

Bombay High Court

Ramchandra Anand Suryavanshi vs Smt. Kalindi Ramchandra ... on 30 January, 1991

Equivalent citations: AIR 1991 Bom 315, (1991) 93 BOMLR 567, I (1992) DMC 133

Bench: A Savant

JUDGMENT

1. This appeal by the husband, original petitioner, seeks to challenge the judgment and decree dated 29th August, 1986 passed by the City Civil Court, Bombay, dismissing the husband's petition for divorce on the ground of cruelty and desertion. The reliefs prayed for were under S. 27(1)(b) of the Special Marriage Act, 1954 on the ground of desertion and under S. 27(1)(d) on the ground of cruelty. Apart from the question of the relief to be granted to the husband, an important question of law which arises in this appeal is as to whether the wife can be granted maintenance while dismissing the husband's petition. In other words whether the order dismissing the husband's petition is a decree within the meaning of the provisions of S. 37 of the Special Marriage Act, 1954. Another incidental question which arises is whether an application for interim alimony pendente lite can itself be treated as an application for grant of maintenance to the wife under S. 37 of the said Act while dismissing the husband's petition for divorce, The few facts are as under :

2. The husband, Ramchandra, and the wife, Kalindi admittedly belonged to Neo-Buddhist caste which is one of the scheduled castes. They are related to each other before their marriage. On 19th July, 1975 their marriage was solemnised under the Special Marriage Act, 1954. It appears that thereafter on 20th July, 1975 the parties also celebrated the marriage in accordance with the buddhist rites. The husband is working as a Teleprinter operator in the Associated Cement Co., at Churchgate, Bombay. Presently, his salary is above Rs.4,000/- per month. Admittedly, Ramchandra and Kalindi had fallen in love and Kalindi had conceived from Ramchandra before the solemnisation of the marriage. Within four months of the marriage, that is to say, on 9th November, 1975 Kalindi gave birth to son Ravindra alias Ravi. The second son Rajiv alias Raju was born on 16th August, 1978. The petition for divorce has been filed on 9th September, 1982 and briefly stated the averments are as under :

3. According to the husband, within a few months after the marriage the wife started picking up quarrels and insulting and abusing him. It is averred that the wife had deserted him several times, but he brought her back to the matrimonial home. It is further stated that the wife's father Krishnarao Kharat, who was formerly working as a Mechanic in the B.E.S.T. was really not happy with the marriage, which, as stated earlier was a love marriage. He always thought that his daughter deserved a better match. It is further alleged that the wife was carrying on an affair with one Dinkar Salve and had herself expressed a desire to the husband that she wanted a divorce from him so that she could marry Dinkar Salve. In para 6 of the petition, it is alleged that on October 20, 1979 Shantabai Shishupal, sister of the wife's father, came to the matrimonial home and asked the wife to accompany her. On the husband refusing to permit the wife to leave the matrimonial home, it is alleged that Shantabai Shishupal came back in the afternoon of the same day and abused and threatened the husband with assault. Shantabai Shishupal is supposed to have brought some goondas during her 2nd visit on October 20, 1979. But on account of the intervention of some neighbours, no actual assault took place. On 21st October, 1979, however, the wife's father,

Krishnarao Kharat, himself came to the matrimonial home and started abusing the husband and thereafter took his daughter Kalindi away. It is in these facts that the husband had alleged that the wife had deserted him on 21st October, 1979. There is reference to the alleged attempts to try to bring about a reconciliation, which attempts have failed. The husband has thereafter alleged that the wife came to his office at Churchgate, Bombay on 30th November, 1981 and 8th February, 1982 and created a scene there. The husband had lodged N.C. complaints in this behalf, which complaints have been produced on record. In these facts, the husband has alleged that the wife has deserted him and further that the wife has treated him with cruelty within the meaning of the provisions of S. 27(1)(b) and S. 27(1)(d) respectively.

4. The wife has filed her written statement in January, 1983. She has obviously denied most of the allegations. She has admitted that the parties knew each other and that they had fallen in love with each other. She had admitted that she had conceived from Ramchandra even before the marriage and that she had delivered the first child within a period of less than four months of the marriage. She has denied the allegation of alleged quarrels and her misbehaviour. She has also denied the allegation of her having any affair with Dinkar Salve and said that it was an imagination of the fertile brain of the husband. She has denied the several acts of alleged cruelty attributed to her.

