CASE NO.:
Appeal (civil) 1774-1775 of 1775

PETITIONER:
Rameshchandra Rampratapji Daga

RESPONDENT:
Rameshwari Rameshchandra Daga

DATE OF JUDGMENT: 13/12/2004

BENCH:
D. M. Dharmadhikari & H. K. Sema

JUDGMENT:
J U D G M E N T

Dharmadhikari J.

These two cross appeals arise from matrimonial proceedings. The wife is aggrieved by the impugned reversing judgment of the High Court declaring her marriage as null and void under Section 11 read with Section 5(i) of the Hindu Marriage Act 1955 (hereinafter referred to as 'the Act' for short). The husband is aggrieved by the part of the impugned judgment of the High Court whereby it maintained the amount of maintenance fixed per month for the wife under Section 25 of the Act.

The facts of this case tell the tragic tale of an Indian woman, who having gone through two marriages with a child born to her apprehends destitution as both marriages have broken down.

The husband is an Income Tax Practitioner in the town of Ratlam in the State of Madhya Pradesh. His first marriage was solemnized with late Smt. Usha in the year 1963 and from her he has two sons and one daughter. The marriage of the present wife, it is alleged, was arranged with one Girdhari Lal Lakhotia on 15.5.1979. According to the wife, the customary rituals of marriage were not completed as in the marriage ceremony family members quarrelled over dowry. She had filed a Divorce Petition No.76/78 in Matrimonial Court at Amravati but it was not prosecuted and no decree of divorce was passed. It is the case of the wife that in accordance with the prevalent custom in Maheshwari community a Chhor Chithhi or a document of dissolution of marriage was executed between the wife and her previous husband on 15.5.1979 and it was later got registered.

After the death of his previous wife, the present husband remarried the present wife on 11.7.1981. According to the version of the wife the document of registered Chhor Chithhi was shown and given to the present husband before his accepting the second matrimony with the present wife. A daughter, who is named Puja, was born from the second marriage on 14.7.1983.

The wife alleges that the husband started ill-treating her due to non-fulfulment of his demands by her father. She was driven out of the house in the year 1989. She thereafter filed proceedings in the Family Court, Bombay for grant of a decree of judicial separation and maintenance of Rupees three thousand per month for herself and for her daughter.

The husband filed a counter-petition seeking declaration of his second marriage with the present wife, as nullity on the ground that on the date of second marriage, her marriage with the previous husband Girdhari Lal Lakhotia, had not been dissolved by any court in accordance with the provisions of the Act. The husband not only

disputed validity of the second marriage but also parentage of daughter Puja.

The Family Court, Bombay allowed the petition of the wife and granted in her favour, a decree of judicial separation. It also granted maintenance in the sum Rupees one thousand per month to the wife and Rupees two thousand per month to the child. The Family Court dismissed the counter petition filed by the husband seeking declaration of his marriage with the present wife as null and void.

The husband went in appeal to the High Court and the wife preferred a cross objection. By the impugned judgment the High Court held that the first marriage of the present wife with her previous husband having not been dissolved by any decree of the Court, her second marriage is in contravention of Section 5(i) of the Act and has to be declared as nullity under Section 11 of the Act. The High Court, on the above finding, granted a decree of declaration of marriage as nullity in favour of the husband. Consequently, the High Court set aside the decree of judicial separation granted to the wife.

Even though the High Court dismissed the wife's petition for decree of judicial separation and granted declaration of the second marriage as null and void in favour of the husband, it maintained the decree granting maintenance to the wife and her daughter. Aggrieved by the order of the High Court, both the parties are before this Court in these two cross appeals.

Learned counsel appearing for the husband took us in great detail in the evidence of the parties led before the Family Court. He advanced lengthy arguments in support of his contention that where a marriage is declared to be null and void by grant of a decree, no order awarding permanent alimony or maintenance could be made in favour of the unsuccessful party under Section 25 of the Act. Reliance is placed on Nazir Ahmad vs. Emperor [AIR 1936 PC 253]; Mohd. Ikram Hussain vs. State of UP [AIR 1964 SC 1625]; Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav [1988 (1) SCC 530]; Raj Kumar Karwal vs. UOI [AIR 1991 SC 47]; K. Vimla vs. K.Veeraswamy[JT 1991 (2) SC 182] and Abbayolla M.Subba Reddy vs. Padmamma[AIR 1999 AP 19].

Learned counsel Shri SC Birla appearing on the other side for the wife also took us through the relevant evidence of the husband and wife recorded before the Family Court and tried to persuade us to set aside the decree of nullity of marriage granted by the High Court and refusing grant of decree of judicial separation to the wife.

