EXTENUATING CIRCUMSTANCES OF AN ADULTRESS

COURTS OF Law should not be chary of deciding a case when there is no judicial authority forthcoming or when the statute does not throw any light on a particular point. The case of *Gorden* v. *Gorden*,[1] decided very recently by the Probate Division in England is a good pointer to this kind of situation. The question which came up for decision, in short, was whether an order of alimony *pendente lite*[2] passed in favour of the wife automatically ceased on the finding of adultery against her, and whether the husband (who was also found to have committed adultery) was discharged from further liability for maintenance from the date of such a finding.

The purpose of this note is first, to find an answer to this question, as given by the Court in the above case; second, to project this decision in the context of the cases already decided in England; and third, to speculate on a possible stand an Indian Court would have taken given the same facts.

I

The position in common law on the issue is not ambiguous. It was decided as early as 1864, in *Wells* v. *Wells and Hudson*,[3] that alimony *pendente lite* ceased when adultery against the wife was proved. Lord Penzence observed : ". . . so soon as the wife shall have been false to her marriage vow, she loses the right she had to her husband's support".[4] In *Whitmore* v. *Whitmore*,[5] the wife had obtained a decree *nisi* dissolving her marriage. Before the decree was made absolute she committed adultery. It was held that she was entitled to alimony *pendente lite* up to the date when the adultery was proved against her, but not thereafter. Probably the reason why alimony *pendente lite* ceases automatically in respect of a wife proved to have committed adultery, is that she loses the right to her husband's support in accordance with the rule of the common law.[5a]

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1. (1969) 3 All E.R. 1254.

2. Alimony is a compound of the words *alere nourish* and *mony*, a suffix, (from FL. *adumonier nutriement*) meaning nourishment or maintenance. It connotes the allowance made to the wife out of her husband's estate for her support, whether during a matrimonial suit or its termination when she proves herself entitled to a separate maintenance. The first is called temporary alimony or alimony *pendente lite* and the latter permanent alimony. See, *Mahalingam Pillai* v. *Amsavatti* (1956) M.L.J. 289 at 296. See, *Latey on Divorce* (1952) 14th ed., p. 228.

3. (1964) 3 Sw. & Tr. 542.

4. *Id.* at 545.

5. (1866) L.R. 1 P. & D. 96.

5a. See, *supra* note 1 at 1259. Rees, J., quoting Becknill, J., in *S.V.S.* (1944) All. E.R. at 440

Rees, J., questioned this common law assumption in *Gorden* v. *Gorden* when he asked :

> Now, does this principle apply in modern times and, in particular, does it apply in such a form that when there has been a finding of adultery against a wife and without any further application to the Court by either party, the Order lapses or is automatically discharged ?[5b]

For instance, in *Welton* v. *Welton*,[6] it was held that the wife was entitled to alimony *pendente lite* despite her adultery in some circumstances. The Court in this case took into account the conduct of the other party (husband) who had connived at the adultery. Bucknill, J., went a step further in *S.V.S.* to make a generalization that "when a wife is found guilty of adultery *without extenuating circumstances* the practice is that alimony *pendente lite* automtically ceases unless the Court otherwise orders."[7]

After a discussion of these two cases Rees, J., held that the common law rule against continuation of alimony after the wife's adultery could not be construed to be good in all cases. There could be extenuating circumstances. Rees, J., thereupon proceeded to enquire if the facts before him in *Gordon* v. *Gordon* would fall under this exception to the rule.

The facts in *Gorden* v. *Gorden*,[8] were as follows: The husband filed a suit in May 1966 charging the wife with adultery, cruelty and desertion and prayed for a decree of divorce. The wife in her defence denied the allegations, and in turn alleged the husband's adultery and desertion. An order was made providing alimony *pendente lite* in favour of the wife on 26th February 1968. The suit was decided on 25th November 1968, in favour of the husband and a decree *nisi* for divorce was passed. The court found adultery established against the wife. It was also found that the husband had committed adultery during the pendency of the litigation. The decree was made absolute on 24th April 1969, and the question of maintenance of the wife came before the learned Registrar on 12th May 1969, who after knowing that the adultery of the wife was proved, passed an interim order for a certain amount as maintenance in favour of the wife. The wife filed a suit in respect of the debt which fell due on the basis of the previous order for alimony *pendente lite* made on 26th February 1968, till the filing of the suit, *i.e.*, 18th June 1969. The amount alleged to be due arose between the date of the decree *nisi* in the suit and the date of the decree absolute.

The husband contended that it had been and was the practice of the common law that the alimony *pendente lite* in favour of the wife ceased automatically upon the finding of adultery. He asserted that the result was 'automatic'. It is important to note that the counsel for the husband

5b. *Supra* Note 1 at 1258.
6. (1927) p. 162.
7. (1944) All E.R. 439 at 440. Emphasis added.
8. *Supra* note 1.

did not question the competency of the wife to file a fresh application for the continuance of alimony after the charge of adultery had been proved, and that the Court in its wide discretion had ample powers to make an order for alimony notwithstanding the finding of adultery.