5. With reference to the visit of Shantabai Shishupal on 20th October, 1979, the wife has denied that Shantabai Shishupal had asked her to leave the matrimonial home. She also denied that there were any quarrels at the instance of Shantabai Shishupal on 20th October, 1979. The allegation that Shantabai came in the afternoon of 20th October, 1979 with goondas and threatened her husband with dire consequences has been denied by the wife. On the contrary, it has been alleged by her that she was mercilessly beaten by the husband and was left at the residence of her aunt, Shantabai Shishupal. In respect of the visit of her father on the 21st October, 1979, the wife's case is that when her father came to know of her being beaten by the husband, the father came and enquired about Kalindi's health. The further case is that since that was a Divali period -- October, 1979, the husband himself expressed a desire that the father himself should take his daughter with him during Divali. The wife has also alleged that several attempts were made to persuade the husband to behave himself and to bring about a reconciliation. That, however, did not succeed. The wife has denied the story that she ever demanded a divorce from the husband on any ground whatsoever. The wife has stated that since she was forced to leave the matrimonial home as a result of the husband's harassment and beating and since the husband was not willing to meet her, she had no other alternative but to go to his office with a view to try to bring about reconciliation. The wife admits of her having visited the husband's office, at Churchgate, Bombay, on the 30th November, 1981 as also on the 8th February, 1982, but denies having created any scene there. On the contrary, the wife alleged that the husband took her out of the office, offered her an amount of Rs. 10,000/- for getting a divorce from her and on her refusing to accept the suggestion, slapped her in the face. The wife, therefore, alleges that it was as a result of the conduct of the husband that she was forced to leave the matrimonial home and that she is not guilty of either desertion, as contemplated by S. 27(1)(b) or of cruelty, as contemplated by S. 27(1)(d). The wife, further alleges that she was constrained to initiate proceedings under S. 125 of the Criminal Procedure Code in the Court of the Metropolitan Magistrate, 30th Court, Kurla, where she was awarded Rs. 300/- per month towards maintenance for herself and her two minor children. The application was made on 19th November, 1982 and the

order was passed on 30th March, 1985. It is true that the wife had filed a revision to the Sessions Court for enhanced maintenance which was, however, rejected on 2nd April, 1986.

6. It must be mentioned at this stage that when this appeal was admitted on the 18th February, 1987, the wife made an application, being Civil Application No. 9 of 1989, for an interim alimony at the rate of Rs. 1,200/- p.m. Upon hearing the counsel for the parties, this Court directed the husband to pay an amount of Rs. 1,000/- p.m. to the wife with effect from 1st May, 1989. Counsel for the parties are agreed before me that this amount is being paid. That, however, was an interim arrangement pending the hearing and final disposal of this appeal.

7. At the trial, the husband examined himself and in support of his case he examined Gangabai Khulkule, who deposed mainly in support of the Dinkar Salve affair and the disputes arising between the spouses as a result of the said affair. The husband also examined Ganpat Bhosale in support of the attempts of reconciliation made by the husband. As far as the wife's evidence is concerned, Kalindi examined herself, her father Krishnarao Kharat, her aunt Shantabai Shishupal and Gangaram Tirpude, who has been examined on the point of attempts to bring about a reconciliation. In the light of the above, the learned trial Judge framed the necessary issues and came to the conclusion that the husband had failed to prove that the respondent had treated him with cruelty. The husband had also failed to prove that the wife had deserted him. On the contrary, it was held by the learned trial Judge that as a result of ill-treatment given by the husband, the wife was compelled to leave the matrimonial home. The learned trial Judge further held that efforts made by the wife and her father to bring about a reconciliation had failed.

Though the wife was and is willing to join the husband, it was the husband who was always unwilling to accept her. It was further held that the father (appellant) had shown no interest in the children, their welfare or upbringing and it was mother (respondent) who was, therefore, entitled to their custody. In the result, the learned trial Judge dismissed the husband's petition with costs.

