

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 125 OF 2019

Vijayashree D/o Ganesh Ingle,
Erstwhile Vijayshree W/o Nishant Kale,
Aged about 28 years, Occupation – Education,
R/o Vijayashree Nivas, Raigad Colony,
Khamgaon, Tq. Khamgaon, Dist. Buldhana

...APPELLANT

// VERSUS //

Dr. Nishant Arvind Kale,
Age 33 years, Occupation – Medical Officer,
R/o. In front of Adv. Anil Kale's House,
Ranpise Nagar, Akola,
Tq. and Dist. Akola

...RESPONDENTS

Shri R.L. Khapre, Sr. Advocate h/f Shri A.M. Tirukh, Advocate for the appellant.
Shri Onkar Ghare, Advocate h/f Shri A.M. Ghare, Advocate for R-sole.

CORAM : PUSHPA V. GANEDIWALA, J.
DATE OF RESERVE : DECEMBER 14, 2020.
DATE OF PRONOUNCEMENT : JANUARY 08, 2021.

JUDGMENT :

Heard Shri R.L. Khapre, learned Senior counsel for the appellant and Shri Onkar Ghare, learned counsel for the respondent.

2. This appeal challenges the judgment and decree in R.C.A. No. 33/2018 dated 07/12/2018 passed by the Ad-hoc District Judge-1, Khamgaon, Dist. Buldhana which dismissed the

appeal and confirmed the judgment and decree dated 20/12/2017 in H.M.P No. 78/2017, passed the Court of Civil Judge, Senior Division, Khamgaon which failed to consider the prayer for permanent alimony of the appellant-wife while decreeing divorce by mutual consent.

3. This Court admitted the appeal on the following substantial questions of law :

(i) Whether it is necessary for the wife to file application in writing to grant permanent alimony under Section 25 of the Hindu Marriage Act, 1955?

(ii) Whether wife can claim maintenance under Section 25 of the Hindu Marriage Act, 1955, as she is divorcee, after passing the decree of divorce ?

4. With regard to the substantial questions of law at serial No. 2, both the learned counsel are at consensus that Section 25 of the Act does permit the divorcee spouse to claim maintenance from the other spouse even subsequent to the passing of the decree of divorce, subject to certain conditions specified therein. Hence, there is no need to discuss on this question. For ready reference text of Section 25 of the Act is reproduced below:

“25. Permanent alimony and maintenance :

1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant [the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.]”

5. Before advertng to answer the first substantial question of law, it would be necessary to have a glance at the facts leading to filing of this appeal. The marriage between the parties was solemnized on 25/03/2016. Since there was matrimonial disharmony and differences between the parties they moved a joint petition for divorce by mutual consent under

Section 13B of the Hindu Marriage Act, 1955 (hereinafter referred to as “the Act”). The Court of Civil Judge, Senior Division, Khamgaon dissolved the marriage between the parties by recording its satisfaction that the parties have not been able to live together. It is the grievance of the appellant / wife that both the courts below have failed to consider her prayer for permanent alimony under Section 25 of the Act.

6. It is the contention of learned counsel for the appellant that the appellant did not give up her right of permanent alimony and maintenance. The appellant in her affidavit before the trial Court has specifically stated that the respondent is serving as a Medical Officer in Government Hospital at Murtizapur Dist. Akola and drawing the salary of Rs. 80,000/- per month and is also having a private practice and earning more than Rs. 1.00 lakh per month from the same. He has also an irrigated land and earns more than 20 lakhs per month. It is further stated that at the time of passing of the mutual consent divorce decree, it was prayed before the Court to grant a permanent alimony to the appellant under Section 25 of the Act. The Court failed to consider the prayer for want of application in writing and thereby rejected her prayer for permanent alimony.

7. In first appeal before the District Judge, Khamgaon the first appellate Court granted interim maintenance at the rate of Rs. 2000/- per month under Section 24 of the Act pending the decision of the appeal. However, the first appellate Court refused to grant permanent alimony u/s 25 of the Act and dismissed the appeal for want of relationship of marriage subsisting between the parties.

