

Some Aspects of Provisions for Maintenance and Property under the Hindu Marriage Act and the Special Marriage Act

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UNDER THE Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 there are provisions for interim maintenance pending the hearing and final disposal of the proceedings and also for permanent alimony and maintenance at the time or within a reasonable time of the final decree. Section 25, clause (1) of the Hindu Marriage Act, 1955 dealing with permanent alimony or maintenance provides :

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.

The wording of section 37 (1) of the Special Marriage Act providing for permanent alimony and maintenance is identical with the wording of section 25(1) of the Hindu Marriage Act except for the words "by either the wife or the husband, as the case may be" and "while the applicant remains unmarried". These conditions are not contained in the Special Marriage Act.

The phrase "while the applicant remains unmarried" has created some confusion in practice, particularly in case of a decree for judicial separation and a decree for restitution. The Law Commission in its *Fifty-ninth Report*

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on the Hindu Marriage Act and Special Marriage Act (submitted in March, 1974) has recommended the removal of the said words. The Law Commission has observed that the court can revoke the order on remarriage under section 25(3) of the Hindu Marriage Act. In view of these recommendations no further comments are made on the same.

II

As regards the construction of the words "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", it is possible to take three views. The first view is that under section 25 the court can make order for alimony on a decree in all proceedings except on a decree of nullity. The second view is that after the decree the court can order maintenance only in proceedings for restitution of conjugal rights and judicial separation and not when there is a decree for dissolution of marriage or nullity. As per the third view, giving liberal construction to the words on 'any decree' the court can make order for alimony and maintenance on a decree in any proceeding whether for restitution of conjugal rights, judicial separation, divorce or nullity. These three views are represented in conflicting decisions of various High Courts in India.

Some of these conflicting decisions may be considered here. A Division Bench of the Madras High Court¹ has held that section 25 cannot be construed in such a manner as to hold that notwithstanding the nullity of the marriage the wife retains her status for purposes of applying for alimony and maintenance. The proper construction of section 25 would be that where a marriage is admittedly a nullity the section will have no application. Some High Courts² have taken the view that the words "on application made to it for the purpose by either the wife or the husband" mean that no application for permanent alimony can be maintained under it after the passing of a decree for divorce or nullity. This view is taken on the reasoning that after the passing of decree for divorce or nullity the relationship of husband and wife no longer exists. As such an order for permanent alimony and maintenance on dissolution of marriage by a decree of divorce or annulment of marriage by a decree of nullity is outside the scope of section 25 of the Act.

Some other High Courts have held that the words 'any decree' would not have been used if the intention of the legislature was to restrict the

1. *Narayanaswami v. Padmanabhan*, A.I.R. 1966 Mad. 394.

2. *Ganyantray v. Bai Prabha*, A.I.R. 1963 Guj. 242; construction expressly overruled in *Dharamshi Premji v. Bai Sakar Kanji*, A.I.R. 1968 Guj. 150 (D B.); *Nathalal v. Mana Devi*, A.I.R. 1971 Raj. 208.

operation of the section only to cases where there were proceedings for restitution of conjugal rights or judicial separation. As per this view, the language of section 25 should not receive a very strict construction and the aggrieved party (in the case of Special Marriage Act it would mean only the wife) should be treated as wife or husband, as the case may be, (wife in the case of Special Marriage Act) for the purpose of application under section 25. The Calcutta High Court³ got over the difficulty in a case of annulment of marriage by the use of the fiction of 'reputed wife'. In that case it was observed that the relief of alimony is incidental to the passing of the decree for nullity. In a recent decision under section 25 the Madras High Court,⁴ relying on the Calcutta decision has held that the court can order maintenance to the spouse in any proceeding whether it is for judicial separation or for restitution of conjugal rights or dissolution of marriage by divorce or for annulment of marriage by a decree of nullity.

Such divergence of views has rendered remedial action by legislation necessary. Legally, there is much to be said in support of the earlier view of the Madras High Court.⁵ Whichever view is adopted the words 'any decree' may be accordingly specifically defined. Section 25 (1) of the Hindu Marriage Act, and section 37(1) of the Special Marriage Act, should be appropriately amended. The Law Commission in its *Fifty-ninth Report* has, however, not considered this aspect of section 25(1) of the Hindu Marriage Act or section 37(1) of the Special Marriage Act.