8. In this appeal, I have heard the learned counsel Shri S. S. Lanke for the appellant/ husband and Shri P. Shankaranarayanan for the respondent/wife at length. In accordance with the mandate of S. 34(2) of the Special Marriage Act, an attempt was made to bring about a reconciliation between the parties. In fact the matter was adjourned and also after hearing for some time to enable the parties to come to some amicable settlement. However, both the counsel expressed their liability to bring about a reconciliation and hence, I am left with no alternative but to decide the appeal on merits.

9. Shri Lanke for the appellant has, in the first place, submitted that the act of the wife in leaving the matrimonial home on the 21st October, 1979 constitutes desertion within the meaning of the provisions of S. 27(1)(b) of the Act. He has further contended that the conduct of the wife on the four dates viz. 20th October, 1979, 21st October, 1979, 30th November, 1981 and 8th February, 1982 is such as would amount to treating the husband with cruelty within the meaning of the provisions of S. 27(1)(d) of the said Act. On the other hand, Shri Shankarnarayanan for the wife supported the findings of the learned trial Judge and prayed for the dismissal of the appeal. On the submissions advanced before me, the following points arise for consideration :

i) Has the husband proved that the wife deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition ?

ii) Has the husband proved that since the solemnisation of the marriage the wife had treated him with cruelty ?

iii) Who is entitled to the custody of the children ?

10. As far as the first question of desertion is concerned, the evidence consists of the husband's own deposition. Unfortunately, the husband's evidence inspires no confidence. His evidence about the disclosure of the Dinakar Salve affair is un-natural and also inconsistent with the evidence of the other witnesses on the point. He has gone to the extent of making reckless allegations against the wife, in as much as in para 7 of his deposition he says as under :

"The respondent used to complain that as far as sex life is concerned, my performance was not as good as others. I say that she was not taking any interest in having sex with me."

He has feigned ignorance about the birth date of his son, Ravindra, who was born within four months of the marriage. The evidence of the other witnesses in respect of the incident of 21st October, 1979 shows that the husband wanted his father-in-law to take Kalindi away for Diwali. The wife's evidence on the incident of 21st October, 1979 appears to be more probable and consistent with the normal course of events. The evidence of the father of the wife viz. Krishnarao Kharat, makes it clear that because the husband was ill-treating and assaulting the wife, he thought it better to bring his daughter to his house during Divali. This was at the behest of the husband himself who may have been temporarily upset at the conduct of the wife. Whether the husband had earlier beaten the wife or not, one thing is clear from the evidence of the husband, the wife and the wife's father Krishnarao that there was no desertion by the wife on the 21st October, 1979. It is well settled that in order to constitute desertion there must be-

(a) the factum of separation;

(b) the intention to bring co-habitation permanently to an end;-- animus deserendi; and

(c) the element of permanence which is the prime condition requires that both these essential ingredients should continue during the entire statutory period.

It is not necessary to discuss the Case law on the requirements of desertion in matrimonial law. In my opinion, in the facts of the present case it is not possible to hold that there was either the factum of separation or the animus-deserendi on the part of the wife. If the husband had ill treated the wife or had quarreled with her, whether or not he had assaulted her and, therefore, the wife goes to her father's place temporarily during the Divali period, it is not possible to hold that there was a separation with the intention to bring co-habitation permanently to an end. The husband's case of desertion by the wife must, therefore, be rejected. My answer to the first point, therefore, is that the husband has failed to prove that the wife had deserted him.

11. On the second point of cruelty, the husband wants to rely upon the four incidents viz. the incident of-

- i) Shantabai Shishupal's visit on 20th October, 1979;
- ii) The visit by the father Krishnarao on 21st October, 1979
- iii) The wife's visit to his office at Church-gate on 30th November, 1981; and
- iv) her visit to his office on 8th February, 1982.