8. With regard to question under consideration before this court, various other High Courts including this High Court have held that the word 'application' as referred to in Section 25 of the Act i.e. 'on application made to it' does not specify as to whether it is oral application or application in writing. It is also held that broader view of Section 25 of the Act is to be taken considering the object and purpose for inclusion of this provision in the Act.

9. The Madras High Court in the case of **Umarani Vs. D. Vivekannandan** reported in **2000 SCC Online Mad 50** held that there is no need of written application under Section 25 of the Hindu Marriage Act, 1955 and permanent alimony and maintenance can be granted on the basis of oral application. The relevant para No. 10 in this judgment reads thus :

“10. It is true that Section 25 of the Act contemplates an application for the said purpose.

When the lower court has not disposed of Section 24 application in time and has disposed of along with the main application, it should have disposed of the application under Section 25 also. Therefore, one more litigation could be avoided and on the basis of very same order, the maintenance could be provided for the wife and child. From the conduct of the respondent, it is clear that he will not pay the maintenance which is legally due to the petitioner. Under these circumstances, asking the petitioner to file another application under Section 25 or asking to file a separate suit and again seeking indulgence of the Court below will be harsh. The Act also does not say that there should a written application. It only says that an application made to it. It can also be on the basis of oral application.....”

10. The Madhya Pradesh High Court in the case of **Surajmal Ramchandra Khati Vs. Rukminibai d/o Prabhulal** reported in **1999 SCC Online MP 87** held that merely because wife had not presented a separate application praying for grant of permanent alimony, it cannot be said that she is not entitled to the same. It is further observed that the provisions of Section 25 of the Act have been introduced for the purpose of protecting the interest of such spouse against whom the court has passed the decree.

11. This Court in the case of **Sadanand Sahadev Rawool Vs. Sulochana Sadanand Rawool** reported in **1989 SCC Online Bom 5** held that Section 25 of the Act when it speaks of an application does not specify that the same has to be in writing. An application can be

in writing as also by word of mouth. Although this judgment is overruled by the Apex Court on the point of entitlement of the spouse to claim permanent alimony and maintenance even if the the court dismisses the petition and does not pass any decree as contemplated in Section 25 of the Act.

12. The Division Bench of the Punjab and Haryana High Court in the case of Mukesh Kumar Vs. Sunita in FAO-M-46 OF 2010 while relying on the judgment in the case of Sadanand Rawool (supra) and Surajmal (supra) held that the approach to be adopted in matrimonial cases has to be practical and not based on mere technicalities. The expression “on application made to it” occurring in Section 25 of the Act should not be construed narrowly but keeping in view the intent of the legislature in enacting this provision. The purpose behind this provision appears to be to safeguard the interest of the spouse against whom the decree had been passed. It is further held that grant of permanent alimony and maintenance under Section 25 of the Act is *sine-qua-non* if the prayer made in that regard whether in writing or orally and there can either be a separate written application claiming permanent alimony and maintenance under Section 25 of the Act or in the written statement or even by oral prayer.”

13. The learned trial Court, in the case in hand, rejected her prayer for permanent alimony for want of separate application in writing to that effect. As per Section 25 of the Act, the court exercising jurisdiction under the Act, while passing decree under the Act or subsequent thereto, on application being made to it, pass an order for permanent alimony, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just.

14. It would be apposite here to have a glance at the procedure for passing the decree of divorce by mutual consent by the trial court u/s 13B of the Act. Both parties have to move a joint petition before court stating therein that they are residing separately for a period of one year or more and they have not been able to reside together and they have mutually agreed that the marriage should be dissolved. The court registers the case and keep the matter pending for second motion by the parties after six month or more but not later than 18 months, if the case is not withdrawn in the meantime. After six months or more but not later than 18 months, on the motion of both the parties, the court shall, on being satisfied, after hearing the parties and after making such enquiries

as it deems fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce by mutual consent.

