Bombay High Court
S. Rashmi Pradipkumar Jain vs Pradeepkumar S/O. Nemichand Jain on 7 February, 1994
Equivalent citations: 1996 (1) BomCR 502, II (1994) DMC 25
Author: B Wahane
Bench: B Wahane
JUDGMENT B.U. Wahane, J.

1. This is unfortunate proceeding pending before me. Before I proceed to decide the matter on merit I would like to dwell for a short while in the Indian culture. Marriage is a social duty towards the family and the community. Marriage is the very foundation of the civil society. It is the duty not only of the couple, but every one in the country to contribute to social metabolism. The marriage, according to the community to which the parties belong, is sacramental and is believed to have been ordained in heaven. The parties to the marriage, therefore, cannot dissolve it at will. They are bound to each other until the death of either of them; and the wife is supposed to be bound to her husband even after his death. This concept of marriage, i.e. it is not dissoluble, is a lofty one because it means that the husband and wife after marriage have to adjust their tastes and temper, their ideals and interests, instead of breaking with each other when they find that these differ. It, thus, involves sacrifices on the part of both husband and wife as each is called upon to overcome the incompatibility of the other. Thereby the spouses are called upon to make the marriage a success by means of compromise and adjustment.

The unfortunate young couple, in the instant case, are living separate for the last 5 to 6 years because of the trifling matters. As a duty-bound citizen who always craves for the welfare society, as also duty being imposed under section 23(2) of the Hindu Marriage Act, 1955, and with a view that an indulgence or guidance may save the marriage, before proceeding with hearing, I asked the learned Counsel for the parties to make every endeavour to bring about a reconciliation between the parties. For the reconciliation, the matter was adjourned on some occasions, with no fruitful result. Therefore, the learned Counsel were heard. Even after the hearing, in the interest of the young couple as also the society, I adjourned the matter and directed the litigant couple to remain present in the Court on 27-10-1993 for reconciliation.

On 27th October, 1993, the litigant young couple with their fathers, were present in the Court. Firstly, I called the young couple in the chamber and had a talk for about an hour having discussion on the individual, family and social aspects in life and persuaded them to forget their black past as pointed out by them and to re-unite and enjoy the marital bliss. I asked them to return to reunion and to adopt the principle of forget and forgive, before coming to the Court on 4-11-1993. Both parties are educated and capable of understanding the effect of dissolution of marriage upon their child. The importance or striving together for the welfare of their child and his proper custody was explained to the parties. The couple being of the same town, they must see each other, talk freely and frankly and thereby resolve their dispute. Both agreed to do so.

Thereafter the fathers of the spouses were individually called in the chamber and they were pursuaded not to put hurdles in their lives, but to see that the couple should enjoy the pleasure of married life. Both expressed that no father will think about the ill of their children. Neither they

were in their way, nor they will be in their way in future. The father of Pradeep Kumar Jain, respondent, specifically stated that if the couple wants to live separate from the family, they may live separate in the interest of their welfare or happy life. Neither he nor any member of his family will come in their way. They will extend all co-operation.

Ultimately, the case was posted on 4-11-1993. However, inspite of my best pursuation, I was shocked to know that there is no possibility of reunion at all. I, therefore, proceed to decide the case on merits.

2. This second appeal under section 100 of the Code of Civil Procedure, read with section 28 of the Hindu Marriage Act, is directed against the decree passed by the Additional District Judge, Amravati, on 30th April, 1991, in Regular Civil Appeal No. 111 of 1990 arising out of the decree passed by the Civil Judge, Senior Division, Achalpur, in Hindu Marriage Petition No. 40 of 1987, dated 25th April, 1990, granting decree of restitution of conjugal rights under section 9 of the Hindu Marriage Act, in favour of the husband and directing the appellant/wife S. Rashmi to join the company of her husband and to discharge the matrimonial obligations of the marital life. By the said order, the learned trial Court refused the alternative relief sought under section 13 of the Hindu Marriage Act for dissolution of marriage by way of divorce.

3. The marriage of the young couple - Pradeep Kumar and Rashmi - was solemnized on 13-7-1983 as per Jain religious rites and community customs at Paratwada, district Amravati. After the marriage, the spouses lived together happily for a few days. According to the respondent-petitioner, he found his wife of a hot temperament and being the only daughter of her father, she has more affection towards her parents. She was always in habit of visiting her parent's house even without the consent of petitioner-respondent and his parents. The petitioner/respondent was living with his parents and three elderly married brothers. In the month of January, 1986, the appellant Rashmi was taken for religious tour by respondent-petitioner's parents. During her pregnancy, when she was not allowed to go to her parents, she adopted an adament attitude and refused to take meals for two days. In fact, despite the persistence of the petitioner-respondent, the appellant-wife went to her parent's house without the consent of the respondent and other members of the family. The first pregnancy terminated into abortion as there was no chance of survival of the child. At the second occasion, the child was found dead in the womb. On the third time, the appellant delivered a child on 4-11-1986. According to the petitioner-respondent, he had utmost love and affection for his wife. After the appellant delivered the child, neither the appellant nor her parents sent any information about the delivery and birth of son, to the respondent. As soon as the respondent learnt about the delivery, he had visited the house of appellant's parents and enquired about her health and that of newly born child. Much prior to the delivery, the appellant had gone to her parents. On 13-10-1986, the petitioner-respondent met with a serious accident in which he had sustained fracture and other injuries, but neither the appellant nor anybody from her parents' family paid any courtesy visit. On the contrary, when there was a sudden demise of the brother of the appellant-wife at Raipur (Madhya Pradesh), the respondent-husband, though he was having a fracture to his leg, along with his parents, had been to Raipur to pay condolence. According to the respondent-husband, he had made all efforts to bring her back and to lead happy married life, but the appellant-wife refused to join his society. The relatives and responsible members of the community persuaded her to join the

society of her husband but attempts proved futile. According to the respondent-husband, the appellant/wife is completely under the thumb of her parents and, therefore, she is not willing to join the company of her husband.