As far as the incident of 20th October, 1979 is concerned, a perusal of the evidence of the husband, the wife and of Shantabai would show that Shantabai was a regular visitor to the house of the appellant. Shantabai is the aunt of the wife. She was living nearby in the same locality. She seemed to have been aware of some bickerings between the husband and the wife. 20th October, 1979 was during Divali days. It is, therefore, not improbable that Shantabai had visited the house of the appellant casually or with a view to discuss the matters between the spouses. There is nothing in the evidence of the husband or the wife which can lead one to the conclusion that Shantabai had gone there at the behest of the respondent/wife for picking up quarrels with the husband or for assaulting or even threatening him. This is wholly improbable. Admittedly, no assault took place though it is alleged that Shantabai came in the afternoon with some goondas. Though it is alleged that because of the intervention of the neighbours no assault took place on the husband, in fact, no neighbour has been examined. Once the story that Shantabai came back in the afternoon of 20th October, 1979, abused and gave threats to the appellant is rejected, no reliance can be placed on the incident of 20th October, 1979 for holding that the wife had treated the husband with cruelty.

12. The second incident for drawing the inference of cruelty is the very incident of 21st October, 1979, on which day the desertion is alleged to have taken place. As stated earlier, while dealing with the question of desertion, if the wife was being ill-treated by the husband and if in such a state of affairs, the husband expresses a desire to his father-in-law that he should take his daughter away during Diwali and, therefore, the wife leaves the matrimonial home temporarily, at the behest of the husband it cannot be construed as an act of cruelty on the part of the wife. The main reason for the disputes between the parties appears to be the Dinkar Salve affair. The evidence of the husband in this behalf is far from satisfactory. As stated earlier, the wife had already conceived much prior to the date of marriage and she had delivered the first child on 9th November, 1975. They were married on 19th July, 1975. The husband wants us to accept his word within a few months of the marriage, the wife herself disclosed her affair with Dinkar Salve, which led to the quarrels between the parties. If one were to accept the case of the husband as made out in the petition, then even before the birth of the first child the wife had started quarrelling with the husband on the ground that she was really in love with Dinkar Salve and still wanted to marry him after getting a divorce from the appellant. The husband's evidence about the Dinkar Salve affair is far from satisfactory. The husband does appear to have drawn upon his imagination in making wild and baseless allegations against the wife as far as the sex life between the parties is concerned as well as the beating to the children is concerned. The fact that the wife's father, Krishnarao, came to the matrimonial home and the wife

accompanied her father on the 21st October, 1979 is not dispute. Considering the facts and circumstances of the case, it appears to be more probable that the husband had asked his father-in-law to take Kalindi away temporarily during the Divali period. No inference of cruelty can, therefore, be drawn on account of the wife's temporarily leaving the matrimonial home on the 21st October, 1979.

13. The third and the fourth incident relied upon for drawing the inference of cruelty are the two visits of the wife to the husband's office at Churchgate on 30th November, 1981 and 8th February, 1982. His true that police complaints have been filed in this behalf by the husband. Such police complaints have also been filed in respect of the incidents of 20th October, 1979 and 21st October, 1979. However, I am not much impressed by the mere filing of the police complaints by the husband repeatedly. The wife has categorically admitted that she did go to the office of the husband and not only that she visited the husband's office on 30th November, 1981 and 8th February, 1982 but that she had even earlier visited her husband's office on 12th November, 1981 and had issued notice on the 25th November, 1981. If despite repeated attempts being made to persuade the husband to take the wife back to the matrimonial home, the husband had remained indifferent, the wife was left with no alternative but to go to his office and talk to him. This she tried to do on 30th November, 1981 and on 8th February, 1982. It is not difficult to accept the wife's story that when she so visited the husband on the 8th February, 1982 in his office at Churchgate the husband came out and offered to pay Rs. 10,000/- to her for obtaining divorce from her. It is equally reasonable to believe the wife's version that on her refusing to accept the suggestion, the husband slapped her. After the husband had ill-treated the wife and assaulted her and had persuaded her to accompany her father to his house, it prima facie appears that the husband was not interested in bringing the wife back to the matrimonial home. It is also in evidence that both the parties admit that the attempts to bring about a reconciliation had failed. If this be so, no objection can be taken to the wife's visiting the office where she was sure to contact the husband. In my opinion, therefore, the visits by the wife to the office of the husband on 30th November, 1981 and 8th February, 1982 are not acts from which an inference of cruelty can be drawn in the facts of the present case. If anything, these visits were with a view to bringing about a reconciliation between the parties, I am, therefore, not inclined to hold that the wife has treated the husband with cruelty in order to justify the husband's claim under Section 27(1)(d) of the Act. The husband must fail on this ground also.

