of and appeals from orders and decrees.

All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the 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 the laws, rules and orders for the time being in force :

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage, nor from the order of the High Court confirming or refusing to confirm such decree :

Provided also that there shall be no appeal on the subject of costs only."

We are really not concerned with the first proviso, but it is clear that the provisions of the main Section 55 of the Indian Divorce Act and the second proviso are almost similarly worded. WE are referring to the provisions of Section 55 of the Divorce Act, because it appears to us that the judicial construction placed on similar phraseology must be presumed to be known to the legislature when Section 28 of the Act was being enacted. Section 55 of the Divorce Act was construed by the Lahore High Court in *Noble Millicans v. Mrs. Gladys Millicans*, AIR 1937 Lah 862. Construing that section the learned Judge of the Lahore High Court observed :

"The language of Section 55, Divorce Act, appears to me to provide expressly for an appeal from all orders passed by the District Judge. The words "in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and appealed from under the laws, rules and orders for the time being in force in Section 55, which is one of the sections dealing with procedure must, I think, be held to apply only to the procedure to be followed and the Court to which appeals lie."

There also the learned Judge was dealing with the question whether an order passed u/s 41 of the Divorce Act about maintenance was appealable or not. Thus the phrase "may be appealed from" had received judicial construction to mean that such a provision itself creates a right of appeal. Now, merely because the words "under any law for the time being in force" are used it does not mean that the right of appeal must itself be granted by some other law. We do not, therefore agree with the view taken in *Prithvirajsingji*'s case, AIR 1960 Bom 315 that an appeal does not lie against an order passed u/s 24 of the Hindu Marriage Act, 1955.

11. The view which we have taken is supported by the decisions of the several High Courts such as Andhra Pradesh, Allahabad, Madhya Pradesh, Punjab, Calcutta and Rajasthan. In *Kode Kutumab Rao Vs. Kode Sesharatnamamba*, a Full Bench of the Andhra Pradesh High Court held that the expression "may be appealed from under any law for the time being in force" in Section 28 cannot be construed to mean that the right of appeal against decrees and orders under the Act depended upon the right to be found in any other law for the time being in force and that this reference was in relation to the act of instituting an appeal and not in relation to a right of appeal and that an order u/s 24 of the Act was appealable u/s 28. In *Smt. Sarla Devi Vs. Shri Balwan Singh*, a Division Bench of the Allahabad High Court held that the words used "and may be appealed from" in Section 28 of the Act clearly give a person aggrieved the right to file an appeal and that the section makes every decree or order passed under the provisions of the Act appealable as of right, but the appeal would be regulated and governed by that particular local civil Act which rules in the State in which the appeal arises. In *Rukhmanibai Vs. Kishanlal Ramlal*, a learned Single Judge of the Madhya Pradesh High Court held that a right of appeal is granted u/s 28 of the Act and an appeal against an order dismissing application u/s 24 by the District Judge lies u/s 28. In *Sunder Singh Vs. Manna Sunder Singh*, the Punjab High Court has held that an order awarding maintenance pendent elite and expenses of proceeding on a wife's application u/s 24 of the Hindu Marriage Act is appealable u/s 28 of the Act. A similar view has also been taken in *Kadia Harilal Purshottam Vs. Kadia Lilavati Gokaldas*, , *Pratima Bose v. Kamal Kumar Bose*, (1964) 68 Cal WN 316 and *Smt. Snehalata Dansena Vs. Jagadish Dansana*, .

12. On a consideration of the provisions of Section 28 and the several authorities referred to above, we are , therefore, fo the view that an order passed u/s 24 of the Act granting maintenance and expenses of proceedings would be appealable u/s 28 of the Act. The reference is answered accordingly. The matter may now be put up before an appropriate Bench. We make no order as to costs of this reference.

13. Answer accordingly.