So far as the appeal preferred by the wife is concerned, on reconsideration of the evidence on record, we find no ground to take a view different from the one taken by the High Court and upset the conclusion that the second marriage was null and void. The wife did not deny the fact that her marriage was arranged with Girdhari Lal Lakhotia in the year 1973 and after marriage she lived with the members of the family of her previous husband. It is also an admitted fact that she instituted proceedings for obtaining decree of divorce being Divorce Petition No.76/78 in the Family Court at Amravati. It is also not denied that no decree of divorce was obtained from the Court and she only obtained a registered document of Chhor Chithhi from her previous husband on 15.5.1979. Existence of such customary divorce in Vaish community of Maheshwaris has not been established. A Hindu marriage can be dissolved only in accordance with the provisions of the Act by obtaining a decree of divorce from the Court. In the absence of any decree of dissolution of marriage from the court, it has to be held that in law the first marriage of the wife subsisted when she went through the second marriage on 11.7.1981 with the present husband. The appeal preferred by the wife, therefore, against grant of decree of declaration of her second marriage as void, has to

be rejected whatever may be the circumstances which existed and the hardships that the wife had to undergo, as alleged, at the hands of her second husband.

So far as the husband's appeal against grant of maintenance under Section 25 of the Act to the wife is concerned, this Court has granted him leave to appeal confined to the question as to 'whether the wife is entitled to maintenance after the Court held that the marriage was nullity.'

Section 25 of the Hindu Marriage Act confers jurisdiction on the Matrimonial Court to grant permanent alimony and maintenance to either of the spouses ' at the time of passing of any decree' or 'at any time subsequent thereto.' Section 25 which arises for interpretation in the husband's appeal 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 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."

[Emphasis supplied]

Learned counsel appearing for the respondents took us through the Full Bench decision of the Andhra Pradesh High Court (supra) and earlier decisions of this Court to persuade us to take a view that where the marriage is found to be null and void under Section 11, question of grant of permanent alimony or maintenance can never arise in favour of either of the spouses.

The decisions of this Court and High Courts which have been relied, in our opinion, are distinguishable and are not directly on the point of law before us. We find that taking into consideration the divergent views of various High Courts, this Court in the case of Chand Dhawan vs. Jawaharlal Dhawan [1993 (3) SCC 406] has dealt with the point on the interpretation of Section 25 read with Sections 9 to 13 read with Section 5 of the Act. The decision in Chand Dhawan (supra) squarely covers the point against the husband. It is true that Chand Dhawan's case (supra) arose from different facts but the statement of law on the interpretation placed on Section 25 answers the question raised by the husband against him on the competence of the court to grant maintenance under Section 25. In the case of Chand Dhawan (supra) a joint petition filed by the spouses for grant of a decree of divorce by mutual consent failed as they withdrew their consent during the statutory waiting period. Thereafter the wife moved a petition for grant of maintenance under Section 25 of the Act. This Court held that Section 25 can be invoked by either of

the spouses where a decree of any kind governed by Sections 9 to 13 has been passed and the marriage-tie is broken, disrupted or adversely affected by such a decree of the Court. The view expressed is that where the marriage is not dissolved by any decree of the Court, resort to Section 25 of the Act is not allowed as any of the spouses whose marriage continues can resort to other provisions for seeking maintenance, like Section 125 of the Criminal Procedure Code or provisions of Hindu Adoption and Maintenance Act.

In interpreting the provision of Section 25 in the case of Chand Dhawan (supra) the Supreme Court categorically held that the expression 'at the passing of passing any decree,' as has been used in Section 25, includes a decree of nullity of marriage. The relevant observations read thus:-

"On the other hand, under the Hindu Marriage Act, in contrast, her claim for maintenance pendente lite is durated (sic) on the pendency of a litigation of the kind envisaged under sections 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenance or alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. Thus when her marital status is to be affected or disrupted the court does so by passing a decree for or against her. On or at the time of the happening of that event, the court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. Not only that, the court retains the jurisdiction at subsequent stages to fulfill this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gammit (sic gamut) of a diseased or a broken marriage. And in order to avoid conflict of perceptions the legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the court passing a decree of the kind as envisaged under sections 9 to 14 of the Act. In other words without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time than the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionizing the law applicable to Hindus.