14. Coming to the third point of the custody of the children, the wife has been honest enough to admit that she had conceived from the appellant even before the marriage. Her version that the husband wanted to bring about an abortion is also prima facie believable. The fact that in the maintenance proceedings an amount of Rs. 300/- was ordered to be paid is eloquent of the husband's refusal and neglect to maintain his wife and children. The further fact that this Court after the admission of the appeal thought it fit to fix the amount of maintenance at Rs. 1,000/- per month is also significant. Though the husband is drawing more than Rs. 4,000/- per month, he has shown no concern whatsoever for the children, much less for the wife. The attitude adopted by the husband while trying to bring about a reconciliation in this Court also is far from satisfactory. The husband has in his evidence even tried to feign ignorance about the date of birth of his first child. He has even denied the fact that he had sexual relations with the wife before the marriage. The allegation that the wife was beating the children mercilessly is a wild and baseless allegation. This allegation is as wild

and baseless as his story in para 7 of his depositions, referred to above, casting serious aspersions on the wife's character. If this be so, I am of the view that the father has shown no concern whatsoever for the welfare of the children. In the circumstances, no objection can be taken to the order of the learned Judge granting custody of the children to the respondent-mother. The husband is liable to fail on this point also.

15. Mr. Lanke for the husband, however, invited my attention to a few judgments in support of his contentions mentioned above. Reliance was placed by Shri Lanke on the Supreme Court decision in , Sanat Kumar Agarwal v. Nalidin Agarwal. A perusal of the peculiar facts and circumstances of the case would show that this was a case of two marriages in two families of Agarwal community in what is described as the pernicious custom known as "GURUWAT" (Salta-Palta). In the facts of the case where the parties were educated, it was held that despite an attempt to bring about reconciliation, the parties had lived separately for more than 10 years.

Stand over to 19-12-1990 Resumed: 19-12-1990 The Supreme Court has in para 7 of the judgment, specifically referred to the fact that the marriage between the sister of Sanat Kumar, namely, Shankuntala, and brother of Nandini, namely, Shivnarayan was already dissolved by the decree for divorce. In the peculiar facts of the said case, the Supreme Court granted a decree of divorce on the ground of desertion. It is difficult to place reliance on the observations in the said Supreme Court decision which is, as stated above, confined to the peculiar facts of that case.

16. Shri Lanke then relied upon a decision of the Madhya Pradesh High Court in the case of Radhesham Sharma v. Kusum Sharma reported in (1990) 1 DMC 290. This was a case where the husband's petition for divorce on the ground of wife's cruelty and desertion was dismissed by the trial Court. The wife had remained absent in the proceeding in the trial Court and the petition had proceeded ex parte against her. The husband's allegations had gone un rebutted. The case of the husband that the wife had denied sexual intercourse to him was unchallenged. It was in these peculiar facts that the Madhya Pradesh High Court held that the husband was entitled to a decree for divorce and allowed the husband's appeal. In the very nature of the facts of this Madhya Pradesh case, it is of no assistance to the husband in the present case. The present case is not a case of the wife remaining absent. There is a serious controversy on every issue and indeed, as stated earlier, the wife's evidence appears to be more probable than the evidence of the husband.

17-18. Shri Lanke then placed reliance on a judgment of the Aurangabad Bench of this Court reported in (1989) 1 DMC 80 in the case of Urmila Sudhakar Bhalekar v. Sudhakar Ambaji Bhalekar. While restating the requirements of desertion to constitute a ground for a decree for divorce, the learned Judge has made observations that the parties were not willing for reconciliation. The conduct of the parties in that case on the question of reconciliation assumed importance and the trial Judge had allowed the husband's petition and dissolved the marriage by decree of divorce. The said decree was challenged by the wife in appeal before the High Court. While dismissing the wife's appeal, the High Court observed that there was no error committed by the trial Judge in taking into consideration the conduct of the parties during the trial particularly on the question of reconciliation. I do not think the said observation is of any assistance to the case of the husband in this appeal. As I have already discussed, the attitude of the husband in the matter of reconciliation

