India has a strong tradition of respect for difference and diversity which is reflected under the Hindu Family Laws as it is applicable to diverse communities living from the southern tip to northern mountains, from western plains to eastern hills.

Hon'ble Mr. Justice N.V. Ramana

Ratanlal alias Babulal Chunilal Samsuka Versus Sundarabaigovardhandas Samsuka (Dead) through Legal Representatives and ors. Decided on 22 November, 2017 (para-13)

COMPILATION OF
LANDMARK JUDGMENTS
OF
SUPREME COURT OF INDIA
ON
FAMILY MATTERS

"While considering the paramount interest and welfare of the minor child, maintenance, education and the loving care that the child would receive are the factors to be kept in view."

Hon'ble Mrs. Justice R. Banumathi

Kalaichezhiyan Srinivasan Versus Nirmala O.S.A.No.255 of 2011 Decided on 15 September, 2011(Para-10)

COMPILATION OF

LANDMARK JUDGMENTS

OF

SUPREME COURT OF INDIA

ON FAMILY MATTERS

Year of Publication : 2019

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Judge, Supreme Court of India

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Chairman, Supreme Court Legal Services Committee

HON'BLE MRS. JUSTICE R. BANUMATHI

Judge, Supreme Court of India

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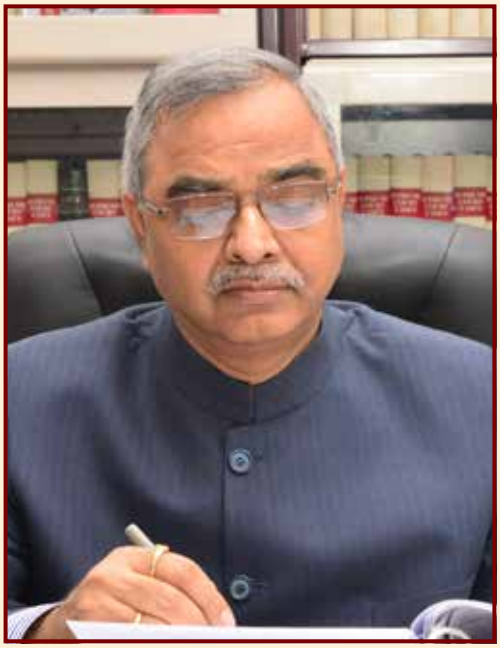

Preface

Ranchi, dated 8th September, 2019

Family is the foundation of Civilization. Ethics and values are carried forward to Generations by the families. In fact our Nation is praised worldwide for the moral ethics and values which we have inherited from the generations right from Vedic period, or may be, even earlier. It is expected from us that we must pass on the same to the posterity as well. Strong family system is the hallmark of Indian Civilization, but, it has come under immense pressure and stress. Strong sense of individuality has given less space for adjustments, necessary for cordial family relationships. Stress in family system has opened floodgates of litigation. Innocence of child and esteem of women and elders are lost in prolonged family disputes.

The Family Courts Act, 1984, has envisaged a different jurisdiction to be exercised with different mindset and approach. The said Act stipulates the minimum possibility of adversarial system of trial before the Family Courts, by taking recourse to conciliation for the settlement of the family disputes, but in fact our experiences show that each and every family litigation suffers from such hostile attitude towards the other party, that the entire families of both the parties suffer immensely. Children are the worst sufferers. Here comes the role of a Judge presiding over the Family Courts. They require skills and aptitude entirely different from the other Judges sitting in the same premises.

Hon'ble Supreme Court Committee for Sensitization of Family Court Matters has been working tirelessly to sensitize all the stakeholders. From 2016 to 2018, this Committee has organized four Regional Level and One National Level Meets of Family Courts Judges, and has also prepared Training Module for the Family Court Judges.

This Compilation of Landmark Judgments of Supreme Court of India on Family Matters is an effort to equip our Judges with all the authorities on the subject. We have compiled the Judgements under the following categories :-

- *Duty of Family Courts*
- *Maintenance & Alimony*
- *Custody of Child, Shared Parenting and Visitation Rights*
- *Marriage & Divorce*
- *Domestic Violence*
- *Streedhan*
- *Miscellaneous*

I hope and trust that this work will be useful for Bar and Bench alike. Any suggestion for improvement is highly solicited for incorporation in www.jhalsa.org as well, for use by one and all.

(Justice H.C. Mishra)
Acting Chief Justice, High Court of Jharkhand
&
Chairman, High Court Committee for
Sensitization of Family Court Matters

INDEX

MISCELLANEOUS ASPECT OF FAMILY MATTERS

DOMESTIC VIOLENCE

ADOPTION

MAINTENANCE AND ALIMONY

MARRIAGE AND DIVORCE

CUSTODY OF CHILD, VISITATION RIGHTS & SHARED PARENTING

DUTY OF FAMILY COURTS

STRIDHAN

LANDMARK JUDGMENTS ON MISCELLANEOUS ASPECTS OF FAMILY MATTERS

SHREYA VIDYARTHI VERSUS ASHOK VIDYARTHI & ORS.

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice N.V. Ramana

CIVIL APPEAL NOS.3162-3163 OF 2010

Shreya Vidyarthi ...Appellant
Versus
Ashok Vidyarthi & Ors. ...Respondents

Decided on 16 December, 2015

While there can be no doubt that a Hindu Widow is not a coparcener in the HUF of her husband and, therefore, cannot act as Karta of the HUF after the death of her husband the two expressions i.e. Karta and Manager may be understood to be not synonymous and the expression "Manager" may be understood as denoting a role distinct from that of the Karta. Hypothetically, we may take the case of HUF where the male adult coparcener has died and there is no male coparcener surviving or as in the facts of the present case, where the sole male coparcener (respondent-plaintiff - Ashok Vidyarthi) is a minor. In such a situation obviously the HUF does not come to an end. The mother of the male coparcener can act as the legal guardian of the minor and also look after his role as the Karta in her capacity as his (minor's) legal guardian.

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi

1. The appellant before us is the 8th Defendant in Suit No. 630 of 1978 which was instituted by the firstrespondent herein as the plaintiff. The said suit filed for permanent injunction and in the alternative for a decree of partition and separation of shares by metes and bounds was dismissed by the learned Trial Court. In appeal, the High Court reversed the order of the Trial Court and decreed the suit of the respondent-plaintiff with a further declaration that he is entitled to 3/4th share in the suit property, namely, House No. 7/89, Tilak Nagar, Kanpur whereas the appellant (defendant No. 8 in the suit) is entitled to the remaining 1/4th share in the said property. Aggrieved, these appeals have been filed.

2. The relevant facts which will have to be noticed may be enumerated hereinunder.

In the year 1937 one Hari Shankar Vidyarthi married Savitri Vidyarthi, the mother of the respondent-plaintiff.

Subsequently, in the year 1942, Hari Shankar Vidyarthi was married for the second time to one Rama Vidyarthi. Out of the aforesaid second wedlock, two daughters, namely, Srilekha Vidyarthi and Madhulekha Vidyarthi (defendants 1 and 2 in Suit No. 630 of 1978) were born.

The appellant-eighth defendant Shreya Vidyarthi is the adopted daughter of Srilekha Vidyarthi (since deceased) and also the legatee/ beneficiary of a Will left by Madhulekha Vidyarthi.

3. The dispute in the present case revolves around the question whether the suit property, as described above, was purchased by sale deed dated 27.9.1961 by Rama Vidyarthi from the joint

family funds or out of her own personal funds. The suit property had been involved in several previous litigations between the parties, details of which may now require a close look.

4. In the year 1968 Suit No. 147/1968 was instituted by Savitri Vidyarthi (mother of the respondent-plaintiff) contending that the suit property being purchased from the joint family funds a decree should be passed against the daughters of Rama Vidyarthi from interfering with her possession. This suit was dismissed under the provisions of Order VII Rule 11 CPC on account of failure to pay the requisite court fee. In the said suit the respondent-plaintiff had filed an affidavit dated 24.2.1968 stating that he had willfully relinquished all his rights and interests, if any, in the suit property. The strong reliance placed on the said affidavit on behalf of the appellant in the course of the arguments advanced on her behalf needs to be dispelled by the fact that an actual reading of the said affidavit discloses that such renunciation was only in respect of the share of Rama Devi in the suit property and not on the entirety thereof. Consistent with the above position is the suit filed by the respondent-plaintiff i.e. Suit No. 21/70/1976 seeking partition of the joint family properties. The said suit was again dismissed under the provisions of Order VII Rule 11 CPC for failure to pay the requisite court fee. It also appears that Rama Vidyarthi the predecessor-in-interest of the present appellant had filed Suit No. 37/1969 under Section 6 of the Specific Relief Act for recovery of possession of two rooms of the suit property which, according to her, had been forcibly occupied by the present respondentplaintiff.

During the pendency of the aforesaid suit i.e. 37/1969 Rama Vidyarthi had passed away. The aforesaid suit was decreed in favour of the legal heirs of the plaintiff-Rama Vidyarthi namely, Srilekha and Madhulekha Vidyarthi on 4.2.1976.

5. It is in the aforesaid fact situation that the suit out of which the present appeals have arisen i.e. Suit No. 630 of 1978 was filed by the present respondent-plaintiff impleading Srilekha Vidyarthi (mother of the appellant) and Madhulekha Vidyarthi (testator of the Will in favour of the appellant) as defendants 1 and 2 and seeking the reliefs earlier noticed.

6. The specific case pleaded by the plaintiff in the suit was that the plaintiff's father, Hari Shankar Vidyarthi, died on 14.3.1955 leaving behind his two widows i.e. Savitri Vidyarthi (first wife) and Rama Vidyarthi (second wife).

According to the plaintiff, the second wife i.e. Rama Vidyarthi had managed the day to day affairs of the entire family which was living jointly. The plaintiff had further pleaded that Rama Vidyarthi was the nominee of an insurance policy taken out by Hari Shankar Vidyarthi during his life time and that she was also receiving a monthly maintenance of a sum of Rs. 500/- on behalf of the family from the "Pratap Press Trust, Kanpur" of which Hari Shankar Vidyarthi was the managing trustee. In the suit filed, it was further pleaded that Rama Vidyarthi received a sum of Rs. 33,000/- out of the insurance policy and also a sum of Rs. 15,000/- from Pratap Press Trust, Kanpur as advance maintenance allowance. It was claimed that the said amounts were utilized to purchase the suit property on 27.9.1961. It was, therefore, contended that the suit property is joint family property having been purchased out of joint family funds. The plaintiff had further stated that all members of the family including the first wife, the first respondent and his two step sisters i.e. Srilekha and Madhulekha Vidyarthi had lived together in the suit property. As the relationship between the parties had deteriorated/changed subsequently and the plaintiffrespondent and his mother (Savitri Vidyarthi) were not permitted to enter the

suit property and as a suit for eviction was filed against the first respondent (37 of 1969) by Rama Vidyarthi the instant suit for permanent injunction and partition was instituted by the respondent-plaintiff.

7. The plaintiff's suit was resisted by both Srilekha and Madhulekha, primarily, on the ground that the suit property was purchased by their mother Rama Vidyarthi from her own funds and not from any joint family funds. In fact, the two sisters, who were arrayed as defendants 1 and 2 in the suit, had specifically denied the existence of any joint family or the availability of any joint family funds.

8. The Trial Court dismissed the suit by order dated 19.8.1997 citing several reasons for the view taken including the fact that respondent-plaintiff was an attesting witness to the sale deed dated 27.9.1961 by which the suit property was purchased in the name of Rama Vidyarthi; there was no mention in the sale deed that Rama Vidyarthi was representing the joint family or that she had purchased the suit property on behalf of any other person. The learned Trial Court further held that in the year 1955 when Hari Shankar Vidyarthi had died there was no joint family in existence and in fact no claim of any joint family property was raised until the suit property was purchased in the year 1960-61. The Trial Court was also of the view that if the other members of the family had any right to the insurance money such a claim should have been lodged by way of a separate suit. Aggrieved by the dismissal of the suit, the respondent-plaintiff filed an appeal before the High Court.

9. Certain facts and events which had occurred during the pendency of the appeal before the High Court will require a specific notice as the same form the basis of one limb of the case projected by the appellant before us in the present appeal, namely, that the order of the High Court is an ex-parte order passed without appointing a legal guardian for the appellant for which reason the said order is required to be set aside and the matter remanded for a de novo consideration by the High Court.

10. The first significant fact that has to be noticed in this regard is the death of Madhulekha Vidyarthi during the pendency of the appeal and the impleadment of the appellant as the 8th respondent therein by order dated 31.08.2007. This was on the basis that the appellant is the sole legal heir of the deceased Madhulekha. The said order, however, was curiously recalled by the High Court by another order dated 10.10.2007. The next significant fact which would require notice is that upon the death of her mother Srilekha Vidyarthi, the appellant-defendant herself filed an application for pursuing the appeal in which an order was passed on 16/18.05.2009 to the effect that the appellant is already represented in the proceedings through her counsel (in view of the earlier order impleading the appellant as legal heir of Madhulekha). However, by the said order the learned counsel was given liberty to obtain a fresh vakalatnama from the appellant which, however, was not so done. In the aforesaid fact situation, the High Court proceeded to consider the appeal on merits and passed the impugned judgment on the basis of consideration of the arguments advanced by the counsel appearing on behalf of the appellant at the earlier stage, namely, one Shri A.K. Srivastava and also on the basis of the written arguments submitted on behalf of the deceased Srilekha Vidyarthi. It is in these circumstances that the appellant has now, inter alia, contended that the order passed by the High Court is without appointing any guardian on her behalf and contrary to the provisions of Order XXXII Rules 3, 10 and 11 of the CPC.

11. Insofar as the merits of the appeal are concerned, the High Court took the view that on the facts before it, details of which will be noticed in due course, there was a joint family in existence in which the second wife Rama Vidyarthi had played a predominant role and that the suit property was purchased out of the joint family funds namely the insurance money and the advance received from the Pratap Press Trust, Kanpur. Insofar as the devolution of shares is concerned, the High Court took the view that following the death of Hari Shankar Vidyarthi, as the sole surviving male heir, the respondent-plaintiff became entitled to 50% of the suit property and the remaining 50% was to be divided between the two wives of Hari Shankar Vidyarthi in equal proportion. Srilekha and Madhulekha Vidyarthi, i.e. defendants 1 and 2 in the suit, as daughters of the second wife, would be entitled to share of Rama Vidyarthi, namely, 25% of the suit property. On their death, the appellant would be entitled to the said 25% share whereas the remaining 25% share (belonging to the first wife) being the subject matter of a Will in favour of her minor grandchildren (sons of the respondent-plaintiff), the respondentplaintiff would also get the aforesaid 25% share of the suit property on behalf of the minors. Accordingly, the suit was decreed and the order of dismissal of the suit was reversed.

12. The aforesaid order of the High Court dated 12.08.2009 was attempted to be recalled by the appellant-8th defendant by filing an application to the said effect which was also dismissed by the High Court by its order dated 24.11.2009. Challenging both the abovesaid orders of the High Court, the present appeals have been filed.

13. Having heard learned counsels for the parties, we find that two issues in the main arise for determination in these appeals. The first is whether the High Court was correct in passing the order dated 24.11.2009 on the recall application filed by the appellant and whether, if the appellant had really been proceeded ex-parte thereby rendering the said order untenable in law, as claimed, should the matter be remitted to the High Court for reconsideration. The second question arising is with regard to the order dated 12.08.2009 passed by the High Court in First Appeal No. 693 of 1987 so far as the merits thereof is concerned.

14. The detailed facts in which the appellant-8th defendant came to be impleaded in the suit following the death of Madhulekha Vidyarthi (defendant No. 2) and thereafter on the death of Srilekha Vidyarthi (defendant No. 1) has already been seen. From the facts recorded by the High Court in its order dated 24.11.2009 it is clear and evident that the appellant had participated in the proceeding before the High Court at various stages through counsels. Therefore, there is no escape from the conclusion that the order passed in the appeal was not an ex-parte order as required to be understood in law. The appellant was already on record as the legal heir of Madhulekha Vidyarthi (defendant No. 2) and was represented by a counsel. The High court had passed its final order after hearing the said counsel and upon consideration of the written arguments filed in the case. In its order dated 24.11.2009 the High Court has observed that full opportunity of hearing on merits was afforded to the appellant. Even before us, the appellant has been heard at length on the merits of the case. In these circumstances there can hardly be any justification to remand the matter to the High Court for a fresh consideration by setting aside the impugned order.

15. Insofar as the merits of the order of the High Court is concerned, the sole question involved is whether the suit property was purchased by Rama Vidyarthi, (defendant No.1) out of the joint family funds or from her own income.

The affidavit of Rama Vidyarthi in Suit No. 147 of 1968 filed by Savitri Vidyarthi discloses that she was looking after the family as the Manager taking care of the respondent No.1, her step son i.e. the son of the first wife of Hari Shankar Vidyarthi. In the said affidavit, it is also admitted that she had received the insurance money following the death of Hari Shankar Vidyarthi and the same was used for the purchase of the suit property along with other funds which she had generated on her own. The virtual admission by the predecessor-in-interest of the appellant of the use of the insurance money to acquire the suit property is significant. Though the claim of absolute ownership of the suit property had been made by Rama Vidyarthi in the aforesaid affidavit, the said claim is belied by the true legal position with regard to the claims/entitlement of the other legal heirs to the insurance amount. Such amounts constitute the entitlement of all the legal heirs of the deceased though the same may have been received by Rama Vidyarthi as the nominee of her husband. The above would seem to follow from the view expressed by this Court in Smt. Sarbati Devi & Anr. vs. Smt. Usha Devi[1] which is extracted below. (Paragraph 12)

> *"12. Moreover there is one other strong circumstance in this case which dissuades us from taking a view contrary to the decisions of all other High Courts and accepting the view expressed by the Delhi High Court in the two recent judgments delivered in the year 1978 and in the year 1982. The Act has been in force from the year 1938 and all along almost all the High Courts in India have taken the view that a mere nomination effected under Section 39 does not deprive the heirs of their rights in the amount payable under a life insurance policy. Yet Parliament has not chosen to make any amendment to the Act. In such a situation unless there are strong and compelling reasons to hold that all these decisions are wholly erroneous, the Court should be slow to take a different view. The reasons given by the Delhi High Court are unconvincing. We, therefore, hold that the judgments of the Delhi High Court in Fauza Singh case and in Uma Sehgal case do not lay down the law correctly. They are, therefore, overruled. We approve the views expressed by the other High Courts on the meaning of Section 39 of the Act and hold that a mere nomination made under Section 39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them."*

16. The fact that the family was peacefully living together at the time of the demise of Hari Shankar Vidyarthi; the continuance of such common residence for almost 7 years after purchase of the suit property in the year 1961; that there was no discord between the parties and there was peace and tranquility in the whole family were also rightly taken note of by the High Court as evidence of existence of a joint family. The execution of sale deed dated 27.9.1961 in the name of Rama Vidyarthi and the absence of any mention thereof that she was acting on behalf of the joint family has also been rightly construed by the High Court with reference to the young age of the plaintiff-respondent (21 years) which may have inhibited any objection to the dominant position of Rama Vidyarthi in the joint family, a fact also evident from the other materials on record.

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1 1984 (1) SCC 424

Accordingly, there can be no justification to cause any interference with the conclusion reached by the High Court on the issue of existence of a joint family.

17. How could Rama Vidyarthi act as the Karta of the HUF in view of the decision of this Court in Commissioner of Income Tax vs. Seth Govindram Sugar Mills Ltd.[2] holding that a Hindu widow cannot act as the Karta of a HUF which role the law had assigned only to males who alone could be coparceners (prior to the amendment of the Hindu Succession Act in 2005). The High Court answered the question in favour of the respondent-plaintiff by relying on the decision of this Court in Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy[3] wherein the rights enjoyed by a Hindu widow during time when the Hindu Women's Rights to Property Act, 1937 remained in force were traced and held to be akin to all rights enjoyed by the deceased husband as a coparcener though the same were bound by time i.e. life time of the widow (concept of limited estate) and without any authority or power of alienation. We do not consider it necessary to go into the question of the applicability of the ratio of the decision in Controller of Estate Duty, Madras (supra) to the present case inasmuch as in the above case the position of a Hindu widow in the co-parcenary and her right to co-parcenary property to the extent of the interest of her deceased husband was considered in the context of the specific provisions of the Estate Duty Act, 1953. The issue(s) arising presently are required to be answered from a somewhat different perspective.

18. While there can be no doubt that a Hindu Widow is not a coparcener in the HUF of her husband and, therefore, cannot act as Karta of the HUF after the death of her husband the two expressions i.e. Karta and Manager may be understood to be not synonymous and the expression "Manager" may be understood as denoting a role distinct from that of the Karta. Hypothetically, we may take the case of HUF where the male adult coparcener has died and there is no male coparcener surviving or as in the facts of the present case, where the sole male coparcener (respondent-plaintiff - Ashok Vidyarthi) is a minor. In such a situation obviously the HUF does not come to an end. The mother of the male coparcener can act as the legal guardian of the minor and also look after his role as the Karta in her capacity as his (minor's) legal guardian. Such a situation has been found, and in our opinion rightly, to be consistent with the law by the Calcutta High Court in Sushila Devi Rampuria v. Income Tax Officer and Anr.[4] rendered in the context of the provisions of the Income Tax Act and while determining the liability of such a HUF to assessment under the Act. Coincidently the aforesaid decision of the Calcutta High Court was noticed in Commissioner of Income Tax vs. Seth Govindram Sugar Mills Ltd. (supra).

19. A similar proposition of law is also to be found in decision of the Madhya Pradesh High Court in Dhujram v. Chandan Singh & Ors.[5] though, again, in a little different context. The High Court had expressed the view that the word 'Manager' would be consistent with the law if understood with reference to the mother as the natural guardian and not as the Karta of the HUF.

20. In the present case, Rama Vidyarthi was the step mother of the respondent-plaintiff -Ashok Vidyarthi who at the time of the death of his father - Hari Shankar Vidyarthi, was a minor. The respondent plaintiff was the only surviving male coparcener after the death of Hari Shankar Vidyarthi. The materials on record indicate that the natural mother of Ashok Vidyarthi, Smt.

2 AIR 1966 SC 24
3 [1977 (3) SCC 385]
4 AIR 1959 Cal 697
5 1974 MPL J554

Savitri Vidyarthi, had played a submissive role in the affairs of the joint family and the step mother, Rama Vidyarthi i.e. second wife of Hari Shankar Vidyarthi had played an active and dominant role in managing the said affairs. The aforesaid role of Rama Vidyarthi was not opposed by the natural mother, Savitri Vidyarthi. Therefore, the same can very well be understood to be in her capacity as the step mother of the respondentplaintiff-Ashok Vidyarthi and, therefore, consistent with the legal position which recognizes a Hindu Widow acting as the Manager of the HUF in her capacity as the guardian of the sole surviving minor male coparcener. Such a role necessarily has to be distinguished from that of a Karta which position the Hindu widow cannot assume by virtue of her dis-entitlement to be a coparcener in the HUF of her husband. Regrettably the position remain unaltered even after the amendment of the Hindu Succession Act in 2005.

21. In the light of the above, we cannot find any error in the ultimate conclusion of the High Court on the issue in question though our reasons for the aforesaid conclusion are somewhat different.

22. Before parting we may note that the history of the earlier litigation between the parties involving the suit property would not affect the maintainability of the suit in question (630 of 1978). Suit No.37 of 1969 filed by Rama Vidyarthi was a suit under Section 6 of the Specific Relief Act whereas Suit No.147 of 1968 and Suit No. 21/70/1976 filed by first wife Savitri Vidyarthi and Ashok Vidyarthi, respectively, were dismissed under Order VII Rule 11 CPC on account of non-payment of court fee. In these circumstances, the suit out of which the present appeal has arisen i.e. Suit No. 630 of 1978 was clearly maintainable under Order VII Rule 13 CPC.

23. The apportionment of shares of the parties in the suit property made by the High Court, in the manner discussed above, also does not disclose any illegality or infirmity so as to justify any correction by us. It is our considered view that having held and rightly that the suit property was a joint family property, the respondent-plaintiff was found entitled to seek partition thereof and on that basis the apportionment of shares in the suit property between the plaintiff and the contesting eighth defendant was rightly made by the High Court in accordance with the reliefs sought in the suit.

24. For the aforesaid reasons, we do not find any merit in these appeals, the same are being accordingly dismissed.

However, in the facts of the case we leave the parties to bear their own costs.

❑❑❑

R. KASTHURI VERSUS M. KASTHURI AND ANR

Supreme Court of India

Bench : Hon'ble Mr. Justice Ranjan Gogoi and Hon'ble Mrs. Justice R. Banumathi

R. Kasthuri & ors. ...Appellant(s)
Versus
M. Kasthuri & ors. ...Respondent(s)

CIVIL APPEAL NO (S). 432 OF 2018

[Arising out of Special Leave Petition

(Civil) No.12985 of 2016]

Decided on : 16th January, 2018

The appellant-plaintiff filed a petition in Civil Court at Madras seeking to declare that applellant-Plaintiff 1 is the legally wedded wife of the late Gunaseelan and Plaintiff 2 to 4 are legitimate children of the plaintiff 1 and the late Gunaseelan and these are the legal heirs of the deceased person. The suit arose in the situation when the legal heir-ship of the plaintiffs was challenged by the Defendant 1 and 2 who also claimed to be the wife and legitimate child of the deceased person. Here, in the second appeal to the High Court , it was claimed that the nature of the suit and the relief clearly shows that the civil court had no jurisdiction to entertain the suit as the matter completely lies within the domain of the Family Court constituted under Family Court Act, 1984. The Supreme Court decided that there is no family dispute involved between the plaintiff and defendant because it is not a matrimonial matter as the suit arose after the death of the concerned husband. The present dispute is of civil nature as it will be resolved on the basis of evidence to be tendered by the parties which will be judged by the Evidence Act, 1872. Therefore, it is held that the High Court was incorrect in holding the suit filed by the appellant-plaintiff to be not maintainable by law. The order of the High Court was set aside.

ORDER

1. Leave granted.

2. The appellants – plaintiffs had instituted a civil suit (O.S. No.222 of 1998) in the City Civil Court at Madras seeking, inter alia, following reliefs:

> *"A. Declaring that the first plaintiff is the legally wedded wife of the deceased Gunaseelan S/o V.M. Aalai.*
>
> *B. Declaring that the plaintiffs 2 to 4 are the Signature Not Verified Digitally signed by legitims to children of the first plaintiff and late Gunaseelan S/o Alai.*
>
> *C. Declaring that the first plaintiff as wife, the plaintiffs 2 to 4 as children and the 3rd defendant as mother are the legal heirs of late Gunaseelan S/o V.M. Aalai."*

3. The suit was filed in a situation where the legal heirship obtained by the plaintiffs – appellants was sought to be challenged by the defendants 1 and 2 who claimed to be the wife and son of late Gunaseelan whom the plaintiff no.1 also claimed to be her husband.

4. The suit was decreed by the learned trial Court which decree was affirmed in First Appeal. The High Court, in Second Appeal, took the view that having regard to the nature of the suit and the reliefs claimed the civil court had no jurisdiction to entertain the suit which lay within the domain of the Family Court constituted under the Family Courts Act, 1984. (hereinafter referred to as "the Act") Accordingly, on the aforesaid basis the decree has been reversed.

5. The objects and reasons behind the enactment of the Act which is reproduced herein below would suggest that the reason for constitution of family courts is for settlement of family disputes, if possible, by pre-litigation proceedings. If the dispute cannot be settled the same has to be adjudicated by adoption of a process which is different from what is adopted in ordinary civil proceedings.

"Statement of objects and reasons:

Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes."

6. Sections 13, 14 and 15 of the Act spell out a special procedure. The other provisions of the Act i.e. Section 4(4) would indicate that a major objective behind the enactment of the Act is to have a specialized body to preserve and save the institution of marriage.

7. In the present case, there is no family dispute between the plaintiffs and the defendants. The dispute arose after the demise of Gunaseelan to whom both the plaintiff No.1 and the defendant No.1 claim to be married. The other plaintiffs and defendant No.2 are the children claimed to be born out of the respective marriages.

8. The above would indicate that the dispute between the parties is purely a civil dispute and has no bearing on any dispute within a family which needs to be resolved by a special procedure as provided under the Act. No issue with regard to the institution of marriage and the need to preserve the same also arises in the present case. That apart, the dispute between the parties can only be resolved on the basis of evidence to be tendered by the parties, admissibility of which has to be adjudged within the four corners of the provisions of the Indian Evidence Act, 1872. In such a proceeding it would be clearly wrong to deprive the parties of the benefit of the services of counsels.

9. Taking into account all that has been said above we are of the view that the High Court was not correct in holding the suit filed by the plaintiffs – appellants to be not maintainable in law. Accordingly, we set aside the order of the High Court dated 15th June, 2015 passed in S.A.

No.725 of 2005 and remand the matter to the High Court for a decision on merits of the Second Appeal filed by the defendants.

10. Consequently and in the light of the above, the appeal is allowed and the order of the High Court is set aside.

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BALRAM YADAV VERSUS FULMANIYA YADAV

Supreme Court of India

Bench : Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Rohinton Fali Nariman

CIVIL APPEAL NO. 4500 OF 2016[†]

Balram Yadav .. Appellant;
Versus
Fulmaniya Yadav .. Respondent.

Decided on April 27, 2016

Family and Personal Laws — Family Courts Act, 1984 — Ss. 7(1) Expln. (b), 8 & 20 -— Jurisdiction of Family Court — Scope of — Declaration as to validity of both marriage and matrimonial status of a person — Suit or proceeding as to, held, is within the exclusive jurisdiction of Family Court in view of the provisions contained in Ss. 7(1) Expln. (b), 8 and 20 of the Family Courts Act

— Thus, where there is a dispute on matrimonial status of any person, a declaration in that regard has to be sought only before Family Court irrespective of whether said declaration is affirmative or negative in nature — Consequently, in present case, Family Court had jurisdiction to entertain civil suit filed by appellant seeking declaration to the effect that respondent was not his legally married wife — High Court erred in taking a contrary view opining that a negative declaration was outside the jurisdiction of Family Court — Civil Procedure Code, 1908, S. 9 — Specific Relief Act, 1963 — S. 34 — Evidence Act, 1872 — S. 41 — Family and Personal Laws — Marriage, Divorce, Other Unions and Children — Marital Status, Determination/Proof/Presumption of — Competent court to determine

Allowing the appeal, the Supreme Court

Held :

Under Section 7(1) Explanation (b) of the Family Courts Act, 1984, a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8 of the said Act, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 of the Family Courts Act also endorses the above view, since the said Act has an overriding effect on other laws. Consequently, the impugned judgment of the High Court is set aside. The matter is remitted to the High Court to be decided on merits. (Paras 7 and 8)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Kurian Joseph.—

Leave granted. The appellant instituted a civil suit before the Family Court, Ambikapur, Sarguja, Chhattisgarh seeking a declaration to the effect that the respondent is not his legally married wife.

By judgment dated 28-12-2013, the civil suit was decreed declaring that the respondent was not the appellant's legally married wife.

2. The respondent, being aggrieved, moved the High Court of Chhattisgarh. The High Court, as per the impugned order dated 14-1-2015, allowed the appeal holding that the Family Court lacked jurisdiction to deal with the matter. According to the High Court, a negative declaration was outside the jurisdiction of the Family Court.

3. Heard the learned counsel for the parties.

4. Section 7 of the Family Courts Act, 1984 (for short "the Act") deals with the jurisdiction of the Family Courts, which reads as follows:

"7. Jurisdiction.—(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

5. Section 8 of the Act deals with the exclusion of jurisdiction, which reads as follows:

> *"8. Exclusion of jurisdiction and pending proceedings.—Where a Family Court has been established for any area—*
>
> *(a) no District Court or any subordinate civil court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;*
>
> *(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);*
>
> *(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)—*
>
> *(i) which is pending immediately before the establishment of such Family Court before any District Court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and*
>
> *(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established."*

6. Section 20 of the Family Courts Act, 1984 provides for overriding effect of the Act on other laws or instruments having the effect of law. The said section reads as follows:

> *"20. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

7. Under Section 7(1) Explanation (b), a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws.

8. In view of the above, the appeal is allowed. The impugned judgment of the High Court is set aside. The matter is remitted to the High Court to be decided on merits. We request the High Court to hear the appeal afresh and dispose it of expeditiously, preferably within a period of six months. No costs.

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ABC VERSUS STATE (NCT OF DELHI)

Supreme Court of India

Bench : Hon'ble Mr. Justice Vikramajit Sen and Hon'ble Mr. Justice Abhay Manohar Sapre

CIVIL APPEAL NO. 5003 OF 2015[†]

ABC

Versus

State (NCT of Delhi)

A. ***Constitution of India — Preamble and Arts. 44,14,19, 21, 25 and 26 — Law of the land — Interpretation of — Personal law/Religious tenets — Relevance — Held, India is a secular nation and it is a cardinal necessity that religion be distanced from law — Therefore, the task before the court is to interpret the law of the land, not in the light of the tenets of the parties' religion but in keeping with the legislative intent and prevailing case law — Rule of Law***

B. ***Constitution of India — Arts. 14,15,21 and 44 — Equality before the law and equal protection of the laws, regardless of religion, caste, community, faith, etc. — Attainment of — Interpretation of general/secular law of the land in such a manner as to attain parity in rights/entitlements of persons of one religious group standing disadvantaged when compared with their counterparts from another religious group — Disadvantaged position of Christian unwed mothers vis-a-vis Hindu counterparts — Existence of a Uniform Civil Code envisioned by directive principles of State policy, yet an unaddressed constitutional expectation — Stressed that in such scenario, the Court has to interpret law divorced from any religious tenets***

C. ***Family and Personal Laws — Guardians and Wards Act, 1890 — Ss. 7 and 11 — Interpretation of, should be in secular context and not in light of tenets of parties' religion — India is a secular nation and it is a cardinal necessity that religion be distanced from law — Even if Christian unwed mother seeking guardianship of her child bora outside wedlock is in disadvantaged position in comparison to Hindu counterpart, who in view of S. 6(b) of Hindu Minority and Guardianship Act, 1956 is natural guardian, 1890 Act has to be interpreted on basis of legislative intendment irrespective of religion of parties — Hindu Minority and Guardianship Act, 1956 — Ss. 6 to 8 — Constitution of India, Arts. 44 and 15(3)***

D. ***Family and Personal Laws — Guardians and Wards Act, 1890 — S. 7 — Appointment of guardian of child born outside wedlock — If mother is sole caregiver of child while putative father remains uninvolved and unconcerned, mother's application for declaring her as sole guardian deserves acceptance — Welfare of child is of paramount consideration vis-a¬vis rights of parents — Hindu Minority and Guardianship Act, 1956 — Ss. 6 to 8 — Constitution of India, Arts. 44 and 15(3)***

E. ***Family and Personal Laws — Guardians and Wards Act, 1890 — S. 11 — Applicability — S. 11 applies where a third party seeks guardianship of child — Where one of the parents of child born outside wedlock, mother in this case, applies under S. 7 for appointing her as sole guardian, notice under S. 11 to putative father who remains uninvolved and unconcerned, not mandatory — "Parents" in S. 11 should be construed to mean mother alone when she is sole***

caregiver of child — S. 11, being purely procedural, can be relaxed to attain intendment of the Act i.e. to protect welfare of child — Hindu Minority and Guardianship Act, 1956 — Ss. 6 to 8 — Constitution of India, Arts. 44 and 15(3)

F. Family and Personal Laws — Guardians and Wards Act, 1890 — Ss. 7 and 11 — Appointment of guardian of child born outside wedlock — Where mother applies under S. 7 for her appointment as sole guardian as putative father remains uninvolved and unconcerned, she cannot be compelled by court to disclose identity of putative father for serving notice under S. 11 to him — Such compulsion would be violative of her fundamental right to privacy — Non-disclosure would, instead protect the child from social stigma and controversy — Although child also has right to know father's identity, but that right would not be affected in the instant case as mother furnished particulars of putative father to Supreme Court which have been placed in sealed envelope and could be read only under specific direction of the Court — Constitution of India — Art. 21 — Right to privacy — Human and Civil Rights — UN Convention on the Rights of the Child, 1989 (as acceded to by India on 11-11-1992) — Arts. 1, 3, 7, 9, 12, 18, 21 and 27 — Child's right to know his/her parents' identity — Hindu Minority and Guardianship Act, 1956 — Ss. 6 to 8 — Constitution of India, Arts. 44 and 15(3)

G. Family and Personal Laws — Guardians and Wards Act, 1890 — S. 7 — Guardianship or custody orders never attain finality and can be questioned at any time by any person genuinely concerned for the child's welfare — Hindu Minority and Guardianship Act, 1956, Ss. 6 to 8

H. Demographics and Demography — Birth Certificate — Child born outside wedlock — Application made by single parent/unwed mother — Authorities should issue birth certificate on basis of affidavit of mother alone that child was born from her womb — Issuance of certificate not dependent on mother's appointment as guardian by court — Responsibility is of State to take requisite steps for recording birth of every citizen — Family and Personal Laws — Guardians and Wards Act, 1890, S. 7 I. Citizens, Migrants and Aliens — Passports Act, 1967 — Ss. 5 and 6 — Application for passport — No need to state name of father if mother's name given

J. Education and Universities — Admission — Generally — No need to state name of father if mother's name given

K. Family and Personal Laws — Children born outside wedlock — Unwed mothers — Rights/entitlements of, particularly re custody and guardianship of her children — Law surveyed in UK, USA, Ireland, Philippines, New Zealand and South Africa — Interpretation of law in India, with aid of

— Held, this conspectus indicates that preponderant position is that it is the unwed mother who possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child — This analysis should assist us in a meaningful, dynamic and enduring interpretation of the law as it exists in India

— U.K. Children Act, 1989 — S. 2(2) — Ireland Guardianship of Infants Act, 1964 — S. 6(4) — Philippines Family Code — Art. 176 — New Zealand Care of Children Act, 2004 — S. 17 — South Africa Children's Act, 2005 (38 of 2005) — S. 26 — Interpretation of Statutes — External

Aids — Foreign Statutes — Guardians and Wards Act, 1890 — Ss. 7 and 11 — Hindu Minority and Guardianship Act, 1956 — Ss. 6 to 8 — Constitution of India, Arts. 44 and 15(3)

L. Family and Personal Laws — Guardians and Wards Act, 1890 — Ss. 7, 11 and 19 — Guardianship and custody matters — Parens patriae nature of court's jurisdiction, emphasised — A child, as has been ubiquitously articulated in different legal forums, is not a chattel or a ball to be shuttled or shunted from one parent to the other — Court exercises parens patriae jurisdiction in custody or guardianship wrangles; it steps in to secure welfare of hapless child of two adults whose personal differences and animosity has taken precedence over future of their child — Guardian Court as well as High Court which was in seisin of appeal ought not to have lost sight of the fact that they had been called upon to discharge their parens patriae jurisdiction— Upon a guardianship petition being laid before court, child concerned ceases to be in exclusive custody of parents; thereafter, until attainment of majority, child continues in curial curatorship — Having received knowledge of a situation that vitally affected future and welfare of a child, courts below could be seen as having been derelict in their duty in merely dismissing petition without considering all problems, complexities and complications concerning the child brought within its portals

The appellant, as a Christian by faith, gave birth to a child and raised him without any assistance from or involvement of his putative father. She filed an application under Section 7 of the Guardians and Wards Act before the Guardian Court for declaring her the sole guardian of her son. She got published a notice of the petition in a daily newspaper but is strongly averse to naming the father. She has filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and whereabouts of the father in view of the requirement under Section 11 of the Act for service of notice to the parents of the child before appointment of a guardian. The appellant, having refused to do so, the court dismissed her guardianship application. The appellant's appeal before the High Court was dismissed in limine, on the reasoning that her allegation that she is a single mother could only be decided after notice is issued to the father; that a natural father could have an interest in the welfare and custody of his child even if there is no marriage; and that no case can be decided in the absence of a necessary party.

It was contended on behalf of the State that Section 11 requires a notice to be given to the "parents" of a minor before a guardian is appointed; and that as postulated by Section 19, a guardian cannot be appointed if the father of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. The impugned judgment is, therefore, in accordance with the Act and should be upheld.

Allowing the appeal of the appellant mother, the Supreme Court

Held:

An analysis of the law relating to custody and guardianship of children bom outside wedlock in various jurisdictions indicates that the preponderant position is that it is the unwed mother who possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child. This analysis should assist us in a meaningful, dynamic and enduring interpretation of the law as it exists in India.

The predominant legal thought in different civil and common law jurisdictions spanning the globe as well as in different statutes within India is to bestow guardianship and related rights to the mother of a child born outside of wedlock. Avowedly, the mother is best suited to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word "mamta". Furthermore, recognising her maternity would obviate the necessity of determining paternity. In situations such as this, where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the well-being of the child. (Paras 17 and 18)

In a case where one of the parents petitions the court for appointment as guardian of her child, the provisions of Section 11 would not be directly applicable. Section 11 applies to a situation where the guardianship of a child is sought by a third party, thereby making it essential for the welfare of the child being given in adoption to garner the views of the child's natural parents. The views of an uninvolved father are not essential, to protect the interests of a child born out of wedlock and being raised solely by his/her mother. The father's right to be involved in his child's life may be taken away if Section 11 is read in such a manner that he is not given notice, but given his lack of involvement in the child's life, there is no reason to prioritise his rights over those of the mother or her child. The sole factor for consideration is the welfare of the minor child, regardless of the rights of the parents. Section 11 is purely procedural and there is no harm or mischief in relaxing its requirements to attain the intendment of the Act. Given that the term "parent" is not defined in the Act, it has to be interpreted that in the case of illegitimate children whose sole caregiver is one of his/her parents, to principally mean that parent alone.(Paras 21, 24 and 25)

Laxmi Kant Pandey v. Union of India, 1985 Supp SCC 701; Githa Hariharan v. RBI, (1999) 2 SCC 228, relied on

Guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. The uninvolved parent is therefore not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate. There is thus no mandatory and inflexible procedural requirement of notice to be served to the putative father in connection with a guardianship or custody petition preferred by the natural mother of the child of whom she is the sole caregiver. This should not be misunderstood as having given the imprimatur to an attempt by one of the spouses to unilaterally seek custody of a child from the marriage behind the back of other spouse.

(Paras 24 and 25)

The appellant has taken care to clarify that should her son's father evince any interest in his son, she would not object to his participation in the litigation, or in the event of its culmination, for the custody issue to be revisited. Although the Guardian Court needs no such concession, the mother's intent in insisting that the father [of her child born outside of wedlock] should not be publicly notified seems not to be unreasonable. It is imperative that the rights of the mother must also be given due consideration. The appellant mother's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. As the intention of the Act is to protect the welfare of the child, the applicability of Section 11 would have to be read accordingly. In the

present case, there is no indication that the welfare of the child would be undermined if the appellant is not compelled to disclose the identity of the father, or that court notice is mandatory in the child's interest. On the contrary, this may well protect the child from social stigma and needless controversy.

(Paras 18, 20 and 22)

However, implicit in the notion and width of welfare of the child, as one of its primary concomitants, is the right of the child to know the identity of his or her parents. This right has now found unquestionable recognition in the Convention on the Rights of the Child, which India has acceded to on 11-11-1992. In order to secure and safeguard the child's right to know the identity of his parents is not vitiated, undermined, compromised or jeopardised, the Supreme Court interviewed the appellant and impressed upon her the need to disclose the name of the father to her son. She has disclosed his name, along with some particulars to the Court; she states that she has no further information about him. These particulars have been placed in an envelope and duly sealed, and may be read pursuant only to a specific direction of the Supreme Court. (Paras 26 and 27)

It is a perturbing fact that the appellant has not obtained a birth certificate for her son who is nearly five years old. This is bound to create problems for the child in the future. In this regard, the appellant has not sought any relief either before the Supreme Court or before any of the courts below. It is a misplaced assumption in the law as it is presently perceived that the issuance of a birth certificate would be a logical corollary to the appellant succeeding in her guardianship petition. Owing to curial fiat, it is no longer necessary to state the name of the father in applications seeking admission of children to school, as well as for obtaining a passport for a minor child. However, in both these cases, it may still remain necessary to furnish a birth certificate. The law is dynamic and is expected to diligently keep pace with time and the legal conundrums and enigmas it presents. The identity of the mother is never in doubt. Accordingly, it is directed that if a single parent/unwed mother applies for the issuance of a birth certificate for a child borri from her womb, the authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the birth certificate, unless there is a court direction to the contrary. It is the responsibility of the State to ensure that no citizen suffers any inconvenience or disadvantage merely because the parents fail or neglect to register the birth. Nay, it is the duty of the State to take requisite steps for recording every birth of every citizen. To remove any possible doubt, the direction pertaining to issuance of the birth certificate is intendedly not restricted to the circumstances or the parties before the Supreme Court. (Para 28)

Accordingly, the Guardian Court is directed to recall the dismissal order passed by it and thereafter consider the appellant's application for guardianship expeditiously without requiring notice to be given to the putative father of the child. (Para 30)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Vikramajit Sen.— A legal nodus of seminal significance and of prosaic procedural origination presents itself before us. The conundrum is whether it is imperative for an unwed mother to specifically notify the putative father of the child whom she has given birth to, in her petition for appointment as the guardian of her child. The common perception would be that three competing legal interests would arise, namely, of the mother and the father and the child. We think that it is only the last one which is conclusive, since the parents in actuality have only legal obligations. A child, as has been ubiquitously articulated in different legal forums, is not a chattel or a ball to be shuttled or shunted from one parent to the other. The Court exercises parens patriae jurisdiction in custody

or guardianship wrangles; it steps in to secure the welfare of the hapless child of two adults whose personal differences and animosity has taken precedence over the future of their child.

2. Leave granted. This appeal is directed against the judgment dated 8-8-2011[6] delivered by the High Court of Delhi, which has dismissed the first appeal of the appellant, who is an unwed mother, holding that her guardianship application cannot be entertained unless she discloses the name and address of the father of her child, thereby enabling the Court to issue process to him. As per the appellant's request, her identity and personal details as well as those of her son have not been revealed herein.

3. The appellant, who adheres to the Christian faith, is well-educated, gainfully employed and financially secure. She gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. Desirous of making her son her nominee in all her savings and other insurance policies, she took steps in this direction, but was informed that she must either declare the name of the father or get a guardianship/adoption certificate from the court. She thereupon filed an application under Section 7 of the Guardians and Wards Act, 1890 (the Act) before the Guardian Court for declaring her the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. The appellant has published a notice of the petition in a daily newspaper, namely, VirArjun, Delhi edition but is strongly averse to naming the father. She has filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application on 19-4-2011. The appellant's appeal before the High Court was dismissed in limine, on the reasoning that her allegation that she is a single mother could only be decided after notice is issued to the father; that a natural father could have an interest in the welfare and custody of his child even if there is no marriage; and that no case can be decided in the absence of a necessary party.

4. Ms Indu Malhotra, learned Senior Counsel for the appellant, has vehemently argued before us that the appellant does not want the future of her child to be marred by any controversy regarding his paternity, which would indubitably result should the father refuse to acknowledge the child as his own. This is a brooding reality as the father is already married and any publicity as to a declaration of his fathering a child out of wedlock would have pernicious repercussions to his present family. There would be severe social complications for her and her child. As per Section 7 of the Act, the interest of the minor is the only relevant factor for appointing of a guardian, and the rights of the mother and father are subservient thereto. In this scenario, the interest of the child would be best served by immediately appointing the appellant as the guardian. Furthermore, it is also pressed to the fore that her own fundamental right to privacy will be violated if she is compelled to disclose the name and particulars of the father of her child. Ms Malhotra has painstakingly argued this appeal, fully cognizant that the question that arises is of far-reaching dimensions. It is this very feature that convinced us of the expediency of appointing amicus curiae, and Mr Sidharth Luthra has discharged these onerous duties zealously, for which we must immediately record our indebtedness.

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6 ABC v. State (NCT of Delhi), FAO No. 346 of 2011, 2011 SCC OnLine Del 5632

5. It would be pertinent to succinctly consider the Guardians and Wards Act, 1890. The Act, which applies to the Christians in India, lays down the procedure by which guardians are to be appointed by the jurisdictional court. Sections 7, 11 and 19 deserve extraction, for facility of reference:

"7. Power of the court to make order as to guardianship.—(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act." (emphasis supplied)

6. The details of the form of application are contained in Section 10 and the procedure that applies to a guardianship application is prescribed in Section 11:

"11. Procedure on admission of application.—(1) If the court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing—

(a) to be served in the manner directed in the Code of Civil Procedure, 1882 (14 of 1882) on—

(i) the parents of the minor if they are residing in any State to which this Act extends;

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor;

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant; and

(iv) any other person to whom, in the opinion of the court, special notice of the application should be given; and

(b) to be posted on some conspicuous part of the courthouse, and of the residence of the minor, and otherwise published in such manner as the court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The State Government may, by general or special order, require that, when any part of the property described in a petition under Section 10 sub-section (1), is land of which a Court of Wards could assume the superintendence, the court shall also cause a notice as aforesaid to be served on the Collector in whose

district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the court or the Collector for the service or publication of any notice served or published under sub-section (2)." (emphasis supplied)

7. Section 19 is of significance, even though the infant son does not independently own or possess any property, in that it specifically alludes to the father of a minor. It reads thus:

"19. Guardian not to be appointed by the court in certain cases.— Nothing in this Chapter shall authorise the court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

(a) of a minor who is a married female and whose husband is not, in the opinion of court, unfit to be guardian of her person; or

(b) of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor." (emphasis supplied)

8. We must immediately underscore the difference in nomenclature i.e. "parents" in Section 11 and "father" in Section 19, which we think will be perilous to ignore.

9. It is contended on behalf of the State that Section 11 requires a notice to be given to the "parents" of a minor before a guardian is appointed; and that as postulated by Section 19, a guardian cannot be appointed if the father of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. The impugned judgment[1] is, therefore, in accordance with the Act and should be upheld. It seems to us that this interpretation does not impart comprehensive significance to Section 7, which is the quintessence of the Act. However, before discussing the intendment and interpretation of the Act, it would be helpful to appreciate the manner in which the same issue has been dealt with in other statutes and spanning different legal systems across the globe.

10. Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan Law accords the custody of illegitimate children to the mother and her relatives. The law follows the principle that the maternity of a child is established in the woman who gives birth to it, irrespective of the lawfulness of her connection with the begetter. However, paternity is inherently nebulous especially where the child is not an offspring of marriage. Furthermore, as per Section 8 of the Succession Act, 1925, which applies to the Christians in India, the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother is domiciled. This indicates that priority, preference and pre-eminence is given to the mother over the father of the child concerned.

11. In the United Kingdom, the Children Act, 1989 allocates parental responsibility, which includes all rights, duties, powers, responsibilities and authority of a parent over the child and his/her property. According to Section 2(2) of that Act, parental custody of a child born of unwed parents is with the mother in all cases, and additionally with the father provided he has acquired responsibility in accordance with the provisions of the Act. To acquire responsibility, he would have to register as the child's father, execute a parental responsibility agreement with the mother or obtain a court order giving him parental responsibility over the child.

12. In USA, each State has different child custody laws but predominantly the mother has full legal and physical custody from the time the child is born. Unless an unmarried father establishes his paternity over the child it is generally difficult for him to defeat or overwhelm the preferential claims of the mother to the custody. However, some States assume that both the parents who sign the child's birth certificate have joint custody, regardless of whether they are married.

13. In Ireland, Section 6(4) of the Guardianship of Infants Act, 1964 ordains — "The mother of an illegitimate infant shall be guardian of the infant". Unless the mother agrees to sign a statutory declaration, an unmarried father must apply to the court in order to become a legal guardian of his child.

14. Article 176 of the Family Code of the Philippines explicitly provides that "illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code". This position obtains regardless of whether the father admits paternity. In 2004, the Supreme Court of the Philippines in Joey D. Briones v. Maricel P. Miguel[7] held that an illegitimate child is under the sole parental authority of the mother.

15. The law in New Zealand, as laid out in Section 17 of the Care of Children Act, 2004, is that the mother of a child is the sole guardian if she is not married to, or in civil union with, or living as a de facto partner with the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child.

16. In South Africa, according to the Children's Act 38 of 2005, parental responsibility includes the responsibility and the right: (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. The father has full parental responsibility if he is married to the mother, or if he was married to her at the time of the child's conception, or at the time of the child's birth or any time in between, or if at the time of the child's birth he was living with the mother in a permanent life partnership, or if he (i) consents to be identified or successfully applies in terms of Section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

17. This conspectus indicates the preponderant position that it is the unwed mother who possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child. This analysis

7 G.R. No. 156343, order dated 18-10-2004 (SC Philippines)

should assist us in a meaningful, dynamic and enduring interpretation of the law as it exists in India.

18. It is thus abundantly clear that the predominant legal thought in different civil and common law jurisdictions spanning the globe as well as in different statutes within India is to bestow guardianship and related rights to the mother of a child born outside of wedlock. Avowedly, the mother is best suited to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word "mamta". Furthermore, recognising her maternity would obviate the necessity of determining paternity. In situations such as this, where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the well-being of the child. The appellant has taken care to clarify that should her son's father evince any interest in his son, she would not object to his participation in the litigation, or in the event of its culmination, for the custody issue to be revisited. Although the Guardian Court needs no such concession, the mother's intent in insisting that the father should not be publically notified seems to us not to be unreasonable.

19. We feel it necessary to add that the purpose of our analysis of the law in other countries was to arrive at a holistic understanding of what a variety of jurisdictions felt would be in the best interest of the child. It was not, as the learned counsel suggested, to understand the tenets of Christian law. India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before us is to interpret the law of the land, not in the light of the tenets of the parties' religion but in keeping with the legislative intent and prevailing case law.

20. It is imperative that the rights of the mother must also be given due consideration. As Ms Malhotra, learned Senior Counsel for the appellant, has eloquently argued, the .appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. Any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world; this does not appear to be so in the present case, on a perusal of the pleading as they presently portray. Furthermore, Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers. It would be apposite for us to underscore that our directive principles envision the existence of a Uniform Civil Code, but this remains an unaddressed constitutional expectation.

21. We recognise that the father's right to be involved in his child's life may be taken away if Section 11 is read in such a manner that he is not given notice, but given his lack of involvement in the child's life, we find no reason to prioritise his rights over those of the mother or her child. Additionally, given that the appellant has already issued notice to the public in general by way of a publication in a national daily and has submitted an affidavit stating that her guardianship rights may be revoked, altered or amended if at any point the father of the child objects to them, the rights, nay, duty of the father have been more than adequately protected.

22. The issue at hand is the interpretation of Section 11 of the Act. As the intention of the Act is to protect the welfare of the child, the applicability of Section 11 would have to be read accordingly. In Laxmi Kant Pandey v. Union of India[8], this Court prohibited notice of guardianship applications from being issued to the biological parents of a child in order to prevent them from tracing the adoptive parents and the child. Although the Guardians and Wards Act was not directly attracted in that case, nevertheless it is important as it reiterates that the welfare of the child takes priority above all else, including the rights of the parents. In the present case we do not find any indication that the welfare of the child would be undermined if the appellant is not compelled to disclose the identity of the father, or that court notice is mandatory in the child's interest. On the contrary, we find that this may well protect the child from social stigma and needless controversy.

23. Even in the absence of Laxmi Kant Pandey", we are not like mariners in unchartered troubled seas. The observations of a three-Judge Bench of this Court in Githa Hariharan v. RBI4 wee readily recollected. RBI had refused to accept an application for a fixed deposit in the name of the child signed solely by the mother. In the context of Section 6 of the Hindu Minority and Guardianship Act as well as Section 19 of the Guardians and Wards Act, this Court had clarified that: (Githa Hariharan case4, SCC p. 239, para 16)

> *"76". ... in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be 'absent' for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act."* (emphasis in original)

This Court has construed the word "after" in Section 6(a) of the Hindu Minority and Guardianship Act as meaning " 'in the absence of — be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise". (Githa Hariharan case[9], SCC p. 246, para 46)

Thus, this Court interpreted the legislation before it in a manner conducive to granting the mother, who was the only involved parent, guardianship rights over the child.

24. In a case where one of the parents petitions the Court for appointment as guardian of her child, we think that the provisions of Section 11 would not be directly applicable. It seems to us that Section 11 applies to a situation where the guardianship of a child is sought by a third party, thereby making it essential for the welfare of the child being given in adoption to garner the views of the child's natural parents. The views of an uninvolved father are not essenial, in our opinion, to protect the interests of a child born out of wedlock and being raised solely by his/her mother. We may reiterate that even in the face of the express terms of the statute, this Court had in Laxmi Kant Pandey3 directed that a notice should not be sent to the parents, as that was likely to jeopardise the future and interest of the child who was being adopted. The sole factor for consideration before us, therefore, is the welfare of the minor child, regardless of the rights of the

8 1985 Supp SCC 701
9 (1999) 2 SCC 228

parents. We should not be misunderstood as having given our imprimatur to an attempt by one of the spouses to unilaterally seek custody of a child from the marriage behind the back of other spouse. The apprehensions of Mr Luthra, learned Amicus Curiae, are accordingly addressed.

25. Section 11 is purely procedural; we see no harm or mischief in relaxing its requirements to attain the intendment of the Act. Given that the term "parent" is not defined in the Act, we interpret it, in the case of illegitimate children whose sole caregiver is one of his/her parents, to principally mean that parent alone. Guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. The uninvolved parent is therefore not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate. There is thus no mandatory and inflexible procedural requirement of notice to be served to the putative father in connection with a guardianship or custody petition preferred by the natural mother of the child of whom she is the sole caregiver.

26. Implicit in the notion and width of welfare of the child, as one of its primary concomitants, is the right of the child to know the identity of his or her parents. This right has now found unquestionable recognition in the Convention on the Rights of the Child, which India has acceded to on 11-11-1992. This Convention pointedly makes mention, inter alia, to the Universal Declaration of Human Rights. For facility of reference, the salient provisions are reproduced:

"Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

* * *

Article 3

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

* * *

Article 7

1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*

* * *

Article 9

1. *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

2. *In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*

3. *States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*

* * *

Article 12

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

* * *

Article 18

1. *States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*

* * *

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) *Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the*

child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

* * *

Article 27

* * *

2. *The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.*

* * *

4. *States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.*"

27. In Laxmi Kant Pandey[3], this Court duly noted the provisions of the Convention on the Rights of the Child, but in the general context of adoption of children and, in particular, regarding the necessity to involve the natural parents in the consequent guardianship/custody proceedings. The provisions of the Convention which we have extracted indeed reiterate the settled legal position that the welfare of the child is of paramount consideration vis-a-vis the perceived rights of parents not only so far as the law in India is concerned, but preponderantly in all jurisdictions across the globe. We are mindful of the fact that we are presently not confronted with a custody conflict and, therefore, there is no reason whatsoever to even contemplate the competence or otherwise of the appellant as custodian of the interests and welfare of her child. However, we would be loathe to lose perspective of our parens patriae obligations, and in that regard we need to ensure that the child's right to know the identity of his parents is not vitiated, undermined, compromised or jeopardised. In order to secure and safeguard this right, we . have interviewed the appellant and impressed upon her the need to disclose the name of the father to her son. She has disclosed his name, along with some particulars to us; she states that she has no further information about him. These particulars have been placed in an envelope and duly sealed, and may be read only pursuant to a specific direction of this Court.

28. We are greatly perturbed by the fact that the appellant has not obtained a birth certificate for her son who is nearly five years old. This is bound to create problems for the child in the future. In this regard, the appellant has not sought any relief either before us or before any of the courts below. It is a misplaced assumption in the law as it is presently perceived that the issuance of a birth certificate would be a logical corollary to the appellant succeeding in her guardianship petition. It may be recalled that owing to curial fiat*, it is no longer necessary to state the name of the father in applications seeking admission of children to school, as well as for obtaining a passport for a minor child. However, in both these cases, it may still remain necessary to furnish a birth certificate. The law is dynamic and is expected to diligently keep pace with time and

the legal conundrums and enigmas it presents. There is no gainsaying that the identity of the mother is never in doubt. Accordingly, we direct that if a single parent/unwed mother applies for the issuance of a birth certificate for a child born from her womb, the authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the birth certificate, unless there is a court direction to the contrary. Trite though it is, yet we emphasise that it is the responsibility of the State to ensure that no citizen suffers any inconvenience or disadvantage merely because the parents fail or neglect to register the birth. Nay, it is the duty of the State to take requisite steps for recording every birth of every citizen. To remove any possible doubt, the direction pertaining to issuance of the birth certificate is intendedly not restricted to the circumstances or the parties before us.

29. We think it necessary to also underscore the fact that the Guardian Court as well as the High Court which was in seisin of the appeal ought not to have lost sight of the fact that they had been called upon to discharge their parens patriae jurisdiction. Upon a guardianship petition being laid before the Court, the child concerned ceases to be in the exclusive custody of the parents; thereafter, until the attainment of majority, the child continues in curial curatorship. Having received knowledge of a situation that vitally affected the future and welfare of a child, the courts below could be seen as having been derelict in their duty in merely dismissing the petition without considering all the problems, complexities and complications concerning the child brought within its portals.

30. The appeal is allowed. The Guardian Court is directed to recall the dismissal order passed by it and thereafter consider the appellant's application for guardianship expeditiously without requiring notice to be given to the putative father of the child.

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* Ed.: See the declaration in this regard in Githa Hariharan v. RBI, (1999) 2 SCC 228, extracted hereinabove in para 23 at SCC p. 14b-f. See also Ishman v. Regl. Passport Office, 2011 SCC Online Del 5630.

LANDMARK JUDGMENTS ON DOMESTIC VIOLENCE

PRAVEEN SINGH RAMAKANT VERSUS NEELAM PRAVEEN SINGH BHADAURIYA

Supreme Court of India

Bench : Hon'ble Mrs. Justice R Banumathi

Praveen Singh Ramakant ...Appellant(S)
Versus
Neelam Praveen Singh Bhadauriya ...Repondent(S)

CIVIL APPEAL NO. 4541 OF 2019

(@ SPECIAL LEAVE PETITION (CIVIL) NO. 30555 OF 2013)

Decided on 1 May, 2019

JUDGMENT

Hon'ble Mrs. Justice R. Banumathi.—

Leave granted.

2. Being aggrieved by the judgment and order dated 29.05.2013 passed by the High Court of Allahabad in Second Appeal No. 641 of 2013, in which the High Court has dismissed the appeal preferred by the appellant and thereby declining to dissolve the marriage.

3. The appellant and the respondent were married on 07.05.1998. A girl child was born out of the said wedlock and she is now aged about 18 years. Due to strained relationship, the parties are living separately. The appellant-husband has filed a suit for dissolution of marriage Signature Not Verified before the Family Court, Mumbai, which was Digitally signed by MADHU BALA Date: 2019.05.06 15:32:18 IST Reason: subsequently transferred to Etawah District Court, Uttar Pradesh. The Trial Court dismissed the divorce petition filed by the appellant by judgment dated 09.11.2009. The appeal preferred by the appellant was also dismissed by the District Court by the judgment dated 29.11.2012. The High Court also dismissed the second appeal preferred by the appellant-husband. Being aggrieved, the appellant is before us.

4. We have heard Mr. Ashok Mathur, learned counsel appearing on behalf of the appellant as well as Mr. Rajesh Aggarwal, learned counsel appearing on behalf of the respondent.

5. When the matter was pending before this Court, the parties were referred to mediation and the parties have amicably settled the matter. The parties have also filed a separate application agreeing for dissolution of marriage by mutual consent invoking the powers under Article 142 of Constitution of India. As per the settlement between the parties, the appellant-husband has agreed to pay Rs.10,00,000/- (Rupees ten lakhs) to the respondent-wife (paid today by way of post-dated cheque No. 000278 drawn in favour of respondent-wife viz. Neelam Singh dated 11th May, 2019 drawn on Bank of Baroda) in full and final settlement of her claims towards monthly maintenance past, present and future and in full quit of all other claims. Additionally, the appellant has agreed to pay Rs.3,00,000/- by way of FDR in the name of the daughter payable within a period of three months from today. He has also agreed to contribute another one lakh at the time of solemnization

of the marriage of the daughter. The parties have also agreed that all the pending cases between the parties shall be withdrawn or they will agree for quashing the respective cases.

6. Since the parties have amicably settled the matter, considering the facts and circumstances of the case, in exercise of our power under Article 142 of the Constitution of India, the marriage of the appellant and the respondent solemnized on 07.05.1998 is dissolved. The following terms of Compromise between the parties shall form part of this judgment which reads as under:

"4. Both the parties hereto, had earlier arrived at an amicable mutual settlement on the following terms and conditions for divorce by mutual consent, before the mediation centre.

5. It was agreed between the parties that they will pray for withdrawing/quashing before the Hon'ble Court/s to dispose of/quash the following pending cases, as mutually settled:

i. In the Court of CJM, Etawah, UP Case No. 1537/2009 Neelam vs. Pravin (under Section 125 CrPC) including its appeal before Allahabad High Court.

ii. In the Court of ACJM, Etawah, Case No. 186 of 2009 Neelam Vs. Pravin (under Domestic Violence Act)

iii. Before Special Anti Dakait Magistrate Case No. 323 of 2006 Praveen Vs. Ramender.

iv. Case under Section 396 IPC pending before Hon'ble High Court of Allahabad, Uttar Pradesh.

vi. Before ACJM , Etawah, Case No. 506 of 2002 Neelam Vs.Pravin & Others under Section 406 IPC vii. Any other case amongst the parties before any other courts, if any.

6. The parties shall pray before the Hon'ble Court for the passing of the decree of divorce by mutual consent invoking the powers under Article 142 of the Constitution of India.

7. The petitioner-husband had agreed to pay Rs.10,00,000/-(Rupees Ten Lacs only) to the respondent-wife viz. full and final settlement of all her claims towards monthly maintenance past present and future, stridhan, belongings and any other claim whatsoever.

8. The applicant wife desired a further sum for the marriage and educational expenses for her daughter to be deposited in the shape of FDR in the name of daughter "Janhavi Singh". When the said aspect was brought to the knowledge of this Hon'ble Court in last 2 hearings, it was orally agreed upon by the opposite side; and the matter was adjourned for filing the necessary documents.

8A. One FDR of Rs.3,00,000/- (Rupees three lakhs) shall be paid to daughter within three months and Rs.1,00,000/-(Rupees one lakh) shall be paid at the time of marriage of the daughter".

9. So ar as other cases are concerned, as and when the application is made before the concerned Court, the concerned Court shall pass the appropriate orders in view of the settlement arrived at between the parties.

10. In case of non-compliance of the terms of compromise, the parties would be liable for contempt of this Court in addition to other remedies available under law.

11. The Registry shall draft the decree accordingly.

12. The appeal is disposed of in above terms.

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SAMIR VIDYASAGAR BHARDWAJ VERSUS NANDITA SAMIR BHARDWAJ

Supreme Court of India

Bench : Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mrs. Justice R. Banumathi

Samir Vidyasagar Bhardwaj ...Appellant
Versus
Nandita Samir Bhardwaj ...Respondent

CRIMINAL APPEAL NO. 6450 OF 2017
(Arising out of SLP(C) No.4385 of 2017)

Decided on : 09th May, 2017

The respondent filed a petition under Sec 27(1)(d) of the Special Marriage Act for divorce against the appellant in the family court in Mumbai. The respondent sought relief - directing the appellant to move out of the matrimonial home and hand over the vacant possession of the same to respondent and to pay a maintenance of Rs.1,00,000 and other consequential reliefs apart from seeking dissolution of marriage. It is a proved fact that the concerned flat was purchased in the joint names of the appellant and respondent . The family court arrived at a finding that prima facie material was available on record to accept the allegation of the respondent wife on domestic violence . judge concerned had exercised his discretion under Section 19(1)(b) of the Domestic Violence Act which provides that the Magistrate on being satisfied that domestic violence has taken place can remove the spouse from the shared household which in our opinion he has rightly done.[Para 11]. The appellant husband appealed to High Court contending that the final relief sought in the main petition could not have been granted at interim stage and also being co-owner of the flat, he cannot be ousted. The High Court declined to interfere with the order. Supreme Court also decided tthat the family court has correctly applied its discretion on Section 19(1)(b) of DV Act.

JUDGMENT

Hon'ble Mrs. Justice R. Banumathi :—

Leave granted.

2. An order passed by the High Court of Bombay in Writ Petition(C) No. 169 of 2017 dated 11.01.2017 wherein the High Court affirmed the interim order passed by the Family Court in and by which the appellant-husband has been directed to remove himself from his own home and not to visit there until the divorce petition is finally decided is under challenge.

3. This case presents a very unpleasant tale of a couple having daughters who are in their early twenties witnessing a bitter matrimonial battle between their parents. The appellant and the respondent herein tied nuptial knot on 05.05.1992. The couple resided in two flats being Flat No. 102 and Flat No. 103 situated in the building known as "Hi Ville" 29th Road, Bandra(West), Mumbai. The said two flats were sold by the couple and they purchased a flat bearing No. 201 situated in "Aashna" Building, 8, St. Martin Road, Bandra (West) Mumbai by way of Agreement

for Sale dated 22.11.2010. The said flat was purchased in the joint names of the appellant and the respondent herein where they have been residing with their two daughters till date.

4. After more than two decades of marital life, on 09.07.2015 respondent-wife filed a petition under Section 27(1)(d) of the Special Marriage Act for divorce against the appellant being Petition No. A-1873 of 2015 in the Family Court at Bandra, Mumbai. The respondent has sought various other reliefs including a direction to be given to the appellant to move out of the matrimonial home and handover vacant and peaceful possession of the same to the respondent and to pay a maintenance of Rs.1,00,000/- and other consequential reliefs apart from seeking dissolution of marriage. An application being I.A. No.162 of 2015 was filed by the respondent-wife under Section 19(1)(b) of the Protection of Women from Domestic Violence Act, 2005 (for short 'the Domestic Violence Act') praying for issuance of mandatory injunction against the appellant-husband to move out of the matrimonial house and handing over the vacant and peaceful possession of the house. In addition to the above, she had also sought for alimony/maintenance and the expenses of marriage of her daughters.

5. When the application was taken up by the Family Court, the respondent-wife did not press for other reliefs and she pressed only for the relief of mandatory injunction to direct the appellant-husband to move out of the matrimonial house. The application was resisted by the appellant herein denying all the allegations stating therein that identical relief with regard to injunction having been sought in the Divorce Petition, the same cannot be granted at an interim stage. The appellant had also contended before the Family Court that he being the owner of the flat, cannot be deprived from using his house. It is also the case of the appellant-husband that the allegations made by the respondent-wife are not supported by way of anything on record and that the wife owns a flat jointly with her mother at Tardeo and another one on pagadi basis.

6. The Divorce Petition has been filed on the ground of cruelty and the respondent-wife had alleged in the application seeking interim relief that she had been subjected to mental and physical cruelty due to which living under one roof with the appellant-husband has become impossible. Even the daughters who have filed their respective affidavits have supported the stand taken by their mother namely the respondent. The counsel further stated that the husband was owing a flat jointly with his mother and is just five minutes walking distance from the matrimonial home and that no inconvenience would be caused to him.

7. The Family Court passed the interim order on 13.12.2016 directing the appellant-husband to remove himself out of the matrimonial house and not to visit the same till the decision of the divorce petition. Aggrieved by the interim order passed by the Family Court, the appellant-husband approached the High Court by way of a writ petition stating therein that final relief sought in the main petition could not have been granted at interim stage; he being a co-owner of the premises, he cannot be evicted from that premises which amounted to his virtual dispossession of the premises of which he was a co-owner. It was urged that there is no independent/corroborative evidence to support the claim of domestic violence and impugned order is harsher than temporary injunction.

8. Heard learned counsel for the parties.

9. The only issue to be addressed in this case is whether the order directing appellant-husband to remove himself from the matrimonial home of which he is a co-owner warrants interference.

10. It is an undisputed fact that the property is a shared household of the parties. The appellant-husband is working with the Taj Group of Hotels and the respondent-wife is working as an airhostess with the British Airways. As is seen from the organisations in which they are working, both the appellant and the respondent are independent and having their own source of income. We have gone through the allegations of domestic violence made not only by the respondent-wife but also in the affidavits filed by their grown up daughters wherein they have expressed their feelings in view of the dispute between their parents and also their feelings as to the conduct of their father at home. We do not propose to go into those averments in the affidavit sworn in by the daughters, lest it would prejudice either parties while contesting the main matter.

11. Section 19(1)(b) of the Protection of Women Domestic Violence Act provides that the Court may direct the appellant-husband to remove himself from the shared household. The order passed under Section 19 of the Act seeks to maintain continued and undisturbed residence of the aggrieved party within the shared household and in pursuance of same it directs the respondent to execute a bond with or without surety or secure an alternate accommodation for the aggrieved party and pay the rent for the same and restrains the respondent from or renouncing property rights or valuable security of the aggrieved party.

12. The Family Court arrived at a finding that prima facie material was available on record to accept the allegation of the respondent-wife on domestic violence wherein the concerned Judge had exercised his discretion under Section 19(1)(b) of the Domestic Violence Act which provides that the Magistrate on being satisfied that domestic violence has taken place can remove the spouse from the shared household which in our opinion he has rightly done. Exercise of discretion by Family Court cannot be said to be perverse warranting interference. The High Court while declining to interfere with the order has also considered the factual and legal position.

13. Having gone through the orders of the High Court and the Family Court and considering the fact that the daughters are grown up, we are not inclined to exercise our discretion under Article 136 of the Constitution of India at the interlocutory stage. The appeal is dismissed. We direct the Family Court, Bandra, Mumbai to expedite the hearing in the Divorce Petition and dispose the same expeditiously. We make it clear that we have not expressed any opinion on the merits of the matter. The Family Court shall try and dispose of the case uninfluenced by any observations or findings either in the impugned order or this order. No costs.

