
(1992) 08 MAD CK 0057
In the Madras High Court

Seetharaman

APPELLANT

Vs

Vaduvambal

RESPONDENT

Date of Decision : 07-08-1992

Acts Referred:

Hindu Marriage Act, 1955 — Section 24, 25, 28

Citation : (1993) 1 MLJ 175

Hon'ble Judges : Maruthamuthu, J

Bench : Division Bench

Judgement

Maruthamuthu, J.—The revision petitioner herein is the husband and the respondent herein is his wife, The revision petitioner filed the petition H.M.O.P. No. 83 of 1987 u/s 13(1)(b) of the Hindu Marriage Act (hereinafter referred to as "the Act"), praying for a decree for divorce against the respondent. The revision petitioner alleged in his petition that the marriage between him and the respondent took place at Panrution 19.8.1983 and the respondent was not ordinarily and continuously living with the revision petitioner subsequent to the marriage and had chosen to live with her parents after deserting the revision petition and that the panchayat convened for the purpose of settlement became in vain. The revision petitioner has added that he filed H.M.O.P. No. 667 of 1985 for restitution of conjugal rights and obtained an ex parte decree on 23.4.1987 and that the even thereafter the respondent had refused to go and live with the revision petitioner. After exhausting the steps to get at the respondent, the revision petitioner hastened to file the petition for divorce. This was resisted by the respondent. Of course, she admitted her marriage with the revision petitioner as true and valid, but she all that the revision petitioner had treated her with cruelty by compelling her to gel Sridhana from her parents" house quite often. She contended that she was deserted by the revision petitioner in June, 1984. She however slated that she was willing to go and live with the revision petitioner, when the revision petitioner filed H.M.O.P. No. 667 of 1985. She finally contended that there is no reason for granting a decree of divorce against her. Pending enquiry on the original petition, the respondent wife filed 1.A. No. 184 of

1989 u/s 27 of the Act praying for a direction to the revision petitioner to return the gold jewels mentioned in the petition of the respondent. She alleged therein that the revision petitioner has married a second wife by name Gunabushani and that she is wearing the gold necklace of the respondent, weighing 40 grams, which is not to the liking of the respondent, stated that of the various items of jewellery, a gold coin weighing one sovereign, presented to her as "Seer" during the first Deepavali, is with the revision petitioner. This was opposed by the revision petitioner stating that he is not in possession of any gold jewels belonging to the respondent. He also denied the allegation that he has married a second wife by name Gunabushani.

2. After enquiry of the main original petition and the interlocutory application, the learned Subordinate Judge, Cuddalore, granted a decree of divorce on the ground that the respondent deserted the revision petitioner and allowed the original petition. As regards the return of the jewels, the learned Subordinate Judge, Cuddalore, rejected the claim of the wife/respondent. Aggrieved by the said order of the learned Subordinate Judge, Cuddalore, the respondent herein preferred C.M.A. No. 29 of 1990 as a single appeal, before the District Judge, South Arcot at Cuddalore. On the objection raised on behalf of the revision petitioner that no single appeal can be maintained on two orders passed by the Sub Court in O.P. and I.A., and that appeal could be filed on the orders, in I.A. The learned District Judge, South Arcot at Cuddalore.

The prayer in the memo of appeal is for accepting this appeal and the petition for return of jewel in I.A. No. 184 of 1989. Therefore, no separate appeal is necessary for I.A. No. 184 of 1989. Appeal is maintainable for both orders...

Now, the revision petitioner has come forward with the present Civil Revision Petition challenging the correctness of the said order of the learned District Judge, South Arcot at Cuddalore. He would reiterate his contention that no single appeal as C.M.A. No. 29 of 1990 is maintainable for two orders passed by the Subordinate Judge. On two different subjects and that though appeal can lie as against the order passed in H.M.O.P. No. 83 of 1987, no appeal can be maintained with regard to the order passed in I.A. No. 184 of 1989, which is an order passed u/s 27 of the Act. The learned Counsel for the revision petitioner contended that if at all, a revision alone can lie as against the order passed in I.A. No. 184 of 1989 and that as the same has not been filed by the respondent so far, her claim for the return of the jewels asked for in I.A. No. 184 of 1989 and rejected by the Subordinate Judge cannot be gone into by the lower appellate court.

3. On a consideration of the respective claims and contentions, I am afraid I may have to agree with the contentions raised on behalf of the petitioner. No doubt, the petitioner has filed a petition u/s 13(1)(i-b) of the Hindu Marriage Act seeking a decree of divorce against the respondent and in the course of the same proceedings, the respondent has preferred an application I.A. No. 184 of 1989 purporting the same as one u/s 27 of the Hindu Marriage Act praying for the

return of the gold jewels mentioned in the said application to her in the event of grant of a decree of divorce. A casual scrutiny of the said application I.A. No. 184 of 1989 shows that it is very difficult to hold that it is an application to come within the ambit of Section 27 of the Hindu Marriage Act. Section 27 of the Act runs as follows:

In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

It only means and implies that in respect of any property presented at or about the time of marriage which may belong jointly to both the spouses can be claimed u/s 27. In respect of other properties which do not belong to both the parties or which were not given to them at or about the time of marriage, any dispute with reference to such property must be settled in the ordinary court of the country and cannot be a matter for provision in the decree in the matrimonial proceeding. In fact, this is the objection raised on behalf of the petitioner. Learned Counsel for the petitioner submitted that in as much as the gold jewels in respect of which an order is sought for by the respondent, have not been alleged to be those presented at or about the time of marriage, belonging to both of them, the application I.A. No. 184 of 1989 is not maintainable and even the provision of law quoted as Section 27 of the Hindu Marriage Act is misconceived. According is to file a suit for recovery of gold jewels. It may be noted here that the respondent alleges in her application that only a gold coin (one sovereign) was presented to her as "seer" during first Deepavali and that the rest of the gold jewels, gold necklace weighing 40 grams and gold ring of half a sovereign merely belong to the respondent. She has not clearly alleged that those jewels were presented to her and the petitioner at or about the time of marriage.