was unreasonable. Apart from the fact that the wife was required to leave the matrimonial home as a result of the husband's harassment, if not assault, there were sincere efforts made by the wife and her father to bring about the reconciliation. The evidence of the wife, her father Krishnarao and her witness Gangaram Tirpude shows that the husband refused to respond favourably to the attempts of reconciliation. Even at the hearing of this appeal, as mentioned at the beginning, the matter was adjourned to enable the parties to come to reconciliation. Unfortunately, because of the somewhat adamant attitude on the part of the husband, reconciliation is not possible. If that be so, I find nothing in the judgment in *Urmila Bhalekar v. Sudhakar A. Bhatekar* (supra) which can support the contention of the husband.

19. It has been contended by Shri Shankarnarayanan that though the husband's petition has been dismissed, the dismissal of the petition is a decree and hence the wife would be entitled to ask for permanent alimony under S. 37 of the Act.

Section 37 reads as under :

37(1): Any Court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property and ability (the conduct of the parties and other circumstances of the case), it may seem to the Court to be just.

(2) If the District 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-sec. (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the Court to be just.

(3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, (it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the Court may deem just.) Stand over to 21-12-1990 Resumed : 21-12-1990

20. Shri Lanke for the husband on the other hand has contended that the scheme of the provisions of S. 37 would contemplate the granting of the relief under a decree and at the time of passing which alone the power can be exercised for grant of permanent alimony and maintenance. Shri Lanke's contention, therefore, is that if the husband's petition for divorce was being dismissed, the power under S. 37 cannot be exercised for grant of permanent alimony and maintenance. In support of his submission Shri Lanke placed strong reliance upon two decisions of this Court, *Shanta-ram Narkar v. Hirabai* and *Shantaram v. Malti*. Both these decisions are of learned single Judges who were considering the scheme of the provisions of Section 25 of the Hindu Marriage Act. In Narkar's case, on the application under Section 10(1)(b) of the Hindu Marriage Act, being withdrawn by the husband, it was held that there was no decree passed in favour of the husband and if there was no decree, the Court had no jurisdiction to pass any order directing the husband to pay the maintenance to the wife under Section 25 of the Act. In Karnik's case it was held that the words "passing of any decree" referred to the passing of any decree provided for in Sections 9 to 13 of the

Hindu Marriage Act. It was further observed that although technically speaking, dismissal of the suit or a petition may be called a decree, such decree is not contemplated by Section 25(1) of the Hindu Marriage Act. Accordingly, it was held that the Court will have no jurisdiction to make an order for payment of alimony or maintenance in the event of the petition for any of the reliefs under Sections 9 to 13 being dismissed. Karnik's case placed reliance on the decision in Narkar's case.

21. However, Shri Shankarnarayanan for the wife has invited my attention to a Division Bench decision of this Court in the case of Shkumtalabai v. Sahebrao Ramabhau, ILR (1978) Bom 127. This was also a case under the provisions of Section 25 of the Hindu Marriage Act. The question as to whether the wife would be entitled to a relief of permanent alimony and maintenance under Section 25(1) of the Hindu Marriage Act, in a case where the husband's petition was dismissed, was considered by the Division Bench, Narkar's case reported in AIR 1982 Bom 27, and Karnik's case were cited before the Division Bench. There are judgments of the other High Courts which have been considered by the Division Bench at pages 142 and 143 of the report. It is true that the said Division Bench decision is in a Letters Patent Appeal arising out of the wife's application in forma pauperis for a permanent alimony under Section 18 of the Hindu Adoptions and Maintenance Act after the husband's petition for divorce on the ground of adultery was dismissed. After discussing the cases cited before it, the Division Bench observed thus at page 143 :

