Geeta Satish Gokarna Vs Satish Shankarrao Gokarna

Court: Bombay High Court

Date of Decision: March 29, 2004

Acts Referred: Hindu Marriage Act, 1955 â€" Section 25(1), 25(2)

Citation: AIR 2004 Bom 345 : (2004) 3 ALLMR 229 : (2004) 3 MhLj 159

Hon'ble Judges: S.R. Sathe, J; F.I. Rebello, J

Bench: Division Bench

Advocate: Vasanti Bangera, for the Appellant; R.R. Salvi, for the Respondent

Judgement

F.I. Rebello, J.
The marriage between the appellant and respondent was dissolved by judgment dated 26th May, 1995 by mutual consent

u/s 33 of the Hindu Marriage Act, 1955. There was also other consent terms included of which clauses 4 and 5 read as under:--

4. Both the parties agrees and undertakes to the Hon''ble Court that they will not initiate any proceeding against each other in future.

5. The petitioner will not claim any maintenance or alimony in future from the Respondent.

2. The appellant herein for reasons disclosed in the application being Application No. 122 of 1997 prayed that she be granted permanent

maintenance of Rs. 25,000/- per month from the date of the application or such other date as this Court deems fit and proper. The application was

filed on 4th September, 1997. In the application the appellant contended that after the marriage the appellant and respondent had been on tour of

Europe and that the respondent had taken a premises on lease by paying monthly compensation at the rate of Rs. 10,000/- per month. It was also

pointed out that the Respondent had two garages to keep his two Mercedes cars. It is then pointed out that the respondent is a professional

architect and interior designer and has well furnished posh office at Peddar Road, a prestigious locality in Bombay. The respondent, it is

contended, also has an independent house in the locality known as Opera House which belongs to the respondent and his parents. There is a

Restaurant and the respondent and his family members are getting substantial amount as and by way of rent. To the best of her knowledge the

income of the appellant would be in the vicinity of Rs. 2.00 lakhs, per month. The respondent, it is contended, does not disclose his correct income

to the Income Tax authorities to avoid the payment of higher taxes and filing returns for smaller amount than his actual income. The appellant further

pointed out that she attempted to secure a job, but she has been unable to do so. At the time of her marriage she was employed and gave up the

same at the instance of the respondent herein.

3. The respondent herein filed his reply. It is his contention that the appellant is employed and keeps on changing her job from time to time and as

such cannot claim maintenance. The respondent further has stated that on the tour of Europe his friends Mr. and Mrs. Parikh accompanied them,

but he denied that he met the expenses from his own pocket. It is pointed out that Mr. and Mrs. Parikh were his friends. Considering the

contention on behalf of the appellant that the consent terms were filed when she was not in a fit mental state it was pointed out that the consent

terms were filed in the presence of her lawyers including her sister, who is a practicing Advocate and, therefore, the contention that the consent

terms were signed under pressure is false and misconceived. Her correspondence to him which is on record would also negate that contention. It is

pointed out that the respondent could have easily got a divorce on the grounds of desertion, cruelty and other acts of the appellant and the only

reason he agreed to a consent divorce petition was the assurance given by the appellant that she would not in future claim any maintenance from

the respondent. The respondent admitted that he is Architect and Interior Designer, but that he suffered from a heart attack in April, 1991. As he

could not fulfil his commitments to his clients his work suffered so also his income. The respondent denied that he owns any office at Peddar Road

and stated that he has one car which is 37 years old. It is his case that he is living in a tenanted premises which are rented by his mother. Referring

to leased flat it is pointed out that the respondent was paying Rs. 3,000/- per month and not Rs. 10,000/- per month and the applicant herself had

signed the leave and license agreement. Insofar as the garages is concerned, he is paying Rs. 500/- per month. It is also denied that the respondent

has his own independent house and or restaurant. It is his further contention that between the period January 1, 1994 to December 31, 1995 he

had no income whatsoever due to his ill-health and due to the recession in the economy. Between 1st January, 1996 to December 31, 1997 the

respondent''s average income works out to approximately Rs. 8,500/- per month. For all the aforesaid reasons it is pointed out that the Appellant

is not entitled to any maintenance and the application ought to be rejected.

4. After hearing the parties the learned Judge of the Family Court by the impugned judgment dated 12th February, 1999 rejected the contention of

the respondent herein that the application was not maintainable and found in favour of the appellant herein. Insofar as maintenance is concerned,

considering the material on record the learned Family Court fixed maintenance at the rate of Rs. 2,000/- per month from the date of the

Application i.e. from 4th September, 1997.

5. The appellant being aggrieved by the order of granting maintenance only at the rate of Rs. 2,000/- per month has preferred the present appeal.