On 26-3-1987, a notice was served on the appellant-wife asking her to join the company of the respondent/husband along with all ornaments which she had taken at the time of leaving the matrimonial house. In spite of the notice Exh. 45, the appellant-wife did not turn up. However, she sent a reply notice dated 31-3-1987 levelling false allegations against the petitioner-husband. She stated that she is ready to cohabit with him if he leaves dangerous habits of drinking and beating, on giving assurance of good behaviour within 8 days from the receipt of the notice. If not, he will have to make a provision for maintenance for her and the child. Failing which, she will be constrained to institute legal proceedings for maintenance.

Another notice dated 6-4-1987, Exh. 47, was sent to the appellant/wife in which the respondent/husband specified that he is ready to bring her to his residence. He expressed that he will come to her parent's house on 8th April, 1987 or between 8th and 10th April, 1987, and she be ready to accompany with son, ornaments and garments. In pursuance of his notice dated 6-4-1987, he, along with panchas, had been to her parent's house to bring her back. But she declined to accompany him in absence of her father. Consequently, on 11-4-1987, a telegraphic notice was sent, directing her to join his society with son.

4. It is an admitted fact that the financial position of the father of the respondent-husband is more sound than the father of the appellant-wife. Inspite of this, the marriage was solemnized. As the financial condition of the parents of the appellant-wife was and is weak, question of demand of any dowry by the parents of respondent, does not arise. Neither the petitioner nor his parents had demanded or accepted any dowry, is admitted by the father of the appellant-wife in his evidence.

5. The appellant-wife denied the allegations that she was hot tempered and she was in the habit of leaving her matrimonial house without the permission of her husband. She denied that she has deserted her husband without any cause. According to her, she has not either withdrawn or deserted from the society of her husband. According to her, her in-laws and other female folks of the family were insisting her to bring some financial help from her father. Her father had given cheques of Rs. 15,000/-. Even after fulfilling the demands, she was given cruel treatment. According to her, her husband was addicted to vices like drinking liquor and gambling. He used to consume liquor to such extent that he was, many times, required to be lifted by others and brought to house. Because of this, she suffered mental torture. Though for some days, the husband and wife were living separate in mess and residence from the parents of the husband, during that period also she found no change in the behaviour of the husband. She apprehends danger to her life, if she cohabits with her husband. Therefore, she expressed that she is not willing to join the society of her husband.

According to the respondent-husband, the appellant-wife had wilfully and without any reasonable cause withdrawn herself from his society and hence he instituted the proceeding under section 9 of the Hindu Marriage Act, 1955, for restitution of conjugal rights. Later on, he, by way of amendment, made an alternative claim for dissolution of marriage by decree of divorce under section

13(1)(i-a)(i-b) of the Act.

6. On the basis of the pleadings, the learned trial Judge framed issues at Exh. 39. The parties led oral as well as documentary evidence. After scrutinizing the evidence of the parties, the learned trial Judge on 25-4-1990 passed a decree for restitution of conjugal rights under section 9 of the Hindu Marriage Act (for short the Act), directing the appellant/wife to join the company of her husband and to discharge the matrimonial obligations. The alternative prayer to grant a decree for dissolution of marriage by decree of divorce under section 13 of the Act, was refused.

The appellant-wife, being aggrieved by the judgment and order passed by the learned Civil Judge, Senior Division, Achalpur, dated 25-4-1990, preferred a Regular Civil Appeal No. 111 of 1990. The learned Lower Appellate Court confirmed the findings of the learned trial Court and dismissed the appeal by order dated 30-4-1991.

7. Shri Chandurkar, the learned Counsel for the appellant, vehemently submitted that the judgment is full of perversity. According to him, the learned lower Appellate Court has set out the points for determination, recorded the findings thereon and gave its own reasons for the said findings. He further submitted that the learned lower Appellate Court has failed to comply with the legal requirement of Order 41, Rule 31 C.P.C. The provisions of Order 41, Rule 31 are mandatory. Failure to comply with the mandatory provisions of Order 41, Rule 31 C.P.C., resulted in the failure of justice at the hands of the Lower Appellate Court. The provisions of Order 41, Rule 31 C.P.C. reads as under :

"The judgment of the Appellate Court shall be in writing and shall state-

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appe

Provided that where the judgment is pronounced by dictation to a shorthand writer in op

It is apparent from the reading of the provisions of Order 41, Rule 31 of C.P.C. that

"Where the High Court is sitting in exercise of its power of superintendence and when it is shown that the judgment of the first appellate Court has failed to comply with the legal requirements of Order 41, Rule 31, it cannot be sustained by the High Court looking into the facts and arrogating to itself the role of a fact finding Court. The provisions of Order 41, Rule 31 are mandatory. The judgment of the first appellate Court has to set out points for determination, record the decision

thereon and give its own reasons for the said decision. Looking to the plain language of that rule, it cannot be said that failure to comply with these provisions is a bare irregularity. The legislature has laid down these rules so that either the Second Appellate Court or the Court exercising such extraordinary jurisdiction as power of superintendence under Article 227 of the Constitution should be in a position to find out the track traversed by the Appellate Court. It cannot run away from its onerous duties of recording the finding of fact and/or discussing the evidence."

This aspect is also dealt by the Hon'ble Mr. Justice Jahagirdar in a case of Smt. Anita M. Harrettor v. Abdul Wahid Sanaullah , and it is observed in para 16 as under :

"Order 41, Rule 31 deals with the judgment of the Appellate Court and it says amongst other things that the judgment shall state the points for determination. When a requirement such as this is insisted upon by the procedural law of the land, one must try to understand the object and scope of this provision. Merely asking the question as to whether the judgment of the Court below is correct, legal or valid is hopelessly an inadequate method of meeting the requirement of this legal provision."