"The word "decree" in Section 25 of the Hindu Marriage Act can mean only a final order adjudicating upon the rights of the parties to a petition under the Hindu Marriage Act and it must, therefore, include a decree dismissing the petition which is appealable in the same way as the decree granting divorce or judicial separation and restitution of conjugal rights or annulment of marriage. We are unable to find any reason for holding that the decree which is contemplated in Section 25 is only a decree granting the relief asked for in a petition and not one dismissing a petition. This appears to be the basis of the above Madras decision and also the decision of the Mysore High Court in Munirattam Shantamma (AIR 1971. Mys 25) and of the Rajasthan High Court in Devki v. Purshottam . In some of the above decisions, the remedy under S. 25 given to either of the parties for making an application for permanent alimony and maintenance is described as ancillary or incidental to the main petition. But, however, it is described, there can be no doubt that Section 25 provides a remedy by a simple application, in addition to other remedies which may be open to a wife such as the remedy under the Criminal Procedure Code or a remedy by way of a suit under the Civil Procedure Code. Section 25 must be, therefore, considered partly substantive and partly procedural, whether it is described as incidental or ancillary or supplementary or complementary to the main proceedings under the Hindu Marriage Act."

22. Shri Lanke for the husband has also invited my attention to the decision of the Allahabad High Court reported in AIR 1988 All 50 Vinod Chandra Sharma v. Smt. Rajesh Pathak. Reliance has been placed in the said Allahabad decision on the Delhi High Court decision in Smt. Sushama's case . It is true that the Allahabad decision supports Shri Lanke's contention in as much as the view taken by the Allahabad High Court is to the effect that where an application for divorce is dismissed there is no decree passed. Obviously, therefore, alimony cannot be granted in case where decree for divorce is refused because in such a case the marriage will subsist with respect. I am unable to accept the reasoning of the learned single Judge of the Allahabad High Court. Apart from that, I am bound by

the views expressed by the Division Bench of our Court in Pawar's case reported in I.L.R. 1978 Bom 27. As stated earlier, the Division Bench has considered the two judgments of the learned single Judge referred to earlier and has taken a contrary view. I am in respectful agreement with the said view expressed by the Division Bench.

23. As against this, Mr. Shankarnarayanan has invited my attention to a judgment of this Court in Sadanand Sahadeo v. Sulochana Sadanand . The learned single Judge in Sadanand Rawool's case was considering the question as to whether dismissal of a petition for a decree of nullity or divorce under the Hindu Marriage Act was a bar to granting maintenance to the successful spouse. On the review of some of the judgments referred to above, the learned Judge came to the conclusion that the fact that the petition of the petitioner spouse was dismissed would not be a bar to the granting of maintenance to the successful spouse. It appears that the attention of the learned Judge dealing with Rawool's case was not invited to the Division Bench decision in Pawar's case. However, for the reasons set out earlier, I am inclined to agree with the view expressed by the learned single Judge in Sadanand Rawool's case which is in conformity with the view expressed by the Division Bench in Pawar's case.

24. The judgment in Sadanand Rawool's case also supports the proposition that the application to be made by the wife need not be in writing and that it could be oral. It is true that Sadanand Rawool's case was under the Hindu Marriage Act, 1955 and what was considered was the scheme of the provisions of Section 25 of the Hindu Marriage Act. However, there is a striking similarity between the provisions of Section 25 of the Hindu Marriage Act, 1955 and provisions of Section 37 of the Special Marriage Act, 1954. On a comparison of the two provisions, it will] have, therefore, to be held that the ratio in the; Division Bench judgment in Pawar's case will apply to a case under Section 37 of the Special Marriage Act, 1954. In this view of the matter, the wife will be entitled to make an application for permanent alimony even when the husband's petition for divorce is being dismissed under Section 27 of the Special Marriage Act. The objection of Shri Lanke will have, therefore, to be overruled. The petition filed by the husband was for a relief under Section 27 of the Special Marriage Act. Section 27 occurs in Chapter VI dealing with the nullity of the marriage and divorce. Section 37 of the Special Marriage Act would, therefore, be attracted while disposing of the petition under Section 27 of the Special Marriage Act.

25. As stated earlier, while the Criminal Court, in the application under Section 125 of the Criminal Procedure Code, had granted a meagre amount of Rs. 300/- per month for maintenance of the wife and her two children, this Court thought it necessary while admitting this first appeal to fix the amount of interim maintenance at Rs. 1000/- per month. This was done on the application of the wife being Civil Application No. 9 of 1989. In the light of the order passed by this Court on 17th April 1989 the parties were directed to apply to the learned Magistrate to suspend the order under Section 125 of the Criminal Procedure Code. Counsel for the parties are agreed before me that this order of the High Court has accordingly been carried out in the sense that the application was made to the learned Magistrate for stay of the operation of his order. However, all this was during the pendency of this appeal. The submission of Shri Shankarnarayana is to the effect that having regard to the peculiar facts and circumstances of this case and the conclusions reached by this Court, it would only be fair that the husband be directed to continue to pay the amount of Rs. 1000/- per month for

maintenance of his wife and children.