The counsel for the wife, on the other hand, contended that the practice in the Probate Division was 'out of step with the law'. Secondry, if such a practice were to be allowed, then an enormous volume of proceedings would have to be initiated by each wife so affected in order to have her alimony reassessed. Thirdly, the fact that the Court had fixed a certain amount as alimony in the light of adultery of the wife, no court could make an order for less than the sum already ordered.

Rees, J., found in this case the 'clearest possible extenuating circumstances' referred to above and held that the wife was entitled to her alimony *pendente lite* for the whole period.[9] What then is meant by extenauting circumstances? These words have been idefined in the *Oxford Dictionary* as 'circumstances that tend to diminish culpability'.[10] Therefore, in the context of matrimonial law these words would mean, mitigating the matrimonial guilt of the defaulting spouse. Cruelty, condonation, or conniving at adultery, or any other conduct of one of the spouses which has the effect of lessening the matrimonial fault of the other spouse are examples of "extenuating circumstances'. The Court takes into account such circumstances while ordering alimony in favour of the wife.

II

It would be interesting to speculate whether in a case of similar facts as that of *Gorden* v. *Gordon* an Indian Court is likely to follow the principle laid down in the English decision. The relevant provision of the Hindu Marriage Act, 1955, dealing with alimony *pendente lite* states :

> Section 24 :
> Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceedings, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

It is apparent that the Court has ample discretionary powers to grant maintenance *pendente lite* as it deems just and reasonable and that it could be claimed as a matter of right. Such discretion, however, is not arbitrary but judicial in character controlled by more or less well established principles

9. *Supra* note 1 at p. 1262.
10. See, *Shorter Oxford Dictionary* (1933) Vol. 1, p. 660.

of law.[11] It is interesting to note that this provision envisages the possibility of alimony in the cases of both the husband and the wife, whereas under the English law only the wife could claim alimony.[12]

When we say that the Court has wide discretion while granting relief under this section, the question whether the Court can take into account the conduct of the parties also becomes relevant. A comparison of this section with section 25 of the Act,[13] dealing with permanent alimony reveals that under the latter section, the words 'conduct of the parties' find place and form an important factor for consideration in awarding maintenance.

Jurists differ on the point whether the court in its exercise of judicial discretion ought to take into consideration the conduct of the parties when an application has been made under section 24 of the Act.[14] According to one view 'conduct of the parties' also may be taken into account and it cannot be ignored by the Court.[15] The other view is that 'conduct of the parties' is an irrelevant consideration inasmuch as the section lays down specifically the criteria to be taken into consideration; *i.e.* (*a*) the applicant has no independent income, (*b*) or has no means to meet the necessary expenses of the suit.[16]

No case has come up before the Indian Courts (as far as the present writer is aware of) having exactly the same facts as in *Gordon* v. *Gordon*. Nevertheless, the following cases came close enough. The case of *Raja Gopalan* v. *Rajamma*,[17] decided by the Kerala High Court may be cited as

11. *Mahalingam Pillai* v. *Amsavatti* (1956) M.L.J. 289 at p. 296.
12. See, Sections 19, 20 and 22 of the Matrimonial Causes Act, 1950.
13. Sec. 25(1).
Any Court exercising jurisdiction under this Act may, at the time of passing any decree or on 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 of the applicant and the conduct of the parties, it may seem to the Court to be just, and any such payment 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) Ifthe 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 shall rescind the order.
14. Mulla, *Principles of Hindu Law*, (1970) 13th edition, reprint. p. 732 and 742 N.R. Raghavachariar, *Hindu Law, Principles and Precedents* (1965) 5th edition p. 1055. S.V. Gupte, *The Hindu Marriage Act*, 1955 (1961) p. 241.
15. Mulla, *Principles of Hindu Law* (1970) 13th edition reprint, p. 732.
16. S.V. Gupte, *The Hindu Marriage* Act, 1955 (1961) p. 241.
17. A.I.R. (1967) Ker. 181.

an example. The husband in this case petitioned for judicial separation on the ground that his wife had, since the solemnization of the marriage, sexual intercourse with some other person. A decree was granted and an order under section 25(1)[18] of the Hindu Marriage Act was passed for maintenance in favour of the wife. The husband afterwards obtained a decree of divorce on the ground that there had been no resumption of cohabitation for a period of 2 years or upwards.[19] When the wife wanted to enforce the claim for alimony and maintenance which fell due in arrears on the basis of the order passed as stated above, the husband resisted the order on the ground that since her unchastity was proved, she was not entitled to maintenance. The court held that she was not entitled even to the 'starving allowance'. The decision of the Calcutta High Court,[20] where on the dissolution of the marriage on the ground of adultery of the wife, it was held that she was entitled to a bare subsistence allowance, was dissented from.