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LALITA TOPPO VERSUS THE STATE OF JHARKHAND & ANR.

Supreme Court of India

Bench : Hon'ble Mr. Justice Ranjan Gogoi, CJ, Hon'ble Mr. Justice Uday Umesh Lalit and Hon'ble Mr. Justice K.M. Joseph

Lalita Toppo ...Appellant(S)
Versus
The State Of Jharkhand & Anr. ...Respondent(S)

CRIMINAL APPEAL NO(S). 1656/2015

Decided on : 30th October, 2018

The appellant Lalita Toppo claimed maintenance under the provisions of the Protection of Women from Domestic Violence Act, 2011 despite the fact that she was not a legally wedded wife and thus was not eligible to claim maintenance under Section 125 of the Code of Criminal Procedure, 1973.

Held that the maintenance can be claimed under Domestic Violence Act, 2005 even if the claimant is not a legally wedded wife . Such relief cannot be allowed under section 125 of CrPC.

The bench expanded the definition of the term "domestic violence" contained in Section 3(a) of the DVC Act, 2015 to include economic abuse as domestic violence.

Further, the court held that the estranged wife or live-in-partner would be entitled to extra relief under the provisions in Section 3(a) of the DVC Act, 2015 than what is provided under Section 125 of the CrPC i.e. to a shared household also.

ORDER

1. The appellant before us would have an efficacious remedy to seek maintenance under the provisions of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to "DVC Act, 2005") even assuming that she is not the legally wedded wife and, therefore, not entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973.

"3. Definition of domestic violence.- For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

(a) harms or injures or endangers the health, safety, life, limp or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or ....."

2. What would be significant to note is that economic abuse also constitutes domestic violence and economic abuse has been defined by Explanation I(iv) to Section 3 of the DVC Act, 2005 to mean:

"(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any,

stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household."

3. In fact, under the provisions of the DVC Act, 2005 the victim i.e. estranged wife or live-in-partner would be entitled to more relief than what is contemplated under Section 125 of the Code of Criminal Procedure, 1973, namely, to a shared household also.

4. The questions referred to us by the Referral Order were formulated on the basis of the decisions of this court rendered in Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another[1] and Savitaben Somabhai Bhatiya vs.State of Gujarat and others[2] which were rendered prior to the coming into force of the DVC Act, 2005. In view of what has been stated herein before, it is, therefore, our considered view that the questions referred would not require any answer. We, therefore, decline to answer the said questions. The appellant is left with the remedy of approaching the appropriate Forum under the provisions of the DVC Act, 2005, if so advised. If in the event the appellant moves the appropriate

5. The appeal is disposed of in the above terms.

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1 (1988) 1 SCC 530
2 (2005) 3 SCC 636

AJAY KUMAR VERSUS LATA@ SHARUTI

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice D.Y. Chandrachud and Hon'ble Mr. Justice Hemant Gupta

Ajay Kumar Appellant(S)
Versus
Lata @ Sharuti & Ors. Respondent(S)

CRIMINAL APPEAL NO(S). 617 OF 2019
(@SLP(Crl.) No(s). 652 of 2019)

Decided on 8 April, 2019

ORDER

Leave granted.

This appeal arises from a judgment of a learned Single Judge of the High Court of Punjab and Haryana dated 10 October 2018. The High Court dismissed a petition against the judgment of the Additional Sessions Judge, Panipat confirming an interim order for the award of maintenance to the first respondent and her minor child under the provisions of the Protection of Women from Domestic Violence Act, 2005[3].

The complaint alleges that at the death of Vijay Kumar, the first respondent was pregnant and that she gave birth to a child on 31 January 2013. The travails of the first respondent are alleged to have commenced after the death of her spouse and she was not permitted to reside in her matrimonial home.

The learned Trial Judge by an order dated 3 July 2015 granted monthly maintenance in the amount of Rs 4,000 to the first respondent and Rs 2,000 to the second respondent. The award of maintenance was directed against the appellant who was carrying on the above business together with the deceased spouse of the first respondent. This order of the Judicial Magistrate, First Class, Panipat dated 3 July 2015 was confirmed by the Additional Sessions Judge, Panipat on 14 August 2018. The High Court, in a petition filed by the appellant, affirmed the view. Hence these proceedings came to be instituted under Article 136 of the Constitution of India.

The submission which has been urged on behalf of the appellant is that there was no basis under the provisions of the Act to fasten liability on the appellant, who is the brother of the deceased spouse of the first respondent. Learned counsel submitted that the sole basis on which liability has been fastened is that the appellant and his deceased brother carried on a joint business. It was urged that this cannot furnish any lawful basis to direct the appellant to meet the award of maintenance.

3 "Act" The first respondent filed a petition under Section 12 of the Act inter alia for the purpose of seeking an award of maintenance. The complaint contains a recital of the fact that after her marriage, the complainant and her spouse resided at a house which constitutes ancestral Hindu Joint Family Property. She and her husband resided on the ground floor of the residential accommodation. The appellant and the deceased spouse of the first respondent jointly carried on a business of a kiryana store at Panipat from which, it has been alleged, each had an income of about Rs 30,000 per month.

On the other hand, learned counsel appearing on behalf of the respondents has relied upon the averments in the complaint and submitted that at this stage, there is no reason or justification for the Court to interfere under Article 136 of the Constitution of India particularly against an interlocutory order.

Section 12(1) provides that an aggrieved person may present an application to the Magistrate seeking one or more reliefs under the Act. Under the provisions of Section 20(1), the Magistrate while dealing with an application under sub- Section (1) of Section 12 is empowered to direct the respondent(s) to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence. This may include but is not limited to an order for maintenance of the aggrieved person as well as her children, if any, including an order under or in addition to an order for maintenance under Section 125 of the CrPC or any other law for the time being in force.

The expression "respondent" is defined in Section 2(q) as follows:-

> *2(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:*

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;

The substantive part of Section 2(q) indicates that the expression "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom relief has been sought. The proviso indicates that both, an aggrieved wife or a female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner, as the case may be.

Section 2(f) defines the expression "domestic relationship" thus:

> *2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;*
>
> *Section 2(f) defines the expression 'domestic relationship' to mean a relationship where two persons live or have lived together at any point of time in a shared household when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are members living together as a joint family.*

The expression "shared household" is defined in Section 2(s) as follows:-

> *2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a*

member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;

All these definitions indicate the width and amplitude of the intent of Parliament in creating both an obligation and a remedy in the terms of the enactment.

In the present case, at this stage, it would be sufficient to advert to the contents of paragraph 10 of the complaint which read as follows:-

> *"10. That the marriage between the Complainant No. 1 and Sh. Vijay Kumar Jindal was settled through Sh. Narender Jain S/o. Late Sh. Rameshwar Dass R/o Haryana School-Wali-Gali, VIII, Inder Garhi, Tehsil Gohana, Distt. Sonepat, and before marriage he (Mediator namely Sh. Narender Jain) told that previously there was a residential house situated near Railway Fathak, Jatal Road, Panipat, which was constructed by Sh. Mai Dhan (Grandfather of Sh. Vijay Kumar Jindal and Respondent No. 2) and after the death of said Sh. Mai Dhan, his son Sh. Brahmanand Jindal (Father of Sh. Vijay Kumar Jindal and Respondent No. 2) became the owner in possession of the said house and later on Sh. Brahmanand Jindal, sold away the said house and purchased H No. 149, Eight Marla Colony, Kranti Nagar, Near Radha Krishna Mandir, Panipat in the name of his wife Smt. Rajo Devi (Respondent No. 1) about 8 years ago. Thus the said house i.e. H No. 149, Eight Marla Colony, Kranti Nagar, Near Radha Krishna Mandir, Panipat is ancestral Joint Hindu Family property / residential house standing in the name of Respondent No. 1 qua the present complainants." In paragraph 12 and 13, it has been averred as follows:-*
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> *"12. That after marriage between the Complainant No. 1 and Sh. Vijay Kumar Jindal, the Respondents provided the ground floor of H No. 149, Eight Marla Colony, Kranti Nagar, Near Radha Krishna Mandir, Panipat to the and Sh. Vijay Kumar Jindal) and they kept all dowry articles, house hold articles etc. mentioned above in the said residential accommodation (ground floor of said house) and she (i.e. Complainant No. 1) also consummated her marriage with her husband in the Ground floor of said house and Kirti Jindal (Complainant No. 2) was born out of the said wedlock. It is pertinent to mention here that all dowry articles, istridhan, household articles, furniture etc. etc. are still kept in said house / matrimonial house of Complainant No. 1 and the golden ornaments and jewelry etc., all are yet in possession of the Respondents.*
>
> *13. That it is worthwhile to mention here that after the marriage of Complainant No. 1, both brother Sh. Vijay Kumar Jindal and Ajay Kumar Jindal were running their joint business of M/s. Ajay Kumar Vijay Kumar Kiryana Store, at Jatal Road, Sanjay Chowk Panipat, very smoothly and both brothers were taking / deciding Rs. 30,000/- P.M. each, out of the income of the said business, for the maintenance of their respective families. However after the death of Sh. Vijay Kumar, the Respondent No. 2 has been running the said business and the Complainants are equally entitled to the amount which the respondent No. 2 has been deducting from the said joint business or at least Rs. 30,000/- P.M. which the Complainant No. 1 has been receiving during the life time of Sh. Vijay Kumar Jindal." At the present stage, there are sufficient averments in the complaint to sustain the order for the award of interim maintenance. Paragraph 10 of*

the complaint prima facie indicates that the case of the complainants is that the house where the first respondent and her spouse resided, belong to a joint family. The appellant and his brother (who was the spouse of the first respondent and father of the second respondent) carried on a joint business. The appellant resided in the same household. Ultimately, whether the requirements of Section 2(f); Section 2(q); and Section 2(s) are fulfilled is a matter of evidence which will be adjudicated upon at the trial. At this stage, for the purpose of an interim order for maintenance, there was material which justifies the issuance of a direction in regard to the payment of maintenance.

However, we clarify that the present order as well as orders which have been passed by the courts below shall not come in the way of a final adjudication on the merits of the complaint in accordance with law.

The arrears shall be paid over within a period of four months from today by equal monthly installments.

The Appeal is, accordingly, disposed of. Pending application(s), if any, shall also stand disposed of.

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MAHENDRA PRASAD MEHTA VERSUS THE STATE OF BIHAR

Supreme Court of India

Bench : Hon'ble Mr. Justice Ranjan Gogoi

Rupali Devi … Appellant
Versus
State of Uttar Pradesh & Ors. … Respondents

CRIMINAL APPEAL NO.71 OF 2012

WITH
CRIMINAL APPEAL NO. 619 OF 2019
[Arising out of SLP(Crl.) No. 5695/2010]
CRIMINAL APPEAL NO. 620 OF 2019
[Arising out of SLP(Crl.) No. 8246/2010]
CRIMINAL APPEAL NO. 621 OF 2019
[Arising out of SLP(Crl.) No. 7387/2011]
CRIMINAL APPEAL NO. 622 OF 2019
[Arising out of SLP(Crl.) No. 5052/2014]
CRIMINAL APPEAL NO. 623 OF 2019
[Arising out of SLP(Crl.) No. 5139/2014]

Decided on 9 April, 2019

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi, CJI

1. "Whether a woman forced to leave her matrimonial home on account of acts and conduct that constitute cruelty can initiate and access the legal process within the jurisdiction of the courts where she is forced to take shelter with the Signature Not Verified Digitally signed by DEEPAK GUGLANI Date: 2019.04.09 17:17:30 IST Reason: parents or other family members". This is the precise question that arises for determination in this group of appeals.

2. The opinions of this Court on the aforesaid question being sharply divided, the present reference to a larger Bench has been made for consideration of the question indicated hereinabove.

3. In

(i) Y. Abraham Ajith and Others v. Inspector of Police, Chennai and Another (2004) 8 SCC 100.

(ii) Ramesh and Others v. State of Tamil Nadu (2005) 3 SCC

(iii) Manish Ratan and Others v. State of Madhya Pradesh and Another (2007) 1 SCC 262.

(iv) Amarendu Jyoti and Others v. State of Chhattisgarh and Others (2014) 12 SCC 362.

a view has been taken that if on account of cruelty committed to a wife in a matrimonial home she takes shelter in the parental home and if no specific act of commission of cruelty in the parental home can be attributed to the husband or his relatives, the initiation of proceedings

under Section 498A in the courts having jurisdiction in the area where the parental home is situated will not be permissible. The core fact that would be required to be noted in the above cases is that there were no allegations made on behalf of the aggrieved wife that any overt act of cruelty or harassment had been caused to her at the parental home after she had left the matrimonial home. It is in these circumstances that the view had been expressed in the above cases that the offence of cruelty having been committed in the matrimonial home the same does not amount to a continuing offence committed in the parental home to which place the aggrieved wife may have later shifted.

4. In Sujata Mukherjee v. Prashant Kumar Mukherjee (1997) 5 SCC 30; Sunita Kumari Kashyap v. State of Bihar and Another (2011) 11 SCC 301 and State of M.P. v. Suresh Kaushal & Anr. (2003) 11 SCC 126 a seemingly different view has been taken. However, the said view may appear to be based in the particular facts of each of the cases in question. For instance, in Sujata Mukherjee (Supra) there was a specific allegation that the husband, after committing acts of cruelty in the matrimonial home, had also gone to the parental house of the wife where she had taken shelter and had assaulted her there. On the said facts this court in Sujata Mukherjee (Supra) held that the offence is a continuing offence under Section 178 (c) of the Cr.P.C. In Sunita Kumari Kashyap (Supra), there was an allegation that the wife was illtreated by her husband who left her at her parental home and further that the husband had not made any enquiries about her thereafter. There was a further allegation that even when the wife had tried to contact the husband, he had not responded. In the said facts, this court took the view that the consequences of the offence under Section 498A have occurred at the parental home and, therefore, the court at that place would have jurisdiction to take cognizance of the offence alleged in view of Section 179 of the Cr.P.C. Similarly in State of M.P. vs. Suresh Kaushal (Supra) as the miscarriage was caused to the wife at Jabalpur, her parental home, on account of cruelty meted out to her in the matrimonial home, it was held that the court at the place of the parental home of the wife would have jurisdiction to entertain the complaint under Section 179 Cr.P.C.

5. The above two views which the learned referring bench had considered while making the present reference, as already noticed, were founded on the peculiar facts of the two sets of cases before the Court. It may be possible to sustain both the views in the light of the facts of the cases in which such view was rendered by this court. What confronts the court in the present case is however different. Whether in a case where cruelty had been committed in a matrimonial home by the husband or the relatives of the husband and the wife leaves the matrimonial home and takes shelter in the parental home located at a different place, would the courts situated at the place of the parental home of the wife have jurisdiction to entertain the complaint under Section 498A. This is in a situation where no overt act of cruelty or harassment is alleged to have been committed by the husband at the parental home where the wife had taken shelter.

6. A look at the provisions of Chapter XIII of the Code of Criminal Procedure, 1973 (Cr.P.C) dealing with the jurisdiction of the Criminal Court in inquires and trials will now be required. Section 177 of the Code of Criminal Procedure contemplates that "every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed". It is, therefore, clear that in the normal course, it is the court within whose local jurisdiction the offence is committed that would have the power and authority to take cognizance of the offence in question.

7. Sections 178 and 179 are exceptions to the above rule and may be set out hereinunder:

"178. Place of inquiry or trial.-

(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas." "179. Offence triable where act is done or consequence ensues.- When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

8. Section 178 creates an exception to the "ordinary rule" engrafted in Section 177 by permitting the courts in another local area where the offence is partly committed to take cognizance. Also if the offence committed in one local area continues in another local area, the courts in the latter place would be competent to take cognizance of the matter. Under Section 179, if by reason of the consequences emanating from a criminal act an offence is occasioned in another jurisdiction, the court in that jurisdiction would also be competent to take cognizance. Thus, if an offence is committed partly in one place and partly in another; or if the offence is a continuing offence or where the consequences of a criminal act result in an offence being committed at another place, the exception to the "ordinary rule" would be attracted and the courts within whose jurisdiction the criminal act is committed will cease to have exclusive jurisdiction to try the offence.

9. At this stage it may also be useful to take note of what can be understood to a continuing offence. The issue is no longer res integra having been answered by this court in State of Bihar v. Deokaran Nenshi (1972) 2 SCC 890. Para 5 may be usefully noticed in this regard.

"5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

10. The question that has posed for an answer has nothing to do with the provisions of Section 178 (b) or (c). What has to be really determined is whether the exception carved out by Section 179 would have any application to confer jurisdiction in the courts situated in the local area where the parental house of the wife is located.

11. To answer the above question, one will have to look into the Statement of Objects and Reasons of the Criminal Law [2 nd Amendment Act, 1983 (Act 46 of 1983)] by which Section 498A was inserted in the Indian Penal Code. The section itself may be noticed in the first instance:

"498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purposes of this section, "cruelty" means —

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

12. Section 498A of the Indian Penal Code was introduced by the Criminal Law (second amendment) Act, 1983. In addition to the aforesaid amendment in the Indian Penal Code, the provisions of Sections 174 and 176 of the Code of Criminal Procedure, 1973 relating to inquiries by police in case of death by suicides and inquiries by magistrates into cause of such deaths were also amended. Section 198A was also inserted in the Code of Criminal Procedure with regard to prosecution of offences under Section 498A. Further by an amendment in the first schedule to the Cr.PC the offence under Section 498A was made cognizable and non-bailable. Of considerable significance is the introduction of Section 113A in the Indian Evidence Act by the Criminal Law (second amendment) Act, 1983 providing for presumption as to abetment of suicide by a married woman to be drawn if such suicide had been committed within a period of seven years from the date of marriage of the married woman and she had been subjected to cruelty. Section 113A is in the following term:

"113-A. Presumption as to abetment of suicide by a married woman.– When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. Explanation.– For the purposes of this section, "cruelty" shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860)."

13. The object behind the aforesaid amendment, undoubtedly, was to combat the increasing cases of cruelty by the husband and the relatives of the husband on the wife which leads to commission of suicides or grave injury to the wife besides seeking to deal with harassment of the wife so as to coerce her or any person related to her to meet any unlawful demand for any property, etc. The above stated object of the amendment cannot be overlooked while answering the question arising in the present case. The judicial endeavour must, therefore, always be to make the provision of the laws introduced and inserted by the Criminal Laws (second amendment) Act, 1983 more efficacious and effective in view of the clear purpose behind the introduction of the provisions in question, as already noticed.

14. "Cruelty" which is the crux of the offence under Section 498A IPC is defined in Black's Law Dictionary to mean "The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage (Abuse, inhuman treatment, indignity)". Cruelty can be both physical or mental cruelty. The impact on the mental health of the wife by overt acts on the part of the husband or his relatives; the mental stress and trauma of being driven away from the matrimonial home and her helplessness to go back to the same home for fear of being illtreated are aspects that cannot be ignored while understanding the meaning of the expression "cruelty" appearing in Section 498A of the Indian Penal Code. The emotional distress or psychological effect on the wife, if not the physical injury, is bound to continue to traumatize the wife even after she leaves the matrimonial home and takes shelter at the parental home. Even if the acts of physical cruelty committed in the matrimonial house may have ceased and such acts do not occur at the parental home, there can be no doubt that the mental trauma and the psychological distress cause by the acts of the husband including verbal exchanges, if any, that had compelled the wife to leave the matrimonial home and take shelter with her parents would continue to persist at the parental home. Mental cruelty borne out of physical cruelty or abusive and humiliating verbal exchanges would continue in the parental home even though there may not be any overt act of physical cruelty at such place.

15. The Protection of Women from Domestic Violence Act, as the object behind its enactment would indicate, is to provide a civil remedy to victims of domestic violence as against the remedy in criminal law which is what is provided under Section 498A of the Indian Penal Code. The definition of the Domestic Violence in the Protection of Women from Domestic Violence Act, 2005 contemplates harm or injuries that endanger the health, safety, life, limb or well- being, whether mental or physical, as well as emotional abuse. The said definition would certainly, for reasons stated above, have a close connection with Explanation A & B to Section 498A, Indian Penal Code which defines cruelty. The provisions contained in Section 498A of the Indian Penal Code, undoubtedly, encompasses both mental as well as the physical well-being of the wife. Even the silence of the wife may have an underlying element of an emotional distress and mental agony. Her sufferings at the parental home though may be directly attributable to commission of acts of cruelty by the husband at the matrimonial home would, undoubtedly, be the consequences of the acts committed at the matrimonial home. Such consequences, by itself, would amount to distinct offences committed at the parental home where she has taken shelter. The adverse effects on the mental health in the parental home though on account of the acts committed in the matrimonial home would, in our considered view, amount to commission of cruelty within the meaning of Section 498A at the parental home. The consequences of the cruelty committed at the matrimonial home results in repeated offences being committed at the parental home. This is the kind of offences contemplated under Section 179 Cr.P.C which would squarely be applicable to the present case as an answer to the question raised.

16. We, therefore, hold that the courts at the place where the wife takes shelter after leaving or driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section 498A of the Indian Penal Code.

17. All the appeals are disposed of in terms of the above.

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DEOKI PANJHIYARA VERSUS SHAHSHI BHUSHAN NARAYAN AZAD & ANR

SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice P. Sathasivam and Hon'ble Mr. Justice Ranjan Gogoi

Deoki Panjhiyara ...Appellant
Versus
Shashi Bhushan Narayan Azad & Anr. Respondents

CRIMINAL APPEAL NOS.2032-2033 OF 2012

(Arising out of SLP (Criminal) Nos. 8076-8077 of 2010

Decided on 12 December, 2012

- ***The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.***

- ***Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnised after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5."***

- ***While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court inYamunabai v. Anantrao[3] has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.It must, however, be noticed that in Yamunabai (supra) there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.***

- ***In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The***

legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage,

- ***In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage.***

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

1. Leave granted.

2. The appellant, who was married to the respondent in the year 2006, had filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the DV Act) seeking certain reliefs including damages and maintenance. During the pendency of the aforesaid application the appellant filed an application for interim maintenance which was granted by the learned trial court on 13.02.2008 at the rate of Rs.2000/- per month. The order of the learned trial court was affirmed by the learned Sessions Judge on 09.07.2008. As against the aforesaid order, the respondent (husband) filed a Writ Petition before the High Court of Jharkhand.

3. While the Writ Petition was pending, the respondent sought a recall of the order dated 13.02.2008 on the ground that he could subsequently come to know that his marriage with the appellant was void on the ground that at the time of the said marriage the appellant was already married to one Rohit Kumar Mishra. In support, the respondent husband had placed before the learned trial court the certificate of marriage dated 18.04.2003 between the appellant and the said Rohit Kumar Mishra issued by the competent authority under Section 13 of the Special Marriage Act, 1954 (hereinafter referred to as the Act of 1954).

4. The learned trial court by order dated 7.8.2009 rejected the aforesaid application on the ground that notwithstanding the certificate issued under Section 13 of the Act of 1954, proof of existence of the conditions enumerated in Section 15 of the Act would still required to be adduced and only thereafter the certificate issued under Section 13 of the Act can be held to be valid.

5. The aforesaid order dated 07.08.2009 was challenged by the respondent-husband in a revision application before the High Court which was heard alongwith the writ petition filed earlier. Both the cases were disposed of by the impugned common order dated 09.04.2010 holding that the marriage certificate dated 18.04.2003 issued under Section 13 of the Act of 1954 was conclusive proof of the first marriage of the appellant with one Rohit Kumar Mishra which had the effect of rendering the marriage between the appellant and the respondent null and void. Accordingly, it was held that as the appellant was not the legally wedded wife of the respondent she was not

entitled to maintenance granted by the learned courts below. It is against the aforesaid order of the High Court that the present appeals have been filed by the appellant wife.

6. We have heard Shri Gaurav Agarwal, learned counsel for the appellant and Shri Mahesh Tiwari, learned counsel for the respondent.

7. Learned counsel for the appellant has strenuously urged that the allegation of the earlier marriage between the appellant and Rohit Kumar Mishra had been denied by the appellant at all stages and the said fact is not substantiated only by the Marriage Certificate dated 18.04.2003. Even assuming the marriage between the appellant and the respondent to be void, the parties having lived together, a relationship in the nature of marriage had existed which will entitle the appellant to claim and receive maintenance under the DV Act, 2005. Placing the legislative history leading to the aforesaid enactment, it is urged that in the Bill placed before the Parliament i.e. Protection from Domestic Violence Bill, 2002 an aggrieved person and relative was, initially, defined in the following terms :

Section 2

(a) aggrieved person means any woman who is or has been relative of the respondent and who alleges to have been subjected to act of domestic violence by the respondent;

(b) (c)

(d).

(e).

(f)

(g)

(h).

(i) relative includes any person related by blood, marriage or adoption and living with the respondent. Thereafter, the different clauses of the Bill were considered by a Parliamentary Standing Committee and recommendations were made that having regard to the object sought to be achieved by the proposed legislation, namely, to protect women from domestic violence and exploitation, clause (2)(i) defining relative may be suitably amended to include women who have been living in relationship akin to marriages as well as in marriages considered invalid by law. Pursuant to the aforesaid recommendation made by the Standing Committee, in place of the expression relative appearing in clause 2(i) of the Bill, the expression domestic relationship came be included in clause (f) of Section 2 of the Act. Learned counsel by referring to the definition of aggrieved person and domestic relationship as appearing in the DV Act, 2005 has urged that the legislative intent to include women, living in marriages subsequently found to be illegal or even in relationships resembling a marriage, within the protective umbrella of the DV Act is absolutely clear and the same must be given its full effect. It is submitted that having regard to the above even if the marriage of the appellant and the respondent was void on account of the previous marriage of the appellant, the said fact, by itself, will not

disentitle the appellant to seek maintenance and other reliefs under the DV Act, 2005.

8. Before proceeding further it will be appropriate to notice, at this stage, the definition of the expressions aggrieved person and domestic relationship appearing in Section 2(a) and (f) of the DV Act, 2005.

Section 2..

(a) aggrieved person means any women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(b)

(c)

d)

(e)

(f) domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

9. Learned counsel, in all fairness, has also drawn the attention of the court to a decision rendered by a coordinate Bench in D. Velusamy vs. D.Patchaimmal[1] wherein this court had occasion to consider the provisions of Section 2(f) of the DV Act to come to the conclusion that a relationship in the nature of marriage is akin to a common law marriage which requires, in addition to proof of the fact that parties had lived together in a shared household as defined in Section 2(s) of the DV Act, the following conditions to be satisfied:

a) The couple must hold themselves out to society as being akin to spouses.

b) They must be of legal age to marry.

c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. [Para 33]

10. Learned counsel has, however, pointed out that in Velusamy (supra) the issue was with regard to the meaning of expression wife as appearing in Section 125 Cr.P.C. and therefore reference to the provisions of Section 2(f) of the DV Act, 2005 and the conclusions recorded were not required for a decision of the issues arising in the case. Additionally, it has been pointed out that while rendering its opinion in the aforesaid case this Court had no occasion to take into account the deliberations of the Parliamentary Standing Committee on the different clauses of Protection of Women from Domestic Violence Bill, 2002. It is also urged that the equation of the expression relationship in the nature of marriage with a common law marriage and the stipulation of the four requirements noticed above is not based on any known or acceptable authority or source of law. Accordingly, it is submitted that the scope and expanse of the expression relationship in

the nature of marriage is open for consideration by us and, at any rate, a reference of the said question to a larger bench would be justified.

11. Opposing the contentions advanced on behalf of the appellant learned counsel for the respondent husband has submitted that the object behind insertion of the expression relationship in the nature of marriage in Section 2(f) of the DV Act is to protect women who have been misled into marriages by the male spouse by concealment of the factum of the earlier marriage of the husband. The Act is a beneficial piece of legislation which confers protection of different kinds to women who have been exploited or misled into a marriage. Learned counsel has pointed out that in the present case the situation is, however, otherwise. From the marriage certificate dated 18.04.2003 it is clear that the appellant was already married to one Rohit Kumar Mishra which fact was known to her but not to the respondent. The second marriage which is void and also gives rise to a bigamous relationship was voluntarily entered into by the appellant without the knowledge of the husband. Therefore, the appellant is not entitled to any of the benefits under the DV Act. In fact, grant of maintenance in the present case would amount to conferment of benefit and protection to the wrong doer which would go against the avowed object of the Act. Learned counsel has also submitted that the conduct of the appellant makes it clear that she had approached the court by suppressing material facts and with unclean hands which disentitles her to any relief either in law or in equity. In this regard the decision of this court in S.P. Changalvaraya Naidu vs. Jagannath and others[2] has been placed before us.

12. Having considered the submissions advanced by the learned counsels for the contesting parties, we are of the view that the questions raised, namely, whether the appellant and the respondent have/had lived together in a shared household after their marriage on 4.12.2006; if the parties have/had lived together whether the same gives rise to relationship in the nature of marriage within the meaning of Section 2(f) of the DV Act, 2005; whether the decision of this Court in Velusamy (supra) is an authoritative pronouncement on the expression relationship in the nature of marriage and if so whether the same would require reference to a larger Bench, may all be premature and the same need not be answered for the present. Instead, in the first instance, the matter may be viewed from the perspective indicated below.

13. The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.

14. Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnised after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5.

15. While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court in Yamunabai v. Anantrao[3] has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.

It must, however, be noticed that in Yamunabai (supra) there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.

16. A similar view has been expressed by this Court in a later decision in M.M. Malhotra v. Union of India[4] wherein the view expressed in Yamunabai (supra) was also noticed and reiterated.

17. However, the facts in which the decision in M.M. Malhotra (supra) was rendered would require to be noticed in some detail:

The appellant M.M. Malhotra was, inter alia, charged in a departmental proceeding for contracting a plural marriage. In reply to the charge sheet issued it was pointed out that the allegation of plural marriage was not at all tenable inasmuch as in a suit filed by the appellant (M.M. Malhotra) for a declaration that the respondent (wife) was not his wife on account of her previous marriage to one D.J. Basu the said fact i.e. previous marriage was admitted by the wife leading to a declaration of the invalidity of the marriage between the parties. The opinion of this court in M.M. Malhotra (supra) was, therefore, once again rendered in the situation where there was no dispute with regard to the factum of the earlier marriage of one of the spouses.

18. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in Yamunabai (supra) and M.M. Malhotra (supra). In this regard, we may take note of a recent decision rendered by this Court in A. Subash Babu v. State of Andhra Pradesh & Anr.[5] while dealing with the question whether the wife of a second marriage contracted during the validity of the first marriage of the husband would be a person aggrieved under Section 198 (1)(c) of the Code of Criminal Procedure to maintain a complaint alleging commission of offences under section 494 and 495 IPC by the husband. The passage extracted below effectively illuminates the issue:

Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband.

19. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a relationship in the nature of marriage would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage. We would also like to emphasise that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005.

20. Our above conclusion would render consideration of any of the other issues raised wholly unnecessary and academic. Such an exercise must surely be avoided.

21. We, accordingly, hold that the interference made by the High Court with the grant of maintenance in favour of the appellant was not at all justified. Accordingly, the order dated 09.04.2010 passed by the High Court is set aside and the present appeals, are allowed.

[1] (2010) 10 SCC 469

[2] AIR 1994 SC 853

[3] AIR 1988 SC 645

[4] 2005 (8) SCC 351

[5] 2011 (7) SCC 616

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HIRAL P. HARSORA AND ORS VERSUS KUSUM NAROTTAMDAS HARSORA AND ORS

SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Rohinton Fali Nariman

Hiral P. Harsora and Ors. Appellants
Versus
Kusum Narottamdas Harsora and Ors. Respondents

CIVIL APPEAL NO. 10084 OF 2016
(Arising out of SLP (Civil) No. 9132 of 2015)

Decided on 6 October, 2016

- ***The present appeal arises out of a judgment dated 25.9.2014 of a Division Bench of the Bombay High Court. It raises an important question as to the constitutional validity of Section 2(q) of the Protection of Women from Domestic Violence Act, 2005, (hereinafter referred to as the 2005 Act).***
- ***This appeal therefore raises a very important question in the area of protection of the female sex generally. The Court has first to ascertain what exactly is the object sought to be achieved by the 2005 Act. In doing so, this Court has to see the statement of objects and reasons, the preamble and the provisions of the 2005 Act as a whole.***
- ***To be permissible under Article 14 of the Constitution a classification must satisfy two conditions namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, but what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.***

Object of the 2005 Act from the statement of objects and reasons:-

STATEMENT OF OBJECTS AND REASONS

1. ***Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.***
2. ***The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.***

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

- ***A cursory reading of the statement of objects and reasons makes it clear that the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal, civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence.***
- ***The preamble of the statute is again significant. It states:***

  Preamble An Act to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.
- ***What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious***
- ***It will be noticed that the definition of domestic relationship contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of four ways - blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the respondent is a member.***
- ***When Section 3 of the Act defines domestic violence, it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral.***
- ***Section 19(1)(c) makes it clear that the Magistrate may pass a residence order, on being satisfied that domestic violence has taken place, and may restrain the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides. This again is a pointer to the fact that a residence order will be toothless unless the relatives, which include female relatives of the respondent, are also bound by it. And we have seen from the definition of respondent that this can only be the case when a wife or a common law wife is an aggrieved person, and not if any other woman belonging to a family is an aggrieved person. Therefore, in the case of a wife or a common law wife complaining of domestic violence, the husbands relatives including mother-in-law and sister-in-law can be arrayed as respondents and effective orders passed against them. But in the case of a mother-in-law or sister-in-law***

who is an aggrieved person, the respondent can only be an adult male person and since his relatives are not within the main part of the definition of respondent in Section 2(q), residence orders passed by the Magistrate under Section 19(1)(c) against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.

- ***We were given to understand that the aforesaid Bill lapsed, after which the present Bill was introduced in the Lok Sabha on 22.8.2005, and was then passed by both Houses. It is interesting to note that the earlier 2002 Bill defined respondent as meaning any person who is.. without the addition of the words adult male, being in consonance with the object sought to be achieved by the Bill, which was pari materia with the object sought to be achieved by the present Act. We also find that, in another Act which seeks to protect women in another sphere, namely, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, respondent is defined in Section 2(m) thereof as meaning a person against whom the aggrieved woman has made a complaint under Section 9. Here again it will be noticed that the prefix adult male is conspicuous by its absence. The 2002 Bill and the 2013 Act are in tune with the object sought to be achieved by statutes which are meant to protect women in various spheres of life.We have adverted to the aforesaid legislation only to show that Parliament itself has thought it reasonable to widen the scope of the expression respondent in the Act of 2013 so as to be in tune with the object sought to be achieved by such legislations.***
- ***We, therefore, set aside the impugned judgment of the Bombay High Court and declare that the words adult male in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(q),being rendered otiose, also stands deleted. We may only add that the impugned judgment has ultimately held, in paragraph 27, that the two complaints of 2010, in which the three female respondents were discharged finally, were purported to be revived, despite there being no prayer in Writ Petition No.300/2013 for the same. When this was pointed out, Ms. Meenakshi Arora very fairly stated that she would not be pursuing those complaints, and would be content to have a declaration from this Court as to the constitutional validity of Section 2(q) of the 2005 Act.***

JUDGMENT

Hon'ble Mr. Justice R.F. Nariman :—

1. Leave granted.

2. The present appeal arises out of a judgment dated 25.9.2014 of a Division Bench of the Bombay High Court. It raises an important question as to the constitutional validity of Section 2(q) of the Protection of Women from Domestic Violence Act, 2005, (hereinafter referred to as the 2005 Act).

3. On 3.4.2007, Kusum Narottam Harsora and her mother Pushpa Narottam Harsora filed a complaint under the 2005 Act against Pradeep, the brother/son, and his wife, and two sisters/ daughters, alleging various acts of violence against them. The said complaint was withdrawn on 27.6.2007 with liberty to file a fresh complaint.

4. Nothing happened for over three years till the same duo of mother and daughter filed two separate complaints against the same respondents in October, 2010. An application was moved

before the learned Metropolitan Magistrate for a discharge of respondent Nos. 2 to 4 stating that as the complaint was made under Section 2(a) read with Section 2(q) of the 2005 Act, it can only be made against an adult male person and the three respondents not being adult male persons were, therefore, required to be discharged. The Metropolitan Magistrate passed an order dated 5.1.2012 in which such discharge was refused. In a writ petition filed against the said order, on 15.2.2012, the Bombay High Court, on a literal construction of the 2005 Act, discharged the aforesaid three respondents from the complaint. We have been informed that this order has since attained finality.

5. The present proceedings arise because mother and daughter have now filed a writ petition, being writ petition No.300/2013, in which the constitutional validity of Section 2(q) has been challenged.

Though the writ petition was amended, there was no prayer seeking any interference with the order dated 15.2.2012, which, as has already been stated hereinabove, has attained finality.

6. The Bombay High Court by the impugned judgment dated 25.9.2014 has held that Section 2(q) needs to be read down in the following manner:-

In view of the above discussion and in view of the fact that the decision of the Delhi High Court in Kusum Lata Sharma's case has not been disturbed by the Supreme Court, we are inclined to read down the provisions of section 2(q) of the DV Act and to hold that the provisions of "respondent" in section 2(q) of the DV Act is not to be read in isolation but has to be read as a part of the scheme of the DV Act, and particularly along with the definitions of "aggrieved person", domestic relationship" and "shared household" in clauses (a), (f) and (s) of section 2 of the DV Act. If so read, the complaint alleging acts of domestic violence is maintainable not only against an adult male person who is son or brother, who is or has been in a domestic relationship with the aggrieved complainant- mother or sister, but the complaint can also be filed against a relative of the son or brother including wife of the son / wife of the brother and sisters of the male respondent. In other words, in our view, the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of the DV Act, where they are co- respondent/s in a complaint against an adult male person, who is or has been in a domestic relationship with the complainant and such corespondent/s. It must, of course, be held that a complaint under the DV Act would not be maintainable against daughter-in-law, sister-in- law or sister of the complainant, if no complaint is filed against an adult male person of the family.

7. The present appeal has been filed against this judgment. Shri Harin P. Raval, learned senior advocate appearing on behalf of the appellants, assailed the judgment, and has argued before us that it is clear that the respondent as defined in Section 2(q) of the said Act can only mean an adult male person. He has further argued that the proviso to Section 2(q) extends respondent only in the case of an aggrieved wife or female living in a relationship in the nature of a marriage, in which case even a female relative of the husband or male partner may be arraigned as a respondent. He sought to assail the judgment on the ground that the Court has not read down the provision of Section 2(q), but has in fact read the proviso into the main enacting part of the said definition, something that was impermissible in law. He has argued before us that the 2005 Act is a penal statute and should be strictly construed in the event of any ambiguity. He further argued that in fact there was no ambiguity because the expression adult male person cannot

be diluted in the manner done by the High Court in the impugned judgment. He cited a large number of judgments on the golden rule of literal construction, on how reading down cannot be equated to re-reading in constitutional law, and on how a proviso cannot be introduced into the main part of a provision so as to distort its language.

He also cited before us judgments which stated that even though a statute may lead to some hardship, that would not necessarily render the provision unconstitutional nor, in the process of interpretation, can a Court mend or bend the provision in the face of the plain language used. He also cited judgments before us stating that given the plain language, it is clear that it is only for the legislature to make the changes suggested by the High Court.

8. Ms. Meenakshi Arora, learned senior counsel appearing on behalf of the respondents, countered each of these submissions. First and foremost, she argued that the 2005 Act is a piece of social beneficial legislation enacted to protect women from domestic violence of all kinds. This being the case, it is clear that any definition which seeks to restrict the reach of the Act would have to be either struck down as being violative of Article 14 of the Constitution or read down. According to her, given the object of the statute, which is discernible clearly from the statement of objects and reasons, the preamble, and various provisions of the 2005 Act which she took us through, it is clear that the expression adult male person is a classification not based on any intelligible differentia, and not having any rational relationship with the object sought to be achieved by the Act. In fact, in her submission, the said expression goes contrary to the object of the Act, which is to afford the largest possible protection to women from domestic violence by any person, male or female, who happens to share either a domestic relationship or shared household with the said woman. In the alternative, she argued that the High Court judgment was right, and that if the said expression is not struck down, it ought to be read down in the manner suggested to make it constitutional. She also added that the doctrine of severability would come to her rescue, and that if the said expression were deleted from Section 2(q), the Act as a whole would stand and the object sought to be achieved would only then be fulfilled. She referred to a large number of judgments on Article 14 and the doctrine of severability generally. She also argued that within the definition of shared household in Section 2(s) of the Act, the respondent may be a member of a joint family. She has adverted to the amendment made to the Hindu Succession Act in 2005, by which amendment females have also become coparceners in a joint Hindu family, and she argued that therefore the 2005 Act is not in tune with the march of statutory law in other areas. She also countered the submission of Shri Raval stating that the 2005 Act is in fact a piece of beneficial legislation which is not penal in nature but which affords various remedies which are innovative in nature and which cannot be availed of in the ordinary civil courts. She added that Section 31 alone was a penal provision for not complying with a protection order, and went on to state that the modern rule as to penal provisions is different from that sought to be contended by Shri Raval, and that such rule requires the court to give a fair interpretation to the provisions of these statutes, neither leaning in favour of the accuser or the accused. She also added that given the beneficial statute that we have to strike down/interpret, a purposive construction alone should be given, and as the offending expression adult male person is contrary to such purpose and would lead to absurdities and anomalies, it ought to be construed in tune with the Act as a whole, which therefore would include females, as well, as respondents. She also pointed out that, at present, the sweep of the Act was such that if a mother-in-law or sister-in-law were to be an aggrieved person, they could only be aggrieved against adult male members and not against

any opposing female member of a joint family for example, a daughter-in-law or a sister-in- law. This will unnecessary stultify what was sought to be achieved by the Act, and would make the Act a dead letter insofar as these persons are concerned. She also argued that the Act would become unworkable in that the reliefs that were to be given would only be reliefs against adult male members and not their abettors who may be females.

9. Ms. Pinky Anand, learned Additional Solicitor General for India, more or less adopted the arguments of the counsel who appeared for the Union of India in the Bombay High Court. It was her submission that in view of the judgment in Kusum Lata Sharma v. State (Crl. M.C. No.75 of 2011 dated 2.9.2011) of the Delhi High Court, laying down that the mother-in-law is also entitled to file a complaint against the daughter-in-law under the provisions of the 2005 Act, and the SLP against the said judgment having been dismissed by the Supreme Court, her stand was that it would be open to a mother-in-law to file a complaint against her son as well as her daughter- in-law and other female relatives of the son. In short, she submitted that the impugned judgment does not require interference at our end.

10. This appeal therefore raises a very important question in the area of protection of the female sex generally. The Court has first to ascertain what exactly is the object sought to be achieved by the 2005 Act. In doing so, this Court has to see the statement of objects and reasons, the preamble and the provisions of the 2005 Act as a whole. In so doing, this Court is only following the law already laid down in the following judgments.

11. In Shashikant Laxman Kale v. Union of India, (1990) 2 SCR 441, this Court was faced with the constitutional validity of an exemption section contained in the Indian Income Tax Act, 1961. After referring in detail to Re: Special Courts Bill, 1979 2 SCR 476 and the propositions laid down therein on Article 14 generally and a few other judgments, this Court held:-

It is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification. In Francis Bennion's Statutory Interpretation, (1984 edn.), the distinction between the legislative intention and the purpose or object of the legislation has been succinctly summarised at p. 237 as under: The distinction between the purpose or object of an enactment and the legislative intention governing it is that the former relates to the mischief to which the enactment is directed and its remedy, while the latter relates to the legal meaning of the enactment. There is thus a clear distinction between the two. While the purpose or object of the legislation is to provide a remedy for the malady, the legislative intention relates to the meaning or exposition of the remedy as enacted. While dealing with the validity of a classification, the rational nexus of the differentia on which the classification is based has to exist with the purpose or object of the legislation, so determined. The question next is of the manner in which the purpose or object of the enactment has to be determined and the material which can be used for this exercise. For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady. In A. Thangal Kunju

Musaliar v. M. Venkitachalam Potti [(1955) 2 SCR 1196 : AIR 1956 SC 246 : (1956) 29 ITR 349] , the Statement of Objects and Reasons was used for judging the reasonableness of a classification made in an enactment to see if it infringed or was contrary to the Constitution. In that decision for determining the question, even affidavit on behalf of the State of the circumstances which prevailed at the time when the law there under consideration had been passed and which necessitated the passing of that law was relied on. It was reiterated in State of West Bengal v. Union of India [(1964) 1 SCR 371 : AIR 1963 SC 1241] that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. Similarly, in Pannalal Binjraj v. Union of India [1957 SCR 233 : AIR 1957 SC 397 : (1957) 31 ITR 565] a challenge to the validity of classification was repelled placing reliance on an affidavit filed on behalf of the Central Board of Revenue disclosing the true object of enacting the impugned provision in the Income Tax Act.

12. To similar effect, this Court held in Harbilas Rai Bansal v. State of Punjab, (1996) 1 SCC 1, as follows:

The scope of Article 14 has been authoritatively laid down by this Court in innumerable decisions including Budhan Choudhry v. State of Bihar [(1955) 1 SCR 1045 : AIR 1955 SC 191] , Ram Krishna Dalmia v. Justice S.R. Tendolkar [1959 SCR 279 : AIR 1958 SC 538] , Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P. [(1969) 1 SCC 817] and Mohd. Hanif Quareshi v. State of Bihar [1959 SCR 629 : AIR 1958 SC 731] . To be permissible under Article 14 of the Constitution a classification must satisfy two conditions namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, but what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.

The statement of objects and reasons of the Act is as under: Statement of Objects and Reasons of the East Punjab Urban Rent Restriction Act, 1949 (Act 3 of 1949). Under Article 6 of the India (Provisional Constitution) Order, 1947, any law made by the Governor of the Punjab by virtue of Section 93 of the Government of India Act, 1935, which was in force immediately before 15-8-1947, is to remain in force for two years from the date on which the Proclamation ceased to have effect, viz., 14-8- 1947. A Governor's Act will, therefore, cease to have effect on 14-8-1949. It is desired that the Punjab Urban Rent Restriction Act, 1947 (Punjab Act No. VI of 1947), being a Governor's Act, be re-enacted as a permanent measure, as the need for restricting the increase of rents of certain premises situated within the limits of urban areas and the protection of tenants against mala fide attempts by their landlords to procure their eviction would be there even after 14-8-1949. In order to achieve the above object, a new Act incorporating the provisions of the Punjab Urban Rent Restriction Act, 1947 with necessary modification is being enacted. It is obvious from the objects and reasons quoted above that the primary purpose for legislating the Act was to protect the tenants against the mala fide attempts by their landlords to procure their eviction. Bona fide requirement of a landlord was, therefore, provided in the Act as originally enacted a ground to evict the tenant from the premises whether residential or non-residential.

The provisions of the Act, prior to the amendment, were uniformly applicable to the residential and non-residential buildings. The amendment, in the year 1956, created the impugned classification. The objects and reasons of the Act indicate that it was enacted with a view to restrict the increase of rents and to safeguard against the mala fide eviction of tenants. The Act, therefore, initially provided conforming to its objects and reasons bona fide requirement of the premises by the landlord, whether residential or non-residential, as a ground of eviction of the tenant. The classification created by the amendment has no nexus with the object sought to be achieved by the Act. To vacate a premises for the bona fide requirement of the landlord would not cause any hardship to the tenant. Statutory protection to a tenant cannot be extended to such an extent that the landlord is precluded from evicting the tenant for the rest of his life even when he bona fide requires the premises for his personal use and occupation. It is not the tenants but the landlords who are suffering great hardships because of the amendment. A landlord may genuinely like to let out a shop till the time he bona fide needs the same. Visualise a case of a shopkeeper (owner) dying young. There may not be a member in the family to continue the business and the widow may not need the shop for quite some time. She may like to let out the shop till the time her children grow up and need the premises for their personal use. It would be wholly arbitrary in a situation like this to deny her the right to evict the tenant. The amendment has created a situation where a tenant can continue in possession of a non-residential premises for life and even after the tenant's death his heirs may continue the tenancy. We have no doubt in our mind that the objects, reasons and the scheme of the Act could not have envisaged the type of situation created by the amendment which is patently harsh and grossly unjust for the landlord of a non- residential premises. [paras 8, 9 & 13]

13. In accordance with the law laid down in these judgments it is important first to discern the object of the 2005 Act from the statement of objects and reasons:-

STATEMENT OF OBJECTS AND REASONS

1. Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

4. The Bill, inter alia, seeks to provide for the following:-

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by

consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any female relative of husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.

(ii) It defines the expression domestic violence to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v) It provides for appointment of Protection Officers and registration of non-governmental organizations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

5. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill.

14. A cursory reading of the statement of objects and reasons makes it clear that the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal, civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence.

15. The preamble of the statute is again significant. It states:

Preamble An Act to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

16. What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors

of such violence can, in given situations, be women themselves, is obvious. With this object in mind, let us now examine the provisions of the statute itself.

17. The relevant provisions of the statute are contained in the following Sections:

2. Definitions.In this Act, unless the context otherwise requires,

(a) aggrieved person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(f) domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

(q) respondent means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

(s) shared household means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

3. Definition of domestic violence.For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it

(a) harms or injures or endangers the health, safety, life, limb or well- being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.For the purposes of this section,

(i) physical abuse means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) sexual abuse includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) verbal and emotional abuse includes

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) economic abuse includes

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Explanation II.For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes domestic violence under this section, the overall facts and circumstances of the case shall be taken into consideration.

17. Right to reside in a shared household. (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

18. Protection orders.The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from

(a) committing any act of domestic violence;

(b) aiding or abetting in the commission of acts of domestic violence;

(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order.

19. Residence orders. (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing of the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require: Provided that no order under clause (b) shall be passed against any person who is a woman.

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.

(5) While passing an order under sub-section (1), sub-section (2) or sub- section (3), the court may also pass an order directing the officer-in- charge of the nearest police station to give

protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer-in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.

20. Monetary reliefs. (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in- charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

26. Relief in other suits and legal proceedings.

1. Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

2. Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

3. In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

31. Penalty for breach of protection order by respondent. (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrates may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

18. It will be noticed that the definition of domestic relationship contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of four ways - blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the respondent is a member. As has been rightly pointed out by Ms. Arora, even before the 2005 Act was brought into force on 26.10.2006, the Hindu Succession Act,1956 was amended, by which Section 6 was amended, with effect from 9.9.2005, to make females coparceners of a joint Hindu family and so have a right by birth in the property of such joint family. This being the case, when a member of a joint Hindu family will now include a female coparcener as well, the restricted definition contained in Section 2(q) has necessarily to be given a relook, given that the definition of shared household in Section 2(s) of the Act would include a household which may belong to a joint family of which the respondent is a member. The aggrieved person can therefore make, after 2006, her sister, for example, a respondent, if the Hindu Succession Act amendment is to be looked at. But such is not the case under Section 2(q) of the 2005 Act, as the main part of Section 2(q) continues to read adult male person, while Section 2(s) would include such female coparcener as a respondent, being

a member of a joint family. This is one glaring anomaly which we have to address in the course of our judgment.

19. When Section 3 of the Act defines domestic violence, it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral. When one goes to the remedies that the Act provides, things become even clearer. Section 17(2) makes it clear that the aggrieved person cannot be evicted or excluded from a shared household or any part of it by the respondent save in accordance with the procedure established by law. If respondent is to be read as only an adult male person, it is clear that women who evict or exclude the aggrieved person are not within its coverage, and if that is so, the object of the Act can very easily be defeated by an adult male person not standing in the forefront, but putting forward female persons who can therefore evict or exclude the aggrieved person from the shared household. This again is an important indicator that the object of the Act will not be sub-served by reading adult male person as respondent.

20. This becomes even clearer from certain other provisions of the Act. Under Section 18(b), for example, when a protection order is given to the aggrieved person, the respondent is prohibited from aiding or abetting the commission of acts of domestic violence. This again would not take within its ken females who may be aiding or abetting the commission of domestic violence, such as daughters-in-law and sisters-in-law, and would again stultify the reach of such protection orders.

21. When we come to Section 19 and residence orders that can be passed by the Magistrate, Section 19(1)(c) makes it clear that the Magistrate may pass a residence order, on being satisfied that domestic violence has taken place, and may restrain the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides. This again is a pointer to the fact that a residence order will be toothless unless the relatives, which include female relatives of the respondent, are also bound by it. And we have seen from the definition of respondent that this can only be the case when a wife or a common law wife is an aggrieved person, and not if any other woman belonging to a family is an aggrieved person. Therefore, in the case of a wife or a common law wife complaining of domestic violence, the husbands relatives including mother-in-law and sister-in-law can be arrayed as respondents and effective orders passed against them. But in the case of a mother-in-law or sister-in-law who is an aggrieved person, the respondent can only be an adult male person and since his relatives are not within the main part of the definition of respondent in Section 2(q), residence orders passed by the Magistrate under Section 19(1)(c) against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.

22. When we come to Section 20, it is clear that a Magistrate may direct the respondent to pay monetary relief to the aggrieved person, of various kinds, mentioned in the Section. If the respondent is only to be an adult male person, and the money payable has to be as a result of domestic violence, compensation due from a daughter-in-law to a mother-in-law for domestic violence inflicted would not be available, whereas in a converse case, the daughter-in-law, being

a wife, would be covered by the proviso to Section 2(q) and would consequently be entitled to monetary relief against her husband and his female relatives, which includes the mother-in-law.

23. When we come to Section 26 of the Act, the sweep of the Act is such that all the innovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affecting the aggrieved person and the respondent. The proceeding in the civil court, family court or criminal court may well include female members of a family, and reliefs sought in those legal proceedings would not be restricted by the definition of respondent in the 2005 Act. Thus, an invidious discrimination will result, depending upon whether the aggrieved person chooses to institute proceedings under the 2005 Act or chooses to add to the reliefs available in either a pending proceeding or a later proceeding in a civil court, family court or criminal court. It is clear that there is no intelligible differentia between a proceeding initiated under the 2005 Act and proceeding initiated in other fora under other Acts, in which the self-same reliefs grantable under this Act, which are restricted to an adult male person, are grantable by the other fora also against female members of a family. This anomaly again makes it clear that the definition of respondent in Section 2(q) is not based on any intelligible differentia having any rational relation to the object sought to be achieved by the 2005 Act. The restriction of such person to being an adult male alone is obviously not a differentia which would be in sync with the object sought to be achieved under the 2005 Act, but would in fact be contrary to it.

24. Also, the expression adult would have the same effect of stultifying orders that can be passed under the aforesaid sections. It is not difficult to conceive of a non-adult 16 or 17 year old member of a household who can aid or abet the commission of acts of domestic violence, or who can evict or help in evicting or excluding from a shared household an aggrieved person. Also, a residence order which may be passed under Section 19(1)(c) can get stultified if a 16 or 17 year old relative enters the portion of the shared household in which the aggrieved person resides after a restraint order is passed against the respondent and any of his adult relatives. Examples can be multiplied, all of which would only lead to the conclusion that even the expression adult in the main part is Section 2(q) is restrictive of the object sought to be achieved by the kinds of orders that can be passed under the Act and must also be, therefore, struck down, as this word contains the same discriminatory vice that is found with its companion expression male.

25. Shri Raval has cited a couple of judgments dealing with the provisions of the 2005 Act. For the sake of completeness, we may refer to two of them.

26. In Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade, (2011) 3 SCC 650, this Court, in a petition by a married woman against her husband and his relatives, construed the proviso to Section 2(q) of the 2005 Act. This Court held:

No restrictive meaning has been given to the expression relative, nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005. [Para 16]

27. In Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755, the appellant entered into a live-in relationship with the respondent knowing that he was a married person. A question arose before this Court as to whether the appellant could be said to be in a relationship in the nature of marriage.

Negativing this contention, this Court held:

The appellant, admittedly, entered into a live-in relationship with the respondent knowing that he was a married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy [(1928) 27 LW 678 : AIR 1927 PC 185] , that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character. Reference may also be made to the judgments of this Court in Badri Prasadv. Director of Consolidation [(1978) 3 SCC 527] and Tulsa v. Durghatiya [(2008) 4 SCC 520] .

We may note that, in the instant case, there is no necessity to rebut the presumption, since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. The long- standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that the DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive. Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and the children, born out of such kinds of relationships be protected, though those types of relationship might not be a relationship in the nature of a marriage. [Paras 57, 59 & 64]

28. It may be noted that in Badshah v. Urmila Badshah Godse & Anr., (2014) 1 SCC 188, this Court held that the expression wife in Section 125 of the Criminal Procedure Code, includes a woman who had been duped into marrying a man who was already married. In so holding, this Court held:

Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction of ut res magis valeat quam pereatin such cases i.e. where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125 Cr.P.C, such a woman is to be treated as the legally wedded wife.[Para 20]

29. We will now deal with some of the cases cited before us by both the learned senior advocates on Article 14, reading down, and the severability principle in constitutional law.

30. Article 14 is in two parts. The expression equality before law is borrowed from the Irish Constitution, which in turn is borrowed from English law, and has been described in State of U.P. v. Deoman Upadhyaya, (1961) 1 SCR 14, as the negative aspect of equality. The equal protection of the laws in Article 14 has been borrowed from the 14th Amendment to the U.S. Constitution and has been described in the same judgment as the positive aspect of equality namely the protection of equal laws. Subba Rao, J. stated:

This subject has been so frequently and recently before this court as not to require an extensive consideration. The doctrine of equality may be briefly stated as follows: All persons are equal before the law is fundamental of every civilised constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well nigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of and the purpose for which it is made. [at page 34]

31. In Lachhman Dass v. State of Punjab, (1963) 2 SCR 353, Subba Rao, J. warned that over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive Article 14 of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality. This admonition seems to have come true in the present case, as the classification of adult male person clearly subverts the doctrine of equality, by restricting the reach of a social beneficial statute meant to protect women against all forms of domestic violence.

32. We have also been referred to D.S. Nakara v. Union of India, (1983) 1 SCC 305. This judgment concerned itself with pension payable to Government servants. An office Memorandum of the Government of India dated 25.5.1979 restricted such pension payable only to persons who had retied prior to a specific date. In holding the date discriminatory and arbitrary and striking it down, this Court went into the doctrine of classification, and cited from Re: Special Courts Bill, (1979) 2 SCR 476 and Maneka Gandhi v. Union of India, (1978) 2 SCR 621, and went on to hold that the burden to affirmatively satisfy the court that the twin tests of intelligible differentia having a rational relation to the object sought to be achieved by the Act would lie on the State, once it has been established that a particular piece of legislation is on its face unequal. The Court further went on to hold that the petitioners challenged only that part of the scheme by which

benefits were admissible to those who retired from service after a certain date. The challenge, it was made clear by the Court, was not to the validity of the Scheme, which was wholly acceptable to the petitioners, but only to that part of it which restricted the number of persons from availing of its benefit. The Court went on to hold:

If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who, retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs 8100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs 12,000 p.a. and average emolument will be computed on the basis of last 10 months' average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter-productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours' difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14. [para 42]

33. We were also referred to Rattan Arya and others v. State of Tamil Nadu and another, (1986) 3 SCC 385, and in particular, to the passage reading thus:-

We may now turn to S.30(ii) which reads as follows:

"Nothing contained in this Act shall apply to any residential building or part thereof occupied by anyone tenant if the monthly rent paid by him in respect of that building or part exceeds four hundred rupees."

By one stroke, this provision denies the benefits conferred by the Act generally on all tenants to tenants of residential buildings fetching a rent in excess of four hundred rupees. As a result

of this provision, while the tenant of a non-residential building is protected, whether the rent is Rs. 50, Rs. 500 or Rs. 5000 per month, a tenant of a residential building is protected if the rent is Rs. 50, but not if it is Rs. 500 or Rs. 5000 per month. Does it mean that the tenant of a residential building paying a rent of Rs. 500 is better able to protect himself than the tenant of a non- residential building paying a rent of Rs. 5000 per month? Does it mean that the tenant of a residential buildingwho pays a rent of Rs. 500 per month is not in need of any statutory protection? Is there any basis for the distinction between the tenant of a residential building and the tenant of a non-residential building and that based on the rent paid by the respective tenants? Is there any justification at all for picking out the class of tenants of residential buildings paying a rent of more than four hundred rupees per month to deny them the |rights conferred generally on all tenants of buildings residential or non-residential by the Act? Neither from the Preamble of the Act nor from the provisions of the Act has it been possible for us even to discern any basis for the classification made by S.30(ii) of the Act.(Para 3)

34. In Subramanian Swamy v. CBI, (2014) 8 SCC 682, a Constitution Bench of this Court struck down Section 6A of the Delhi Police Special Establishment Act on the ground that it made an invidious distinction between employees of the Central Government of the level of Joint Secretary and above as against other Government servants. This Court, after discussing various judgments dealing with the principle of discrimination (when a classification does not disclose an intelligible differentia in relation to the object sought to be achieved by the Act) from para 38 onwards, ultimately held that the aforesaid classification defeats the purpose of finding prima facie truth in the allegations of graft and corruption against public servants generally, which is the object for which the Prevention of Corruption Act, 1988 was enacted. In paras 59 and 60 this Court held as follows:

It seems to us that classification which is made in Section 6-A on the basis of status in government service is not permissible under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988.

Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences. In the words of Mathew, J. in Shri Ambica Mills Ltd. [State of Gujarat v. Shri Ambica Mills Ltd., (1974) 4 SCC 656 : 1974 SCC (L&S) 381 : (1974) 3 SCR 760] : (SCC p. 675, paras 53-54) 53. The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify.

54. A reasonable classification is one which includes all who are similarly situated and none who are not. Mathew, J., while explaining the meaning of the words, similarly situated stated that we must look beyond the classification to the purpose of the law. The purpose

of a law may be either the elimination of a public mischief or the achievement of some positive public good. The classification made in Section 6-A neither eliminates public mischief nor achieves some positive public good. On the other hand, it advances public mischief and protects the crimedoer. The provision thwarts an independent, unhampered, unbiased, efficient and fearless inquiry/investigation to track down the corrupt public servants. [paras 59 and 60]

35. In a recent judgment, reported as Union of India v. N.S. Ratnam, (2015) 10 SCC 681, this Court while dealing with an exemption notification under the Central Excise Act stated the law thus:-

We are conscious of the principle that the difference which will warrant a reasonable classification need not be great. However, it has to be shown that the difference is real and substantial and there must be some just and reasonable relation to the object of legislation or notification. Classification having regard to microscopic differences is not good. To borrow the phrase from the judgment in Roop Chand Adlakha v. DDA [1989 Supp (1) SCC 116 : 1989 SCC (L&S) 235 : (1989) 9 ATC 639] :

To overdo classification is to undo equality. [para 18]

36. A conspectus of these judgments also leads to the result that the microscopic difference between male and female, adult and non adult, regard being had to the object sought to be achieved by the 2005 Act, is neither real or substantial nor does it have any rational relation to the object of the legislation. In fact, as per the principle settled in the Subramanian Swamy judgment, the words adult male person are contrary to the object of affording protection to women who have suffered from domestic violence of any kind. We, therefore, strike down the words adult male before the word person in Section 2(q), as these words discriminate between persons similarly situate, and far from being in tune with, are contrary to the object sought to be achieved by the 2005 Act. Having struck down these two words from the definition of respondent in Section 2(q), the next question that arises is whether the rest of the Act can be implemented without the aforesaid two words. This brings us to the doctrine of severability a doctrine well-known in constitutional law and propounded for the first time in the celebrated R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930. This judgment has been applied in many cases. It is not necessary to refer to the plethora of case law on the application of this judgment, except to refer to one or two judgments directly on point.

37. An early application of the aforesaid principle is contained in Corporation of Calcutta v. Calcutta Tramways Co. Ltd., [1964] 5 S.C.R. 25, in which a portion of Section 437(i)(b) of the Calcutta Municipal Act, 1951 was struck down as being a procedural provision which was an unreasonable restriction within the meaning of Article 19(6) of the Constitution. Chamarbaugwallas case was applied, and it was ultimately held that only the portion in parenthesis could be struck down with the rest of the Act continuing to apply.

38. Similarly, in Motor General Traders v. State of A.P., (1984) 1 SCC 222, Section 32(b) of the Andhra Pradesh Buildings (Lease, Rent & Eviction) Control Act, 1960 which exempted all buildings constructed on and after 26.8.1957, was struck down as being violative of Article 14 of the Constitution. This judgment, after applying Chamarbaugwallas case in para 27, and D.S. Nakaras case in para 28, stated the law thus:-

On a careful consideration of the above question in the light of the above principles we are of the view that the striking down of clause (b) of Section 32 of the Act does not in any way affect the rest of the provisions of the Act. The said clause is not so inextricably bound up with the rest of the Act as to make the rest of the Act unworkable after the said clause is struck down. We are also of the view that the Legislature would have still enacted the Act in the place of the Madras Buildings (Lease and Rent Control) Act, 1949 and the Hyderabad House (Rent, Eviction and Lease) Act, 1954 which were in force in the two areas comprised in the State of Andhra Pradesh and it could not have been its intention to deny the beneficial effect of those laws to the people residing in Andhra Pradesh on its formation. After the Second World War owing to acute shortage of urban housing accommodation, rent control laws which were brought into force in different parts of India as pieces of temporary legislation gradually became almost permanent statutes. Having regard to the history of the legislation under review, we are of the view that the Act has to be sustained even after striking down clause (b) of Section 32 of the Act. The effect of striking down the impugned provision would be that all buildings except those falling under clause (a) of Section 32 or exempted under Section 26 of the Act in the areas where the Act is in force will be governed by the Act irrespective of the date of their construction. [para 29]

39. In Satyawati Sharma v. Union of India, (2008) 5 SCC 287, Section 14(1)(e) of the Delhi Rent Control Act was struck down in part, inasmuch as it made an invidious distinction between bonafide requirement of two kinds of landlords, the said ground being available for residential premises only and not non residential premises. An argument was made that if the Section was struck down only in part, nothing more would survive thereafter. This was negatived by this Court in the following words:

In view of the above discussion, we hold that Section 14(1)(e) of the 1958 Act is violative of the doctrine of equality embodied in Article 14 of the Constitution of India insofar as it discriminates between the premises let for residential and non-residential purposes when the same are required bona fide by the landlord for occupation for himself or for any member of his family dependent on him and restricts the latter's right to seek eviction of the tenant from the premises let for residential purposes only. However, the aforesaid declaration should not be misunderstood as total striking down of Section 14(1)(e) of the 1958 Act because it is neither the pleaded case of the parties nor the learned counsel argued that Section 14(1)(e) is unconstitutional in its entirety and we feel that ends of justice will be met by striking down the discriminatory portion of Section 14(1)(e) so that the remaining part thereof may read as under: 14. (1)(e) that the premises let for residential purposes are required bona fide by the landlord for occupation as a residence for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable accommodation;

*** While adopting this course, we have kept in view well-recognised rule that if the offending portion of a statute can be severed without doing violence to the remaining part thereof, then such a course is permissibleR.M.D. Chamarbaugwalla v. Union of India [AIR 1957 SC 628] and Lt. Col. Sawai Bhawani Singh v. State of Rajasthan[(1996) 3 SCC 105] . As a sequel to the above, the Explanation appearing below Section 14(1)(e) of the 1958 Act will have to be treated as redundant. [paras 41 43]

40. An application of the aforesaid severability principle would make it clear that having struck down the expression adult male in Section 2(q) of the 2005 Act, the rest of the Act is left intact and can be enforced to achieve the object of the legislation without the offending words. Under Section 2(q) of the 2005 Act, while defining respondent, a proviso is provided only to carve out an exception to a situation of respondent not being an adult male. Once we strike down adult male, the proviso has no independent existence, having been rendered otiose.

41. Interestingly the Protection from Domestic Violence Bill, 2002 was first introduced in the Lok Sabha in 2002. This Bill contained the definition of aggrieved person, relative, and respondent as follows:

> **2.** Definitions.
>
> In this Act, unless the context otherwise requires,- aggrieved person means any woman who is or has been a relative of the respondent and who alleges to have been subjected to acts of domestic violence by the respondent; xxxx
>
> **i)** relative includes any person related by blood, marriage or adoption and living with the respondent;
>
> **j)** respondent means any person who is or has been a relative of the aggrieved person and against whom the aggrieved person has sought monetary relief or has made an application for protection order to the Magistrate or to the Protection Officer, as the case may be; and

42. We were given to understand that the aforesaid Bill lapsed, after which the present Bill was introduced in the Lok Sabha on 22.8.2005, and was then passed by both Houses. It is interesting to note that the earlier 2002 Bill defined respondent as meaning any person who is.. without the addition of the words adult male, being in consonance with the object sought to be achieved by the Bill, which was pari materia with the object sought to be achieved by the present Act. We also find that, in another Act which seeks to protect women in another sphere, namely, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, respondent is defined in Section 2(m) thereof as meaning a person against whom the aggrieved woman has made a complaint under Section 9. Here again it will be noticed that the prefix adult male is conspicuous by its absence. The 2002 Bill and the 2013 Act are in tune with the object sought to be achieved by statutes which are meant to protect women in various spheres of life. We have adverted to the aforesaid legislation only to show that Parliament itself has thought it reasonable to widen the scope of the expression respondent in the Act of 2013 so as to be in tune with the object sought to be achieved by such legislations.

43. Having struck down a portion of Section 2(q) on the ground that it is violative of Article 14 of the Constitution of India, we do not think it is necessary to go into the case law cited by both sides on literal versus purposive construction, construction of penal statutes, and the correct construction of a proviso to a Section. None of this becomes necessary in view of our finding above.

44. However, it still remains to deal with the impugned judgment. We have set out the manner in which the impugned judgment has purported to read down Section 2(q) of the impugned Act. The doctrine of reading down in constitutional adjudication is well settled and has been

reiterated from time to time in several judgments, the most recent of which is contained in Cellular Operators Association of India v. TRAI, (2016) 7 SCC 703. Dealing with the doctrine of reading down, this Court held:-

But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely, the judgment of the Federal Court in Hindu Women's Rights to Property Act, 1937, In re [Hindu Women's Rights to Property Act, 1937, In re, 1941 SCC OnLine FC 3 : AIR 1941 FC 72] . In that judgment, the word property in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land, which would be outside the Central Legislature's powers under the Government of India Act, 1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word property, the Federal Court held: (SCC OnLine FC) If the restriction of the general words to purposes within the power of the legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the legislature intended the general words which it has used to be construed only in the narrower sense: Owners of SS Kalibia v.Wilson [Owners of SS Kalibia v. Wilson, (1910) 11 CLR 689 (Aust)] , Vacuum Oil Co. Pty. Ltd. v. Queensland [Vacuum Oil Co. Pty. Ltd. v. Queensland, (1934) 51 CLR 677 (Aust)] , R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co. [R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co., (1910) 11 CLR 1 (Aust)] and British Imperial Oil Co. Ltd. v.Federal Commr. of Taxation [British Imperial Oil Co. Ltd. v. Federal Commr. of Taxation, (1925) 35 CLR 422 (Aust)] . (emphasis supplied) This judgment was followed by a Constitution Bench of this Court in DTC v.Mazdoor Congress [DTC v. Mazdoor Congress, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] . In that case, a question arose as to whether a particular regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant, J., this Court stated: (SCC pp. 728-29, para 255) 255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possibleone rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of

the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so. (emphasis supplied) [paras 50 and 51]

45. We may add that apart from not being able to mend or bend a provision, this Court has earlier held that reading up a statutory provision is equally not permissible. In B.R. Kapur v. State of T.N., (2001) 7 SCC 231, this Court held:

Section 8(4) opens with the words notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3), and it applies only to sitting members of Legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be reading up the provision, not reading down, and that is not known to the law. [para 39]

46. We, therefore, set aside the impugned judgment of the Bombay High Court and declare that the words adult male in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(q), being rendered otiose, also stands deleted. We may only add that the impugned judgment has ultimately held, in paragraph 27, that the two complaints of 2010, in which the three female respondents were discharged finally, were purported to be revived, despite there being no prayer in Writ Petition No.300/2013 for the same. When this was pointed out, Ms. Meenakshi Arora very fairly stated that she would not be pursuing those complaints, and would be content to have a declaration from this Court as to the constitutional validity of Section 2(q) of the 2005 Act. We, therefore, record the statement of the learned counsel, in which case it becomes clear that nothing survives in the aforesaid complaints of October, 2010. With this additional observation, this appeal stands disposed of.