26. If one has regard to the provisions of Section 37 quoted above, it is obvious that in this case, the wife would be entitled to maintenance of herself and her two children. This is also clear the provisions of Section 38 of the Special Marriage Act dealing with the custody, maintenance and education of minor children. The children have all along continued to live with the mother. The husband's income has infact risen to more than Rs.4000/- per month today. Though no separate written application has been made by the wife, Shri Shankaranarayanan has made a prayer to treat the application for interim relief as an application for final relief in this appeal. Shri Shankarnarayanan has made an oral application for treating Civil Application No. 9 of 1989 as an application for exercising jurisdiction under Section 37 read with Section 38 of the Act. I am, therefore, inclined to accept the submission of Shri Shankaranarayanan in this behalf. Shri Lanke for the husband, no doubt, maintained that the scheme of Sections 37 and 38 would necessitate the formality of a separate written application being made at the stage of disposal proceedings. Shri Lanke perhaps wants to create a situation where through the wife has succeeded in both the Courts, as a result of the dismissal of the appeal filed by the husband the parties may be relegated back to the position obtaining under the order passed by the learned Magistrate under Section 125 of the Criminal Procedure Code. That would mean that if the interim order passed by the High Court directing the husband to pay Rs. 1000/- per month to the wife and her two children came to an end, the order of the learned Magistrate fixing the amount of maintenance at Rs. 300/- per month would be revived. This would be a very strange situation and indeed a travesty of law. If upon hearing both the parties the amount of interim maintenance was fixed by this Court Rs. 1000/- per month in April, 1989, surely in December 1990 the wife must continue to get at least that much amount if not more. No change of circumstance has been pleaded before me to reduce the amount. It is further necessary to direct that in respect of the payment of amount of Rs. 1000/- per month to the wife and two sons, there shall be a charge on the property of the appellant-husband.

Stand over to 18-1-1991; 2-1-1991 30-1-1991.

Resumed; 30-1-1991.

27. Apart from the above the scheme of provisions of Sections 37 and 38 does contemplate a subsequent application being made in the event of a change in the circumstances necessitating a modification or variance in the order passed earlier. While, therefore, reserving a liberty to either party to adopt such proceedings as may be open to them, I think, interests of justice require that the husband should be directed to continue to pay the amount of Rs. 1000/- per month towards maintenance of his wife and two children.

28. In view of the above, my answers to the questions framed in para 1 of this judgment are that :

(i) the order dismissing the husband's petition is a decree within the meaning of the provisions of Section 37 of the Special Marriage Act, 1954. Consequently, relief can be granted to the spouse which has succeeded while the petition of the other spouse was being dismissed.

(ii) the application for interim alimony pendente lite can itself be treated as an application for grant of maintenance under Section 37 of the said Act and that an application for treating the application for interim alimony as an application for grant of maintenance under Section 37 need not be in writing and that such an application can be orally made.

Hence the order.

ORDER

(i) The appeal stands dismissed.

(ii) The appellant/ husband is hereby directed to continue to pay to the respondent/ wife the amount of Rs. 1000/ per month towards the maintenance of the respondent and the two children viz., Ravindra alias Ravi and Rajiv alias Raju.

(iii) The amount to be paid to the respondent directly on or before the 10th day of each month i.e. for the month of February 1991 the amount of maintenance should be paid on or before 10th February 1991 and so on.

(iv) It is further directed that in respect of the said payment of the amount of Rs. 1000/-per month to the wife and the two sons, there shall be a charge on the properties of the appellant/ husband.

(v) The parties are at liberty to take such proceedings as they deem fit in the event of a change in the circumstances necessitating a modification of the order of maintenance.

(vi) The appellant/husband to pay the costs to the wife.

29. Order accordingly.