Again in Para 17, his Lordship observed as under :

"The points which must arise for determination by a Court of first appeal must cover all important questions involved in the case and they should not be general and vague. It is a matter of almost text book knowledge that the exact questions which arise in the appeal and require determination must be stated in the judgment. "It is not sufficient to state the point to be determined in appeal whether or not the decision is consistent with the merits of the case". The point so stated is hardly a point for determination as contemplated in Order 41, Rule 31 of the Code."

8. Repelling the submissions of the learned Counsel for the appellant, Shri Somalwar, the learned Counsel for the respondent/petitioner, submitted that the appeal before the first appellate Court was under section 28 of the Hindu Marriage Act. It is a special Act. In view of the provisions of section 21 of the Hindu Marriage Act, all proceedings under the Special Act shall be regulated as far as may be, by the Code of Civil Procedure, 1908. The legislature specifically enumerated that all the proceedings under Hindu Marriage Act, 1955, shall be regulated, as far as may be, by the Code of Civil Procedure. It does not mean that in all the proceedings under the Hindu Marriage Act, the Court has to follow the provisions of Civil Procedure Code. Therefore, according to Shri Somalwar, the learned Counsel for the respondent/petitioner, it was not necessary to frame issues or to set out the points for determination. Presuming that it was obligatory on the Lower Appellate Court to set out the points for determination, the trial Court had framed issues vide Exh. 39, which are reproduced as under :

"(1) Does petitioner prove that respondent has withdrawn from society of petitioner since July, 1986?

(2) Does petitioner prove that without just and reasonable cause respondent is living at her parental home?

(3) Does petitioner prove that respondent treated him with cruelty and deserted petitioner from 11/2 years?

(4) Does respondent prove that she was ill-treated by the petitioner his family and mother-in-law without lawful excuse?

(5) Does respondent prove that petitioner deserted her in addiction of liquor without any fault on her part and thereby if she has suffered with injuries?

(6) Does respondent prove that petitioner is false?

(7) Relief and costs?"

It is not the case of the appellant-wife before the lower Appellate Court, as transpired from the memo of appeal, that the trial Court has not framed proper issues. It means no grievance was made before the lower Appellate Court about the framing of issues. Only submissions were made before the lower Appellate Court on merits. Under the circumstances, is it obligatory on the Appellate Court to set out the points for determination? No new point was raised and argued before the learned lower Appellate Court. So, therefore, question arises what were the issues or points for determination before the Lower Appellate Court.

The respondent-husband had instituted the proceedings under section9 of the Act. Section 9 of the Act reads as under :

"When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation : Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society."

From the reading of the provisions of section9 of the Act, it is clear that the learned trial Court or the Lower Appellate Court could have framed a point for determination i.e. "Whether the appellant-wife has without reasonable excuse withdrawn herself from the society of her husband?". It was also for the learned Lower Appellate Court to find out whether there is a compliance of section 9 of the Hindu Marriage Act. However, the learned Lower Appellate Court set out the following points for determination in the appeal :

"1. Whether the judgment of the Lower Court is contrary to the provisions of law and whether any interference is necessary?

2. Whether the present appellant/wife is entitled for any permanent alimony as asked vide appln. (Exh. 23)?

3. What order?"

Shri Somalwar, therefore, rightly submitted that the learned lower Appellate Court rightly set out the points for determination according to the provisions of section 9 of the Act. Thus, there is a sufficient and substantial compliance of the Order 41, Rule 31 of the Code of Civil Procedure.

Before the learned lower Appellate Court, the submissions were made by the parties on the issues framed by the learned trial Court and the reasonings thereon. These submissions have been considered by the learned lower Appellate Court in the body of the judgment. Thus, there is a substantial compliance of Order 41, Rule 31 of C.P.C. While dealing with the provisions of this special Act, we have to consider that whether the points for determination were in the mind of the Judge or not. In the instant case, from the detailed judgment on each point, it is clear that the learned trial Court, while dealing with the case under the provisions of section 9 of the Act, dealt in accordance with the issues before him.

In para 10 of the judgment, before touching to the merits of the case, the learned Judge firstly stated what was in his mind. The learned Lower Appellate Judge has specifically mentioned that before touching the merits of the case, the principle under section 9 of the Act, 1955 are to be seen. These lines make it clear that what was in the mind of the Judge though not spelt out in specific words. Thus, no fault can be found out. In para 11 of the judgment, the contentions of both the spouses have been considered in the opening lines only. These lines read as under:

"In this petition, it is throughout the case of the respondent/husband that the wife, present appellant, had wilfully, without any reason, had withdrawn from his society, and whereas the appellant/wife contends that there are reasons like demand of financial help, mental cruelty caused by the parents of the respondent/husband and the addiction of the husband to the liquor and gambling, as the reasons for her withdrawal from the society of the husband."

It is, thus, clear that the learned Lower Appellate Court had extensively discussed the evidence on record. Under the facts and circumstances and particularly considering the provisions of section 9 of the Act, there is a sufficient and substantial consideration by the learned trial Court. Court below has dealt with all these aspects in lucid manner in its judgment and I am in entire agreement with the said findings.

A reliance has been placed on a case of Durga Thathera v. Narain Thathera and another wherein it is observed :

"In a judgment delivered on hearing an appeal under Order 41, Rule 11 by a Court sub-ordinate to the High Court, compliance with the provisions of Rule 31, Order 41 is necessary. The question whether in a particular case there has been a substantial compliance with the provisions of Rule 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance

with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the Lower Appellate Court."