❑❑❑

MANMOHAN ATTAVAR VERSUS NEELAM MANMOHAN ATTAVAR

SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Rohinton Fali Nariman and Hon'ble Mr. Justice Sanjay Kishan Kaul

Manmohan Attavar
Versus
Neelam Manmohan Attavar

CIVIL APPEAL NO.2500 OF 2017 WITH CIVIL APPEAL NO.2502 OF 2017

Decided on 14 July, 2017

- ***The appellant is 84 years old and the respondent is 62 years old. The respondent seeks to establish her status as the wife/companion of the appellant who has been left high and dry by the appellant while on the other hand the appellant categorically denies any such status.***
- ***The respondent initiated proceedings under Section 12 of The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the D.V. Act') on 16.9.2013 being Criminal Misc. Petition No.179 of 2013. This case is stated to have been re-numbered as Crl. Misc. Application No.139 of 2015. The endeavor of the appellant seeking quashing of these proceedings before the High Court vide Criminal Writ Petition No.6126/2013 under Section 482 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Cr.P.C.) did not succeed and petition was dismissed on 2.1.2015.***
- ***We thus set forth the controversy -***
  - ***(i) Whether an interim order could have been passed on 19.9.2016 permitting the respondent to occupy the premises of the appellant;***
  - ***(ii) Whether the learned Single Judge was right in withdrawing the proceedings pending before the learned Addl. Sessions Judge to the High Court vide the impugned order dated 7 24.10.2016.***
- ***The parties have never lived together in the property in question. It is not as if the respondent has been subsequently excluded from the 10 enjoyment of the property or thrown out by the appellant in an alleged relationship which goes back 20 years. They fell apart even as per the respondent more than 7 years ago. We may also note that till 22.2.2010 even the wife of the appellant was alive. We may note for the purpose of record that as per the appellant, he is a Christian and thus there could be no question of visiting any temple and marrying the respondent by applying "kumkum", and that too when the wife of the appellant was alive.***
- ***We are thus unequivocally of the view that the nature of the ex-parte order passed on 19.9.2016 permitting the respondent to occupy the premises of the appellant cannot be sustained and has to be set aside and consequently Civil Appeal No.2500 of 2017 is liable to be allowed.***
- ***It is also the contention of the appellant that such transfer cannot take place at the whims and fancy of the respondent. The respondent, whenever she fails to obtain a favourable order, chooses to file proceedings for transfer whether it be before the 1 (1988) 2 SCC 602 12 MM or before the appellate court. It is submitted that this approach ought not to be encouraged.***

- ***On examination of the issue, we tend to agree with the submission of the learned senior counsel for the appellant that there was no reason for the proceedings to be withdrawn from the appellate court to the High Court itself. There is not only absence of the reason for the same but it would also result in the deprivation of valuable rights of the appellant against the order of an appellate authority and thus an additional forum for scrutiny was being negated.***

Hon'ble Mr. Justice Sanjay Kishan Kaul :—

1. The appellant is 84 years old and the respondent is 62 years old. The respondent seeks to establish her status as the wife/companion of the appellant who has been left high and dry by the appellant while on the other hand the appellant categorically denies any such status.

2. The admitted facts are that the respondent was married to one Shri Harish Chander Chhabra. That marriage did not work out and ultimately a consent decree for divorce was obtained on 2 10.10.1996. Even in the interregnum period, the respondent claims to have developed a relationship with the appellant starting from their introduction in 1987.

It is her case that there was continuous interaction between the two and the appellant even proposed to her in December 1993. The appellant earned a National Award on 16.10.1996. The respondent also claims to have been requested to travel with the appellant to Bangalore on 30.10.1996. The appellant's wife was alive when the respondent claims that the appellant took her to No.38/1, Jayanagar, Bengaluru and that the appellant's wife was apparently also aware of the relationship between the two parties.

The respondent claims that she resigned from the job with ICAR at the behest of the appellant. On 10.1.1998, the respondent claims that the appellant applied "kumkum" to her forehead and soon thereafter he was conferred with the Padma Shri Award and the respondent accompanied the appellant for the felicitation ceremony on 21.3.1998.

3. It is the respondent's claim that from 2002-2008 the respondent was made to stay in different residences hired by the appellant. But apparently the relationship soured. The endeavors for reconciliation, however, did not succeed. The wife of the appellant was incidentally alive at that time and she passed away 3 on 22.2.2010. The endeavor, prior to this, by the respondent seeking remedy for what she claims to be her neglect, through the Women and Child Welfare Department of State of Karnataka, also did not succeed.

4. The respondent claims to have made various efforts by approaching authorities and high dignitaries apart from police authorities but to no avail.

5. The respondent initiated proceedings under Section 12 of The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the D.V. Act') on 16.9.2013 being Criminal Misc. Petition No.179 of 2013. This case is stated to have been re-numbered as Crl. Misc. Application No.139 of 2015. The endeavor of the appellant seeking quashing of these proceedings before the High Court vide Criminal Writ Petition No.6126/2013 under Section 482 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Cr.P.C.) did not succeed and petition was dismissed on 2.1.2015.

The trial went on and at the request of the respondent made under Section 410 of the Cr.P.C., the application was transferred from the Court of the Metropolitan Magistrate-VI to the Court

of Metropolitan Magistrate-II at Bangalore. This application was finally dismissed by the learned Metropolitan Magistrate on 30.7.2015.

6. The respondent, aggrieved by the said order, filed Criminal Appeal No.1070/2015 under Section 29 of the D.V. Act on 18.8.2015 which was assigned to the learned Addl. Sessions Judge presiding over Court 67. The interim relief prayed for in this petition was, however, rejected by the learned Addl. Sessions Judge on 5.11.2015.

7. The respondent again sought a transfer from that court and the appeal was transferred to the Court of the learned Additional Sessions Judge presiding over Court No.53 vide order dated 16.2.2016. A second application was filed by the respondent for stay of the impugned order for interim maintenance. The respondent was once again aggrieved by the conduct of the proceedings during the hearing of the interim application and submitted a complaint to the High Court of Karnataka.

In terms of an administrative order of the Registrar General of the High Court, the application was called upon to be decided on or before 30.4.2016. The application was rejected on 21.4.2016 as being not maintainable. The applications filed for additional evidence by the respondent also met an adverse fate.

8. It is in the aforesaid scenario that the respondent filed Writ petition No.49153 of 2016 under Articles 226 and 227 of the Constitution of India before the High Court of Karnataka praying 5 for the transfer of Criminal Appeal No.1070 of 2015 to the High Court itself on the ground that the order for rejection of the applications for additional evidence did not inspire faith.

9. Learned Single Judge of the High Court by an ex-parte order dated 19.9.2016, while issuing notice in the petition, stayed all further proceedings and permitted the respondent to occupy the premises No.38/1, 30th Cross, 3rd Main, 7th Block Jayanagar, Bengaluru, 560082 belonging to the appellant. This interim order is subject matter of challenge before us in SLP (C) No. 32783/2016 now numbered as Civil Appeal No.2500 of 2017.

10. On service being effected on the appellant, the writ petition was opposed along with the prayer for vacation of the ex-parte order. It is the case of the appellant that instead of deciding the Interlocutory Application, the appellant was compelled to pay a lump sum amount of Rs.30,000/- as a onetime payment. This order is stated to have been challenged in SLP No.33150 of 2016. In fact the declining of interim relief by the appellate court was not even specifically challenged before the High Court and yet the High Court granted an ex parte order.

11. Learned Single Judge vide the subsequent order dated 24.10.2016 sought to withdraw the appeal proceedings from the learned Addl. Sessions Judge to the High Court itself and this 6 order has been assailed in SLP No.32534/2016 now numbered as Civil Appeal No.2502 of 2017.

12. We have heard the contentions of the learned senior counsel for the appellant and have also heard the respondent appearing in person, quite elaborately. Written submissions were filed both by the appellant and by the respondent. We have noticed that a large part of the submissions of the respondent relate to the merits of the claim as to why the learned Metropolitan Magistrate fell into error while dismissing the application filed by the respondent on 30.7.2015 under Section 12 of the D.V. Act.

13. We may note at this stage itself that it would neither be advisable nor proper to dwell into the controversy on merits because the appeal filed by the respondent is yet to be decided. Any

observations by us at this stage could affect either of the parties in the appeal proceedings. The controversy before us is in a very narrow compass. We thus set forth the controversy -

(i) Whether an interim order could have been passed on 19.9.2016 permitting the respondent to occupy the premises of the appellant;

(ii) Whether the learned Single Judge was right in withdrawing the proceedings pending before the learned Addl. Sessions Judge to the High Court vide the impugned order dated 7 24.10.2016.

14. Insofar as the first question is concerned, reliance has been placed by the respondent on the provisions of the D.V. Act and the desirability to construe the provisions liberally in favour of women seeking relief, as it is in the nature of a social legislation meant for protection of women's rights. In order to appreciate the controversy, we reproduce the relevant provisions as under:-

"17. Right to reside in a shared household.-

(1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law. .....

19. Residence orders.-

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in 8 which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman. ....."

15. A reading of the aforesaid provisions show that it creates an entitlement in favour of the woman of the right of residence under the "shared household" irrespective of her having any legal interests in the same. The direction, inter alia, can include an order restraining dispossession or a direction to remove himself on being satisfied that domestic violence had taken place.

16. The factual matrix of the present case is such that one would have to look to the definition clauses relevant for the determination of the controversy contained in Section 2 as under: "2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

9 ..... 2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household. ..."

17. The facts of the present case are that the respondent has never stayed with the appellant in the premises in which she has been directed to be inducted. This is an admitted position even in answer to a court query by the respondent during the course of hearing. The "domestic relationship" as defined under Section 2 (f) of the D.V. Act refers to two persons who have lived together in a "shared household". A "shared household" has been defined under Section 2(s) of the D.V. Act. In order for the respondent to succeed, it was necessary that the two parties had lived in a domestic relationship in the household.

However, the parties have never lived together in the property in question. It is not as if the respondent has been subsequently excluded from the 10 enjoyment of the property or thrown out by the appellant in an alleged relationship which goes back 20 years. They fell apart even as per the respondent more than 7 years ago. We may also note that till 22.2.2010 even the wife of the appellant was alive. We may note for the purpose of record that as per the appellant, he is a Christian and thus there could be no question of visiting any temple and marrying the respondent by applying "kumkum", and that too when the wife of the appellant was alive.

18. We are thus unequivocally of the view that the nature of the ex-parte order passed on 19.9.2016 permitting the respondent to occupy the premises of the appellant cannot be sustained and has to be set aside and consequently Civil Appeal No.2500 of 2017 is liable to be allowed.

19. Now turning to the second controversy, a perusal of the impugned order shows that the learned Single Judge found the remedy sought for by the respondent to be "misconceived". However, the learned Judge found it appropriate to treat the petition as one under Section 407 of the Cr.P.C. The learned Single Judge has expressed the view that the appellate court ought to have called

upon the respondent to argue the appeal rather than spend time on interim reliefs, which was not maintainable in the face of the earlier order resulting in a predictable order.

20. We fail to appreciate the aforesaid observations when the respondent herself sought once again to press for interim relief and applications to adduce additional evidence. Learned ASJ can hardly be faulted on this account. The learned Single Judge has also given latitude to the respondent on account of her appearing in person whereby she may not have documented the bits and pieces of her past with the intention of initiating the proceedings which she was pursuing. In the conspectus of the same, the appeal has been withdrawn to the High Court itself.

21. The grievance of the appellant against this order is that the valuable rights of the appellant of an additional forum to ventilate his grievance would be lost as against any decision in appeal. A remedy of revision under Section 327 of the Cr.P.C. would be available or a writ petition under Article 227 of the Constitution of India. In this behalf reliance has been placed on what is claimed to be a settled legal position, more particularly, the Constitutional Bench Judgment of 7 Judges of this Court in A.R.Antulay vs. Ram Naik 1.

22. It is also the contention of the appellant that such transfer cannot take place at the whims and fancy of the respondent. The respondent, whenever she fails to obtain a favourable order, chooses to file proceedings for transfer whether it be before the 1 (1988) 2 SCC 602 12 MM or before the appellate court. It is submitted that this approach ought not to be encouraged.

23. On examination of the issue, we tend to agree with the submission of the learned senior counsel for the appellant that there was no reason for the proceedings to be withdrawn from the appellate court to the High Court itself. There is not only absence of the reason for the same but it would also result in the deprivation of valuable rights of the appellant against the order of an appellate authority and thus an additional forum for scrutiny was being negated.

24. We are unable to agree with the reasoning of the learned Single Judge nor can we fault the appellate authority on any account which could have necessitated such withdrawal of the proceedings to the High Court.

25. We may also note the concession made by the learned senior counsel for the appellant in court that in the scenario the matter can be entrusted to any ASJ in Bangalore as there are a large number of the same holding court.

26. We thus set aside even the order dated 24.10.2016 and allow Civil Appeal No.2502/2017. We request the learned Chief Justice of the High Court on the administrative side to nominate any of the ASJs in Bangalore to hear the appeal of the respondent and the appellate authority shall endeavor to 13 conclude the proceedings as expeditiously as possible.

27. The appeals are accordingly allowed leaving the parties to bear their own costs with the hope that there would be an early end to this contentious dispute between the two parties.

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VAISHALI ABHIMANYU JOSHI VERSUS NANASAHEB GOPAL JOSHI

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice A.K Sikri and Hon'ble Mr. Justice Ashok Bhushan

Vaishali Abhimanyu Joshi ..... Appellant
Versus
Nanasaheb Gopal Joshi ..... Respondent

CIVIL APPEAL NO. 6448 OF 2017

(Arising out of SLP (C) No. 24045 of 2016)

Decided on May 9, 2017

- ***This appeal raises an important question pertaining to interpretation of Section 26 of theProtection of Women from Domestic ViolenceAct, 2005. The question is as to whether counter claim by the appellant seeking right under Section 19 of Act, 2005 can be entertained in a suit filed against her under Section 26of Act, 1887 seeking a mandatory injunction directing her to stop using the suit flat and to remove her belongings therefrom.***
- ***Therespondent filed Suit No. 77/2013 in the Small Causes Court, Pune seeking for following reliefs:***

  "A. By an order of mandatory injunction thedefendant may be directed to stop the use and occupation of the suit flat and remove her belongings therefrom.

  B. The defendant may be restrained by an orderof perpetual prohibitory injunction fromusing/occupying the suit flat.
- ***The appellant filed a written statement in thesuit pleading that she was residing in the suit flat since 26.01.2004 along with her husband and daughter. Her husband who was also residing along with her left her on 13.06.2011 to live with the respondent. It was pleaded that suit flat was intended to be used by thejoint family as a joint family property and although theagreement of purchase of the suit flat bears thename of the respondent, the suit flat has been used as joint family property. The allegation that respondent is the sole owner of the flat was denied.***
- ***The appellant claimed that since she has been subjected to domesticviolence she is entitled for the reliefs sought by wayof counter claim as provided in the Act, 2005. It was contended that the reliefs sought by way of counter claim are not barred as per Section 15 of Act, 1887.The trial court framed preliminary issue "as to whetherthe Court has jurisdiction to entertain the counter claim". Judge Small Causes Court by its judgment and order dated 05.11.2014 held that Court has no jurisdiction to entertain the counter claim. Revision was filed against the order passed by the Small Causes Court before the District Judge. The District Judge rejected the revision on 17.12.2015 which order was challenged by the appellant by means of writ petition which has been dismissed by judgment dated 07.07.2016 The High Court has held that in view ofthe express language in Section 15 as also the Second Schedule of Act, 1887, the Small Causes Court constituted under Act, 1887 cannot entertain and trythe counter claim. Aggrieved by the order of theHigh Court, the appellant has come up in this appeal.***

- ***The Protection of Women from DomesticViolence Act, 2005 has been enacted to provide for more effective protection of the rights of womenguaranteed under the Constitution who are victimsof violence of any kind occurring within the family and for matters connected therewith or incidental thereto. Act, 2005 was enacted by the Parliament to give effect to various international conventions.***
- ***Section 26 provides that any relief available underSection 18 to 22 may also be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and therespondent. Section 26 is material for the present case since the appellant has set up her counter claim onthe basis of this Section before the Judge, Small Causes Court.***
- ***There cannot be any dispute that proceeding before the Judge, Small Causes Court is a legal proceeding and the Judge, Small Causes Court is a civil court. On the strength of Section 26 any relief available under Section 18 to 22 of Act, 2005, thus, can also be sought by the aggrieved person.***
- ***We, thus, are of considered opinion that the counter claim filed by the appellant before Judge, Small Causes Court in Civil Suit NO. 77 of 2013 was fully entertainable and courts below committed error in refusing to consider such claim.***

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Ashok Bhushan :—

Leave granted.

2. This appeal raises an important question pertaining to interpretation of Section 26 of theProtection of Women from Domestic ViolenceAct, 2005 (hereinafter referred to as "Act, 2005") quathe Provincial Small Cause Courts Act, 1887(hereinafter to referred to as "Act, 1887") as amended in the State of Maharashtra. The question is as to whether counter claim by the appellant seeking right under Section 19 of Act, 2005 can be entertained in a suit filed against her under Section 26of Act, 1887 seeking a mandatory injunction directing her to stop using the suit flat and to remove her belongings therefrom.

3. This appeal has been filed challenging thejudgment dated 7th July, 2016 of High Court ofJudicature at Bombay in Writ Petition No. 1550 of 2016 by which the writ petition filed by the appellant questioning the judgment and order of 5th Additional Judge, Small Causes Court dated 5th November, 2014 and order passed by the District Judge, Pune dated 17th December, 2015 was dismissed.

4. Necessary facts of the case need to be noted for deciding the issue raised are:

The appellant got married with one Abhimanyu who is son of the respondent on 10.02.2000 Theappellant started residing in the suit flat No. 4, 45/4, Arati Society Shilavihar Colony, Paud Fata, Pune since 2004 alongwith her husband. The flat was alloted to the respondent by the Society inthe year 1971. On 13th June, 2011, the husbandof appellant left her at the suit flat and shifted to live with his parent at Mrutunjay Society. A daughter, namely, Ishwari was born from the wedlock ofthe appellant and the Abhimanyu, who was about 9 years in the year 2014. The respondent along with his wife had been residing in another flat nearby. The appellant was treated with cruelty by her husband and other members of the family. A suit for divorce on the basis

of cruelty being P.A No. 23/2011 was filed by the appellant against her husband. A notice was sent on behalf of therespondent to the appellant on 23.01.2013 revoking the gratuitous licence and asking theappellant to stop the use and occupation of thesuit flat. The appellant replied the notice. Therespondent filed Suit No. 77/2013 in the Small Causes Court, Pune seeking for following reliefs:

"A. By an order of mandatory injunction thedefendant may be directed to stop the use and occupation of the suit flat and remove her belongings therefrom.

B. The defendant may be restrained by an orderof perpetual prohibitory injunction fromusing/occupying the suit flat.

C. The defendant may be restrained by an orderof perpetual prohibitory injunction fromobstructing the plaintiff and his family members to possess, use and occupy thesuit flat.

D. Interim orders in terms of clause A, B, C above may be passed.

E. Costs of the suit may be awarded to theplaintiff from the defendant.

F. Any other just and other equitable orders inthe interest of justice may please be passed."

5. The appellant filed a written statement in thesuit pleading that she was residing in the suit flat since 26.01.2004 along with her husband and daughter. Her husband who was also residing along with her left her on 13.06.2011 to live with the respondent. It was pleaded that suit flat was intended to be used by thejoint family as a joint family property and although theagreement of purchase of the suit flat bears thename of the respondent, the suit flat has been used as joint family property. The allegation that respondent is the sole owner of the flat was denied. In her written statement a counter claim was also laid by theappellant. In the counter claim following reliefs have been claimed by the appellant:

"i. The suit & injunction application at Exh.5 ofthe plaintiff may kindly be dismissed with heavy costs.

ii. It may be declared that the suit flat is theshared household.

iii. The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction fromdispossessing, disturbing the possession ofthe defendant in any manner from the suit flat, as per S.19 of D.V Act.

iv. The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction fromentering in the suit flat as per S.19 of DV Act.

v. The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction from alienating, disposing off, encumbering the suit flat and/or creating any of third party right, title and interest in the suit flat, or renouncing therights in the suit flat as per S.19 of DV Act.

vi. Any other order in the interest of justice and equity may kindly be passed in favour of thedefendant and oblige."

6. In the counter claim the appellant prayed for an order of residence in suit flat under Section 19 ofthe Act, 2005.

7. The respondent who was the plaintiff in thesuit has filed an application dated 14.07.2014 underSection 9A(Maharashtra Amendment) of the Code ofCivil Procedure, 1908. In the application, therespondent claimed that declaration sought by theappellant in the suit is not maintainable, hence, a preliminary issue under Section 9A of CPC be framed.The application was objected by the appellant by filing objection on 16.08.2014 The appellant claimed that since she has been subjected to domesticviolence she is entitled for the reliefs sought by wayof counter claim as provided in the Act, 2005. It was contended that the reliefs sought by way of counter claim are not barred as per Section 15 of Act, 1887.The trial court framed preliminary issue "as to whetherthe Court has jurisdiction to entertain the counter claim". Judge Small Causes Court by its judgment and order dated 05.11.2014 held that Court has no jurisdiction to entertain the counter claim. Revision was filed against the order passed by the Small Causes Court before the District Judge. The District Judge rejected the revision on 17.12.2015 which order was challenged by the appellant by means of writ petition which has been dismissed by judgment dated 07.07.2016 The High Court has held that in view ofthe express language in Section 15 as also the Second Schedule of Act, 1887, the Small Causes Court constituted under Act, 1887 cannot entertain and trythe counter claim. Aggrieved by the order of theHigh Court, the appellant has come up in this appeal.

8. We have heard Shri Nikhil Majithia, learned counsel for the appellant and Shri Vinay Navare, learned counsel for the respondent.

9. Shri Nikhil Majithia, learned counsel for theappellant submitted that courts below erred in law in taking the view that counter claim of the appellant is barred by the Act, 1887. He submits that Act, 2005 is a special Act which has been enacted to provide various remedies and the special Act shall have overriding effect over Act, 1887. He submits that courts below erred in law in not adverting to this aspect ofthe matter. Learned counsel has further placed reliance on Section 3(c) of the Act, 1887. It is submitted that Section 3(c) itself saves applicability oflocal law or any special law and the Act, 2005 being a special law it will have to be given full effect and Section 3(c) itself carves out an exception. It is submitted that inthe event of conflict between a general statute and a special statute, special statutes always have overriding effect on a general statute. He further submits that even if both are treated to be a special statute, latter in pointof time shall override the Act, 1887 and he further referring to the Section 26 of Act, 2005 contends that a relief under Sections 18 to 22 of Act, 2005 can be sought in any legal proceeding before a Civil Court, Family Court and Criminal Court. He submits that Courtof Provincial Small Cause being a civil Court remedyunder Section 26 is fully available to the appellant.

10. Shri Vinay Navare, learned counsel for therespondent refuting the submission of learned counsel for the appellant contends that counter claimof the appellant is clearly barred by Section 15 read with Schedule II of the Act, 1887. He has referred to Item Nos. 11, 17 and 19. He submits that Provincial Small Cause Court is a Court which has limited jurisdiction. Referring to provisions of Order L of Civil Procedure Code he submits that only limited provisionsof Civil Procedure Code have been made applicable which indicates that no substantive issue can be decided by Provincial Small Cause Court. Learned counsel further made reference to Section 12 and Section 18 of Act, 1887 by which, according to him,the Registrar, who is a Chief Ministerial

Officer of theCourt, is empowered to try certain suits which theJudge, Provincial Small Cause Court by general or special order directs. He submits that power given to Registrar to decide certain issues also militate againstthe idea that substantive issues can be decided by a Judge, Small Causes Court.

11. Learned counsel for the parties relied on various decisions of this Court and Bombay High Court which shall be referred to while considering submissions in detail.

12. We have considered the above submissions ofthe parties and perused the record.

13. As noted above, the only question to be answered in this appeal is as to whether the counter claim filed by the appellant seeking right ofresidence in accordance with Section 19 of Act, 2005 in a suit filed by the respondent, her father-in-lawunder the Provincial Small Cause Courts Act, 1887 is entertainable or not. Whether the provisions of theAct, 1887 bar entertainment of such counter claim, isthe moot question to be answered. The Provincial Small Cause Courts Act, 1887 was enacted to consolidate and amend the law relating to Courts ofSmall Causes established beyond the Presidency-towns. Under Section 5, the State Government is empowered to establish Court of Small Causes. Section 15 deals with jurisdiction of Court of Small Causes. Section 15 which is relevant for the present purposes is extracted below:

"Section 15. Cognizance of suits by Courtsof Small Causes.—

(1) A Court of Small Causes shall not take cognizance of the suits specified in theSecond Schedule as suits expected from thecognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suitsof a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the [State Government] may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order."

14. Section 17 provides that the procedure prescribed in the Civil Procedure Code, shall save in so far as is otherwise provided by that Code or by 1887Act, be the procedure followed in a Court of Small Causes, in all suits cognizable by it and and in all proceedings arising out of such suits.

15. Section 23 provides for return of plaint in suits involving questions of title. Section 15 refers to Schedule II. Schedule II enumerates the category ofsuits which are excepted from the cognizance ofCourt of Small Causes. For the purposes of this case Item Nos. 4, 11, 17 which may be relevant for thepresent case are extracted below:

"(4) a suit for the possession of immoveable property or for the recovery of an interest in such property;

(11) a suit for the determination or enforcementof any other right to or interest in immoveable property;

(17) a suit to obtain in injunction;"

16. The submission which has been pressed by thelearned counsel for the respondent is that the High Court for holding that Judge, Small Causes Court has no jurisdiction has relied on Section

15 read with clause (11) of Second Schedule. In paragraph 14 of thejudgment, the High Court gives the following reasoning for deciding against the appellant:

"14. As noted earlier, clause(11) of the Second Schedule of P.S.C.C Act which is one of theexcepted categories does not empower the Small Causes Court to entertain and try the suit for thedetermination or enforcement of any other right to or interest in immovable property. In the counter claim the defendant has prayed for residenceorders as provided in Section 19 of D.V Act as also for declaration that the suit flat is the shared household as per section 2(s) of D.V Act and also for injunction restraining the plaintiff (i) fromdispossessing her from the suit flat and disturbing her possession in any manner in the suit flat, (ii)from entering suit flat, and (iii) from creating third party interest as per Section 19 of D.V Act. It is not in dispute and cannot be disputed that the counter claim is to be tried as a suit. The defendant seeks determination or enforcement of her right or interest in the suit flat i.e immovable property. In view thereof, counter claim set up by the defendant cannot gone into by the Small Causes Court in viewof express language of Section 15 and Second Schedule of P.S.C.C Act. If the contention of Mr. Kulkarni is accepted, it will enlarge the jurisdictionof Small Causes Court and the same will be contrary to mandate of Section 15 and Second Schedule of P.S.C.C Act."

17. The Protection of Women from DomesticViolence Act, 2005 has been enacted to provide for more effective protection of the rights of womenguaranteed under the Constitution who are victimsof violence of any kind occurring within the family and for matters connected therewith or incidental thereto. Act, 2005 was enacted by the Parliament to give effect to various international conventions. One ofus (A.K Sikri, J.) had occasion to consider the purposesof enacting the Act, 2005 in Kunapareddy alias Nookala Shanka Balaji v. Kunapareddy Swarna Kumari,(2016) 11 SCC 774. In paragraph 12 of the judgment following has been stated:

"12. In fact, the very purpose of enacting theDV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e aggrieved person. Intention was to protectwomen against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A ofthe Penal Code, 1860. The purpose of enactingthe law was to provide a remedy in the civil law forthe protection of women from being victimsof domestic violence and to prevent theoccurrence of domestic violence in the society. It is for this reason, that the scheme of the Actprovides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes thecharacter of criminality. In order to demonstrate it, we may reproduce the introduction as well as relevant portions of the Statement of Objects and Reasons of the said Act, as follows:

"Introduction

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Eliminationof All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to

protect womenagainst violence of any kind, especially that occurring within the family. The phenomenon ofdomestic violence in India is widely prevalent but has remained invisible in the public domain. Thecivil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent theoccurrence of domestic violence in the societythe Protection of Women from DomesticViolence Bill was introduced in Parliament.

Statement of Objects and Reasons

1. Domestic violence is undoubtedly a human rights issue and serious deterrent to development.The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms ofDiscrimination against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

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3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed underArticles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the women from being victims of domestic violence and to prevent theoccurrence of domestic violence in the society.

4. The Bill, inter alia, seeks to provide for thefollowing—

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(ii) It defines the expression "domesticviolence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right ofa woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to passprotection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence."

18. Section 17 provides for right to reside in a shared household by aggrieved person. Section 18 empowers the Magistrate to pass protection ordersof different categories as enumerated in section itself. Section 19 provides for passing of a residence order in favour of an aggrieved person who is subjected todomestic violence.

19. Section 26 of the Act is a special provision which has been enacted in the enactment. Although, Chapter IV of the Act containing Section 12 to Section 29 contains the procedure for obtainingorders of reliefs by making application before theMagistrate whereas steps taken by the Magistrate and different categories of reliefs could be granted as noted in Section 18 to 22 and certain other provisions. Section 26 provides that any relief available underSection 18 to 22 may also be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and therespondent. Section 26 is material for the present case since the appellant has set up her counter claim onthe basis of this Section before the Judge, Small Causes Court. Section 26 is extracted below:

"26. Relief in other suits and legal proceedings.—

(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after thecommencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by theaggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of thegrant of such relief."

20. There cannot be any dispute that proceeding before the Judge, Small Causes Court is a legal proceeding and the Judge, Small Causes Court is a civil court. On the strength of Section 26 any relief available under Section 18 to 22 of Act, 2005, thus, can also be sought by the aggrieved person.

21. Order VIII Rule 6A provides for counter claim by defendant. Order VIII Rule 6A of CPC is quoted below:

"6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right ofpleading a set off under rule 6, set up, by way ofcounter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of to suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in thenature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdictionof the court.

(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claimof the defendant within such period as may be fixed by the court.

(4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

22. Order L of CPC enumerates the provisions which shall not extend to the Provincial Small Cause Court. The provisions which have been excepted fromapplicability of the Small Causes Court do not include Order VIII, thus, counter claim can very well be filed bythe defendant in a suit before the Small Causes Court.

23. We have noted above the reasons given by theHigh Court holding that Provincial Small Cause Court cannot entertain the counter claim filed by thedefendant who is appellant before us.

24. The High Court refers to Item No. 11 of Second Schedule which is "a suit for the determination or enforcement of any other right to or interest in immovable property". It appears that the High Court had taken the view that the right under Section 26of Act, 2005 as claimed by the appellant involvesthe determination or enforcement of any right to or interest in immovable property.

25. The Act, 1887 has been amended in the Stateof Maharashtra by Maharashtra Act 24 of 1984 w.e.f 1.1.1985 Chapter IVA has been inserted in Act, 1887 containing Section 26, 26A, 26B and 26C. Section 26 is quoted as below:

"26. Suits or proceedings between licensors and licensees or landlords and tenants for recovery ofpossession of immovable property and licence fees or rent, except those to which other Acts apply, to lie in Court of Small Causes.—

(1) Notwithstanding anything contained elsewhere in this Act, but subject to theprovision of sub-section (2), the Court ofSmall Causes shall have jurisdiction to entertain and try all suits and proceedings between in licensor and licensee, or a landlord and tenants, relating to therecovery of possession of any immovable property situated in the area within thelocal limits of the jurisdiction of the Courtof Small Causes, or relating to the recoveryof the licence fee or charges or rent therefor, irrespective of the value of thesubject matter of such suits or proceedings.

(2) Nothing contained in sub-section (1) shall apply to suits or proceedings for therecovery of possession of any immovable property or of licence fee or charges or rent thereof, to which the provisions of theBombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955,the Bombay Provincial Municipal Corporations Act, 1919 or the Maharashtra Housing and Area Development Act, 1976, or any law for the time being in force, apply."

26. Section 26 sub-Section (1) begins with "notwithstanding anything contained elsewhere in this Act". In the suit which was filed by therespondent before the Judge, Small Causes Court, the plaintiff (respondent herein) has claimed himself to be licensor and appellant as gratuitous licensee. In paragraph 9 of the plaint following has been pleaded by the plaintiff:

"9. The Plaintiff submits that the Defendant has falsely stated in the Marriage petition bearing PA No. 23/2011 that she is in actual and physical possession of the suit flat even though she has been in use of the suit flat only as a gratuitous licensee. The plaintiff through his advocate served a notice to the Defendant on 23.01.2013, revokingthe

gratuitous license and asking the Defendant to stop the use and occupation of the suit flat…"

27. Although the relief which has been claimed bythe plaintiff does not specifically contain any relief regarding recovery of possession from the appellant but the reliefs sought for indicate that the appellant is sought to be restrained from using the suit flat.

28. It is relevant to note that Item No. 4 of Second Schedule which included "a suit for the possession ofimmovable property or for the recovery of an interest in such property" had been deleted by MaharasthraAct 24 of 1984. Section 26 begins with 'non obstante' clause which shall override all contrary provisions contain in Act, 1887. Maharasthra Act 24 of 1984 has been brought by inserting Section 26 and by deleting Item No. 4 of Second Schedule only to make suit between licensor and licensee to be filed before theJudge, Small Causes Court. The suit filed by theplaintiff is virtually a suit for possession of the suit flatfrom the appellant who is occupying the same. Plaintiff alleged in the plaint that the gratuitous licence of the appellant has been terminated on 23.01.2013, hence, appellant is not entitled to use theflat and is liable to remove her belongings.

29. "Notwithstanding anything contained elsewhere in this Act" as used in Section 26(1) of Act, 1887 are words of expression of the widest amplitude engulfing the contrary provisions contained in theAct. The suit in question has been filed by theplaintiff for enforcement of his right as a licensor after allegedly terminating the gratuitous licence of theappellant. On a plain reading Item No. 11 of Schedule II covers determination or enforcement of any such right or interest in immovable property. But by virtueof Section 26 sub-Section (1) as applicable in State ofMaharasthra, Item No. 11 of Schedule 2 has to give way to Section 26(1) and a suit between licensor and licensee which is virtually a suit for recovery ofimmovable property is fully maintainable in Judge, Small Causes Court that is why the suit has been instituted by the plaintiff in the Judge, Small Causes Court claiming the right and interest in theimmovable property.

30. When the suit filed by the plaintiff for determination or enforcement of his right as a licensor can be taken cognizance by Judge, Small Causes Court we fail to see that why the relief claimed by theappellant in the Court of Small Causes within themeaning of Section 26 of Act. 2005 cannot be considered by the Judge, Small Causes Court. In factsof the present case, the bar and embargo underItem No. 11 of Schedule II read with Section 15 ofAct, 1887 stand whittled down and engulfed by virtueof Section 26 sub-Section (1) as applicable in Maharashtra.

31. A statutory provision containing non obstanteclause has to be given full effect. This Court in Union ofIndia v. G.M Kokil, 1984 Supp SCC 196 has laid down in paragraph 11 as below:

"11. …It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect ofall contrary provisions. Thus the non obstante clause in Section 70, namely, "notwithstanding anything contained in that Act" must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to theexempting provisions which would be contrary tothe general applicability of the Act…"

32. Learned counsel for the appellant has placed reliance on a judgment of the Bombay High Court in Writ Petition No. 5648 of 2015, Ambreen Akhoon v.Aditya Aurn Paudwal Decided on 4th

August, 2015. Theissue which was involved in the said case has been noted in paragraph 2 which is to the following effect:

"2. This Writ Petition involves a question of law as to whether any relief can be sought against therelative of the respondent husband in theproceedings filed under Section 26 of theProtection of Women from Domestic ViolenceAct before the Family Court?"

33. After considering the provisions of Act, 2005 and certain precedents, the Bombay High Court has laid down following in paragraph 18:

"18. As a question of law is raised before this Court, the Court has restricted its finding only to that extent and answered that the relatives of thehusband being respondents under Section 2(q) ofthe D V Act can be made party respondents beforethe Family Court if the proceedings specifiedunder Section 26 of the D.V Act are preferred."

34. In the present case, the issue which is raised is entirely different and pertains to the jurisdiction ofSmall Causes Court to entertain counter claim filed bythe appellant seeking an order of residence. Theabove judgment is not relevant for answering the issue raised in the present case.

35. Learned counsel for the appellant has placed reliance on judgments of this Court in Allahabad Bankv. Canara Bank, (2000) 4 SCC 406; Solidaire India Ltd. v.Fair Growth Financial Services Ltd., (2001) 3 SCC 71 andBank of India v. Ketan Parekh, (2008) 8 SCC 148 forthe proposition that a special Act overrides a generalAct and when a conflict is found in two special Acts,the special Act latter in point of time has to prevail. He further contends that dominant purpose of theAct has to be looked into while deciding the question as to which of the Act shall prevail over other. Inthe facts of the present case especially Section 26 as inserted in the State of Maharashtra by MaharasthraAct 24 of 1984, it is not necessary to enter into theissue of conflict between Act, 1887 and Act, 2005. We have already observed above that the suit in thenature of present suit was cognizable before theJudge, Small Causes Court, hence, in the said suit determination of claim of the appellant seeking a right of residence under Section 19 is also not excluded from consideration. It is further to be noted that Act, 2005 was enacted to secure a social purpose. The provisions of the Act have to be construed widely. This Court in Hiral P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165 had occasion to consider the ambit and scope of Act, 2005. In paragraph 25 following has been stated by this Court:

"25. When we come to Section 26 of the Act,the sweep of the Act is such that all theinnovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affectingthe aggrieved person and the respondent. Theproceeding in the civil court, family court or criminal court may well include female members ofa family, and reliefs sought in those legal proceedings would not be restricted by thedefinition of "respondent" in the 2005 Act. Thus, an invidious discrimination will result, depending upon whether the aggrieved person chooses to institute proceedings under the 2005 Act or chooses to add to the reliefs available in either a pending proceeding or a later proceeding in a civil court, family court or criminal court. It is clear that there is no intelligible differentia between a proceeding initiated under the 2005 Act and proceeding initiated in other fora under other Acts, in which the self-same reliefs grantable under this Act, which are restricted to an adult male person, are grantable by the other fora also against female members of a family…"

36. Section 26 of the Act, 2005 has to be interpreted in a manner to effectuate the very purpose and object of the Act. Unless the determination of claim by an aggrieved person seeking any order as contemplated by Act, 2005 is expressly barred from consideration by a civil court, this Court shall be loath to read in bar in consideration of any such claim in any legal proceeding before the civil court. When the proceeding initiated by plaintiff in the Judge, Small Causes Court alleged termination of gratuitous licence of the appellant and prays for restraining the appellant from using the suit flat and permit the plaintiff to enter and use the flat, the right of residence as claimed by the appellant is inter-connected with such determination and refusal of consideration of claim of the appellant as raised in her counter claim shall be nothing but denying consideration of claim as contemplated by Section 26 of the Act, 2005 which shall lead to multiplicity of proceeding, which can not be the object and purpose of Act, 2005.

37. We, thus, are of considered opinion that the counter claim filed by the appellant before Judge, Small Causes Court in Civil Suit NO. 77 of 2013 was fully entertainable and courts below committed error in refusing to consider such claim.

38. We, however, make it clear that we have neither entered into the merits of the claim of the appellant nor shall be understood to have expressed any opinion on the claim either way and the merits of the claim has to be considered by the court in accordance with law.

39. In the result, the appeal is allowed, the judgment of the High Court dated 07.07.2016, judgment and order dated 05.11.2014 of 5th Additional Judge, Small Causes Court, Pune and judgment dated 17.12.2015 of the District Judge, Pune are set aside. It is held that counter claim filed by the appellant in Civil Suit No. 77 of 2013 is fully entertainable by Judge, Small Causes Court and needs to be considered in accordance with law.

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LANDMARK JUDGMENTS ON ADOPTION

RATANLAL ALIAS BABULAL CHUNILAL SAMSUKA VERSUS SUNDARABAIGOVARDHANDAS SAMSUKA (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS

Supreme Court of India

Bench : Hon'ble Mr. Justice N.V. Ramana and Hon'ble Mr. Justice Amitava Roy

CIVIL APPEAL NO. 6378 OF 2013[†]

Ratanlal Alias Babulal Chunjlal Samsuka ... Appellant;

Versus

Sundarabaigovardhandas Samsuka (Dead) Through Legal Representatives And Others ... Respondents.

Decided on November 22, 2017

A. Family and Personal Laws — Hindu Law — Adoption, Maintenance and Financial Provision — Requirements/Customary Adoption/Proof/ Validity — Customary adoption — Adoption of married man in Jain community — Burden and nature of proof — Held, burden of proving adoption is heavy and in absence of documentary evidence in support of adoption, court should be cautious in relying upon oral evidence

— Only evidence adduced by appellant in instant case was his own testimony and word of priest alleged to have performed that ceremony — General custom which appellant intends to prove requires greater proof than that adduced — Besides, appellant had failed to plead in his written statement existence of any custom as such and thus any amount of evidence produced in support of alleged adoption inconsequential — Moreover, lots of contradictions were discernible in testimonies of witnesses on material aspects of adoption — Appellant failed to plead and prove factum of adoption by adducing evidence to satisfaction of court — Hindu Adoptions and Maintenance Act, 1956, Ss. 3(a), 3 and 10 (Paras 19 to 25)

Kishori Lai v. Chaltibai, AIR 1959 SC 504; Rahasa Pandiani v. Gokulananda Panda, (1987) 2 SCC 338 : AIR 1987 SC 962, relied on

B. Custom — Generally — Governance on basis of—Extent of—Nature and degree of proof — Burden of proof — Principles summarised

— Held, custom commands legitimacy not by authority of law but from public acceptance and acknowledgment — Further held, ingredients necessary for establishing valid custom are continuity, certainty, long usage and reasonability — Presumption that law prevails and when claim of custom is against such presumption, person setting up plea of existence of custom must discharge onus of proving it with all its requisites to satisfaction of court in clear and unambiguous manner i.e. it must be proved that it has characteristics of genuine custom inasmuch as it is plural, uniform and constant — Custom evolves by conduct and hence its validity cannot be measured solely by element of express sanction accorded by courts — Customs are essentially non-litigious in origin and arise not from any conflict of rights but from practices prompted by convenience of society — Judicial decision recognising custom may be relevant but is not indispensable for its establishment

— On facts held, there was no pleading or proof which could justify that aforestated standards were met which substantiated claim of valid adoption of appellant, a married man belonging to Jain community — Custom on which appellant was relying being matter of proof, cannot be based on priori reasoning or logical and analogical deduction — Appellant had failed to prove that such practice had attained status of general custom prevalent in Jain community — Impugned judgment finding that appellant was not adopted son, calls for no interference — Evidence Act, 1872, Ss. 48 and 56 (Paras 9 to 18)

Gokal Chand v. Parvin Kumari, AIR 1952 SC 231; Collector of Madura v. Moottoo Ramalinga Sathupathy, 1868 SCC Online PC 3 : (1867-69) 12 Moo IA 397; Rup Chand v. Jambu Parshad, 1910 SCC OnLine PC 5: (1909-10) 37 IA 93: ILR (1910) 32 All 247; Sheokuarbai v. Jeoraj, 1920 SCC OnLine PC 54 : AIR 1921 PC 77, relied on Sundarabai Govatdhandas Samsuka v. Ratanlal, 2006 SCC OnLine Bom 1517, affirmed Bryan A. Garner, Black's Law Dictionary (10th Edn.) p. 468, relied on

C. Civil Procedure Code, 1908 — Or. 6 Rr. 1 and 2 — Pleadings — Cardinality of— Held, parties to suit are always governed by their pleadings — Any amount of evidence or proof adduced without proper pleadings inconsequential and would not come to rescue of parties — Practice and Procedure — Pleadings (Para 19)

D. Family and Personal Laws — Hindu Law — Adoption, Maintenance and Financial Provision — Requirements/Customary Adoption/Proof/Validity — Customary adoption — Burden of proof — On facts held, lay on appellant-defendant who alleged factum of adoption — Trial court erred in placing same on respondent-plaintiff to prove that appellant was not adopted son, which is contrary to law — Hindu Adoptions and Maintenance Act, 1956, Ss. 2(a), 3 and 10 (Para 25)

Kishori Lai v. Chaltibai, ADR 1959 SC 504; Rahasa Pandiani v. Gokulananda Panda, (1987) 2 SCC 338, relied on

The Judgment of the Court was delivered by

Hon'ble Mr. Justice N.V. Ramana.— The appellant is before us aggrieved by the judgment and decree passed by the High Court of Judicature at Bombay, in Sundarabai Govardhandas Samsuka v. Ratanlal[1]. The High Court has partly allowed the appeal by setting aside the judgment of trial court and declared that the first defendant, who is the appellant herein, was not the adopted son of late Govardhandas Laxmichand Samsuka and consequently the appellant herein was permanently restrained from representing himself as son of Govardhandas and further restrained him from naming himself as Ratanlal Govardhandas Samsuka.

2. A brief reference to the factual matrix necessary for disposal of the case on hand are, late Govardhandas has a brother by name Chunilal Laxmichand who is none other than the father of the first defendant/appellant herein. Right from his childhood, the appellant used to reside with his paternal uncle Govardhandas. During his life Govardhandas used to carry on business of timber in the name of Defendant 5 initially and later he inducted into business the appellant and Defendants 2 to 4 as partners. After the death of Govardhandas his wife Sundarabai who is the original plaintiff in the suit was also taken as a partner. When the other partners failed to give her share in the business, she issued notice to all the partners to give accounts of the fifth defendant partnership firm and also to pay the amount of her share.

1 2006 SCC OnLine Bom 1517

3. In the year 1984, wife and children of Chunilal i.e. brother of Govardhandas issued notice, to Sundarabai and the appellant, stating that the appellant is the adopted son of late Govardhandas as such he cannot claim any share in his natural family and further sought for partition of the joint family properties, for that Sundarabai issued a reply notice denying the factum of adoption and thereafter filed the present suit i.e. Special Civil Suit No. 395 of 1987 for dissolution and accounts of Defendant 5 partnership firm and also sought for a declaration that the appellant is not the adopted son of late Govardhandas. During the pendency of the suit, Sundarabai died and her daughters were brought on record.

4. The trial court, after a full-fledged trial, has partly decreed the suit declaring that the deceased Sundarabai, original plaintiff had l/5th share in the assets and liabilities of the partnership firm and passed preliminary decree for taking accounts. But the declaration claimed by the plaintiff that the appellant is not the adopted son of late Govardhandas was rejected and the trial court came to the conclusion that plaintiff failed to prove that the defendant is not the adopted son of late Govardhandas. The reasoning of the trial court can be summed up as under:

(a) The plaintiff failed to prove that the appellant herein is not the adopted son of late Govardhandas.

(b) Continuation of biological father's name over adopted father's name even after 1973 is inconsequential in view of other evidences on record.

(c) That some letters and invitations were addressed to the appellant with his adoptive father's name.

(d) That the priest [Chaturbuj Sharma] who is alleged to have performed the adoption ceremony has deposed in favour of the appellant.

(e) Photographs taken at the time of the adoption ceremony are self-explanatory. It is to be noted that in one particular photograph the appellant is seen with a garland and absence of Asha or her husband in the photographs clearly proves that adoption had taken place one day prior to the marriage of Asha [daughter of Govardhandas and respondent].

5. Aggrieved by the judgment and decree passed by the trial court, the plaintiffs carried the matter to the High Court in First Appeal No. 1662 of 1996. The appellant herein has not questioned the preliminary decree passed for accounts and declaration that late Sundarabai is entitled to l/5th share in the fifth defendant company as such those findings have become final. The High Court, while partly allowing the appeal, concluded that the appellant herein is not the adopted son as the conduct and circumstances surrounding the adoption are suspicious. The following circumstances have weighed with by the High Court in coming to the conclusion that the factum of adoption was not proved with cogent evidence—

(a) Non-production of negatives of alleged photographs taken during the adoption ceremony.

(b) That the photographs do not portray any ceremony being performed by the priest involving the appellant and his adoptive parents.

(c) The alleged adoption took place one day before the marriage of Asha (daughter of respondent), which casts shadow on the photographs taken during the ceremony.

(d) That there was no evidence on record other than the oral testimony of one Chaturbuj Sharma that he performed the adoption ceremony as a priest.

(e) That appellant himself has contradicted the oral testimony of the alleged priest Chaturbuj Sharma concerning the ceremony of taking the appellant into the lap of Govardhandas.

(f) That the letters exhibited to show the change of name does not cogently establish the adoption.

(g) From the date of adoption up to filing the suit, the appellant continued to use his earlier name without adopting the name of the adoptive father.

(h) The income tax returns of the appellant after 1973 indicates that he continued to use his earlier name.

(i) No explanation forthcoming from the appellant concerning the above suspicious circumstances.

(j) Moreover, the adoptive mother herself is contesting the factum of adoption.

6. The learned counsel appearing on behalf of the appellant has argued that—

(a) The custom of married men getting adopted is prevalent in Jain community, which has been proved by the priest who performed the adoption ceremony.

(b) The custom of adoption of married men was judicially recognised in catena of cases.

(c) The appellant has been validly adopted in consonance with the accepted customs.

7. On the other hand, the learned counsel appearing on behalf of the respondents has contended that—

(a) The appellant has not pleaded any custom in Jain community which allows adoption of married men.

(b) That the adoption should be accepted only when it is established with cogent and consistent proof, as it has the potential to alter the succession.

(c) The appellant retained his earlier name and acquired properties subsequently in his earlier name itself.

8. In the light of the submissions advanced before us, we are called upon to answer two short questions concerning the alleged adoption of the appellant herein by late Govardhandas in the year 1973. Hence the following issues arise for consideration before this Court:

8.1. (i) Whether the person who alleges the existence of a custom need not prove the same because it is judicially accepted?

8.2. (ii) Whether the appellant could plead and prove the factum of adoption?

9*. In response to Issue (i), first and foremost, we would like to deal with the submission of the learned counsel for the appellant that the custom of giving married man in adoption in Jain community is judicially accepted and hence the adoption need not be proved. It is an admitted fact that the parties concerned in this case are Jains. There is no dispute that Jains are governed by the Hindu Adoption and Maintenance Act, 1956 [hereinafter "the Act", for brevity] and

therefore certain provisions which may throw some light on the question, have to be looked into.

10. Section 3 of the Act deals with definitions. The term "custom" is defined as under:

"3. Definitions.—In this Act unless the context otherwise requires—

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;"

11. Section 10 of the Act provides thus:

"10. Persons who may be adopted.—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely—

* * *

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

12. From the aforesaid provisions, it is clear that a person cannot be adopted if he or she is a married person, unless there is a custom or usage, as defined under Section 3(a), applicable to the parties which permits persons who are married being taken in adoption.

13. India has a strong tradition of respect for difference and diversity which is reflected under the Hindu Family Laws as it is applicable to diverse communities living from the southern tip to northern mountains, from western plains to eastern hills. Diversity in our country brings along various customs which defines what India is. Law is not oblivious of this fact and sometimes allows society to be governed by customs within the foundation of law. It is well known that a custom commands legitimacy not by an authority of law formed by the State rather from the public acceptance and acknowledgment. This Court in Gokal Chand v. Parvin Kumari[2], has explained the ingredients of a valid custom in the following manner: (AIR p. 234, para 14)

"14. ... (3) A custom, in order to be binding, must derive its force from the fact that by long, usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality."

2 AIR 1952 SC 231

Black's Law Dictionary defines customary law as:

"customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws"?[3]

The Privy Council in Collector of Madura v. Moottoo Ramalinga Sathupathy[4], has observed that:

"under the Hindu system of law, clear proof of usage will outweigh the written text of law". (SCC OnLine PC)

14*. As per the settled law under Section 3(a) of the Act, the following ingredients are necessary for establishing a valid custom:

(a) Continuity

(b) Certainty

(c) Long usage

(d) Reasonability

As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the court in a most clear and unambiguous manner. It should be noted that, there are many types of customs to name a few—general customs, local customs and tribal customs, etc. and the burden of proof for establishing a type of custom depends on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz. that it is accepted wilfully as having force of law, and is not a mere practice more or less common. The acts required for the establishment of customary law ought to be plural, uniform and constant.

15. Custom evolves by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law. The characteristic of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted, but from practices prompted by the convenience of society. A judicial decision recognising a custom may be relevant, but these are not indispensable for its establishment. When a custom is to be proved by judicial notice, the relevant test would be to see if the custom has been acted upon by a court of superior or coordinate jurisdiction in the same jurisdiction to the extent that justifies the court, which is asked to apply it, in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration. In this case at hand there was no pleading or proof which could justify that the above standards were met.

16. It would not be out of context to observe certain judicial decisions which throw some light on the issue raised in this case instant. In Rup Chand v. Jambu Parshad[5], the Privy Council held that: (SCC OnLine PC)

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3 Bryan A. Garner, Black's Law Dictionary (10th Edn.) p. 468.
4 1868 SCC OnLine PC 3 : (1867-69) 12 Moo IA 397
5 1910 SCC OnLine PC 5 : (1909-10) 37 IA 93 : ILR (1910) 32 All 247

"The custom alleged in the pleading was this: "Among the Jains adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them." And that appears to be the custom found by the High Court to exist. But upon the argument before their Lordships it was strenuously contended that the evidence in the present case, limited as it is to a comparatively small number of centres of Jain population, was insufficient to establish a custom so wide as this, and that no narrower custom was either alleged or proved.

In their Lordships' opinion there is great weight in these criticisms, enough to make the present case an unsatisfactory precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming."

17. In Sheokuarbai v. Jeoraj[6], the Privy Council observed that, among the Sitambari Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption, and the adopted son may at the time of his adoption be a grown-up and married man. The only ceremony to the validity of such an adoption is the giving and taking of the adopted son.

18. It is very much evident that the appellant in this case has failed to produce any evidence to prove that such practice has attained the status of general custom prevalent among the community concerned. Custom, on which the appellant is relying, is a matter of proof and cannot be based on a priori reasoning or logical and analogical deductions, as sought to be canvassed by the appellant herein. Hence the issue is answered against the appellant.

19. In response to Issue (li), we are concerned here with the custom of adopting married sons in the community of the appellant. The only evidence, the appellant has adduced, is his own testimony and a word of a priest who had performed the ceremony. A general custom which the appellant intends to prove requires greater proof than the one the appellant adduced before the court. Moreover, there is no dispute with regard to the fact that the appellant did not plead in his written statement about existence of any custom as such. Parties to a suit are always governed by their pleadings. Any amount of evidence or proof adduced without there being proper pleading is of no consequence and will not come to the rescue of the parties.

20. At this juncture it would be necessary to observe the law laid down by this Court in numerous cases that the burden of proving adoption is a heavy one and if there is no documentary evidence in support of adoption, the Court should be very cautious in relying upon oral evidence. This Court held so in Kishori Lai v. Chaltibai[7]. We can do no better than to quote the relevant passage from the above judgment which reads as under: (AIR p. 508, para 7)

"7. As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance."
(emphasis supplied)

6 1920 SCC OnLine PC 54 : AIR 1921 PC 77
7 AIR 1959 SC 504

21. In Rahasa Pandiani v. Gokulananda Panda[8], the aforesaid aspect was observed as under: (SCC pp. 341-42, para 4)

> *"4. ... When the plaintiff relies on oral evidence in support of the claim that he was adopted by the adoptive father in accordance with the Hindu rites, and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the court has to act with a great deal of caution and circumspection. Be it realised that setting up a spurious adoption is not less frequent than concocting a spurious will, and equally, if not more difficult to unmask. And the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims about execution of a will, there have been spurious claims about adoption having taken place. And the court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the suspicion of the court and the conscience of the court is not satisfied that the evidence preferred to support such an adoption is beyond reproach."" (emphasis supplied)*

22. In the light of the above precedents, it would be necessary to observe statements of certain witnesses. The appellant, himself, got examined as a witness, which is marked as Ext. 121. He stated that after death of his biological father in 1972, he came to Nasik to continue his education while living with Govardhandas at his residence. As per his evidence, during the marriage of Asha, Govardhandas decided to adopt the appellant and the ceremony was held on 8-7-1973, one day before the marriage. The adoption ceremony was held at the residence of Govardhandas. As the appellant and Govardhandas were from the Jain community, there was no bar in their community either for adoption of a married son or concerning the age of the adopted son. It is stated that there is no custom in their community to reduce the adoption in writing. One Chaturbuj Maharaj was the priest who performed the said ceremony in the presence of his biological mother, sisters and other relatives. His biological mother gave the appellant in adoption to Govardhandas and Sundarabai i.e. the original plaintiff. Govardhandas and Sundarabai performed the pooja of the said ceremony. The said ceremony was held with the desire and consent of Sundarabai and Govardhandas. After the appellant was given in adoption to Govardhandas, the appellant was instructed by the priest to sit on the lap of Govardhandas and Sundarabai. After the ceremony, lunch was served to all persons, who had attended the ceremony. It is to be noted that invitation cards were printed but the same were sent separately and not with the marriage invitation card. In the cross-examination he states that even though the marriage was held on 9-7-1973, certain marriage ceremonies were held as per community traditions on 8-7-1973. That he was aged thirty-two when he was allegedly adopted and he does not know of any examples of adoption of a thirty-two-year-old man. He admits that he did

8 (1987) 2 SCC 338 : AIR 1987 SC 962

not submit any document to show that he was using his adoptive father's name after 1973. He further states that he had filed an application before the municipal council for succession rights, but the same was not produced in the suit. Moreover, he states that he was filing income tax returns in his earlier name "Ratanlal Chunilal".

23. One Chaturbuj Laxminarayan Sharma was examined as Witness 2 on behalf of the appellant. His deposition was marked as Ext. No. 152. He stated that he knew Govardhandas for 30 years. He used to perform ceremonies for his family including the adoption ceremony of the appellant which had taken place at the residence of Govardhandas. He deposed that the ceremony was attended by a gathering of 100 to 200 people. According to him he had performed Navgrah pooja, Kuldevi pooja, Laxmi-narayan pooja, havan and sankalp as part of adoption. Thereafter, name of the appellant was changed from Ratanlal Chunilal to Ratanlal Govardhandas. At the time of the ceremony, mother of the appellant gave the hand of the appellant in the hands of Govardhandas. Photographs were t^aken at the time of the ceremony. In the cross-examination he stated that invitation card for the ceremony was published and distributed. He was unable to tell who decided to perform adoption ceremony by giving the hand of the appellant. He admits that in Jain community, person to be adopted has to be seated on the lap of the adopting father. But he stated that Ratanlal was not asked to take a seat on the lap of Govardhandas as he was weak and Defendant 1 (Ratanlal) was healthier; this is a glaring contradiction between the evidence of appellant and the priest. One Harakchand Bhansali of Kapoorgaon was adopted after he was married. He was not able to give particulars of such adoption. Further he states that he does not know of any other example of adoption of a married person.

24. Girjappa Gangaram Kothule, who was examined as defence Witness 3, stated that he knew Govardhandas for many years. He recollected that many years ago Govardhandas had discussed the matter of adopting the appellant with him. He was present during the ceremony. He could not recollect whether invitation cards were printed for the adoption ceremony. According to his statement, the adoption ceremony was performed at the residence of Govardhandas wherein 200 to 300 persons attended that function. He further stated that no religious ceremony relating to the marriage had taken place prior to the day of marriage. It is to be noted that Mohanlal and Ajith have deposed on the same lines in favour of the appellant.

25. The evidence as discussed above makes it clear that there are lot of contradictions in the evidence of witnesses on all material aspects of adoption. A thorough glance at the entire evidence makes it clear that the appellant who asserts the fact that he is adopted by late Govardhandas failed to plead and prove the factum of adoption. All the circumstances pleaded by the appellant are not properly explained by adducing cogent evidence to the satisfaction of the Court. The trial court placed burden on the plaintiff to prove the adoption which is contrary to law. The appellant failed to satisfy the Court that any question of law much less substantial questions of law arise in this appeal which warrant interference of this Court.

26. Having regard to the evidence available on record and the circumstances elucidated herein above, the view taken by the High Court, being convincingly reasonable, we see no reason to interfere with the judgment[1] of the High Court. Accordingly, this appeal is dismissed. There shall be no orders as to costs.

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KARINA JANE CREED VERSUS UNION OF INDIA & ORS.

SUPREME COURT OF INDIA

Bench: Hon'ble Ms. Justice Indira Banerjee Hon'ble Mr. Justice Ajay Rastogi

Karina Jane Creed.....Petitioner(s)
Versus
Union of India & Ors.....Respondent(s)

SPECIAL LEAVE TO APPEAL (C) NO(S).13627/2019

The special leave petition has been filed by the petitioner, an Australian citizen, challenging the final Judgment and order dated 28.05.2019 passed by the Division Bench of the Delhi High Court. The Supreme Court held that in view of the statutory provisions of the JJ Act and in particular Section 59(12) thereof the relief prayed for in the writ petition cannot be granted. The writ Court could not have waived the statutory requirement of Section 59(12) of the JJ Act.

Decided on : 10th June 2019

This special leave petition has been filed by the petitioner, an Australian citizen, challenging the final Judgment and order dated 28.05.2019 passed by the Division Bench of the Delhi High Court dismissing the Appeal, being LPA No. 351/2019 of the petitioner, against an order dated 10.5.2019 of the Single Judge dismissing the writ Petition being W.P. No. 3567 of 2019 filed by the petitioner for order on the Central Adoption Resource Authority (hereinafter referred to as "CARA") to issue a No Objection Certificate to the petitioner for adoption of two children aged 5 and 6 respectively.

The petitioner says that she has been residing in India for the last four years. In 2016, the petitioner applied to CARA for adoption of the two children. The application was registered and processed. The petitioner thereafter started visiting the children.

From the averments in the petition as also pictures enclosed, it appears that the petitioner has built up a bond with the children who have also become very fond of the petitioner. Learned counsel appearing on behalf of the petitioner submits that the children know the petitioner as their mother. Admittedly, however, the children are not in pre-adoption foster care of the petitioner.

Both India and Australia are signatories to the Convention on Protection of Children and Cooperation in respect of Inter-Country Adoption held in Hague in 1993 (hereinafter referred to as "Hague Convention"). Article 5 of the Hague Convention provides:-

"Article 5 An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State

a) have determined that the prospective parents are eligible and suited to adopt:

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorized to enter and reside permanently in that State."

Inter-country adoption requires a certification with regard to suitability of the adoptive parents to adopt the child, counselling of the prospective adoptive parents and authorization of the child to enter and reside in the receiving State.

In India all inter-country adoptions are governed by the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'JJ Act'). Section 56(4) of the JJ Act provides:-

"56(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority."

Inter-country adoption of an orphan or abandoned or surrendered child can only be effected in accordance with Section 59 of the JJ Act. Section 59(3) of the JJ Act provides:-

"59(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorized foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority."

A foreigner living abroad if interested to adopt an orphan or abandoned or surrendered child from India might apply to an authorized foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, in the manner as provided in the adoption regulations framed by the CARA as provided in Section 59(3).

The authorized foreign adoption agency, or Central Authority, or concerned Government department, of the foreign country has to prepare a home study report of the prospective adoptive parents and upon finding them eligible sponsor their application to CARA for adoption of a child from India.

A foreigner or a person of Indian origin or an overseas citizen of India who has habitual residence in India can apply for adoption of a child from India to CARA along with No Objection Certificate from the diplomatic mission of his country in India.

Section 59(12) of the JJ Act is set out hereinbelow :-

"59(12) – A foreigner or a person of Indian Origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority" .

In view of the statutory provisions of the JJ Act and in particular Section 59(12) thereof the relief prayed for in the writ petition cannot be granted. The writ Court could not have waived the statutory requirement of Section 59(12) of the JJ Act. As observed by learned Single Bench of Delhi High Court, there is little doubt that the petitioner would have brought up the children well, with love and affection and the children too would have been lucky to have the petitioner as an adoptive parent. We have every sympathy for the petitioner but regret our inability to help her.

The special leave petition is accordingly dismissed. As a sequel to the above, pending interlocutory application also stands disposed of.

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STEPHANIE JOAN BECKER VERSUS STATE AND ORS.

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice V. Gopala Gowda

CIVIL APPEAL NO. 1053 OF 2013

(Arising out of SLP (Civil) No. 29505 of 2012)

Stephanie Joan Becker ... Appellant(s)
Versus
State and Ors. ... Respondent(s)

The rejection of the applications filed by the appellant under Sections 7 and 26 of the Guardians and Wards Act, 1890 (hereinafter for short the "Guardians Act") by the learned Trial Court vide its order dated 17.09.2010 in Guardianship Case No. 2 of 2010 and the affirmation of the said order made by the High Court of Delhi by its order dated 09.07.2012 in FAO No. 425 of 2010 has been put to challenge in the present appeal. By the application filed under Section 7 of the Guardians Act, the appellant had sought for an order of the Court appointing her as the guardian of one female orphan child Tina aged about 10 years whereas by the second application filed under Section 26 of the Guardians Act the appellant had sought permission of the Court to take the child Tina out of the country for the purpose of adoption.

The rejection of the aforesaid two applications by the learned Trial Court as well as by the High Court is on a sole and solitary ground, namely, that the appellant, being a single prospective adoptive parent, was aged about 53 years at the relevant point of time whereas for a single adoptive parent the maximum permissible age as prescribed by the Government of India Guidelines in force was 45.

If the foreign adoptive parent is otherwise suitable and willing, and consent of the child had also been taken (as in the present case) and the expert bodies engaged in the field are of the view that in the present case the adoption process would end in a successful blending of the child in the family of the appellant in USA, we do not see as to how the appellant could be understood to be disqualified or disentitled to the relief(s) sought by her in the proceedings in question. It is our considered view that having regard to the totality of the facts of the case the proposed adoption would be beneficial to the child apart from being consistent with the legal entitlement of the foreign adoptive parent. If the above is the net result of the discussions that have preceded, the Court must lean in favour of the proposed adoption. We, therefore, set aside the orders dated 17.09.2010 in Guardianship Case No. 2 of 2010 passed by the learned Trial Court and the order dated 09.07.2012 in FAO No. 425 of 2010 passed by the High Court of Delhi and appoint the appellant as the legal guardian of the minor female child Tina and grant permission to the appellant to take the child to USA.

JUDGMENT

Hon'ble Mr. Jusice Ranjan Gogoi.—

Leave granted.

2. The rejection of the applications filed by the appellant under Sections 7 and 26 of the Guardians and Wards Act, 1890 (hereinafter for short the "Guardians Act") by the learned Trial Court vide its order dated 17.09.2010 in Guardianship Case No. 2 of 2010 and the affirmation of the said order made by the High Court of Delhi by its order dated 09.07.2012 in FAO No. 425 of 2010 has been put to challenge in the present appeal. By the application filed under Section 7 of the Guardians Act, the appellant had sought for an order of the Court appointing her as the guardian of one female orphan child Tina aged about 10 years whereas by the second application filed under Section 26 of the Guardians Act the appellant had sought permission of the Court to take the child Tina out of the country for the purpose of adoption.

3. The rejection of the aforesaid two applications by the learned Trial Court as well as by the High Court is on a sole and solitary ground, namely, that the appellant, being a single prospective adoptive parent, was aged about 53 years at the relevant point of time whereas for a single adoptive parent the maximum permissible age as prescribed by the Government of India Guidelines in force was 45. Though a no objection, which contained an implicit relaxation of the rigour of the Guidelines with regard to age, has been granted by the Central Adoption Resource Authority (CARA), the High Court did not consider it appropriate to take the said no objection/relaxation into account inasmuch as the reasons for the relaxation granted were not evident on the face of the document i.e. no objection certificate in question.

4. To understand and appreciate the contentious issues that have arisen in the present appeal, particularly, the issues raised by a non-governmental organization that had sought impleadment in the present proceedings (subsequently impleaded as respondent No. 4) it will be necessary to take note of the principles of law governing inter-country adoption, a short resume of which is being made hereinbelow. But before doing that it would be worthwhile to put on record that the objections raised by the Respondent No.4, pertain to the legality of the practice of inter country adoption itself, besides the bonafides of the appellant in seeking to adopt the child involved in the present proceeding and the overzealous role of the different bodies involved in the process in question resulting in side stepping of the laid down norms.

5. The law with regard to inter-country adoption, indeed, was in a state of flux until the principles governing giving of Indian children in adoption to foreign parents and the procedure that should be followed in this regard to ensure absence of any abuse, maltreatment or trafficking of children came to be laid down by this Court in Lakshmi Kant Pandey v. Union of India[9]. The aforesaid proceedings were instituted by this Court on the basis of a letter addressed by one Lakshmi Kant Pandey, a practicing advocate of this Court with regard to alleged malpractices indulged in by social and voluntary organizations engaged in the work of offering Indian children in adoption to foreign parents. After an elaborate consideration of the various dimensions of the questions that arose/were raised before the Court and the information laid before it by the Indian Council of Social Welfare, Indian Council of Child Welfare, SOS Children's Villages of India (respondent No. 2 herein) and also certain voluntary organizations working in the foreign jurisdictions, this Court, after holding in favour of inter country adoption, offered elaborate suggestions to ensure that the process of such adoption is governed by strict norms, and a well laid down procedure to eliminate the possibility of abuse or misuse in offering Indian children for adoption by foreign parents is in place. This Court in Lakshmi Kant Pandey (supra) also laid down the approach that is required to be adopted by the courts while dealing with applications under the Guardians and

9 (1984) 2 SCC 244

Wards Act seeking orders for appointment of foreign prospective parents as guardians of Indian children for the eventual purpose of adoption. Such directions, it may be noticed, was not only confined to hearing various organizations like the Indian Council for Child Welfare and Indian Council of Social Welfare by issuance of appropriate notices but also the time period within which the proceedings filed before the Court are to stand decided. Above all, it will be necessary for us to notice that in Lakshmi Kant Pandey (supra) this Court had observed that :

"Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognized social or child welfare agencies in the country."

6. Pursuant to the decision of this Court in Lakshmi Kant Pandey (supra) surely, though very slowly, the principles governing adoption including the establishment of a central body, i.e., Central Adoption Resource Authority (CARA) took shape and found eventual manifestation in a set of elaborate guidelines laid down by the Government of India commonly referred to as the Guidelines For Adoption from India 2006 (hereinafter referred to as "the Guidelines of 2006"). A reading of the aforesaid Guidelines indicates that elaborate provisions had been made to regulate the pre-adoption procedure which culminates in a declaration by the Child Welfare Committee that the child is free for adoption. Once the child (abandoned or surrendered) is so available for adoption the Guidelines of 2006 envisage distinct and separate steps in the process of adoption which may be usefully noticed below :

(1) Enlisted Foreign Adoption Agency (EFAA)

- The applicants will have to contact or register with an Enlisted Foreign Adoption Agency (EFAA)/Central Authority/Govt. Deptt. in their country, in which they are resident, which will prepare the a Home Study Report (HSR) etc. The validity of "Home Study Report" will be for a period of two years. HSR report prepared before two years will be updated at referral.
- The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government departments are not available, then the applications may be sent by the enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India
- The adoption application dossier should contain all documents prescribed in Annexure-2. All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate Govt. Department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations

- A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to RIPA by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

(2) Role of Recognized Indian Placement Agency (RIPA)

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for inter-country adoption with the applicant.
- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefore.

(3) Child being declared free for intercountry adoption - Clearance by ACA

- Before a RIPA proposes to place a child in the Inter country adoption, it must apply to the ACA for assistance for Indian placement.
- The child should be legally free for adoption.
- ACA will find a suitable Indian prospective adoptive parent within 30 days, failing which it will issue clearance certificate for intercountry adoption.
- ACA will issue clearance for inter-country adoption within 10 days in case of older children above 6 years, siblings or twins and Special Needs Children as per the additional guidelines issued in this regard.
- In case the ACA cannot find suitable Indian parent/parents within 30 days, it will be incumbent upon the ACA to issue a Clearance Certificate on the 31st day.
- If ACA Clearance is not given on 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.
- NRI parent(s) (at least one parent) HOLDING Indian Passport will be exempted from ACA Clearance, but they have to follow all other procedures as per the Guidelines.

(4) Matching of the Child Study Report with Home Study Report of FPAP by RIPA

- After a successful matching, the RIPA will forward the complete dossier as per Annexure 3 to CARA for issuance of "No Objection Certificate".

(5) Issue of No Objection Certificate (NOC) by CARA

- RIPA shall make application for CARA NOC in case of foreign/PIO parents only after ACA Clearance Certificate is obtained.
- CARA will issue the 'NOC' within 15 days from the date of receipt of the adoption dossier if complete in all respect.
- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.
- No Indian Placement Agency can file an application in the competent court for intercountry adoption without a "No Objection Certificate" from CARA.

(6) Filing of Petition in the Court

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/ guardianship in the competent court within 15 days.
- The competent court may issue an appropriate order for the placement of the child with FPAP.
- As per the Hon'ble Supreme Court directions, the concerned Court may dispose the case within 2 months.

(7) Passport and Visa

- RIPA has to apply in the Regional Passport Office for obtaining an Indian Passport in favour of the child.
- The concerned Regional Passport Officer may issue the Passport within 10 days.
- Thereafter the VISA entry permit may be issued by the Consulate/Embassy/High Commission of the concerned country for the child.

(8) Child travels to adoptive country

- The adoptive parent/parents will have to come to India and accompany the child back to their country.

7. Even after the child leaves the country the Guidelines of 2006 contemplate a process of continuous monitoring of the welfare of the child through the foreign placement agency until the process of adoption in the country to which the child has been taken is completed, which process the Guidelines contemplate completion within two years. The monitoring of the welfare of the child after the process of adoption is complete and the steps that are to be taken in cases where the adoption does not materialize is also contemplated under the Guidelines of 2006. As the said aspects are not relevant for the purposes of the present adjudication the details in this regard are not being noticed. What, however, would require emphasis, at this stage, is that by and large the Guidelines of 2006 framed by the Ministry of Women and Child Development are in implementation of the decision of this Court in the case of Lakshmi Kant Pandey (supra).

8. Two significant developments in the law governing adoptions may now be taken note of. Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter for short the "JJ Act") was amended by Act 33 of 2006 by substituting sub-Sections 2, 3 and 4 by the present provisions contained in the aforesaid sub-Sections of Section 41. The aforesaid amendment which was made effective from 22.8.2006 is significant inasmuch as under sub-Section 3 power has been conferred in the Court to give a child in adoption upon satisfaction that the various guidelines issued from time to time, either by the State Government or the CARA and notified by the Central Government have been followed in the given case. The second significant development in this regard is the enactment of the Juvenile Justice (Care and Protection of Children) Rules 2007 by repeal of the 2001 Rules in force. Rule 33 (2) makes it clear that "for all matters relating to adoption, the guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub-section (3) of Section 41 of the Act, shall apply." Rule 33 (3) in the various sub-clauses (a) to (g) lays down an elaborate procedure for certifying an abandoned child to be free for adoption. Similarly, sub-rule (4) of Rule 33 deals with the procedure to be adopted for declaring a surrendered child to be legally free for adoption. Once such a declaration

is made, the various steps in the process of adoption spelt out by the Guidelines of 2006, details of which have been extracted hereinabove, would apply finally leading to departure of the child from the country to his/her new home for completion of the process of adoption in accordance with the laws of the country to which the child had been taken. In this regard the order of the courts in the country under Section 41(3) of the JJ Act would be a step in facilitating the adoption of the child in the foreign country.

