

(1980) 12 CAL CK 0036

Calcutta High Court

Case No: None

Purnanda Banerjee

APPELLANT

Vs

Smt. Swapna Banerjee and  
Union of India

RESPONDENT

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**Date of Decision:** Dec. 10, 1980

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151, 152, 153
- Constitution of India, 1950 - Article 131A, 134A, 15, 19, 228
- Special Marriage Act, 1954 - Section 27, 36

**Citation:** AIR 1981 Cal 123 : (1981) 1 ComplJ 220

**Hon'ble Judges:** Amarendra Nath Sen, C.J; Murari Mohan Dutt, J

**Bench:** Division Bench

**Advocate:** Arun Kumar Dutt and Rabindra Nath Pal, for the Appellant; Kanan Kumar Ghosh, Dilip Kumar Sett, Santanu Mukherjee for Respondent No. 1, N.C. Roy Chowdhury and Nilava Mitra for Union of India, for the Respondent

**Final Decision:** Allowed

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**Judgement**

1. This Rule under Article 228 of the Constitution has been issued at the instance of the defendant-husband in a proceeding for divorce u/s 27 of the Special Marriage Act, 1954 filed in the Court of the District Judge, Alipore, by the opposite-party/wife. Divorce has been asked for by the opposite party on the ground as mentioned in Clause (d) of Section 27 (1) of the Special Marriage Act, that is, that since the solemnization of the marriage her husband treated her with cruelty.

2. After filing the divorce proceeding, the opposite party filed an application before the learned District Judge praying for alimony pendente lite u/s 36 of the Special Marriage Act. That application was opposed by the petitioner husband. The application came up for hearing before the 9th Additional District Judge, Alipore. The learned Additional District Judge, after hearing the parties, by an order dated

October 3, 1977 allowed the said application and directed the petitioner to pay a monthly maintenance of Rs. 165/- to the opposite party with effect from the date of the petitioner's appearance in the proceeding and further directed to pay a sum of Rs. 300/- on account of cost of the litigation. Being aggrieved by the said order of the learned Additional District Judge, the petitioner preferred an appeal to this Court, being F.M.A.T. No. 319 of 1977. The appeal was, however, withdrawn by the petitioner subsequently on the ground that no appeal lay to this Court against an order granting alimony pendente lite. Thereafter, the petitioner filed an application before the learned Additional District Judge under Sections 151, 152 and 153 of the Code of Civil Procedure. In that application the petitioner prayed that the order of alimony pendente lite should be recalled as it was ultra vires the Constitution of India. The learned Additional District Judge, however, dismissed the said application of the petitioner. Thereafter, the petitioner filed an application under Article 228 of the Constitution before this Court praying for the transfer of the said divorce proceeding to this Court on the ground that it involved substantial questions of law as to the interpretation of the Constitution. Upon the said application, the present Rule was issued.

3. Mr. Arun Kumar Dutt, learned Advocate appearing on behalf of the petitioner, submits that Section 36 of the Special Marriage Act in providing for granting alimony pendente lite to the wife makes a discrimination on the ground of sex and, as such, it is ultra vires the provision of Article 15 of the Constitution. Further, it is submitted that Section 36 also puts unreasonable restrictions on the exercise of the right of the male sex, who are the husbands and, accordingly, it is also ultra vires Article 19(1)(f) of the Constitution. Mr. Dutt has relied on a number of decisions in order to persuade us that a substantial question of law relating to the interpretation of the Constitution is involved. The said decisions are (1) [Phulmani Dibya Vs. State of Orissa and Others](#), (2) [In Re: The Special Courts Bill, 1978](#), (3) [The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another](#), (4) [M.R. Balaji and Others Vs. State of Mysore](#), (5) [K.A. Abbas Vs. The Union of India \(UOI\) and Another](#), Apart from the above decisions, Mr. Dutt has also placed reliance on two decisions of the American Supreme Court in (6) Regents of the University of California v. Allan Bakke, 57 L. Ed. 2d. 750 and (7) Orr. v. Orr., 440 U.S. 268.

4. The scope of the present Rule under Article 228 of the Constitution is limited. Article 228 provides as follows: -

If the High Court is satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for disposal of the case, it shall withdraw the case and, subject to the provisions of article 131A may -

(a) either dispose of the case itself, or (b) determine the said question of law and return the case to the Court from which the case has been so withdrawn together

with a copy of its judgment on such question, and the said Court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

5. In order to invoke the provision of Article 228 of the Constitution, three conditions are to be fulfilled, namely, (1) that there is a pending case in the subordinate Court; (2) that the case involves a substantial question of law as to the interpretation of the Constitution; and that (3) the determination of such question is necessary for the disposal of the case.