This aspect has also been observed by the Lordship of the Mysore High Court in a case of Krishna Shetty and others v. Xavier Misquith, A.I.R. 1961 Mysore 242, as under:

"Though it is seldom possible or necessary for a lower Appellate Court to write its judgment in a mechanical way, setting out one underneath the other, the points for consideration arising in the case and the reasons for the conclusions arrived at by the Court as required by Order 41, Rule 31, Civil Procedure Code, where the judgment discloses that the lower Appellate Court did understand and had before it the points for determination, and the judgment also sets out those points and contains the reasons for the decision which it reached, it must be regarded as adequate and full."

9. According to Shri Chandurkar, the learned Counsel for the appellant, the findings given by both the learned Courts below, are not only contrary to the evidence on record, but full of perversity. Though the respondent-husband failed to substantiate that the appellant-wife withdrew from his society since July, 1986 without just and reasonable excuse, the learned trial Court erroneously arrived at the conclusion. Similarly, without any clinching evidence on record, the learned Courts below gave finding to the effect that the appellant-wife treated the petitioner-husband with cruelty and deserted him for 11/2 years. According to him, though there is sufficient evidence on record to the effect that the petitioner-husband was addicted to liquor and the respondent-wife was ill-treated not only by the petitioner, but also by other members of the family without any lawful excuse, both the courts below did not consider the same in true and correct perspective and, therefore, the findings given by the learned courts below are erroneous and pervers and deserve to be set aside.

10. The basic principle of the provisions of section 9 of the Act, is that the restitution of conjugal rights is a fundamental right and one spouse is entitled to the society and the company of the other spouse. Where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse, the other spouse is entitled for the decree of restitution of conjugal rights. While granting the relief under section 9 of the Act, the Court has to see that the burden of proof is on the spouse who claims that other spouse had withdrawn from the society. But as per the explanation to section 9 of the Act, the onus of proving reasonable excuse always rests on the other spouse. The case of the petitioner-husband throughout is that the respondent-wife (present appellant) had wilfully without any reason had withdrawn from his society, whereas the appellant-wife contended that there are reasons for her withdrawal from the society of the husband, like demand of dowry or financial help from her parents, passing taunting remarks and torturing her by beating under the influence of liquor, addiction of the petitioner-husband to gambling, which caused her mental cruelty.

11. Though it is stated by the appellant-wife Smt. Rashmi that as no dowry either in the form of money or valuable ornaments or goods, was given in the marriage by her parents, the parents, wives of the respondent's brothers, always used to pass taunting remarks. They also directed her to bring amount from her parents. Admittedly, the financial condition of the appellant's father was weak in

comparison to that of respondent's father. Knowing this, the girl was approved and the marriage was solemnized. Shri Bhaulal (witness No. 2 for the appellant-wife), the father of the appellant fairly admitted in the cross-examination that there was no talk of any dowry at any point of time even at the time of settlement of marriage. Shri Bhaulal further admitted that even there was no talk regarding payment of money or giving of ornaments to the respondent at the time of settlement of marriage. Bhaulal also admitted in his evidence that whatever ornaments he gave to the appellant, it was on his own accord and not on the demand of the respondent or his family members. This evidence specifically demonstrates that there was no demand of dowry or other articles from the appellant's father at the behest of the respondent.

The appellant-wife stated that the respondent was living with his parents and two married brothers. The appellant was the youngest daughter-in-law in the family. According to her, her mother-in-law was in the habit of picking-up quarrels not only with her, but with the wives of other two brothers of the respondent-husband. However, she deposed that she cannot tell the cause of their quarrels. She volunteered and further stated that it was on domestic affairs. According to the appellant-wife, there is a custom prevailing in the Jain community that all the ladies and gents go to the temple for prayer in the morning hours. When she was asked whether she had disclosed about beating, torturing and humiliation to anybody or Ajay Kumar Jain who is the nephew of her father and resides near the house of the respondent, she admitted that she did not disclose any sort of torturous act to Ajay Kumar Jain, who was on visiting terms as also to anybody else. Under these circumstances, knowing well the unsatisfactory financial condition of appellant's father, it does not stand to reason that either the respondent-husband or anyone of his family would pass remarks taunting her about the dowry. Now-a-days, practically it has become a fashion to level allegations that the wife has been tortured and forced to leave the house for not fulfilling the demand of dowry, if the relations between the spouses becomes strained. Both the learned lower Court have considered this aspect in right earnest and I do not find either any illegality or perversity in the findings recorded by the learned lower Courts.

12. The other reason for withdrawal from the society of the respondent-husband by the appellant-wife, is attributed to drinking and gambling. It is stated that the respondent-husband was required to be brought to the house as he was found lying on the road under the influence of liquor. However, except the bear words of the appellant-wife, there is no other corroborative evidence. It was easy to bring the evidence on this aspect. Paratwada is a small town and if really the respondent-husband used to be found lying on the road under the influence of liquor and was required to be brought to the house by the people, it was not difficult to procure any eye witness of the incident. In absence of any corroborative evidence, it cannot be believed that the respondent-husband was addicted to liquor and gambling. Similarly there is no evidence to show that the appellant-wife was ill-treated and the petitioner used to beat her by kicks under the influence of liquor. It is also alleged that when she was pregnant, the respondent-husband gave kicks on her abdomen. However, it cannot be believed in absence of any corroborative evidence.

13. The appellant-wife examined doctors to substantiate that because of the illtreatment, she suffered mentally and the petitioner and his parents did not care for her ill health. Dr. Shrikant Deshmukh, psychiatrist, deposed that he had given the treatment to the appellant-wife for

anti-depressant and anti-anxiety. In the cross-examination, he admitted that a mind works either in its conscious or sub-conscious condition. When there is conflict between conscious and sub-conscious thinking, the anxiety and depression arise.