9. It will also be necessary at this stage to take note of the fact that the Guidelines of 2006 stand repealed by a fresh set of Guidelines published by Notification dated 24.6.2011 of the Ministry of Women and Child Development, Government of India under Section 41(3) of the JJ Act. The time gap between the coming into effect of the provisions of Section 41(3) of the JJ Act i.e. 22.08.2006 and the publication of the 2011 Guidelines by the Notification dated 24.6.2011 is on account of what appears to be various procedural steps that were undertaken including consultation with various bodies and the different State Governments. A reading of the Guidelines of 2011 squarely indicate that the procedural norms spelt out by the 2006 Guidelines have been more elaborately reiterated and the requirements of the pre-adoption process under Rules 33(3) and (4) have been incorporated in the said Guidelines of 2011. As a matter of fact, by virtue of the provisions of Rule 33(2) it is the Guidelines of 2011 notified under Section 41(3) of the JJ Act which will now govern all matters pertaining to inter-country adoptions virtually conferring on the said Guidelines a statutory flavour and sanction. Though the above may not have been the position on the date of the order of the learned trial court i.e. 17.9.2010, the full vigour of Section 41(3) of the JJ Act read with Rule 33 (2) of the Rules and the Guidelines of 2011 were in operation on the date of the High Court order i.e. 9.7.2012. The Notification dated 24.06.2011 promulgating the Guidelines of 2011 would apply to all situations except such things done or actions completed before the date of the Notification in question, i.e., 24.06.2011. The said significant fact apparently escaped the notice of the High Court. Hence the claim of the appellant along with consequential relief, if any, will have to be necessarily considered on the basis of the law as in force today, namely, the provisions of the JJ Act and the Rules framed thereunder and the Guidelines of 2011 notified on 24.6.2011. In other words, if the appellant is found to be so entitled, apart from declaring her to be natural guardian and grant of permission to take the child away from India a further order permitting the proposed adoption would also be called for. Whether the order relating to adoption of the child should be passed by this Court as the same was not dealt with in the erstwhile jurisdictions (trial court and the High Court) is an incidental aspect of the matter which would require consideration.

10. The facts of the present case, as evident from the pleadings of the parties and the documents brought on record, would go to show that the appellant's case for adoption has been sponsored by an agency (Journeys of the Heart, USA) rendering service in USA which is recognized by CARA. The Home Study Report of the family of the appellant indicates that the appellant apart from being gainfully employed and financially solvent is a person of amicable disposition who has developed affinity for Indian culture and Indian children. The appellant, though unmarried, has the support of her brother and other family members who have promised to look after the child in the event such a situation becomes necessary for any reason whatsoever. The Child Study Report alongwith medical examination Report prepared by the recognized agency in India has been read and considered by the appellant and it is only thereafter that she had indicated her willingness to adopt the child in question. Before permitting the present process of inter

country adoption to commence, all possibilities of adoption of the child by an Indian parent were explored which however did not prove successful.

The matter was considered by the No Objection Committee of the CARA and as stated in the affidavit of the said agency filed before this Court, the No Objection Certificate dated 03.02.2010 has been issued keeping in mind the various circumstances peculiar to the present case, details of which are as hereunder :

- "Child Tina was an older female child (aged 7 years when the NOC was issued) and thus relaxation was permissible as per the guidelines.
- The Prospective parent was 54 years of age, which is within the age up to which adoption by foreign prospective parent is permissible after relaxation i.e. 55 years.
- The Prospective Adoptive Parent is otherwise also suitable as she is financially stable and there are three reference letters supporting adoption of the child by her. The Home study report of the prospective parent (Ms. Stephanie Becker) shows the child as kind, welcoming, caring and responsible individual with physical, mental emotional and financial capability to parent a female child up to age of seven years from India.
- Procedures such as declaration of the child as legally free for adoption by CWC Child Welfare Committee (CWC); ensuring efforts for domestic adoption and clearance of Adoption Coordinating Agency; and taking consent of older child had been followed.
- Follow-up of the welfare of the child was to be properly done through Journeys of the Hearts, USA, the authorized agency which had also given an undertaking to ensure the adoption of child Tina according to the laws in USA within a period not exceeding two years from the date of arrival of the child in her new home. The agency has also committed to send follow-up reports as required.
- The Biological brother of the prospective parent, Mr. Philip Becker Jr. and his wife Ms. Linda Becker have given an undertaking on behalf of the single female applicant to act as legal guardian of the child in case of any unforeseen event to the adoptive parent. This is another important safeguard.
- Article 5 from the Office of Children's Issues, US Department of State allowing child Tina to enter and reside permanently in the United States and declaring suitability of the prospective adoptive parent, was available."

11. In view of the facts as stated above which would go to show that each and every norm of the adoption process spelt out under the Guidelines of 2006, as well as the Guidelines of 2011, has been adhered to, we find that the apprehension raised by the intervener, though may have been founded on good reasons, have proved themselves wholly unsubstantiated in the present case. If the foreign adoptive parent is otherwise suitable and willing, and consent of the child had also been taken (as in the present case) and the expert bodies engaged in the field are of the view that in the present case the adoption process would end in a successful blending of the child in the family of the appellant in USA, we do not see as to how the appellant could be understood to be disqualified or disentitled to the relief(s) sought by her in the proceedings in question. It is our considered view that having regard to the totality of the facts of the case the proposed adoption would be beneficial to the child apart from being consistent with the legal entitlement of the

foreign adoptive parent. If the above is the net result of the discussions that have preceded, the Court must lean in favour of the proposed adoption. We, therefore, set aside the orders dated 17.09.2010 in Guardianship Case No. 2 of 2010 passed by the learned Trial Court and the order dated 09.07.2012 in FAO No. 425 of 2010 passed by the High Court of Delhi and appoint the appellant as the legal guardian of the minor female child Tina and grant permission to the appellant to take the child to USA.

In view of the provisions of Section 41(3) of the JJ Act and to avoid any further delay in the matter which would be caused if we were to remand the aforesaid aspect of the case to the learned Trial Court, only on the ground that the same did not receive consideration of the learned Court, we deem it appropriate to pass necessary orders giving the child Tina in adoption to the appellant. The CARA will now issue the necessary conformity certificate as contemplated under clause 34(4) of the Guidelines of 2011. The appeal consequently shall stand allowed in the above terms.

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SHABNAM HASHMI VERSUS UNION OF INDIA & ORS.

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice Shiva Kirti Singh

WRIT PETITION (CIVIL) NO. 470 OF 2005

Shabnam Hashmi ... Petitioner(S)

Versus

Union of India & Ors. ... Respondent (S)

Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution.

There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

The decision of this Court in Lakshmi Kant Pandey (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi.—

1. Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this sphere of law, gently nudged by the judicial verdict in Lakshmi Kant Pandey Vs. Union of India[10] and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care And Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short 'the JJ Act, 2000) as also The Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short 'the JJ Rules, 2007').

3. The alternative prayer made in the writ petition may be conveniently dealt with at the outset. The decision of this Court in Lakshmi Kant Pandey (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

4. A brief outline of the statutory developments in the concerned sphere may now be sketched. In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short 'the JJ Act, 1986') dealt with only "neglected" and "delinquent juveniles". While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a 'neglected juvenile' is custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head 'Rehabilitation and Social Reintegration' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

10 (1984) 2 SCC 244

5. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2(aa)-"adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship"

6. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. [Rule 33 (5)] Substantial changes were made in the other sub-sections of Section 41 of the JJ Act, 2000. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)].

7. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the concerned State. Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organisation. Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions.

8. It will now be relevant to take note of the stand of the Union of India. Way back on 15th May, 2006 the Union in its counter affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (respondent No. 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 Child Welfare Committees (CWC) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognized adoption organisations in the country are 395. According to the Union the number of reported adoptions in the country from January, 2013 to September, 2013 was 19884 out of which 1712 cases are of inter-country adoption. The third respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

9. In the light of the aforesaid developments, the petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

10. The All India Muslim Personal Law Board (hereinafter referred to as 'the Board') which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption under Section 41(5) of the JJ Act, 2000.

11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

12. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in In re: Manuel Theodore D'souza[11] and Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.[12] respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

13. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in Manuel Theodore D'souza (supra) and the Kerala High Court in Philips Alfred Malvin (supra) can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in Manuel Theodore D'souza (supra) the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable.

14. Consequently, the writ petition is disposed of in terms of our directions and observations made above.

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11 (2000) 3 BomCR 244
12 AIR 1999 Kerala 187

UNION OF INDIA & ANR. ETC. VERSUS. ANKUR GUPTA & ORS.

SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Ashok Bhushan Hon'ble Mr. Justice K.M. Joseph

Union Of India & Anr. Etc. ……Petitioner(s)
Versus
Ankur Gupta & Ors. ……Respondent(s)

CIVIL APPEAL NOS. 2017-2020 OF 2019
(arising out of S.L.P.(C) Nos.1476-1479 of 2019)

Decided On : 25th February, 2019

The statutory procedure and the statutory regime which is prevent as on date and is equally applicable to aspirants, i.e. Indian prospective adoptive parents and prospective adoptive parents for inter country adoption cannot be lost sight.

JUDGMENT

Hon'ble Justice Mr. Ashok Bhushan

Leave granted.

2. The contesting respondent Nos. 1 and 2 having appeared through caveat, we have heard counsel for the parties and proceed to decide the matter finally.

3. Union of India and Central Adoption and Resources Agency, Ministry of Women & Child Development is in appeal questioning the Division Bench judgment dated 04.09.2018 in Writ Appeal No. 2259 of 2018 and Writ Appeal No.2675 of 2018. Two other appeals have been filed by two other appellants questioning a common order dated 04.09.2018 passed by the High Court in C.C.C. No. 1690 of 2018 and C.C.C. No. 1691 of 2018.

4. We first take the Civil Appeal filed against the Division Bench judgment in Writ Appeal No.2259 of 2018 and Writ Appeal No.2675 of 2018. The brief facts giving rise to the appeal as has been noted by the Division Bench of the High Court are to the following effect:-

4.1 That after completing his studies from the Indian Institute of Technology and India Institute of Management, Ahmedabad, in the year 2000, Mr. Ankur Gupta, the respondent No.1 migrated to United State of America (USA for short). In 2004, Ms. Geetika Agarwal, the respondent No.2 went to USA for her Ph.D. During their stay in USA in June, 2006, the respondent Nos. 1 and 2 got married. They stayed in USA for a decade. They returned to India in 2016. While staying in USA, the respondent No.2 became an American Citizen; the respondent No.1 applied for American citizenship. However, till 2016, when the couple returned to India, the respondent No.1 was not given the American Citizenship. Moreover, even after ten years of marriage, the couple was not blessed with any children. Therefore, upon their return to India, they eventually planned to adopt an Indian child.

4.2 The respondent Nos.1 and 2 submitted an Application on 19.07.2016 through Central Adoption Resource Information and Guidance System (CARINGS) to adopt a child as Indian Prospective Adoptive Parents. Just before submitting the application for adoption respondent No.2 had acquired the citizenship of USA on 19.05.2016 which had been declared as such in application submitted on 19.07.2016.

4.3 According to the Guideline, 2015, a Home Study Report has to be prepared by a Specialized Adoption Agency in order to coordinate the efforts of a 'Prospective adoptive parents' to adopt a child. On 01.08.2016, Shishu Mandir Agency, a registered Specialized Adoption Agency, filed its Home Study Report. Thereafter, the respondents were in queue awaiting referral of a child for adoption. On 05.12.2016, during the time they were waiting for referral of a child for adoption, the respondent No.1 was granted the U.S. Citizenship on 05.12.2016.

4.4 According to the respondents, on the basis of the advice received by them, they informed CARA, the appellant No.2 about the change in citizenship status of respondent No.1. Moreover, on 05.11.2017, the couple registered themselves as Overseas Citizens of India (OCI) residing in India. The said registration was made under the Adoption Regulations, 2017 (Regulations, 2017, for short), which was notified on 4th January 2017 in supersession of the Guidelines Governing Adoption of Children, 2015.

4.5 Since the respondents had informed the Specialised Adoption Agency about the change in their citizenship status, the Specialized Agency informed the appellant No.2, through e-mail dated 05.12.2017, about the change of citizenship status of the respondents. The Specialised Adoption Agency referred to the respondents' second registration, namely, CUSA201771205. On behalf of the respondents, the Specialised Adoption Agency requested the appellants that the respondent's seniority for adoption of a child should be continued on the basis of the first registration.

4.6 By e-mail dated 06.12.2017, the appellant No.2 informed the Specialised Adoption Agency that the request for continuing the seniority of the couple would be considered with the approval of the competent authority. However, the eligibility of the couple for adoption would be in the category of "OCI living in India".

4.7 On 01.01.2018, Baby Shomya (born on 30.09.2017) was referred by the respondent No.3 for adoption by the respondent Nos. 1 & 2. The respondent Nos. 1 & 2 accepted the referral on 02.01.2018. The respondent Nos. 1 & 2 visited Baby Shomya, who was with the respondent No.3 at Patna. Therefore, on 04.01.2018, the respondent Nos.1 & 2 wrote to the CEO of the appellant No.2 requesting for continual of the reference of Baby Shomya for adoption. The respondent Nos.1 & 2, who apprehended that the referral of Baby Shomya for adoption would expire on 18.01.2018, repeatedly corresponded with the appellants as a follow-up for completing the adoption of Baby Shomya. Again, in the month of March 2018, the respondent nos. 1 & 2 visited Baby Shomya. During this visit, they were informed that in a High-Level Committee Meeting on 27.02.2018, their request for permission to continue the first application dated 19.07.2016, as Indians living in India Prospective Adoptive Parents, was declared as invalid, because the respondent No.1 had

also been given US citizenship. They were further informed that they will, instead, have to wait for a referral of another child as 'Overseas Citizen of India'.

4.8 Therefore, the respondent Nos. 1 and 2 filed writ petition, namely, W.P. Nos. 12427-428 of 2018, impugning the aforesaid decision, which was communicated to them over an e-mail dated 15.03.2018. The Writ Court allowed the writ petitions by order dated 19.06.2018. The writ Court quashed the aforesaid decision communicated vide the e-mail dated 15.03.2018. Further, the High Court directed the appellants to consider and examine the request of the respondent Nos.1 & 2 on the basis of their first application dated 19.07.2016 expeditiously, but within 15 days from the date of receipt of this order.

4.9 The learned Single Judge vide its judgment and order dated 19.06.2018 allowed the writ petitions by passing following order:-

"ORDER

(1) Writ petitions are hereby allowed.

(2) Communication dated 15.03.2018- Annexure-Z is hereby quashed.

(3) Writ of mandamus is issued to respondents to consider and examine the application submitted by petitioners on the strength and basis of the application dated 19.07.2016 – AnnexureA/Annexure-R-2 expeditiously, at any rate, within 15 days from the date of receipt of this order, by keeping in mind the observations made herein above. "

4.10 Union of India and Central Adoption Resources Agency, Ministry of Women & Child Development filed Writ Appeal No. 2259 of 2018 and Writ Appeal No. 2675 of 2018 against the judgment. Two Contempt Applications being C.C.C. Nos. 1690-1691 of 2018 were also filed by respondent Nos. 1 and 2, which were also considered and decided by Division Bench of High Court vide its judgment dated 04.09.2018. The Division Bench of the High Court vide its judgment dated 04.09.2018 dismissed the writ appeals. The Division Bench affirmed the order of the learned Single Judge. While dismissing the writ appeals, the contempt petitions were also closed. It is useful to extract paragraph Nos. 30 and 31 of the judgment, which is relevant for the present case:-

"30. For the aforesaid reasons, this Court is of the considered opinion that the Writ Court has rightly concluded that the appellants were not justified in denying the benefit of referral of the child, Baby Shomya, for adoption by the respondent Nos.1 and 2, and that no grounds are made out for interference with the exercise of extraordinary jurisdiction by the Writ Court under Article 226 of the Constitution of India in the peculiar facts and circumstances that congeal into exceptional circumstances. Therefore, the Writ appeal is rejected and consequentially, the pending applications are also disposed of. The appellants are directed to implement the directions of the Writ Court within a period of four weeks from the date of receipt of the certified copy of this order.

31. In view of the dismissal of the writ appeal, and the further direction to the appellants to implement the directions of the Writ Court within the further period as stated above, the contempt proceeding is closed."

4.11 The appellants aggrieved by the said judgment have filed these appeals.

5. Shri Aman Lekhi, learned ASG appearing for the appellants submits that High Court, both learned Single Judge and Division Bench erred in not correctly construing the provisions of Sections 57, 58 and 59 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the Adoption Regulations, 2017. It is submitted that the respondent No.1 after submitting first application on 19.07.2016 for in country adoption having acquired US citizenship on 06.12.2016 went outside the zone of in country adoption. It is submitted that the second application was submitted by the respondents on 05.11.2017 for inter country adoption but in that second application, the respondents have given their different identity and mobile numbers. It is submitted that the respondent having gone out of zone of consideration for in country adoption, their application cannot be directed to be considered on the basis of seniority for in country adoption. It is submitted that there are more than 22,000 parents waiting, according to seniority, for in country adoption, respondents cannot stroll march over them. It is submitted that offer to adopt Shomya, which was sent on 01.01.2018 was on the basis of first application of the respondents and after the respondents informed in writing on 04.01.2018 about their second registration dated 05.11.2017, the communication was sent to the respondents that decision regarding their seniority will be taken by the competent authority. The communication was sent on 15.03.2018 to the respondents that they cannot be given the benefit of their seniority on the basis of their first application and they have to wait for receiving an offer as overseas citizen of India. It is submitted that there were no special circumstances on the basis of which any exception can be made in favour of the respondents as has been directed by the High Court.

6. Learned counsel appearing for the respondents submits that the Act, 2015 and the Regulations, 2017 do not provide for any mechanism when Indian parents, who have already got themselves registered for adoption acquires the foreign citizenship. It is submitted that as per Regulation 41 of the Regulations, 2017, a common seniority list is contemplated, which means that respondents shall retain their seniority position on the basis of first application. Thus, offer to adopt Shomya to the respondents cannot be faulted. It is submitted that respondent Nos.1 and 2 being fully competent for applying for adoption, who are still qualified and economically stable and eager to adopt the child cannot be denied their right merely because the respondent No.1 was conferred the US citizenship on 06.12.2016, i.e., much after submission of their first application as Indian parent.

7. It is submitted that even though respondent Nos.1 and 2 have been conferred US citizenship, both are residing in Bangalore, India and in both the applications, their residence is shown as India, hence in peculiar circumstances, they have rightly been offered child Shomya for adoption. It is submitted that the respondent Nos. 1 and 2 bonafide has not concealed any information and has bonafide submitted their application on 05.11.2017 as Overseas Citizen of India and the fact that immediately when they received offer for adoption of Shomya on 02.01.2018, on 04.01.2018, they sent an e-mail giving details of both the applications. The respondents have been bonafide pursuing their claim for adoption, they having not been blessed with a child even though after happy marital life of more than ten years. It is submitted that the High Court has rightly held that present case can be considered as an exceptional case and without making it a precedent, the adoption in favour of the respondents be allowed to maintain.

8. We have considered the submissions of the learned counsel for the parties and have perused the records.

9. The 2015 Act, Chapter VIII deals with adoption. Section 56 sub-section

(1) provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Act, the rules made thereunder and the adoption regulations framed by the authority. Section 57 deals with eligibility of prospective adoptive parents, which is as follows:-

57. Eligibility of prospective adoptive parents.—

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority 10. Section 58 deals with procedure for adoption by Indian prospective adoptive parents living in India, which is to the following effect:-

58. Procedure for adoption by Indian prospective adoptive parents living in India.—

(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

11. The next provision, which needs to be noticed is Section 59, which provides for procedure for intercountry adoption of an orphan or abandoned or surrendered child, which is as follows:-

59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child.—

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority

12. The respondent Nos.1 and 2 submitted their application as prospective adoptive parents living in India. Although, on the date of submission of application, respondent No.2 was already a US citizen, the respondent No.1 being Indian citizen, the application was fully maintainable as per the provisions of Regulations and as per the guidelines applicable at the relevant time as Indian prospective adoptive parents. Even Regulation 21(1) of Regulations, 2017 provides that if one of the prospective adoptive parents is foreigner and other is an Indian, such case shall be treated at par with Indians living in India. After the respondent No.1 acquired the US citizenship on 06.12.2016 and OCI card was issued to respondent No.1 on 27.04.2017, second application was submitted on 05.11.2017 by the respondents for inter-country adoption both having become US citizens. In view of the fact that both had become US citizens by 06.12.2016, they were not eligible for adoption as Indian prospective adoptive parents living in India. Mere fact that Act or Regulations does not provide for any mechanism to upload any further information in first registration cannot alter the legal position and consequences of acquiring the foreign citizenship by an Indian. The consequences of obtaining US citizenship of respondent Nos.1 and 2 shall take its effect immediately.

13. The submission of learned counsel for the respondents that Regulation 41 deals with common seniority list also need to be noted. Regulation 41 of the Regulations, 2017 is as follows:- 41. Seniority of the prospective adoptive parents.-

(1) The prospective adoptive parents shall be referred children on the basis of a single seniority list, which shall be maintained from the date of registration and other criteria as stipulated under these regulations.

(2) The seniority of resident Indians shall be based on the date of online registration and submission of the documents, except for Home Study Report, in Child Adoption Resource Information and Guidance System.

(3) The seniority of Non Resident Indian or Overseas Citizen of India or foreign prospective adoptive parents shall be based on the date of online registration and submission of the requisite documents alongwith Home Study Report in Child Adoption Resource Information and Guidance System.

(4) Prospective adoptive parents shall be allowed to change the State preference once within sixty days from the date of registration and in case they change the State preference after sixty days from the date of registration, they shall be placed at the bottom of the seniority list in the changed State.

(5) Seniority of prospective adoptive parents registered as single, but married later shall be counted from the date of registration as single after receipt of fresh Home Study Report. (6) Prospective adoptive parents registered for normal child, shall be able to adopt a special need child or hard to place child with the same registration.

14. It is also submitted that prior to Regulations, 2017, there were two separate seniority lists, which were maintained under the Guidelines, 2015, which has been now made a single seniority list. Even if there is a single seniority list, now contemplated by Regulation 41, a placement in the seniority list with regard to resident Indian and non-resident Indian or overseas citizen of India are based on different yardsticks as provided in Regulations 41(2) and 41(3). Even if the common seniority list has to be utilised for the purpose of in country adoption and inter-country adoption as per the respective categories, the difference between in country adoption and inter-country adoption cannot be lost sight or given a go bye by the mere fact that a common seniority list is maintained. It is true that Regulation 41 or any other Regulation does not contemplate a situation when a resident Indian after acquiring the foreign citizenship submits a fresh registration, what is the consequence and value of its first registration. Even though regulations are silent and do not provide for any mechanism or any answer to such fact situation, the natural consequences of acquiring foreign citizenship shall follow. We, thus, find force in the submission of the learned ASG that the right of respondent Nos. 1 and 2 for adoption as resident Indian is lost after respondent No.1 having acquired the US citizenship on 06.12.2016. Offer of the child to the respondent Nos. 1 and 2 was based on their first application dated 19.07.2016, in which if the clause of foreign citizenship is ignored, was in accordance with the Act and the Rules. Further, whether the factum of respondent No.1 acquiring US citizenship on 06.12.2016 should be ignored for the purposes of adoption or not is the question, which is required to be addressed and answered in these appeals.

15. Section 58 and 59 provides for two different mechanisms for adoption. As per Section 59(1), if an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parents despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption. Thus, sixty days period has to be elapsed from the date when the child has been declared legally free for adoption. In the present case, child was declared free for adoption on 14.12.2017 by Child Welfare Committee, Patna,

Bihar. Before expiry of sixty days, child could not have been offered for adoption to parents, who are eligible for adoption under Section 59. We are, however, not oblivious to the fact that respondent Nos.1 and 2 had been bonafide pursuing their applications for adoption, initially as resident Indians and thereafter even as overseas citizens of India. As per Section 57, both the respondent Nos.1 and 2 are fully eligible and competent to adopt the child. It was under the circumstances as noticed above that the child Shomya was offered to respondent Nos.1 and 2, who rightly communicated their acceptance and communicated with the child and are willing to take child in adoption and to take all care and provide good education to her. We have no doubt in the bonafide or the competence of respondent Nos.1 and 2 in their effort to take the child in adoption, but the statutory procedure and the statutory regime, which is prevalent as on date and is equally applicable to all aspirants, i.e., Indian prospective adoptive parents and prospective adoptive parents for inter-country adoption, cannot be lost sight. However, by virtue of Section 59(2), the respondent Nos.1 and 2 can at best may be given priority in inter-country adoption, they being eligible overseas citizens of India and further due to consequences of events and facts as noticed above.

16. In view of the foregoing discussions, we are of the view that ends of justice be served in disposing the Civil Appeals arising out of SLP (C) Nos. 1476- 1477 of 2019 in following manner:

(i) The decision dated 27.02.2018 as communicated to the respondent Nos. 1 and 2 by e-mail dated 15.03.2018 is upheld.

(ii) Judgments of learned Single Judge as well as of Division Bench in so far as it directs to consider and examine the application of respondent Nos. 1 and 2 on the basis of first registration dated 19.07.2016 are set aside.

(iii) The competent authority shall again notify the child Shomya legally free for adoption, which notification shall be issued within one week from today.

(iv) That in event, within sixty days from the date the child(Shomya) is declared as legally free for adoption is not taken by or adopted by Indian prospective adoptive parents, the child Shomya shall be given in adoption to the respondent Nos.1 and 2 in inter-country adoption. All consequential steps thereafter shall be completed.

17. Now, coming to Civil Appeals arising out of SLP (C) Nos. 1478-1479, these appeals have been filed against the order dated 04.09.2018 passed in C.C.C. Nos. 1690-1691 of 2018, the contempt proceedings having been closed by the Division Bench by its impugned judgment dated 04.09.2018, nothing more is required to be said in that regard. We, however, observe that filing of the contempt applications in the fact situation of the present case was illadvised. Both the contempt applications deserve to be rejected. The appeals are allowed and contempt applications stand rejected. Parties shall bear their own costs.

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LAKSHMI KANT PANDEY VERSUS UNION OF INDIA

Supreme Court of India
1984 AIR 469

Bench : Hon'ble Mr. Justice P.N. Bhagwati, Hon'ble Mr. Justice R.S. Pathak, Hon'ble Mr. Justice Amarendra Nath Sen

1984 SCR (2) 795

Lakshmi Kant Pandey
vs
Union Of India

Decided on 6 February, 1984

CITATION:

1984 AIR 469 1984 SCR (2) 795

1984 SCC (2) 244 1984 SCALE (1)159

The essence of the directions given in Lakshmi Kant Pandey case (supra) is as follows:

(1)Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter- country adoption' should be acceptable. (2) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents.

(3) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter-county adoption with a view to trafficking in children.

(4) Following are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court.

Adoption of Children by foreigner-International adoptions-Normative and Procedural safeguards to be insisted upon so far as a foreigner wishing to take a child in adoption.

The petitioner, an advocate of the Supreme Court addressed a letter in public interest to the Court, complaining of malpractices indulged in by social organisation and voluntary agencies engaged in the work of offering Indian Children in adoption to foreign parents, the petitioner alleged that not only Indian Children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Houses, they in course of time become beggars or prostitutes for want of proper care from their alleged foster parents." The petitioner,

accordingly, sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian Children by Foreign parents. Being a public interest litigation, the letter was treated as a writ petition.

Disposing of the Writ Petition, after indicating the principles and norms to be observed in giving a Child in adoption to foreign parents, the Court

HELD: 1: 1. Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents.

1:2. When the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness.

2:1. The primary object of giving the child in adoption should be the welfare of the child. Great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life or moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medial or other research and may be placed in a worse situation than that in his own country.

2:2. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians and Wards Act 1890 for the purpose of facilitating such adoption.

2:3. The High Courts of Bombay, Delhi and Gujarat have laid down by Rules and Instructions certain procedure when a foreigner makes an application for adoption under the Guardian and Wards Act including issuing of a notice to the Indian Council of Social Welfare and other officially recognised social welfare agencies with a view to assist the court in properly and carefully scrutinising the applications of the foreign parents for determining whether it will be in the interest of the child and promotive of its welfare, to be adopted by the foreign parents

making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family health and home. This Procedure is eminently desirable and it can help considerably to reduce, if notice imitate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents.

3:1. The requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption and the procedure that should be followed for the purpose of ensuring that such inter-country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life are as under:

(1) Every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency of India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency to individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handler trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.

Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsor in such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certified by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income tax assessment orders, bank references

and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and an undertaking that they would adopt the child according to the law of their country within a period of not more than two years from time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India process. sing their case, and that they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of an officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorize the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents must accompany the application of the foreigner for taking child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the forefingers must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is affected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India.

3:2. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the Government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. Such lists shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies

operation in India in the area of inter-country adoption under licence or recognition from the Government of India.

3:3. If the biological parents are known, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filling an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. But in order to eliminate any possibility of mischief and to make sure that the child has in fact surrendered by its biological parents, it is necessary that the Institution or Centre or home for Child Care or social or Child Welfare Agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. The biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of a child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

3:4. It should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating. Since an application for appointment as guardian can be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter country adoption, and in that event it must send without any undue delay the name and must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in intercountry adoption. The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India. But apart from these two recognised social or child welfare agencies

functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the are of child care and welfare they should also be recognised by the Government of India or the Government of the State for the purpose of inter-country adoptions. But before taking a decision to recognise any particular social or child welfare agency for the purpose of inter country adoptions the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually in cured by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

3:5. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:-

- ***(1) Identifying information, supported where possible by documents.***
- ***(2) Information about original parents, including their health and details of the mother's pregnancy and birth.***
- ***(3) Physical, intellectual and emotional development.***
- ***(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.***
- ***(5) Recent photograph.***
- ***(6) Present environment-category of care (Own home, foster home, institution etc.) relationships routines and habits.***
- ***(7) Social worker's assessment and reasons for suggesting inter-country adoption. [838G-H; 839AE]***

3:6. The recognised social or child welfare agency must insist upon approval of a specific known child and once that approval is obtained the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the

home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption. It is also necessary that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must before offering a child in adoption, make sure that the child is free to be adopted. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for adoption. It is also necessary that the recognised social or child welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that on such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file alongwith the application for guardianship, a certificate reciting such satisfaction.

3:7. In cases where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, there should be no objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. There should also be no difficulty to apply for guardianship of the child in the court of the latter State. because the child not having any permanent place of residence would then be ordinarily resident in the place where it is in the care and custody of such agency or individual.

Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. For the same reasons, notice of the application for guardianship should also not be published in any newspaper. If the court is satisfied, after giving notice of the application to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application, that it will be for the welfare of the child to be give in adoption to the foreigner making the application for guardianship, it will only then make an order appointing the foreigner as guardian of the child and permitting him to remove the child

to his own country with a view to eventual adoption. The Court will introduce the following conditions in the order, namely:

(i) That the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for any reason.

(ii) That the foreigner who is appointed guardian shall submit to the court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child alone with a recent photograph quarterly during the first two years and half yearly for the next three years.

(iii) The order appointing guardian shall carry, attached to it, a photograph of the child duly counter-signed by an officer of the court.

Where an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective Ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Govt. of India will also sent to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain and unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment exploitation or use for ulterior purposes and to immediately report and instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

3:8. The social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding Rs. 60 per day (this outer limit being subjective to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to is new home as also medical expenses including hospitalization charges, any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent.

3:9. If a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Children above the age of 3 years may also be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 to 7 years may be able to assimilate themselves in the new surroundings without any difficulty. Even

children above the age of seven years may be given in inter-country adoption but their wishes may be ascertained if they are in a position to indicate any preference.

3:10. The proceedings on the Application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed.

3:11. The social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. However, a foreigner may make voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parents shall be received until after the child has reached the country of its prospective adoptive parent.

JUDGMENT

ORIGINAL JURISDICTION: Writ Petition (CRL) No. 1171 of 1982.

Under article 32 of the Constitution of India. Petitioner in person.

FOR THE RESPONDENTS:

Miss A. Subhashini for Union of India and Ministry of Social Welfare.

Miss Kamini Jaiswal for Indian Council of Social Welfare.

J.B. Dadachanji & Co. for Indian Council of Child Welfare and Swedish Embassy.

Dr. N.M. Ghatate for all God's Children Inc. Arizone, U.S.A.

P.H. Parekh for Maharashtra State Women's Council of Child Welfare, Bombay and for Enfants de-L'espoir.

P.K. Chakeravorty for Legal Aid Service, West Bengal. Mrs. Manik Karanjawala for Indian Associations for Promotion of Adoption.

Mrs Urmila Kapur for SOS Children's Village of India. Kailash Vasdev for Missionary of Charity, Calcutta. Baldev Raj Respondent in person.

G.M. Coelho Bar at Law for Enfant's du Mande (France) Miss Rani Jethamalani for Kuanyin Charitable Trust. B.M. Bageria for Terre Des Hommes (India) Society. Sukumar Ghose for Mission of Hope (India) Society, Calcutta.

S.K. Mehta for Netherlands Inter Country Child Welfare Oraganisation.

Parijot Sinha for society for International Child Welfare.

Kailash Vasdev for Bhavishys.

The Judgment of the Court was delivered by BHAGWATI, J. This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter referred to a press report based on "empirical investigation carried out by the staff of a reputed foreign magazine" called "The Mail" and alleged that not only Indian children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the Shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster parents." The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition and by an Order dated 1st September, 1982 the Court issued notice to the Union of India the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on 30th September, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on 12th October, 1982 the only written submission filed was that the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish Organisation called `Barnen Framfoer Allt Adoptioner" intimating to the Court that this Organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. S.O.S, Children's Villages of India also appeared through their counsel Mrs. Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could made their submissions on the question of adoption of Indian Children by foreign parents. Since S.O.S, Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated 12th October, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present any material and make their submissions, they could do so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the

writ petition the names of "any Indian Institutions or Organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and S.O.S. Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child Welfare, the Indian Council of Social Welfare and the S.O.S. Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to 9th November, 1982 for enabling the parties to carry out these directions.

It appears that the Indian Council of Social Welfare thereafter in compliance with the directions given by the Court, filed copies of the Adoption of Children Bill, 1972 and the adoption of Children Bill, 1980. The adoption of Children Bill, 1972 was introduced in the Rajya Sabha sometime in 1972 but it was subsequently dropped, presumably because of the opposition of the Muslims stemming from the fact that it was intended to provide for a uniform law of adoption applicable to all communities including the Muslims. It is a little difficult to appreciate why the Muslims should have opposed this Bill which merely empowered a Muslim to adopt if he so wished; it had no compulsive force requiring a Muslim to act contrary to his religious tenets: it was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt. But in view of the rather strong sentiments expressed by the members of the Muslim Community and with a view not to offend their religious susceptibilities, the Adoption of Children Bill, 1980 which was introduced in the Lok Sabha eight years later on 16th December, 1980, contained an express provision that it shall not be applicable to Muslims. Apart from this change in its coverage the Adoption of Children Bill, 1980 was substantially in the same terms as the Adoption of Children Bill, 1972. The Adoption of Children Bill 1980 has unfortunately not yet been enacted into law but it would be useful to notice some of the relevant provisions of this Bill in so far as they indicate what principles and norms the Central Government regarded as necessary to be observed for securing the welfare of children sought to be given in adoption to foreign parents and what procedural safeguards the Central Government thought, were essential for securing this end. Clauses 23 and 24 of the Adoption of Children Bill, 1980 dealt with the problem of adoption of Indian children by parents domiciled abroad and, in so far as material, they provided as follows:

"23 (1) Except under the authority of an order under section 24, it shall not be lawful for any person to take or send out of India a child who is a citizen of India to any place outside India with a view to the adoption of the child by any person.

(2) Any person who takes or sends a child out of India to any place outside India in contravention of sub-section (1) or makes or takes part in any arrangements for transferring the care and custody of a child to any person for that purpose shall be punishable with imprisonment for a term which may extend to six months or with fine, or with both. (24) (1) If upon an application made by a person who is not domiciled in India, the district court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled, and for that purpose desires to remove the child from India either immediately or after an interval, the court may make an order (in this section referred to as a provisional adoption order) authorising the applicant to remove the child for the

purpose aforesaid and giving to the applicant the care and custody of the child pending his adoption as aforesaid:

Provided that no application shall be entertained unless it is accompanied by a certificate by the Central Government to the effect that- (i) the applicant is in its opinion a fit person to adopt the child; (ii) the welfare and interests of the child shall be safeguarded under the law of the country of domicile of the applicant; (iii) the applicant has made proper provision by way of deposit or bond or otherwise in accordance with the rules made under this Act to enable the child to be repatriated to India, should it become necessary for any reason.

(2) The provisions of this Act relating to an adoption order shall, as far as may be apply in relation to a provisional adoption order made under this section. The other clauses of the Adoption of Children Bill, 1980 were sought to be made applicable in relation to a provisional adoption order by reason of sub-clause (3) of clause 24. The net effect of this provision, if the Bill were enacted into law, would be that in view of clause 17 no institution or organisation can make any arrangement for the adoption of an Indian child by foreign parents unless such institution or organisation is licensed as a social welfare institution and under Clause 21, it would be unlawful to make or to give to any person any payment or reward for or in consideration of the grant by that person of any consent required in connection with the adoption of a child or the transfer by that person of the care and custody of such child with a view to its adoption or the making by that person of any arrangements for such adoption. Moreover, in view of Clause 8, no provisional adoption order can be made in respect of an Indian child except with the consent of the parent or guardian of such child and if such child is in the care of an institution, except with the consent of the institution given on its behalf by all the persons entrusted with or in charge of its management, but the District Court can dispense with such consent if it is satisfied that the person whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated the child or has persistently failed without reasonable cause to discharge his obligation as parent or guardian or can not be found or is incapable of giving consent or is withholding consent unreasonably. When a provisional adoption order is made by the District Court on the application of a person domiciled abroad, such person would be entitled to obtain the care and custody of the child in respect of which the order is made and to remove such child for the purpose of adopting it under the law or within the country in which he is domiciled. These provisions in the Adoption of Children Bill, 1980 will have to be borne in mind when we formulate the guidelines which must be observed in permitting an Indian child to be given in adoption to foreign parents. Besides filing copies of the Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980 the Indian Council of Social Welfare also filed two lists, one list giving names and particulars of recognised agencies in foreign countries engaged in facilitating procurement of children from other countries for adoption in their own respective countries and the other list containing names and particulars of institutions and organisations in India engaged in the work of offering and placing Indian children for adoption by foreign parents.

The Writ Petition thereafter came up for hearing on 9th November, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated 9th November, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits

or statements should be filed on or before 27th November, 1982. The Court also issued notice of the writ petition to the State of West Bengal directing it to file its affidavit or statement on or before the same date. The Court also directed the Superintendent of Tees Hazari courts to produce at the next hearing of the writ petition quarterly reports in regard to the orders made under the Guardian and Wards Act, 1890 entrusting care and custody of Indian children to foreign parents during the period of five years immediately prior to 1st October, 1982. Since the Union of India had not yet filed its affidavit or statement setting out what was the attitude adopted by it in regard to this question, the Court directed the Union of India to file its affidavit or statement within the same time as the others. The Court then adjourned the hearing of the writ petition to 1st December 1982 in order that the record may be completed by that time. Pursuant to these directions given by the Court, various affidavits and statements were filed on behalf of the Indian Council of Social Welfare, Enfants Du Monde, Missionaries of Charity, Enfants De L's Espoir, Indian Association for promotion of Adoption Kuan-yin Charitable Trust, Terre Des Homes (India) Society, Maharashtra State Women's Council, Legal Aid Services West Bengal, SOS Children's Villages of India, Bhavishya International Union for Child Welfare and the Union of India. These affidavits and statements placed before the Court a wealth of material bearing upon the question of adoption of Indian children by foreign parents and made valuable suggestions and recommendations for the consideration of the Court. These affidavits and statements were supplemented by elaborate oral arguments which explored every facet of the question, involving not only legal but also sociological considerations. We are indeed grateful to the various participants in this inquiry and to their counsel for the very able assistance rendered by them in helping us to formulate principles and norms which should be observed in giving Indian children in adoption to foreign parents and the procedure that should be followed for the purpose of ensuring that such inter-country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they ave to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years

shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

"The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment." The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has Constituted the National Children's Board with the Prime Minister as the chair person. It is the function of the National Children's Board to provide a focus for planning and review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential services. The National Policy also stresses the vital role which the voluntary organisations have to play in the field of education, health recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations.

There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose:

"PRINCIPLE 2: The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically mentally morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

PRINCIPLE 3: The child shall be entitled from his birth to a name and a nationality.

PRINCIPLE 6: The Child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

PRINCIPLE 9: The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

PRINCIPLE 10: The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men."

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The Adoption of Children Bill 1972 sought to provide for a uniform law of adoption applicable to all communities including the muslims but, as pointed out above, it was dropped owing to the strong opposition of the muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U.N. Agencies including the International Year of the Child Secretariat points out that most third world children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number

of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation. What Paul Harrison has said about children of the third world applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned, to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realise "full potential of growth". But of course as we said above, every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter country adoption' should be acceptable. This principle stems from the fact that inter country adoption may involve trans-racial, trans-cultural and trans-national aspects which would not arise in case of adoption' within the country and the first alternative should therefore always be to find adoptive parents for the child within the country. In fact, the Draft Guidelines of Procedures Concerning Inter-Country Adoption formulated at the International Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved at the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982, recognise the validity of this principle in clause 3.1 which provides: "Before any plans are considered for a child to be adopted by a foreigner, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country". Where, however, it is not possible to find placement for the child in an adoptive family within the country, we do not see anything wrong if: a home is provided to the child with an adoptive family in a foreign country. The Government of India also in the affidavit filed on its behalf by Miss B. Sennapati Programme Officer in the Ministry of Social Welfare seems to approve of inter-country adoption for Indian children and the proceedings of the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982 clearly show that the Joint Secretary, Ministry of Social Welfare who represented the Government of India at the Workshop "affirmed support of the Indian Government to the efforts of the international organisations in promoting measures to protect welfare and interests of children who are adopted aboard."

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925

LVIII requested the Secretary General of the United Nations to convene a group of Experts with relevant experts with relevant experience of family and child welfare with the following mandate:

"(a) To prepare a draft declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally, and to review and appraise the recommendations and guidelines incorporated in the report of the Secretary General and the relevant material submitted by Governments already available to the Secretary General and the regional commissions.

(b) To draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social development-including family and child welfare-programmes."

Pursuant to this mandate an expert Group meeting was convened in Geneva in December, 1978 and this Expert Group adopted a "Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally". The Commission for Social Development considered the draft Declaration at its 26th Session and expressed agreement with its contents and the Economic and Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner. None of the parties appearing could give us information whether any action has been taken by the General Assembly. But the draft Declaration is a very important document in as much it lays down certain social and legal principles which must be observed in case of inter-country adoption. Some of the relevant principles set out in the draft Declaration may be referred to with advantage:

"Art. 2. It is recognised that the best child welfare is good family welfare.

4. When biological family care is unavailable or in appropriate, substitute family care should be considered.

7. Every child has a right to a family. Children who cannot remain in their biological family should be placed in foster family or adoption in preference to institutions, unless the child's particular needs can best be met in a specialized facility.

8. Children for whom institutional care was formerly regarded as the only option should be placed with families, both foster and adoptive.

12. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family.

14. In considering possible adoption placements, those responsible for the child should select the most appropriate environment for the particular child concerned.

15. Sufficient time and adequate counselling should be given to the biological parents to enable them to reach a decision on their child's future, recognizing that it is in the child's best interest to reach this decision as early as possible.

16. Legislation and services should ensure that the child becomes an integral part of the adoptive family.

17. The need of adult adoptees to know about their background should be recognized.

19. Governments should determine the adequacy of their national services for children, and recognize those children whose needs are not being met by existing services. For some of these children, inter-country adoption may be considered as a suitable means of providing them with a oily.

21. In each country, placements should be made through authorized agencies competent to deal with inter country adoption services and providing the same safeguards and standards as are applied in national adoptions.

22. Proxy adoptions are not acceptable, in consideration of the child's legal and social safety.

23. No adoption plan should be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available. All necessary consents must be in a form which is legally valid in both countries. It must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality.

24. In inter-country adoptions, legal validation of the adoption should be assured in the countries involved.

25. The child should at all times have a name, nationality and legal guardian."

Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the Workshop held in Brighton, U.K. on 4th September, 1982. These guidelines were based on the Draft Declaration and they are extremely relevant as they reflect the almost unanimous thinking of participants from various countries who took part in the Regional Conference in Bombay and in the Workshop in Brighton, U.K. There are quite a few of these guidelines which are important and which deserve serious consideration by us:

"1.4. In all inter-country adoption arrangements, the welfare of the child shall be prime consideration. Biological Parents:

2.2. When the biological parents are known they shall be offered social work services by professionally qualified workers (or experienced personnel who are supervised by such qualified workers) before and after the birth of the child.

2.3. These services shall assist the parents to consider all the alternatives for the child's future. Parents shall not be subject to any duress in making a decision about adoption. No commitment to an adoption plan shall be permitted before the birth of the child. After allowing parents a reasonable time to reconsider any decision to relinquish a child for adoption, the decision should become irrevocable.

2.5. If the parents decide to relinquish the child for adoption, they shall be helped to understand all the implications, including the possibility of adoption by foreigners and of no further contact with the child. 2.6. Parents should be encouraged, where possible, to provide information about the child's background and development, and their own health.

2.8. It is the responsibility of the appropriate authority or agency to ensure that when the parents relinquish a child for adoption all of the legal requirements are met.

2.9. If the parents state a preference for the religious up-bringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration. 2.10. If the parents are not known, the appropriate authority or agency, in whose care the child has been

placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

3.1. Before any plans are considered for a child to be adopted by foreigners, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country.

3.2. A child-study report shall be prepared by professional workers (or experienced personnel who are supervised by such qualified workers) of an appropriate authority or agency, to provide information which will form a basis for the selection of prospective adopters for the child, assist with the child's need to know about his original family at the appropriate time, and help the adoptive parents understand the child and have relevant information about him/her.

3.3 As far as possible, the child-study report shall include the following:

3.3.1. Identifying information, supported where possible by documents.

3.3.2. Information about original parents, including their health and details of the mother's pregnancy and the birth.

3.3.3. Physical, intellectual and emotional development.

3.3.4. Health report.

3.3.5. Recent photograph.

3.3.6. Present environment-category of care (Own home, foster home, institution, etc.) relationships, routines and habits.

3.3.7. Social Worker's assessment and reasons for suggesting inter-country adoption.

3.4. Brothers and sisters and other children who have been cared for as siblings should not be separated by adoption placement except for special reasons.

3.5. When a decision about an adoption placement is finalised, adequate time and effort shall be given to preparation of the child in a manner appropriate to his/her age and level of development. Information about the child's new country and new home, and counselling shall be provided by a skilled worker. 3.5. (a) Before any adoption placement is finalized the child concerned shall be consulted in a manner appropriate to his/her age and level of development.

3.6. When older children are placed for adoption, the adoptive parents should be encouraged to come to the child's country of origin, to meet him/her there, learn personally about his/her first environment and escort the child to its new home.

Adoptive Parents:

4.3. In addition to the usual capacity for adoptive, parenthood applicants need to have the capacity to handle the trans-racial, trans-cultural and trans-national aspects of inter-country adoptions.

4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to parent a particular type of child and provide relevant in formation for other authorities such as Courts.

4.5. The report on the family study which must be made in the community where the applicants are residing, shall include details of the following:

4.5.1. Identifying information about parents and other members of the family, including any necessary documentation.

4.5.2. Emotional and intellectual capacities of prospective adopters, and their motivation to adoption. 4.5.3. Relationship (material, family, relatives, friends, community)

4.5.4. Health.

4.5.5. Accommodation and financial position. 4.5.6. Employment and other interests.

4.5.7. Religious affiliations and/or attitude. 4.5.8. Capacity for adoptive parenthood, and details of child preferred (age, sex, degree of disability).

4.5.9. Support available from relatives, friends, community.

4.5.10. Social worker's assessment and details of adoption authority's approval.

4,5.11. Recent photograph of family. Adoption Authorities and Agencies:

5.1. Inter-country adoption arrangements should be made only through Government adoption authorities (or agencies recognised by them) in both sending and receiving countries. They shall use experienced staff with professional social work education or experienced personnel supervised by such qualified workers.

5.2. The appropriate authority or agency in the child's country should be informed of all proposed inter-country adoptions and have the opportunity to satisfy itself that all alternatives in the country have been considered, and that inter-country adoption is the optimal choice of care for the child. 5.3. Before any inter-country adoption plan is considered, the appropriate authority or agency in the child's country should be responsible for establishing that the child is legally free for adoption, and that the necessary documentation is legally valid in both countries.

5.4. Approval of inter-country adoption applicants is a responsibility of the appropriate authorities or agencies in both sending and receiving countries. An application to adopt a child shall not be considered by a sending country unless it is forwarded through the appropriate authority or agency in the receiving country.

5.5. The appropriate authority or agency in both countries shall monitor the reimbursement of costs involved in inter-country adoption to prevent profiteering and traffic king in children.

5.6. XX XX XX XX

5.7. When a child goes to another country to be adopted, the appropriate authority or agency of the receiving country shall accept responsibility for supervision of the placement, and for the provision of progress reports for the adoption authority or agency in the sending country for the period agreed upon.

5.8. In cases where the adoption is not to be finalised in the sending country, the adoption authority in the receiving country shall ensure that an adoption order is sought as soon as possible but not later than 2 years after placement. It is the responsibility of the appropriate authority or agency

in the receiving country to inform the appropriate authority or agency in the sending country of the details of the adoption order when it is granted.

5.8.1. In cases where the adoption is to be finalised in the sending country after placement, it is the responsibility of the appropriate authority or agency in both the sending and receiving country to ensure that the adoption is finalised as soon as possible.

5.9. If the placement is disrupted before the adoption is finalised, the adoption authority in the receiving country shall be responsible for ensuring, with the agreement of the adoption authority in the sending country that a satisfactory alternative placement is made with prospective adoptive parents who are approved by the adoption authorities of both countries.

Adoption Services and Communities:

6.1. Appropriate authorities or agencies in receiving countries shall ensure that there is adequate feedback to the appropriate authorities or agencies in sending countries, both in relation to inter-country adoption generally and to individual children where required.

6.2. XX XX XX XX

6.3. The appropriate authorities and agencies in both sending and receiving countries have a responsibility for public education in relation to inter-country adoption, to ensure that when such adoption is appropriate for children, public attitudes support this. Where public attitude is known to be discriminatory or likely to be hostile on grounds of race or colour, the appropriate authority or agency in the sending country should not consider placement of the child.

Status of the Child:

7.1. Family:

It is essential that in inter-country adoption child is given the same legal status and rights of inheritance, as if she/he had been born to the adoptive parents in marriage.

7.2. Name:

When the legal adoption process is concluded the child shall have the equivalent of a birth registration certificate.

7.3. Nationality:

When the legal adoption is concluded, the child shall be granted appropriate citizenship.

7.4. XX XX XX XX

7.5. Immigration:

Before an inter-country adoption placement with particular prospective adopters is proposed, the appropriate authority or agency in the child's country shall ensure that there is no hindrance, to the child entering the prospective adopters' country, and that travel documents can be obtained at the appropriate time. We shall examine these provisions of the Draft Declaration and the draft guidelines of procedure when we proceed to consider and lay down the principles and norms which should be followed in intercountry adoption.

Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment

in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (a) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court" is defined in sub-section (4) of section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to section 8, such an order shall not be made except on the application of one of four categories of persons specified in clauses (a) to (d), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub section (1) of section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor-and that is the kind of application which is availed of for the purpose of intercountry adoption-it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows section 11, sub- section (1) which prescribes that if the court is satisfied that there is ground for proceeding on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general.

These are the relevant provisions of the Guardians and Wards Act 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay

that High Court has issued a notification dated 10th May 1972 incorporating Rule 361-B in Chapter XX of the Rules of the High Court of Bombay (Original Side) 1957 an this newly added Rule provides inter alia as follows:

When a foreigner makes an application for being appointed as the guardian of the person or property of a minor, the Prothonotary and Senior Master shall address a letter to the Secretary of the Indian Council of Social Welfare, informing him of the presentation of the application and the date fixed for the hearing thereof-he shall also inform him that any representation which the Indian Council of Social Welfare may make in the matter would be considered by the Court before passing the order on the application. A copy of the application shall be forwarded to the Secretary of the Indian Council of Social Welfare along with the letter of Prothonotary and Senior Master."

The High Court of Delhi has also issued instructions on the same lines to the Courts subordinate to it and these instructions read as follows:

(i) A foreigner desirous of being appointed guardian or the person of a minor and praying for leave to remove the minor to a foreign country, shall make an application for the purpose in the prescribed form under the Guardians and Wards Act, attaching with it three copies of passport size photographs of the minor, duly attested by the person having custody of the minor at the time;

(ii) If the court is satisfied that there is no ground for proceedings on the application, it shall fix a day for the hearing there of and cause notice of the application and of the date fixed for the hearing on the person and in the manner mentioned in Section 11, Guardians and Wards Act, 1890 as also to the general public and the Secretary of the Indian Council of child Welfare and consider their representation;

(iii) Every person appointed guardian of the person of a minor shall execute a bond with or without a surety or sureties as the court may think fit to direct and in such sum as the court may fix, having regard to the welfare of the minor and to ensure his production in the court if and when so required by the court;

(iv) On the court making an order for the appointment of a foreigner guardian of the person of an Indian minor, a copy of the minor's photograph shall be counter-signed by the Court and issued to the guardian or joint guardian, as the case may be, appointed by the court alongwith the certificate or guardianship."

The High Court of Gujarat has not framed any specific rule for this purpose like the High Courts of Bombay and Delhi but in a judgment delivered in 1982 in the case of Rasiklal Chaganlal Mehta,(1) the High Court of Gujarat has made the following observations:

"In order that the Courts can satisfactorily decide an intercountry adoption case against the aforesaid background and in the light of the above referred guidelines, we consider it necessary to give certain directions. In all such cases, the Court should issue notice to the Indian Council of Social Welfare (175, Dadabhai Naroji Road, Bombay-400001) and seek its assistance. If the Indian Council of Social Welfare so desires it should be made a party to the proceedings. If the Indian Council of Social Welfare does not appear, or if it is unable, for some reason, to render assistance, the Court should issue notice to an independent, reputed and publicly/officially

recognised social welfare agency working in the field and in that area and request it to render assistance in the matter."

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the Court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay, Delhi and Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the Court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the Court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parents resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidlines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus has in most cases where an application

is made by a foreign parent for being appointed guardian of a child in the courts in Bombay, Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to be adopted by the foreign parents and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed

countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Let us first consider what are the requirements which should be insisted upon so far ar a foreigner whishing to take a child in adoption is concerned In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security

assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty hardship or inconvenience if it is insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgment though it need not strictly adhere to the requirements of that Annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certificate by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than two years from the time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India processing their case, they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of an Officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorise the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary

Public whose signature should be duly attested either by an Officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an Officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter- country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological parents are concerned ? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together of the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents

are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some times on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitential to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child of within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it

may be necessary to allow some time to the child to overcome any health problems experienced after birth.

We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated 23rd August, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerela, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter- country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of intercountry adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian

including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

"**(1)** Identifying information, supported where possible by documents.

(2) Information about original parents, including their health and details of the mother's pregnancy and birth.

(3) Physical, intellectual and emotional development.

(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.

(5) Recent photograph.

(6) Present environment-category of care (Own home, foster home, institution etc.) relationships, routines and habits.

(7) Social worker's assessment and reasons for suggesting inter-country adoption."

The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource

Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adopt on and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards. There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

It is also necessary to point out that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must, before offering a child

in adoption, make sure that the child is free to be adopted. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan or destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile court to an institution, centre or home for committed children and is declared to be a destitute by the juvenile court, it must be regarded as free for adoption. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for the adoption. It is also necessary that the recognised welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that no such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction.

We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court of 22nd July, 1982 in Miscellaneous Petition No. 178 of 1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil.

Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this purpose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and

may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

We must emphasize strongly that the entire procedure which we have indicated above including preparation of child study report, making of necessary enquiries and taking of requisite steps leading upto the filing of an application for guardianship of the child proposed to be given in adoption, must be completed expeditiously so that the child does not have to remain in the care and custody of a social or child welfare agency without the warmth and affection of family life, longer than is absolutely necessary.

We may also point out that if a child is to be given in intercountry adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be some what difficult for a grown up child to get acclimatized to new surroundings in a different land and some times a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown up child. But we make it clear that we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely because they are past the age of 3 years. We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to

indicate any preference. The statistics placed before us show that even children past the age of 7 years have been happily integrated in the family of their foreign adoptive parents.

Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare of the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for and reason. We may point out that such a provision is to be found in clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High

Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter- signed by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents.

Once a child is taken in adoption by a foreigner and the child grows up in the surroundings of the country of adoption and becomes a part of the society of that country, it may not be desirable to give information to the child about its biological parents whilst it is young, as that might have

the effect of exciting his curiosity to meet its biological parents resulting in unsettling effect on its mind. But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child attains maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.

These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical intellectual and spiritual development. We may point out that the adoption of children by foreign parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a period of more than two months, any social or child welfare agency having the care and custody of a child may be permitted to process an application of a foreigner, but barring this departure the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

The writ petition shall stand disposed of in these terms. Copies of this order shall be sent immediately to the Ministry of Social Welfare of the Government of India and the Ministry of Social Welfare of each of the State Governments as also to all the High Courts in the country and to the Indian Council of Social Welfare and the Indian Council of Child Welfare. We would direct that copies of this Order shall also be supplied to the Embassies and Diplomatic Missions of Norway, Sweden, France, Federal Republic of Germany and the United States of America and the High Commissions of Canada and Australia for their informations since the statistics show that these are the countries where Indian children are taken in adoption. S.R.

ANNEXURE-'A'

1. Source of Referral.

2. Number of single and joint interviews.

3. Personality of husband and wife.

4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable),

5. Social status and family background.

6. Nature and Adjustment with occupation.

7. Relationship with community.

8. Description of home.

9. Accommodation for the child.

10. Schooling facilities.

11. Amenities in the home.

12. Standard of living as it appears in the home.

13. Type of neighbourhood.

14. Current relationship between husband and wife.

15. **(a)** Current relationship between parents and children (if any children).

(b) Development of already adopted children (if any) and their acceptance of the child to be adopted.

16. Current relationship between the couple and the members of each other's families.

17. If the wife is working, will she be able to give up the job ?

18. If she cannot leave the job, what arrangements will she make to look after the child ?

19. Is adoption considered because of sterility of one of the maritial partners ?

20. If not, can they eventually have children of their own ?

21. If a child is born to them, how will they treat the adopted child ?

22. If the couple already has children how will these children react to an adopted child ?

23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.

24. Reasons for wanting to adopt an Indian child.

25. Attitude of grand-parents and relatives towards the adoption.

26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.

27. Anticipated plans for the adopted child.

28. Can the child be adopted according to the adoption law in the adoptive parents country ? Have they obtained the necessary permission to adopt ? (Statement of permission required.)

29. Do the adoptive parents know any one who adopted a child from their own country or another country ? Who are they ? From where did they fail to get a child from that source ?

30. Did the couple apply for a child from any other source ? If yes, which source ?

31. What type of child is the couple interested in ? (sex, age, and for what reasons.)

32. Worker's recommendation concerning the family and the type of child which would best fit into this home.

33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.

34. Name of agency responsible for post placement, supervision and follow up.

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LANDMARK JUDGMENTS ON MAINTAINANCE AND ALIMONY

KALYAN DEY CHOWDHURY VERSUS RITA DEY CHOWDHURY NEE NANDY

Supreme Court of India

Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mr. Justice Mohan M. Shantanagoudar

CIVIL APPEAL NO. 5369 OF 2017†

Kalyan Dey Chowdhury . . Appellant;
Versus
Rita Dey Chowdhury Nee Nandy . . Respondent.

Decided on April 19, 2017

A. Family and Personal Laws — Hindu Marriage Act, 1955 — Ss. 25(1) and (2) — Powers of court under — Scope of — Power to modify, vary or discharge permanent alimony or maintenance, due to change in circumstances — Held, S. 25 of Hindu Marriage Act, confers power upon court to grant a permanent alimony to cither spouse who claims same by making an application — S. 25(2) confers ample power on courts to vary, modify or discharge any order for permanent alimony or permanent maintenance that may have been c made in any proceeding under provisions contained in S. 25(1) — in exercising power under S. 25(2), court would have regard to change in circumstances of either party when mi application is made under S. 25(2) for variation, modification or rescission of order as court may deem just (Paras 14 to 16)

Kulbhushan Kumar v. Raj Kumari, (1970) 3 SCC 129, followed

Rita Dey Chowdhury nee Nandy v. Kalyan Dey Chowdhury. 2016 SCC On Line Cal 4972, modified

Rita Dey Chaudhury v. Kalyan Dey Chowdhury, 2015 SCC OnLinc Cal 10447; Rita Dey Choudhury v. Kalyan Dey Chowdhury. Criminal Revision No, 3087 of 2006. order dated 21-3-2011 (Cal); Rita Dey Chowdhury v. Kalyan Dey Chowdhury, SLP(C) No. 12968 of 2015, order dated 22-2-2016 (SC), referred to

B. Family and Personal Laws — Hindu Marriage Act, 1955 — Ss. 25(1), (2) and S, 28(2) — Permanent maintenance — Quantum of — Factors to be considered — Change in circumstances — Enhancement of, under S. 25 of Hindu Marriage Act, 1955 — Validity of

— High Court in review petition in matrimonial appeal enhancing alimony from Rs 16,000 to Rs 23,000 p.m. — In February 2016, net salary of appellant staled to be Rs 95,527 and married for second time with a son from second / wedlock — Divorcee wife with eighteen-year-old son, a qualified beautician and Montessori teacher and earning Rs 30,000 p.m.

— Held, amount of permanent alimony awarded to wife must be befitting status of parties and capacity of spouse to pay maintenance — Maintenance is always dependant on factual situation of case and court would be justified in moulding claim for maintenance passed on various factors — High Court & was justified in enhancing maintenance — However, since appellant lias also got married second time and has a child from the second marriage, in the interest of justice, maintenance of Rs 23,000 reduced to Rs 20,000 p.m. as maintenance lo respondent wife and son — Impugned judgment

modified — Maintenance amount payable to respondent wife on or before 10th of every succeeding English calendar month — Hindu Adoptions and Maintenance Act, 1956, S. 18. (Paras 14 to 16)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice R. Banumathi.—

Leave granted. Challenge in this appeal is to the order dated 15-9-2016 passed by the High Court of Calcutta in Rita Dey Chowdhury nee Nandy v. Kalyan Dey Chowdhury[1], reviewing an order dated 2-2-2015[2] passcd earlier in an application filed under Section 25(2) of the Hindu Marriage Act, 1955, thereby enhancing the amount of maintenance from Rs 16,000 per month to Rs 23,000 per month.

2. The parties are entangled in several rounds of litigation. Background facts in a nutshell are as follows: the marriage of the appellant and the respondent was solemnised on 10-8-1995 as per Hindu rites and customs at the appellant's residence at Kalna. A male child was born on 4-10-1996 at Chandannagore who is now a major pursuing his college education. After the birth of the child, it is alleged that the respondent continued to live in her parents' house. The appellant husband requested the respondent to return lo the matrimonial home at Kalna along with the child. It is alleged that instead of acceding to the request of the appellant husband and returning back to the matrimonial home, the respondent wife insisted that the appellant husband shifts to her father's place at C hand an nag ore.

3. The appellant filed an application under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights against the respondent wife in Matrimonial Suit No. 370 of 1997 before the District Judge, Burdwan on 23-12-1997. On receipt of summons in the above matrimonial suit on 9-2-1998, the respondent wife lodged an FIR bearing PS Case No. 25 dated 13-2-1998 under Sections 498-A and 406 IPC against the appellant and his parents at PS Chandannagore. The appellant and his parents were granted anticipatory bail by the Sessions Judge, Burdwan on 20-5-1998 in the FIR filed by the respondent wife. The respondent wife also filed a maintenance case being Misc. Case a No. 24 of 1998 under Section 125 CrPC against the appellant husband claiming maintenance for herself and the minor son.

4. On 10-8-2000, the Additional District Judge, Burdwan passed decree of restitution of conjugal rights in favour of the appellant husband. However, the respondent did not reconcile and preferred an appeal against the said decree of restitution of conjugal rights before the High Court being FA No. 198 of 2001. In the High Court, by an order dated 24-5-2001 an interim arrangement was made directing the appellant herein to go to the parental home of the respondent wife at Chandannagore and take back the wife and the child to his residence at Kalna and make necessary arrangement for living with his wife and child separately from the parents of the husband in the first floor of the matrimonial home. Subsequently, the interim arrangement was recalled. The interim arrangement did not work and the appeal filed by the respondent wife was allowed on 13-8-2003.

5. In the year 2003, the respondent wife filed Matrimonial Suit No. 533 of 2003 before the District Judge, Hooghly against the appellant husband under Section 10 of the Act for judicial separation. According to the appellant, though he filed written objections denying allegations made against him, he could not attend the hearing and it is alleged that he was manhandled in

1 2016 SCC OnLine Cat 4972

2 Rita Dev Chaudhury v. Kalyan Dey Chowdhury. 2015 SCC OnLine Cal 10447

the court premises by some men of the respondent wife. Ex parte decree for judicial separation was ordered on 19-5-2006, as a consequence of which decree for permanent alimony was also ordered under Section 25 of the Hindu Marriage Act to the respondent wife amounting to Rs 2500 per month and Rs 2000 per month to the minor son.

6. In the meanwhile, the appellant husband and his parents were acquitted e of all the charges by the Additional District and Sessions Judge, 2nd Fast Track Court, Serampore on 20-7-2006 in the case filed alleging dowry harassment. Being aggrieved by the order hereinabove, the respondent wife filed a revision petition being CRR No. 3087 of 2006 before the High Court at Calcutta which came to be dismissed on 21 -3-2011[3].

7. The appellant husband filed a divorce petition being Matrimonial Suit No. 71 of 2007 which was renumbered as Suit No. 193 of 2010 under Section 13(1)0-a) of the Hindu Marriage Act for dissolution of marriage. In the said divorce petition, the respondent wife filed an application for permanent alimony under Section 25 of the Act. By an order dated 19-5-2006, passed by the Additional District Judge, 1st Court, Hooghly in Matrimonial Suit No. 533 of 2003, enhanced the amount of maintenance to Rs 8000 per month in FA g No. 193 of 2008.

8. On 10-10-2010, the respondent filed an amendment application before the Court being Misc. Case No. 2 of 2010 in Matrimonial Suit No. 533 of 2003 under Section 25(2) of the Act praying for enhancement of maintenance amounting to Rs 10,000 per month for herself and Rs 6000 for her minor son. Vide order dated 10-10-2012, the said application was allowed and maintenance @ Rs 6000 each was ordered for the respondent and her minor son.

9. Aggrieved by this order, the respondent wife preferred a revision petition under Article 227 of the Constitution of India before the High Court being CO No. 4228 of 2012. During its pendency, Matrimonial Suit No. 193 of 2010 was decreed and the marriage between the parties came to be dissolved by the order of the Additional District Judge, 1st Fast Track Court, Serampore on 30-11-2012. Post-divorce, the appellant herein remarried and has a male child born from the second wedlock.

10. By an order dated 2-2-2015[2], the High Court disposed of the above revision petition by directing the appellant husband to pay a sum of Rs 16,000 towards the maintenance of the respondent wife as well as her minor son. Aggrieved by this order, the respondent wife preferred Special Leave Petition (C) No. 12968 of 2015 which was disposed[4] of as withdrawn with liberty to approach the High Court by way of review. Pursuant to the above order, the respondent wife filed a review application being RVW No. 85 of 2016 arising out of CO No. 4228 of 2012. Upon hearing both the parties, by order dated 15-9-2016[1], the learned Single Judge of the High Court modified the order under review and enhanced the amount of maintenance from Rs 16,000 to Rs 23,000 which is the subject-matter of challenge in this appeal.

11. The learned counsel for the appellant Mr Pijush K. Roy submitted that in exercise of review jurisdiction, the High Court ought not to have enhanced the maintenance amount from Rs 16,000 to Rs 23,000. It was further submitted that the appellant husband is posted at Malda

3 Rita Dey Choudhury v. Kalyan Dey Choudhury. Criminal Revision No. 3087 of 2006, order dated 21-3-2011 (Cal)

4 Rita Dey Chowdhury v. Kalyan Dey Chowdhury, SLP (C) No. 12968 of 2015, order dated 22-2-2016 (SC), wherein it was directed:

"The learned counsel for the petitioner seeks leave to withdraw this special leave petition with liberty to approach the High Court in a review petition. Permission is granted with the above liberty. The special leave petition is, accordingly, disposed of as withdrawn."

Medical College, Malda, West Bengal and gets a net salary of Rs 87,500 per month and while so, the appellant would find it difficult to pay enhanced maintenance amount of Rs 23,000 per month to the respondent wife. It is also submitted that the respondent is a qualified beautician and Montessori teacher and earns Rs 30,000 per month and the son has also attained eighteen years of age and hence the enhanced maintenance amount of Rs 23,000 per month is on the higher side and prayed for restoring the original order of Rs 16,000 per month.

12. Per contra, the learned counsel for the respondent wife Ms Supriya Juneja submitted that the High Court on perusal of the pay slip and the expenditure of the appellant husband has arrived at the right conclusion of granting Rs 23,000 as maintenance to the respondent. The learned counsel has also further submitted that even though the son has attained majority and since the son is aged only eighteen years and is presently studying in a college and for meeting the expenses of higher education and other requirements enhanced maintenance amount of Rs 23,000 per month is a reasonable one and the impugned order warrants no interference.

13. We have considered the rival contentions and perused the impugned judgment1 and other materials on record.

14. Section 25 of the Hindu Marriage Act, 1955 confers power upon the court to grant a permanent alimony to either spouse who claims the same by making an application. Sub-section (2) of Section 25 of the Hindu Marriage 5 Act confers ample power on the court to vary, modify or discharge any order for permanent alimony or permanent maintenance that may have been made in any proceeding under the Act under the provisions contained in sub-section (1) of Section 25. In exercising the power under Section 25(2), the court would have regard to the "change in the circumstances of the parties". There must be some change in the circumstances of either party which may have to be taken into account when an application is made under sub-section (2) of Section 25 for variation, modification or rescission of the order as the court may deem just.

15. The review petition under Order 47 Rule I CPC came to be tiled by the respondent wife pursuant to the liberty granted by this Court when the earlier order dated 2-2-2015[2] awarding a maintenance of Rs 16,000 to the respondent wife as well as to her minor son was under challenge before this Court. As pointed out by the High Co tin. in February 2015 the appellant husband was getting a net salary of Rs 63,842 after deduction of Rs 24,000 on account of GPF and Rs 12,000 towards income tax. In February 2016, the net salary of the appellant is stated to be Rs 95,527. Following Kulbhushan Kumar v. Raj Kumuri, in this case, it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the respondent wife. The amount of permanent alimony awarded to the wife must be befitting the status e of the parties and the capacity of the spouse to pay maintenance. Maintenance is always dependent on the factual situation of the case and the court would be justified in moulding the claim for maintenance passed on various factors. Since in February 2016, the net salary of the husband was Rs 95,000 per month, the High Court was justified in enhancing the maintenance amount. However, since the appellant has also got married second time and has a child from the second marriage, in the interest of justice, we think it proper to reduce the amount of maintenance of Rs 23,000 to Rs 20,000 per month as maintenance to the respondent wife and son.

16. In the result, the maintenance amount of Rs 23,000 awarded to the respondent wife is reduced to Rs 20,000 per month and the impugned judgment is modified and this appeal is partly allowed. The maintenance of Rs 20,000 per 9 month is payable to the respondent wife on or before 10th of every succeeding English calendar month. No costs.

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MANISH JAIN VERSUS AKANKSHA JAIN

Supreme Court of India

Bench: Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mrs. Justice R. Banumathi

Manish Jain
Versus
Akanksha Jain

CIVIL APPEAL NO. 4615 OF 2017

(Arising out of SLP (C) No.7670 OF 2014)

Decided on 30 March, 2017

- ***An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wife's parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.***
- ***In the present case, at the time of claiming maintenance pendente lite when the respondent-wife had no sufficient income capable of supporting herself, the High Court was justified in ordering maintenance. However, in our view, the maintenance amount of Rs.60,000/- ordered by the High Court (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act) appears to be on the higher side and in the interest of justice, the same is reduced to Rs.25,000/- per month. The maintenance pendente lite of Rs.25,000/- is to be paid to the respondent-wife by the appellant-husband (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act).***

ORDER

Hon'ble Mrs. Justice R. Banumathi

Leave granted.

2. The present appeal has been filed by the appellant-husband against the order dated 21.02.2014 passed by the High Court of Delhi at New Delhi in C.M.(M) No.910 of 2010. In the said judgment, the High Court while setting aside the order dated 15.03.2010 passed by the Additional District Judge-II (West), Tis Hazari, Delhi who declined to award maintenance pendente lite to the respondent-wife under Section 24 of the Hindu Marriage Act, 1955 has granted interim maintenance to the respondent-wife at the rate of Rs.60,000/- per month to be paid by the appellant-husband Manish Jain with effect from 1st February, 2012 till the disposal of divorce petition. The said amount was fixed in addition to Rs.10,000/- which the appellant-husband has

already been paying by way of interim maintenance as per the order passed in Criminal Appeal No.65 of 2008 under Section 23(2) of the Protection of Women from Domestic Violence Act, 2005 [for short the D.V. Act].