4. Learned Counsel for the respondent will not be right in invoking Section 105(1) and (2), C.P.C. which is as follows:

105. Other Orders : (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. (2) Notwithstanding anything contained in Sub-section (1), where any party aggrieved by an order of remand from which an appeal, lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Nor he will be entitled to rely on Order 43, Rule 1-A, C.P.C. either, which is as follows:

1-A. Right to challenge non-appealable orders in appeal against decrees : (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party,

may in an appeal against the decree contend that such order should not have been made and the judgment should not have been pronounced.

The first part of Section 105(1) reiterates that no appeal lies from any order unless such right is expressly given by the Code, but even if an interlocutory order be appealable, a party is not bound to prefer an appeal at once, and under the second part when he appeals against the decree after final decision he can make any error, defect or irregularity in the order affecting the decision of the case, a ground of objection in the appeal. The provision under Order 43, Rule 1-A has been newly inserted in the Code. This rule makes an express provision to clarify the position consequent on the abolition of the right of appeal on order under Order 8, Rule 10, Order 10, Rule 4 and O..16, Rule 20, C.P.C., that in an appeal from the decrees passed as a result of the orders party can take the same point as he could have taken in appeal under those orders in order to avoid doubts which may arise, because the judgment pronounced will be regarded as final in the appeal against the decree. However, Section 105 makes it sufficiently clear that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, could be challenged in an appeal from the final decree or order. Here, the point is whether the respondent against whom an order has been passed by the trial court in I. A. No. 184 of 1989 in respect of the return of the jewellery, is entitled to prefer an appeal along with the Judgment of the trial court delivered in respect of the dissolution of marriage. The above provisions of the CPC makes it clear that the respondent cannot prefer an appeal against the order passed in I.A. No. 184 of 1989. The order against which the respondent seeks to prefer appeal is not one passed under the Civil Procedure Code, but u/s 27 of the Hindu Marriage Act.

5. The next point to be considered is whether there is provision in the Hindu Marriage Act for preferring an appeal against the order passed in I.A No. 184 of 1989. Section 28 of the Act will be relevant and it is as follows:

28. Appeals from decree and orders : (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of Sub-section (3) be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, u/s 25 or Section 26 shall, subject to the provisions of Sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decision of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty

days from the date of the decree or order.

In view of Section 28(1) of the Hindu Marriage Act, it can be stated that the decree passed by the trial court for dissolution of marriage u/s 3 is a decree which is appealable, but it cannot be so in the case of the order passed u/s 27 of the Hindu Marriage Act in I.A. No. 184 of 1989. The said order is only an order passed in an interim application and not decree. A combined reading of Section 28(1) and (2) makes it abundantly clear that appeals can be only from orders of permanent nature under Sections 25 and 26. Since the order passed in I.A. No. 184 of 1989 for return of the jewels is an interim order and not of a permanent nature as contemplated u/s 28, it has to be said that the respondent is not entitled to maintain an appeal against the said order.

6. In *Gurbaksh Singh Vs. Smt. Taran Jit*, it has been observed as follows:

A bare perusal of Section 28 as amended would show that it makes only the decrees made by the court in any proceedings under this Act appealable. There is no mention of the orders as it stood under the old unamended Section 28.

Similar view has been expressed in *Dhani Ram Vs. Smt. Sushila Devi*, which is as follows:

The decrees and orders mentioned in Section 28 of the Hindu Marriage Act, which provides for appeals are the decrees and orders specifically referred to by the Act itself. Certain other orders, it was held, were also appealable. Those are orders made under the CPC by virtue of Section 21 of the Hindu Marriage Act. Those orders are appealable if they have been made appealable expressly under the Code itself. No other order made in the course of trying a petition under the Hindu Marriage Act is appealable. The order impugned in this appeal is an order staying the proceedings in the divorce petition until the application u/s 24 of the Act is disposed of. No appeal lies against such an order.

In *Narain Singh Vs. Smt. Rukmani*, it has been observed as follows: (Headnote).

Under the amended Section 28, an appeal is provided against those orders only which are made under Sections 25 and 26 of the Act, provided they are not interim orders. No appeal, therefore, is contemplated under the amended law against an order u/s 24 of the Act. What has not been expressly included in the new section must be implied to have been excluded. Therefore, no appeal lies now against an order u/s 24.

It may be noted here that Section 28 of the Act does not include Section 24 with regard to the filing of appeal. Section 24 deals with maintenance to be awarded pendente lite and expenses of proceedings.

7. Considering all aspects, I hold that the respondent is not entitled to prefer appeal against the order passed in I.A. No. 184 of 1989 and that the appeal filed in the District Court, South Arcot at Cuddalore in C.M.A. No. 29 of 1990 must be deemed to relate to the decree of divorce. The learned District Judge shall treat

the said appeal accordingly and dispose of it expeditiously in accordance with law. The civil revision petition is allowed. No costs.