Dr. Bakula Shaha, witness No. 3 examined on commission, stated that she examined appellant Smt. Rashmi on 7-4-1984 and attended her delivery. She also stated that respondent delivered a dead child. According to her, a woman develops mental depression in case of delivery of dead child. Dr. Smt. Neera Hirurkar (witness No. 2 on commission) practices as Psychiatrist and Gynaecologist. She stated that Smt. Rashmi Jain was referred to her by Dr. Barabde. On examination, she found appellant Smt. Rashmi Jain in advanced stage of pregnancy. Further she found that the child is dead in her womb and, therefore, accordingly she gave her advice.

The evidence of the doctors, in my opinion, does not lead to the conclusion or inference that appellant-wife developed any depression or anxiety because of the beating, torturing and humiliation.

14. One Khushalchand Jain, husband of respondent's sister, was the mediator in the marriage of the respondent and the appellant. He was on visiting terms with the appellant Rashmi. Khushalchand Jain had been to appellant Rashmi while she was living separately with her husband. According to her, she had disclosed to Khushalchand that she was troubled by the mother of the petitioner. Khushalchand sent a letter on 9-12-1984 to appellant-Smt. Rashmi. Admittedly, it was not replied. The perusal of the letter Exh. 52 sent by Khushalchand to appellant-Smt. Rashmi shows that there were petty quarrels with the wives of the brothers of the petitioner. In the letter, Shri Khushalchand asked her that in case she is in difficulty, to apprise him. He also advised that she is an educated girl and she has to adjust the life. As stated by her that she had informed Khushalchand about her illtreatment at the hands of the petitioner and his family members, it would have definately reflected in the letter. Therefore, from this letter too, it is very difficult to jump to the conclusion that she was tortured either by the mother-in-law or any other member of the family.

15. On the contrary, it is the case of the respondent that the appellant-wife Rashmi had great affection for her parents. She was of a hot temper nature. She being the only daughter, she was in habit of going to her parents on and of. The families of the parents of both the spouses are residing in the one town known as Paratwada. During the pregnancy she was adament to go to her parent's place and when the respondent asked her not to go to her parent's house, she refused to take meals for two days and later on without the consent and knowledge of the respondent and other members of his family, she went to her parent's house. According to the respondent, he had utmost love and affection for his wife-respondent. She was taken to religious tour by the respondent's parents in the month of January, 1986, i.e. about 3 years after the marriage. As per her desire even the respondent lived separate from his parents and brothers from 1-6-1986. The appellant admitted in her evidence that -

"It is true that the period of 7th month pregnancy (Sanji)(Agarani) was celeberated by the father of petitioner on large scale. It is true that at this time invitation cards were distributed and relations and many other in large scale attended function, a dinner was also arranged by the father of

petitioner. My father-mother they also attended the function.....

At this time of Agarani I did not disclose to anybody about the habit of petitioner that he takes wine except to my brother and his wife".

It is not disputed that there was untimely death of the only brother of the appellant Rashmi at Raipur (Madhya Pradesh). Knowing about this unfortunate incident, the parents of the respondent had been to Raipur to pay their condolence. On the contrary, a circumstance has been brought on record that the respondent met with an accident some times in the month of November-December, 1986 and he sustained a fracture. The appellant Smt. Rashmi, though was staying in the same town, did not go to see him. In fact, the husband is of a great importance to a Hindu wife. But, in the instant case appellant-Smt. Rashmi neither visited him nor made any enquiry about the accident and fracture sustained by him.

16. Admittedly, appellant-Smt. Rashmi is a well qualified woman. She is educated upto B. Com., Part-II. On the contrary, the respondent is educated upto S.S.C. Thus, Smt. Rashmi is more qualified than her husband. Therefore, the ego of superiority complex cannot be ruled out. The appellant-wife very specifically deposed as under :

"It is true that we used to meet with each other even now. There is an apprehension in my mind that in case if I stay with the petitioner, there is danger to my life. I am told this by the brother-in-law of the petitioner Shri Kasliwal, Nasik, at the time of my delivery. Kasliwal informed me that the father of petitioner Nemichand saying that he shall see me in case if I stay with petitioner and, therefore, on this talk apprehending my life, I am staying with my parents having no desire to return or join company of petitioner. I am willing to stay with my parents."

In fact, there is no reason for such apprehension. Shri Kasliwal is not examined and, therefore, in fact, there is no evidence to support her story. It is not her case that at any time the petitioner expressed such words or tortured or humiliated her to such an extent to develope apprehension of danger to her life. On the contrary it has been brought on record that her mother is suffering from heart-disease, she takes bed-rest and lives on medicines. Her father is also suffering from blood-pressure since the death of her brother and he is a retired serviceman. She also stated that she is working as a teacher in the school. Naturally, the appellant-Smt. Rashmi appears to have more love and affinity for her parents and wants to render her services to her parents than to her husband. The learned Lower Appellate Court also rightly observed in para 22 of his judgment as follows :

"In this case, particularly the Lower Court had also observed in its judgment and also found that the reasons for appellant in not joining the company of the petitioner/husband is as same as it is found in the maximum matrimonial disputes. The parents are generally responsible in giving a serious turn to minor matters and spoil the life of the youngsters. Youngsters are helpless because of the relations and thinking of their parents. In this particular case while exercising the parental jurisdiction, I found that somewhere the pressure lies on the mind of the appellant-wife in not going to her husband, the respondent and it will be not out of way to say that as the only young son of the

appellant's father i.e. the brother of the appellant, is dead, therefore, the parents of the appellant are interested in pressing that the appellant should stay with her husband with her parents, keeping in mind the need of the daughter at time of their advanced age."