3. This is a case of marital discord which has a chequered history. Brief facts leading to this appeal by way of special leave are as under:- Both the appellant and the respondent got married on 16.02.2005 and they were living at V-38, Green Park, New Delhi. The couple shifted to an accommodation at 303, SFS Apartment, Hauz Khas, New Delhi on 15.04.2007. In or about July, 2007 relationship between the parties got strained. In September, 2007 the appellant-husband filed a divorce petition HMA No.553/2007 under the Hindu Marriage Act, 1955 [for short the HM Act] seeking divorce on the grounds of cruelty.

4. In November, 2007 the respondent-wife filed a petition under the D.V. Act along with interim relief i.e., maintenance. She also filed a complaint on 23.11.2007 under Section 498-A and Section 406 IPC with CAW Cell, Amar Colony, Nanakpura, New Delhi against the appellant-husband and his family members which was later on registered as FIR bearing No.190 of 2008, Police Station, Friends Colony, New Delhi on 04.03.2008. In December, 2007, respondent filed yet another Complaint Case No.381 of 2008 under Section 125 Cr.P.C. before the Mahila Court, Patiala House, New Delhi. Her interim application seeking maintenance amongst other reliefs under Section 23(2) of the D.V. Act was dismissed by the Metropolitan Magistrate, Patiala House, New Delhi by order dated 23.04.2008 on the ground that the respondent was employed and was getting a stable income and that no document was placed on record by the respondent to show that respondent had again become jobless as the publication of the Magazine FNL had been stopped. Against the dismissal of application for maintenance, the respondent had filed appeal before Additional Sessions Judge, Patiala House in Criminal Appeal No.65 of 2008. In the said appeal and in Criminal Revision No.66 of 2008, Additional Sessions Judge, Patiala House by an order dated 01.09.2009 granted maintenance of Rs.10,000/- per month to the respondent-wife.

5. The appellant-husband filed an application under Section 438 Cr.P.C. on 22.04.2008 for grant of bail in anticipation of his likely arrest. The High Court granted anticipatory bail to the appellant-husband subject to return of Toyota Corolla and dowry/jewellery articles to the respondent-wife within a week from the date of order till the next date of hearing which is said to have been complied with. Order was also passed directing the respondent to deposit Rs.12,00,000/- towards alleged return of dowry articles.

6. The respondent-wife filed application under Section 24 of the HM Act claiming interim maintenance pendente lite of Rs.4,00,000/- per month and also a sum of Rs.80,000/- to meet litigation expenses during the pendency of the divorce petition. In the said application, the respondent- wife pleaded that she was having no source of income to maintain herself and that she is dependent upon others for her day to day needs and requirements. The said application was resisted by the appellant-husband contending that the respondent-wife is an educated lady and that she had completed her one year course of Fashion Designing from J.D. Institute, Hauz Khas, New Delhi and that she is capable of earning monthly salary of Rs.50,000/. The application filed under Section 24 of the HM Act was dismissed by Additional District Judge-II, Tis Hazari, Delhi by order dated 15.03.2010. Being aggrieved, the respondent-wife filed Crl. M.A. No.17724 of 2012 before the High Court, Delhi. The High Court in its order dated 08.11.2011 in C.M.(M) No.910 of 2010 filed by the wife against the order dated 15.03.2010 directed both the parties to

file an affidavit truthfully disclosing their correct income. Both the husband and the wife filed an affidavit as to their income in compliance of the aforesaid order. After so directing the parties to file affidavit regarding their income and after referring to the income of appellant-husband and the properties which the appellant and his family are owning and also the standard of living of the respondent-wife which she is required to maintain, the High Court by the impugned order directed the appellant-husband to pay interim maintenance of Rs.60,000/- per month in addition to Rs.10,000/- which was directed to be paid to the respondent-wife in the proceedings under the D.V. Act.

7. Aggrieved by the order of the High Court, the appellant-husband came in appeal before this Court by way of special leave. After giving opportunity to the parties to work out a settlement which ultimately failed, the same was dismissed on 15.04.2014. Being aggrieved by the dismissal of the above petition, a review petition was filed on 13.05.2014 in which notice was issued by this Court on 06.08.2014 and on 03.02.2016 the same was allowed and the Special Leave Petition was restored to its original number which is the subject matter before us.

8. Learned counsel for the appellant-husband submitted that the respondent-wife has concealed her employment and independent source of income on several occasions throughout the matrimonial proceedings before the courts below and also that the High Court has committed a grave error in interfering with the well-reasoned order of the trial Court under Section 24 of the HM Act. The learned counsel for the appellant-husband submitted that the trial court after analyzing the evidence that the wife was educated, professionally qualified in the Fashion industry and had sufficient independent income rejected the application of the wife seeking maintenance under Section 24 of the HM Act. It was submitted that the High Court without proper appreciation of the income of the parties had wrongly set aside the order of the trial Court and fixed an abnormal amount of Rs.60,000/- as maintenance to the respondent-wife under Section 24 of the Hindu Marriage Act.

Learned counsel further submitted that in Criminal Appeal No.65 of 2008 under Section 23(2) of the D.V. Act, the appellant- husband is paying an interim maintenance of Rs.10,000/- per month to the respondent-wife and the appellant-husband has so far made a total payment of Rs.7,50,000/- in the proceedings under D.V. Act, apart from returning a Toyota Corolla car worth Rs.13,00,000/- besides depositing a sum of Rs.12,00,000/- and a sum of Rs.2,75,000/- towards untraced admitted dowry articles in compliance with the order passed by the Court. It was further submitted that the appellant-husbands firms/companies have been either shut down due to heavy loss and/or under the stage of winding up and the appellant-husband is not in a position to pay the exorbitant amount of Rs.60,000/- per month as maintenance pendente lite to the respondent-wife.

9. Learned counsel for the respondent-wife at the outset submitted that the principle of providing maintenance is to ensure the living conditions of respondent-wife similar to that of appellant-husband whereas in the present case the respondent-wife is yet to receive any money.

10. We have heard the matter at considerable length. Parties are entangled in several rounds of litigation making allegations and counter allegations against each other. Since various proceedings are pending between the parties, we are not inclined to go into the merits of the rival contentions advanced by the parties. The only question falling for consideration is whether the respondent-

wife is entitled to maintenance pendente lite and whether the amount of Rs.60,000/- awarded by the High Court is on the higher side.

11. The Court exercises a wide discretion in the matter of granting alimony pendente lite but the discretion is judicial and neither arbitrary nor capricious. It is to be guided, on sound principles of matrimonial law and to be exercised within the ambit of the provisions of the Act and having regard to the object of the Act. The Court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. Section 24 of the HM Act lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the Court must have regard to the appellants own income and the income of the respondent.

12. At the time of filing application under Section 24 of the HM Act in December, 2007, the respondent-wife was doing her internship in fashion designing in J.D. Institute of Fashion Technology and just completed the course and was not employed at that time. Only in the month of May, 2008, she became a trainee and joined FNL Magazine of Images Group as Junior Fashion Stylist and was earning an approximate/stipend income of Rs.21,315/- per month and due to recession, the same is said to have been reduced to Rs.16,315/- for three months that is July, August and September in the year 2009. It is stated that thereafter the respondent-wife has become jobless and associated with Cosmopolitan Magazine and according to the respondent-wife, she was working as a Stylist and is paid nominal amount of Rs.4,500/- per shoot and the said amount is inclusive of expenses like travelling etc. On a perusal of the judgment of the High Court and also the affidavit of the respondent-wife, it is clear that the respondent-wife has no permanent source of employment and no permanent source of income.

13. Appellant-husband is stated to be a partner in the firms of his family business. It is also stated that the appellant-husband and his family own several valuable properties and has flourishing business. Insofar as the properties/income of appellant-husband, the High Court has made the following observations:-

> **38.** From the pleading of the respondent before other Courts, it has come on record that the respondents family is having successful and flourishing business of electrical and non-ferrous metals for the last 22 years. They are successful in their business. His mother belongs to a family of journalists and lawyers.
>
> **39.** From the material placed on record by the petitioner, prima facie it appears to the Court that even the respondent has not made full disclosure about his income and correct status of the family in the affidavits filed by him. The statements made by him are contrary to the statement made in the bail application. Prima facie, it appears to the Court that the respondent is hiding his income by trying to show himself as a pauper, however, the documents placed on record speak differently. At the same time the family members have a reasonably flourishing business and many properties as admitted by him. It has now become a matter of routine that as and when an application for maintenance is filed, the non-applicant becomes poor displaying that he is not residing with the family members if they have a good business and movable and immovable properties in order to avoid

payment of maintenance. Courts cannot under these circumstances close their eyes when tricks are being played in a clever manner.

14. Section 24 of the HM Act empowers the Court in any proceeding under the Act, if it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the applicant and the respondent. Heading of Section 24 of the Act is Maintenance pendente lite and expenses of proceedings. The Section, however, does not use the word maintenance; but the word support can be interpreted to mean as Section 24 is intended to provide for maintenance pendente lite.

15. An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wifes parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.

16. In the present case, at the time of claiming maintenance pendente lite when the respondent-wife had no sufficient income capable of supporting herself, the High Court was justified in ordering maintenance. However, in our view, the maintenance amount of Rs.60,000/- ordered by the High Court (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act) appears to be on the higher side and in the interest of justice, the same is reduced to Rs.25,000/- per month. The maintenance pendente lite of Rs.25,000/- is to be paid to the respondent-wife by the appellanthusband (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act).

17. The order impugned herein is set aside and the appeal is allowed. The amount of Rs.60,000/- awarded as maintenance pendente lite is reduced to Rs.25,000/- per month which is in addition to Rs.10,000/- paid under the proceedings of the D.V. Act. The appellant-husband is directed to pay the arrears w.e.f. 01.02.2012 till the disposal of the divorce petition, within four weeks from today. The appellant-husband shall continue to pay Rs.25,000/- per month in addition to Rs.10,000/- paid under the proceedings of the D.V. Act on or before 10th of every English calendar month till the disposal of the divorce petition. If the appellant-husband has paid or deposited any amount of maintenance pursuant to the order of the High Court dated 21.02.2014, the same shall be set-off against the arrears to be paid by the appellant-husband. The respondent-wife is at liberty to withdraw the amount, if any, deposited by the appellant-husband pursuant to the order dated 21.02.2014. We make it clear that we have not expressed any opinion on the merits of the matter. In case the appellant-husband does not comply with the order, as above, including for payment of arrears, he would be visited with all consequences including action for contempt of Court.

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KYNTIEW AKOR SUCHIANG VERSUS WOSTON HYNNIEWTA AND ANOTHER

Supreme Court of India

Bench : Hon'ble Mr. Justice S.A. Bobde and Hon'ble Mr. Justice L. Nageswara Rao

CRIMINAL APPEAL NO. 804 OF 2017†

Kynteew Akor Suchiang .. Appellant;
Versus
Woston Hynniewta And Another .. Respondents.

Decided on April 26, 2017

Constitution of India — Arts. 244(2) and 275(1), Sch. VI, Para 4, Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram — Jurisdiction of District Council — Dispute between parties belonging to different tribes

— Held, District Council has jurisdiction only in respect of tribals who belong to Scheduled Tribes within such area for which said District Council constituted and would have no jurisdiction where one of the parties belong to another area which is under jurisdiction of another District Council — Thus, District Council East Khasi Hills would have no jurisdiction to decide present dispute which is between appellant wife belonging to tribe of Jaintia Hills District Council and respondent husband belonging to East Khasi Hills District Council — In such cases, courts constituted under ordinary law viz. Criminal Procedure Code, 1973 would have jurisdiction — Direction given by High Court remanding matter to District Council, East Khasi Hills for adjudication modified and matter remanded to District & Sessions Judge i.e. court constituted under ordinary law — Family and Personal Laws — Maintenance and Financial Provision Alimony/Palimony — Criminal Procedure Code, 1973, Ss. 125 and 397 (Paras 4 to 9)

ORDER

1. Leave granted. This appeal has been preferred by the petitioner wife against the impugned judgment and order dated 23-9-2016 passed by the High Court of Meghalaya in Woston Hynniewta v. Kyntiew Akor Suehiang[5], whereby the High Court allowed the said revision petition and directed the learned Judicial Magistrate, Shillong, to remand the case to the District Council, East Khasi Hills, to adjudicate the matter independently.

2. The appellant wife is a tribal belonging to Panar tribe and resident of Jowai, West Jaintia Hills District which falls under the jurisdiction of Jaintia Hills Autonomous District Council. On the other hand, the respondent husband is a tribal belonging to East Khasi Hills District which falls under the jurisdiction of Khasi Hills Autonomous District Council.

5 2016 SCC OnLine Megh 232

3. Initially, the appellant wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure (for short "CrPC") before the learned Judicial Magistrate, Shillong. By order dated 14-3-2016, the learned Magistrate directed the respondent husband to pay an interim maintenance of Rs 7000 in favour of the appellant and issued notice to him. Thereafter, on 2-6-2016, the learned Magistrate, Shillong, rejected the preliminary objection raised by the respondent husband that the Court of the learned Judicial Magistrate, Shillong did not have the requisite jurisdiction to try the matter on account of the fact that the dispute was between two tribal individuals. The respondent husband challenged the said orders of the learned Magistrate by filing revision petition before the High Court which was allowed in terms of the above. Being aggrieved, the appellant wife preferred this appeal.

4. Having heard the learned counsel appearing for the parties and upon perusal of the record, we find that the issue of jurisdiction is covered by Para 4 under the heading "Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram" of the Sixth Schedule to the Constitution of India under Articles 244(2) and 275(1), which reads as follows:

> **"4. Administration of justice in autonomous districts and autonomous regions.—** *(1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-para (1) of Para 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be members of such village councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under Para 3 of this Schedule."* *(emphasis supplied)*

5. As a result, a District Council, constituted for the purpose of deciding disputes, has jurisdiction only in respect of tribals who belong to the Scheduled Tribes within such area for which the said District Council is constituted. It would have no jurisdiction where one of the parties belongs to another area which is under the jurisdiction of another District Council.

6. Thus, we find that East Khasi Hills District Council would have no jurisdiction to determine the present dispute which is between the appellant wife who belongs to a tribe of Jaintia Hills District Council and the respondent husband who belongs to East Khasi Hills District Council. A similar question has been decided by the High Court of Gauhati (Shillong Bench) in State of a Meghalaya v. Richard Lyngdoh[6].

7. In such a situation, the courts constituted under ordinary law, in the instant case, the Code of Criminal Procedure, would have jurisdiction.

8. The orders dated 14-3-2016 and 2-6-2016 passed by the learned Judicial Magistrate, Shillong, in favour of the appellant wife, were correctly dealt with by the High Court. However, the direction of the High Court given to the learned Magistrate to remand the matter to the District

6 2005 SCC OnLine Gau 371 : (2006) 2 Gau LR 328

1 Woston Hynniewta v. Kyntiew Akor Suchiang, 2016 SCC OnLine Megh 232

Council, East Khasi Hills, for fresh adjudication, is not warranted, since both the parties are tribals belonging to two different areas. The aforesaid orders of the learned Magistrate can only be questioned before the appropriate court constituted under the ordinary law and which is admittedly the District Court at Shillong, for deciding the dispute under Sections 397(1) and (2) CrPC.

9. Hence, we partly allow this appeal, uphold the direction of remand given by the High Court vide its impugned judgment and order1, but modify it to the extent that the matter shall stand remanded to the District and Sessions Judge, Shillong.

10. In the meantime, the respondent husband shall pay interim maintenance ^ of Rs 7000 (Rupees seven thousand only) to the appellant wife, as directed by the learned Judicial Magistrate, Shillong.

11. The learned Judicial Magistrate, Shillong, shall direct the payment of arrears of interim maintenance which was not paid by the respondent to the appellant wife, by way of interim order.

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JAIMINIBEN HIRENBHAI VYAS & ANR VERSUS HIRENBHAI RAMESHCHANDRA VYAS & ANR.

Supreme Court of India

Bench : Hon'ble Mr. Justice J. Chelameswar & Hon'ble Mr. Justice S.A. Bobde

Jaiminiben Hirenbhai Vyas & Anr
Versus
Hirenbhai Rameshchandra Vyas & Anr.

Decided on 19 November, 2014

CRIMINAL APPEAL NO. 2435 OF 2014

(Arising out of SLP (Crl.) No. 3345 of 2013)

- ***On the Appellants application for maintenance made for herself and her children, the Family Court granted maintenance in the sum of Rs 5,000/- only to her daughter under Section 125 Cr.P.C. The son was living with the father who was maintaining him and was therefore not granted maintenance. The main ground for denying maintenance to the Appellant was that she was found to have been working before her marriage and the Family Court was of the view that she could earn her living even now after the separation and therefore she was denied maintenance. This view did not find favour with the High Court, which noted that the Appellant had stopped working after her marriage and had given birth to two children. She had been only looking after the family and had therefore stopped working. The High Court thus reversed the Order of the Family Court and granted maintenance in the sum of Rs. 5,000/- . This was however granted from the date of the order.***
- ***The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance . Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance.***
- ***The High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife.***

JUDGMENT

Hon'ble Mr. Justice S.A. Bobde

1. Leave granted.

2. This appeal has been preferred by a wife and a minor daughter. The Family Court directed payment of interim maintenance to wife and minor daughter @ Rs. 6,000/- per month under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C.). Interim maintenance was also ordered under Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as the H.M. Act) @ 3,000/- per month payable to both. Eventually, the Family Court disposed the maintenance proceedings finally by the Order dated 31.01.2009. By this Order the Family Court granted maintenance in favour of daughter @ Rs. 5,000/- per month from the date of judgment. The Family Court, however, took the view that the appellant wife would not be entitled to receive any amount more than the interim maintenance which she is receiving under the H.M. Act.

3. On the Appellants application for maintenance made for herself and her children, the Family Court granted maintenance in the sum of Rs 5,000/- only to her daughter under Section 125 Cr.P.C. The son was living with the father who was maintaining him and was therefore not granted maintenance. The main ground for denying maintenance to the Appellant was that she was found to have been working before her marriage and the Family Court was of the view that she could earn her living even now after the separation and therefore she was denied maintenance. This view did not find favour with the High Court, which noted that the Appellant had stopped working after her marriage and had given birth to two children. She had been only looking after the family and had therefore stopped working. The High Court thus reversed the Order of the Family Court and granted maintenance in the sum of Rs. 5,000/-. This was however granted from the date of the order.

4. We have given our anxious consideration to the Order of the High Court but find it difficult to uphold the direction that the maintenance should be paid only from the date of the Order. The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance.

5. The relevant part of Section 125 reads as follows:

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub- section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

6. The provision expressly enables the Court to grant maintenance from the date of the order or from the date of the application. However, Section 125 of the Cr.P.C. must be construed with sub-section (6) of Section 354 of the Cr.P.C. which reads thus:

354 (6) Language and contents of judgment - Every order under Section 117 or sub-section (2) of Section 138 and every final order made under Section 125, Section 145 or Section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

Therefore, every final order under Section 125 of the Cr.P.C. [and other sections referred to in sub-section (c) of Section 354] must contain points for determination, the decision thereon and the reasons for such decision. In other words, Section 125 and Section 354 (6) must be read together.

7. Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance. Thus, as per Section 354

(6) of the Cr.P.C., the Court should record reasons in support of the order passed by it, in both eventualities.

The purpose of the provision is to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of the particular case.

8. In Shail Kumari Devi v. Krishan Bhagwan Pathak,[1] this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In Shail Kumar Devi, this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such Order. Thus, such maintenance can be awarded from the date of the Order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.

9. In the case before us, the High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife. We, therefore reverse the Order of the High Court in this regard and direct that the respondent shall pay the amount of maintenance found payable from the date of the application for maintenance. As far as maintenance granted under Section 24 of the H.M. Act by the Courts below is concerned, it shall remain unaltered.

10. Accordingly, the appeal is allowed.

[1] (2008) 9 SCC 632; Paras 39 - 41.

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USHA UDAY KHIWANSARA VERSUS UDAY KUMAR JETHMAL KHIWANSARA

Supreme Court of India

Bench : Hon'ble Mr. Justice Abhay Manohar Sapre and Hon'ble Mr. Justice Uday Umesh Lalit

Usha Uday Khiwansara .....Appellant(S)
Versus
Uday Kumar Jethmal Khiwansara .....Respondent(S)

CIVIL APPEAL NO. 6861 OF 2018
[Arising out of S.L.P.(C) No.31332 of 2017]

Decided on : 17th July, 2018

Parties living separately for last more than a decade – There is no issue born out of wedlock – It has also come on record that appellant wife ailing for long time and living with her relatives – She has no independent income of her own and she is wholly dependent upon her family members – On other hand, respondent husband is quite resourceful person having his own or his family bungalow in a posh colony – Held, in order to ensure that parties live peacefully in future, a quietus must be given to all litigations between parties – Consistent with broad consensus arrived at between parties, divorce decree confirmed with direction to respondent husband to make payment of Rs. 30,00,000/- towards permanent alimony to petitioner-wife and also further payment of Rs. 5 lakhs by way of gesture of goodwill and as his contribution toward medical expenses.

JUDGMENTS

Hon'ble Mr. Justice N. V. Ramana :—

1. Delay condoned.

2. Leave granted.

3. This appeal is filed by the appellant-wife against the final judgment and order dated 14.08.2014 passed by the High Court of Signature Not Verified Judicature at Bombay in Family Court Appeal No.155/2007 whereby the High Court allowed the Family Court Appeal filed by the Respondent-husband.

4. Few facts need to be mentioned to appreciate the short issue involved in the appeal.

5. The appellant is the wife whereas the respondent is the husband. The appellant and the respondent married on 07.02.1992. Unfortunately, due to various reasons, their married life was not cordial which eventually led to filing of divorce petition (486 of 2004) by the respondent (husband) in the year 2004 against the appellant (wife) in Pune Family Court.

6. The respondent sought divorce inter alia on the ground of cruelty and desertion against the appellant. The appellant denied the allegations of cruelty/desertion and contested the petition by joining issues.

7. By order dated 19.06.2007, the learned Family Judge dismissed the respondent's divorce petition. He held that respondent failed to make out any case of cruelty and desertion on the part of the appellant so as to entitle him to claim a decree of divorce.

8. The respondent felt aggrieved, filed first appeal (155/2007) before the High Court at Mumbai. By impugned order, the High Court allowed the respondent's appeal and set aside the order of the Family Judge and in consequence allowed the respondent's divorce petition by granting a decree of divorce in his favour on the ground of desertion. It is against this order of the High Court; the wife (appellant herein) felt aggrieved and filed the present special leave to appeal in this Court.

9. We have heard the learned counsel for the parties and perused the record of the case.

10. It is not in dispute that the High Court had allowed respondent's (husband's) appeal and passed the impugned order granting a decree of divorce without hearing the appellant (wife). In other words, none appeared for the wife before the High Court in the appeal, which was, heard ex-parte. Such hearing of the appeal, which eventually resulted in passing an adverse order against the wife and dissolving the marriage undoubtedly caused prejudice to the rights of the appellant-wife.

11. Since the appellant wife thus stood denied of a chance to represent her case before the High Court, the logical consequence would normally have been to set aside the judgment and order under appeal and remit the matter for fresh consideration. At this juncture the learned counsel appearing for both parties submitted that they were willing to part company on a note which would be mutually acceptable to either party. We see force in the submission made by both the learned counsel and rather than relegating them to fight another round of battle, we consider the matter in that perspective.

12. It is not in dispute that the parties have been living separately for last more than a decade. It is also clear that there is absolutely no chance of both coming together to continue their marital life. It has also come on record that there is no issue born out of wedlock. It has also come on record that appellant (wife) has been ailing for long time and living with her relatives in Wardha. It has also come on record that the appellant (wife) has no independent income of her own and she is wholly dependent upon her family members. It has also come on record that the respondent (husband) is quite resourceful person having his own or his family bungalow in a posh colony (Lakaki Road) in Pune where he is living.

13. In *Naveen Kohli v. Neelu Kohli*[7] the husband had filed petition seeking divorce on the ground of cruelty on part of wife. While the matter was pending in the trial court, efforts were made for amicable settlement, without any success. Finding that there was no cordiality left between the parties to live together the trial court ordered dissolution of marriage and directed the husband to deposit Rs.5 lakhs towards permanent maintenance of the wife. The appeal at the instance of the wife having been allowed, the husband approached this Court by filing an appeal. The observations of this Court in paragraphs 86 and 90 are relevant for our purposes and the same are quoted hereunder:

> ***"86.*** *In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been*

7 (2006) 4 SCC 558

initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

90. *Consequently, we set aside the impugned judgment of the High Court and direct that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955. In the extraordinary facts and circumstances of the case, to resolve the problem in the interest of all concerned, while dissolving the marriage between the parties, we direct the appellant to pay Rs 25,00,000 (Rupees twenty-five lakhs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs 5,00,000 (Rupees five lakhs with interest) deposited by the appellant on the direction of the trial court. The respondent would be at liberty to withdraw this amount with interest. Therefore, now the appellant would pay only Rs 20,00,000 (Rupees twenty lakhs) to the respondent within the stipulated period. In case the appellant fails to pay the amount as indicated above within the stipulated period, the direction given by us would be of no avail and the appeal shall stand dismissed. In awarding permanent maintenance we have taken into consideration the financial standing of the appellant."*

14. In *Sanghamitra Ghosh v. Kajal Kumar Ghosh*[8] it was observed in paragraphs 18, 19, 20 and 21 as under:

"*18. In the instant case, we are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure (2007) 2 SCC 220 what is already defunct de facto as observed in Naveen Kohli case7.*

19. In view of peculiar facts and circumstances of this case, we consider it appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution.

20. In order to ensure that the parties may live peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of. According to our considered view, unless all the pending cases are disposed of and we put a quietus to litigation between the parties, it is unlikely that they would live happily and peacefully in future. In our view, this will not only help the parties, but it would be conducive in the interest of the minor son of the parties.

21. On consideration of the totality of the facts and circumstances of the case, we deem it appropriate to pass the order in the following terms:

(a) the parties are directed to strictly adhere to the terms of compromise filed before this Court and also the orders and directions passed by this Court;

8 (2007) 2 SCC 220

(b) we direct that the cases pending between the parties, as enumerated in the preceding paragraphs, are disposed of in view of the settlement between the parties; and

(c) all pending cases arising out of the matrimonial proceedings including the case of restitution of conjugal rights and guardianship case between the parties shall stand disposed of and consigned to the records in the respective courts on being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement."

15. In our considered view, in order to ensure that the parties live peacefully in future a quietus must be given to all litigations between the parties. Such an approach would be consistent with that adopted by this Court in the aforesaid matters. Consistent with the broad consensus arrived at between the parties, we direct:-

"***(i)*** *On making a payment of Rs.30,00,000/- (Rupees thirty lakhs) by the respondent-husband towards permanent alimony to the petitioner-wife, by way of a demaqnd draft drawn in favour of the petitioner –wife, the marriage between the parties shall stand dissolved. The demand draft shall be handed over to Ms. Anagaha Desai, learned counsel for the petitioner who shall transmit the same to the petitioner.*

(ii) *The respondent shall make the aforesaid payment within one month from today.*

(iii) *All the allegations/findings recorded by the High Court against both the parties including the Writ Petition (Crl) No.631 of 2012 pending in the High Court of Bombay, Nagpur Bench are hereby quashed.*"

16. We, thus, accept the terms of settlement suggested by learned counsel appearing for both parties. In view of the peculiar facts and circumstances of this case, we also consider it appropriate to exercise our power under Article 142 of the Constitution and declare dissolution of marriage subject to the fulfillment of the aforesaid conditions. We also deem it appropriate to direct the respondent husband to make a further payment of Rs.5 lakhs (Rupees five lakhs) by way of gesture of goodwill and as his contribution towards the medical expenses which the wife has incurred uptill now. This amount shall be paid by way of Demand Draft along with the above-mentioned sum of Rs.30 lakhs.

17. The appeal stands disposed of in aforesaid terms. No Costs.

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MANJU KUMARI SINGH @ SMT. MANJU ... VERSUS AVINASH KUMAR SINGH

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Abhay Sapre

Manju Kumari Singh @ Smt. Manju Singh ….Appellant(s)
Versus
Avinash Kumar Singh ….Respondent(s)

CIVIL APPEAL NO.6988 OF 2018
(Arising out of S.L.P.(C) No.19420 of 2017)

Decided on 25 July, 2018

JUDGMENT

Hon'ble Mr. Justice Abhay Manohar Sapre.—

1. Leave granted.

2. This appeal is filed by the wife against the final judgment and order dated 28.02.2017 passed by the High Court of Jharkhand at Ranchi in F.A. No. Signature Not Verified 51 of 2004 whereby the High Court dismissed the Digitally signed by ANITA MALHOTRA Date: 2018.07.25 17:07:14 IST Reason:

appeal and affirmed the judgment dated 23.12.2002 passed by the Principal Judge, Family Court, Singhbhum East at Jamshedpur in Matrimonial Suit No.40 of 2001 by which the marriage between the appellant¬wife and the respondent-husband was dissolved.

3. Few facts need to be mentioned infra to appreciate the short issue involved in the appeal.

4. The appellant is the wife whereas the respondent is the husband. The appellant and the respondent were married on 16.02.1997. The appellant is serving as a Teacher whereas the respondent is a practicing advocate. The couple was blessed with a daughter in 1998 and she has been living with the appellant since birth. As on this date, the daughter is studying and is of marriageable age. Unfortunately, due to various reasons, their married life was not cordial soon after the marriage, which eventually led to filing of divorce petition (Matrimonial Suit No.40/358 of 2001) by the respondent (husband) in the year 2001 against the appellant (wife) in the Family Court, Singhbhum East, Jamshedpur.

5. The respondent sought divorce inter alia on the ground of cruelty and desertion against the appellant. The appellant denied the allegations of cruelty/desertion and contested the suit by joining issues.

6. By order dated 23.12.2002, the Family Judge dissolved the marriage between the appellant¬wife and the respondent¬husband on the ground that the allegation of cruelty and desertion against the appellant was proved and the suit filed by the respondent-husband for the dissolution of marriage was decreed.

7. The appellant felt aggrieved, filed First Appeal (51 of 2004) before the High Court of Jharkhand at Ranchi. By order dated 24.09.2008, the High Court affirmed the order passed by the Family Judge.

8. Challenging the said order, the appellant¬wife filed an appeal before this Court. Vide order dated 09.01.2015, this Court remanded the matter to the High Court for fresh hearing. Against the said order, the respondent¬husband filed a review petition, which was dismissed vide this Court's order dated 14.07.2015.

9. After remanding, the High Court again heard the matter. By impugned order, the High Court dismissed the appellant's appeal and affirmed the order of the Family Judge and, in consequence, allowed the respondent's divorce petition by granting a decree of divorce in his favour on the ground of desertion. It is against this order of theHigh Court, the wife (appellant herein) felt aggrieved and filed the present appeal by way of special leave in this Court.

10. We have heard the learned counsel for the parties, respondent¬in¬person and perused the record of the case.

11. It is not in dispute that the parties have been living separately for the last more than a decade. All attempts of reconciliation through mediation have failed. It is, therefore, clear that there is absolutely no chance of both living together to continue their marital life.

12. In Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, the husband had filed petition seeking divorce on the ground of cruelty on the part of wife. While the matter was pending in the Trial Court, efforts were made for amicable settlement but without any success. Finding that there was no cordiality left between the parties to live together, the Trial Court ordered dissolution of marriage and directed the husband to deposit Rs.5 lakhs towards permanent maintenance of the wife. The appeal at the instance of the wife having been allowed, the husband approached this Court by filing an appeal. The observations of this Court in paragraphs 86 and 90 are relevant for our purposes and the same are quoted hereunder:

> *"86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.*
>
> *90. Consequently, we set aside the impugned judgment of the High Court and direct that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955. In the extraordinary facts and circumstances of the case, to resolve the problem in the interest of all concerned, while dissolving the marriage between the parties, we direct the appellant to pay Rs 25,00,000 (Rupees twenty¬five lakhs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs 5,00,000 (Rupees five lakhs with interest) deposited by*

the appellant on the direction of the trial court. The respondent would be at liberty to withdraw this amount with interest. Therefore, now the appellant would pay only Rs 20,00,000 (Rupees twenty lakhs) to the respondent within the stipulated period. In case the appellant fails to pay the amount as indicated above within the stipulated period, the direction given by us would be of no avail and the appeal shall stand dismissed. In awarding permanent maintenance we have taken into consideration the financial standing of the appellant."

13. In Sanghamitra Ghosh v. Kajal Kumar Ghosh, (2007) 2 SCC 220, it was observed in paragraphs 18, 19, 20 and 21 as under:

"18. In the instant case, we are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto as observed in Naveen Kohli case(2006) 4 SCC 558.

19. In view of peculiar facts and circumstances of this case, we consider it appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution.

20. In order to ensure that the parties may live peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of. According to our considered view, unless all the pending cases are disposed of and we put a quietus to litigation between the parties, it is unlikely that they would live happily and peacefully in future.

In our view, this will not only help the parties, but it would be conducive in the interest of the minor son of the parties.

21. On consideration of the totality of the facts and circumstances of the case, we deem it appropriate to pass the order in the following terms:

(a) the parties are directed to strictly adhere to the terms of compromise filed before this Court and also the orders and directions passed by this Court;

(b) we direct that the cases pending between the parties, as enumerated in the preceding paragraphs, are disposed of in view of the settlement between the parties; and

(c) all pending cases arising out of the matrimonial proceedings including the case of restitution of conjugal rights and guardianship case between the parties shall stand disposed of and consigned to the records in the respective courts on being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement."

14. In our considered view, in order to ensure that the parties may live peacefully in future and their daughter would be settled properly in her life, a quietus must be given to all litigations

between the parties. Indeed both the learned counsel appearing for the parties too agreed for this. Such an approach, in our view, would be consistent with the approach adopted by this Court in the aforesaid matters. Consistent with the broad consensus arrived at between the parties, we consider it just and proper to dispose of the appeal with the following directions:¬

(i) The respondent¬husband will pay a total sum of Rs. 10,00,000/¬(ten lakhs) in two instalments towards permanent alimony and maintenance to the appellant and daughter.

(ii) First instalment of Rs. 5,00,000/¬ would be paid by the respondent¬ husband to the daughter by way of a Demand Draft drawn in favour of his daughter within three months from the date of this order.

(iii) Second instalment of Rs.5,00,000/¬ would be paid by the respondent¬husband to the daughter by way of a Demand Draft drawn in favour of his daughter within four months from the date of payment of first instalment.

(iv) All allegations made in pending cases arising out of the matrimonial proceedings including the one out of which this appeal arises are expunged. All proceedings pending in various Courts, if any, shall stand disposed of accordingly.

15. In view of the peculiar facts and circumstances of this case, we also consider it appropriate to exercise our power under Article 142 of the Constitution in order to do substantial justice to the parties to this appeal and accordingly declare dissolution of their marriage subject to fulfillment of the aforesaid conditions.

16. With the aforesaid directions, the appeal stands accordingly disposed of. No costs.

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CHATURBHUJ VERSUS SITA BAI

Appeal (Crl.) 1627 of 2007 (Arising out of SLP (Crl.) No.4379 of 2006)

Bench: Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice Aftab Alam

(2008) 2 SCC 316

Chaturbhuj
Vs.
Sita Bai

Date of Judgment: 27/11/2007

The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Trial Court directed to pay Rs.1500/- p.m.

Revision petition was filed by the present appellant was dismissed . The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children.

The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves

The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan v. Kamla Devi (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

JUDGMENT

Dr. ARIJIT PASAYAT, J.—Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the revision petition filed by the appellant in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'). The challenge before the High Court was to the order passed by learned Judicial Magistrate, First Class, Neemuch, M.P. as affirmed by the learned Additional Sessions Judge, Neemuch, M.P. The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Undisputedly, the appellant and the respondent had entered into marital knot about four decades back and for more than two decades they were living separately. In the application it was claimed

that she was unemployed and unable to maintain herself. Appellant had retired from the post of Assistant Director of Agriculture and was getting about Rs.8,000/- as pension and a similar amount as house rent. Besides this, he was lending money to people on interest. The appellant claimed Rs.10,000/- as maintenance. The stand of the appellant was that the applicant was living in the house constructed by the present appellant who had purchased 7 bighas of land in Ratlam in the name of the applicant. She let out the house on rent and since 1979 was residing with one of their sons. The applicant sold the agricultural land on 13.3.2003. The sale proceeds were still with the applicant. The appellant was getting pension of about Rs.5,700/- p.m. and was not getting any house rent regularly. He was getting 2-3 thousand rupees per month. The plea that the appellant had married another lady was denied. It was further submitted that the applicant at the relevant point of time was staying in the house of the appellant and electricity and water dues were being paid by him. The applicant can maintain herself from the money received from the sale of agricultural land and rent. Considering the evidence on record, the trial Court found that the applicant-respondent did not have sufficient means to maintain herself.

3. Revision petition was filed by the present appellant. Challenge was to the direction to pay Rs.1500/- p.m. by the trial Court. The stand was that the applicant was able to maintain herself from her income was reiterated. The revisional court analysed the evidence and held that the appellant's monthly income was more than Rs.10,000/- and the amount received as rent by the respondent-claimant was not sufficient to maintain herself. The revision was accordingly dismissed. The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

4. Section 125 Cr.P.C. reads as follows:

"125. (1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation .For the purposes of this Chapter,

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

["(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.";] (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's allowance 4 [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an 4 [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

5. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807) falls within constitutional sweep ofArticle 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005 (2) Supreme 503).

6. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means.

7. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It is has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.

8. In an illustrative case where wife was surviving by begging, would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan v. Kamla Devi (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

9. In the instant case the trial Court, the Revisional Court and the High Court have analysed the evidence and held that the respondent wife was unable to maintain herself. The conclusions are essentially factual and they are not perverse. That being so there is no scope for interference in this appeal which is dismissed.

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DANIAL LATIFI & ANR VERSUS UNION OF INDIA

Writ Petition (Civil) 868 of 1986

Bench: Hon'ble Mr. Justice G.B. Pattanaik, Hon'ble Mr. Justice S. RAjendra Babu, Hon'ble Mr. Justice D.P. Mohapatra, Hon'ble Mr. Justice Doraiswamy Raju & Hon'ble Mr. Justice Shivaraj V. Patil

(2001) 7 SCC 740

Danial Latifi & Anr.
Vs.
Union of India

Date of Judgment : 28/09/2001

The Supreme Court in the case of Daniel Latifi v. Union of India a held that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only. The Constitutional validity of the Act was also upheld.

JUDGMENT

RAJENDRA BABU, J.:

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter referred to as the Act] is in challenge before us in these cases.

The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs.179/- per month, enhancing the paltry sum of Rs.25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husbands residence. For about two years the husband paid maintenance to his wife at the rate of Rs.200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs.5,000/- per month provided Rs.200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principle question for consideration before this Court was the interpretation of Section 127(3)(b) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section 125CrPC. A Five-

Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(b) CrPC. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husbands liability under the Act.

It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour ofSection 127(3)(b) CrPC but even in that case, mahr is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(b) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(b)CrPC conferred statutory recognition on this principle. Several Muslim organisations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife brought in question the issue of mata contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this Court was: the husband was claiming exemption on the basis of Section 127(3)(b) CrPC on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahr and iddat maintenance and had not provided the mata i.e. provision or maintenance referred to in the Holy Quran, Chapter II, Sura

241. This Court, after referring to the various text books on Muslim law, held that the divorced wifes right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Banos case ineffective.

The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows :

The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. [AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husbands liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:-

(a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintain herself.

As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in Bai Tahira vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316, andFuzlunbi vs. K.Khader Vali & Anr., (1980) 4 SCC 125.

Smt. Kapila Hingorani and Smt. Indira Jaisingh raised the following contentions in support of the petitioners and they are summarised as follows :

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125CrPC has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500/-. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or the Parsis, pagans or heathens. It is submitted thatSection 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Section 125 CrPC is to off- set or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is, therefore, submitted that this Court will have to examine the questions raised before us not on the basis of Personal Law but on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is an un-islamic, unconstitutional and it has the potential of suffocating the muslim women and it undermines the secular character, which is the basic feature of the Constitution; that there is no rhyme or reason to deprive the muslim women from the applicability of

the provisions of Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application ofSection 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 and Section 4 of the Act is different from the right of a muslim woman like any other woman in the country to avail of the remedies under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a muslim woman from availing of the remedies available under Section 125CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor General, who appeared for the Union of India, submitted that when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear that it cannot be for life but would only be for a period of iddat and when that fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is dehors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Section 125 CrPC to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in Shah Banos case, it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Section 3(1)(a) is not in discord with the personal law.

Shri Y.H.Muchhala, learned Senior Advocate appearing for the All India Muslim Personal Law Board, submitted that the main object of the Act is to undo the Shah Banos case. He submitted that this Court has harzarded interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee & Ors., 24 IA 196, particularly in relation to Suras 241 and 242 Chapter II, the Holy Quran.. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions provision and maintenance are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband. He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1957 at p. 735. He also referred to the English translation of the Holy Quran to explain the meaning of gift in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided underSection 125 CrPC and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which are different and the enactment is consistent with law and justice.

It was further contended on behalf of the respondents that the Parliament enacted the impugned Act, respecting the personal law of muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory; that the personal law is now being continued by a legislative enactment and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same; that the Act aims to prevent the vagaries and not to make a muslim woman, destitute and at the same time, not to penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of muslim community and the fact that the benefits of Section 125 CrPC have not been extended to muslim women, would not necessarily lead to a conclusion that there is no provision to protect the muslim women from vagaries and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All India Muslim Personal Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word mata by this Court in Shah Banos case is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during iddat period and also during the extended period under Section 3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various text books, such as, -

1. The Turjuman al-Quran by Maulana Abul Kalam Azad, translated into English by Dr. Syed Abdul Latif;

2. Persian Translation of the Quran by Shah Waliullah Dahlavi

3. Al-Manar Commentary on the Quran (Arabic);

4. Al-Isaba by Ibne Hajar Asqualani [Part-2]; Siyar Alam-in-Nubla by Shamsuddin Mohd. Bin Ahmed BinUsman Az-Zahbi;

5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr. Mustafa As- Sabai;

6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;

7. Commentary on the Quran by Baidavi (Arabic);

8. Rooh-ul-Bayan (Arabic) by Ismail Haqqi Affendi;

9. Al Muhalla by Ibne Hazm (Arabic);

10. Al-Ahwalus Shakhsiah (the Personal Law) by Mohammad abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned text books, it is contended that the view taken in Shah Banos case on the expression mata is not correct and the whole object of the enactment has been to nullify the effect of the Shah Banos case so as to exclude the application of the provision ofSection 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and 4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslim and there should not be erosion of the personal law.

[On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M. Asad and Dr. Mustafa-as-Sabayi no author subscribed to the view that the Verse 241 of Chapter II of the Holy Quran casts an obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M. Asads translation and commentary has been held to be unauthentic and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr. Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither are they the theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of the Holy Quran and the decree in this regard is to be referred to Verse 236 of Chapter II which makes paying mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated. It is submitted that such divorcees do not have to observe iddat period and hence not entitled to any maintenance. Thus the obligation for mata has been imposed which is a one time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression mata which according to different schools of Muslim law, is obligatory only in typical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr. A.M.Singhvi, learned Senior Advocate who appeared for the National Commission for Women, submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Section 3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy insofar as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the Act is illusory inasmuch as firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, wakf boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone of Articles 14, 15 and alsoArticle 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Section 5 of the Act makes the availability and applicability of the remedy as provided bySection 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in Shah Banos case held that although Muslim personal law limits the husbands liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim Law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but if she is unable to

maintain herself after the period of iddat, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights.

The learned counsel have also raised certain incidental questions arising in these matters to the following effect-

1) Whether the husband who had not complied with the orders passed prior to the enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect?

2) Whether Family Courts have jurisdiction to decide the issues under the Act?

3) What is the extent to which the Wakf Board is liable under the Act?

The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean

a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to -

(a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband;

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

(d) all the properties given to her by her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such

maintenance as determined by him as the case may be. It is, however, significant to note thatSection 4 of the Act refers only to payment of maintenance and does not touch upon the provision to be made by the husband referred to in Section 3(1)(a) of the Act.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either underIndian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced womans right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may

include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided inSection 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision inSection 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a

reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Banos case. In this case to find out the personal law of Muslims with regard to divorced womens rights, the starting point should be Shah Banos case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Banos case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Banos case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Banos case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

In Shah Banos case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language ofSections 3(1)(a)

and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corporation, 1985(3) SCC 545, and Maneka Gandhi v. Union of India, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divoced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted

the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc., AIR 1988 (Guj.) 141; Ali vs. Sufaira, (1988) 3 Crimes 147; K. Kunhashed Hazi v. Amena, 1995 Crl.L.J. 3371;K. Zunaideen v. Ameena Begum, (1998] II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according

to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

In the result, the writ petition Nos. 868/86, 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

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RAMESH CHANDER KAUSHAL VERSUS VEENA KAUSHAL & ORS

Equivalent citations: 1978 AIR 1807, 1978 SCR (3) 782

Bench: Hon'ble Mr. Justice V.R. Krishnaiyer & Hon'ble Mr. Justice D.A. Desai

(1978) 4 SCC 70

Ramesh Chander Kaushal
Vs.
Veena Kaushal & Ors.

Date of Judgment : 27/04/1978

We cannot help but observe that the current Indian ethos rightly regards the family and its stability as basic to the strength of the social fabric and the erotic doctrine of 'sip every flower and change every hour' and the philosophy of philandering self-fulfilment, unless combated on the militant basis of gender justice and conditions of service, are fraught with catastrophic possibilities. All public sector (why, private sector too) institutions, including the Airlines, must manifest, in their codes of discipline, this consciousness of social justice and inner morality as essential to its life style. Lascivious looseness of man or wife is an infectious disease and marks the beginning of the end of the material and spiritual meaning of collective life. The roots of the rule of law lie deep in the collective consciousness of a community and this sociological factor has a role to play in understanding provisions like Section 125 Criminal Procedure Code which seek to inhibit neglect of women and children, the old and the Infirm. A facet of this benignancy of Section 125 falls for study in the present proceeding.

A final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But here two factors make the principle inapplicable.

Firstly, the direction by the civil court is not a final determination under the Hindu Adoptions and Maintenance Act but an order pendente lite, Under Section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

Secondly, this amount does not include the claim for maintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication.

The relevant portion of the section reads :

125. (i) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly

rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the causethe cause of the derelicts.

The judgment would seem to indicate that once divorce is decreed the wife ceases to have any right to claim maintenance and that such an impact can be brought about by an application Under Section 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is a patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated.

JUDGMENT

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 1268 of 1977.

From the Judgment and Order dated 5-9-1977 of the Delhi High Court in Criminal Revision No. 224 of 1977. S. T. Desai and R. Bana for the Petitioner. Y. M. Isser, S. Balakrishnan and M. K. D. Namboodri for the Respondent.

The Order of the Court was delivered by KRISHNA IYER, J.-Social justice is not constitutional claptrap but fighting faith which enlivens legislative texts with militant meaning. The points pressed in the Special Leave Petition, which we negative, illustrate the functional relevance of social justice as an aid to statutory interpretation.

The conjugal tribulations of Mrs. Veena, the respondent, who hopefully married Capt. Kaushal, the petitioner, and bore two young children by him, form the tragic backdrop to this case. The wife claimed that although her husband was affluent and once affectionate, his romantic tenderness turned into flagellant tantrums after he took to the skies as pilot in the Indian Airlines Corporation. Desertion, cruelty and break-up of family followed, that sombre scenario which, in its traumatic frequency, flaring up even into macabre episodes consternates our urban societies. The offspring of the young wedlock were not only two vernal innocents but two dismal litigations one for divorce, by the husband, hurling charges of adultery, and the other for maintenance, by the wife, flinging charges of affluent cruelty and diversion of affection after the Airlines assignment. These are versions, not findings. We do not enter the distressing vicissitudes of this marital imbroglio since proceedings are pending and incidental moralizing, unwittingly injuring one or the other party, are far from our intent and outside the orbit of the present petition. Even so, we cannot help but observe that the current Indian ethos rightly regards the family and its stability as basic to the strength of the social fabric and the erotic doctrine of 'sip every flower and change every hour' and the philosophy of philandering self-fulfilment, unless combated on the militant basis of gender justice and conditions of service, are fraught with catastrophic possibilities. AR public sector (why, private sector too) institutions, including the Airlines, must manifest, in their codes of discipline, this consciousness of social justice and inner morality as essential to its life style. Lascivious looseness of man or wife is an infectious disease and marks the beginning of the end of the material and spiritual meaning of collective life. The roots of

the rule of law lie deep in the collective consciousness of a community and this sociological factor has a role to play in understanding provisions like Section 125 Criminal Procedure Code which seek to inhibit neglect of women and children, the old and the infirm. A facet of this benignancy ofSection 125 falls for study in the present proceeding.

The husband sought divorce through the civil court and the wife claimed maintenance through the criminal Court. As an interim measure, the District Court awarded maintenance and the High Court fixed the rate at 400/- per mensem for the spouse as a provisional figure. Meanwhile, the magistrate, on the evidence before him, ordered ex-parte, monthly maintenance at Rs. 1000/- for the mother and two children together.

Sri S. T. Desai urged two points which merit reflection but meet with rejection. They are that : (i) a civil court's determination of the quantum is entitled to serious weight and the criminal court, in its summary decision, fell into an error in ignoring the former; (ii) the awardable maximum for mother and children, as a whole under Section 125 of the Code was Rs. 500/- having regard to the text of the section. Broadly stated and as an abstract proposition, it is valid to assert, as Sri Desai did, that a final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But here two factors make the principle inapplicable. Firstly, the direction by the civil court is not a final determination under the Hindu Adoptions and Maintenance Act but an order pendente lite, under section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable. Secondly, this amount does not include the claim for maintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication.

Therefore, barring marginal relevance for the Magistrate it does not bar his jurisdiction to award a higher maintenance. We cannot, therefore, fault the Magistrate for giving Rs. 1000/- on this score.

The more important point turns on the construction of section 125, Crl. Procedure Code which is a reincarnation of section 488 of the old Code except for the fact that parents also are brought into the category of persons eligible for maintenance and legislative cognizance is taken of the devaluation of the rupee and the escalation of living costs by raising the maximum allowance for maintenance from Rs. 100/- to Rs. 500/-. The relevant portion of the section reads "125. (i) if any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article

39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sec- tions like women and children must inform interpretation if it has to have

social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause he cause of the derelicts.

Sri Desai contends that section 125 of the Code has clearly fixed the ceiling of the monthly allowance "for the maintenance of.... wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole". Assuming the Parliament not to be guilty of redundancy it is argued that the words "in the whole" mean that the total award- for wife, child, father or mother together cannot exceed Rs. 500/-. We do not agree. Both precedentially and interpretatively the argument is specious.

The words which connote that the total, all together, cannot exceed Rs. 500/- namely "in the whole' have been inherited from the previous Code although some ambiguity in the sense of the clause is injected by these words. Clarity, unfortunately, has not been a strong point of our draftsmanship, at least on occasions, and litigation has been engendered by such deficiency. Luckily, these words have been subject to decisions which we are inclined to adopt as correct. A Full Bench of the Bombay High Court in Prabhavati v. Sumatilal(1) has held that the sum specified is not compendious but separate. Chagla C.J. explained the position correctly, if we may say so with respect :

"The suggestion that the jurisdiction of the Magistrate is limited to allowing one hundred rupees in respect of maintenance of the wife and the children jointly is, in our opinion, an impossible construction once it is accepted that the right of the wife and of each child is an independent right. Such a construction would lead to extremely anomalous results.

If, for instance, a wife applies for maintenance for herself and for her children and the Magistrate allows a maintenance of one hundred rupees, and if thereafter an (1) A.I.R. 1954 Bom. 546illegitimate child were to come forward and to make an application for maintenance, the Magistrate having allowed an allowance to her up to the maximum of his jurisdiction would be prevented from making any order in favour of the illegitimate child. Or, a man may have more than one wife and he may have children by each one of the wives. If the suggestion is that maintenance can be, allowed in a compendious application to be made and such maintenance cannot exceed one hundred rupees for all the persons applying for maintenance, then in a conceivable case a wife or a child may be deprived of maintenance altogether under the section.

The intention of the Legislature was clear, and the intention was to cast an obligation upon a person who neglects or refuses to maintain his wife or children to carry out his obligation towards his wife or children. The obligation is separate and independent in relation to each one of the persons whom he is bound in law to maintain. it is futile to suggest that in using the expression "in the whole" the Legislature was limiting the jurisdiction of the Magistrate to passing an order in respect--Of all the persons whom he is bound to maintain allowing them maintenance not exceeding a sum of one hundred rupees." Meeting the rival point of view Chief Justice Chagla held :

". . . . we are unable to accept the view taken by the Division Bench that the jurisdiction of the Magistrate is confined to making a compendious order allowing one hundred rupees in respect of all the persons liable to be maintained."

A recent ruling of the Calcutta High Court in Md. Bashir v. Noon Jahan Begum(1) has taken a similar view reviewing the case law in India on the subject. We agree with Talukdar, J. who quotes Mr. Justice Macardie:

"All law must progress or it must perish in the esteem of man."

In short the decided cases have made a sociological approach to, conclude that each claimant for maintenance, be he or she wife, child, father or mother, is independently entitled to maintenance up to a maximum of Rs. 500/-. Indeed, an opposite conclusion may lead to absurdity. If a woman has a dozen children and if the man neglects the whole lot and, in his addiction to a fresh mistress, neglects even his parents and all these members of the family seek maintenance in one petition against the delinquent respondent, can it be, that the Court cannot- (1) 1971 Crl.L.J. 547@553.

award more than Rs. 500/- for all of them together ? On the other hand if each filed a separate petition there would be a maximum of Rs. 500/- each awarded by the Court. We cannot, therefore, agree to this obvious jurisdictional inequity by reading a limitation of Rs. 500/- although what the section plainly means is that the Court cannot grant more than Rs. 500/- for each one of the claimants. "In the whole" in the context means taking all the items of maintenance together, not all the members of the family put together. To our mind, this interpretation accords with social justice and semantics and, more than all, is obvious :

"It is sometimes more important to emphasize the obvious than to elucidate the obscure."

-Attributed to Oliver Wendell Holmes.

We admit the marginal obscurity in the diction, of the section but mind creativity in interpreting the provision dispels all doubts. We own that Judges perform a creative function even in interpretation.

"All the cases in this book are examples, greater or smaller, of this function".

writes Prof. Griffith in the Politics of the Judiciary.(1) The conclusion is inevitable, although the argument to the contrary is ingenious, that the Magistrate did not exceed his powers while awarding Rs. 1000/- for mother and children all together.

We have been told by Shri S. T. Desai that the divorce pro- ceeding terminated adversely to his client but an appeal is pending. If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under section 127 of the Code the Magistrate has the power to make alterations in the allowance order and cipherise it. We make the position clear lest confusion should breed fresh litigation.

The special leave petition is dismissed.

ORDER (22-8-78) Noticing a patent error which has unfortunately crept in the above judgment in the last paragraph thereof, counsel on both sides were given notice to appear and they were heard. Section 125(1), Explanation (b) of the Cr. P.C. reads "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried." The last paragraph in the judgment concludes with the statement "If the appeal ends in divorce being decreed, the wife's claim for (1) J.A.G. Griffith 'The Politics of the Judiciary' p. 175.

maintenance qua wife comes to an end and under section 127 of the Code, the Magistrate has the power to make alterations in the allowance order and cipherise it." The judgment would seem to indicate that once divorce is decreed the wife ceases to have any right to, claim maintenance and that such an impact can be brought about by an application u/S. 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is a patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated. Therefore, we direct that in substitution of the last paragraph, the following

paragraph will be introduced. "We have been told by Shri S. T. Desai that the divorce proceeding has terminated adversely to his client but that an appeal is pending: Whether the appeal ends in divorce or no, the wife's claim for maintenance qua wife under the definition contained in the Explanation (b) to sec. 125 of the Code continues unless parties make adjustments and come to terms regarding the quantum or the right to maintenance. We make the position clear that mere divorce does not end the right to maintenance."

We regret the error and pass this order under Art. 137 of the Constitution with the consent of both sides so that the ends of justice and the law that this Court lays down may be vindicated.

S. R. Petition dismissed.

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ROSY JACOB VERSUS JACOB A. CHAKRAMAKKAL

1973 SCR (3) 918 1973 SCC (1) 840

Bench : Hon'ble Mr. Justice I.D. Dua, Hon'ble Mr. Justice A. Alagiriswami & Hon'ble Mr. Justice C.A. Vaidyialingam

1973 AIR 2090

Petitioner: Rosy Jacob
Vs.
Respondent: Jacob A. Chakramakkal

DATE OF JUDGMENT 05/04/1973

In Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840, a three-Judge Bench of the Supreme Court in a rather curt language had observed that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of tamprament has to be endeavored to be disciplined into compatibility and not to be magnified by abnormal impluses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. 'Both parents have, therefore, to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Guardians and Wards. Act, 1890, Sec. 25-Husband's application for the custody of children-Welfare of the children is the dominant consideration.

On the wife's application, judicial separation was granted under the Indian Divorce Act by the single Judge of the High Court. The custody of the eldest son was maintained with the husband while that of the daughter and the youngest son was given to the wife. In the Letters Patent Appeal preferred by the husband, the Division Bench varied the order directing handing over the custody of the daughter and the youngest son also to the husband. The principal question before the Court was whether the husband's application for the custody of the children u/s 25 of the Guardian and Wards Act, 1890,

was maintainable and, if so, what are the considerations which the Court should bear in mind in exercising the discretion regarding custody of children.

Allowing the appeal,

HELD: (i) On the facts and circumstances of the case, namely, that the Court cannot make any order under the Divorce Act, as the daughter had attained majority, and no guardian could be appointed U/S. 19 of the Guardians and Wards Act, 1890 during the life time of the existing guardian, husband's application was competent. Welfare of the children is the primary consideration, and hyper technicalities should not be allowed to deprive the guardian necessary assistance from the Court in effectively discharging his duties and obligations towards his ward.

(ii) The controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents. The Court while exercising the discretion should consider all relevant facts and circumstances so as to ensure the welfare of the children.

The contention that if the husband is not unfit to be the guardian of his minor children, then the question of their welfare does not at all arise, is misleading. If the custody of the father cannot promote the children's welfare, equally or better, than the custody of the mother, then, he cannot claim indefeasible right to their custody u/s 25 merely because there is no defect in his personal character and he has attachment for his children-which every normal parent has. As the daughter has just attained puberty and the youngest son was of the tender age, in the interest of their welfare, the mother should have the custody in preference to the father.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1295 & 1296 of 1972.

Appeals by special leave from the judgment and order dated April 26, 1972 of the Madras High.Court in O.S.A. Nos. 2 and 3 of 1971.

K. N. Balasubramanian and Lily Thomas, for the appellant.

The respondent appeared in person.

The Judgment of the Court was delivered by

DUA, J.-The real controversy in these two appeals by special leave preferred by the wife against her husband, lies in a narrow compass. These appeals are directed against the judgment and order of a Division Bench of the Madras High Court allowing the appeals by the husband and dismissing the cross-objections by the wife from the judgment and order of a learned single judge of the same High Court dismissing about 25 applications seeking diverse kinds of reliefs, presented by one or the other party. According to the learned single Judge (Maharajan J.) "these 25 applications represent but a fraction of the bitterness and frustration of an accomplished Syrian Christian couple who after making a mess of their married life have endeavoured to convert this Court into a machinery for wreaking private vengeance'. This observation reflects the feelings of the husband and the wife towards each other in the present litigation. The short question which we are called upon to decide relates to the guardianship of the three children of the parties and the solution of this problem primarily requires consideration of the welfare of the children.

The appellant, Rosy Chakramakkal (described herein as wife) was married to respondent Jacob A. Chakramakkal (described herein as husband) sometime in 1952. Three children were born from this wedlock. Ajit alias Andrews,, son, was born in 1955, Maya alias Mary was born in 1957 and Mahesh alias Thomas was born in 1961. Sometime in 1962 the wife started proceedings for judicial separation (O.M.S. 12 of 1962). on the ground that the husband had inflicted upon her several acts of physical, mental and moral cruelty and obtained a decree on April 15, 1964. Sadasivam J., while granting the decree directed that Ajit alias Andrews (son) the eldest child should be kept in the custody of the husband and Mary alias Maya (daughter) and Thomas alias Mahesh (youngest son) should be kept in the custody of the wife. The husband was directed to pay to the wife Rs.200/ per mensem towards the expenses and maintenance of the wife and the two children.

The wife applied to Sadasivam J., sometime later for a direction that Ajit alias Andrews should also be handed over to her or in the alternative for a direction 'that the boy should be admitted in a boarding school. In this application (no. 2076 of 1964) it was alleged by the wife that the husband had beaten Ajit on the ground that he had accepted from his mother' (the wife) a fountain pen as a present. This was denied by the husband but the learned Judge, after elaborate enquiry, held that he had no doubt that the husband had caused injuries to the boy on account of his sudden out burst of temper on learning that Ajit had received a fountain pen by way of present from his mother on his birth day. Ajit was accordingly to be handed over to the mother subjected to certain conditions.

The husband preferred an appeal against the decree made in O.A4.S. 12 of 1962 (O.S.A. 65 of 1964) and another appeal against the order made by Sadasivam J., (in application no. 2076 of 1964 in O.M.S. 12 of 1962) directing the custody of the eldest son Ajit to be handed over to the wife (O.S.A. 63 of 1964). On August 2, 1966 the appellate bench confirmed the decree for judicial separation granted by Sadasivam J., and also issued certain, directions based on agreement of the parties with respect to the custody of the children, as. also reduction of the monthly maintenance payable by the husband to the wife from Rs. 200/to Rs. 15011- p.m., inclusive of maintenance payable for Mahesh. According to this order the eldest boy Ajit alias Andrews directed to remain in the custody of the father and to be educated 'by him at his expense : Mahesh alias Thomas was directed to be in the custody of the mother to be educated at her expense: and the second child Maya alias Mary was directed to be put in a boarding school, the expenses of her board and education to be met in equal shares by both the parents.

The husband also undertook that 'he will arrange to have the presence of his mother or sister at his residence to attend to the children whenever they are with him and never to leave the children alone at his residence or to the care of his servants or others". Later both the husband and wife presented a series of applications in the appellate court seeking modifications of its directions. That court ultimately made an order on February 2, 1967 modifying its earlier directions. The modified order directed Maya to be left in the exclusive custody of the wife who was at liberaty to educate her in the manner she thought best at her own cost. The appellate court also modified the direction regarding maintenance and ordered that the husband should pay to the wife maintenance at the rate of Rs. 200/- p.m. as awarded by the learned single judge. Subsequently the directions of the appellate, court regarding access of the mother and the father to the children were also sought by the parties to be modified to the prejudice of each other. The matters are stated to have been heard by most of the Judges of the Madras High Court at one stage or the other and according to Maharajan J., 'he parties even tried to secure transfer of these proceedings by making wild allegations of partiality against some of the Judges. The

husband who is an advocate of the Madras High Court, had, according to the wife, been filing cases systematically against her and the wife, who, in the opinion of Maharajan J., has the gift of the gab also argued her own cases. The children for whose welfare the parents are supposed to have been fighting as observed by Maharajan J., are given a secondary consideration and the quarrelling couple have lost all sense of proportion. On account of these considerations the learned single Judge felt that it would be a waste of public time to consider in detail the trivialities of the controversy pressed by both the parties to this litigation.

According to the learned single Judge the following four points arose for his judicial determination'.

> *"(1) Whether by defaulting to pay the maintenance decreed, the husband must be held guilty of contempt and shall not be allowed to prosecute his applications before he purges himself of contempt?*
>
> *(2) What is the proper order to pass as regards the custody of the three children of the marriage in the light of the events that have occurred subsequent to the judgement of the appellate court and under the Guardians and Wards Act ?*
>
> *(3) What is the proper order to pass as to the access of either parent to the children in the custody of the other?*
>
> *(4) Whether in the light of the subsequent events, the order regarding maintenance allowance should be reduced, enhanced or altered in any manner and if so, how?'*
>
> *On the first point the learned single Judge came to the conclusion that the husband could not be declined hearing merely because he had not paid the maintenance as directed by the matrimonial court. The amount in respect of which the husband had defaulted payment could be recovered through execution proceedings. On point no. 2 the learned single Judge proceeded to consider the question of the custody of the three children with the preliminary observation that the controlling factor governing their custody would be their welfare and not the rights of their parents. The eldest child Ajit alias Andrews, according to the learned Judge, was doing well at the school and was progressing satisfactorily both mentally and physically. There was accordingly no reason 'to. transfer his custody from his father to his mother. As regards the second child Maya alias Mary, as she was about to attain puberty and the wife being anxious that till she got married she must be in the mother's vigilant and affectionate custody she was to remain with her mother. Mahesh alias Thomas, who was considered to be of tender years and in the formative stage of life requiring sense of emotional security which a mother alone could give, was also kept in the custody of his mother. With respect to Maya and Mahesh it was further observed that from their educational. point of view the wife was a more suitable custodian than the husband because she was running a primary school from nursery to fifth standard with more than a hundred pupils and was also residing in a portion or the school premises enjoying certain facilities in her capacity as the founder and principal of that school. The husband, who was described as a grass widower without female relatives to look after the children, was not preferred to the wife as, while being with her, the children would be living in an academic atmosphere. With respect to the husband's complaint that from the moral point of view the wife was not fit to have the custody of the children, Maharajan J., observed that earlier Sadasivam J., had dealt with the entire evidence relating to this charge and had found no sufficient ground for such amputations and that they were*

likely to cause mental pain to the wife and affect her health. The husband had even been held guilty of mental and moral cruelty to the wife. The husband's contention that his opinion was reversed by the appellate bench was disposed of by Maharajan J., after quoting the following passage from the appellate judgment dated August 2, 1966 "But it is to be clearly understood that there should be no slur on the part of either the appellant or the respondent because of the several proceedings in court and other happenings outside. The decree for judicial separation which is confirmed does not cast any cloud on the reputation or character of the husband or the wife. They have reached this settlement keeping in view all the circumstances and particularly the welfare of their minor children."

According to Maharajan 3., the appellate bench had felt satisfied that the charge of immorality levelled by the husband against the wife was not established because had it not been so satisfied the bench would not have entrusted two of the three children to the wife. The husband was in the circumstances held by Maharajan J., disentitled to reopen the question of the wife's immorality. In any event, Maharajan J., also rejected the charge of immorality as unproved, for the same reasons which had weighed with Sadasivam J. With respect to point no. 3 the learned single Judge gave the following directions :

"(1) On the first Sunday of every month, except during the school vacations, the husband shall send Ajit alias Andrews to the wife by 8.00 a.m. and the wife shall send back the child by 8. p.m. the same day.

(2) The wife shall send Maya alias Mary and Thomas alias Mahesh to the husband's by 8 a.m. on the last Sunday of every month, except during the school vacations, and the husband shall send them back by 8 p.m. the same day.

(3) Each party shall send the children by a conveyance taxi, rickshaw or bus, after prepaying the fare thereof.

(4) The wife shall send Mary alias Maya and Thomas alias Mahesh to the husband, so hat they might stay with him and Ajit alias Andrews for thirty days during the summer vacation. The exact time and dates of departure and arrival will be fixed with reference to the convenience of parties and after change, of letters between them at least one months prior to the commencement of the vacation' Likewise, the husband will send Ajit to the wife to enable him to spend the whole Dasara and Christamas vacations in the company of his mother, sister and brother."

On the fourth point the learned single Judge, fater considering at length the wife's allegations against the husband with respect to his extravagance and inability, reduced the quantum of maintenance payable by him to the wife to Rs. 100/- p.m., the reduced amount being payable with effect from January 1, 1971. The husband was directed to pay the monthly maintenance on or before the 10th of the succeeding month. This order was made with the observation that the earning capacity of the wife was superior to that of the husband.

It is unnecessary to refer to the formal orders separately passed in the various applications. Suffice it to say that the parties were left to bear to their own costs and hope was expressed in the coneluding para of the judgment by Maharajan, J. that "the parties will refrain from rushing to this court with applications of the kind that have been dismissed and will apply themselves assiduously to the improvement of their status in their respective professions and to alleviation of the pain of material failure, which has unfortunately been visited upon the three lovely and sprightly children that they have produced."

Contrary to the hope expressed by learned Judge, the matter was taken to the appellate bench of the High Court under cl. 15 of the Letters Patent (O S. Appeal Nos. 2 and 3 of 1971). The wife also pressented cross-objections against the reduction of alimony and against directions as regards the father's access of Maya. A large number of applications were presented to the Court parties praying for diverse reliefs including action for contempt of court for disobedience of the court's orders. The hearing of the appeals somewhat surprisingly lasted for more than a year (March 1971 to March 1972). We find no justification for such prolonged hearing on a fairly simple matter like this. According to the Letters Patent Bench the arguments on both sides "mainly rested upon the character of each". The husband is said to have repeatedly accused the wife with immorality. In the opinion of the Letters Pantent Bench "the truth or otherwise of the matter may assume importance only for the purpose of deciding upon the fitness of the person to 'be the guardian of the children". Final orders were passed on April 26, 1972 by means of which the husband was held to be better fitted to be the guardian of the three children and to have their custody. This decision was stated to be based on evidence and in view of ss. 17, 19 and 25 of the Guardians and Wards Act. This is what one of the Judges constituting the Letters Patent Bench (Gokul Krishnan, J.,) said in this connection "In our opinion, the principles to be applied to cases of this kind will be the same both under the Indian Divorce Act and the Guardians and Wards Act, 1890. But since the father has specifically filed a petition, O.P. No. 270 of 1970, under section 25 of the Guardians and Wards Act, and that being a special law for the purpose will certainly apply, we shall concentrate on the Guardians and Wards Act, 1890".

After quoting S. 19 of the Guardians and Wards Act the learned Judge proceeded :

> *"It is thus clear that the special enactment definitely states that the father is the guardian of the minor until he is found unfit to be the guardian of the person of the minor. The welfare of the minor is the paramount consideration in the matter of apointing guardian for the person of minor, and cannot be said to be in conflict with the terms of section 19 of the Guardians and Wards Act which recognize the father as the guardian. Bear ing this in mind, we proceed to consider as to who is fit and proper to be the guardian for the person of the minor children in this case."*

In his view the principle on which the Court should decide the fitness of the guardian mainly depends on two factors :

(i) the father's fitness or otherwise to be the guardian and

(ii) the interests of the minors. Considering these factors it was felt that both the parties in the present case loved their children who were happy during their stay with both of their parents. There was in his view, absolutely no proof as regards disqualification of the husband to be the guardian of the minor children. It may here be pointed out that both the Judges constituting the Letters Patent Bench wrote separate judgments. Gokulakrishnan J., commenting on the Judgment of Maharajan J., observed thus :

"Maharajan J. in his judgment under appeal no doubt referred to section 19 of the Guardians and Wards Act, but would observe that if the Court finds that the welfare of the minor children could be protected only in the maternal custody, the Court has power to put the children in the care of custody of the mother. The learned Judge clearly observed that Ajit, the eldest boy, who is in the custody of the appellant, is quite healthy and cheerful, doing well at school and that his sojourn with the father has not prejudicially affected him physically or mentally. But at the same breath, the learned Judge

says that Maya and Mahesh 'are of tender years and in the formative stage of their life and need a sense of emotional security, which a mother alone can give.'In the case of Maya and Mahesh, the learned Judge has applied a different standard in regard to their custody. Considering the present age of both Maya and Mahesh and taking into consideration the upbringing of Ajit by the appellant having him in his custody, we are of the view that the same amount of sense of emotional security can be enjoyed by Maya and Mahesh at the hands of the appellant also. The learned Judge's reasoning that the mother is running a school and has also facilities to make these two children live in the academic atmosphere rather than with their father, cannot have any force, in. view of the clear and categorical principles laid down in the various decisions noticed (supra) and also in view of the clear intendment and spirit of the Guardians and Wards Act, which prescribes that father is the guardian of his minor child unless other wise found unfit. The academic qualification of the mother, her financial status and the other standards cannot at all weigh in the matter when the appellant has not been rejected as a person unfit to be the guardian of the minors. If they should weigh, the poorer and affectionate father with moderate capacity to protect his children will be deprived of the custody of the minor children on the flimsy ground of 'welfare of the minor children'. That is how and why ',the welfare of the minor children' must be read with 'fitness or unfitness of the father to be guardian of the minors. Once it is found that the father is the fit and proper person to be the guardian of his minor children, unless it is otherwise found that he is not fit, it must be presumed that the children's interests will be properly protected by the father. As far as the present case is concerned, when the trial court itself has found that Ajit has been properly looked after and brought up very well in his academic career by the appellant, there cannot be any difficulty in coming to the conclusion that Maya and Mahesh will also be looked after and protected and imparted with proper education by the affectionate father, the appellants After reproducing certain observations from the judgment', of (i) Sadasivam J., dated April 15, 1964, (ii) Veeraswamy 1.. (as he then was) and Krishnaswami Reddy J., dated February 1967 in C.M.P. 415 in O.S.A. nos. 63 & 65 of 1969, Ramamurthy J., dated April 24, 1968 in application nos. 769 and 770 of 1968 in O.M.S. 12 of 1962 and after referring to the view of Maharajan J., that Ajit when produced in Court was found quite healthy and cheerful and was doing well at school, Venkataraman J. in his concurring judgment observed thus :-

> *"Regarding the other children, he gave their custody to the mother, because he thought that they were of tender years and needed emotional security which a mother alone could give.*
>
> *Here, with respect we must differ from the learned Judge. We find that the father is quite fit to have the custody of the children, and. in law, custody of the minor children cannot be refused to him. We are also satisfied from what we saw of the appellant and, heard from him during the several hearings, that he is very deeply attached to his children and is quite competent to have their custody. It wilt be enough if the mother is allowed a somewhat liberal access to the three children."*

With respect to alimony the appellate bench concluded that the wife was managing her school very successfully; she had purchased a mini-bus and also possessed wet lands in her village The husband on the other hand was not getting on well in his profession which he attributed to the present litigation : his house at Adyar was stated to be under mortgage and he had practically sold everything in his native village with the exception of one, or one-and-half acres of land. In view of the financial position of the wife and the husband and in view of the fact that all the three children were to be in the custody of the husband the appellate bench considered it unnecessary for the' husband to pay any maintenance to

the wife. The payment of the arrears of alimony was also suspended as the appellate bench considered itself empowered to do so under the proviso to s. 37 of the Indian Divorce Act. In so far as access of the wife to' the children is concerned a detailed order was passed by the bench about the right of the wife to take the daughter with her during the summer and Christmas vacations and also during several days every month, particularly during the periods. We do not consider it necessary to state in full the details of that order. With respect to Ajit and Mahesh also a detailed order was made fixing the precise days and even time when the wife could bring the children from the father to stay with her. In the event of any difficulty in getting custody of the children from the wife, it was ordered at the instance of the husband, that he could take the police help on the strength of the High Court judgment. We find it extremely difficult to appreciate this direction. Orders from the Court in execution would have 'been more appropriate. Police intervention in such personal domestic differences in the present case, where parties belong to educated respectable families should have been avoided.