The respondent has also preferred an Appeal contending that as the appellant had signed the consent terms which contain a provision that she

would not claim maintenance in future she is estopped from claiming maintenance. It is pointed out that it is not open to the appellant to call on the

Court to reopen the consent terms which is already concluded by the order of the Court in which maintenance was not granted in terms of the

consent terms.

6. It will, therefore, be necessary to first deal with the issue as to whether in a case where consent terms were filed which provided that the wife

would not claim maintenance or alimony in future whether it is still open to the wife to claim maintenance. It may be pointed out that initially there

was some discussion as to whether it is the provisions of Section 25(1) and/or Section 25(2) of the Hindu Marriage Act which were applicable. To

our mind the entire exercise is academic. If there is a power to grant relief the mere fact that wrong section was quoted is of no consequences. It is

in that context that we may now look at the provisions of Section 25 of the Hindu Marriage Act, 1955. Sections 25(1) and 25(2) read as under :--

25(1). 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, 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.

A bare perusal, therefore, of Section 25(2) indicate that the section would only apply if there is a change of circumstance of either party, at any

time after an order has been made u/s 25(1) then at the instance of either party the Court could vary, modify or rescind any such order u/s 25(1)

the order for maintenance. Therefore, it is clear that if only an order was passed u/s 25(1) could the appellant apply u/s 25(2) for varying,

modifying or rescinding such an order. In the instant case no maintenance was awarded u/s 25(1) and consequently Section 25(2) would not be

attracted. The case, therefore, rests about applicability of Section 25(1) of the Act.

7. A perusal of Section 25(1) will show that the power to grant alimony or maintenance is not only at the time of passing of a decree. It is in the

alternative i.e. at any time subsequent thereto. This expression ""or at any time subsequent thereto"" can only mean after the decree for divorce has

been passed, provided that no maintenance was provided for in the order granting decree for divorce. Therefore, clearly in terms of the express

language of the section itself any of the parties if no maintenance has been granted u/s 25(1) may at any time subsequent thereto move an

application. Having held that there is a power u/s 25(1) the next question is whether considering the consent terms the appellant is entitled for

maintenance. We have already reproduced the clauses of the consent terms. We may now advert to some of the judgments adverted to on behalf

of the parties hereto. On behalf of the respondent, who has raised the contention that the Appellant cannot claim maintenance his learned Counsel

relied upon the judgment in the case of Gurdev Kaur and Another Vs. Mehar Singh and Others, . That judgment did not deal with the issue which

is in issue here. That judgment only dealt with the issue that the consent decree cannot be challenged in subsequent suit except on grounds on

which contract can be set aside on the ground of fraud, misrepresentation, etc. In the instant case this is not an application or a suit for setting aside

the decree. It may be made clear that the decree passed really speaking is not a consent decree, but was a decree by mutual consent u/s 13-B of

the Hindu Marriage Act, 1955. Whilst passing this decree the Court also accepted certain other consent terms which were signed by the parties

and made part of the decree. At the highest, therefore, the challenge by the respondent can be by placing reliance on Clause 5 of the consent terms

which provided that the appellant would not claim alimony/maintenance in the future. It is no doubt true that the appellant had contended that she

has signed the consent terms in the circumstances set out thereto as she was not in a mental state of mind. In our opinion it is not necessary for us

to deal with the issue considering the larger point that is going to be considered while disposing of the contention. Reliance was also placed on the

judgment of a learned Single Judge of the Punjab and Haryana High Court in the case Manjit Singh Vs. Savita Kiran, . In that case the husband

gave up his right to get custody of the child and similarly the wife gave up her rights to claim alimony. The learned single Judge held that such an

agreement was not contrary to public policy. It is not necessary to refer to the other judgments.

On behalf of the appellant learned Counsel has drawn our attention firstly to the judgment of a learned single Judge of this Court in the case of

Hirabai Bharucha v. Pirojshah Bharucha AIR 1945 Bom. 537. The issue before the learned Judge was the provisions of Section 40 of the Parsi

Marriage Act. The learned Judge was considering two issues firstly a term in the agreement whereby a wife had given up her right to claim

alimony/maintenance in future. Whether such a term is contrary to public policy and consequently whether the Court will recognize such an

agreement where the Court has statutory power u/s 40. After considering the various case law the learned Judge held that Section 40 is based on

grounds of public policy and based directly on the principle of not allowing parties whose marital ties are severed to become a burden. The learned

Judge then observed that ""Therefore, the principle is that where on grounds of public policy a wife cannot enter into such a contract then the

contract is void and the Court will take notice of that and ignore that part of the order although it was made by consent because as remarked by

Lord Atkin ""the wife''s right to future maintenance is a matter of public concern which she cannot barter away...."" The learned Judge also

distinguished some other judgments where after maintenance had been ordered parties agreed to give up the claim for maintenance.

