

(2023) 11 GUJ CK 0051
In the Gujarat High Court
Case No : R/Second Appeal No. 279 Of 2009

Umarshi Kayabhai Chande

APPELLANT

Vs

Vanitaben Umarshi Chande

RESPONDENT

Date of Decision : 29-11-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 2(2), 100
Hindu Marriage Act, 1955 — Section 9, 10, 11, 12, 13, 23(A), 24, 25, 26, 28
Hindu Adoptions And Maintenance Act, 1956 — Section 18
Code Of Criminal Procedure, 1973 — Section 125

Citation : (2023) 11 GUJ CK 0051

Hon'ble Judges : Ilesh J. Vora, J

Bench : Single Bench

Advocate : Kirtidev R Dave, Rahul K Dave, Mankad

Final Decision : Dismissed

Judgement

Ilesh J. Vora, J

1. This second appeal under Section 100 of the Civil Procedure Code has been filed against the judgment and decree dated 28.08.2009 passed by the Additional District Judge at Kachchh-Bhuj in Regular Civil Appeal No.13 of 2008, arising out of the judgment and decree dated 31.08.2007 passed by the Civil Judge, Bhuj in Hindu Marriage Petition No.27 of 2003.

2. The appellant and the respondent are husband and wife. The appellant-husband has lost his case from both the Courts below. The appellant by invoking Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as the "Act" for the sake of brevity), filed a suit for restitution of conjugal rights. The said suit was resisted by the respondent-wife. By way of counter claim, the wife claimed maintenance under Section 24 and 25 of the Act. The Civil Court during the proceedings of the suit directed the husband to pay maintenance pendente lite under Section 24 of the Act. Pending the proceedings, the appellant-husband vide Exh.25 withdrew the said suit. The withdrawal was objected by the

respondent-wife and insisted upon the Court to determine the permanent alimony as provided under Section 25 of the Act. The learned Civil Court vide its order dated 04.09.2006, permitted the appellant-husband to withdraw the suit for restitution of conjugal rights and ordered to proceed with the issue of permanent alimony to be determined finally on merits. The Civil Court had framed the issue at Exh.30 and after considering the oral as well as documentary evidence, the application filed under Section 25 seeking permanent alimony was partly allowed. The appellant-husband directed to pay a sum of Rs.1,500/- as monthly maintenance to minor children and so far wife is concerned, no maintenance was passed in her favour as at relevant time, she having sufficient means for livelihood. Being aggrieved with the said judgment and decree dated 31.08.2007, the appellant-husband by preferring appeal, challenged it before the District Court, Bhuj. The learned First Appellate Court after hearing the parties, by confirming the judgment and decree passed by the Civil Court, dismissed the appeal.

3. Being aggrieved with the judgment and decree of the First Appellate Court, the appellant-husband has preferred the present second appeal. While admitting the appeal, the following questions have been formulated as substantial questions of law:

“(a) Whether the Courts below have committed an error of law in passing the order of permanent alimony when there is no decree?

(b) Whether the judgment and decree of the Civil Court is bad in law in view of the provision of Section 25 of the Hindu Marriage Act?

(c) Whether the judgment and decree of the Appellate Court is bad in law in view of provision of Section 26 of the Hindu Marriage Act?”

4. In the aforesaid background facts, this Court has heard learned counsel Mr. Kirtidev R. Dave and Mr. B.Y. Mankad for the respective parties.

5. Mr. Dave, learned counsel for the appellant argued that, the Courts below were not justified in granting permanent alimony under Section 25 of the Act, having regard to the facts that, the petition for restitution of conjugal rights having been dismissed as not pressed and therefore, Section 25 of the Act which is ancillary to the relief sought in the main petition filed under Section 9 of the Act and the same can be granted only when the main relief is granted. Thus, the Courts below have overlooked the provision of Section 25 which says that, any Court exercising jurisdiction, may at the time of passing any decree or at any time subsequent thereto, upon application made by the wife, may directed the husband to pay the maintenance.

6. In the aforesaid contention, learned counsel Mr. Dave argued that, the order passed under Section 25 granting maintenance is being passed in utter disregard to the aforesaid provision and order is without jurisdiction and therefore, the Court below committed an error of law while passing the order of permanent

alimony in favour of the respondent-wife and same deserves to be set aside.

7. On the other hand, countering to the submissions, Mr. B.Y. Mankad, learned counsel has submitted that, the Courts below have not committed any error of law while granting permanent alimony under Section 25 of the Act. He further submitted that, Section 23(A) of the Act permits the parties to make counter claim and accordingly, the respondent being a party defendant made a counter claim for permanent alimony under Section 25 of the Act. Thus, therefore he urged that, even if the suit for restitution of conjugal rights is withdrawn, the Court before whom the relief sought under Section 25 of the Act can proceed as if separate suit is filed and Court is duty bound to dispose of the said relief on its own merits. Thus, in the instant case, while permitting the appellant-husband to withdraw the relief sought in the main suit, the Court below rightly proceeded with the matter so far counter claim made under Section 25 of the Act and deciding the said counter claim, the Court below after considering the evidence on record, held liable the appellant-husband to pay the amount of permanent alimony to the minor children.