In this Court a preliminary objection to the hearing of the wife's appeal was raised by the husband, who, being an advocate, personally addressed us in opposing these appeals. Indeed in June, 1972 he had presented Civil Miscellaneous Petitions Nos. 4188 and 4189 of 1972 for revoking special leave, and it was these applications which he pressed before us at the outset. These lengthy applications covering nearly 50 pages mainly contain arguments on the merits and there is hardly any cogent ground made out justifying revocation of the special leave. It is no, doubt open to this Court to revoke special leave when it transpires that special leave had been secured by the appellant on deliberate misrepresentation on a material point having a bearing on the question of granting such leave. The extraordinary discretionary power vested in this Court by the Constitution under Act, 136 is in the nature of a special residuary power exercisable in its judicial discretion outside the purview of ordinary law in cases where the needs of justice demand interference. Being discretionary power intended only to Promote the cause of justice when there is no other adequate remedy, this Court expects those seeking resort to this reserve. of constitutional power for securing justice to be absolutely fair and frank with this Court in correctly stating the relevant facts and circumstances of the case. In the event of a party making a misrepresentation on a point having a bearing on the question of the exercise of judicial discretion and thereby-trying to over-reach this Court the party forfeits the claim to the discretionary relief : the same is the case when such misrepresentation is discovered by this Court and brought to its notice after the grant of special leave and this Court is competent and indeed it considers it proper to revoke the special-leave thus Obtained. But the misrepresentation must be deliberate and on a point having such relevance to the question of special leave that if true facts were known this Court would leave in all Probability declined special leave. Applying this test to the, present case we arc unable to find any such deliberate misrepresentation by the, appellant indicating intention to mislead or over-reach this Court. The points to which our attention was drawn seem to relate to the merits of the controversies between the parties which would fall for determination on the hearing of the appeal after considering the arguments pro and con. The preliminary objection thus fails and must be disallowed.

Turning to the merits of these appeals, it may be pointed out that with the exception of O.P. No. 270 of 1970 filed by the husband under S. 25 of the Guardians and Wards Act all the other applications presented by the parties and disposed of by Maharajan J., were off-shoots of O.M.S. 12 of 1962 in which the wife had obtained a decree for judicial separation. The first contention raised on behalf of the appellant was that O.P. No. 270 of 1970 did not lie. It was strenuously pressed by Shri Balasubaramania lyer the counsel for the appellant wife that the husband's application under s. 25, Guardians and Wards

Act was not competent because none of the children had been illegally removed from the lawful custody of their father, the custody of the two children having been lawfully entrusted to the wife in proceedings to which the husband was a party. It was emphasised in this connection that the custody of the girl Maya and of the boy Mahesh had been lawfully entrusted to ,the wife by a competent Court and unless there is actual physical removal of the children from the custody of the father, S. 25 would. not be attracted.

Now the first thing to be notified is that this objection as to the competence of the application under S. 25 is in the nature of a preliminary objection. But it was not raised either before the learned single Judge or before the Letters Patent Bench in the manner in which it is pressed before us. In this Court also in the special leave appeal the objection seems to be based on the argument that the Guardians and Wards Act would be inapplicable to cases where orders have been made in. matrimonial proceedings, and s. 19 of the Guardians and Wards Act cannot control the custody or children given by a consent decree under the Indian Divorce Act. However, as the objection was stated to pertain to jurisdiction we allowed the parties to address us on this point.

For determining the question of competence of the husband's application under s. 25 of the Guardians and Wards Act (18 of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Indian Divorce Act.

The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. But as provided by s.3, this Act is not to be construed, inter alia ,to take away any Power possessed by any High Court. According to s.4, which is the definition section, a "minor' is a Person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. Under S. 3 of that Act this age is fixed at 18 years, except for those, for whose person or property or both a guardian has already been appointed by a court of justice (other than a guardian for a suit under Chapter XXXI, C.P.C.) and for whose property, superintendence has been assumed by a Court of Wards, for whom it is fixed at 21 years. A "ward" under this Act means a minor for whose person or property or both there is a guardian and "guardian" is a person having the care of the person of a minor or of his property or both. Chapter 11 of this Act (18 of 1890), consisting of ss.5 to 19 (s. 5 applicable to European British subjects has since been repealed, deals with the Appointment and Declaration of Guardians. Section 7 empowers the Court to make orders as to guardianship where it is satisfied that it is for the welfare of the minor that an order should be made appointing his guardian or declaring a person to be such guardian. Section 7(3) places certain restrictions with respect to cases where guardians have been appointed by will or other instrument or appointed or declared by court. Section 8 provides for persons entitled to apply under s. 7 : they include Collectors as specified in cls. (c) and (d). Sections 9 to 11 provide for jurisdiction of. courts, form of applications and procedure on admission of applications. Section 12 provides for interlocutory orders subject to certain restrictions. Next important sections are ss. 17 and 19. Section 17 which provides for the matters to be considered by the court in appointing or declaring guardian reads :

> *"17. Matters to be considered by the Court in appointing guardian.*
>
> *(1) In appointing or declaring the, guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.*

(2) In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference."

Section 19, which prohibit the Court from appointing guardians in certain cases, reads :

"*19. Guardians not to be appointed by the Court in certain cases Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person.*

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the Court. unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Chapter III (ss. 2O to 42) prescribes duties, rights and liabilities of, guardians. Sections 20-23 (General provisions) do not concern us. Section 20 provides for the fiduciary relationship of guardian towards his wards and S. 22 provides for remuneration of guardians appointed or declared by the Court. Sections 24 to 256 deal with "'Guardian of the person". Under s. 24 the guardian is bound, inter alia, to look to his ward's support, health and education. Section 25 which is of importance for our purpose provides for "Title of Guardian to custody of Ward" and reads

"*25. Title of guardian to custody of ward :*

(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion ,that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

Sections 27 to 37 deal with "Guardian's Property" and Sections 38 to 48 deal with"'Termination of Guardianship". Chapter IV (ss. 43 to 51) is the last chapter dealing with supplementary provisions.

Now it is clear from the language of S. 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Count is empowered to make an order for,the return of the ward to his guardian if it is of opinion that it will be for the, welfare of the, ward to return to the custody of his guardian. The Court is entrusted with a judicial discretion to order return of the Ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leave little doubt that it is the guardian who, having the care of the person of his ward, has be-In deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation under the Indian Divorce Act, (4 of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree : s. 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the ,fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be; minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years : s. 3(5).

The Court under the Divorce Act would thus be incompetent now to make any order under ss. 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent husband under these circumstances he cannot approach the Court under the Divorce, Act for relief with respect to the custody of these children and now that those children have ceased to be minors under that Act, the orders made by that Court have also. lost their vitality On this reasoning the husband claimed the right to invoke S. 25 of the Guardians and Wards Act : in case this section is not applicable, then the husband contended, that his application (O.P. 270 of 1970) should be, treated to be an application under S. 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could Let the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under s.7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The counsel added that ss. 7 and 17 of that Act also postulate welfare of ,the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served it they remain in her custody.

In our opinion, S. 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian ,to properly look after the ward's health, maintenance and ,education, this section demands reasonably liberal interpretation so as to effectuate that object.

Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the ,Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under s. 19 during his life-time, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is S. 25. Without, therefore, laying down exhaustively the circumstances in which s. 25 can be invoked, 'in our opinion, on the facts and circumstances of this case the husband's application under S. 25 was competent with respect to the two elder children. The Court entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas. however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, herefore, somewhat difficult to impute to the legislature an intention to set up, another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be, considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents" It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under s.25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom-if ever-identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under s.25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of (their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case.

There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under s.25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the

husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot over-ride considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute ,generally to be better fitted to look after the children-being normally the earning member and head of the family-but the Court has in each-case to see primarily to the welfare of the children in determining the question of their custody, in the background of .all the relevant facts having a bearing on their health, maintenance and education.

The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they got their due share of affection and care from both the parents in their normal parental home.

Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and who in addition because of her profession and financial resources, may be in a posit-ion to guarantee better health, education and maintenance for them. The children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives.of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute 'between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us have erred in reversing him on grounds which we are unable to appreciate.

At the bar reference was made to a number of decided cases on 'the question of the right of, father to No appointed or declared as guardian and to be granted custody of his minor children under s. 25 read with S. 19 of the Guardians and Wards Act. Those decisions were mostly decided on their own peculiar facts. We have, therefore not considered it necessary to deal with them. To the extent, however, they go against the view we have taken of s. 25 ,of the Guardians and Wards Act, they must be held to be wrongly, decided. The respondent's contention that the Court under the Divorce Act had granted custody of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of ,I grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also' in our

opinion, be much better looked after by his mother than by his father who will have to work hard to take a mark in his profession.

He has quite clearly neglected his profession and we have no doubt that if he devotes himself' wholeheartedly to it he is sure to find his place fairly high tip in the legal profession.

The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and Circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based, on consent decrees cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.

We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patnet Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under s. 25 of the Guardians and Wards Act, The directions given by him with respect to access of the parties to their children are also restored. As regards alimony, no doubt. the Letters Patent Bench was, in our opinion, not quite right in withholding payment of the alimony already fallen due and in arrears. But in view of the fact that the financial position of the wife is far superior to that of the husband who according to his own submission. has yet to establish himself in his profession, we do not consider it just and proper to interfere with that order under Art. 136 of the Constitution. With respect to the alimony, therefore, the appeal fails and is dismissed. We also direct that the parties should bear their own costs throughout. ,

Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own offspring if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy, domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of tamprament has to be endeavored to be disciplined into compatibility and not to be magnified by abnormal impluses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. 'Both parents have, therefore, to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Appeal allowed in part.

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LANDMARK JUDGMENTS ON MARRAIGE AND DIVORCE

MOHAMMED SALIM (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS VERSUS SHAMSUDEEN (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS

Supreme Court of India

Bench : Hon'ble Mr. Justice N.V. Ramana anad Hon'ble Mr. Justice Mohan M. Shantanagoudar

CIVIL APPEAL NO. 5158 OF 2013†

Mohammed Salim (Dead) Through Legal Representatives And Others .. Appellants;
Versus
Shamsudeen (Dead) Through Legal Representatives And Others .. Respondents.

Decided on January 22,2019

A. Family and Personal Laws — Muslim Law — Irregular (fasid) marriage — Marriage between Muslim male and Hindu woman — Held, irregular (fasid) and not void (batil)—Word "fasid" synonymously regarded as invalid or irregular — Children born from such wedlock treated as legitimate and entitled to share in father's property — Words and Phrases — "Fasid" and "batil"

B. Family and Personal Laws — Muslim Law — Intestate/Customary Succession/Inheritance — Property belonging to mother, gifted by her to one of her two sons — After donee's death, property would devolve absolutely upon his LRs — Other property belonging to mother, after her death, would devolve on her LRs i.e. two sons in equal share

C. Evidence Act, 1872 — Ss. 35 and 114 111. (e) — Parentage — Proof — Birth register extract — Register maintained by statutory authorities — Mentioning names, of plaintiff's parents — Held, being public document, is a fact relevant for determining parentage of plaintiff

One Z, a Muslim woman, owned Schedule A and Schedule B properties. She had two sons IL and ID (Defendant 1). The plaintiff-Respondent 1 is the son of IL and Defendants 2 to 7 are children of ZD, Z had gifted Schedule A property to IL by executing a gift deed. From the wedlock of the first wife of IL no issue was born. Thereafter, IL married V, a Hindu woman in 1946 and they lived together as husband and wife. V was later renamed as Souda. From the said wedlock, the plaintiff was born. Z died in 1955 and IL died in 1947. Thereafter, V (Souda) married to another person.

The plaintiff filed a suit for partition and possession of 14/16th share in Schedule A property, being the only son of IL and half the rights over Schedule B property through inheritance after demise of Z. It is the case of the defendants that V was not the legally wedded wife of IL and that she was a Hindu by religion at the time of marriage. She had not converted to Islam at the time of her marriage, and thus the plaintiff being the son of V, is not entitled to any share in the property of IL. It is their further case that IL had died two years prior to the birth of the plaintiff. The trial court decreed the suit and the first appellate court allowed the appeal and dismissed the suit by setting aside the judgment and decree of the trial court. However, the High Court by the impugned judgment set aside the judgment passed by the first appellate court and confirmed the judgment and decree passed by the trial court. Hence, the

instant appeal was filed by the original defendants and the legal representatives of those among them who have since died.

Dismissing the appeal, the Supreme Court

Held:

Under Muslim law, there are three types of marriage—valid (sahih), or irregular (fasid) or void from the beginning (batil). A void marriage is one which is unlawful in itself, the prohibition against such a marriage being perpetual and absolute. As regards the Arabic word "fasid", it was contended that its correct translation is "invalid" and not "irregular" and therefore, a fasid marriage is a void marriage. This contention has to be considered in the light of changes over time. While in Mulla's Principles of Mahomedan Law, 6th Edn. Section 200, p. 162 it was stated that a marriage of a Mahomedan male with an idolatress or fire- worshipper is not void (batil) but merely "invalid" (fasid), in Mulla's 10th Edn. onwards, fasid marriage has been described as an irregular marriage, instead of invalid, but there has been no change with regard to the effect of a fasid marriage from the 6th Edn. onwards. As stated in Mulla (21st Edn., Section 264, p. 349), an irregular marriage is one which is not unlawful in itself, but unlawful for something else as where prohibition is temporary being that where a marriage is prohibited by reason of difference of religion, the objection may be removed by the wife becoming a convert to the Mussalman religion. Evidently, Muslim law clearly distinguishes between a valid marriage (sahih), void marriage (batil), and invalid/irregular marriage (fasid). Thus, it cannot be stated that a batil (void) marriage and a fasid (invalid/irregular) marriage are one and the same. The effect of a batil (void) marriage is that it is void ab initio and does not create any civil right or obligations between the parties. So also, the offspring of a void marriage are illegitimate. But children conceived and born during the subsistence of a fasid marriage are legitimate, as in the case of a valid marriage. A marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate. (Paras 16, 17, 20, 23, 21 and 30)

Chand Patel v. Bismillah Begum, (2008) 4 SCC 774 : (2008) 2 SCC (Cri) 490, relied on

Aisha Bi v. Saraswathi Fathima, 2012 SCC OnLine Mad 1275 : (2012) 3 LW 937; Ihsan Hassan Khan v. Panna Lai, 1927 SCC OnLine Pat 139 : AIR 1928 Pat 19, approved

The marriage of a Muslim man with an idolater or fire-worshipper is neither a valid (sahih) nor a void (batil) marriage, but is merely an irregular (fasid) marriage. Since Hindus are idol worshippers, which includes worship of physical images/statues through offering of flowers, adornment, etc., the marriage of a Hindu female with a Muslim male is not a regular or valid (sahih) marriage, but merely an irregular (fasid) marriage. Any child born from such wedlock (fasid marriage) is legitimate as in the case of a valid marriage and is entitled to claim a share in his father's property. (Para 31)

Shamsudeen M. Illias v. Mohd. Salim M. Idris, 2007 SCC OnLine Ker 93 : AIR 2008 Ker 59, affirmed

Mulla's Principles of Mahomedan Law, 6th Edn. Section 200, p. 162, Section 204, p. 164; 8th Edn.; 10th Edn.; 21st Edn.; Syed Ameer All's Mohamedan Law; Tahrir Mahmood: Muslim

Law in India and Abroad, (2nd Edn.) at p. 151; A. A. A. Fyzee: Outlines of Muhammadan Law (5th Edn.), at p. 76, relied on

In view of the gift deed in favour of IL, upon his death, Schedule 'A' property would have devolved upon his legal heirs as an absolute property as provided under Muslim law. Plaint Schedule 'B' property

admittedly belonged to Z and upon her death, it devolved on her legal heirs. Since Z had two sons, both the sons/their respective legal heirs would have inherited half a share each after the death of Z. (Para 8)

The birth register extract of the plaintiff maintained by the statutory authorities indicates that the plaintiff is the son of IL and V. The entry made in such register, which is a public document, is itself a relevant to resolve the dispute at hand. Additionally a specific pleading was found in the plaint that IL and V were living together as husband and wife. Defendant 8, the first wife of IL had also clearly admitted in her written statement that IL had married V and from the wedlock the plaintiff was born. Further, having regard to the date of birth of the plaintiff as per the birth register extract and the date of death of IL, as seen from the Government Almanac, which cannot be disputed inasmuch as it is a public record maintained by the Trivandrum Public Library (Government of Kerala), it can be concluded that the plaintiff was born two months prior to the death of IL. (Paras 9 and 10)

In this view of the matter, the trial court and the High Court were justified in concluding that the plaintiff is the legitimate son of IL and V, and is entitled to his share in the property as per law. The High Court was also justified in modifying the decree passed by the trial court and awarding the appropriate share in favour of the plaintiff. No issue has been raised before us relating to the quantum of share. Accordingly, the appeal fails and stands dismissed. (Para 32)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Mohan M. Shantanagoudar.— The judgment dated 5-9-2007 passed in Shamsudeen M. Illias v. Mohd. Salim M. Idris[1] by the High Court of Kerala at Ernakulam is the subject-matter of this appeal. By the impugned judgment[1], the High Court set aside the judgment of the District Court, Thiruvananthapuram dated 12-7-1994 passed in AS No. 264 of 1989 and restored the judgment and decree passed in OS No. 144 of 1984 by the Additional Sub-Court, Thiruvananthapuram dated 17-7-1989.

2. The facts leading to this appeal are that a suit for partition and possession of 14/16th share in the plaint Schedule 'A' property and half the rights over plaint Schedule 'B' property was filed by Respondent 1 herein (original plaintiff). Defendant 1 in the suit, Mohammed Idris, is the brother of Mohammed Ilias, the father of the plaintiff, and Defendants 2 to 7 are the children of Mohammed Idris. Both, the plaintiffs father and Defendant 1 are the sons of Zainam Beevi, who expired in 1955. Both plaint properties belonged to her. Plaint Schedule 'A' property was gifted to Mohammed Ilias, based on a gift deed executed by Zainam Beevi.

3. The case of the plaintiff is that Defendant 8, namely, Saidat, was the first wife of Mohammed Ilias, and no issue was born from the said wedlock. Thereafter, Mohammed Ilias married Valliamma in 1120 ME (as per the Malayalam calendar, which corresponds to 1945 AD in the Gregorian system). Valliamma was a Hindu at the time of her marriage with Mohammed Ilias. Both Mohammed Ilias and Valliamma lived together as husband and wife at Thiruvananthapuram. Later, Valliamma was renamed Souda Beebi. From the said wedlock, Shamsudeen (the plaintiff) was born. Subsequent to the death of Mohammed Ilias in 1947 AD, Valliamma (Souda Beebi) married Aliyarkunju.

4. The plaintiff claimed that he was the only son of Mohammed Ilias and on his death, he became entitled to 14/16th of the share in Schedule 'A' property. He also claimed half the share in

1 2007 SCC Online Ker 93 : AIR 2008 Ker 59

Schedule 'B' property through inheritance after the demise of Zainam Beevi, as the same would have devolved upon the plaintiff, being the son of the predeceased son of Zainam Beevi, and Mohammed Idris, Defendant 1, being the only surviving son of Zainam Beevi. Hence, the suit was filed.

5. It is the case of the defendants that Valliamma was not the legally wedded wife of Mohammed Ilias and that she was a Hindu by religion at the time of marriage. She had not converted to Islam at the time of her marriage, and thus the plaintiff being the son of Valliamma, is not entitled to any share in the property of Mohammed Ilias. It is their further case that Mohammed Ilias had died two years prior to the birth of the plaintiff.

6. As mentioned supra, the trial court decreed the suit and the first appellate court allowed the appeal and dismissed the suit by setting aside the judgment and decree of the trial court. However, the High Court by the impugned judgment1 set aside the judgment passed by the first appellate court and confirmed the judgment and decree passed by the trial court. Hence, the instant appeal was filed by the original defendants and the legal representatives of those among them who have since died.

7. Mr Guru Krishna Kumar, learned Senior Counsel, taking us through the material on record, submitted that the trial court and the High Court were not justified in decreeing the suit, inasmuch as the plaintiff himself had admitted that he was born in the year 1949, whereas his alleged father Mohammed Ilias expired in the year 1947. Therefore, the plaintiff could not be treated as the son of Mohammed Ilias. He further submitted that since Valliamma was a Hindu by religion, she would not have any right over the property of Mohammed Ilias, and consequently the plaintiff would not get any share in the property of Mohammed Ilias.

8. It is not in dispute that Zainam Beevi gifted plaint Schedule 'A' property to her son Mohammed Ilias. In view of the gift deed in favour of Mohammed Ilias, upon his death, Schedule 'A' property would have devolved upon his legal heirs as an absolute property as provided under Muslim law. Plaint Schedule 'B' property admittedly belonged to Zainam Beevi and upon her death, it devolved on her legal heirs. Since Zainam Beevi had two sons, both the sons/ their respective legal heirs would have inherited half a share each after the death of Zainam Beevi.

9. It is also not in dispute that Defendant 8, Saidat is the widow (first wife) of Mohammed Ilias. She has clearly admitted in her written statement that Mohammed Ilias married Valliamma, Defendant 9, and from the said wedlock, the plaintiff was born. Ext. A-3 is the birth register extract of the plaintiff maintained by the statutory authorities, which indicates that the plaintiff is the son of Mohammed Ilias .and Valliamma. It is a public document. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law in accordance with which such book, register or record is kept, is itself a relevant fact, as per Section 35 of the Evidence Act, 1872. Ext. A-3 being a public document is relevant to resolve the dispute at hand. Additionally, a specific pleading was found in the plaint that Mohammed Ilias and Valliamma were living together as husband and wife in House No. T.C. 13 of Poojappura Ward in Thiruvananthapuram, which has not been denied in the written statement of the defendants.

10. As per Ext. A-3 mentioned above, the plaintiff was born on 1-7-1124 ME (12-2-1949 as per the Gregorian Calendar) and the same has not been seriously disputed. Admittedly, Mohammed Ilias died on 10-9-1124 ME The said date corresponds to 22-4-1949 in the Gregorian Calendar, as seen from the Government Almanac, which cannot be disputed inasmuch as it is a public record maintained by the Trivandrum Public Library (Government of Kerala). Thus, it can be concluded that the plaintiff was born two months prior to the death of Mohammed Ilias.

11. Under these circumstances, in our considered opinion, the trial court and the High Court were justified in concluding, based on the preponderance of probabilities, that Valliamma was the legally wedded wife of Mohammed Ilias, and the plaintiff was the child born from the said wedlock.

12. The High Court, in our considered opinion, was also justified in concluding that though the plaintiff was born from a fasid (irregular) marriage, he cannot be termed as an illegitimate son of Mohammed Ilias. On the contrary, he is the legitimate son of Mohammed Ilias, and consequently is entitled to inherit the shares claimed in the estate of his father. The High Court relied upon various texts, including Mulla's Principles of Mahommedan Law (for brevity "Mulla") and Syed Ameer AW s Principles of Mahommedan Law, to conclude that Muslim law does not treat the marriage of a Muslim with a Hindu woman as void, and confers legitimacy upon children born from such wedlock.

13. In the 21st Edn. of Mulla, at p. 338, Section 250, "marriage" is defined as follows:

"Marriage (nikah) is defined to be a contract which has for its object the procreation and the legalising of children."

14. Thus, it appears that a marriage according to Muslim law is not a sacrament but a civil contract. Essentials of a marriage are dealt with in Section 252 at p. 340 of Mulla (21st Edn.) as follows:

"It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohamedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential."

15. Section 259(1) at p. 345 of the 21st Edn. deals with difference of religion, providing that marriage of a Muslim man with a non-Muslim woman who is an idolatress or fire worshipper is not void, but merely irregular. It reads:

"A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a Kitabia, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular."

16. Before proceeding further, it is crucial to note that under Muslim law, there are three types of marriage—valid, irregular and void, which are dealt with in Section 253 at p. 342 of Mulla (21st Edn.):

"A marriage may be valid (sahih), or irregular (fasid) or void from the beginning (batil)."

The High Court, while dealing with the contention that the correct translation of the Arabic word "fasid" was "invalid", and not "irregular", and that therefore a fasid marriage was a void marriage, considered the changes over time in the interpretation of "fasid". It would be worthwhile for us to refer to these changes as well. In the 6th Edn. of Mulla, at Sections 197,199 and 200, fasid marriage is interpreted as "invalid". So also in Sections 197, 199 and 204-A of the 8th Edn. of Mulla, fasid is stated to mean "invalid". For instance, in the 6th Edn. of Mulla, Section 200 at p. 162, dealing with the difference of religion, reads:

"(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman but with a Kitabia, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. If he does marry an idolatress or a fire-worshipper the marriage is not void (batil), but merely invalid (fasid)." (emphasis supplied)

17. Section 204-A at p. 164 of the same edition deals with the distinction between void (batil) and invalid (fasid) marriage. It provides that a marriage which is not valid may either be void (batil) or invalid (fasid). A void marriage is one which is unlawful in itself, the prohibition against such a marriage being perpetual and absolute. An invalid marriage (fasid marriage) is described as one which is not unlawful in itself, but unlawful "for something else", as here the prohibition is temporary or relative, or when the invalidity arises from an accidental circumstance such as the absence of a witness. Section 204-A(3) at p. 165 of the 6th Edn. of Mulla reads:

"... Thus, the following marriages are invalid, namely—

(a) a marriage contracted without witnesses (Sections 196-197);

(b) a marriage by a person having four wives with a fifth wife (Section 198); •

(c) a marriage with a woman who is the wife of another (Section 198-A);

(d) a marriage with a woman undergoing iddat (Section 199);

(e) a marriage prohibited by reason of difference of religion (Section 200);

(f) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (Section 204)...." (emphasis supplied)

18. The reason why the aforesaid marriages are invalid and not void has also been provided later in the same paragraph. With respect to marriages prohibited by reason of difference of religion, it is stated thus:

"... in clause (e), the objection may be removed by the wife becoming a convert to the Mussulman, Christian or Jewish religion, or the husband adopting the Moslem faith...."

19. In the 10th Edn., a change has been made to the meaning of fasid marriage. In Section 196-A, valid, irregular and void marriages are dealt with. It reads:

"A marriage may be valid (sahih) or irregular (fasid), or void from the beginning (batil)." (emphasis supplied)

20. From the 10th Edn. onwards, fasid marriage has been described as an irregular marriage, instead of invalid, but there has been no change with regard to the effect of a fasid marriage from the 6th

Edn. onwards. The effects of an invalid (fasid) marriage have been dealt with in the 6th Edn. of Mulla at Section 206 at p. 166, clauses (1) and (2) of which read:

"(1) An invalid marriage has no legal effect before consummation.

(2) If consummation has taken place, the wife is entitled to dower ["proper" (Section 220) or specified (Section 218), whichever is less], and children conceived and born during the subsistence of the marriage are legitimate as in the case of a valid marriage. But an invalid marriage does not, even after consummation, create mutual rights of inheritance between the parties."

21. In the 8th Edn. of Mulla, the effects of a fasid marriage have been dealt with in Section 206 at p. 173. As in the 6th Edn., it is stated that children conceived and born during the subsistence of a fasid marriage are legitimate, as in the case of a valid marriage. As noted supra, the same position has been followed in the subsequent editions also, except that fasid has been described as "irregular" from the 10th Edn. onwards rather than as "invalid".

22. Irrespective of the word used, the legal effect of a fasid marriage is that in case of consummation, though the wife is entitled to get dower, she is not entitled to inherit the properties of the husband. But the child born in that marriage is legitimate just like in the case of a valid marriage, and is entitled to inherit the property of the father.

23. Evidently, Muslim law clearly distinguishes between a valid marriage (sahih), void marriage (batil), and invalid/irregular marriage (fasid). Thus, it cannot be stated that a batil (void) marriage and a fasid (invalid/irregular) marriage are one and the same. The effect of a batil (void) marriage is that it is void ab initio and does not create any civil right or obligations between the parties. So also, the offspring of a void marriage are illegitimate (Section 205-A of the 6th and 8th Edns. and Sections 205-A of the 10th Edn., and 266 of the 18th Edn. of Mulla). Therefore, the High Court correctly concluded that the marriage of Defendant 9 with Mohammed Ilias cannot be held to be a batil marriage but only a fasid marriage.

24. We find that the same position has been reiterated in the 21st Edn. of Mulla as follows. The distinction between void and irregular marriages has been dealt with in Section 264 at p. 349:

"(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity (Section 260), affinity (Section 261), or fosterage (Section 262), is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful 'for something else', as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus, the following marriages are irregular, namely:

(a) a marriage contracted without witnesses (Section 254);

(b) a marriage with a fifth wife by a person having four wives (Section 255);

(c) a marriage with a woman undergoing iddat (Section 257);

(d) a marriage prohibited by reason of difference of religion (Section 259);

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (Section 263).

The reasonwhy the aforesaid marriages are irregular, and not void, is that in clause (a) the irregularity arises from an accidental circumstance; in clause (b) the objection may be removed by the man divorcing one of his four wives; in clause (c) the impediment ceases on the expiration of the period of iddat; in clause (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in clause (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus, if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself." (emphasis supplied)

25. The effect of an irregular (fasid) marriage has been dealt with in Section 267 at pp. 350-51 of the 21st Edn. of Mulla as follows:

"267. Effect of an irregular (fasid) marriage.—(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place—

(i) the wife is entitled to dower, proper or specified, whichever is less (Sections 286, 289);

(ii) she is bound to observe the iddat, but the duration of the iddat both on divorce and death is three course [see Section 257(2)];

(iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife...." (emphasis supplied)

26. The Supreme Court, in Chand Patel v. Bismillah Begum[2], while considering the question of the validity of a marriage of a Muslim man with the sister of his existing wife, referred to the above passages from Mulla (from an earlier edition, as reproduced in the 21st Edn.) while discussing the difference between void and irregular marriages and the effects of an irregular marriage.

27. In Syed Ameer All's Mohamedan Law also, the same principle has been enunciated. The learned author, while dealing with the issue of the legitimacy of the children, observed at p. 203 of Vol. II, 5th Edn.:

"*The subject of invalid marriages, unions that are merely invalid (fasid) but not void (batil) ab initio under the Sunni law, will be dealt with later in* detail, but it may be stated here that the issue of invalid marriage is without question legitimate according to all the sects.

For example, if a man were to marry a nonscriptural woman, the marriage would be only invalid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate."

2 (2008) 4 SCC 774 : (2008) 2 SCC (Cri) 490

28. Tahrir Mahmood in his book Muslim Law in India and Abroad, (2nd Edn.) at p. 151 also affirms that the child of a couple whose marriage is fasid i.e. unlawful but not void, under Muslim law will be legitimate. Only a child born outside of wedlock or born of a batil marriage is not legitimate.

29. A.A.A. Fyzee, at p. 76 of his book Outlines of Muhammadan Law (5th Edn.) reiterates by citing Mulla that the nikah of a Muslim man with an idolater or fire-worshipper is only irregular and not void. He also refers to Ameer Ali's proposition that such a marriage would not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam, which would at once remove the bar and validate the marriage.

30. The position that a marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate has also been affirmed by various High Courts. (See Aisha Bi v. Saraswathi Fathima[3], Ihsan Hassan Khan v. Panna Lai[4]).

31. Thus, based on the above consistent view, we conclude that the marriage of a Muslim man with an idolater or fire-worshipper is neither a valid (sahih) nor a void (batil) marriage, but is merely an irregular (fasid) marriage. Any child born from such wedlock (fasid marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/ statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (sahih) marriage, but merely an irregular (fasid) marriage.

32. In this view of the matter, the trial court and the High Court were justified in concluding that the plaintiff is the legitimate son of Mohammed Ilias and Valliamma, and is entitled to his share in the property as per law. The High Court was also justified in modifying the decree passed by the trial court and awarding the appropriate share in favour of the plaintiff. No issue has been raised before us relating to the quantum of share. Accordingly, the appeal fails and stands dismissed.

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3 2012 SCC OnLine Mad 1275 : (2012) 3 LW 937

4 1927 SCC OnLine Pat 139 : AIR 1928 Pat 19

JUVERIA ABDUL MAJID PATNI VERSUS ATIFIQBAL MANSOORI AND ANOTHER

Supreme Court of India

Bench : Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya and Hon'ble Mr. Justice S.A. Bobde

CRIMINAL APPEAL NO. 2069 OF 2014[†]

Juveria Abdul Majid Patni ...Appellant;
Versus
Atifiqbal Mansoori And Another ...Respondents.

Decided on September 18,2014

A. Family and Personal Laws — Muslim Law — Divorce — Khula —Wife's proposal for dissolution of marriage — When becomes effective —Principles laid down — Mere ex parte fatwa (advisory opinion) of khula (divorce) obtained from Mufti (juris consult) without clear proof of acceptance of proposal of dissolution of marriage by the husband, or, without issuance of qaza (judgment) of khula by Qazi (Judge), held, ineffectual in effecting divorce

— Definite pleading and evidence is required to prove that khula became effective — Ex parte fatwa of khula obtained by appellant wife from Mufti under Muslim Personal Law — Respondent husband, instead of accepting ex parte fatwa of khula or seeking qaza from Qazi, filed petition before Family Court and also sought restitution of conjugal rights — No definite plea taken by respondent husband or appellant wife that khula under Muslim Personal Law (Shariat) became effective — Held, in absence of definite pleading, evidence and finding re khula, it cannot be concluded with certainty that divorce had taken place — Muslim Law — Muslim Personal Law (Shariat) Application Act, 1937, S. 2

B. Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — Ss. 12, 2(a), (f) & (s), 3,18 to 23 and 26 —"Aggrieved person" — Who is — Divorced wife, held, included — Application under S. 12 seeking relief under Ss. 18 to 23 filed by appellant Muslim wife against husband after obtaining divorce — Held, maintainable — If domestic violence had taken place when wife lived together in shared household with her husband through relationship in nature of marriage, held, application would be maintainable — Act of domestic violence once committed, subsequent decree of divorce, would not absolve husband from his liability for offence (though in present case, the alleged divorce not really found to have taken place) — Criminal Procedure Code, 1973 — S. 125 — Words and Phrases — "Aggrieved person", "domestic relationship" and "shared household"

C. Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — Ss. 26 and 18 to 22 — Proceedings in which relief under Ss. 18 to 22 of DVA Act can be claimed — Proceedings other than under DVA Act — Held, any relief available under the aforesaid provisions may also be sought for in any legal proceeding even before a civil court and Family Court, apart from the criminal court, affecting the aggrieved person whether such proceeding was initiated before or after the commencement of the DVA Act — Even before the criminal court where case under S. 498-A IPC is pending, if the allegation is found genuine, it

is always open to the appellant to ask for reliefs under Ss. 18 to 22 of the DVA Act and interim relief under S. 23 of the DVA Act — Penal Code, 1860 — S. 498-A — Criminal Procedure Code, 1973, S. 125

D. Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — Ss. 20 and 12 — Nature of relief available under S. 20 — Distinguished from maintenance — Held, monetary relief as stipulated under S. 20 of the DVA Act is different from maintenance, which can be in addition to an order of maintenance under S. 125 CrPC or any other law — Such monetary relief can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, which is not dependent on the question whether the aggrieved person, on the date of filing of the application under S. 12 of the DVA Act is in a domestic relationship with the respondent — Criminal Procedure Code, 1973, S. 125

E. Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — S. 23 — Grant of interim relief under — When warranted — Held, in view of S. 23 of the DVA Act it is well within the jurisdiction of the Magistrate to grant the interim ex parte relief as he deems just and proper, if the Magistrate is satisfied that the application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence

The appellant got married to the first respondent according to Muslim rites and rituals on 13-5-2005. According to the appellant, the respondent was in the habit of harassing her. She was subjected to physical abuse and cruelty during the period of 2006-2007. The appellant lodged an FIR in 2007 under Sections 498-A and 406 IPC against the first respondent, his mother and his sister. Against the same, a writ petition was filed by the first respondent which was partly allowed by the High Court quashing the FIR against the first respondent's mother and sister with the observation that a prima facie case under Section 498-A was made out against the first respondent. According to the appellant, she obtained an ex parte khula (divorce) from Mufti under the Muslim Personal Law on 9-5-2008. The first respondent challenged the khula (divorce) pronounced by Mufti before the Family Court, and also filed a petition for restitution of conjugal rights.

On 29-9-2009, the appellant filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 against the first respondent for relief under Sections 18 to 23 of the DVA Act alleging that he is not providing maintenance for herself as well as for the minor child. The Protection Officer appointed by the Magistrate under the DVA Act filed his report, inter alia, stating that an act of domestic violence was committed by the first respondent upon the appellant. Subsequently, pursuant to an application filed by the appellant, the Magistrate directed the first respondent to pay interim maintenance of Rs 25,000. Without paying the maintenance, the first respondent preferred an appeal before the Sessions Court challenging the order of the Magistrate. The Sessions Court concluded that the divorce having been taken place on 9-5-2008 the domestic relationship between the parties did not remain and therefore, the application under Section 12 was not maintainable and the question of granting any interim relief did not arise because it could be said that the applicant had no prima facie case. Accordingly, the Sessions Court allowed the appeal and set aside the interim order passed by the Magistrate. The High Court by the impugned judgment affirmed the order passed by the Sessions Court.

The following questions arose for consideration by the Supreme Court in the present appeal:

(i) Whether divorce of the appellant and the first respondent had taken place on 9-5-2008? and

(ii) Whether a divorced woman can seek reliefs against her ex-husband under Sections 18 to 23 of the Domestic Violence Act, 2005? Allowing the appeal, the Supreme Court

Held:

(1) Khula (divorce) is a mode of dissolution of marriage when the wife does not want to continue with the marital tie. If the wife does not want to continue with marital tie and takes mode of khula (divorce) for dissolution of marriage, she is required to propose her husband for dissolution of marriage. This may or may not accompany her offer to give something in return. The wife may offer to give up her claim to Mahr (dower). The khula (divorce) being a mode of divorce which proceeds from the wife, the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return. To settle the matter privately, the wife need only to consult a Mufti (juris consult) of her school. The Mufti gives his fatwa or advisory decision based on the Shariat of his school. However, if the matter is carried to the point of litigation and cannot be settled privately then the Qazi (Judge) is required to deliver a qaza (judgment) based upon the Shariat. (Para 13)

Masroor Ahmed v. State (NCI of Delhi), ILR (2007) 2 Del 1329, approved

C. Mohammad Yunus v. Syed Unnissa, AIR 1961 SC 808 : (1962) 1 SCR 67, cited

In the present case, the appellant stated that she obtained an ex parte khula (divorce) on 9-5-2008 from Mufti under the Muslim Personal Law. There is no definite plea taken either by the appellant wife or by the first respondent husband that khula (divorce) became effective in accordance with Muslim Personal Law (Shariat). Neither the appellant nor the first respondent placed any evidence on record in support of such divorce. Neither it is pleaded nor is it made clear by the appellant or the first respondent as to whether for such khula (divorce) the appellant had made a proposal to the first respondent-husband for dissolution of marriage accompanied by an offer to give something in return. It has not be made clear whether the appellant gave up her claim to Mahr (dower). The first respondent-husband has neither accepted khula (divorce) given by Mufti (jui consult) nor has he moved before the Qazi (Judge) to deliver a qaza (judgmei based upon the Shariat. Instead, he has moved before the Family Court agair the khula (divorce) by filing petition and also prayed for restitution of conjug rights. In this background it must be held that the Sessions Judge wrong concluded that the appellant is no more wife of the first respondent when i evidence was produced in support of the statement either made by the appellant or by the first respondent. Therefore, it cannot be stated with certainty that tl divorce took place on 9-5-2008, in absence of pleading, evidence and finding. (Paras 14 and 17)

ShamimAra v. State ofU.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814, relied on

(2) In the instant case, the appellant wife had filed an application und Section 12 seeking relief under Sections 18 to 23 of the DVA Act. The moneta relief as stipulated under Section 20 of the DVA Act is different fro maintenance, which can be in addition to an order of maintenance under Section 125 CrPC or any other law. Such monetary relief can be granted to meet tl expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, which is not dependent the question whether the aggrieved person, on the date of filing of the applicable under Section 12 of the DVA Act is in a domestic relationship with the respondent. In

view of Section 23 of the DVA Act it is well within jurisdiction of the Magistrate to grant the interim ex parte relief as he deems and proper, if the Magistrate is satisfied that the application prima facie disclost that the respondent is committing, or has committed an act of domestic violent or that there is a likelihood that the respondent may commit an act of domest violence. Further, it is not necessary that relief available under Sections 18, 20, 21 and 22 of the DVA Act can only be sought for in a proceeding under the Domestic Violence Act. Any relief available under the aforesaid provisions also be sought for in any legal proceeding even before a civil court and Fami Court, apart from the criminal court, affecting the aggrieved person whether proceeding was initiated before or after the commencement of the DVA Act. There is apparent from Section 26 of the DVA Act. Even before the criminal cou where case under Section 498-A IPC is pending, if the allegation is four genuine, it is always open to the appellant to ask for reliefs under Sections 18 and 22 of the DVA Act and interim relief under Section 23 of the DVA Act. In the present case, the alleged domestic violence took place during 2006-2007 and the writ petition filed by the first respondent the High Court refused to quash FIR against him observing that a prima facie case under Section 498-A IPC made out against him. (Paras 23 to 31)

V.D. Bhanot v. Savita Bhanot, (2012) 3 SCC 183 : (2012) 2 SCC (Civ) 53 : (2012) 2 SC (Cri) 102, relied on

Even if it is accepted that the appellant has obtained ex parte khula (divorce under the Muslim Personal Law from the Mufti on 9-5-2008, the petition undi Section 12 of the Domestic Violence Act is maintainable. The erstwhile wife cz claim one or other relief as prescribed under Sections 18, 19, 20, 21, 22 ar interim relief under Section 23 of the Domestic Violence Act, 2005, as domesti " violence had taken place when the wife lived together in shared household wil her husband through a relationship in the nature of marriage. An act of domesti violence once committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under the DVA Act including monetary relief under Section 20, child custody under Section 21, compensation under Section 22 and interim or ex parte order under Section 23 of the DVA Act. Both the Sessions Judge and the High Court failed to notice the provisions of the DVA Act viz. Sections 2(a), 2(f), 2(s), 3, 18 to 23 and 26 and the fact that in any case the FIR under Sections 498-A and 406 IPC was lodged much prior to the alleged divorce between the parties and erred in holding that the petition under Section 12 of the DVA Act was not maintainable. (Paras 18,19 and 29 to 31)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya.— Leave granted. This appeal has been preferred by the appellant against the judgment dated 23-1-2013 passed by the High Court of Judicature of Bombay in Juveria Abdul Majid Patni v. Atif Iqbal Mansoori1. By the impugned judgment[5], the High Court dismissed me writ petition preferred by the appellant and upheld the order dated 3-11-2012 passed by the Additional Sessions Judge, Sewree, Mumbai whereby the Sessions Judge held that the application filed by the appellant under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the Domestic Violence Act, 2005") is not maintainable.

2. The case of the appellant is that she got married to the first respondent according to Muslim rites and rituals on 13-5-2005. The first respondent was in the habit of harassing her. She was subjected to physical abuse and cruelty. For example, the first respondent acted with cruelty,

5 Criminal WP No. 4250 of 2012, decided on 23-1-2013 (Bom)

harassed her and had banged her against a wall on her back and stomach on 5-1-2006, due to which she suffered severe low back pain. The first respondent refused her entry into the matrimonial house on 19-2-2006 and asked her to stay with her parents. She delivered a baby boy at Breach Candy Hospital, Mumbai on 10-8-2006 but the first respondent never visited to see the new-born baby. Later, the first respondent filed a petition seeking custody of the minor child.

3. The appellant lodged FIR No. 224 of 2007 on 6-9-2007 before Agripada Police Station under Sections 498-A and 406 IPC against the first respondent, his mother and his sister. Against the same, a writ petition was filed by the first respondent bearing Writ Petition No. 1961 of 2007 seeking quashing of the FIR. The High Court dismissed[6] the said writ petition and the same was challenged by the first respondent on which this Court issued notice. Subsequently, this Court by order dated 16-7-2008[7], remitted the matter to the High Court for hearing afresh Writ Petition No. 1961 of 2007. On 4-12-2008[8], Writ Petition No. 1961 of 2007 was partly allowed by the High Court quashing the FIR against the first respondent's mother and sister with the observation that the prima facie case under Section 498-A was made out against the first respondent.

4. According to the appellant, she obtained an ex parte "khula" from Mufti under the Muslim Personal Law on 9-5-2008. The first respondent challenged the "khula" pronounced by Mufti before the Family Court, Bandra vide Petition No. B-175 of 2008. He also filed a petition for restitution of conjugal rights.

5. On 29-9-2009, the appellant filed a petition under Section 12 of the Domestic Violence Act, 2005 against the first respondent before the ACMM's 46th Court, Mazgaon, Mumbai for relief under Sections 18 to 23 of the Domestic Violence Act, 2005 alleging that he is not providing maintenance for herself as well as for the minor child. The first respondent filed his reply to the said application which was followed by the rejoinder filed by the appellant. The protection officer appointed by the Magistrate under the Domestic Violence Act, 2005 filed his report, inter alia, stating that an act of domestic violence was committed by the first respondent upon the appellant.

But the Magistrate was transferred, the Court fell vacant and no order was passed. Subsequently, the appellant fded an application for interim maintenance and the Magistrate by order dated 4-2-2012 allowed the application directing the first respondent to pay interim maintenance of Rs 25,000. Without paying the maintenance, the first respondent preferred an appeal before the Sessions Court challenging the order of the Magistrate dated 4-2-2012. The Sessions Court, Sewree, Mumbai by order dated 3-8-2012 condoned the delay in preferring the appeal and directed the first respondent to deposit the entire amount of maintenance prior to the hearing of the appeal. As the first respondent did not deposit the amount, the appellant filed an application for issuance of distress warrant. Accordingly a notice was issued on 1-9-2012. The counsel for the respondent stated across the Bar that the first respondent had deposited the money before the Sessions Court and filed two applications on 3-9-2012 for recalling the order dated 4-2-2012 and for dismissal of the application on the ground that the domestic relationship did not exist between the appellant and the first respondent.

6 Atif Iqbal Mansuri v. State of Maharashtra, Criminal WP No. 1961 of 2007, order dated 18-12-2007 (Bom)

7 Atif Iqbal Mansuri v. State of Maharashtra, Criminal Appeal No. 1120 of 2008, order dated 16-7-2008 (SC)

8 Atif Iqbal Mansuri v. State of Maharashtra, Criminal WP No. 1961 of 2007, order dated 4-12-2008 (Bom)

6. The Sessions Judge, Seweree, Mumbai by order dated 3-11-2012 observed and held as follows:

"*14. First I will take the legal point which has been taken by the learned advocate for the appellant as to whether there was domestic relationship between the parties (sic) on the divorce that took place between the parties on 9-5-2008. The learned advocate for the respondent submitted that though the divorce has taken place as per custom, then also it is not confirmed by the civil court. Secondly, he argued that the non-applicant himself filed a proceeding for restitution of conjugal rights after this date and also filed proceedings for setting aside that divorce obtained by custom and therefore, it cannot be said that divorce took place between the parties. But this argument cannot be accepted because we have to see the pleadings of the applicant. She herself came with a case that marriage was dissolved by Mufti on 9-5-2008. She herself filed such documents along with application in which declaration is made about Nikah of the applicant with the non-applicant is declared null and void and therefore, the applicant is no more wife of the appellant, after period of Iddat she was (sic no more) wife of the appellant, after period of Iddat she was free from any hindrance. She herself came with a case that she is no more wife of the non-applicant after 9-5-2008. It is further to be noted that she herself moved for this customary divorce and according to the non-applicant same was obtained ex parte. In this background the applicant cannot blow hot and cold by saying that though she took such divorce then also same has not been confirmed by the civil court as well as the non-applicant has filed the proceeding for restitution of conjugal rights and setting aside of that divorce and therefore, she may be treated as bis wife.*

75. So, now a legal question arises as to whether in view of divorce that took place on 9-5-2008, the domestic relationship between the parties existed on the date of filing of this petition on 29-9-2009?; and if there is no domestic relationship then whether the application is maintainable?

* * *

20. So, it is the consistent view of the Hon'ble Apex Court, the Hon'ble Bombay High Court and other Hon'ble High Court that after divorce, domestic relationship between the parties did not remain and therefore, application under the Act after date of divorce is not maintainable. In the present case also the facts are similar and therefore, the law laid down is applicable.

21. ... So, I conclude that in view of divorce that took place between the parries on 9-5-2008 the domestic relationship between the parties did not remain and therefore, this application filed on 29-6-2009 under the Act is not maintainable and therefore, question of granting of any interim relief does not arise because it can be said that the applicant has no prima facie case.

* * *

23. ... Even if I would have held that the application is maintainable, then in such circumstances it would have remanded back the matter to the lower court for hearing afresh and recording such reasons. But when I am coming to a conclusion that as prima facie the application is itself not maintainable so the applicant has no prima facie case and therefore, I told that the impugned order is liable to be set aside straightaway." The

Sessions Judge by the aforesaid judgment allowed the appeal and set aside the interim order dated 4-2-2012 passed by the Additional Chief Metropolitan Magistrate, 46th Court at Mazgaon, Mumbai. By the impugned judgment1, the High Court affirmed the aforesaid order.

7. Before this Court the parties have taken similar pleas as taken before the lower courts. According to the appellant the cause of action i.e. domestic violence took place much before the divorce, therefore, FIR was filed and hence the appellant is entitled for the relief under the Domestic Violence Act, 2005. The protection officer has already submitted the report holding that domestic violence was committed by the first respondent upon the appellant.

8. On the other hand, according to the counsel for the first respondent after dissolution of the marriage no relief can be granted under the Domestic Violence Act, 2005. In his support reliance was placed on the decision of this Court in Inderjit Singh Grewal v. State of Punjab[9].

9. The questions that arise for our consideration are:

(i) Whether divorce of the appellant and the first respondent has taken place on 9-5-2008? and

(ii) Whether a divorced woman can seek for reliefs against her ex-husband under Sections 18 to 23 of the Domestic Violence Act, 2005?

10. For determination of the issue, it is necessary to notice the relationship between the appellant and the first respondent. It is not in dispute that the appellant got married to the first respondent according to the Muslim rites and rituals on 13-5-2005. Since then their relationship was "domestic relationship" as defined under Section 2(f) of the Domestic Violence Act, 2005. Both of them had lived together in a "shared household" as defined under Section 2(s) of the Domestic Violence Act when they are/were related by marriage.

11. The appellant had taken plea that she obtained an ex parte "khula" from Mufti under the Muslim Personal Law. But the first respondent has not accepted the same and has challenged the "khula" obtained by the appellant before the Family Court, Bandra vide MJ Petition No. B-175 of 2008. The respondent has also filed a petition for restitution of conjugal rights.

12. The concept of dissolution of marriage under Muslim Personal Law was noticed and discussed by the Single Judge of the High Court of Delhi in Masroor Ahmed v. State (NCT of Delhi)[10]. In the said case, the High Court noticed different modes of dissolution of marriage under the Muslim Personal Law (Shariat) and held: (ILR pp. 1348-51, paras 15-16)

"15. The question which arises is, given the Shariat and its various schools, how does a person proceed on an issue which is in dispute? The solution is that in matters which can be setded privately, a person need only consult a mufti (jurisconsult) of his or her school. The mufti gives his fatwa or advisory decision based on the Shariat of his school. However, if a matter is carried to the point of litigation and cannot be settled privately then the Qazi (Judge) is required to deliver a qaza (judgment) based upon the Shariat [A Qazi (or qadi) is a Judge appointed by the political authority or State. He or she may pass judgments in his or her jurisdiction in respect of many legal matters,

9 (2011) 12 SCC 588 : (2012) 2 SCC (Civ) 742 : (2012) 2 SCC (Cri) 614

10 ILR (2007) 2 Del 1329

including divorce, inheritance, property, contractual disputes, etc. Schacht, p. 188. A qaza or kada is a judgment, which must be given according to the madhab to which the Qadi belongs. Schacht, p. 196. More information on qazis and qazas can be found at pp. 188-98]. The difference between a fatwa and a qaza must be kept in the forefront. A fatwa is merely advisory whereas a qaza is binding. Both, of course, have to be based on the shariat and not on private interpretation dehors the shariat [Abdur Rahim, p. 172 (in respect of Qazis)].

The Muslim Personal Law (Shariat) Application Act, 1937 and the various forms of dissolution of marriage recognised by it.

16. *In India, the confusion with regard to application of customary law as part of Muslim law was set at rest by the enactment of the Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the 1937 Act reads as under:*

'2. *Application of personal law to Muslims.—Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lion, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).'*

The key words are 'notwithstanding any customs or usage to the contrary' and 'the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)'. This provision requires the court before which any question relating to, inter alia, dissolution of marriage is in issue and where the parties are Muslims to apply the Muslim Personal Law (Shariat) irrespective of any contrary custom or usage. This is an injunction upon the court (see C. Mohammad Yunus v. Syed Unnissa[11]). What is also of great significance is the expression— 'dissolution of marriage, including talaq, ila, zihar, Han, khula and mubaraat....' This gives statutory recognition to the fact that under the

Muslim Personal Law, a dissolution of marriage can be brought about by various means, only one of which is talaq. Although Islam considers divorce to be odious and abominable, yet it is permissible on grounds of pragmatism, at the core of which is the concept of an irretrievably broken marriage. An elaborate lattice of modes of dissolution of marriage has been put in place, though with differing amplitude and width under the different schools, in an attempt to take care of all possibilities. Khula, for example, is the mode of dissolution when the wife does not want to continue with the marital tie. She proposes to her husband for dissolution of the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to Mahr (dower). Khula is a divorce which proceeds from the wife which the husband cannot refuse subject only to reasonable negotiation with regard

11 AIR 1961 SC 808 : (1962) 1 SCR 67

to what the wife has offered to give him in return. Mubaraat is where both the wife and husband decide to mutually put an end to their marital tie. Since this is divorce by mutual consent there is no necessity for the wife to give up or offer anything to the husband. It is important to note that both under khula and mubaraat there is no need for specifying any reason for the divorce. It takes place if the wife (in the case of khula) or the wife and husband together (in the case of mubaraat) decide to separate on a no-fault/no-blame basis. Resort to khula (and to a lesser degree, mubaraat) as a mode of dissolution of marriage is quite common in India." (emphasis in original)

13. From the discussion aforesaid, what we find is that "khula" is a mode of dissolution of marriage when the wife does not want to continue with the marital tie. To settle the matter privately, the wife need only to consult a Mufti (juris consult) of her school. The Mufti gives his fatwa or advisory decision based on the Shariat of his school. Further, if the wife does not want to continue with marital tie and takes mode of "khula" for dissolution of marriage, she is required to propose her husband for dissolution of marriage. This may or may not accompany her offer to give something in return. The wife may offer to give up her claim to Mahr (dower). The "khula" is a mode of divorce which proceeds from the wife, the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return. The Mufti gives his fatwa or advisory decision based on the Shariat of his school. However, if the matter is carried to the point of litigation and cannot be settled privately then the Qazi (Judge) is required to deliver a qaza (judgment) based upon the Shariat.

14. In the present case, the appellant stated that she has obtained an ex parte "khula" on 9-5-2008 from Mufti under the Muslim Personal Law. Neither it is pleaded nor is it made clear by the appellant or the first respondent as to whether for such "khula" the appellant made a proposal to first respondent-husband for dissolution of marriage accompanied by an offer to give something in return. It has not been made clear that whether the appellant gave up her claim to Mahr (dower). The husband, first respondent has not accepted "khula" given by Mufti (juris consult) which is in the form of fatwa or advisory decision based on the Shariat. He, however, has not moved before the Qazi (Judge) to deliver a qaza (judgment) based upon the Shariat. Instead, he has moved before the Family Court, Bandra against the "khula" by filing petition MJ Petition No. B-175 of 2008. He has also prayed for restitution of conjugal rights. Therefore, with no certainty, it can be stated that the divorce was taken on 9-5-2008.

15. In Shamim Ara v. State of U.P.[12], this Court considered valid "talaq" in Islamic Law. This Court while discussing the correct law of "talaq", as ordained by the Holy Quran observed that: (SCC p. 526, para 13)

"13. ... talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected." The Court further held that the talaq to be effective has to be pronounced.

16. In Shamim Ara cases, the Muslim woman claimed maintenance under Section 125 of the Code of Criminal Procedure, 1973. The husband, Respondent 2 in his written statement filed in the proceedings under Section 125 CrPC alleged his wife, the applicant under Section 125 CrPC

12 (2002) 7 SCC 518 : 2002 SCC (Cri) 1814

to be sharp, shrewd and mischievous and stated that he divorced her on 11-7-1987 being fed up with all such activities unbecoming of the wife. This Court noticed that the particulars of the alleged talaq were not pleaded and even during the trial, the husband, examining himself, adduced no evidence in proof of talaq said to have been given by him on 11-7-1987. It was further observed that there were no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded talaq. Subsequently, it was held that there is no proof of talaq for having been taken place on 11-7-1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. This Court held that: (Shamim Ara case^, SCC p. 527, para 16)

> *"16. ... a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. [The husband] ought to have adduced evidence and proved the pronouncement of talaq on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have treated as failed."*

17. In the present case, as noticed that there is no definite plea taken either by the appellant or by the first respondent that "khula" become effective in accordance with Muslim Personal Law (Shariat). Neither the appellant nor the first respondent placed any evidence in support of such divorce. No specific pleading was made that the appellant proposed to her husband, first respondent for dissolution of marriage. On the other hand, it is clear that the "khula" was pronounced by the Mufti ex parte. For the said reason, the first respondent challenged the same by filing MJ Petition No. B-175 of 2008, before the Family Court, Bandra. In this background, we hold that the Sessions Judge, Sewree, Mumbai by order dated 3-11-2012 wrongly observed and held that the appellant is no more wife of the first respondent. The High Court has also failed to notice that no evidence was produced in support of the statement either made by the appellant or by the first respondent. It also failed to appreciate the fact that the "khula" was obtained from the Mufti and not from Qazi and the same was challenged by the first respondent before the Family Court, Bandra, Mumbai and Wrongly upheld the finding of the Sessions Judge. Therefore, with no certainty, it can be stated that the divorce has taken place on 9-5-2008, in absence of pleading, evidence and finding.

18. Even if it is presumed that the appellant has taken "khula" (divorce) on 9-5-2008 and the first respondent is no more the husband, the question arises that in such case whether the erstwhile wife can claim one or other relief as prescribed under Sections 18, 19, 20, 21, 22 and interim relief under Section 23 of the Domestic Violence Act, 2005, if domestic violence had taken place when the wife lived together in shared household with her husband through a relationship in the nature of marriage.

19. For determination of such issue, it is desirable to notice the relevant provisions of the Domestic Violence Act, 2005, as discussed hereunder:

19.1. Section 2(a) of the Domestic Violence Act, 2005 defines "aggrieved person" as follows:

"2. (a) 'aggrieved person' means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;"

Therefore, it is clear that apart from the woman who is in a domestic relationship, any woman who has been, in a domestic relationship with the respondent, if alleges to have been subjected to act of domestic violence by the respondent comes within the meaning of "aggrieved person".

19.2. Definition of "domestic relationship" reads as follows:

"2. (a) 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;"

From the aforesaid provision we find that a person aggrieved (wife herein), who at any point of time has lived together with husband (first respondent) in a shared household, is also covered by the meaning of "domestic relationship".

19.3. Section 2(s) defines "shared household":

"2. (s) 'shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointiy by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointiy or singly have any right, tide, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, tide or interest in the shared household;"

Therefore, if the "person aggrieved" (wife herein) at any stage has lived in a domestic relationship with the respondent (husband herein) in a house, the person aggrieved can claim a "shared household".

19.4. Definition of "domestic violence" as assigned in Section 3 reads:

"3. Definition of domestic violence.—For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (by, or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section—

(i) 'physical abuse' means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) 'sexual abuse' includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) 'verbal and emotional abuse' includes—

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) 'economic abuse' includes—

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) .disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entided to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes 'domestic violence' under this section, the overall facts and circumstances of the case shall be taken into consideration."

Therefore, apart from "physical abuse" and "sexual abuse", "verbal and emotional abuse" and "economic abuse" also constitute "domestic violence".

20. Chapter IV of the Domestic Violence Act, 2005 deals with "procedure for obtaining the orders of reliefs". Section 12 relates to the application to Magistrate, which reads as follows:

"12. Application to Magistrate.—(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing."

21. As per proviso to sub-section (1) of Section 12, the Magistrate before passing any order under Section 12 is required to take into consideration any domestic incident report received by him from the protection officer or the service provider.

22. The reliefs which can be granted by the Magistrate under the Domestic Violence Act, 2005 are as follows:

(i) Right to reside in a shared household - Section 17;

(ii) Protection orders - Section 18;

(iii) Residence orders - Section 19;

(iv) Monetary reliefs - Section 20;

(v) Custody orders - Section 21;

(vi) Compensation orders - Section 22; and

(vii) Interim and ex parte orders - Section 23.

23. In the instant case, the appellant sought relief under Sections 18 to 23 of the Domestic Violence Act, 2005. It includes protection order under Section 18, monetary relief under Section 20, custody orders under Section 21, compensation under Section 22 and interim relief under Section 23. The relevant provisions read as follows:

"20. Monetary reliefs.—(1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may direct the respondent to pay monetary relief to meet

the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to direcdy pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent."

The monetary relief as stipulated under Section 20 is different from maintenance, which can be in addition to an order of maintenance under Section 125 CrPC or any other law. Such monetary relief can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, which is not dependent on the question whether the aggrieved person, on the date of filing of the application under Section 12 is in a domestic relationship with the respondent.

24. "22. Compensation orders.—In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

23. Power to grant interim and ex parte orders.—(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent."

Therefore, it is well within the jurisdiction of the Magistrate to grant the interim ex parte relief as he deems just and proper, if the Magistrate is satisfied that the application prima facie discloses that the respondent is comrnittixig, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence.

25. It is not necessary that relief available under Sections 18, 19, 20, 21 and 22 can only be sought for in a proceeding under the Domestic Violence Act, 2005. Any relief available under the aforesaid provisions may also be sought for in any legal proceeding even before a civil court and Family Court, apart from the criminal court, affecting the aggrieved person whether such proceeding was initiated before or after the commencement of the Domestic Violence Act. This is apparent from Section 26 of the Domestic Violence Act, 2005 as quoted hereunder:

"26. Relief in other suits and legal proceedings.—(1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, Family Court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

26. The appellant has filed an FIR against the first respondent for the offence committed under Section 498-A IPC. The High Court refused to quash the FIR qua first respondent on the ground that prima facie case has been made out. Even before the criminal court where such case under Section 498-A is pending, if allegation is found genuine, it is always open to the appellant to ask for reliefs under Sections 18 to 22 of the Domestic Violence Act and interim relief under Section 23 of the said Act.

27. In V.D. Bhanot v. Savita Bhano[13], this Court held that the conduct of the parties even prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005 could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. The wife who had shared a household in the past, but was no longer residing with her husband can file a petition under Section 12 if subjected to any act of domestic violence. In V.D. Bhanot9 this Court held as follows: (SCC pp. 186-87, para 12)

13 (2012) 3 SCC 183 : (2012) 2 SCC (Civ) 53 : (2012) 2 SCC (Cri) 102

"72. We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005."

28. In Inderjit Singh Grewal5 the appellant Inderjit Singh and Respondent 2 of the said case got married on 23-9-1998. The parties to the marriage could not pull on well together and decided to get divorce and, therefore, filed a case for divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955. After recording the statement in the said case, the proceedings were adjourned for a period of more than six months to enable them to ponder over the issue. The parties again appeared before the Court on second motion and on the basis of their statement, the District Judge, Ludhiana vide judgment and order dated 20-3-2008 allowed the petition and dissolved their marriage. After dissolution of marriage, the wife filed a complaint before the Senior Superintendent of Police, Ludhiana against Inderjit Singh under the provisions of the Domestic Violence Act alleging that the decree of divorce obtained by them was a sham transaction. It was further alleged that even after getting divorce both of them had been living together as husband and wife. In the said case, the Superintendent of Police, City I conducted the full-fledged inquiry and reported that the parties had been living separately after the dissolution of the marriage. Hence, no case was made out against Inderjit Singh. In this context, this Court held that Section 12 "application to Magistrate" under the Domestic Violence Act challenging the said divorce was not maintainable and in the interest of justice and to stop the abuse of process of court, the petition under Section 482 CrPC was allowed. The law laid down in the said case is not applicable for the purpose of determination of the present case.

29. In the present case, the alleged domestic violence took place between January 2006 and 6-9-2007 when FIR No. 224 of 2007 was lodged by the appellant under Sections 498-A and 406 IPC against the first respondent and his relatives. In a writ petition filed by the first respondent the High Court refused to quash the said FIR against him observing that prima facie case under Section 498-A was made out against him. Even if it is accepted that the appellant during the pendency of the SLP before this Court has obtained ex parte "khula" (divorce) under the Muslim Personal Law from the Mufti on 9-5-2008, the petition under Section 12 of the Domestic Violence Act, 2005 is maintainable.

30. An act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entided under the Domestic Violence Act, 2005 including monetary relief under Section 20, child custody under Section 21, compensation under Section 22 and interim or ex parte order under Section 23 of the Domestic Violence Act, 2005.

31. Both the Sessions Judge and the High Court failed to notice the aforesaid provisions of the Act and the fact that the FIR was lodged much prior to the alleged divorce between the parties and erred in holding that the petition under Section 12 was not maintainable.

32. For the reasons aforesaid, we set aside the impugned judgment dated 23-1-2013 passed by the High Court of Judicature of Bombay in Juveria Abdul Majid Patni v. Atiflqbal Mansoori1, the order dated 3-11-2012 passed by the Additional Sessions Judge, Mumbai and uphold the order dated 4-2-2012 passed by the Additional Chief Metropolitan Magistrate, 46th Court at Mazgaon, Mumbai. The first respondent is directed to pay the amount, if not yet paid, in accordance with the order passed by the Magistrate. The Magistrate will now proceed with the matter and finally dispose of the petition under Section 12 of the Domestic Violence Act after going through the report and hearing the parties.

33. The appeal is allowed with the aforesaid observations and directions.

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† Under Article 32 of the Constitution of India

MR. ANURAG MITTAL VERSUS MRS. SHAILY MISHRA MITTAL

Supreme Court of India

Bench : Hon'ble Mr. Justice S.A. Bobde and Hon'ble Mr. Justice L. Nageswara Rao

Mr. Anurag Mittal ...Appellant (S)
Versus
Mrs. Shaily Mishra Mittal ...Respondent (S)

CIVIL APPEAL NO.18312 OF 2017

Decided on : 24th August, 2018

In the present case, the petitioner-wife filed a petition seeking divorce under Section 13(1)(i)(a) of the Hindu Marriage Act, 1955 which was granted by the Additional District Judge, North, Tis Hazari Court, Delhi. It also dismissed the petition filed under Section 9 of the Act by the husband. Aggrieved by the order of the court, the appellant-husband filed appeals before the High Court and accordingly, the High Court stayed the judgment and the operation of the judgment passed by the Family Court. While the appeal was pending before the High Court, the parties reached a settlement through mediation which stipulated that the Appellant-husband was required to withdraw the appeals before the High Court within 30 days. Subsequently, the High Court dismissed the appeals as withdrawn on 20.12.2011. In the meanwhile, the Appellant-husband married the Respondent on 06.12.2011. Very soon, their relationship got bitter and the respondent-wife filed a petition for declaring the marriage as void under Section 5(i) read with Section 11 of the Act. The family court dismissed the petition. The respondent-wife approached the High Court challenging the judgment of the Family court. The High Court allowed the appeal and declared the marriage between the Appellant-husband and the Respondent-wife as null and void. Aggrieved by this order of the High court, the Appellant-husband approached the Supreme Court. The Supreme Court held that the restriction placed on a second marriage in S.15 of the Act till dismissal of an appeal would not apply to a case where the parties have settled and decided not to pursue further appeal. Also, the court observed that it is not the case of the appellant that marriage was lawful because of the interim order that was passed in appeals filed by him against the decree of divorce and he rested his case on petition filed for withdrawal of appeal. Therefore the judgment of the High Court that the marriage was void is erroneous. [Per L. Nageshwar Rao, J.] If provision of law prescribes incapacity to marry and yet person marries while under that incapacity, marriage would not be void in absence of express provision that declares nullity. [Per S.A. Bobde, J.] Further, the court held that the withdrawal of suit is an absolute right of the plaintiff and Order 13 Rule 1 applies to appeals as well, therefore, if the appellant makes such an application unconditionally to the court, the court has to grant it. Hence, the appeal is deemed to have been withdrawn on the date of filing of application of withdrawal.

JUDGMENT

Hon'ble Mr. Justice L. Nageswara Rao :—

1. By a judgment dated 31.08.2009, the Additional District Judge, North, Tis Hazari Court, Delhi allowed the petition filed by Ms. Rachna Aggarwal under Section 13 (1) (i) (a) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) and dissolved the marriage between her

and the Appellant. By the said judgment the petition filed under Section 9 of the Act by the Appellant for restitution of conjugal rights was dismissed. The Appellant filed appeals against the said judgment Date: 2018.08.24 and the operation of the judgment and decree dated 31.08.2009 was stayed by the High Court on 20.11.2009. During the pendency of the Appeal, the Appellant and Ms. Rachna Aggarwal reached a settlement before the Mediation Centre, Tis Hazari Court, Delhi. According to the terms of the settlement dated 15.10.2011, the Appellant had to move an application for withdrawal of the Appeals within 30 days. The Appellant filed an application to withdraw the appeals before the High Court in terms of the settlement dated 15.10.2011 which was taken up on 28.11.2011 by the Registrar of the High Court of Delhi. He recorded that there was a settlement reached between the parties before the Mediation Centre, Tis Hazari Court, Delhi and listed the matter before the Court on 20.12.2011. The High Court dismissed the appeals filed by the Appellant as withdrawn in terms of the settlement by an order dated 20.12.2011. In the meanwhile, the Appellant married the Respondent on 06.12.2011. Matrimonial discord between the Appellant and the Respondent led to the filing of a petition by the Respondent for declaring the marriage as void under Section 5 (i) read with Section 11 of the Act. The main ground in the petition was that the appeal filed by the Appellant against the decree of divorce dated 31st August, 2009 was pending on the date of their marriage i.e. 06.12.2011. The Family Court dismissed the petition filed by the Respondent. The Respondent challenged the judgment of the Family Court in the High Court. By a judgment dated 10.08.2016, the High Court set aside the judgment of the Family Court and allowed the appeal of the Respondent and declared the marriage between the Appellant and the Respondent held on 06.12.2011 as null and void. Aggrieved by the judgment of the High Court, the Appellant has approached this Court.

2. As a pure question of law arises for our consideration in this case, we make it clear that we are not dealing with the merits of the allegations made by both sides. The points that arises for consideration are:

a) Whether the dismissal of the appeal relates back to the date of filing of the application for withdrawal?

b) Whether the marriage dated 06.12.2011 between the Appellant and the Respondent during the pendency of the appeal against the decree of divorce is void?

3. The Family Court framed only one substantial issue as to whether the marriage between the parties was null and void on account of the contravention of Section 5 (i) of the Act. It was held by the Family Court that the judgment and decree of divorce dated 31.08.2009 is a judgment in rem which was neither reversed nor set aside by a superior court. As the judgment was confirmed by the High Court, the marriage between the parties stood dissolved w.e.f. 31.08.2009 itself. The Family Court also observed that there is no provision in the Act which declares a marriage in contravention of Section 15 to be void. It was further held by the Family Court that the effect of stay of the judgment by a superior court is only that the decree of divorce remained in abeyance but it did not become non-existent. On the other hand, the High Court framed a question whether the Appellant could have contracted a second marriage after the decree of divorce was passed on 31.08.2009 notwithstanding the operation of the decree being stayed. The High Court was of the opinion that any marriage solemnized by a party during the pendency of the appeal wherein the operation of the decree of divorce was stayed, would be in contravention of Section 5 (i) of the Act.