6. It has been stated already that the application for alimony pendente lite was disposed of by the learned Additional District Judge, Alipore on October 3, 1977. Although the petitioner preferred an appeal, he did not proceed with the same, but withdraw the same on the ground that it was not maintainable. Be that as it may, the case or the proceeding that was started by the opposite party by filing an application for the grant of alimony pendente lite was long disposed of. No case is now pending before the learned Additional District Judge, regarding the question as to the grant of alimony pendente lite. We are also told that the order that was passed by the learned Additional District Judge granting alimony pendente lite to the opposite party was also put into execution by her. The first condition, therefore, that there must be a pending case in the subordinate Court is not fulfilled. It is, however, argued by Mr. Dutt that the case started on the filing of the application for divorce and which is still pending is a case within the meaning of Article 228 of the Constitution.

7. Even assuming that the proceeding for divorce should be taken to be a case within the meaning of Article 228 of the Constitution., still the other two conditions are to be fulfilled. The second condition is that the case involves a substantial question of law as to the interpretation of the Constitution. It has been already stated that the petitioner has challenged the constitutional validity of Section 36 of the special Marriage Act on two grounds, namely, that it makes a discrimination on the ground of sex which is forbidden under Article 15 of the Constitution and that it puts an unreasonable restriction on the exercise of fundamental rights by the male sex, who are the husbands in matrimonial proceedings as guaranteed under Article 19(1) (f) of the Constitution. It may be pointed out that we are not to finally decide the question as to the constitutional validity of Section 36 as raised by the petitioner. We are only to consider prima facie whether the case involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case.

8. Under Article 15(1) of the Constitution the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. It is complained by the petitioner that Section 36 makes a discrimination only on the ground of sex in providing for the grant of alimony pendente lite. The word "only" in Article 15(1) is significant. The discrimination must be "only" on the grounds mentioned in Article 15(1). Section 36 provides for the payment of alimony to the

wife in a case where the wife has no independent income sufficient for her support. It is, therefore, manifestly clear that no discrimination has been sought to be made "only" on the ground of sex. The condition precedent to the grant of alimony pendente lite u/s 36 is that the wife has no independent income sufficient for her support. The exercise of jurisdiction u/s 36 is discretionary with the Court. Before making an order for alimony pendente lite, the Court has also to consider the pecuniary condition of the husband. Even assuming that Section 36 makes such a discrimination as contended on behalf of the petitioner, still that will not be invalid in view of the provision of Clause (3) of Article 15 of the Constitution which provides: "Nothing in this Article shall prevent the State from making any special provision for women and children. Section 36 of the Special Marriage Act is a special provision and even if it is opposed to the provision of Clause (1) of Article 15 of the Constitution which, in our opinion, is not, it is protected under Clause (3) of Article 15. We do not think that the observation of the Supreme Court in (4) [M.R. Balaji and Others Vs. State of Mysore](#), on which reliance has been placed on behalf of the petitioner applies to the facts and circumstances of the instant case. Section 36 of the Special Marriage Act in providing for the payment of alimony by the husband to the wife cannot be said to have ignored the interest of the rest of the people of the society. We are unable to accept the contention of the learned Advocate for the petitioner that "Special provision" referred to in Clause (3) of Article 15 of the Constitution postulate only such provision as will give effect to the directive principles as contained in Clause (e) and (f) of Article 39 and in Article 42 of the Constitution. Prima facie, therefore, Section 36 of the Special Marriage Act does not offend against the provision of clause (1) of Article 15 of the Constitution. The other ground of challenge to the constitutional validity of Section 36 is equally untenable, for there is no question of Section 36 putting unreasonable restriction on the fundamental rights of the husbands in matrimonial proceedings as contended on behalf of the petitioner. The second condition of Article 228 of the Constitution is not, therefore, fulfilled.

9. Let us now consider the third condition, namely, that the determination of the substantial question of law as to the interpretation of the Constitution is necessary for the disposal of the case. It has been stated already that the divorce has been sought for by the opposite party on the ground of cruelty. The determination of the question whether Section 36 of the Special Marriage Act is ultra vires or not will have no effect on the proceeding for divorce or on the ground the opposite party has to prove before an order for divorce can be made in her favour. In the circumstances, as the conditions of Article 228 of the Constitution are not fulfilled, we are afraid, we shall not be justified in directing transfer of the matrimonial proceeding from the Court of the learned Additional District Judge to this Court in exercise of our jurisdiction under Article 228 of the Constitution. In other words, the petitioner having failed to satisfy us prima facie that the question as to the interpretation of the Constitution that has been raised by him has any connection with or being upon

the matrimonial proceeding, that is pending in the Subordinate Court, he cannot succeed in this Rule.

10. In the circumstances, for the reasons aforesaid, the Rule is discharged, but there will be no order for costs, for already on an earlier application of the opposite party we directed the petitioner to pay a sum of Rs. 500/- to the opposite party. It may be recorded that the said sum has been paid by the petitioner to the opposite party.

11. Mr. Dutt prays for a certificate for appeal to the Supreme Court under Article 134A of the Constitution. In our opinion, no substantial question of law is involved in this Rule. In the circumstances, the prayer for a certificate is refused.

Sen, C.J.

12. I agree.