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We have thus, in this light, no hesitation in coming to the view that when by court intervention under the Hindu Marriage Act, affectation or disruption to the marital status has come by, at that juncture, while passing the decree, it undoubtedly has the power to grant permanent alimony or maintenance, if that power is invoked at that time. It also retains the power subsequently to be invoked on application by a party entitled to relief. And such order, in all events, remains within the jurisdiction of that court, to be altered or modified as future situations may warrant.
[Emphasis supplied]

In the present case, on the husband's petition, a decree

declaring the second marriage as null and void has been granted. The learned counsel has argued that where the marriage is found to be null and void \026 meaning non-existent in eye of law or non est, the present respondent cannot lay a claim as wife for grant of permanent alimony or maintenance. We have critically examined the provisions of Section 25 in the light of conflicting decisions of the High Court cited before us. In our considered opinion, as has been held by this Court in Chand Dhawan's case (supra), the expression used in the opening part of Section 25 enabling the 'Court exercising jurisdiction under the Act' 'at the time of passing any decree or at any time subsequent thereto' to grant alimony or maintenance cannot be restricted only to, as contended, decree of judicial separation under Section 10 or divorce under Section 13. When the legislature has used such wide expression as 'at the time of passing of any decree,' it encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under Section 11, annulment of marriage as voidable under Section 12 and Divorce under Section 13.

Learned counsel for the husband has argued that extending the benefit of Section 25 to even marriages which have been found null and void under Section 11 would be against the very object and purpose of the Act to ban and discourage bigamous marriages.

It is well known and recognized legal position that customary Hindu Law like Mohammedan Law permitted bigamous marriages which were prevalent in all Hindu families and more so in royal Hindu families. It is only after the Hindu Law was codified by enactments including the present Act that bar against bigamous marriages was created by Section 5(i) of the Act. Keeping into consideration the present state of the statutory Hindu Law, a bigamous marriage may be declared illegal being in contravention of the provisions of the Act but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependant. It is with the purpose of not rendering a financially dependant spouse destitute that Section 25 enables the court to award maintenance at the time of passing any type of decree resulting in breach in marriage relationship.

Section 25 is an enabling provision. It empowers the Court in a matrimonial case to consider facts and circumstances of the spouse applying and decide whether or not to grant permanent alimony or maintenance.

The facts of the present case fully justify grant of maintenance both to the wife and the daughter. The evidence of the wife has been believed by the courts below and according to us rightly so. From circumstances preceding and attending the marriage, it can safely be inferred that the present husband must have made reasonable enquiries about the previous marriage of the present wife. The wife's version is natural and inspires belief that the document of Chor Chhithi was shown and given to the husband. It is proved from the photocopy of the foil of Registration, placed on record. According to the wife, the husband did receive the document of Chor Chhithi but has not produced it before the Family Court. It is argued that it is open to the wife, if the document was registered, to get a copy from the Registration office. Even if that was possible, we find no ground to disbelieve her version that the fact of her previous marriage was not concealed from the present husband. The husband is an advocate. His falsehood went to the extent of denying his second marriage and calling his wife only to be a governess of his children from the first wife. He unsuccessfully denied even the parentage of daughter Puja, born through him. He failed to lead any evidence on the illegitimacy of the child. After the second marriage the parties lived as husband and wife and they had a considerably long married life of about nine years

from 1981 to 1990. In such a situation, the Family Court and High Court were fully justified in holding that the wife deserves to be granted maintenance under Section 25 of the Act.

Lastly, it is urged by counsel for the wife that daughter Puja is now of marriageable age and the maintenance of total Rupees three thousand granted to them, therefore, deserves to be suitably enhanced to fulfill their present needs. We say nothing on this prayer at this stage because it is always open to the wife and the daughter in accordance with sub-section (2) of Section 25, to approach the Matrimonial Court to suitably enhance the quantum of maintenance granted to them. If such an application is made to the Matrimonial Court, it shall be decided after hearing the husband in accordance with law.

We are told that the order of the High Court in so far as it directs the husband to return ornaments of the wife or its equivalent value in the sum of Rs.3,25,650/- with 9% per annum, is a subject-matter of a separate appeal. We, therefore, express no opinion with regard to the same.

In the result, both the appeals preferred by the parties are dismissed and the impugned judgments of the High Court, to the extent of granting decree of declaration of marriage as nullity and granting maintenance to the wife and daughter are maintained. The husband shall pay all the arrears of maintenance to the wife and daughter. The earlier order made on 2.3.2001 passed in Civil Appeal No. 1775 of 2000 granting stay of maintenance to the wife is hereby vacated. In the circumstances, the husband shall bear his own costs and pay costs to the wife incurred in these proceedings.