4. Section 11 of the Act provides that any marriage solemnized after commencement of the Act shall be null and void if it contravenes any of the conditions specified in Clauses (i), (iv) and (v) of Section

5. Clause (i) of Section 5 places a bar on marriage by a person who has a spouse living at the time of the marriage. Section 15 of the Act which is relevant is as follows: 15. Divorced persons. When may marry again.- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

5. There is no dispute that the marriage between the Appellant and the Respondent was held on 06.12.2011 during the pendency of the appeals filed by the Appellant against the decree of divorce in favour of Ms. Rachna Aggarwal. It is also clear from the record that the appeals were dismissed as withdrawn on 20.12.2011 pursuant to an application for withdrawal that was placed before the Registrar on 28.11.2011. The Family Court has rightly held that the decree of divorce is a judgment in rem.1

6. It is pertinent to take note of the Proviso to Section 15 of the Act according to which it shall not be lawful for the respective parties to marry again unless at the time of such marriage at least one year has elapsed from the date of the decree in the Court of first instance. This Proviso was repealed w.e.f. 27.05.1976. 2 In Lila Gupta v. Laxmi Narain3, Rajender Kumar contracted second marriage with Lila Gupta before the expiry of one year from the date of decree of divorce. This Court was concerned with a point relating to the marriage between Rajender Kumar and Lila Gupta being void having been contracted in violation of the Proviso to Section 15 of the Act. In the said context this Court observed as follows:

> **8.** Did the framers of law intend that a marriage contracted in violation of the provision contained in 1 Marsh v. Marsh 1945 AC 271 2 Hindu Marriage (Amendment) Act, 1976, Act 68 of 1976 3 (1978) 3 SCC 258 the proviso to Section 15 to be void? While enacting the legislation, the framers had in mind the question of treating certain marriages void and provided for the same. It would, therefore, be fair to infer as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void. While prescribing conditions for valid marriage in Section 5 each of the six conditions was not considered so sacrosanct as to render marriage in breach of each of it void. This becomes manifest from a combined reading of Sections 5 and 11 of the Act. If the provision in the proviso is interpreted to mean personal incapacity for marriage for a certain period and, therefore, the marriage during that period was by a person who had not the requisite capacity to contract the marriage and hence void, the same consequence must follow where there is breach of condition (iii) of Section 5 which also provides for personal incapacity to contract marriage for a certain period. When minimum age of the bride and the bridegroom for a valid marriage is prescribed in condition (iii) of Section 5 it would only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now, before attaining the minimum age if a marriage is contracted Section 11 does not render it void even though Section 18 makes it punishable. Therefore, even where a marriage in breach of a certain condition is made punishable yet the law does not treat it as void. The marriage in breach

of the proviso is neither punishable nor does Section 11 treat it void. Would it then be fair to attribute an intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the marriage void? If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication. It would be all the more hazardous in the case of marriage laws to treat a marriage in breach of a certain condition void even though the law does not expressly provide for it. Craies on Statute Law, 7th Edn., P. 263 and 264 may be referred to with advantage:

The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void ... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain or any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it (emphasis supplied). . . . From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity [Ed. Quoting Catterall v. Sweetman, (1845) 9 Jur 951, 954]
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9. In the Act under discussion there is a specific provision for treating certain marriages contracted in breach of certain conditions prescribed for valid marriage in the same Act as void and simultaneously no specific provision having been made for treating certain other marriages in breach of certain conditions as void. In this background even though the proviso is couched in prohibitory and negative language, in the absence of an express provision it is not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso.

10. Undoubtedly the proviso opens with a prohibition that: It shall not be lawful etc. Is it an absolute prohibition violation of which would render the act a nullity? A person whose marriage is dissolved by a decree of divorce suffers an incapacity for a period of one year for contracting second marriage. For such a person it shall not be lawful to contract a second marriage within a period of one year from the date of the decree of the Court of first instance. While granting a decree for divorce, the law interdicts and prohibits a marriage for a period of one year from the date of the decree of divorce. Does the inhibition for a period indicate that such marriage would be void? While there is a disability for a time suffered by a party from contracting marriage, every such disability does not render the marriage void. A submission that the proviso is directory or at any rate not mandatory and decision bearing on the point need not detain us because the interdict of law is that it shall not be lawful for a certain party to do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done thereby making it unlawful without providing for consequence of the breach, it is not legitimate to say that such a thing when done is void because that would tantamount

to saying that every unlawful act is void. As pointed out earlier, it would be all the more inadvisable in the field of marriage laws. Consequences of treating a marriage void are so serious and far reaching and are likely to affect innocent persons such as children born during the period anterior to the date of the decree annulling the marriage that it has always been considered not safe to treat a marriage void unless the law so enacts or the inference of the marriage being treated void is either inescapable or irresistible. Therefore, even though the proviso is couched in a language prohibiting a certain thing being done, that by itself is not sufficient to treat the marriage contracted in contravention of it as void.

7. In the said judgment, this Court also had occasion to deal with the continuance of the marital tie even after the decree of divorce for the period of incapacity as provided in the Proviso to Section 15 of the Act. In the said context, this Court held as follows:

> **13.** To say that such provision continues the marriage tie even after the decree of divorce for the period of incapacity is to attribute a certain status to the parties whose marriage is already dissolved by divorce and for which there is no legal sanction. A decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. Each one becomes competent to contract another marriage as provided by Section
>
> **15.** Merely because each one of them is prohibited from contracting a second marriage for a certain period it could not be said that despite there being a decree of divorce for certain purposes the first marriage subsists or is presumed to subsist. Some incident of marriage does survive the decree of divorce; say, liability to pay permanent alimony but on that account it cannot be said that the marriage subsists beyond the date of decree of divorce. Section 13 which provides for divorce in terms says that a marriage solemnised may on a petition presented by the husband or the wife be dissolved by a decree of divorce on one or more of the grounds mentioned in that section. The dissolution is complete once the decree is made, subject of course, to appeal. But a final decree of divorce in terms dissolves the marriage. No incident of such dissolved marriage can bridge and bind the parties whose marriage is dissolved by divorce at a time posterior to the date of decree. An incapacity for second marriage for a certain period does not have effect of treating the former marriage as subsisting. During the period of incapacity the parties cannot be said to be the spouses within the meaning of clause (i), sub-section (1) of Section 5. The word spouse has been understood to connote a husband or a wife which term itself postulates a subsisting marriage. The word spouse in sub-section (1) of Section 5 cannot be interpreted to mean a former spouse because even after the divorce when a second marriage is contracted if the former spouse is living that would not prohibit the parties from contracting the marriage within the meaning of clause (i) of sub-section (1) of Section 5. The expression spouse in clause (i), sub- section (1) of Section 5 by its very context would not include within its meaning the expression former spouse. (underlining ours)

8. After a comprehensive review of the scheme of the Act and the legislative intent, this Court in Lila Gupta (supra) held that a marriage in contravention of the proviso to Section 15 is not void. Referring to Sections 5 and 11 of the Act, this Court found that a marriage contracted in breach of only some of the conditions renders the marriage void. This Court was also conscious of the absence of any penalty prescribed for contravention of the proviso to Section 15 of the Act. This

Court referred to the negative expression it shall not be lawful used in proviso to Section 15 which indicates that the prohibition was absolute. In spite of the absolute prohibition, this Court was of the view that a marriage contracted in violation of the proviso to Section 15 was not void. There was a further declaration that the dissolution of a marriage is in rem and unless and until a Court of appeal reversed it, marriage for all purposes was not subsisting. The dissolution of the marriage is complete once the decree is made, subject of course to appeal. This Court also decided that incapacity for second marriage for a certain period of time does not have the effect of treating the former marriage as subsisting and the expression spouse would not include within its meaning the expression former spouse.

9. The majority judgment was concerned only with the interpretation of proviso to Section 15 of the Act. Justice Pathak in his concurring judgment referred to Section 15, but refrained from expressing any opinion on its interpretation.

Effective date of the Dismissal of Appeal

10. In case of a dissolution of marriage, a second marriage shall be lawful only after dismissal of the appeal. Admittedly, the marriage between the Appellant and the Respondent was on 06.12.2011 i.e. before the order of withdrawal was passed by the Court on 20.12.2011. There is no dispute that the application for withdrawal of the appeal was filed on 28.11.2011 i.e. prior to the date of the marriage on 06.12.2011. We proceed to consider the point that whether the date of dismissal of the appeal relates back to the date of filing of the application for withdrawal of the appeal. Order XXI Rule 89 (2) of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) provides that unless an application filed under Order XXI Rule 90 of the CPC is withdrawn, a person shall not be entitled to make or prosecute an application under Order XXI Rule 89 of the CPC. In Shiv Prasad v. Durga Prasad,4 the contention of the Appellant therein that an application filed under the aforesaid Rule 90 does not stand withdrawn until an order to the effect is recorded by the Court, was not accepted. It was held that every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting the withdrawal of the application. This Court concluded that the act of withdrawal is complete as soon as the applicant intimates the Court that he intends to withdraw the application. The High Court of Bombay in Anil Dinmani Shankar Joshi v. Chief Officer, Panvel Municipal Council, Panvel5 followed the judgment of this Court in Shiv Prasad (supra) and held that the said judgment is applicable to suits also. The High Court recognized the unconditional right of the plaintiff to withdraw his suit and held that the withdrawal would be 4 (1975) 1 SCC 405 5 AIR 2003 Bom. 238, 239 complete as soon as the plaintiff files his purshis of withdrawal.

11. Order XXIII Rule 1 (1) of the CPC enables the plaintiff to abandon his suit or abandon a part of his claim against all or any of the defendants. Order XXIII Rule 1 (3) of the CPC requires the satisfaction of the Court for withdrawal of the suit by the plaintiff in case he is seeking liberty to institute a fresh suit. While observing that the word abandonment in Order XXIII Rule 1 (1) of the CPC is absolute withdrawal which is different from the withdrawal after taking permission of the court, this Court held as follows6: 12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and

(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted 6 K.S. Bhoopathy v. Kokila (2000) 5 SCC 458 by the Court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.

12. Order XXIII Rule 1 (1) of the CPC gives an absolute right to the plaintiff to withdraw his suit or abandon any part of his claim. There is no doubt that Order XXIII Rule 1 of the CPC is applicable to appeals as well and the Appellant has the right to withdraw his appeal unconditionally and if he makes such an application to the Court, it has to grant it. 7 Therefore, the appeal is deemed to have been withdrawn on 28.11.2011 i.e. the date of the filing of the application for withdrawal. On 06.12.2011 which is the date of the marriage between the Appellant and the Respondent, Ms. Rachna Aggarwal cannot be considered as a living spouse. Hence, Section 5 (i) is not attracted and the marriage between the Appellant and the Respondent cannot be declared as void.

13. Sh. Sakha Ram Singh, learned Senior Counsel appearing for the Respondent placed reliance on a judgment of this Court in Lila Gupta (supra) to submit that the marriage between the Appellant and the 7 Bijayananda Patnaik v. Satrughna Sahu (1962) 2 SCR 538, 550 Respondent held on 06.12.2011 is void as it was in violation of Section 15 of the Act. He relied upon the concurring judgment of Justice Pathak in support of his submission that the findings pertaining to Proviso to Section 15 cannot be made applicable to Section 15. He submitted that there is a qualitative difference between the period of incapacity set out in the Proviso during which a second marriage cannot be contracted and the bar for another marriage during the pendency of an appeal. We have already noted that Justice Pathak refrained from expressing any view on the expression of Section 15 of the Act.

However, the scope and purport of Section 15 of the Act arise for consideration in the present case.

Interpretation of Section 15 Interpretation has been explained by Cross in Statutory Interpretation8 as:

> *"The meaning that the Court ultimately attaches to the statutory words will frequently be that which it believes members of the legislature attached to them, or the meaning which they would have attached to the words had the situation before the Court been present to their minds. Interpretation is the process by which the Court determines the meaning of a statutory*
> *8 Cross Statutory Interpretation, Ed. Dr. John Bell & Sir George Ingale, Second Edition (1987)*
> *provision for the purpose of applying it to the situation before it.*

14. The Hindu Marriage Act is a social welfare legislation and a beneficent legislation and it has to be interpreted in a manner which advances the object of the legislation. The Act intends to bring about social reforms.9 It is well known that this Court cannot interpret a socially beneficial legislation on the basis as if the words therein are cast in stone.10

15. The predominant nature of the purposive interpretation was recognized by this Court in Shailesh Dhairyawan v. Mohan Balkrishna Lulla11 which is as follows:

> **33.** We may also emphasise that the statutory interpretation of a provision is never static but is always dynamic. Though the literal rule of interpretation, till some time ago, was treated as the golden rule, it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced.

Not only legal process thinkers such as Hart and Sacks rejected intentionalism as a grand strategy for statutory interpretation, and in its place they offered purposivism, this principle is now widely applied by 9 Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi (1996) 4 SCC 76, para 68 10 Revanasiddappa v. Mallikarjun, (2011) 11 SCC 1, para 40 11 (2016) 3 SCC 619 the courts not only in this country but in many other legal systems as well.

16. In Salomon v. Salomon & Co Ltd.12, Lord Watson observed that :

In a Court of Law or Equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. In Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG13, Lord Reid held that:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

17. It is also relevant to take note of Dy. Custodian v. Official Receiver14 in which it was declared that if it appears that the obvious aim and object of the statutory provisions would be frustrated by accepting the literal construction suggested by the Respondent, then it may be open to the Court to inquire whether an alternative construction which would serve the purpose of achieving the aim and object of the Act, is reasonably possible .

12 [1897] AC 22 at 38 13 [1975] AC 591, p. 613 14 (1965) 1 SCR 220 at 225 F - G

18. Section 15 of the Act provides that it shall be lawful for either party to marry again after dissolution of a marriage if there is no right of appeal against the decree. A second marriage by either party shall be lawful only after dismissal of an appeal against the decree of divorce, if filed. If there is no right of appeal, the decree of divorce remains final and that either party to the marriage is free to marry again. In case an appeal is presented, any marriage before dismissal of the appeal shall not be lawful. The object of the provision is to provide protection to the person who has filed an appeal against the decree of dissolution of marriage and to ensure that the said appeal is not frustrated. The purpose of Section 15 of the Act is to avert complications that would arise due to a second marriage during the pendency of the appeal, in case the decree of dissolution of marriage is reversed. The protection that is afforded by Section 15 is primarily to a person who is contesting the decree of divorce.

19. Aggrieved by the decree of divorce, the Appellant filed an appeal and obtained a stay of the decree. During the pendency of the appeal, there was a settlement between him and his former spouse. After entering into a settlement, he did not intend to contest the decree of divorce. His

intention was made clear by filing of the application for withdrawal. It cannot be said that he has to wait till a formal order is passed in the appeal, or otherwise his marriage dated 06.12.2011 shall be unlawful. Following the principles of purposive construction, we are of the opinion that the restriction placed on a second marriage in Section 15 of the Act till the dismissal of an appeal would not apply to a case where parties have settled and decided not to pursue the appeal.

20. It is not the case of the Appellant that the marriage dated 06.12.2011 is lawful because of the interim order that was passed in the appeals filed by him against the decree of divorce. He rested his case on the petition filed for withdrawal of the appeal. The upshot of the above discussion would be that the denouement of the Family Court is correct and upheld, albeit for different reasons. The conclusion of the High Court that the marriage dated 06.12.2011 is void is erroneous. Hence, the judgment of the High Court is set aside.

21. Accordingly, the Appeal is allowed.

Per **Hon'ble Mr. Justice S.A. Bobde :—**

1. I am in agreement with the view taken by Nageswara Rao J. but it is necessary to state how the question before us has already been settled by the decision in Lila Gupta v. Laxmi Narain and Ors.1. Even when the words of the proviso were found to be prohibitory in clear negative terms it shall not be lawful etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of Lila Gupta (supra). It is all the more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like it shall be lawful. Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 (1978) 3 SCC 258 and 10 of Lila Gupta case. The Court must have regard to the consequences of such an interpretation on children who might have been conceived or born during the period of disability.

2. The observations in Lila Guptas case are wide. They are undoubtedly made in the context of the proviso to sec 15 of the Hindu Marriage (Amendment) Act, 1976 2, since deleted. The proviso opened with the prohibition that it shall not be lawful. This Court considered the question whether a marriage contracted in violation of the proviso would be a nullity or void and came to the conclusion that though the proviso is couched in prohibitory and negative language, in the absence of an express provision it was not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso.

What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as it shall not be lawful or an incapacity imposed by positive language like it shall be lawful (in certain conditions, in the absence of which it is impliedly unlawful). It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it

was contracted under an incapacity. Obviously, this would Act 68 of 1976 have no bearing on the other conditions of a valid marriage. The decision in Lila Gupta case thus covers the present case on law.

3. In any event, in the present case we are satisfied that the appellants marriage was not subsisting when he married again. He had filed an application for withdrawal of his appeal against the decree for dissolution and had done nothing to contradict his intention to accept the decree of dissolution.

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AMARDEEP SINGH VERSUS HARVEEN KAUR

IN THE SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice Adarsh Kumar Goel & Hon'ble Mr. Justice Uday Umesh Lalit

Amardeep Singh …Appellant
Versus
Harveen Kaur …Respondent

CIVIL APPEAL NO. 11158 OF 2017

(Arising out of Special Leave Petition (Civil)No. 20184 of 2017)

The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.as follows:15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question,in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances,namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

- ***Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2),it can do so after considering the following :***

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/ Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

JUDGMENT

Hon'ble Mr. Justice Adarsh Kumar Goel :—

1. The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

Signature Not Verified Digitally signed by SWETA DHYANI Date: 2017.09.12 16:23:52 IST Reason:

2. Factual matrix giving rise to this appeal is that marriage between the parties took place on 16 th January, 1994 at Delhi. Two children were born in 1995 and 2003 respectively. Since 2008 the parties are living separately. Disputes between the parties gave rise to civil and criminal proceedings. Finally, on 28 th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The respondent wife is to be given permanent alimony of Rs.2.75 crores. Accordingly, HMA No. 1059 of 2017 was filed before the Family Court (West), Tis Hazari Court, New Delhi and on 8 th May, 2017 statements of the parties were recorded. The appellant husband has also handed over two cheques of Rs.50,00,000/-, which have been duly honoured, towards part payment of permanent alimony. Custody of the children is to be with the appellant. They have sought waiver of the period of six months for the second motion on the ground that they have been living separately for the last more than eight years and there is no possibility of their re union. Any delay will affect the chances of their resettlement. The parties have moved this Court on the ground that only this Court can relax the six months period as per decisions of this Court.

3. Reliance has been placed inter alia on decision of this Court in Nikhil Kumar vs. Rupali Kumar 1 wherein the statutory period of six months was waived by this Court under Article 142 of the Constitution and the marriage was dissolved.

The text of Section 13B is as follows:

"13-B. Divorce by mutual consent.— (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

4. There is conflict of decisions of this Court on the question whether exercise of power under Article 142 to waive the statutory period under Section 13B of the Act was appropriate. In 1 (2016) 13 SCC 383 Manish Goel versus Rohini Goel2, a Bench of two-Judges of this Court held that jurisdiction of this Court under Article 142 could not be used to waive the statutory period of six months for filing the second motion under Section 13B, as doing so will be passing an order in contravention of a statutory provision. It was observed :

"14. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla[(1994) 1 SCC 175], State of U.P. v. Harish Chandra [(1996) 9 SCC 309], Union of India v. Kirloskar Pneumatic Co. Ltd. [(1996) 4 SCC 453], University of Allahabad v. Dr. Anand Prakash Mishra [(1997) 10 SCC 264] and Karnataka SRTC v. Ashrafulla Khan [(2002) 2 SC 560]

15. A Constitution Bench of this Court in Prem Chand Garg v. Excise Commr.[AIR 1963 SCC 996] held as under: (AIR p. 1002, para 12) "12. … An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws." (emphasis supplied) The Constitution Benches of this Court in Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] and E.S.P. Rajaram v. Union of India [(2001) 2 SCC 186] held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only 2 (2010) 4 SCC 393 through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure."

5. This Court noted that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. This power was also exercised to put quietus to all litigations and to save the parties from further agony 3. This view was reiterated in Poonam versus Sumit Tanwar4.

6. In Neeti Malviya versus Rakesh Malviya5, this Court observed that there was conflict of decisions in Manish Goel (supra) and Anjana Kishore versus Puneet Kishore6. The matter was referred to bench of three-Judges. However, since the matter became infructuous on account of grant of divorce in the meanwhile7.

3 Para 11 ibid, noting earlier decisions in Romesh Chander v. Savitri (1995) 2 SCC 7; Kanchan Devi v. Promod Kumar Mittal (1996) 8 SCC 90; Anita Sabharwal v. Anil Sabharwal (1997) 11 SCC 490; Ashok Hurra v. Rupa Bipin Zaveri (1997) 4 SCC 226; Kiran v. Sharad Dutt (2000)10 SCC 243; Swati Verma v. Rajan Verma (2004) 1 SCC 123; Harpit Singh Anand v. State of W.B. (2004) 10 SCC 505; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit (2005) 13 SCC 410; Durga Prasanna Tripathy v. Arundhati Tripathy (2005) 7 SCC 353; Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558; Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220; Rishikesh Sharma v. Saroj Sharma (2007) 2 SCC 263; Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511 and Satish Sitole v. Ganga (2008) 7 SCC 734 4 (2010) 4 SCC 460 5 (2010) 6 SCC 413 6 (2002) 10 SCC 194 7 Order dated 23rd August, 2011 in Transfer Petition (Civil)No. 899 of 2007

7. Without any reference to the judgment in Manish Goel (supra), power under Article 142 of the Constitution has been exercised by this Court in number of cases 8 even after the said judgment.

8. We find that in Anjana Kishore (supra), this Court was dealing with a transfer petition and the parties reached a settlement. This Court waived the six months period under Article 142 in the facts and circumstances of the case. In Anil Kumar Jain versus Maya Jain9, one of the parties withdrew the consent. This Court held that marriage had irretrievably broken down and though the civil courts and the High Court could not exercise power contrary to the statutory provisions, this Court under Article 142 could exercise such power in the interests of justice. Accordingly the decree for divorce was granted. 8 Priyanka Singh v. Jayant Singh(2010) 15 SCC 390; Sarita Singh v. Rajeshwar Singh (2010) 15 SCC 374; Harpreet Singh Popli v. Manmeet Kaur Pople (2010) 15 SCC 316; Hitesh Bhatnagar v. Deepa Bhatnagar (2011) 5 SCC 234; Veena v. State (Govt of NCT of Delhi) (2011) 14 SCC 614; Priyanka Khanna v. Amit Khanna (2011) 15 SCC 612; Devinder Singh Narula v. Meenakshi Nangia (2012) 8 SCC 580; Vimi Vinod Chopra v. Vinod Gulshan Chpra (2013) 15 SCC 547; Priyanka Chawla v. Amit Chawla (2016) 3 SCC 126; Nikhil Kumar v. Rupali Kumar (2016) 13 SCC 383 9 (2009) 10 SCC 415

9. After considering the above decisions, we are of the view that since Manish Goel (supra) holds the field, in absence of contrary decisions by a larger Bench, power under Article 142 of the Constitution cannot be exercised contrary to the statutory provisions, especially when no proceedings are pending before this Court and this Court is approached only for the purpose of waiver of the statute.

10. However, we find that the question whether Section 13B(2) is to be read as mandatory or discretionary needs to be gone into. In Manish Goel (supra), this question was not gone into as it was not raised. This Court observed :

"23. The learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/ appellate jurisdiction."

11. Accordingly, vide order dated 18th August, 2017, we passed the following order :

"List the matter on 23rd August, 2017 to consider the question whether provision of Section 13B of the Hindu Marriage, Act, 1955 laying down cooling off period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case.

Mr. K.V. Vishwanathan, senior counsel is appointed as Amicus to assist the Court. Registry to furnish copy of necessary papers to learned Amicus".

12. Accordingly, learned amicus curiae has assisted the Court. We record our gratitude for the valuable assistance rendered by learned amicus who has been ably assisted by S/Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao Angara, Advocates.

13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini 10, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy11, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra12 and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta13. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan 10 AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13 AIR 2005 MP 106 (DB) Moorkkanatt14. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?

ii) How long litigation is pending?

iii) How long they have been staying apart?

iv) Are there any other proceedings between the parties?

v) Have the parties attended mediation/conciliation?

vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14. AIR 2010 Ker 157 14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after

filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.15as follows:

15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

22. Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice. 23. The parties are now at liberty to move the concerned court for fresh consideration in the light of this order.

The appeal is disposed of accordingly.

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SWAPNANJALI SANDEEP PATIL VERSUS SANDEEP ANANDA PATIL

THE SUPREME COURT OF INDIA

Bench: Hon'ble Justice Mr. L. Nageswara Rao And Hon'ble Justice Mr. M. R. Shah

Swapnanjali Sandeep Patil……Appellant(S)
Versus
Sandeep Ananda Patil……Respondent(S)

CIVIL APPEAL NO.....OF 2019
(ARISING OUT OF SLP (C) NO.25080 OF 2016)

Decided On 16th July, 2019

JUDGMENT

Hon'ble Justice Mr. M.R. SHAH

Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 09.03.2016 passed by the High Court of Judicature at Bombay in First Appeal No.342 of 2015 by which the High Court has dismissed the said appeal filed by the original applicant and has confirmed the judgment and decree dated 01.12.2014 passed by the learned District Judge, Pune in Marriage Petition No.55 of 2012 by which the learned District Judge dismissed the said marriage petition, the original applicant/appellant-wife has preferred the present appeal.

3. The facts leading to the present appeal in nutshell are as under:

(a) That the appellant herein married with respondent– husband on 05.04.2010.

(b) That their marriage was an inter-caste marriage.

(c) According to the appellant-wife the respondent-husband started harassing her in various ways.

(d) That he used to come in a drunken state and he withdrew money from the bank account of the appellant by using her credit card. Therefore, on 30.06.2012 the appellant left the matrimonial house and took shelter in her parental home.

(e) According to the appellant-wife, while gathering her personal belongings for leaving the house, the appellant came across a zerox copy of Marriage Dissolution Deed, dated 14.12.2009 between the respondent and his first wife.

(f) She realized that the respondent had married her without obtaining the decree of divorce from the competent court and that at that time of marriage the respondent was having a living spouse and that he has suppressed the fact of the first marriage from the appellant.

(g) Therefore, the appellant-wife filed Marriage Petition No.55 of 2012 in the Court of District Court, Pune under Section 25 of the Special Marriage Act, 1954, for declaration of marriage as null and void.

4. Thus, according to the appellant, the respondent obtained her consent for marriage by fraud; the appellant was ignorant to the first marriage of the respondent at the time of marriage; the respondent, at the time of registration of marriage, in the document of marriage has declared himself as bachelor; that he concealed the fact of his earlier marriage which was in existence on the date of marriage of the appellant with the respondent; and that at the time of her marriage with the respondent, the respondent's first marriage was subsisting and therefore according to the appellant, she is entitled for declaration of nullity of marriage.

5. The application was vehemently opposed by the respondent-husband. According to the respondent-husband, prior to his marriage with the applicant, they were having a love affair; that the respondent married with the daughter of his maternal uncle on 08.03.2007 at Bhusawal and the applicant was in knowledge of the said fact. According to the respondent, after his marriage he started residing with his wife at Dehu Road. According to the respondent, at the time of their marriage on 05.04.2010, the applicant was in knowledge of his first marriage and despite the same she married with him. According to the respondent, at the time of marriage, as such, he was not at all willing to marry to the applicant, however, because of the pressure of the applicant and her threat to commit suicide he was compelled to marry the applicant. It was also the case on behalf of the respondent-husband that there was a customary divorce between the respondent and his first wife, which was prior to the solemnization of the marriage between the applicant and the respondent. Therefore, it was the specific case on behalf of the respondent-husband that neither there was any fraud nor there was any suppression of his first marriage by the respondent-husband and therefore it was prayed to dismiss the petition.

6. The learned trial court framed the following issues :

"**(1)** Whether marriage of petitioner and respondent performed on 5.4.2010 under Special Marriage Act by suppressing previous marriage of respondent, performed on 8.3.2007 with Savita Patil in the said marriage was in existence on the date of marriage of party?

(2) Whether consent of petitioner has been sought by respondent for the above marriage by suppressing previous marriage?

(3) Whether respondent has meted out mental cruelty to petitioner?

(4) Whether petitioner has forced the respondent to perform marriage with her by giving threat of suicide having knowledge of substitution of marriage of respondent with Savita Patil?

(5) Whether the petitioner justified decree of divorce?

(6) What order?"

7. That the learned trial court dismissed the marriage petition by observing that as the applicant is seeking nullity of marriage only on the grounds that she was ill-treated by the respondent and on the date of marriage the respondent was having a subsisting first marriage and her consent to the marriage was obtained by fraud, none of the above grounds is a ground for nullity of marriage as per the provisions of the Section 25 of the Special Marriage Act, 1954 (hereinafter referred to as the 'Act'). The learned trial court therefore did not go into the details of the allegations and counter-allegations made in the plaint and the written statement on the ground that the case of

the applicant does not fall in any of the provisions enumerated under Section 25 of the Act and therefore the applicant is not entitled for a decree of nullity of marriage.

8. Learned trial court also observed that even the application was out of period of limitation as according to the provisions of Section 25 of the Act, the period of limitation is one year after the coercion had ceased or, as the case may be, the fraud had been discovered or the petitioner has with his or her free consent lived with other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.

9. Feeling aggrieved and dissatisfied with the judgment and decree passed by the learned trial court dismissing her marriage petition, the appellant-wife preferred the appeal before the Bombay High Court bearing First Appeal No.342 of 2015. Before the High Court the grievance made on behalf of the appellant was that the district court has decided the issue of limitation without framing the issue on that ground. It was submitted that since no issue was framed, the appellant did not get an opportunity to lead the evidence and, therefore, first she was deprived of an opportunity of leading the evidence to show the fact as regards the knowledge of the earlier marriage of respondent, and the same has not been specifically pleaded anywhere. Therefore, it was submitted that in the absence of any such pleadings, there could not have been any evidence as regards the fact of knowledge. The High Court did not accept the same by observing that though ordinarily in the absence of framing an issue and giving an opportunity to the parties to lead evidence, the issue cannot be decided, in the present case, there is sufficient evidence before the court that the appellant was, in fact, well aware of the fact of earlier marriage of the respondent and the customary divorce obtained by him and, therefore, the uncontroverted evidence of the respondent has established that in fact the appellant was the cause of divorce of the respondent from his first wife. By observing so, the High Court has dismissed the first appeal.

10. Feeling aggrieved and dissatisfied with the impugned judgment passed by the High Court, the appellant-wife has preferred the present appeal.

10.1 Shri Vinay Navare, learned Counsel has appeared on behalf of the appellant-wife and Shri Sushil Kumar Jain, learned Senior Advocate has appeared as an Amicus Curiae on behalf of the respondent-husband.

11. Shri Navare, learned Advocate has vehemently submitted that, in the present case, both the learned trial court as well as the High Court have not at all considered Section 24 of the Act. Relying upon Section 24 of the Act, it is vehemently submitted by Shri Navare that, at the time of marriage between the appellant and the respondent, the first marriage of the respondent with his first wife was subsisting and therefore the marriage between the appellant and respondent was a nullity/void marriage. It is submitted that, in the present case, neither the district court nor the High Court had considered Section 24 of the Act and only considered Section 25 of the Act.

11.1 Further, it is vehemently submitted by Shri Navare that though it was the case on behalf of respondent-husband that there was a customary divorce between the respondent-husband and his first wife, which was prior to the marriage between the appellant and the respondent, neither there was any specific issue framed by the learned trial court nor even the respondent-husband led any evidence and prayed for the customary divorce between the respondent-husband and his first wife. It is submitted, therefore, in absence

of proving customary divorce between the respondent-husband and his first wife, there was a subsisting marriage between the respondent-husband and his first wife at the time of the marriage between the appellant and the respondent and therefore Section 24 read with Section 4 of the Act was required to be considered.

11.2 It is submitted by learned advocate appearing on behalf of the appellant-wife that so far as for the declaration sought for in view of Section 24 of the Act is concerned, there is no period of limitation provided, as a declaration for a void marriage can be sought at any time, as the void marriage as is void and nullity. It is submitted therefore the limitation provided under Section 25 of the Act shall not be applicable in a case where the declaration for nullity of marriage is sought in view of Section 24 read with Section 4 of the Act is concerned.

11.3 Making the above submissions, it is prayed to allow the present appeal.

12. Present appeal is vehemently opposed by Shri Jain, learned Senior advocate appearing as an Amicus Curiae on behalf of the respondent-husband. It is vehemently submitted by Shri Jain that, in the facts and circumstances of the case, both the learned trial court as well as the High Court have rightly dismissed the marriage petition and have rightly refused to grant the relief of declaration of nullity of marriage between the appellant and the respondent, considering Section 25 of the Act and by observing that the marriage petition was barred by period of limitation, as provided under Section 25 of the Act.

12.1 It is further submitted by Shri Jain that it was the specific case on behalf of the respondent-husband that, at the time of marriage, the appellant was in the knowledge of the first marriage of the respondent with his first wife. It is submitted that as such she was the root cause for the divorce between the respondent and his first wife. It is submitted that as such the customary divorce had taken place between the respondent-husband and his first wife much prior to the date of marriage between the appellant and the respondent. It is submitted, therefore, when there was already a dissolution of marriage between the respondent and his first wife, by way of customary divorce, which was much prior to the marriage between the appellant and the respondent and, therefore the marriage between the appellant and the respondent cannot be said to be void under Section 24 of the Act.

12.2 Shri Jain, learned Senior Counsel has heavily relied upon the decision of this Court in the case of Ass Kaur (Smt) (Deceased) by LRs v. Kartar Singh (Dead) by LRs (2007) 5 SCC 561 and the case of Laxmibai (Dead) through LRs v. Bhagwantbuva (Dead) through LRs (2013) 4 SCC 97.

12.3 Making the above submissions, it is prayed to dismiss the present appeal.

13. Heard the learned counsel appearing on behalf of the respective parties at length.

13.1 At the outset it is required to be noted that the appellant filed the marriage petition for a declaration to declare her marriage with the respondent as null and void on the ground that, at the time of their marriage, the first marriage of the respondent with his first wife was subsisting; that the respondent committed a fraud and suppressed the material fact of his first marriage, and in fact, in the registration form he stated himself to be a bachelor. On the other hand, it was the case on behalf of the respondent that neither there was any

suppression nor any fraud committed by him. It was the case on behalf of the respondent that the appellant was in the knowledge of his first marriage and that as such there was a customary divorce between the respondent and his first wife, which was much prior to the marriage between the appellant and the respondent. That the learned trial court dismissed the marriage petition on the ground that none of the grounds stated in the plaint for declaration of the marriage between the appellant and respondent as null and void, would fall within Section 25 of the Act and that, even otherwise, the marriage petition is beyond the period of limitation as prescribed in explanation to Section 25 of the Act. It is required to be noted that, however, neither the trial court nor even the High Court at all considered Section 24 read with Section 4 of the Act nor considered the case on behalf of the appellant that as at the time of her marriage with the respondent, the respondent's first marriage was subsisting and therefore the marriage between the appellant and the respondent would be void and nullity.

13.2 As per Section 4 of the Act, the marriage between any two persons may be solemnized under the Special Marriage Act if at the time of the marriage neither party has a spouse living. Section 24 of the Act provides that any marriage solemnized under the Special Marriage Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if any of the conditions specified in clauses (a), (b), (c) and (d) of Section 4 has not been fulfilled. Clause (a) of Section 4 provides that neither party shall have a spouse living at the time of marriage. Therefore, considering Section 24 read with Section 4 of the Act, if at the time of marriage either of the party has spouse living, then the said marriage is a void marriage and a decree of nullity can be passed on a petition presented by either party thereto against the other party. No period of limitation is prescribed so far as presentation of petition for declaration to declare a marriage being nullity/void marriage, under Section 24 of the Act and rightly so, as once the marriage is void the same is a nullity and at any time the same can be declared as nullity being a void marriage. Therefore, both the trial court as well as the High Court have committed an error in observing that the marriage petition was barred by limitation. While holding so, both the trial court as well as the High Court had considered first proviso to Section 25 of the Act. In the facts and circumstances of the case, we are of the opinion that Section 25 of the Act shall not be applicable and Section 24 of the Act would be applicable which does not provide for any period of limitation like first proviso to Section 25 of the Act.

14. Now, so far as the submission on behalf of the respondent-husband that there was already a customary divorce between him and his first wife, which was much prior to the marriage between the appellant and the respondent and that the appellant was in the knowledge of his first marriage is concerned, at the outset, it is required to be noted that as such there is no specific issue framed by the learned trial court on the alleged customary divorce between the respondent and his first wife. Even there was no specific issue framed with respect to the limitation. There was not even an issue framed with respect to the knowledge of the appellant that she was having the knowledge of the first marriage of the respondent with his first wife. In absence of any such issue framed, the learned trial court as well as the High Court have committed a grave error in observing that there was a customary divorce between the respondent-husband and his first wife. There must be a specific issue framed by the Court on the aforesaid and the same is

required to be established and proved by leading evidence. In the present case, neither an issue has been framed nor even the respondent husband has led any evidence and proved that there was a customary divorce between respondent and his first wife. Even the respondent-husband was required to prove that such a customary divorce was permissible in their caste/community. In the absence of any such issue or any evidence, the Courts below were not justified in observing that there was a customary divorce between the respondent and his first wife. Therefore, in absence of the above, it can be said that at the time of marriage between the appellant and the respondent, the respondent had a living spouse and, therefore, considering Section 24 read with Section 4 of the Act, the marriage between the appellant and respondent was void and the appellant was entitled to a decree of nullity at her instance. Therefore, both the Courts below have materially erred in rejecting the marriage petition. For the reasons stated above, we are of the opinion that the appellant is entitled to a decree of nullity of the marriage between the appellant and the respondent.

15. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court dated 09.03.2016 passed in First Appeal No.342/2015, as well as the judgment and decree passed by the learned district court, dismissing the marriage petition, are hereby quashed and set aside. The Marriage Petition No.55 of 2012 is hereby decreed and there shall be a decree of nullity of the marriage of the appellant-wife with the respondent-husband, solemnized on 05.04.2010 before the Marriage Officer, Pune. Consequently, the marriage between the appellant-wife and the respondent-husband solemnized on 05.04.2010 before the Marriage Officer, Pune is hereby declared as null and void. No costs.

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SAMAR KUMAR ROY (DEAD) THROUGH LEGAL REPRESENTATIVE (MOTHER) VERSUS JHARNA BERA

Supreme Court of India

Bench : Hon'ble Mr. Justice Rohinton Fali Nariman and Hon'ble Mr. Justice Sanjay Klshan Kaul

CIVIL APPEAL NO. 11200 OF 2017†

Samar Kumar Roy (Dead) Through Legal Representative (Mother) . . Appellant;
Versus
Jharna Bera .. Respondent.

Decided on September 5, 2017

Specific Relief Act, 1963 — S. 34 — Suit for declaration of legal character of parties in regard to their alleged marriage can be filed under S. 34 by plaintiff and on his death can be continued by his LR at behest of plaintiff — Nature of such suit — Effect, if any, of Ss. 7 and 8, Family Courts Act, 1984 on jurisdiction of ordinary civil court to entertain such declaratory suit

— Plaintiff sought declaration that defendant was not his legally married wife and that she had no right to claim him as her husband as his alleged marriage with defendant was not legal and valid, and thus claimed a permanent injunction restraining defendant from claiming plaintiff as her husband and temporary injunction — Suit not based on any ground specified under S. 11 or S. 12 of Hindu Marriage Act or under Special Marriage Act, 1954 — After death of plaintiff, his mother applied under Or. 22 R. 3 CPC to be added as LR of plaintiff — Held, suit was in substance one filed under S. 34, hence maintainable at behest of deceased plaintiff — Suit having not been filed under Hindu Marriage Act or Special Marriage Act, civil suit under S. 34 not barred by Ss. 7 and 8 of Family Court Act — High Court in revision erred in setting aside order allowing application for substitution of LR on ground that after death of plaintiff, no right to sue survived in favour of plaintiff's mother

— Family and Personal Laws — Judicial Intervention/Family Courts/ Judges/Officers — Family Courts Act, 1984 — Ss. 7 and 8 — Exclusion of civil court's jurisdiction — Civil court's jurisdiction under S. 34 of Specific Relief Act in respect of suits or proceedings between parties which are not filed under Hindu Marriage Act or Special Marriage Act not barred under S. 8 — In absence of express bar, exclusion of civil court's jurisdiction should not be readily inferred — Hindu Marriage Act, 1955 — Ss. 12 and 11 — Special Marriage Act, 1954 — Ss. 31 and 27 — Civil Procedure Code, 1908, S. 9

Held:

The first question that needs to be decided is as to whether a suit which is, in substance, a suit filed under Section 34 of the Specific Relief Act, is maintainable at the behest of a legal representative of a dead plaintiff. The High Courts have uniformly taken the view that a suit for declaration of a legal character filed under Section 34 can be filed by a third party plaintiff, or continued at the behest of the legal representative of a dead plaintiff. In Krishna Pal, 1982 SCC OnLine Cal 120, a Single Judge of the Calcutta High Court observed "... the plaintiff has chosen not to pray for any relief either by way of annulment of decree of nullity or by way of a decree for dissolution of the alleged marriage. The plaint filed by him cannot be considered to be a petition under the Hindu Marriage Act. The

plaintiff has sought for certain declaration regarding the status of the parties and for consequential reliefs and the learned Munsif has jurisdiction under the Specific Relief Act to consider whether the plaintiff has made out any case for obtaining such discretionary declaratory and consequential reliefs." In Sasanka Sekhar Basu, 1993 SCC OnLine Cal 48, the Calcutta High Court observed: "In the instant case, although the petitioner inter alia prayed for a declaration that the marriage between the parties was void, the same will not make the plaint ipso facto a petition under the Hindu Marriage Act within the meaning of Section 19 of the said Act. Under Sections 11 and 12 of the Hindu Marriage Act, the circumstances under which a petition can be filed for annulment of marriage on the ground that the same is void are clearly specified. But in the instant case, such declaration that the marriage is void has not been asked for by the plaintiff on any of such grounds on which such an annulment can be obtained under Section 12 or even under Section 11 of the said Act. The instant suit really appears to be on the face of the plaint, a suit for declaration as to the status of the parties." (Paras 6, 10 and 12)

Krishna Pal v. Ashok Kumar Pal, 1982 SCC OnLine Cal 120 : (1982) 2 Cal LJ 366; Tapash Kumar Moitra v. Pratima Roy Chowdhury, (1984-85) 89 CWN 671; Sasanka Sekhar Basu v. Dipika Roy, 1993 SCC OnLine Cal 48 : AIR 1993 Cal 203; Harmohan Senapati v. Kamala Kumari Senapati, 1978 SCC OnLine Ori 105 : AIR 1979 Ori 51; Ram Pyari v. Dharam Das, 1983 SCC OnLine All 652 : AIR 1984 All 147; Lajya Devi v. Kamla Devi, 1992 SCC OnLine J&K 22 : AIR 1993 J&K 31, approved Har-Shefi v. Har-Shefi, 1953 P 161 : (1953) 2 WLR 690 (CA); NoorJehan Begum v. Eugene Tiscenko, 1941 SCC OnLine Cal 221 : AIR 1942 Cal 325, cited

An allied question that arises is as to whether suits of the present kind would be barred under any provision of law. From Sections 7 and 8 of the Family Courts Act it is clear that a suit or proceeding between parties to a marriage for a decree of nullity or restitution of conjugal rights or judicial separation or dissolution of marriage, all have reference to suits or petitions that are filed under the Hindu Marriage Act and/or Special Marriage Act for the aforesaid reliefs. There is no reference whatsoever to suits that are filed for declaration of a legal character under Section 34 of the Specific Relief Act. The examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act show that the statute creates special rights or liabilities and provides for determination of rights relating to marriage. The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act. Section 8(a) of the Family Courts Act excludes the civil court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the civil court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage. Also an exclusion of the jurisdiction of the civil courts is not readily inferred. Given the line of judgments referred to by the High Courts, and given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either de jure or de facto, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law. (Paras 14 to 16)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Rohinton Fali Nariman.— Leave granted. The present case arises out of a title suit filed in January 2006 by one Samar Kumar Roy against Smt Jharna Bera. The suit is instituted as a

title suit under Section 34 of the Specific Relief Act, 1963 for a declaratory decree, and under Section 38 of the Specific Relief Act, 1963 for perpetual injunction.

2. According to the plaintiff, the father of the defendant was a senior employee under the Directorate of Employment Exchange, Government of West Bengal. The plaintiff was a junior employee under the same Directorate. According to the plaintiff, by blackmail and coercion, a show of marriage was arranged by the defendant's father with the plaintiff by registration of the said marriage under the Special Marriage Act, 1954. The averments in the plaint are that no essential ceremonies of a Hindu marriage were performed and that there was no consummation of the said marriage thereafter. After narrating a litany of wrongs by the defendant, the plaintiff asked for the following reliefs:

> *"A. A decree of declaration that the defendant is not legally married wife of the plaintiff and that she has no right to claim the plaintiff as her husband inasmuch as the alleged marriages between the plaintiff and the defendant are not legal, valid and tenable in law;*
>
> *B. Permanent injunction against the defendant restraining her from claiming the plaintiff as her husband and disturbing the plaintiff at his office, on the way of the plaintiff going to office and coming back home;*
>
> *C. Temporary injunction;*
>
> *D. For such other relief or reliefs, the plaintiff is entitled to in law and equity."*

3. A written statement was filed by the present respondent in the said suit, denying all the allegations contained therein. While the said suit was pending, the plaintiff died on 10-10-2012. On 19-12-2012, the plaintiff's mother applied under Order 22 Rule 3 of the Code of Civil Procedure, 1908, to be added as a legal representative of the plaintiff. By an order dated 17-4-2013, the plaintiffs mother was so substituted. Against the said order, a revision was filed, and by the impugned order dated 15-10-2015[14], the order dated 17-4-2013 was set aside, it being held that after the death of the plaintiff, no right to sue survived in favour of the plaintiffs mother.

4. Mr Gourab Banerji, learned Senior Counsel appearing on behalf of the appellant, has submitted that the High Court's judgment is wrong on principle, and has cited extracts from the 59th Law Commission Report of 1974 and various judgments to show that the plaintiffs mother could continue the suit, inasmuch as the said suit was not, in substance, a petition for dissolution of marriages under either the Special Marriage Act, 1954 or the Hindu Marriage Act, 1955. It was a suit filed under the Specific Relief Act for declaration of a legal character which, according to him, was maintainable as such.

5. On the other hand, the learned counsel for the respondent, has argued before us that the High Court judgment is correct and that, in substance, the suit is really for a decree for annulment of marriage and would, therefore, fall under the Special Marriage Act and/or the Hindu Marriage Act. He has referred to the Family Courts Act, 1984, Sections 7 and 8 in particular, to buttress his submission that in any event, the civil court's jurisdiction would be barred the moment a suit of this nature is filed.

14 Jharna Bera v. Samar Kumar Roy, Civil Order No. 3409 of 2013, decided on 15-10-2015 (Cal)

6. Having heard the learned counsel for the parties, the question that needs to be decided is as to whether a suit which is, in substance, a suit filed under Section 34 of the Specific Relief Act is maintainable at the behest of a legal representative of a dead plaintiff.

7. Shri Banerji took us through portions of the 59th Law Commission Report, 1974. What exercised the Law Commission was as to whether the expression "on a petition presented by either parties thereto" ought to be omitted, and third parties be allowed to ask for the reliefs that only the husband and wife could ask for under the Hindu Marriage Act. Examples were given of a first wife being left out and persons who seek reliefs after the death of a party being left out. The Law Commission opined that there was no need to change the present law inasmuch as:

"2.4. ... A third party (for example, a person interested in the estate of either the husband or the wife) can certainly question the validity of their marriage in a civil suit and obtain a finding, or he may even bring a suit for a declaration that the marriage was void. But such a decree, made by a civil court, will not be a decree of "nullity", as contemplated by matrimonial law.

2.5. ... A void marriage can, no doubt, be invalidated at the instance of other parties, but it is better not to incorporate the remedies of third parties into the Hindu Marriage Act and confuse matrimonial relief with declaratory relief."

8. The Law Commission then went on to state:

"2.6. Remedy available to third parties.—This does not mean that third parties have no remedy at all. They have—but not by a petition under the Hindu Marriage Act.

The Specific Relief Act, in Section 34, provides as follows:

'34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.'

Under Section 35 of the Act, the declaration is binding only on the parties, etc.

Banerji in his Tagore Law Lectures on the Law of Specific Relief, observed:

'The Indian enactment, in one respect at any rate, has a more extended scope, for it contemplates the settlement, not only of conflicting claims to property but also of disputes as to status.'

Holland, in his Elements of Jurisprudence, explaining the meaning of "status" says:

'The Chief varieties of status among natural persons may be referred to the following causes:

(1) Sex, (2) minority, (3) "patria potestas" and "manus", (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect (8) rank, caste and official position, (9) race and colour, (10) slavery, (11) profession, (12) civil death, (13) illegitimacy, (14) heresy, (15) foreign nationality, and (16) hostile nationality. All of the facts included in this list, which may be extended, have been held, at one time or another, to differentiate the legal position of persons affected by them from that of persons of the normal type.'

There can, therefore, be no objection if a third party claiming an interest in the property, sues for a declaration that B was not the lawfully wedded spouse of A. In an English case[15], it was specifically held that a declaration may be granted that a marriage has been dissolved. The grant of similar relief was held to be competent in a Calcutta case[16]." (emphasis in original)

9. We may hasten to add that since the Special Marriage Act did not contain an express limitation to the effect that the petition can only be filed by a party to the marriage, this was also recommended and, in fact, carried out by the Marriage Laws (Amendment) Act, 1976.

10. We find that the High Courts have uniformly taken the view that a suit for declaration of a legal character filed under Section 34 can be filed by a third party plaintiff, or continued at the behest of the legal representative of a dead plaintiff. Thus, in Krishna Pal v. Ashok Kumar Pal[17] a Single Judge of the Calcutta High Court was confronted with whether a suit filed in the Munsif s Court for a declaration that there was no marriage solemnised at all would be without jurisdiction. Section 19 of the Hindu Marriage Act requires all suits or petitions filed under the Act to be instituted before a District Court, whereas a suit for declaration as to a legal status is to be instituted in the Munsif s court. After referring to the prayer in that case, the learned Single Judge found: (SCC OnLine Cal para 9)

"9. As already stated, the plaintiff has chosen not to pray for any relief either by way of annulment of decree of nullity or by way of a decree for dissolution of the alleged marriage. The plaint filed by him cannot be considered to be a petition under the Hindu Marriage Act. The plaintiff has sought for certain declaration regarding the status of the parties and for consequential reliefs and the learned Munsif has jurisdiction under the Specific Relief Act to consider whether the plaintiff has made out any case for obtaining such discretionary declaratory and consequential reliefs. I add that the findings and observations made by the learned Munsif regarding the maintainability of the suit did not amount to determination of any other issue framed by him. I accordingly discharge this rule without any orders as to costs. Let the records be sent down expeditiously."

11. This statement of the law has since been followed by the Calcutta High Court in Tapash Kumar Moitra v. Pratima Roy Chowdhury[18]. Paras 12 to 15 of the judgment are as under:

"12. I respectfully agree with the above observations of Chittatosh Mookerjee, J. in the case referred to above.

15 Har-Shefi v. Har-Shefi, 1953 P 161 : (1953) 2 WLR 690 (CA)

16 Noor Jehan Begum v. Eugene Tiscenko, 1941 SCC OnLine Cal 221 : AIR 1942 Cal 325

17 1982 SCC OnLine Cal 120 : (1982) 2 Cal LJ 366

18 (1984-85) 89 CWN 671

13. In the instant case, the plaintiff-petitioner in his plaint has neither prayed for restitution of conjugal rights nor for dissolution of marriage under Section 9 or Section 13 of the said Act. He has also not prayed for annulment of alleged marriage by a decree of nullity. The plaintiff in the instant suit has asked for a declaration that the purported registration of the alleged marriage be declared null and void and consequently, cancellation of the said purported registration of marriage.

14. In my opinion, this suit is simply for cancellation of purported registration of the alleged marriage under the Hindu Marriage Act, 1955 and the Hindu Marriage Registration Rules, 1958 and consequential reliefs. If it is the averment that marriage has not been solemnised, then the registration under Section 8 of the Act read with relevant provisions of the said Hindu Marriage Registration Rules by itself will not result in making the marriage complete and binding between the parties. Such registration may raise a presumption of marriage being solemnised.

75. 1 am, therefore, of opinion that the plaint in the instant suit cannot be considered to be a petition under Section 19 of the said Act, and the learned Munsif is fully competent and has jurisdiction to entertain, try and determine the suit."

12. And in Sasanka Sekhar Basu v. Dipika Roy[19], it was held:

"*16. In the instant case although the petitioner inter alia prayed for a declaration that the marriage between the parties was void, the same will not make the plaint ipso facto a petition under the Hindu Marriage Act within the meaning of Section 19 of the said Act. Under Sections 11 and 12 of the Hindu Marriage Act, the circumstances under which a petition can be filed for annulment of marriage on the ground that the same is void are clearly specified. But in the instant case, such declaration that the marriage is void has not been asked for by the plaintiff on any of such grounds on which such an annulment can be obtained under Section 12 or even under Section 11 of the said Act. The instant suit really appears to be on the face of the plaint, a suit for declaration as to the status of the parties.*

17. In deciding whether or not the plaint filed by the petitioner in substance is a petition under Section 12 or under Section 11 of the Hindu Marriage Act for annulling the marriage between the parties by a decree of nulling or for the matter of that under any other provisions of the Hindu Marriage Act and which is the proper forum for filing the suit, at the preliminary stage the Court is not called upon to record a finding about truth or otherwise of the allegations made in the plaint. The only question relevant for consideration at such a stage is whether on the basis of the averments made in the plaint and the prayers contained therein, the suit is a suit for annulment of marriage within the meaning of the Hindu Marriage Act or for a declaration under the Specific Relief Act.

18. Proceeding on such a basis it appears to me prima facie that suit is not one under Section 11 or under Section 12 of the Hindu Marriage Act or for any other provisions under the Hindu Marriage Act, but for a declaration relating to status. Therefore, not being a petition under the Hindu Marriage Act, Section 19 of the said Act is not

19 1993 SCC OnLine Cal 48 : AIR 1993 Cal 203

attracted in the instant case. The learned Munsif, therefore, has jurisdiction to try the suit before whom such a suit can be maintained."

13. A similar view has been taken by the Orissa High Court at the behest of a suit filed by the first wife in Harmohan Senapati v. Kamala Kumari Senapati[20]; and by the Allahabad and Jammu and Kashmir High Courts in Ram Pyari v. Dharam Das[21] and Lajya Devi v. Kamla Devi[22] respectively.

14. An allied question that arises is as to whether suits of the present kind would be barred under any provision of law. The learned counsel for the respondent has brought to our notice Sections 7 and 8 of the Family Courts Act, 1984 which read as follows:

"7. Jurisdiction.—<1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

*(b) * * **

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

* * *

8. Exclusion of jurisdiction and pending proceedings.—Where a Family Court has been established for any area—

(a) no district court or any subordinate civil court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

*(b)-(c) * * *"*

15. It is obvious that a suit or proceeding between parties to a marriage for a decree of nullity or restitution of conjugal rights or judicial separation or dissolution of marriage, all have reference to suits or petitions that are filed under the Hindu Marriage Act and/or Special Marriage Act for the aforesaid reliefs. There is no reference whatsoever to suits that are filed for declaration of a legal character under Section 34 of the Specific Relief Act. Indeed, in Dhulabhai v. State ofM.P.[23], this Court had occasion to consider whether the civil court's jurisdiction was expressly or impliedly barred by statute. After referring to a number of judgments, this Court laid down 7 propositions of law, of which two are of relevance to the present case: (AIR pp. 89-90, para 32)

20 1978 SCC OnLine Ori 105 : AIR 1979 Ori 51

21 1983 SCC OnLine All 652 : AIR 1984 All 147

22 1992 SCC OnLine J&K 22 : AIR 1993 J&K 31

23 (1968) 3 SCR 662 : AIR 1969 SC 78

"32 (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

* * *

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

16. On a reading of the aforesaid propositions, it is clear that the examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act show that the statute creates special rights or liabilities and provides for determination of rights relating to marriage. The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act. Section 8(a) of the Family Courts Act excludes the civil court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the civil court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage. Also as was pointed out, an exclusion of the jurisdiction of the civil courts is not readily inferred. Given the line of judgments referred to by the High Courts, and given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either de jure or de facto, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law.

17. This Court has referred to personal causes of action and held in Yallawwa v. Shantawa[24] which reads as follows: (SCC pp. 168-69, para 6)

"6. ... Save and except the personal cause of action which dies with the deceased on the principle of actio personalis moritur cum persona i.e. a personal cause of action dies with the person, all the rest of the causes of action which have an impact on proprietary rights and socio-legal status of the parties cannot be said to have died with such a person."

18. The learned counsel for the respondent has also argued before us that the 2006 suit is itself time-barred inasmuch as the so-called marriage between the parties took place on 13-12-2002 whereas the suit was filed in January 2006, that is beyond the period of three years mentioned in Article 58 of the Limitation Act, 1963. Shri Banerji, appearing on behalf of the appellant, has drawn our attention to Section 16(1) of the Limitation Act in this behalf and has argued that in

24 (1997) 11 SCC 159

any event insofar as his client is concerned, the cause of action would begin to run only from the date of death of the plaintiff, and that since he has applied within two-and-a-half months for continuing the suit, the bar of limitation would not apply. We do not propose to go into this plea in view of the fact that Shri Banerji has very fairly submitted before us that instead of driving the parties to another long litigation, he would be prepared to share the estate of the deceased plaintiff with the respondent. This being the case, we call upon the respondent to file an affidavit, within a period of four weeks from today, in which she has to disclose truly and faithfully to this Court all the amounts that have been received by her owing to her alleged marriage with the deceased plaintiff. 50% of the total amount stated therein shall be payable by her to the appellant within a period of eight weeks thereafter.

19. The appeal is disposed of accordingly.

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SHEOLI HATI VERSUS SOMNATH DAS

SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Ashok Bhushan and Hon'ble Mr. Justice Navin Sinha

Sheoli Hati …….Petitioner
Versus
Somnath Das .....Respondent

CIVIL APPEAL NOS. 5388-5389 OF 2019

[arising out of SLP (C) Nos. 15912-15913 of 2018]

Decided on :11th July, 2019.

Sheoli Hati vs Somnath Das SLP (C) 15912-15913/2018 The matter is related matrimonial disputes. Gopal Subramaium Sr. Adv apeared for husband. Rupali Samntha Ghose appeared for wife. There is a 11 year old girl child whoes carrier is on stake due to fighting between the parents. She was admitted in boarding school in banglore far from Jamshedpur. The counsel for wife submitted that the Loyala school Ranchi is also a good school. why she has been admitted too far from jamshedpur though Ranchi & Kolkata having good boarding school. Court said since the child is already admitted to banglore boarding school let see for one year the progress of the child, father is taking all the expenses. Both parties are ready to withdraw cases pending to each other. On request SLP is kept in pending status in between the parties will not interfare in the study of the child.

JUDGEMENT

Hon'ble Mr. Justice Ashok Bhushan :-

1. Leave granted.

2. The appellant aggrieved by the judgment dated 26.04.2018 passed by a Division Bench of the High Court of Jharkhand at Ranchi has come up in these appeals. The impugned judgment of the High Court was passed in First Appeal No.59 of 2016 filed by the appellant and First Appeal No.68 of 2016 filed by the respondent both challenging the order dated 31.03.2016 passed by the Principal Judge, Family Court, Jamshedpur in Guardianship Case No.11 of 2012 filed by the respondent under Sections 7 and 12 of the Guardian and Wards Act, 2 1890.

3. The brief facts and circumstances giving rise to these appeals are:

3.1 The appellant and the respondent were married in the year 2003. There has been matrimonial dispute between the parties since the year 2006. A girl child was born to the appellant and the respondent on 09.04.2007, named as Aditi. The appellant filed complaint against the husband before various authorities, employer of the respondent as well as National Human Rights Commission. A a petition for seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 was filed by the respondent at Bengaluru where the respondent was residing. In the year 2008, the appellant lodged FIR against the respondent under Section 498A of the IPC being Case No.204 of 2008. In the

year 2008, the respondent filed an application for seeking a decree of divorce before the Family Court, Bengaluru which was registered as Matrimonial Case No.3358 of 2008.

3.2 The respondent filed an application before the High Court of Jharkhand at Ranchi seeking anticipatory bail in connection with Kadma PS Case No.204 of 2008 in which case parties were referred to mediation and conciliation to amicably resolve their issues. On 11.09.2009, the Principal Judge, Family Court at Bengaluru granted ex parte decree of divorce dated 11.09.2009. During the pendency of the Anticipatory Bail Application being No.518 of 2009, the parties amicably settled all their disputes before Jharkhand Legal Services Authority. A Settlement dated 19.12.2009 between the parties was communicated to the High Court.

As per the terms of the settlement, the respondent agreed to pay an amount of Rs.5,00,000/ as permanent alimony 4 to the appellant. Further, the respondent agreed to deposit a sum of Rs.5,00,000/in the name of Aditi for her all time maintenance. The appellant further agreed not to challenge ex parte divorce decree. The appellant also agreed to allow the respondent to meet their child once in every two months starting from January, 2010. The High Court disposed of the matter in terms of the settlement.

3.3 The respondent alleging obstruction by the appellant in his visiting rights filed an application seeking custody of the child, Aditi under Sections 7 and 12 of the Guardian and Wards Act, 1890 at Bengaluru. The said proceedings under Guardian and Wards Act were transferred to Family Court at Jamshedpur under order of this Court dated 27.03.2012.

The appellant filed written statement in Guardianship Case No.11 of 2012. The 5 respondent made an amendment application before the Family Court, Jamshedpur praying for an alternative relief for addition of a prayer in his application in Guardianship Case, i.e., for directing the child to be admitted in any reputed residential/boarding school in India at the expenses of the respondent, which amendment application was allowed by an order dated 16.05.2013.

The Principal Judge, Family Court by order dated 31.03.2016 decided the Guardianship Case No.11 of 2012. It is to be noted that in the Guardianship proceedings the respondent has given up his claim of the custody of child and confined his case to alternative prayer, i.e., direction to admit the child in a boarding school. The Family Court, Jamshedpur in paragraph 41 of the judgment directed:

"41. Thus, in view of the discussions made above, I come to the conclusion that minor daughter of the petitioner and respondent Aditi Bishaskha Das shall continue 6 in the care, custody and guardianship of her mother till she reaches the age of 11 years and shall continue to pursue her education from Jamshedpur along with her mother. However, the petitioner shall have the visitation right as is continuing since before i.e. during the pendency of the case. However, the petitioner shall be entitled to the custody of the child for half of each vacation of the school where Aditi is or shall be studying and for the first half of vacation Aditi shall be in the care and custody of her father i.e. petitioner and for the second half of the vacation she shall be under the care and custody of her mother.

The vacations referred to above are the Summer and Winter vacations in every school. Further, Aditi upon attaining the age of 12 years i.e. for the academic session 20192020 she shall be sent to a boarding school of repute where she qualifies and is able to get admission. The entire cost of such Boarding School shall be borne by the petitioner and once Aditi gets into the Boading School then the respondent shall have the right to visit her daughter as permitted by the School calendar but at the cost of the petitioner and the petitioner shall pay such cost which shall include the travelling airfare and other expenses in advance. Issue No.V is decided accordingly. The custody in course of vacation shall continue as before."

3.4 The Family Court directed that Aditi shall continue in the custody and guardianship of her mother till she reaches the age of 11 years and continue to pursue her education from Jamshedpur. The respondent was allowed visitation right and also allowed custody of the child for half of each vacation of the school. First half of the vacation be in the care and custody of her father and second half be in the custody of the mother. The Family Court further directed that for the academic session 20192020 she shall be sent to a boarding school of repute where she qualifies and is able to get admission.

3.5 Aggrieved by the judgment of the Family Court both the parties have filed appeals in the High Court. The appellant filed First Appeal No.59 of 2016 and the respondent filed First Appeal No.68 of 2016. The High Court interacted with the child on several 8 occasions. The High Court in the aforesaid appeals passed an order dated 17.11.2016 proposing to the parties that the minor child be admitted in Sacred Heart Convent School, Jamshedpur which is a very good school for girls in Jamshedpur. On 28.11.2016, the High Court directed that Aditi be admitted in Sacred Heart Convent School, Jamshedpur. The High Court also increased the visiting hours of the respondent and also permitted the respondent to get the child registered for admission in La Martiniere Girls School, Kolkata. Against the order dated 28.11.2016, the appellant filed SLP(C)Nos.37915-37916 of 2016 which were dismissed by this Court by order dated 23.12.2016.

By the subsequent order dated 26.04.2018 which is impugned in the present appeals, the High Court directed the child to be admitted in Good Shepherd International School, Ooty in Class IV which is a residential institution affiliated to 9 ICSE for the Session 20182019, which commenced from 21.07.2018. These appeals were taken by this Court on 10.07.2018. In its order dated 10.07.2018 following observations were made by this Court: "After hearing the learned counsel for the parties yesterday as well as today, we are of the opinion that there is no need to stay the directions of the High Court in the impugned order whereby the High Court has directed that the child Aditi Bisakha Das be admitted in Good Shephard International School, Ooty in Class V where the respondent has already secured admission for her. This arrangement, as per the High Court's order, is made for the Academic Year 201819.

We also find that the High Court has passed this order after weighing and discussing all the alternatives and pros and cons of the matter and has formed its opinion that it is one of the most suitable solutions. We feel that once such an order is given on objective considerations, it is better that the child is admitted in the said School in the current

academic year in order to find out as to how she is able to cope up with and studies in the said School at Ooty and what kind of progress she is able to make on shifting her from the present 10 atmosphere to a boarding School."

3.6 In pursuance of the order of the High Court dated 26.04.2018, ultimately, the child, Aditi was admitted in Good Shephard International School, Ooty reluctantly by the appellant. With regard to the visiting rights of the respondent orders were passed for the winter vacation by this Court on 12.12.2018. After spending second half of the winter vacation with father the child went to Jamshedpur to attend birthday of her mother on 13.01.2019. After attending birthday she was to catch a flight for Bengaluru from Ranchi. Father along with an Advocate was to take the child. On 14.01.2019 at the Airport child complained to the CISF personnel that she did not want to go along with father to Bengaluru. The CISF officer informed the concerned Police Station and the lady Police personnel interacted with the child.

Although the appellant and her father were telephonically informed but they did not come to take the child and the child was ultimately lodged in a shelter home. The Child Welfare Committee, Ranchi (Jharkhand) also interacted with the child. This Court vide order dated 21.01.2019 directed following: "The child being student in a good school and her session coming to close, we are of the view that first thing to be done is to direct the Child Welfare Committee to send the child to the school. Respondent/father will bear all expenses for traveling of the child along with one woman companion which may be deputed by the Child Welfare Committee to take the child and handover the child to the Principal of the School. This order shall be complied by the Child Welfare Committee within three days from the date of production of this order. All other issues between the parties shall be taken care subsequently.

We further direct that report of the Child Welfare Committee be submitted in a sealed cover before this Court. The Principal of the school also submit an interim report of the academic session in a sealed cover before this Court. Reports be submitted within two weeks. The school may also send detail report by the end of this academic session.

Accordingly, I.A. is disposed of. List the matters after four weeks."

3.7 After aforesaid order dated 21.01.2019, the child was handed over to the School to complete her session. Further, on 21.02.2019, the report from Child Welfare Committee, Ranchi, Jharkhand and on 29.01.2019 and 02.02.2019 report from Good Shepherd International School, Tamil Nadu were received. By order dated 03.05.2019 on the request of the mother she was permitted to have the custody of the child during the entire vacation with effect from 22.05.2019. Thereafter, the matter was heard on 01.07.2019.

4. Learned counsel for the appellant submits that the child is not doing well at Good Shepherd International School, Ooty and she has suffered medical issues also.

The appellant submits that proper medical care was not taken by the School. Learned counsel submits that the appellant has always contended that child shall be allowed to get her education at Jamshedpur where the mother is residing. An I.A.No.74433 of 2019 has been filed by the appellant where the second prayer is that Aditi to be admitted in some reputed school for the Academic Session 20192020 in Jamshedpur or alternatively Aditi be admitted in some boarding

school near Jamshedpur. In the application, the appellant has referred to LaMartiniere Girls School, Kolkata and Loreto Convent Entally, Kolkata.

5. Learned counsel for the appellant has also referred to medical prescription dated 20.05.2019 of one Dr. Devi Prasad Rao, Child Specialist, Hospital Road, Ooty and one further prescription dated 07.06.2019 of Aditi from Zila Mansik Swasthaya Karyakaram, Jamshedpur, East Singhbhoom, Jharkhand.

6. Learned counsel for the respondent refuting the submissions of the counsel for the appellant contends that child Aditi has done very well in the institution, Good Shepherd International School, Ooty. In reply filed by the respondent, the respondent has referred to various progress reports and certificates issued by the Good Shepherd International School of the child for Academic Session 20182019. Learned counsel submits that the child has shown over all development and her participation in all the activities inside the classroom and outside, there is no complaint of health issues. She participated in several competitions and got prizes and certificates.

The weight and height has specially increased. In the reply affidavit, learned counsel has referred to cocurricular report card of the child. In her progress report, she has been promoted to Class VI. It is submitted that it is the appellant, who has always been creating hindrance in normal development of the child. She has always been from day one poisoning the child against the respondent. The child has always been tutored to make complaint against the respondent. The child is treated in a manner by the appellant so as to alienate her from father. The child was in neutral environment and has done well in the school in all fields which instead of being appreciated by the appellant, she still wants that child be taken out from the School for which several tricks have been played by the appellant.

7. We have heard the learned counsel for the parties and perused the records.

8. Before we proceed to enter into the submissions of the parties, it is useful to refer to the order passed by the High Court on 26.04.2018, which is impugned in the present appeals. As noted above, the child was initially studying in the institution, where appellant is a teacher, i.e., Motilal Nehru Public School, Jamshedpur. Now, pursuant to the orders of the High Court, the child was admitted for the Academic Session 20172018 in Sacred Heart Convent School, Jamshedpur. The High Court has noticed the report of Sacred Heart Convent School, Jamshedpur, which was received from the 16 School on 21.03.2018. The report has been extracted by the High Court in paragraph No.16 of the judgment, which is to the following effect: "

"Sub:School Performance Report of Aditi Bishakaha Das.

Sir,

With reference to CASE No.Cont.(Cr.)08/ 2017 dated 4600/17.03.2018, Aditi Bishakaha Das, who is presently studying is Std. V, having Admission No.16510, is trying her best to come up to the average level. In the year 2017 when Aditi was admitted in Sacred Heard Convent School she was below average in her studies. Whenever her mother was called by the class teacher her heath was not permitting to visit the class teacher and the coordinator of the Primary School. It seems home atmosphere is not contucive for the child to perform well

in her studies. The child is in the school only for six hours and the rest of the time the child is at home. Aditi is an intelligent girl. Parents cooperation is very important.

It is up to the parents to help the child and to cooperate with the school authorities. Environment is very important for the child's performance and to do well in her studies. It is up to the parents to decide her further. Residential school might held her to do well in her future studies.

Sister Mridula Ac.

Principal,

Sacred Heard Convent School, Jamshedpur."

9. Another factor which has been taken into consideration by the High Court is the report of the District Probation Officer, East Singhbhum, Jamshedpur which was called for by the Court. By letter dated 10.04.2018, the District Officer, Jamshedpur has submitted that report regarding well being of the child Aditi. in paragraph No. 5 with regard to Educational condition, following was opined:

"5. Educational condition:Now Aditi is in Std.5 in Sacred Heart School in Jamshedpur. Acceding to her School progress report card, she is an average student but talking with Aditi, this investigator founded that she is an intelligent girl. In the better educational atmosphere and without any type of stress or tension she will do better for her future."

10. The High Court in paragraph 21 ultimately said:

"21. Considered thus, in the totality of the facts and circumstances, we are inclined to accede to the request of the father to allow the child to be admitted to a reputed school i.e. Good Shepherd International School, Ooty in ClassV which is affiliated to ICSE. The session 201819 commences from 21.07.2018. In that way, the girl would not lose any valuable period of the session as it is yet to commence. As informed by the father, aptitude test and personal interview is to be held before 10.05.2018. Good Shepherd International School, Ooty as its brochure shows was established in 1977 and has the facilities of best teaching and learning practices, services and opportunities provided by a team of committed mentors and facilitators.

It has a knowledge village, a reputed Finishing Schools for girls along with 9hole golf course, hospital, bank, vegetable farms, dairy and poultry. It is spread over 150 acres of verdant land in Nilgiris in Tamil Nadu, India. Avowedly, it has a state of art infrastructure for academic and boarding talent to deliver world class education. There are houses for the students from Class VI to XII. The Institution is a Member of the Council of International Schools, a benchmark of world class school education. It has a distinguished faculty who are exposed to global developments and reside within the Global Village to devote complete time to make the learning experience for the students an enriching one."

11. The order impugned indicates that the High Court has not finally decided both the appeals filed against the order dated 31.03.2016 of the Family Court. The matter has been kept pending by the

High Court. The High Court had directed that after child is admitted in the school the matter should again be posted before the High Court to file compliance report.

12. As noted above, the application which was filed by 19 the respondent before the Family Court under the Guardian and Wards Act, 1890 was confined only to the consideration of the issue as to whether child Aditi should be directed to be admitted in a boarding school. The respondent has given up his claim of custody of the child and has only pressed his prayer of sending the child to the boarding school.