8. In such circumstances, Mr. Mankad, learned counsel submitted that, the present second appeal deserves to be dismissed as the Court below has rightly interpreted the provision of law while deciding the counter claim and therefore, the present appeal would not be considered as giving right to a substantial question of law and the same may be dismissed with cost.

9. In the second appeal, the High Court cannot reverse the concurrent findings of the lower Courts under ordinary circumstances. The basic law pertaining to the second appeal is that, if no substantial question of law would emerge, the findings of the First Appellate Court or the concurrent findings of the Courts below on the question of fact cannot be interfered with. In the facts of the present case, the status of parties are not in dispute. In the HMP Suit, which was filed under Section 9 of the Act for restitution of conjugal rights was unconditionally withdrawn and at the time of submitting the withdrawal application, the claim of maintenance under Section 25 of the Act was being made by the respondent-wife. The learned trial Court while permitting to withdraw the suit, decided to determine the claim of permanent alimony as if the separate suit as a counter claim is made by the respondent-wife and the prayer sought was tried and decided on its own merits.

10. In the aforesaid admitted facts the issue arise for consideration is to whether the Courts below have committed an error of law in passing the order of permanent alimony under Section 25, despite the facts that, the main suit wherein no decree is passed?

11. To decide the controversy, it is necessary to refer Section 23A and Section 25 of the Hindu Marriage Act. Section 23A is as follows:

“23A. Relief for respondent in divorce and other proceedings.—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent

may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

11.1. It is evident from bare reading of aforesaid provision, the party defendant has a right to oppose the relief sought in the main suit, but also make a counter claim for any relief under the Act i.e. Hindu Marriage Act, 1955.

11.2. Section 25 of the Act reads as under:

"25. Permanent alimony and maintenance.—(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 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 4 [the conduct of the parties and other circumstances of the case], 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.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just."

12. Now let us deal with the contention that, the Court below could not have passed the order of permanent alimony in absence of any order or decree sought in the main HMP Suit. This Court does not find merits in the said contention. It is no doubt true that, in Section 25, the expressions used is "at the time of passing of any decree", the Court may consider the counter claim of the defendant. Generally, the Civil Court while dealing with the matter either allow or dismiss the suit, but, at the same time, the judgment and order would be followed by the decree. Thus, if the suit is dismissed, then also, it is incumbent on the part of the Court to draw the decree. The interpretation made by learned counsel Mr. Dave that, the decree means granting a relief, cannot be accepted. In the identical issue, the Division Bench of Andhra Pradesh High Court in the case of "Silla

Jagannadha Prasad alias Ramu vs. Silla Lalitha Kumari (I 1988 DMC 319) wherein view was taken that, the expression "at the time of passing any decree" used in Section 25 only means "that at the time of disposal of the case". The Division Bench of Andhra Pradesh High Court after interpreting Section 25 of the Act, observed that, passing of any decree includes of dismissal of the petition. The view taken by the Division Bench of Andhra Pradesh High Court is squarely applicable to the facts of the present case. Para-4, 5 and 6 of the aforesaid decision reads as under:

"4. Thus, the main object of the Section is to provide some amount for the sustenance of parties who are unable to support themselves. Under Sub-section

(1) the provision can be made at the time of passing of the decree or at any time subsequent thereto. The contention of the learned Counsel for the appellant is that the words "at the time of passing of the decree" mean only when the petition is allowed and not when it is dismissed. It is suggested that the words "passing of any decree" mean a decree granting the relief. As seen from Section 25 the expression used is "at the time of passing of any decree". The word "decree" is not defined under the Hindu Marriage Act. Therefore, we can borrow the definition under the Civil P.C. In fact, under Section 25-A of the Act, the provisions of the Civil P.C. are made applicable for enforcement of decrees and orders under the Hindu Marriage Act, Section 2(2) of C.P.C. defines a "decree" as a formal expression of an adjudication which conclusively determine the rights of parties with regard to all or any of the matters' in controversy in the suit and may be either preliminary or final". Thus a decree means the expression of an adjudication. The suit or petition may either be dismissed or allowed. A relief may be given or refused. In either case, it is a decree. There is no reason to give a restricted meaning to the expression "decree". In this connection the word "any" is also significant. It indicates either allowing or rejecting. Under Section 28 of the Act all decrees are made appeal able. If the contention of the learned Counsel that a decree means only granting a relief, then no appeal would lie against an order dismissing the petition as the word used in Section 28, the appeal section, is decree. But it is submitted that Section 28 uses the words "decree made" as distinguished from "passing of the decree" used in Section 25. In our view it is a distinction without any difference. The expression "at the time of passing any decree" used in Section 25 only means "that at the time of disposal of the case". The emphasis is on the time and this is evident from the later expression "or at any time subsequent thereto". The further expression that "any Court exercising jurisdiction under this Act" also lends support to this conclusion. The intention appears to be that the Court which had the opportunity of seeing the parties and knowing the full details of the case must be vested with the power to provide for maintenance either to the needy husband or the needy wife. It is an ancillary power no doubt but ancillary to the main power of disposal of the petition. To our mind this Section from its express language empowers every Court deciding a matrimonial matter to give the relief of maintenance to either party irrespective of the fact whether the petition for any of the reliefs

