

Before S. C. Mital, J.

JAI DEVI,—Petitioner.

versus

BISHAN DASS,—Respondent.

Civil Revision No. 2575 of 1979

August 25, 1980.

Hindu Marriage Act (XXV of 1955)—Section 25—Code of Civil Procedure (V of 1908)—Section 47—Consent decree of divorce providing for maintenance for the wife—Husband refusing to pay the maintenance—Execution of such decree—Validity of the decree challenged on the ground of non-filing of an application under section 25—Such challenge—Whether could be made before the executing Court.

Held, that the District Judge undoubtedly has jurisdiction under section 25 of the Hindu Marriage Act, 1955 to grant permanent alimony. Although no application was made as required by section 25 of the Act, yet the basic fact remains that the parties have consented to the decree. Above all if the decree sought to be executed suffers from any illegality, the proper course was to get the same set aside by filing an appeal under section 28 of the Act. The consent decree, as such, is executable and a challenge to its validity on the ground of non-filing of an application under section 25 of the Act cannot be made in execution proceedings (Paras 7 and 8).

Petition Under Section 115, C.P.C. for revision of the Order of Shri Amarjit Chopra, District Judge, Faridkot, dated 2nd August, 1979, allowing the objection petition filed by the husband and dismissing the execution application of the wife and making no order as to costs.

T. S. Doabia, Advocate and B. S. Bindra, Advocate, for the Petitioner.

N. C. Jain, Advocate and V. K. Jain, Advocate, for the Respondent.

JUDGMENT

S. C. Mital, J.

(1) Facts giving rise to this petition under section 115 of the Code of Civil Procedure are that the petition filed under section 13 of the Hindu Marriage Act, 1955, by Bishan Dass against his wife Jai Devi, seeking dissolution of their marriage by decree of divorce, was allowed by the District Judge, Faridkot on January 27, 1978. In this consent decree it was further agreed that Bishan Dass would pay monthly maintenance of Rs. 100 to Jai Devi till she re-marries. Accordingly, the District Judge exercising power under section 25 of the Act passed an order. Upon the failure of Bishan Dass to pay

maintenance, Jai Devi took out execution. The objections raised by Bishan Dass gave rise to the following issues:—

1. Whether the pay of the Judgment-debtor is not liable to attachment ?
- (2) Whether the order fixing maintenance, is illegal and without jurisdiction ?

(2) The learned District Judge decided issue No. 1 in favour of Jai Devi and she was held entitled to 2/3rd of the monthly basic salary of Rs. 132 of Bishan Dass. As issue No. 2 was decided in favour of Bishan Dass her execution application was dismissed. Hence this revision petition.

(3) Learned counsel for the parties have addressed me only on the decision of the District Judge on issue No. 2. A perusal of the impugned judgment shows that the learned District Judge was influenced by the fact that Jai Devi did not make any application under section 25 of the Act for grant of maintenance in her favour. Thus, he formed the view that the decree passed by his learned predecessor being illegal and without jurisdiction was inexecutable. Sub-section (1) of section 25 of the Act is in the following terms:—

- (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 immoveable property of the respondent.
- (2)
- (3)"

(4) There being provision of the filing of an application for maintenance in section 25(1) of the Act (quoted above), the ratio of the impugned judgment appears to be that, notwithstanding the consent of Bishan Dass, failure on the part of Jai Devi to file the said application was fatal. Support was sought from *Patel Dharamshi Premji v. Bai Sakar Kanji* (1). Therein the question was: whether

(1) A.I.R. 1968 Gujrat 150.

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a husband or wife can apply to the Court for permanent alimony under section 25 of the Act after the passing of the decree of divorce. A Division Bench of the Gujarat Court answered the question in affirmative. It deserves mention that that was not a case of non-filing of an application under section 25 of the Act, rather the maintainability of such an application having been filed, after the dissolution of marriage, received their Lordships' consideration. Emphasis on the filing of the application referred to in section 25 of the Act was made in that context by the learned Judges. The most distinguishing feature of that case is that the question relating to the non-filing of an application under section 25 of the Act in execution proceedings was obviously not there. In other words that was not a case like the present in which validity of the compromise decree has been challenged on the ground of non-filing of an application under section 25 of the Act. The ruling is, therefore, of no avail to Bishan Dass.