Inspite of the efforts made by the respondent-husband and other members of his family along with panchas to bring appellant-wife Smt. Rashmi back to his residence, as also issuance of notices to her, she did not join the society of the respondent-husband. According to the petitioner, the appellant-wife Smt. Rashmi left the matrimonial home without the knowledge and consent of the respondent-husband and did not return inspite of his best efforts. It is, therefore, pleaded that the appellant-wife has without reasonable excuse withdrawn from the society of the respondent-husband. The respondent being in love with appellant Smt. Rashmi, instituted the proceeding under section 9 of the Act for restitution of conjugal rights and there being no possibility of re-union, he amended the petition and made an alternative claim under section 13 of the Act for dissolution of marriage by decree of divorce.

17. Shri Somalwar, the learned Counsel for the respondent-husband, raised an interesting and a substantial question of law in the interest of spouses, reiterating the relief sought by the husband for dissolution of marriage by a decree of divorce under section 13(1)(i-a), (i-b) of the Act, in view of section 23-A of the Act. Thus, according to Mr. Somalwar, considering the proved facts to the effect that she deserted her husband without reasonable cause treated her husband with cruelty and also there is non-compliance of sub-section (I-A)(ii) of section 13 of the Act, the respondent-husband is entitled to a decree of divorce in this proceeding. According to him, the purpose of amended section 23-A is to avoid multiplicity of litigations and waste of time. Section 23-A of the Act specifically indicates that the Court has a discretion in the matter of accepting the counter claim made by the respondent. Shri Somalwar, the learned Counsel for the respondent-husband, further submited that the object and purpose of amendments made in the year 1976 to the Act, is that litigation was to be reduced to minimum. In view of ex-debito justitiae, Shri Somalwar submit that to do real and substantial justice to parties for which alone the Court exists. The parties should not be driven again in the Court and on technical ground, no relief in the case, if any, for decree of divorce be denied. The learned trial Court passed a decree of restitution of conjugal rights under section 9 of the Act on 25-4-1990. Since then, though it was obligatory for the wife to join the company of her husband, there is no restitution or re-union of the parties for the last more than three years. On the contrary, the appellant-wife preferred appeals against the decree for restitution of conjugal rights. Now it will be mere formality of filing a petition for decree of divorce. Shri Somalwar, the learned Counsel for the respondent-husband, relied on a case Dr. Shrikant Rangacharya Adya v. Smt. Anuradha (D.B.) and particularly paras 5, 7, 13 and 14.

Shri Chandurkar, the learned Counsel for the appellant-wife, opposed the claim of the respondent-husband on the ground that the learned trial Court in para 20 of his judgment has rejected the claim of the respondent-husband for dissolution of marriage by a decree of divorce. The respondent-husband did not challenge this finding in appeal and, therefore, the alternative claim for dissolution of marriage by a decree of divorce, cannot be considered now. Further it is submitted that the provisions of section 23-A of the Act gives rights only to the respondent and not to the petitioner. The provisions are applicable at the initial stage before the trial Court, and not in appeal.

If this relief is considered at the appellate stage, it would be re-writing of the provisions. The Court has to act upon or deal with the provisions and not to make out the new provisions. Therefore, the relief sought is not sustainable. According to him, the situation in the case before the Lordships of the Karnataka High Court referred supra, was altogether different and, therefore, it does not help in any way to the proposition sought out by the learned Counsel for the respondent-husband.

18. The history of development of Hindu Law, shows that it was never static and it had changed from time to time so as to meet the challenges of the changing requirements on different stages. Hindu Marriage Act, 1955 (Act. No. 25 of 1955), which is one part of codification of personal law, became law on 18th May, 1955. By the Act No. 68 of 1976, various amendments were effected to the Act including section 23-A and section 13(1)(i-a)(i-b). These amendments were introduced with an intention to liberalised the provisions relating to divorce and for speedy disposal of the matrimonial cases.

19. Divorce is really a very serious matter which affects not only the lives of two individuals but which has a great social bearing. It is in the interest of the community that the institution of marriage is upheld. A Hindu marriage is not merely a sacrament, but like all marriages, it is also a status, and as such it is a matter of concern of the community as well as the parties. The right to abandon the marital alliance is, therefore, hedged with positive restrictions and conditions. The husband and wife are not free to terminate their marriage at pleasure. Divorce may not be the panacea for all matrimonial ills, but, in certain circumstances that may be the only remedy.

In the old days, the marriage was considered as sacrament. We have given a go-bye to that ancient principle that the marriage is a sacrament and that it continues throughout the life of the partners and even beyond their lives. That principle is no longer relevant or applicable in the context of changed social values of our modern lives. Therefore, once the principle of divorce and the principle of judicial separation have been incorporated in Hindu Marriage Act, 1955 and by amendment of 1976, some provisions have been liberalised not to allow the agonies of the unhappy couple to prolong the litigation for years together, but to take them out from the unfortunate circumstances in which they are placed.

There are thousands of marriages which are dissolved and which are terminated by the customary law of the parties. Those customary laws are still operative in Hindu society.

20. Admittedly, under the provisions of section 13 of the Act, either of the spouses can approach the Court of competent jurisdiction for dissolution of marriage by a decree of divorce, after one year from the date of solemnization of marriage. Either of the spouses can get the relief of dissolution of marriage by a decree of divorce on the grounds of cruelty, desertion, etc. Sub-section (1)(i-a) of section 13 of the Act entitles to get the relief of divorce if the other spouse treated the first one with cruelty. Similarly, in view of sub-section (1)(i-b) of section 13 of the Act, the petitioner spouse is entitled to get the relief of divorce if the other spouse has deserted him for a continuous period of not less than two years just preceding the presentation of the petition.