Another problem arising under section 25(1) of the Hindu Marriage Act, and section 37(1) of the Special Marriage Act, is of ascertaining the income and property of the parties for fixing the quantum of alimony and maintenance. In practice the difficulty comes in ascertaining the income and property of the respondent. There is no provision in law making it obligatory or requiring the parties to make full and proper disclosure of their income. The applicant is not generally aware of or is not in possession of documents from which the income of the respondent can be ascertained. Such documents are accessible to the respondent only and are necessarily within the knowledge of the respondent. In most cases the applicant has no means of getting these documents except through the respondent. The applicant cannot get as of right even Income-tax returns from the Income-tax department. It is, therefore, suggested that these two matrimonial statutes themselves should contain specific provisions which would make it obligatory on the parties to maintenance proceeding to produce documents particularly Income-tax returns and

3. *Mina Rani v. Dasarath*, A.I.R. 1963 Cal. 428.

4. *A.R.M. Rajoo v. Hansa Rani*, A.I.R. 1975 Mad. 15.

5. *Supra* note 1.

wealth-tax returns wherever necessary or ordered by the court. When such documentary proof of that of income and property is available the non-production of the same or mis-statement of the same must be met with serious consequences. In any event courts should be entitled to draw adverse inference on non-production of conclusive proof of parties' own income and properties. These views are expressed taking into consideration the general practice in the city civil court at Bombay where the burden is thrown on the applicant to prove the income and property of the respondent.

III

The question then arises as to what is the position of property of the husband and/or wife when the court passes or is about to pass a decree of nullity, dissolution of marriage or judicial separation.³ Section 27 of the Hindu Marriage Act provides :

In any proceeding under the 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.

The rule provided in section 27 of the Hindu Marriage Act was intended to make provision only for certain property of parties to any proceeding under the Act. The section specifically provides that an application may be made with respect to any property presented at or about the time of marriage to the husband and wife jointly. Such an application may be made by either party to such proceeding and the court may in the exercise of its discretion make provision for disposal of such property as it deems just and proper. There is no similar section in the Special Marriage Act.

The provisions of the section have been construed by courts differently. The strict technical view taken is that in a matrimonial proceeding under the Act, the court has power only to deal with or dispose of that property which is given jointly to the husband and wife at or about the time of the marriage and which may belong jointly to the husband and wife. The Mysore High Court,⁶ has held that before an order is made under section 27 of the Hindu Marriage Act, it must be shown that the property in respect of which a claim is made was presented at or about the time of the marriage. The word 'at' must necessarily mean the actual time of marriage and the words "about the time of marriage" mean near or round about the time of marriage, which may either be prior to or after but it must be near or round about the time of marriage. According to this view, the matrimonial court does not get juris-

5a. See s. 138 of the Income-tax Act, 1961.

6. *M.D. Krishan v. M.C. Padma*, A.I.R. 1968 Mysore 226.

diction to make an order in respect of the property presented subsequent to the marriage. This decision in terms states that the matrimonial court gets jurisdiction to make suitable provision on the decree which it may pass in the proceedings under the Act only with respect to any property which is proved to have been presented at or about the time of marriage and which may belong jointly to both the husband and the wife. The Bombay High Court⁷ in a case under section 42 of the Parsi Marriage and Divorce Act, 1936 which is *pari materia* with section 27 has also held that the questions of title to property and/or property owned by husband and wife and other reliefs in respect of such property must be disposed of by ordinary civil courts and not the matrimonial court.

A different view of the provision has also been taken. In a reported decision of the Allahabad High Court,⁸ it has been held that section 27 of the Hindu Marriage Act, does not exclude the jurisdiction or the power of the court to pass an appropriate decree in regard to the property belonging to either the wife or the husband exclusively. In this view the expression "which may belong jointly to both the husband and wife" indicates that section 27 confers a wider and enabling power on the court to deal also with properties which jointly belong to the husband and wife, but it does not restrict the powers of the court only to such properties. The section does not exclude the power to pass a decree relating to property belonging exclusively either to the husband or the wife as that power is inherent in the proceedings under the Act. According to the Allahabad High Court the words "which may belong jointly to both the husband and wife" in the section show conferment of an enabling power to deal with jointly-owned properties also but do not restrict the court's power to such properties alone and in view of section 21 all powers of a civil court are available while dealing with the proceedings under the Hindu Marriage Act. Further, according to the same court, by virtue of the powers under section 151 and order 7, rule 7 of the Civil Procedure Code, also the court has the power to pass a decree with respect to property belonging exclusively to the husband or the wife.