Reliance was also placed in the judgment in the case of Patel Dharamshi Premji Vs. Bai Sakar Kanji, . One of the issues there was whether it was

open to a party to maintain an application after a decree has been passed. After considering the language of Section 25(1) the learned Division

bench noted that the application for such incidental relief should be maintainable after passing of the decree granting substantive relief which is a

decree for divorce. It was also laid down that Section 25 can be resorted to by any of the parties and merely because the decree is passed cannot

by itself disentitle the claim for permanent alimony. The judgment in the case of Ram Shanker Rastogi Vs. Smt. Vinay Rastogi, was a judgment of

the Division Bench of the Allahabad which dealt with a case u/s 25(2) with which we are really not concerned.

8. Having considered the judgment in the case of Hirabai Bharucha (supra) the question really would be whether u/s 25(1) a party who has been

divorced is entitled to maintenance even if in the consent terms had agreed not to claim alimony/maintenance. The language of Section 25 shows

that it is a power conferred on the Court at the time of passing of the decree or at any time subsequent thereto on an application made to award

alimony or maintenance. This is a jurisdiction to be exercised by the Court. The parties, therefore, cannot by an agreement between themselves,

agree to oust the jurisdiction of the Court which otherwise Parliament has conferred. The second aspect of the matter is that permanent alimony

and maintenance are a larger part of the right to life. These provisions have been included to enable a person unable to maintain herself to be

protected. The learned single Judge of this Court in Hirabai Bharucha interpreting Section 40 of the Parsi Marriage Act has taken a view following

similar views taken by English Courts that such a section is based on public policy. That public policy is now reflected in our Constitutional

philosophy. The power as conferred on the Court with the object of helping the weak. Therefore, any clause in a contract or consent terms

providing to the contrary would be against public policy. (See Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others,). Clause

5 of the consent terms is clearly severable from the other terms of the consent terms. Clause 5 would be contrary to public policy and consequently

that clause will have to be treated as non-est. The only question is whether Clause 4 would bar the appellant herein from so applying. The very fact

that Clause 5 was placed differently from Clause 4 will indicate that it ought to cover situations other than those covered by Clause 5. Even

otherwise Clause 4 to the extent that prohibits a party from claiming maintenance would also suffer similar consequences as Clause 5 of being

against public policy. Considering the above discussion the appellant was not barred from applying u/s 25(1). The application, therefore, by the

appellant was clearly maintainable. The learned trial Judge was right in so holding. The Cross Objections, therefore, filed by the respondent on that

count must be rejected.

9. We now come to the contention as raised by the appellant in the appeal that the amount of Rs. 2000/- as awarded is grossly inadequate and

requires to be enhanced. We are in Appeal. What the Court must consider is the material on record. It is true that in the case of maintenance it is

open to the Court to not only see whether the issue has been answered by material evidence, but whether it is possible for the Court from the

material available to draw any inference about the earning capacity so as to base the order of maintenance. In the instant case the appellant

examined herself and the respondent examined himself. By examination we mean that both filed affidavits which were treated as evidence. Neither

party applied for cross-examination of each other. The evidence, therefore, is of word to word of the appellant versus respondent. Whatever be

the position that may have been at the time of the marriage, what emerges now is that the appellant is an Architect by profession. He is staying in a

rented premises. The rent receipts from the premises is on record. The premises were rented in the name of the mother. The contention of the

appellant is that the respondent is the owner of the building and the family has a Restaurant is not supported by any material on record. The

respondent has so denied it. That has not been challenged. The other aspect of the matter is that the case of the appellant was that the respondent

visits foreign countries frequently. We do not find any material on record including any application moved by the appellant for production of the

passport which was rejected by the Family Court. However, to satisfy ourselves we called upon the Counsel for the respondent to produce the

passport. The passport now produced was issued in 1998 and is valid till 13th September, 2008. That only shows that the respondent had left

sometime between 1998 and 1999 for Hong Kong. After that there are no entries indicating that the respondent has travelled abroad. The case of

the respondent after his sickness his income has decreased. Learned Counsel asked us to ignore the income tax returns as they do not correctly

reflect the true earnings of the respondent. Even if we ignore the said material there must be some other material before us to arrive at a figure

different from that was arrived at by the Family Court. We are afraid that there is no such material before the Court based on which we can

enhance the maintenance ordered by the Family Court. No attempt was made to examine any witness or produce any other material to show that

the earning capacity of the respondent was more than what is reflected in his Income Tax return. In the absence of any material, we do not find this

to be a fit case for us to interfere with the amount of maintenance granted by the Family Court u/s 25(1). Hence, the Appeal on that ground stands

rejected.

10. Considering the circumstances the Appeal and Cross Objections rejected. There shall be no order as to costs.