In view of sub-section (I-A)(ii) of section 13 of the Act, either party to marriage may present a petition for dissolution of marriage by decree of divorce if there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. Undisputedly after the decree for restitution of conjugal rights was granted by the trial Court on 25-4-1990, there has been no restitution of conjugal rights as the appellant-wife did not comply with the decree. On the contrary, she challenged the decree. The respondent-husband was entitled to present a petition for dissolution of marriage by a decree of divorce on the grounds mentioned in sub-section (I-A)(ii). It appears that the respondent-husband did not present a petition for dissolution of marriage by a decree of divorce only because an appeal was preferred before the first appellate Court and this Court. From the date of decree i.e. 25th April, 1990, for more than three years, the appellant-wife did not join the company of her husband and also during the reconciliation it is found that there are loose chances on the part of the appellant-wife to join the society of her husband. The trial Court upon appreciation of the entire evidence found that the attitude of the respondent/husband towards appellant-wife was always affectionate. Regarding constructive desertion, the Court below found that the appellant-wife failed to establish that respondent-husband deserted her; but on the other hand the appellant-wife herself wanted to put an end to the marital relationship. There is complete distruction of the essence of marriage between parties and it has reached the stage of irretrievable break down.

21. In view of proviso to section 14(1) of the Act, a petition for divorce can be filed before the expiration of a statutory period of one year from the date of marriage, with the leave of the Court on the ground that the case is one of exceptional hardship to the petitioner or of exceptional deprivity on the part of the respondent.

By insertion of Clause 13-B in the year 1976, according to which, if the parties have been living separately for a period of one year or more and it has not been possible for them to live together, then by mutual consent, the marriage can be dissolved. This is a revolutionary and unprecedented measure that the parties after one year of their marriage can with mutual consent get their marriage dissolved. In the matrimonial matters, if the parties have by force of circumstances, within or outside their control, been unable to live together in the best period of their married youthful lives, then the marriage should be dissolved. By this process, the valuable time of the Court will be saved as also the parties save the expenses for the litigations, and save their prospect of life in their own way and trouble underlying these litigations. When the marriage tie has been broken, the Court has to look the interest of parties. When it is impossible to live like husband and wife any compulsion to unite them will lead to social evils and disturbance of mental peace and disorder in the family life.

22. By the Act No. 68 of 1976, a new section 23-A has been inserted in the Act, providing relief for the respondent in a divorce and other proceedings. Section 23-A of the Act reads :

"23-A. Relief for respondent in divorce and other proceedings -

In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion,

but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

Even according to the statement of objects and reasons to insert new section 23-A in the Act, it was to avoid the multiplicity of the proceedings. Where the proceeding is initiated by a party on the ground of adultery, cruelty or desertion then the respondent may not only oppose the relief sought, but may also make counter claim for any relief under the Act on any ground but in separate or cross petition.

In the instant case, had the decree of restitution of conjugal rights dated 25-4-1990, not been delayed by filing first and second appeal, the respondent-husband would have been entitled to divorce under section 13(I-A)(ii) read with section 23-A of the Act. A question, therefore, arises whether at this stage can the marriage be dissolved by a decree of divorce under section 13(I-A)(ii) read with section 23-A, of the Act?

23. Undoubtedly, a matrimonial proceeding is an ordinary civil proceeding. The appeal is a continuation of the original proceeding. In a case of Ct.A.Ct. Nachiappa Chettiar and others v. Ct.A.Ct. Subramaniam Chettiar of the judgment, their Lordships observed as under :

"After a decree is drawn up in the trial Court and an appeal is presented against it, proceedings in appeal are a continuation of the suit; and speaking generally, as prescribed by section 107 of the Code of Civil Procedure the appellate Court has all the powers of the trial Court and can perform as nearly as may be the same duties as are conferred and imposed on the trial Court."

Further in para 36 of the judgment, their Lordships observed as under :

"Similarly the word "suit" cannot be construed in the narrow sense of meaning only the suit and not an appeal. In our opinion, "court" in section 21 includes the appellate Court proceedings before which are generally recognised as continuation of the suit; and the word "suit" will include such appellate proceedings".

In a case of Alphonso Nazareth v. Xavier Dias and other, A.I.R. 1971 Mysore 79, the meaning of the word "suit" in Order 43, Rule 1(k) has been construed as under :

"The word 'suit' has a narrow meaning as well as a wider meaning. In its wider meaning it includes an appeal also because an appeal is in a sense, continuation of a suit. The word 'suit' in Clause (k) of Rule 1 of Order 43 should be interpreted to include an appeal. cited supra, is relied)."

In a case of Lakshmi Narayan Guin and others v. Niranjan Modak, A.I.R. 1985 Supreme Court their Lordships held as under :

"It is well settled that when a trial Court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on merits, the trial Court decree is said in law to merge in the appellate decree and it is the appellate decree which rules."

24. A relief under section 23-A of the Act can be granted to the respondent in any proceeding for divorce or judicial separation or restitution of conjugal rights. The appellate proceedings being the continuation of the original proceedings, and the husband is the respondent in the second appeal, therefore, according to me, he can reiterate the relief of dissolution of marriage by decree of divorce which he alternatively prayed in the petition for restitution of conjugal rights. It is no doubt that at the appellate stage, no written application has been presented by the respondent-husband seeking such relief. The respondent-husband, at the initial stage, by amendment, sought the alternative relief of divorce. Though the relief was declined, the fact remains that he sought such relief. It is the practice which is followed that even the oral prayer made by the counsel is accepted. In case of Chhedi Rana and others v. State of Bihar, 1990(Supp.) S.C.C. 88, their Lordships condoned the delay though there was no written application for condonation of delay, on the oral prayer of the counsel. The Court can grant the relief if satisfied on the merits that the petitioner is entitled to relief claimed. The judicial procedure has been framed for the furtherance of justice and not to defeat it, and the Court cannot refuse to give any aid of justice merely on technical grounds. Refusal to grant relief is not only likely to defeat the justice, but to tend to multiplicity of litigation and waste of time of the Court. The Courts of justice have before them the paramount duty to do justice in each case.