The view taken by the Allahabad High Court appears to go beyond the scope of section 27 of the Hindu Marriage Act. However, the result arrived at on that decision is a desirable result. It is submitted that such result should be achieved by the legislature by making the necessary amendment in section 27 of the Hindu Marriage Act. It is desirable that the view taken in the Allahabad decision be given statutory force by specific provision to the effect being made in both the Hindu Marriage Act and the Special Marriage

7. *Banoo v. Jal C. Daruwalla*, 65 Bom. L.R. 750.

8. *Kamta Prasad v. Om Wati*, A.I.R. 1972 All. 153.

Act. Section 27 may be so amended as to confer on the court express power to deal with and make an order with respect to any property belonging to the husband or wife. A similar section may be enacted in the Special Marriage Act.

As far as section 27 of the Hindu Marriage Act is concerned, the Law Commission has recommended insertion of a section, 27A, reading as follows:

In any proceeding under this Act instituted within six months of the solemnization of the marriage, the court may, if it considers it necessary to do so in the circumstances of the case, make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of the marriage to either party by a parent of the other party.⁹

The Law Commission has observed that such a provision will put an end to blackmail which often plays ugly part in litigation for matrimonial relief. The Law Commission, however, has not considered any further alteration or amendment of section 27 of the Hindu Marriage Act and the insertion of the same in the Special Marriage Act.

IV

The consideration of property rights incidentally leads to the question about the matrimonial home. The place where the husband and wife reside or have intention of residing permanently is the matrimonial home. Ordinarily it is the husband's duty to provide his wife with a home according to his circumstances. The courts in matrimonial proceedings in certain cases in their inherent jurisdiction have granted injunctions pending the hearing and final disposal of the petitions whereby one spouse is restrained from visiting the matrimonial home. However, after a decree granting matrimonial relief the matrimonial court exercising jurisdiction under the Hindu Marriage Act, 1955 or the Special Marriage Act, 1954 has no power to grant an injunction excluding the husband from the matrimonial home since the wife has no property right therein. In practice the wife's right to remain in the matrimonial home forms one of the considerations before permanent alimony is assessed and decreed.

It has been held by the Bombay High Court¹¹ when exercising jurisdiction under the Parsi Marriage and Divorce Act, 1936 that where the

9. The Law Commission *Fifty-ninth Report* 87 (1974).

10. *Id.* at 86.

11. *Supra* note 7.

court is satisfied that both the spouses cannot reside in the matrimonial home and it is not appropriate to eject the husband, the court would award appropriate larger amount of maintenance to the wife in finally determining the alimony to be paid to her by the husband. It may be noted here that the question of right of residence in the matrimonial home is now codified in England by the Matrimonial Homes Act, 1967. Where one spouse has a right to remain in occupation of a dwelling house and the other spouse has no such right, the latter is, under the Act, given protection against eviction and, if not in occupation, given a right to occupy the dwelling house. Provision is also made whereby the right of occupation given to a spouse by that Act is a charge on the estate or interest by virtue of which the spouse is entitled to occupy the dwelling house.

It is suggested that these provisions of the English Matrimonial Homes Act, should be enacted in the Hindu Marriage Act and the Special Marriage Act by making the necessary amendments. It is further submitted that this may be done also by a separate enactment as also by making provisions or appropriate amendments in various enactments dealing with eviction and rent control, as such protection of possession and occupation is required not merely against the other spouse but as against the landlord or owner of the house. In this context the word 'landlord' is used in its widest sense and must include individuals, limited companies, co-operative societies as also licensors and similar categories of superior holders including mortgagers, creditors and charge-holders. The matrimonial courts exercising jurisdiction under the Hindu Marriage Act and the Special Marriage Act should be empowered to deal with these questions in matrimonial proceedings. The granting of or withholding protection of possession and occupation should be one of the factors to be considered by the matrimonial court at the time of making orders for interim maintenance and permanent alimony.

It is submitted, that the aforesaid amendments and provisions are necessary in order to avoid multiplicity of proceedings and delays in litigation. It is further suggested that it may be specifically provided by making rules under the Hindu Marriage Act and the Special Marriage Act that the court should split up the hearing of the proceedings for the main matrimonial relief and the incidental questions such as those pertaining to maintenance and custody. This step will also lead to quicker disposal of matrimonial proceedings.