The High Court of Kerala in the case referred to above has taken a view that when the Court records a finding of adultery against the wife, it ought not allow alimony and maintenance because she had been already unchaste. C.A. Vaidalingam, J., interpreting section 25(3) of the Hindu Marriage Act, observed that if a subsequent conduct of the wife who had become unchaste can form the basis for cancellation of an order passed under section (1), a finding recorded during the judicial separation proceedings regarding the unchastity of the wife must and should be taken into account even in the first instance when an order is being passed under section 25(1) of the Act. Otherwise, it would lead in his opinion, to a very incongruous situation, namely, that it was only when the wife becomes unchaste after the award of maintenance that she is disabled for continuing to receive that maintenance, whereas a wife who has been held guilty of unchastity by the Court would nevertheless be entitled to get maintenance. The incongruity pointed out by the learned judge, it is submitted with respect, will arise when we take into account matrimonial life. The question of conduct or chastity of a woman may arise at three stages for the purposes of obtaining relief under the Act. Firstly, chastity before marriage; secondly, chastity during matrimonial life; and thirdly, chastity after the decree of divorce or judicial separation is passed. Unchastity before marriage has not been made a ground to avoid the marriage except in one specific case, *i.e.*, where the wife has been pregnant by some person other than her husband, at the time of solemnization of marriage.[21] Unchastity during matrimonial life has been taken care of and a remedy of judicial separation of divorce, as the case

18. *Supra* note 13.

19. See, Section 13(1) (viii) of the Hindu Marriage Act, 1955.

20. *Amar Kanta Sen* v. *Sovana Sen*, A.I.R (1960) Cal. 438. See also *Sachindra Nath* v. *Banamala*, A.I.R., (1960) Cal. 575. In *Kandaswami* v. *Murugammal*, (1895) 19. Mad. 6 where the wife who persisted in a vicious course of conduct about the time of litigation was disentitled to maintenance.

21. *Supra* note 17 at 185.

may be, is provided. Subsequent unchastity on the part of a divorced or judicially separated wife will debar her from claiming further maintenance. The effect of the decision in the case under consideration would be to totally deny maintenance to a wife who has, during the married life, been unchaste. This is too harsh. Unchastity of a wife during married life may be a matter for consideration for reducing the quantum of maintenance at a time when the Court awards maintenance, but it cannot be a total denial of this ancillary relief. The decision, it is submitted with respect, may result in an injustice in case of a wife who has no doubt committed the gravest matrimonial offence but who afterwards becomes honest and chaste. The observation of Rachpal Singh, J., in *Ram Kumar Dube* v. *Bhagwanta*,[22] (a case before the passing of the Hindu Marriage Act) are very instructive in this context. The learned Judge said :

> There is no text which says that a widow once unchaste must be deemed unchaste for ever and must for ever forfeit her claim to even starving allowance although she reforms and gives up leading an immoral life.[23]

Although the above statement referred to the case of a widow it is equally true in respect of a wife who has been divorced on the ground on unchastity.

Professor Derrett is of the opinion that the law laid down by the Calcutta High Court in *Amar Kanta Sen* v. *Sovona Sen*,[24] entitling the unchaste wife to alimony is good law. In his view it is in tune with the *sastric* notion of marriage and conforms to the spirit of the *Dharmasastra*.[25] In so far as the wife who continues to be unchaste after the passing of the decree of divorce is concerned, she is not entitled to maintenance and there is no differrence of opinion and there cannot be any. Unchaste wives are not privileged women to be maintained by their husbands. But the case of *Raja Gopalan* v. *Rajamma*,[26] from Kerla has brought to light some interesting points. This case underlines the importance of distinguishing between the two types of cases which may arise in this context. The first is the case of a wife against whom a decree of divorce is granted on the ground of unchastity but who remains chaste in future. The second is the case of a wife against whom a decree of divorce is given on the ground of adultery which will debar her from maintenance.

Conclusion

In *Rajagopalan's* case we saw that the facts were very nearly the same

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22. (1934) 56 All. 392.
23. *Id.* at 392. See also *Parami* v. *Mahadevi*, (1909) I.L.R. 34 Bom. 278.
24. A.I.R. 1960 Cal. 438.
25. Derrett, *The Unchaste Wife's Alimony*: *A Conflict of Decisions*, Bom. L.R.J. pp. 34-35.
26. A.I.R. 1967 Ker. 181.

as were found in the English case *Gordon* v. *Gordon*. The only difference was that in the former the husband had not committed adultery, whereas in the latter the husband had committed adultery. It may now be said firstly, that Courts in India have to the extent possible acted and given relief on principles and precedents which are conformable to the English principle in matrimonial cases. Therefore, it is not likely that the Indian Courts would not refer to *Gordon* v. *Gordon*. Secondly, the doctrine of 'extenuating circumstance' may find favour in the Indian courts. Thirdly, following the equitable principle 'he who comes to the Court must come with clean hands', the Court, where the husband himself had committed adultery, may not allow him to resist successfully the order of alinomy passed against him. Lastly the great economic dependence of the wife on her husband in India, in comparison with her European counterpart, may tilt the scale of judicial balance in her favour. All that could safely be said is that judicial discretion might operate against a husband *prima facie* entitled to refuse to pay the amount to the wife, when he himself has committed an act of infidelity.

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