mentioned in Sections 9 to 13 is dismissed or allowed, whether the reliefs are granted or declined. Let us take for instance a case where one of the parties seeks for divorce on the ground of desertion and the relief is refused on the finding that the respondent] had reasonable excuse to live separately from the other spouse. In that case would it not be just to provide maintenance for the party who is not at fault even though the main relief of divorce is dismissed. We fail to see how the court is deprived of making a provision in the decree for maintenance of the other party who is not at fault.

The very case which we are dealing is an illustration. The husband sued for divorce on the ground of desertion. The petition was resisted by the wife saying that she had to live separately as the husband kept a concubine and brought her to live in the same house. The Court found that the case of the wife is true and consequently dismissed the petition of the husband for divorce. Then why not the wife ask for maintenance in the same proceeding. Why should she be driven to another Court for relief under Section 18 of the Hindu Women's Adoption and Maintenance Act or to the Magistrate's Court under Section 125, Cr. P.C. It is conceded that if the main petition for divorce was allowed, the Court would have jurisdiction to order maintenance to the wife notwithstanding the fact that she was the faulting party. Then would it not be an a fortiori case to award maintenance when the party is not at fault and the opposite party was not entitled to divorce. In this connection, we may also refer to Section 23-A, Hindu Marriage Act, which was introduced in 1976. It is as follows : --

"23-A :- Relief for respondent in divorce and other proceedings : --

In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

This Section enables the opposite party not only to oppose the relief of divorce, judicial separation or restitution of conjugal rights, but also (to) make a counter claim for any relief under the Act and proves that it was the petitioner who was guilty of adultery, cruelty or desertion (and) he or she is entitled to that relief. If the interpretation suggested by the learned Counsel is accepted, this Section would be rendered otiose and no relief can be given to the respondent even if the petitioner's adultery, desertion or cruelty are proved and the petition for divorce, restitution of conjugal rights or judicial separation is dismissed. It is submitted that the reliefs contemplated under Section 23-A are the reliefs mentioned in Sections 9 to 13 of the Hindu Marriage Act. We cannot accept. The words used are "any relief" which include a relief under Section 25 and if the opposite party makes a counter-claim for the relief under Section 25 while opposing the petitioner's claim for divorce this Section empowers the Court to grant such

relief. The word "any relief" occurring in Section 23-A has been held to include not only the reliefs mentioned in Sections 9 to 13, but also a relief under Section 25 of the Hindu Marriage Act.

5. In *Sannaiah v. Padma*, a question arose whether a claim for maintenance under Section 25 would amount to a counter claim contemplated under Section 23-A. The facts are that the husband filed a petition for restitution of conjugal rights. The wife alleged cruelty by the husband and claimed permanent alimony for herself and the minor child. The husband wanted to withdraw the petition. The request was not allowed observing that under Section 23-A of the Act, the wife's claim for permanent alimony is a counter claim and the petition cannot be allowed to be withdrawn. The argument that the counter-claim contemplated under Section 23A is divorce or judicial separation or restitution of conjugal rights and not any other relief was rejected and held that any relief includes a relief under Section 25 of the Act.

6. The intention of the legislature is clear that inasmuch as the matrimonial Court has been seized of the matter and has gone into the merits of the controversy between the parties and know who had committed the wrong and where the justice lay should be empowered to make an order of permanent alimony. The passing of any decree includes passing of dismissal of the petition and the decree may be a decree allowing the petition or dismissing the same. The words "any decree" take, in both kinds of decrees Otherwise, the words will not be any decree hut merely "a decree". Besides there is no meaning in allowing the parties to go to some, other Court and start back once again: after they have done it before the matrimonial Court which knows their respective strength and can be expected to do justice especially when the Court is one of the superior Courts in the Country being a District Court or its equivalent."

13. In light of the aforementioned discussion and considering the provisions of law as referred above, I do not find any merits in the second appeal as it does not involve any substantial question of law and the Courts below have not committed any error while coming to a conclusion that, the claim of permanent alimony is maintainable despite no decree and/or order passed in the main suit. Accordingly, the present second appeal stands dismissed.