In a case of Dinanath Sarma Kataki v. Gour Nath Sarma Kataki and others it is observed as under :

"When it appears to the Court that the plaintiff is entitled to an equitable relief it would be well advised to allow the plaintiff where the defendant has been obviously in default, to avail himself of any such equitable relief to which he is entitled under the law and if necessary to treat his pleadings as amended for that purpose even at the appellate stage of the suit."

Similarly, in a case of Shingounda Shidgounda v. Ganesh Yeshwat and others of the Judgment, is observed :

"The Court has jurisdiction to adjust the rights of the parties as ascertained by it and to grant a declaration accordingly. If it is necessary in the ends of justice to do so and the Court's jurisdiction cannot be restricted because the plaintiff has asked for a more extensive declaration or a declaration in a different form."

25. Giving conscious thoughts to the facts and circumstances of the case, as also to the provisions of the Act, in order to mitigate the hardship which the parties may have to undergo, to avoid the multiplicity of the litigations and waste of time of the Court and also considering the fact that parties are living separate since July, 1986, I have no hesitation to accept the oral prayer of the counsel of the petitioner-husband.

The learned trial Court simply denied the relief of dissolution of marriage by decree of divorce on the ground that no sufficient ground has been proved by the petitioner. However, there is no discussion on this point. The learned trial Judge observed that the appellant-wife deserted her husband. It has also been observed that the respondent-husband proved the cruelty at the hands of appellant-wife. The learned lower Appellate Court, considering the conduct and adamancy of the appellant-wife, observed in para 20 that by denying the decree for divorce, the lower Court had rather given a chance to the appellant-wife to think about the re-joining of matrimonial relations with the husband. But, the appellant-wife, instead of joining the society of her husband, challenged the decree of restitution of conjugal rights.

Inspite of the consistent efforts to re-unite them, they did not reconcile. The appellant-wife has specifically stated that she does not want to cohabit with the respondent-husband and enjoy the bliss of marital life, but wants to continue to reside with her parents. Even this Court persuaded the parties to reconcile, but in vain.

It appears from the facts made available and it is clear that when separation is of a longer period and chances of reunion an impossibility, a decree of divorce is the only prudent course.

As discussed above, as the appellant-wife failed to join the society of her husband for the last more than 3 years even after passing of the decree for restitution of conjugal rights by the trial Court, the respondent-husband is entitled for dissolution of marriage by decree of divorce under section 13(I-A)(ii) of the Act. In the back ground of the circumstances narrated in the case, the dissolution of marriage is the only just and proper way to allow them to spend their remaining period of life happily with contentment instead of compelling them to lead a miserable and emotional life without any constructive purpose.

26. According to Shri Chandurkar, the learned Counsel for the appellant-wife under section 25 of the Act, the appellant-wife is entitled to permanent alimony even if a decree of divorce is passed. A reliance has been placed on a case of Gulab Jagdusa Kakwane v. Smt. Kamal Gulab Kakwane . Their Lordships of this Court observed as follow :

"Under section 25 an applicant is entitled to maintenance under sub-section (1) thereof notwithstanding the kind of matrimonial decree that is passed and the ground on which it is passed. A decree passed against the applicant on the ground of unchastity is no bar to his or her claiming maintenance either at the time of passing such decree or any time subsequent thereto. The Court has ample discretion to grant or refuse maintenance, and the extent to which to grant the same, depending on the facts and circumstances of each case".

In a case of Modilal Kaluramji Jain v. Lakshmi Modilal Jain , my brother Desai, J., has observed as follows :

"Where in a proceeding initiated by the wife under section 9 of the Hindu Marriage Act, the claim for restitution of conjugal rights is rejected, the grant of claim for permanent alimony under section 25 of the Act is not in any way affected. Grant of permanent alimony could not be a relief ancillary to

the matrimonial claim. The right of either spouse in this regard is not made dependent on success or failure of the parties. Under the scheme of section 25(1) of the Hindu Marriage Act if read in a right spirit, the claim of maintenance could not be consequential to the result of the matrimonial claim as envisaged under sections 9 to 13 of the Act of 1955. The term 'any decree' as used under section 25 of the Act of 1955 does not suffer from any limitation or restriction or ambiguity or vagueness. It is clear that the scheme of section 25 speaks about the grant of permanent alimony and maintenance, after the culmination of the matrimonial proceedings".

To grant permanent alimony under section 25 of the Act or not, is a discretion of the Court. Both the learned lower Courts, considering the evidence on record and particularly, the conduct of the appellant-wife Smt. Rashmi Jain, refused to grant permanent alimony to her. Permanent alimony can be granted only when the wife has no sufficient independent source of income.

In this case, it has been amply proved that the respondent-husband tried his level best to bring back the appellant-wife for leading a peaceful marital life. Similarly, efforts for reconciliation were made even after a decree of restitution of conjugal rights was passed by the lower Courts, but it is found that the appellant-wife is not ready to join the society of her husband though the respondent-husband is ready to enjoy the company of his wife. Shri Somalwar, the learned Counsel for the respondent, at bar, stated that the appellant-wife is working as a Laboratory Assistant in the school at Paratwada and getting more than Rs. 2,000/- p.m. and thereby is an earning member. According to me, considering the facts and circumstances of the case and that the appellant-wife is an earning member, she is not entitled for the permanent alimony under section 25 of the Act. Both the learned lower Courts have rightly rejected the application of the appellant-wife for permanent alimony. This Court is also reluctant to differ with the said order.

27. In the result, the instant appeal is dismissed. However, for the reasons discussed above, the decree passed by Court below is varied and in place of it, I allow the prayer of the respondent-husband for grant of decree of divorce. The marriage solemnized between the appellant and respondent on 13-3-1983, is hereby declared as dissolved by a decree of divorce under section 13(I-A)(ii) of the Act. A decree be drawn accordingly. Parties to bear their own costs.