(5) In the impugned judgment the learned District Judge has also referred to *Ishar Singh and others versus The State of Punjab and others* (2) laying down that an order which is a nullity, for want of jurisdiction cannot be sustained because the parties consented thereto. This is the well settled proposition but the question, to be presently discussed in the case, relates to the powers of an Executing Court.

(6) In this case to my mind the approach to the basic question involved has been quite erroneous, in as much as, before the learned *District Judge* the scope of the powers of the Executing Court was not pressed with clarity. In *Vasudev Dhanpibhai Modi v. Rajabhai Abdul Rehman and others* (3), their Lordships of the Supreme Court have laid down that:—

“A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties,

(2) 1970 P.L.R. 478.

(3) A.I.R. 1970 S.C. 1475.

When a decree which is a nullity, for instance where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree on the ground of absence of jurisdiction.

(7) Very fairly it has not been disputed before me that the District Judge had the jurisdiction under section 25 of the Hindu Marriage Act to grant permanent alimony at the rate of Rs. 100 per month against Bishan Dass. But the learned counsel for Bishan Dass vehemently argued that because the provisions of section 25 of the Act (quoted above) were not fully complied with therefore, the decree could not be executed. In the first place, argued the learned counsel, that no application was made by Jai Devi for grant of maintenance. Secondly, neither the income nor the property of Jai Devi, if any, was taken into account. There was no reference in the decree sought to be executed with regard to any property owned by Bishan Dass, the conduct of the parties and other circumstances of the case. The argument ignores the basic fact that the parties having consented, there was no occasion for the Court to go into these questions and it is not known if any of these factors were ever brought on record by any of the parties. Above all if the decree sought to be executed suffers from the illegality being pressed now, the proper course for Bishan Dass was to get it set aside by filing an appeal under section 28 of the Act.

(8) Learned counsel for Bishan Dass then laid stress on two Supreme Court decisions *Smt. Kaushalya Devi and others v. K. L. Bansal* (4) and *Ferozi Lal Jain v. Man Mal and others*

(4) A.I.R. 1970 S.C. 838.

(5) A.I.R. 1970 S.C. 794.

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Those were execution, cases wherein the executability of the eviction orders passed by the Courts was successfully challenged. In both the cases the parties compromised and in accordance with the terms thereof eviction orders were passed. In that context the tenants pressed into service section 13 of the Delhi and Ajmer Rent Control Act, 1952 (38 of 1952). The material portion of Section 13 (1) reads:—

“Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any court in favour of the landlord against any tenant (including a tenant whose tenancy is terminated):

Provided that nothing in this sub-section shall apply to any suit or other proceeding for such recovery of possession ‘if the Court’ is satisfied (b) that the tenant without obtaining the consent of the landlord in writing has, after the commencement of this Act.
(i) sublet, assigned or otherwise parted with the possession of, the whole or any part of the premises
.....”

It deserves mention that section 25 of the Hindu Marriage Act reproduced above is quite differently worded. My attention could not be drawn to any term thereof, divesting the Court of its jurisdiction to pass the decree owing to the non-fulfilment of any condition. In other words it could not be said that the present consent decree was in any way forbidden by the terms of section 25 of the Act, when the Court had jurisdiction to pass the decree under section 25 of the Act. For the foregoing reasons I reverse the decision of the learned District Judge on issue No. 2.

(9) Neither the learned counsel for Jai Devi nor the learned counsel for Bishan Dass has assailed the decision of the learned District Judge on issue No. 1. It is accordingly affirmed.

(10) In view of the discussion above, it appears that the learned District Judge has failed to exercise jurisdiction vested in him. I accordingly allow the revision petition, set aside the impugned judgment and remand the case for decision according to law. The parties are left to bear their own costs.

(11) The parties are directed to appear before him on September 22, 1980.

H. S. B.