15. In terms of section 25 of the Act, for granting the relief of permanent alimony, the court has to consider the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just.

16. In the cases of decree of restitution of conjugal rights, decree of judicial separation, decree of nullity of marriage and decree of divorce u/s 13 of the Act, it would be very easy for the court to consider the aforementioned parameters for passing the order for permanent alimony at the time of passing the decree even by oral prayer made to it, as the court had an opportunity to observe the conduct of the parties, to examine the oral and documentary evidence before the court with regard to the financial stability of the parties and other attending circumstances between the parties.

17. However, in case of decree by mutual consent, if a relief for permanent alimony is sought by one of the parties, there is no occasion for the court to observe the conduct of the parties, to examine their financial stability and other circumstances of the case to pass any order of permanent alimony at the time of passing of decree of divorce by mutual consent. In such cases, the party claiming the right of permanent alimony, must bring before the court the financial status of other side and other relevant circumstances for consideration of the court. The question of mode and manner of application is immaterial. What is essential, the court should be able to comprehend the financial position and conduct of both the parties to pass any order of permanent alimony, though the relief is incidental to the main relief.

18. In the case in hand, undisputedly, the appellant narrated the financial status of the respondent husband in her affidavit before the court and she prayed to keep open the issue of permanent alimony for its consideration later on. The trial court could have postponed the passing of decree of mutual consent on later date and could have granted opportunity of hearing to both the sides on the issue of permanent alimony and decided the issue of permanent alimony and divorce by mutual consent

simultaneously or alternatively could have kept open the question of permanent alimony to be decided on later date and could have passed the decree of divorce by mutual consent by keeping the petition pending. There is absolutely no hurdle in passing two judgments in a case.

19. In her affidavit the appellant has sufficiently narrated the financial means and sources available with the respondent – husband. Yet the learned trial Court ignored the same and emphasised on technicality.

20. Surprisingly, the first appellate Court too without reading the provision dismissed the appeal on a misplaced ground that as the marital tie between the couple does not subsist, the petitioner is not entitled for maintenance. While, the first appellate Court in paragraph No. 9 has observed that the Court has discretion for grant of permanent alimony at the time of passing the decree or at any time subsequent thereto. The relevant part of appeal is reproduced below :

“9..... There is no quarrel that, the Court exercising jurisdiction under the Hindu Marriage Act, has discretion at the time of passing any decree or at any time subsequent thereto, to grant permanent alimony to one party by the other, having regard to the various factors as stated in the said provision of Section 25(1).”

21. In spite of above, it is very shocking that the prayer for permanent alimony to the appellant was not considered in accordance with law. The appellate court not only failed to read the bare text of the provision but also failed to rely on any authority of the higher courts before reaching the said conclusion. Given the circumstances, the judgment and decree of the appellate court needs to be set aside.

22. For the reasons aforesaid, in the opinion of this Court, the 'application' as referred to in Section 25 of the Act implies any application either in writing or oral for the prayer of permanent alimony and maintenance. The mode and form of the application u/s 25 of the Act for claiming permanent alimony is immaterial. What is essential is the material before the court to decide the same. The court cannot pass any order of permanent alimony and maintenance in vacuum. The court has to consider the parameters as guided in the provision itself. The relief is incidental in nature and it is not the substantive relief.

23. As the issue of permanent alimony has not been decided by the trial Court, it would be appropriate to remand the

matter for deciding the same in accordance with law and accordingly, the matter is remanded to the trial court. Parties to appear before the trial court on 15.02.2021. I answer the substantial questions accordingly.

24. Needless to say that the trial Court shall decide the issue of permanent alimony on its own merits in accordance with law without getting influenced by any of the above observations of this Court.

25. With the above directions, the second appeal is allowed with costs and disposed of accordingly.

JUDGE

D.S.Baldwa