13. It is also relevant to note that it is the respondent, who is bearing all expenses of the child in the boarding school at Ooty, which are more than Rs.10 lakhs p.a. In addition to the above expenses of the school, the respondent also offered to bear expenses of flight charges and stay of the appellant when she visit the child at Ooty from Jamshedpur. From the material on the record, we are satisfied that the respondent's intention has always been that the child should get best education at a neutral environment, which may help in developing her personality. It is also to be noticed that the appellant has right from beginning opposing the prayer of the respondent to send the child 20 in the boarding school and tried to find fault with the school at Ooty. In the circumstance in which the child is there, the Court has to take extra caution and precaution to ensure that the child is kept away from negative influences.

14. As noted above, even the Family Court has directed for admitting the child in boarding school but from Academic Session 20192020. The High Court initially directed that the child to be admitted in Sacred Heart Convent School, Jamshedpur and after receiving a report from the said School, the High Court directed for admission of Aditi in Good Shepherd International School, Ooty for the Academic Session 20182019, which order is under challenge in these appeals.

15. As noted above, we in our order dated 10.07.2018 declined to stay the directions of the High Court for admission of Aditi in Good Shepherd International School, Ooty in Class V. The order passed by the High Court, impugned, in these appeals, has been given effect to and both the appeals being still pending in the High Court awaiting final decision, we are of the view that the High Court may finally decide the appeals after hearing the parties. Order dated 26.04.2018 having been given effect to, we see no justification in interfering with this order at this stage. Learned counsel for the parties submitted that this Court may itself decide all the issues finally but the appeals against the order of the Family Court being awaiting the final decision of the High Court. it is appropriate that the High Court may be requested to decide the appeals finally.

16. Before we close, few observations on the issues which have arisen before us need to be made. The present is a case, where limited issue has arisen regarding giving education to the child in boarding school or to permit the status quo regarding education of the child as was on the date when the Family Court passed order dated 31.03.2016. When the child has to go in the environment, where there is marital discord between her parents affecting the peace of mind of all including the parents and children, child suffers physical and mental distress. The ill consequences of the discord between mother and father effect the child in her normal upbringing and is a negative factor on child's personality and upbringing. This Court in Vivek Singh vs. Romani Singh, (2017) 3 SCC 231, has discussed the term "Parental Alienation Syndrome". In paragraph No.18 of the judgment, following was observed:"

18. .....Psychologists term it as "The Parental Alienation Syndrome". It has at least two psychological destructive effects: (i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

17. In the above case also there was bitter fight between father and mother. The Family Court has allowed the custody of the minor girl child to the father by dismissing the petition of the respondentmother for custody. The High Court on appeal decided the entitlement of the custody of the child to the mother. Aggrieved by the order of the High Court, father had filed the appeal in which backgrounds the above observations were made by this Court. The ill effect on child, due to discord between the parents with negative feeling against each other has natural effect, which hinders the child's normal development. 18. It is well settled that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration.

This Court in Gaurav Nagpal vs. Sumedha Nagpal, (2009) 1 SCC 42, had occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. This Court referred to English Law, American Law, the statutory provisions of Guardian and Wards Act, 1890 and provisions of Hindu Minority and Guardianship Act, 1956, this Court laid down following in paragraph Nos. 43, 44, 45, 46 and 51:

"43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

44. The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and wellbeing as paramount consideration.

45. In Saraswathibai Shripad Ved v. Shripad Vasanji Ved, ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated; "....It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration....."

(emphasis supplied)

18. In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840, this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the

Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical wellbeing. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases. "

19. Every child has right to proper health and education and it is the primary duty of the parents to ensure that child gets proper education. The Courts in exercise of parens patriae jurisdiction have to decide such delicate question. It has to consider the welfare of the child as of paramount importance taking into consideration other aspects of the matter including the rights of parents also. In reference to custody of a minor, this Court had elaborated certain principles in Thrity Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, where this Court again reiterated that welfare of the child is of paramount importance. In paragraph No.17, following was laid down:

"17. The principles of law in relation to the custody of a minor appear to be wellestablished. It is wellsettled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

20. In the above case, the issue of minor girl came for consideration in the context of custody. The mother, who was school teacher wanted to send the child to boarding school, which was opposed by the father, who wanted to have custody of the minor girl. It is to be noted that in the said case the minor girl has expressed her wish not to go to boarding school. This 27 Court held that in embittered relationship between the parents and the attempt of one spouse poisoning the mind of other spouse has disastrous effect. In paragraph Nos. 32 to 35 following was laid down:

"32. The effect on the little girl of the embittered relationship between her parents and the attempt of the father to poison the mind of the daughter against her mother and to alienate her from the mother has been simply disastrous. The intelligent and sensible girl, distressed at the acrimony between her parents, who wanted to spend her time with each of her parents as she is deeply attached to both, as recorded by Lentin, J. in his order dated June 28, 1979, was on the verge of near nervous breakdown as noted by the Division Bench in its judgment dated July 31, 1981. The various orders passed in between which we have set out at length also, indicate what great mental strain and agony the little girl had suffered because of the acrimonious dispute between her parents.

During this period of two years, the girl had been under home influence, as she had been staying with her quarrelling parents in terms of the various orders of the High Court.

The little girl also had been compelled to make her appearances in Court from time to time. The facts and circumstances clearly establish that the effect of home influence on the minor in the present case has been to reduce a bright, happy and sensible child to a state of complete misery; and, the extreme psychological strain on the sensible mind of the little girl has caused almost a near nervous breakdown.

When the atmosphere in a house, vitiated and rendered surcharged with tension as a result of bitter squabbles between husband and wife causes misery and unhappiness to a child, who has to live in constant psychological strain in such a broken home in view of the bitter relationship between her parents for each of whom she has great affection, the healthy and normal growth of the child is bound to be seriously affected. In the interest and for the welfare of the child in such a case, the child is necessarily to be removed from such unhealthy environment of a broken home surcharged with tension. In such a case, the proper and best way of serving the interest and welfare of the child will be to remove the child from such atmosphere of acrimony and tension and to put the child in a place where the embittered relationship between her parents does not easily and constantly effect her tender mind.

33. In the facts and circumstances of the present case the best way to serve the welfare and interest of the child will be to remove the child from the unhealthy atmosphere at home which has caused a very great strain on her nerves and has certainly affected her healthy growth, to a place where she can live a normal healthy life and will have a good opportunity of proper education and healthy growth. We note with satisfaction that the view that we have taken is fully supported by the report of the Social Welfare Expert. The report of the Social Welfare Expert, though not binding on the Court is entitled to weighty consideration. In the instant case, the Expert has made a very careful study of the entire matter and has given a well reasoned report.

34. Pursuant to the order passed by the Division Bench of the Bombay High Court the mother got the child admitted into Kimmins 29 Boarding School at Panchgani. By an interim order passed by this Court in the stay application in this appeal, the child was directed to continue her stay in the said Boarding institution. By the interim order passed by us on the conclusion of the hearing we directed that the child should continue her study in the Boarding School.

35. On a consideration of all the facts and circumstances of this case and bearing in mind the paramount consideration of the welfare of the child, we are of the opinion that the child's interest and welfare will be best served by removing her from the influence of home life and by directing that she should continue to remain in the Boarding School. It is not in dispute that Kimmins Boarding School at Panchgani to which the child has been admitted is a good institution."

21. In the above case, the child was allowed to continue in the boarding school. We notice one more decision of this Court in Nutan Gautam vs. Prakash Gautam, (2019) 4 SCC 734, which was a case where appeal was filed by mother of a child against the order of the High Court passed in First Appeal. While decreeing the divorce petition of the husband ex parte the trial court had directed the son, the minor boy, to be admitted in a boarding school at New Delhi. Ex parte 30

order passed by the trial court was challenged by the mother in the High Court, which matter was pending before the High Court. The High Court by interim order had permitted the father to take the boy to boarding school.

The said interim order was challenged in this Court. This Court interacted with the boy and took the view that in the facts of the case, the child should not be compelled to go to boarding school. This Court allowed the child to continue his studies at Global International School, Shahjahanpur, where he was earlier studying in the interest of the child. Every case where issue pertaining to custody of child and education is decided depends upon the facts of each case. No hard and fixed formula can be found out which can be applied to each and every case. Each case has to be examined in its own facts. We may again refer to the judgment in Thrity Hoshie Dolikuka (supra), where also this Court noticed that child has expressed his wishes not to go to boarding school. This Court in the said case took the view that the minor is not fit to form an intelligent preference, which may be taken into consideration in deciding her welfare. In paragraph No.26, following was laid down:

"26. In the facts and circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. We have earlier set out in extenso the various orders passed by the various learned Judges of the Bombay High Court after interviewing the minor and the learned Judges have recorded their impressions in their judgments and orders. The impressions as recorded by the learned Judges of the Bombay High Court, go to indicate that the minor has expressed different kinds of wishes at different times under different conditions.

It also appears from the report of the Social Welfare Expert that these interviews cast a gloom on the sensitive mind of the tender girl and caused a lot of strain and depression on her. Torn between her love for both her parents and the acrimonious dispute between them resulting in the minor being dragged from court to court, we can well appreciate that the sensitive mind of the minor girl is bound to be sadly affected.

Though the girl is quite bright and intelligent as recorded by the learned Judges of the Bombay High Court in their orders after their interviews with the girl who is of a tender age and is placed in a very delicate and embarrasing situation because of the unfortunate relationship and litigation between her parents for both of whom she has great deal of affection, she is not in a position to express any intelligent preference which will be conducive to her interest and welfare. Mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. Any child who is placed in such an unfortunate position, can hardly have the capacity to express an intelligent preference which may require the Court's consideration to decide what should be the course to be adopted for the child's welfare.

The letters addressed by the daughter to her mother from Panchgani and also a letter addressed by her to her aunt (father's sister) also go to show that the minor cannot understand her own mind properly and cannot form any firm desire. We feel that sending for the minor and interviewing her in the present case will not only not

serve any useful purpose but will have the effect of creating further depression and demoralisation in her mind."

22. We, thus, are of the view that what is in the interest of the child depends on the facts and circumstances of each case and has to be decided on its own merits without adhering to any fixed formula or rule. The appeals being pending before the High Court, we are of the view that while deciding the appeals finally, High Court should also take into consideration subsequent materials which may be brought before it by the parties including the progress report of the child from Good Shepherd International School, Ooty. Learned counsel has also raised certain medical issues pertaining to the child. It is also open for the High Court to take decision on the said issues and if necessary to obtain medical reports as may be required.

In so far as interacting with the child, the High Court during hearing of the appeals had already interacted with the child on many occasions and it is for the High Court to take a decision with regard to interacting with the child.

23. The reports received from Child Welfare Committee, Jharkhand and Good Shepherd International School, Ooty by this Court on 29.01.2019 and 02.02.2019 respectively be remitted to the High Court for consideration in sealed cover. After we closed the hearing on 01.07.2019, another report dated 08.07.2019 has been received from Good Shepherd International School, Ooty in sealed cover which has not been opened. Let all the above reports in a sealed cover be transmitted to the Jharkhand High Court by a special Messenger, to be considered in the pending first appeals.

24. In view of the foregoing discussion, we do not find 34 any good ground to interfere with the impugned judgment of the High Court. The High Court is requested to decide First Appeal No.59 of 2016 and First Appeal No.68 of 2016 after hearing the parties keeping in view the observations as made above. The appeals are disposed of accordingly.

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KARUNA KANSAL VERSUS HEMANT KANSAL & ANR.

SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Abhay Manohar Sapre and Hon'ble Mr. Justice Dinesh Maheshwari

Karuna Kansal …….Petitioner
Versus
Hemant Kansal …….Respondent

CIVIL APPEAL NOS. 4847-4848 OF 2019

[arising out of S.L.P.(C) Nos.7529-7530 of 2015]

Decided on : 09th May, 2019

JUDGEMENT

karuna kansal .appellant(s) versus hemant kansal & anr. .respondent(s) judgment abhay manohar sapre, j.1. leave granted.2. these appeals are filed against the final judgment and order dated 17.10.2014 passed by the division ..... due performance.12. in such a situation, where the impugned order was passed without hearing the appellant and not issuing any notice of the appeal to her and yet giving 5 such directions, which may not be capable of being carried out, the impugned order, in our view, is wholly without jurisdiction and legally unsustainable and it has to be set ..... (respondent no.1) and his two wives (appellant and respondent no.2). it arises out of the matrimonial suit decided by the family court between respondent nos. 1 and 2.5. by impugned order dated 09.08.2011, the high court disposed of the appeal (m.a. no.709/2005) filed by respondent no.2.

Hon'ble Mr. Justice Abhay Manohar Sapre

1. Leave granted.

2. These appeals are filed against the final judgment and order dated 17.10.2014 passed by the Division Bench of the High Court of Madhya Pradesh at Indore in Review Petition No.48 of 2014 whereby the Division Bench of the High Court dismissed the said Review Petition filed by the appellant herein and upheld the order dated 09.08.2011 passed by the Single Judge of 1 the High Court in Miscellaneous Appeal No.709 of 2005.

3. A few facts need mention herein below for the disposal of these appeals, which involve a short point.

4. The dispute, which is the subject matter of these appeals, is between the husband (respondent No.1) and his two wives (appellant and respondent No.2). It arises out of the matrimonial suit decided by the Family Court between respondent Nos. 1 and 2.

5. By impugned order dated 09.08.2011, the High Court disposed of the appeal (M.A. No.709/2005) filed by respondent No.2 (first wife) against respondent No.1 (husband) under Order 43 Rule 1 (d) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") against the order dated 10.12.2004 passed by the Additional District Judge, Kukshi in MJC No. 35 of 2003.

6. By order dated 10.12.2004, the ADJ had declined to condone the delay in filing the application filed by respondent No.2 under Order 9 Rule 13 of the CPC and thereby declined to set aside the ex parte decree dated 23.08.2003 passed in C.S. No. 09A/ 02 by the said Court.

7. The appellant herein is the second wife of respondent No.1 (husband). It is the case of the appellant that after passing of the ex parte decree for dissolution of marriage of respondent No.1 with respondent No.2 and expiry of period of limitation for filing appeal, respondent No.1(husband) entered into matrimony with her (appellant). On the other hand, respondent No.2 (first wife of respondent No.1) filed the aforesaid appeal of which the appellant had no knowledge, but the fact of respondent No.1 having married the appellant was indeed stated before the High Court. However, when respondent No.1 stated 3 that she was having no problem with the appellant, the High Court set aside the ex parte decree passed on 23.08.2003 in C.S. No.09A of 2002 and directed that, "the parties shall live together as husband and wife."

The appellant herein (second wife of respondent No.1), on coming to know of the aforesaid order dated 09.08.2011 passed by the Single Judge of the High Court in M.A. No.709/2005, filed review petition (R.P. No.48 of 2014) before the High Court. The Division Bench of the High Court, by order dated 17.10.2014, dismissed the said review petition. Challenging both the orders, the appellant has filed the present appeals by way of special leave in this Court.

8. Heard Mr. A.K. Chitale, learned senior counsel for the appellant and Ms. Pankhuri and Mr. S.K. Verma, learned counsel for the respondents.

9. Having heard the learned counsel for the parties and on perusal of the record of the case, we are 4 constrained to allow these appeals, set aside the impugned orders and remand the case to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law.

10. The need to remand the case has occasioned because we find that the appellant was not made a party to the appeal and nor she was heard by the High Court.

11. On perusal of the impugned order dated 09.08.2011, we find that the High Court, even after taking note of the factum of the marriage of the appellant with respondent No.1, has not adverted to the consequences thereof and has given such directions, which may not be capable of due performance.

12. In such a situation, where the impugned order was passed without hearing the appellant and not issuing any notice of the appeal to her and yet giving such directions, which may not be capable of being carried out, the impugned order, in our view, is wholly without jurisdiction and legally unsustainable and it has to be set aside on this short ground alone.

13. It is apart from the fact as to whether such directions could at all be issued; and secondly, whether such directions were necessary in an appeal between the respondents inter se for its disposal wherein the only question involved was as to whether the Family Court (ADJ) was justified in declining to condone the delay in filing the application filed by respondent No.1 herein under Order 9 Rule 13 of the CPC and, if so, on what grounds.

14. In view of the foregoing discussion, the appeals succeed and are accordingly allowed. The impugned orders are set aside. The case is remanded to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law after impleading the appellant herein as a party respondent in the appeal before the High Court.

15. We, however, consider it apposite to mention that admittedly during pendency of the litigation, certain events have taken place which have bearing over the rights of the parties.

16. It is for this reason, we request the High Court to implead the appellant herein as a party in the miscellaneous appeal and persuade the parties to settle the issues, if possible, on some mutually acceptable terms to give quietus to this long pending matrimonial dispute, since it is not in the interest of any of the parties to these appeals to continue this litigation.

17. It is only if the High Court eventually finds that the parties are not able to settle amicably for any reason, the miscellaneous appeal be decided on its merits in accordance with law without being influenced by any observations made in the impugned order and in this order.

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JOSEPH SHINE VERSUS UNION OF INDIA

Supreme Court of India

Bench : Hon'ble Mr. Justice A.M. Khanwilkar, Hon'ble Mr. Justice Dr. D.Y. Chandrachud and Hon'ble Mrs. Justice Indu Malhotra

Joseph Shine ...Petitioner(s)
Versus
Union of India ...Respondent(s)

WRIT PETITION (CRIMINAL) NO. 194 OF 2017[†]

Decided on 27 September, 2018

A. Penal Code, 1860 — S. 497 — Adultery — Futility of punishing it as a criminal offence in protecting institution of marriage from breakdown — Held, when parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation — It is now widely recognised that causes for the breakdown in marriages are far more complex — Quite frequently adultery is found to be the result and not the cause of an unhappy marital relationship — It is absolutely a matter of privacy at its pinnacle — The theories of punishment, whether deterrent or reformative, would not save the situation — A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party

B. Penal Code, 1860 — S. 497 — Adultery as a crime — Held, provision violative of Arts. 14, 15(1) and 21 of the Constitution, being manifestly arbitrary, gender discriminatory, encroachment into women's identity, dignity, liberty, privacy, sexual autonomy and freedom to make independent choice in matters of sexuality — An anachronistic law with underlying stereotypes of masculine chauvinism and dominance by treating women as mere property of men devoid of independent sexual agency

— Change in social, cultural, moral, economic and political values and perspective with passage of time and in the wake of evolving notions of transformative constitutionalism and constitutional moralism, provision criminalising adultery has lost its efficacy — Global trend is also in favour of treating adultery as a civil wrong and a ground of divorce — Hence S. 497 IPC and S. 198 CrPC deserve to be struck down as unconstitutional — Sowmithri Vishnu, 1985 Supp SCC 137 and V. Revathi, (1988) 2 SCC 72, overruled — Constitution of India — Arts. 14, 15(1) and 21 — Human and Civil Rights — Right to Sexual Freedom/Orientation, Marry, Family Life, Reproductive Freedom/Right to Abortion and Adoption — Family and Personal Laws — Marriage, Relationships and Sexual Freedom

C. Criminal Procedure Code, 1973 — S. 198 — Providing procedure for filing complaint in respect of offence of adultery under S. 497 IPC struck down as unconstitutional alongwith S. 497 IPC — Constitution of India, Arts. 14, 15(1) and 21

The instant writ petition has been filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC. A three-Judge Bench, on the first occasion, taking note of the authorities in Yusuf Abdul Aziz, 1954 SCR 930, Sowmithri Vishnu, 1985 Supp SCC 137, V. Revathi, (1988) 2 SCC 72 and W. Kalyani, (2012) 1 SCC 358 and appreciating the submissions advanced by the petitioner, felt

the necessity to have a re-look at the constitutionality of the provision. That is how the matter is placed before the present Bench.

Unanimously striking down Section 497 IPC, the Supreme Court

Held:

Per Dipak Misra, C.J. and Khanwilkar, J.

In Yusuf Abdul Aziz, 1954 SCR 930, the Court was dealing with the controversy that had travelled to the Supreme Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution. The Court treated the provision to be a special provision made for women and, therefore, saved by clause (3) of Article 15. Thus, the Court proceeded on the foundation of affirmative action. (Paras 8 and 9)

YusufAbdul Aziz v. State of Bombay, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri U 886, distinguished

Central Board ofDawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673 : 2005 SCC (Cri) 546 : 2005 SCC (L&S) 246, referred to

Yusuf Abdul Ajiz v. State, 1951 SCC OnLine Bom 59 : ILR 1952 Bom 449 : AIR 1951 Bom 470; Union of India v. Raghubir Singh, (1989) 2 SCC 754; Union of India v. Hansoli Devi, (2002) 7 SCC 273, cited

In Kalyani the issue of constitutional validity of the provision did not arise. (Para 23)

W. Kalyani v. State, (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445, distinguished

Section 497 IPC is unconstitutional as it violates Articles 14 and 21 Of the Constitution. Adultery should not be treated as an offence. It is also appropriate to declare Section 198 CrPC which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path. (Paras 66 and 67)

The decisions in Sowmithri Vishnu and V. Revathi cases stand overruled and any other judgment following precedents also stands overruled. (Para 68)

Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri U 886, limited

Sownuthri Vishnu v. Union of India, 1985 Supp SCC 137 : 1985 SCC (Cri) 325; V. Revathi v. Union of India, (1988) 2 SCC 72 : 1988 SCC (Cri) 308, overruled

Per Nariman, J. (concurring)

In Yusuf Abdul Aziz case, the difference in language between Article 15(3) and Articles 19(2) to (6) was not noticed. The limited ratio of this judgment merely refers to the last sentence in Section 497 which it upholds. Its ratio does not extend to upholding the entirety of the provision or referring to any of the arguments made before the present Bench for striking down the provision as a whole. This judgment does not, in any manner, commend itself or keep in tune with modern constitutional doctrine. In any case, its ratio is an extremely limited one as it upheld a wife hot being punishable as an abettor which is contained in Section 497 IPC. The focus on whether the provision as a whole would be constitutionally infirm was not there in the aforesaid judgment. (Paras 91 and 108)

Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri U 886, limited

Sowmithri Vishnu case must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14,15 and 21. Ancient notions

of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today. The statement in this judgment that stability of marriages is not an ideal to be scorned, can scarcely be applied to this provision, marital stability is not the object for which this provision was enacted. On all these counts, therefore, Sowmithri judgment is overruled. (Para 109)

Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137 : 1985 SCC (Cri) 325, overruled

Equally, the judgment in V. Revathi case, which upheld the constitutional validity of Section 198 must, for similar reasons, be held to be no longer good law. (Para 109)

V. Revathi v. Union of India, (1988) 2 SCC 72: 1988 SCC (Cri) 308, overruled

Section 497 IPC and Section 198 CrPC are violative of Articles 14, 15(1) and 21 of the Constitution of India and is, therefore, struck down as being invalid. (Para 109)

Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri U 886, distinguished

Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137 : 1985 SCC (Cri) 325; V. Revathi v. Union of India, (1988) 2 SCC 72 :1988 SCC (Cri) 308, overruled

Per Chandrachud, J. (concurring)

In Yusuf Abdul Aziz, the challenge was to a limited part of Section 497: that which prohibited a woman from being prosecuted as an abettor. Broader issues such as whether (/) the punishment for adultery violates Article 21; (z7) the statutory provision suffers from manifest arbitrariness; (Hi) the legislature has, while ostensibly protecting the sanctity of marriage, invaded the dignity of women; and (/v) Section 497 violates Article 15(1) by enforcing gender stereotypes were neither addressed before the Supreme Court nor were they dealt with. (Para 117)

Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri U 886, limited

In the subsequent decision of the three-Judge Bench in Sowmithri Vishnu case, the Court proceeded on the basis that the earlier decision in Yusuf Abdul Aziz case had upheld Section 497 against a challenge based on Articles 14 and 15 of the Constitution. This is not a correct reading or interpretation of the judgment. The decision in Sowmithri Vishnu case dealt with the constitutional challenge by approaching the discourse on the denial of equality in formal, and rather narrow terms. The error in Sowmithri Vishnu case lies in holding that there was no constitutional infringement. The decision has left unanswered the fundamental challenge under Article 14 of the Constitution which was urged before the Court. It construed Article 14 in narrow and formal sense. Sowmithri Vishnu case fails to deal with the substantive aspects of constitutional jurisprudence which have a bearing on the validity of Section 497: the guarantee of equality as a real protection against arbitrariness, the guarantee of life and personal liberty as an essential recognition of dignity, autonomy and privacy and above all gender equality as a cornerstone of a truly equal society. For these reasons, the decision in Sowmithri Vishnu case cannot be regarded as a correct exposition of the constitutional position. Sowmithri Vishnu case is overruled. (Paras 119, 122 and 125)

Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137": 1985 SCC (Cri) 325, overruled

The decision in Revathi case is a reiteration of Sowmithri Vishnu case. It applies the doctrine of equality and the prohibition against discrimination on the ground of sex in a formalistic sense. The logic of the judgment is that since neither of the spouses (man or woman) can prosecute the erring

spouse, the provision does not discriminate on the ground of sex. Apart from reading equality in a narrow confine, the judgment does not deal with crucial aspects bearing on the constitutionality of the provision. Revathi case, like Sowmithri Vishnu case does not lay down the correct legal principle. (Para 127)

Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137 :1985 SCC (Cri) 325, overruled

Section 497 lacks an adequately determining principle to criminalise consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution. (Para 220.1)

Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution. (Para 220.2)

Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution. (Para 220.3)

Section 497 is unconstitutional. (Para 220.4)

The decisions in Sowmithri Vishnu and Revathi cases are overruled. (Para 220.5)

Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137 : 1985 SCC (Cri) 325; V. Revathi v. Union of India, (1988) 2 SCC 72 : 1988 SCC (Cri) 308, overruled

Per Indu Mathotra, J. (concurring)

Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution. (Para 282.1)

Section 198(2) CrPC which contains the procedure for prosecution under Chapter XX IPC shall be unconstitutional only to the extent that it is applicable to the offence of adultery under Section 497. (Para 282.2)

The decisions in Sowmithri Vishnu case, V. Revathi case and W. Kalyani case hereby stand overruled. The view taken by the two-Judge Bench in Revathi case, that the absence of the right of the wife of an adulterous husband to sue him, or his paramour, was well-balanced by the inability of the husband to prosecute his adulterous wife for adultery, cannot be sustained. The wife's inability to prosecute her husband and his paramour, should be equated with the husband's ability to prosecute his wife's paramour. (Paras 282.3 and 264)

Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137 : 1985 SCC (Cri) 325; V. Revathi v. Union of India, (1988) 2 SCC 72 : 1988 SCC (Cri) 308; W. Kalyani v. State, (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445, overruled

Constitution of India — Art. 14

D. Penal Code, 1860 — S. 497 — Adultery as penal offence — Ingredients — Creates gender discrimination by not treating sexual agency of women on a par with that of men, contrary to constitutional guarantee of equality

— Anomalies and inconsistencies — Married man having sexual relationship with unmarried woman or widow with her consent or with married woman with her husband's consent or connivance

does not constitute offence of adultery — Adulteress is excluded from punishment as abettor by treating her a victim which shows chauvinistic nature of the provision — But wife of adulterer given no right to prosecute husband — On one hand it protects a woman on other hand it does not protect the other woman — By criminalising adultery ostensible object of preserving and protecting sanctity of marriage cannot be achieved — Adultery as an offence does not distinguish between broken marriage and continuing marriage as it depends upon spouses to exonerate marital infidelity and continue to live together or to seek divorce and separation — Provision reflects male dominance and subjugation of women and husband's control over wife's sexuality — Provision, based on hypothesis of husband being owner of wife's sexual agency, perpetuates patriarchal and paternalistic notions of wife as mere chattel or property of husband — Held, provision discriminatory, irrational, manifestly arbitrary, inconsistent with constitutional morality and fails to meet essence of substantive equality in its application to marriage — Hence violative of Art. 14 — Constitution of India, Art. 14

E. Criminal Procedure Code, 1973 — S. 198(2) — Aggrieved person — Husband of adulteress deemed to be person aggrieved having right to seek prosecution of adulterer but wife of adulterer having no such right — Held, deeming definition manifestly arbitrary — Provision violative of Art. 14 — Constitution of India, Art. 14

F. Doctrines and Maxims — Coverture — Doctrine recognises that after marriage wife's person gets incorporated into that of husband, as a result wife loses her identity and remains under protection and cover of husband — Words and Phrases — "Coverture"

G. Constitution of India — Art 14 — Substantive equality — Concept — It is in consonance with constitutional morality — Test — What is real impact of legislation; whether it contributes to subordination of disadvantaged group of individuals having regard to present social realities — Envisages an egalitarian existence where all forms of inequality, social, cultural, economic, political and sexual, are recognised and obliterated

H. Constitution of India — Art. 14 — Manifest arbitrariness — Test — Has elements of caprice, irrationality and lack of determining principle — Manifestly arbitrary legislation would be violative of Art. 14

I. Constitution of India — Art. 14 — Classification — Test — Whether based on intelligible differentia having rational nexus with object which legislation sought to achieve

J. Constitution of India — Art. 14 — Gender discrimination — A law not held unconstitutional earlier can be held so having regard to later developments in societal norms and values, including gender equality

Held:

Per Dipak Misra, C.J. and Khanwilkar, J.

Section 497 IPC does not bring within its purview an extramarital relationship with an unmarried woman or a widow. The provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery as Section 497 IPC lays down that when there is consent or connivance of the husband of the adulteress, there is no offence. Section 198 CrPC treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC. It does not consider the wife of the adulterer as an aggrieved person. The offence

and the deeming definition of an aggrieved person is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. This is so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, it is clear that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach. (Para 30)

Further, on a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted. Therefore, it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary. (Paras 29 and 30)

A statutory law can be struck down if it is found to be arbitrary. "Manifest arbitrariness", as laid own in Shayara Bano, (2017) 9 SCC 1 "must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary." Therefore arbitrariness in the sense of manifest arbitrariness would apply to negate legislation as well under Article 14 of the Constitution. (Para 26)

Shayara Bono v. Union of India, (2017) 9 SCC 1: (2017) 4 SCC (Civ) 277, relied on Joseph Shine v. Union of India, (2018) 2 SCC 189 : (2018) 2 SCC 190 : (2018) 1 SCC (Cri)

470 : (2018) 1 SCC (Cri) 471, referred to Prem Chand Garg v. Excise Commr, AIR 1963 SC 996; State ofU.P. v. Deoman Upadhyaya, (1961) 1 SCR 14 : AIR 1960 SC 1125 : 1960 Cri U 1504; Lachhman Dass v. State of Punjab, (1963) 2 SCR 353 : AIR 1963 SC 222; S.G. Jaisinghani v. Union of India, (1967) 2 SCR 703 : AIR 1967 SC 1427; United States v.Wunderlich, 1951 SCC Online US SC 93 : 96 L Ed 113 : 342 US 98 (1951); R. v. Wilkes, (1770) 4 Burr 2527 : 98 ER 327; State of Mysore v. S.R. Jayaram, (1968) 1 SCR 349 : AIR 1968 SC 346; Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; E.P. Royappa v. State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; A.L Kalra v. Project & Equipment Corpn. of India Ud., (1984) 3 SCC 316 : 1984 SCC (L&S) 497; Ajay Hasia v. Khalid Mujib Sehravaidi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258; K.R. Lakshmanan v. State of T.N., (1996) 2 SCC 226; Mithu v. State of Punjab, (1983) 2 SCC 277 : 1983 SCC (Cri) 405; SunilBatra v. DelhiAdmn., (1978) 4 SCC 494:1979 SCC (Cri) 155, cited

Per Nariman, J. (concurring)

In order to constitute the offence of adultery, the following must be established:

(i) Sexual intercourse between a married woman and a man who is not her husband;

(ii) The man who has sexual intercourse with the married woman must know or has reason to believe that she is the wife of another man;

(in) Such sexual intercourse must take place with her consent i.e. it must not amount to rape;

(iv) Sexual intercourse with the married woman must take place without the consent or connivance of her husband. (Para 100)

What is apparent from these ingredients is that a married man, who has sexual intercourse with an unmarried woman or a widow, does not commit the offence of adultery. Also, if a man has sexual intercourse with a married woman with the consent or connivance of her husband, he does not commit the offence of adultery. The consent of the woman committing adultery is material only for showing that the offence is not another offence, namely, rape. (Para 101)

The background in which the provision was enacted shows that in 1860, when the Penal Code was enacted, the vast majority of the population in this country, namely, Hindus, had no law of divorce as marriage was considered to be a sacrament. Equally, a Hindu man could marry any number of women until 1955. It is, therefore, not far to see as to why a married man having sexual intercourse with an unmarried woman was not the subject-matter of the offence. Since adultery did not exist as a ground in divorce law, there being no divorce law, and since a man could marry any number of wives among Hindus, it was clear that there was no sense in punishing a married man in having sex with an unmarried woman as he could easily marry her at a subsequent point in time. Two of the fundamental props or bases of this archaic law have since gone. Post 1955-1956, with the advent of the "Hindu Code", so to speak, a Hindu man can marry only one wife; and adultery has been made a ground for divorce in Hindu Law. (Para 102)

Charles A. Tinker v. Frederick L Colwell, 1904 SCC OnLine US SC 70 : 48 L Ed 754 : 193 US 473 (1904); Pritchard v. Pritchard and Sims, 1967 P 195 : (1967) 2 WLR 264 : (1966) 3 All ER 601 (CA), referred to

Exodus 20:14 (King James Version); Leviticus 20:10 (King James Version); 1 Corinthians 6:9-10 (King James Version); Matthew 5:27-28 (King James Version); John 8:7 (English Standard Version); G. Buhler (Tr.), The Laws of Manu (Clarendon Press, UK 1886) p. 150; Patrick Olivelle (Tr.), Dharmasutras—The Law Codes of Apastamba, Gautama, Baudhayana, and Vasistha (OUP 1999) pp. 70-71; Maulana Muhammad Ali (Tr.), The Koran (Al-Qur'an): Arabic-English Edn. with an Introduction by Mohamed A. 'Arafa (Tellerbooks 2018) p. 363; Linda Fitts Mischler: "Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex between Domestic Relations Attorneys and Their Clients", 23 Harvard Women's Law Journal 1,21-25 (2000) ["Linda Fitts Mischler"]; Section 4, Law Reforms (Miscellaneous Provisions) Act, 1970; G.H. Hmtmann: A Penal Code Prepared by the Indian Law Commissioners, and Published by the Command of the Governor General of India in Council (Bengal Military Orphan Press 1837) pp. 91-93; James C. Melvill: Copies of the Special Reports of the Indian Law Commissioners (East India House 1847) p. 76, referred to

Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman's husband is obtained — the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the "licensor", namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject-matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third- party male has "seduced" her, she being his victim. What is clear, therefore, is that this archaic

law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt. (Para 103)

The ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage, is not in fact the object of Section 497 at all. The sanctity of marriage can be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow, as has been seen hereinabove. Also, if the husband consents or connives at such sexual intercourse, the offence is not committed, thereby showing that it is not sanctity of marriage which is sought to be protected and preserved, but a proprietary right of a husband. Secondly, no deterrent effect has been shown to exist, or ever to have existed, which may be a legitimate consideration for a State enacting criminal law. Also, manifest arbitrariness is writ large even in cases where die offender happens to be a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she has sex with another man, the other man is immediately guilty of the offence. (Para 104)

Even when the CrPC was fully replaced in 1973, Section 198 CrPC continued to be on the statute book. Even as of today, Section 497 IPC continues to be on the statute book. When these sections are wholly outdated and have outlived their purpose, not only does the maxim of Roman law, cessante ratione legis, cessat ipsa lex, apply to interdict such law, but when such law falls foul of constitutional guarantees, it is the Supreme Court's solemn duty not to wait for legislation but to strike down such law. (Para 109)

Section 497 IPC and Section 198 CrPC are violative of Article 14 of the Constitution of India and are, therefore, struck down as being invalid. (Paras 105 and 109)

Per Chandrachud, J. (concurring)

The act which constitutes the offence under Section 497 IPC is a man engaging in sexual intercourse with a woman who is the "wife of another man". For the offence to arise, the man who engages in sexual intercourse must either know or have reason to believe that the woman is married. The provision stipulates that a man who has sexual intercourse with the wife of another will not be guilty of offence if the husband of the woman were to consent or, worse still, to connive. Whether or not a man with whom she has engaged in sexual intercourse is guilty of an offence depends exclusively on whether or not her husband is a consenting 'individual. For, in the eye of the law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. The mirror image of this constitutional infirmity is that the wife of the man who has engaged in the act has no voice or agency under the statute. Again, the law does not make it an offence for a married man to engage in an act of sexual intercourse with a single woman. His wife is not regarded by the law as a person whose agency and dignity is affected. The underlying basis of not penalising a sexual act by a married man with a single woman is that she (unlike a married woman) is not the property of a man (as the law would treat her to be if she is married). (Paras 160, 161 and 123)

Iris Marion Young: Justice and the Politics of Difference (Princeton University Press, 1990), referred to

Though women are exempted from prosecution under Section 497, the underlying notion upon which the provision rests, which conceives of women as property, is extremely harmful. The power to prosecute lies only with the husband (and not to the wife in cases where her husband commits adultery), and whether the crime itself has been committed depends on whether the husband provides "consent for the allegedly adulterous act". Women, therefore, occupy a liminal space in the law: they cannot be prosecuted for committing adultery, nor can they be aggrieved by it, by virtue of their status as their husband's property. Section 497 is also premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. The notion that women are "victims" of adultery and therefore require the beneficial exemption under Section 497. Such an understanding of the position of women is demeaning and fails to recognise them as equally autonomous individuals in society. Effectively, Indian jurisprudence has interpreted the constitutional guarantee of sex equality as a justification for differential treatment: to treat men and women differently is, ultimately, to act in women's interests. The status of Section 497 as a "special provision" operating for the benefit of women, therefore, constitutes a paradigmatic example of benevolent patriarchy. (Paras 141 and 142)

Cleveland Board of Education v. LaFLEUR, 1974 SCC Online US SC 18 : 39 L Ed 2d 52 : 414 US 632 (1974); Griswotd v. Connecticut, 1965 SCC Online US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965); Carey v. Population Services International, 1977 SCC Online US SC 103 : 52 L Ed 2d 675 : 431 US 678 (1977); Irving v. Commonwealth of Virginia, 1967 SCC Online US SC 152 : 18 L Ed 2d 1010 : 388 US 1 (1967); Zablocki v. Redhail, 1978 SCC Online US SC 14:54 L Ed 2d 618 : 434 US 374 (1978); Boddie v. Connecticut, 1971 SCC Online US SC 44 : 28 L Ed 2d 113 : 401 US 371 (1971); Moore v. City of East Cleveland Ohio, 1977 SCC Online US SC 93 : 52 L Ed 2d 531 : 431 US 494 (1977); Bowers v. Haniwick, 1986 SCC Online US SC 165 :92 L Ed 2d 140: 478 US 186 (1986); Roberts v. United States, 1984 SCC Online US SC 182 : 82 L Ed 2d 462 : 468 US 609 (1984); Thornburgh v. American College of Obstetricians and Gynecologists, 1986 SCC Online US SC 126 : 90 L Ed 2d 779 : 476 US 747 (1986); Eisenstadt v. R, Baini, 1972 SCC Online US SC 62: 31 L Ed 2d 349 :405 US 438 (1972); Law & Advocacy for Women in Uganda v. Attorney General of Uganda, 2007 SCC Online UGCC 1, referred to

Law Commission of India, 42nd Report: Indian Penal Code (1971), p. 326; Law Commission of India, 156th Report: Indian Penal Code (1997) p. 172; Report of Malimath Committee on Reforms of Criminal Justice System (2003), p. 190; Abhinav Sekhri: "The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India", Socio-Legal Review (2016), p. 63; Brenda Cossman and Ratna Kapur: Subversive Sites: Feminist Engagements with Law in India (Sage Publications 1996); Katherine T. Bartlett, "Feminist Legal Methods", Harvard Law Review (1990); UN Working Group on Women's Human Rights: Report (18-10-2012), available at: <http://newsarchiye.ohchr.org/EN/ NewsEvents/ Pages/DisplayNews.aspx?NewsID=12672&LangID=E>; Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <Error! Hyperlink reference not valid.>; Firstpost, "South Korean court abolishes law that made adultery illegal", (26-2-2015), available at <https://www.firstpost.com/world/south-korean-court-aboUshes-law-saying-adultery-is-illegal-2122935.html>; Opinions of Park Han-Chul, Lee Jin-Surig, Kim Chang-Jong, Seo Ki-Seog and Cho Yong-Ho, JJ. (Adultery is Unconstitutional); Article 10 of the South Korean Constitution; Case No: 2009Huri-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourtgo.kr/ cckh6me/eng/deeisionsAnajordecisions/majorDetail.do>, Part V-A (3)(1) ("Change in Public's Legal Awareness" under the head of "Appropriateness of Means and Least Restrictiveness"); Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourt.go.kr/ cckhome/eng/decisions/majordecisions/majorDetail.do>, Part V-A

(3)(3) ("Effectiveness of Criminal Punishment", under the head of "Appropriateness of Means and Least Restrictiveness"); Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourt.go.kr/cckhome/ eng/decisions/majordecisions/majorDetail.do>, Part V-A (5) ("Balance of Interests & Conclusion"); Reuters: 'Uganda scraps "sexist" adultery law', (5-4-2007), available at <https://www.reuters.com/article/us-uganda-adultery/uganda-scraps-sexist-adultery-law-idUSL0510814320070405>; Martin J. Siegel: "For Better or For Worse: Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) pp. 45,70,74, 78,82,85 and 89; Deborah Rhode, Adultery: Infidelity and the Law (HUP, 2016), referred to

The offence applies only to the man committing adultery. A woman committing adultery is not considered to be an "abettor" to the offence. The power to prosecute for adultery rests only with the husband of the woman. The history of adultery throws light upon disparate attitudes toward male and female infidelity, and reveals the double standard in law and morality that has been applied to men and women. Section 497 IPC and Section 198 CrPC are seen to treat men and women unequally. That a woman is regarded no more than as a possession of her husband is evidenced in Section 497 IPC, in more than one context. Arbitrariness is writ large on the provision. The problem with Section 497 IPC is not just a matter of underinclusion. (Paras 128, 129, 140 and 123)

R. v. Mawgridge, 1707 Kelyng J 119 : 84 ER 1107, referred to

David Turner: "Adultery", in The Oxford Encyclopaedia of Women in World History (2008); James A. Brundage: Law, Sex, and Christian Society in Medieval Europe, pp. 6, 10 & 27; Faramerz Dabhoiwala: The Origins of Sex: A History of the First Sexual Revolution (2012) p. 5; David Turner: "Adultery", in The Oxford Encyclopaedia of Women in World History (2008), p. 30; Vern Bullough: Medieval Concepts of Adultery, p. 7; Bonnie G. Smith (Ed.): The Oxford Encyclopaedia of Women in World History (Oxford), pp. 27 & 30; Martin Siegel: "For Better or for Worse: Adultery, Crime & the Constitution", Vol. 30, Journal of Family Law (1991), p. 46; Jeremy D. Weinstein: "Adultery, Law, and the State: AHistory", Vol. 38, HASTINGS L.J. (1986), p. 202; R. Huebner, F. Philbrick (Tr.) A History of Germanic Private Law (1918); James R. Mellow: "Hawthorne's Divided Genius", The Wilson Quarterly (1982); Mary Beth Norton: Founding Mothers and Fathers: Gendered Power and the Forming of American Society (1996); Keith Thomas: "The Puritans and Adultery: The Act of 1650 Reconsidered", in Donald Pennington, Keith Thomas (Eds.), Puritans and Revolutionaries: Essays in Seventeenth Century History Presented to Christopher Hill, p. 281; Charles E. Torcia: Wharton's Criminal Law, Section 218, (1994) p. 528; J.E. Loftis: "Congreve's Way of the World and Popular Criminal Literature", Studies in English Literature, 1500-1900, 36(3) (1996) p. 293; Joanne Bailey: Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800 (2009) p. 143; David Turner: Adultery in The Oxford Encyclopaedia of Women in World History (2008) p. 28; Blackstone's Commentaries on the Laws of England, Book TV (1778), pp. 191-92; William Blackstone: Commentaries on the Laws of England, Vol. I (1765), pp. 442-45; Vera Bergelson: "Rethinking Rape-By-Fraud" in Chris Ashford, Alan Reed and Nicola Wake (Eds.), Legal Perspectives on State Power: Consent and Control (2016), p. 161; Blackstone's Commentaries on the Laws of England, (Book IV 1778) pp. 64-65; Abhinav Sekhri: "The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India", Socio-Legal Review (2016), p. 52; Macaulay's Draft Penal Code (1837), Note Q; Second Report on the Indian Penal Code (1847), at pp. 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, at p. 365; A Penal Code prepared by The Indian Law Commissioners (1838), The Second Report on the Indian Penal Code, at p. 74, referred to

The provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be "adulterous", by definition. (Para 160)

Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the "institution of marriage", it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision. (Para 162)

The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. "Ostensible" it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The essential values on which the Constitution is founded—liberty, dignity and equality—cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness. (Para 168)

Navtej Singh Joharv. Union of India, (2018) 10 SCC 1: (2019) 1 SCC (Cri) 1; Shayara Bono v. Union of India, (2017) 9 SCC 1: (2017) 4 SCC (Civ) 277, relied on

State of A.P.V. McDowell & Co., (1996) 3 SCC 709, cited

While engrafting the provision into Chapter XX of the Penal Code—"Of offences relating to marriage"—the legislature has based the offence on ah implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law is that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman is bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality is an essential aspect of identity. Choices in matters of sexuality are reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be disassociated from

the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and are premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it is only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision is proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which is one-sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14. (Para 169)

In consonance with constitutional morality, substantive equality is "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society". To move away from a f formalistic notion of equality which disregards social realities, the Court must take into account the impact of the rule or provision in the lives of citizens. (Para 171) S. Martin and K. Mahoney (Eds.), Kathy Lahey: Feminist Theories of (Inequality, in Equality and Judicial Neutrality (1987), referred to

The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the , subordination of a disadvantaged group of individuals. The disadvantage must be addressed not by treating a woman as "weak" but by construing her entitlement to an equal citizenship. The former legitimises patronising attitudes towards women. The latter links true equality to the realisation of dignity. The focus of such an approach is not simply on equal treatment under the law, but rather on the real impact of the legislation Thus, Section 497 has to be examined in the light of existing social structures which enforce the position of a woman as an unequal participant in a marriage. (Para 172)

Nivedita Menon (Ed.), Ratna Kapur and Brenda Cossman: "On Women, Equality and the Constitution: Through the Looking Glass of Feminism in Gender and Politics in India" (1993); Maureen Maloney: "An Analysis of Direct Taxes in India: A Feminist Perspective", Journal of the Indian Law Institute (1988); Catherine A. Mackinnon: "Sex equality under the Constitution of India: Problems, prospects, and 'personal laws' ", (OUP and New York University School of Law 2006), referred to

Facially, the law may be construed to operate as an exemption from criminal sanctions. However, when viewed in the context of a social structure which considers the husband as the owner of the wife's sexuality, the law perpetuates a deeply entrenched patriarchal order. The true realisation of the substantive content of equality must entail an overhaul of these social structures. When all visible and invisible forms of inequality—social, cultural, economic, political or sexual—are recognised and obliterated; a truly egalitarian existence can be imagined. (Para 174)

Per Indu Malhotra, J. (concurring)

The provision of Section 497 is replete with anomalies and incongruities, such as: (7) Under Section 497, it is only the male paramour who is punishable for the offence of adultery. The woman who is pari delicto with the adulterous male, is not punishable, even as an "abettor". The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery (W. Kalyani case, SCC para 10). (2) The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man, has no similar right to prosecute her husband or his paramour. (3) Section 497 IPC read with Section 198(2) CrPC only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery. (4) The act of a married man engaging in sexual intercourse with an unmarried or divorced woman* does not constitute "adultery" under Section 497. (5) If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery. The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory. (Para 271),

W. Kalyani v. State, (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445, considered

The constitutional validity of Section 497 has to be tested on the anvil of Article 14 of the Constitution. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied: (i) The classification is made on the basis of an "intelligible differentia" which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and (ii) The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision. (Para 272)

E. V. Chinnaiah v. State ofA.P., (2005) 1 SCC 394: (2008) 2 SCC (L&S) 329, relied on

With respect to the offence of adultery committed by two consenting adults, there ought not to be any discrimination on the basis of sex alone since it has no rational nexus with the object sought to be achieved. Section 497 IPC, makes two classifications: The first classification is based on who has the right to prosecute: It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery. Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour. The second classification is based on who can be prosecuted. It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence. It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a "victim", and the male offender is the "seducer". Section 497 fails to consider both men and women as equally autonomous individuals in society. (Paras 272.1, 272.2, 273.3 and 273.4)

Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1, affirmed

Having regard to the historical background, adultery, as an offence, was not a crime under Common Law, in England. It was punishable by the ecclesiastical courts which exercised jurisdiction over sacramental matters that included marriage, separation, legitimacy, succession to personal property, etc. In England, coverture determined the rights of married women, under Common Law. A "feme sole" transformed into a "feme coverf after marriage. "Feme covert" was based on the doctrine of "Unity of Persons" — i.e. the husband and wife were a single legal identity. This was based on notions of biblical morality that a husband and wife were "one in flesh and blood". The effect of "coverture" was that a married woman's legal rights were subsumed by that of her husband. A married woman could not own property, execute legal documents, enter into a contract, or obtain an education against her husband's wishes, or retain a salary for herself. The principle of coverture subsisted throughout the marriage of the couple. (Paras 224 and 227)

Pritchard v. Pritchard and Sims, 1967 P 195 : (1967) 2 WLR 264: (1966) 3 All ER 601 (CA), referred to

The New International Webster's Comprehensive Dictionary of the English Language, (Deluxe Encyclopedic Edition, Trident Press International 1996) p. 21, referred to

On the historical context in 1860 when the IPC was enacted, women had no rights independent of their husbands, and were treated as chattel or "property" of their husbands. Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a "theft" of his property, for which he could proceed to prosecute the offender. The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone. (Para 272.3)

A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore ex facie discriminatory against women, and violative of Article 14. Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary. (Para 272.4)

A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality. Section 497 IPC was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860s. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals. This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society. (Paras 273.1 and 273.2)

Motor General Traders v. State of A.P., (1984) 1 SCC 222; Rattan Arya v. State of T.N., (1986) 3 SCC 385; John Vallamattom v. Union of India, (2003) 6 SCC 611, referred to

A Penal Code prepared by The Indian Law Commissioners (1838), Notes of Lord Thomas Babington Macaulay, Note Q, referred to

Section 497 fails to consider both men and women as equally autonomous individuals in society. The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereotypes in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution.

There is therefore, no justification for continuance of Section 497 IPC as framed in 1860, to remain on the statute book. (Paras 273.4 and 273.5) Uma Chakravarti: Gendering Caste: Through a Feminist Lens (STREE Publications 2003 p. 71; 156th Report on the Indian Penal Code (Vol. I), Law Commission of India at Para 9.43 at p. 169; A Penal Code prepared by The Indian Law Commissioners (1838), The Second Report on the Indian Penal Code; A Penal Code prepared by The Indian Law Commissioners (1838), Notes of Lord Thomas Babington Macaulay, Note Q; 42nd Report on the Indian Penal Code, Law Commission of India; 156th Report on the Indian Penal Code (Vol. I), Law Commission of India, pp. 169-72; Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, chaired by Justice VS. Malimath, (2003), referred to

Constitution of India — Art. 15

K. Penal Code, I860 — S. 497 — Adultery — Provision discriminates against woman on ground of sex only

— Provision an archaic law which seeks to perpetuate gender stereotype of women being submissive and passive, not expected to exercise their sexual agency during marriage but infidelity of men is normal — Treats woman as chattel and punishes man who commits theft of husband's property — Recognises husband's control over wife's sexual agency — Thereby it demeans women because of sex, while Constitution guarantees men and women equal status — Such discriminatory treatment meted out to women on ground of sex only offends Art. 15(1) — Provision not conceived to benefit women, hence not saved by Art. 15(3) — Constitution of India — Arts. 15(1) and (3) — Human and Civil Rights — Right to Gender Equality/Freedom/Justice and against Discrimination — Generally

L. Constitution of India — Art. 15(3) — Enabling provision — Object is to effectuate protective discrimination — To discriminate in favour of women, a form of affirmative action for their advantage

— Has to be considered in entire context of Arts. 14 to 18, being constituent of a single code on equality incorporating principle of non¬discrimination — Does not protect legislation which perpetuates patriarchal notions in garb of protecting women — Human and Civil Rights — Right to Gender Equality/Freedom/Justice and against Discrimination — Generally

Held:

Per Nariman, J.

Section 497 IPC is violative of Article 15(1) of the Constitution being discriminatory against women on ground of sex only. (Para 105)

In treating a woman as chattel for the purposes of Section 497 IPC, it is clear that such provision discriminates against women on grounds of sex only, and must be struck down on ground of being violative of Article 15(3) of the Constitution. (Para 105)

Section 198 CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 has also to be held constitutionally infirm being violative of Article 15(1) of the Constitution. (Para 105)

Per Chandrachud, J.

From a joint reading of Section 497 IPC and Section 198(2) CrPC, the following propositions emerge:

(i) Sexual relations by a married woman with another man outside her marriage without the consent of her husband is criminalised;

(ii) In an "adulterous relationship", the man is punished for adultery, while the woman is not (even as an abettor);

(iii) Sexual relations by a married man with an unmarried woman are not criminalised;

(iv) Section 497 accords primacy to the consent of the husband to determine whether criminality is attached to the man who has consensual sexual relations with the spouse of the former. Consent or willingness of the woman is irrelevant to the offence;

(v) A man who has sexual relations with the spouse of another man is relieved of the offence only if her spouse has consented or, even connived; and

(vi) Section 497 IPC, read with Section 198 CrPC, gives the man the sole right to lodge a complaint and precludes a woman from initiating criminal proceedings. (Para 176)

The effect of Section 497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing. (Para 178)

Section 497 criminalises the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being denuded of sexual agency, should be afforded the "protection" of the law. In criminalising the accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is "submissive", or worse still "naive" has no legitimacy in the discourse of a liberal Constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalises only the accused man. (Para 179)

Pertinent to the present enquiry, is that the provision allows only the husband to initiate a prosecution for adultery. The consent or connivance of the husband precludes prosecution. If a husband consents, his spouse is effectively granted permission to exercise her sexual agency with another individual. This guarantees a degree of control to the husband over the sexual agency of his spouse. As a relic of Victorian morality, this control over the sexual agency of the spouse, views the wife as the property of the husband. Fidelity of the woman, and the husband's control over it, is seen as maintaining the "property" interest of a husband in his wife. In this view, a woman is confounded with things that can be possessed. In construing the spouse as a passive or inanimate object, the law on adultery seeks to punish a person who attempts theft on the property of the husband. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497. (Paras 180 and 181)

Phyllis Coleman: "Who's Been Sleeping in My Bed? You and Me, and the State Makes Three", Vol. 24, Indian Law Review (1991); Women's Work, Men's Property: The Origins of Gender and Class (1986), referred to

Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. Women are expected to be chaste. A woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband. Section 497 has a significant social impact on the sexual agency of women. It builds on existing gender stereotypes and bias and further perpetuates them. Cultural stereotypes are more forgiving of a man engaging in sexual relations than a woman. In restricting the sexual agency of women, Section 497 gives legal recognition to socially discriminatory and gender-based norms. This is also offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values. (Paras 181 to 183)

The provision is grounded in and has a deep social effect on how society perceives the sexual agency of women. In reinforcing the patriarchal structure which demands her controlled sexuality, Section 497 purports to serve as a provision envisaged for the protection of the sanctity of marriage. In the context of a constitutional vision characterised by the struggle to break through the shackles of gender stereotypes and guarantee an equal citizenship, Section 497 entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order. (Para 186)

In Navtej Singh Johar, (2018) 10 SCC 1, it was observed (SCC p. 222 para 438): "A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex." In Yusuf Abdul Aziz, 1954 SCR 930, the Court construed the exemption granted to women from criminal sanctions as a "special provision" for the benefit of women and thus, protected under Article 15(3) of the Constitution. It is of particular relevance to examine the mischief that the provision intends to remedy. The history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency. Thus, Section 497 was never conceived to benefit women. (Paras 185 and 118)

Union of India v. Elphinstone Spg. and Wvg. Co. Ltd., (2001) 4 SCC 139; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1, relied on

Anuj Carg v. Hotel Assn. of India, (2008) 3 SCC 1, affirmed

Section 497 exempts a woman from being punished as an abettor. Underlying this exemption is the notion that a woman is the victim of being seduced into a sexual relationship with a person who is not her husband. In assuming that the woman has no sexual agency, the exemption seeks to be justified on

the ground of being a provision that is beneficial to women and protected under Article 15(3) of the Constitution. This is contrary to the remedy which Article 15(3) sought to embody. (Para 187)

State ofA.P. v. P.B. Vijayakumar, (1995) 4 SCC 520 : 1995 SCC (L&S) 1056; Independent Thought v. Union of India, (2017) 10 SCC 800 : (2018) 1 SCC (Cri) 13, affirmed

Article 15(3) encapsulates the notion of "protective discrimination". The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of "protection". This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was "seduced" into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to "protect" her. The "protection" afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women. (Para 189)

Per Indu Malhotra, J.

Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens. Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution. The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as "beneficial legislation". (Para 274)

Thota Sesharathamma v. Thota Manikyamma, (1991) 4 SCC 312, affirmed

W. Kalyani v. State, (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445, considered

The purpose of Article 15(3) is to further socio-economic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences. A section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination. (Para 277)

Constitution of India — Arts. 366(10) and 372 — "Existing Law"

M. Penal Code, 1860 — S. 497 — An "existing law" enacted prior to the Constitution within meaning of Art. 366(10), which continues by virtue of Art. 372(1) of Constitution — Constitution of India, Arts. 366(10) and 372(1)

N. Constitution of India — Arts. 366(10), 372(1), 15(3), 16(4) and 19(2) to (6) — "Existing laws" refer to pre-constitutional laws which continue to operate by virtue of Art. 372(1) — Expres-

sion "State making any laws" used in Arts. 19(2) to (6) refers to law made by State after Constitution

Held:

Per Nariman, J.

Section 497 is, in constitutional language, an "existing law" which continues, by virtue of Article 372(1), to apply, and could not, therefore, be said to be a law made by the "State". (Para 87)

Articles 19(2) to (6) clearly refer to "existing law" as being separate from "the State making any law", indicating that the State making any law would be laws made after the Constitution comes into force as opposed to "existing law", which are pre-constitutional laws enacted before the Constitution came into force, as is clear from the definition of "existing law" contained in Article 366(10). (Para 89) Dattatraya MotiramMore v. State of Bombay, 1952 SCC Online Bom 120 : AIR 1953 Bom 311, criticised Article 15(3) refers to the State making laws which therefore, obviously cannot include existing law. Article 15(3) is in this respect similar to Article 16(4). The vital difference in language between Articles 15(3) and 16(4) on the one hand, and Articles 19(2) to.(6) on the other, must thus be given effect. (Para 90)

Constitution of India — Art. 21

O. Penal Code, 1860—S. 497—Adultery as a crime—It encroaches upon women's liberty, dignity, privacy, sexual autonomy and freedom of choice in matters of sexuality — Hence violative of Art. 21 of the Constitution

— By criminalising adultery, it seeks to enforce fidelity in marriage by coercive means which amounts to intrusion into core of privacy — Further, underlying command to remain loyal in matrimonial relationship is socio-moral in nature which has no place in evolving concept of constitutional morality — It confers power to prosecute adulterer on husband of adulteress and whether crime itself committed also made dependent upon "consent or connivance" of husband — But consent of adulteress irrelevant in constituting offence if ingredients of the provision satisfied — Wife of adulterer also incapable of making complaint for prosecution of adulterer — Such masculine chauvinism downgraded status of married women to mere chattel or property of husband

— Thereby women are denuded of their identity, right to liberty and dignity — Provision also disregards sexual autonomy of women and disallows them to make fundamental choices regarding sexuality — In view of violation of these basic rights, equally guaranteed to women by the Constitution, this anachronistic provision deserves to be struck down — Constitution of India, Art. 21

P. Constitution of India — Arts. 15,14,21 and 32 — Role of constitutional court in case of violation of fundamental rights of women — Court would be obliged to step in to ensure that these rights be enjoyed equally by women as well in fullest sense

Q. Constitution of India — Art. 21 — Identity — Human sexuality Is an essential aspect of identity — Identity of an individual must be as an individual in her/his own right — Woman's Identity does not get submerged as a result of her marriage — If women are forced to think as men or how society desires, that would be disastrous to their identity — Human and Civil Rights — Right to Identity/Identification/Aadhaar — Generally

R. Constitution of India — Art. 21 — Sexual autonomy and dignity — Individual has sovereignty over own body and can surrender it wilfully to another individual — Autonomy to fulfil

sexual desires in pursuit of happiness is intrinsic to dignified human existence—To characterise woman as a passive object denuded of sexual agency is denial of autonomy — Respect for sexual autonomy of woman is founded on equality

S. Constitution of India — Art. 21 — Freedom of choice in matters of sexuality — Reflective of human desire of expression and to be intimate with person of choice — To make sexual choice by an individual is a facet of human liberty and dignity

T. Constitution of India — Art. 21 — Privacy of women — Connotes acts within their personal sphere which includes exercise of sexual agency — Men's control over wife's sexuality results in violation of Art. 21 — Privacy and personal liberty are, however, subject to reasonable restrictions when legitimate public interests involved — Freedom to have consensual sexual relationship outside marriage by a married person does not warrant protection under Art. 21 — Human and Civil Rights — Right to Privacy

U. Constitution of India — Art 21 — Liberty — Perspective of public interest relevant — Human and Civil Rights — Right to Liberty and Freedom

Held:

Per Dipak Misra, C.J. and Khanwilkar, J.

Individual dignity has a sanctified realm in a civilised society. The civility of a civilisation earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. (Para 1)

There cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance. A husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written. (Paras 43 and 1)

R. v. R., (1992) 1 AC 599 : (1991) 3 WLR 767 : (1991) 4 All ER 481 (HL), relied on

Arun Kumar Agrawal v. National Insurance Co. Ltd., (2010) 9 SCC 218 : (2010) 3 SCC (Civ) 664 : (2010) 3 SCC (Cri) 1313; State ofM.P. v. Madanlal, (2015) 7 SCC 681 : (2015) 3 SCC (Cri) 287; Pawan Kumarv. State of HP., (2017) 7 SCC 780: (2017) 4 SCC (Cri) 161; Shamima Farooqui v. ShahidKhan, (2015) 5 SCC 705 ; (2015) 3 SCC (Civ) 274 : (2015) 2 SCC (Cri) 785; Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287; Cham Khurana v. Union of India, (2015) 1 SCC 192 : (2015) 1 SCC (L&S) 161; Shakti Vahini v. Union of India, (2018) 7 SCC 192 : (2018) 3 SCC (Civ) 580 : (2018) 3 SCC (Cri) 1, affirmed

Ajit Savant Majagvai v. State ofKarnataka, (1997) 7 SCC 110 : 1997 SCC (Cri) 992; Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125; State of HP. v. Nikku Ram, (1995) 6 SCC 219 :1995 SCC (Cri) 1090, cited

The Due Process of Law (Butterworths, London 2002) p. 212, relied on

John Stuart Mill, On Subjection of Women, Chapter 1 (1869), referred to

In case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite. (Para 63)

The Court, with the passage of time, has recognised the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, Section 497 IPC offends Article 21 of the Constitution. (Para 48)

K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1; Common Cause v. Union of India, (2018) 5 SCC 1, relied on

National Legal Services Authority v. Union of India, (2014) 5 SCC 438, affirmed

Prem Shankar Shukla v. Delhi Admn., (1980) 3 SCC 526 : 1980 SCC (Cri) 815; Francis CoralieMullin v. State (UT of Delhi), (1981) 1 SCC 608 : 1981 SCC (Cri) 212; Bandhua MuktiMorcha v. Union of India, (1984) 3 SCC 161 : 1984 SCC (L&S) 389; Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal, (2010) 3 SCC 786 : (2010) 1 SCC (L&S) 894; Shabnam v. Union of India, (2015) 6 SCC 702 : (2015) 3 SCC (Cri) 355; Jeeja Ghosh v. Union of India, (2016) 7 SCC 761: (2016) 3 SCC (Civ) 551; Mehmood NayyarAzam v. State ofChhattisgarh, (2012) 8 SCC 1: (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449, Cited

Per Nariman, J. (concurring)

The dignity of the individual, which is spoken of in the Preamble to the Constitution of India, is a facet of Article 21 of the Constitution, A statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine and must be struck down on this ground also. (Para 107)

K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, relied on

Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360; Prem Shankar Shukla v. Delhi Admn., (1980) 3 SCC 526 : 1980 SCC (Cri) 815, cited

Per Chandrachud, J. (concurring)

In the preceding years, the Court has evolved a jurisprudence of rights— granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the stature of a constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, the validity of Section 497 IPC has to be examined. In doing so, the constitutionality of moral and societal regulation of women and their intimate lives through the law have also to be tested. (Para 114)

Section 497 IPC, in its effort to protect the sanctity of marriage, has adopted a notion of marriage which does not regard the man and the woman as equal partners. It proceeds on the subjection of the

woman to the will of her husband. In doing so, Section 497 IPC subordinates the woman to a position of inferiority thereby offending her dignity, which is the core of Article 21 of the Constitution.

(Para 124)

The criminalisation of adultery came at a social cost: of disregarding the agency of a woman as a sentient being. The law on adultery is but a codified rule of patriarchy. Patriarchy has permeated the lives of women for centuries. Ostensibly, society has two sets of standards of morality forjudging sexual behaviour. One set for its female members and another for males. Society ascribes impossible virtues to a woman and confines her to a narrow sphere of behaviour by an expectation of conformity. Raising a woman to a pedestal is one part of the endeavour. The second part is all about confining her to a space. The boundaries of that space are defined by what a woman should or should not be. A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex determination and infanticide. As an embodiment of virtue, society expects the women to be a mute spectator to and even accepting of egregious discrimination within the home. This is part of the process of raising women to a pedestal conditioned by male notions of what is right and what is wrong for a woman. The notion that women, who are equally entitled to the protections of the Constitution as their male counterparts, may be treated as objects capable of being possessed, is an exercise of subjugation and inflicting indignity. Anachronistic conceptions of "chastity" and "honour" have dictated the social and cultural lives of women, depriving them of the guarantees of dignity and privacy, contained in the Constitution. The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, courts must step in to ensure that dignitj is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situation! when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution. Section 497 seeks the preservation of a construct of marriage in wbicl female fidelity is enforced by the letter of the law and by the coercive authority o the State. Such a conception goes against the spirit of the rights-based jurisprudence of the Supreme Court, which seeks to protect the dignity of an individual and her "intimate personal choices". It cannot be held that these rights cease to exist once the woman enters into a marriage. (Paras 190 to 192 and 202)

Charles Jean Marie Letorneau, The Evolution of Marriage (2011); Nandita Haksar, "Dominance, Suppression and the Law" in Lotika Sarkar and B. Sivaramayya (Eds.), Women and the Law: Contemporary Problems, (Vikas Publishing House 1994), referred to

Control over women's sexuality is the key patriarchal assumption that underlies family and marriage. When it shifts to the "public" as opposed to the "private", the misogyny becomes even more pronounced. Section 497 embodies this. By the operation of the provision, women's sexuality is sought to be controlled in a number of ways. First, the husband and he alone is enabled to prosecute the man with whom his wife has sexual relations. Even in cases where the relationship is based on the consent of the woman, the law treats it as an offence, denying a woman who has voluntarily entered into a consensual relationship of her sexual agency. Second, such a relationship would be beyond the reach of penal law if her husband consents to it. The second condition is a telling reflection of the patriarchal assumption underlying the criminal provision: that the husband is the owner of the wife's sexual agency.(Para 195)

K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, relied on

Nivedita Menon, Seeing like a Feminist, (Zubaan Books 2012) p. 35, relied on

Patriarchy and paternalism are the underpinnings of Section 497. It needs no iteration that misogyny and patriarchal notions of sexual control find no place in a constitutional order which has recognised dignity as intrinsic to a person, autonomy being an essential component of this right. The operation of Section 497 denotes that "adulterous women" virtually exercise no agency; or at least not enough agency to make them criminally liable. They are constructed as victims. As victims, they are to be protected by being exempt from sanctions of a criminal nature. Not only is there a denial of sexual agency, women are also not seen to be harmed by the offence. Thus, the provision is not simply about protecting the sanctity of the marital relationship. It is all about protecting a husband's interest in his "exclusive access to his wife's sexuality". (Para 197)

Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, (Sage Publications 1996) pp. 119-120, referred to

Section 497 chains the woman to antediluvian notions of sexuality. Sexual autonomy as a facet of individual liberty, is protected under Article 21 of the Constitution. To characterise a woman as a passive object, denuded of agency, is a denial of autonomy. (Paras 198 and 199)

Navtej Singh Johar v. Union of India, (2018) 10 SCC 1: (2019) 1 SCC (Cri) 1, relied on

David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution", Hastings Law Journal, Vol. 30, at pp. 1000-1001; Thomas M. Jr. Scanlon, "Rawls' Theory of Justice", University of Pennsylvania Law Review (1973) at p. 1022; Id, p. 1023, referred to

The identity of the woman must be as an "individual in her own right". In that sense, her identity does not get submerged as a result of her marriage. Section 497 lays down the norm that the identity of a married woman is but as the Wife of her spouse. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal Constitution.

(Para 203)

Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1, relied on

In criminalising adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship. (Para 209)

This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. Individuals in a relationship, whether within or outside marriage, have a legitimate expectation that each will provide to the other the same element of companionship and respect for choices. Respect for sexual autonomy is founded on the equality between spouses and partners and the recognition by each of them of the dignity of the other. Control over sexuality attaches to the human element in each individual. Marriage —whether it be a sacrament or contract— does not result in ceding of the autonomy of one spouse to another. (Para 210)

Shafin Jahan v. Asokan KM., (2018) 16 SCC 368 : (2019) 1 SCC (Civ) 446, affirmed Nivedita Menon: Seeing like a Feminist, (Zubaan Books 2012) p. 135; quoting Archana Verma, Stree Vimarsh Ke Mahotsav (2010), referred to

The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse. It is the duty of the Supreme Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life—irrespective of whether these spheres may be regarded as "public" or "private". (Para 213)

The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution. (Para 192)

In remedying injustices, the Court cannot shy away from delving into the "personal", and as a consequence, the "public". It becomes imperative to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and "granting" rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink—women are equal citizens of this nation, entitled to the protections of the Constitution. Any legislation which results in the denial of these constitutional guarantees to women, cannot pass the test of constitutionality. (Para 196)

Per Indu Malhotra, J. (concurring)

The right to privacy and personal liberty is not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved. It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21. (Para 278)

In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a threefold requirement as set held in K.S. Puttaswamy (Privacy-9J.), (2017) 10 SCC 1: (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (Hi) proportionality, which ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the threefold requirement, and must therefore be struck down. (Para 279)

K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, relied on

Adultery as criminal offence — Propriety

V. Penal Code, 1860 — S. 497 — Adultery should not be treated as criminal offence — It can be a ground for civil wrong including dissolution of marriage

— Treating adultery an offence would tantamount to State entering into privacy of matrimonial sphere and impinging on rights to liberty, dignity, equality and autonomy, which would offend Art.

21 of the Constitution — Adultery envisages a tripartite involvement of adulterer, adulteress and husband of adulteress—Though several enactments made by Parliament provided penal offences in matrimonial matters for protection of women but those are meant for other purposes relating to matrimonial relationship and extinction of life of married women during subsistence of marriage and there is no third party involvement therein — Therefore, adultery should be left as a ground of divorce —Constitution of India — Art. 21 — Family and Personal Laws — Marriage, Divorce, Other Unions and Children — Alienation of Affection — Divorce — Grounds for Divorce — Adultery

W. Jurisprudence — Transnational jurisprudence — Decisions on a point rendered by judiciary across the world lead to creation of a rich body of transnational jurisprudence — Interpretation of Statutes — External Aids — Foreign case-law/law

X. Criminal Jurisprudence — Generally — Crime — What is — Public wrongs — Criminal sanction justified where there is public element in wrong, where victim is not individual but community as a whole — State must follow minimalist approach in criminalising offences and avoid criminal sanction where civil remedy will serve the purpose

Held:

Per Dipak Misra, C.J. and Khanwilkar, J.

Even assuming that the new definition of adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage. There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, Parliament has always made efforts to maintain the rights of women. For instance, Section 498-A IPC deals with husband or relative of husband of a woman subjecting her to cruelty. Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere. But adultery is different from an offence committed under Section 498-A or any violation of the Protection of Women from Domestic Violence Act, 2005 or, for that matter, the protection conceived of under Section 125 of the Code of Criminal Procedure or Sections 306 or 304-B or 494 IPC. These offences are meant to subserve various other purposes relating to a matrimonial relationship and extinction of life of a married woman during subsistence of marriage.

(Paras 49 and 57)

Pinakin Mahipatray Rawal v. State of Gujarat, (2013) 10 SCC 48 : (2013) 4 SCC (Civ) 616 : (2013) 3 SCC (Cri) 801; Ghusabhai Raisangbhai Chorasiya v. State of Gujarat, (2015) 11 SCC 753 : (2015) 4 SCC (Cri) 545, referred to

Edmund Burke had said, "a good legislation should be fit and equitable so that it can have a right to command obedience". Burke would like to put it in two compartments, namely, "equity" and "utility". If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life. (Para 50)

Under the existing Section 497 IPC, the husband is treated as an aggrieved person and the wife is ignored as a victim. Presently, the provision is reflective of a tripartite labyrinth. A situation may be conceived of where equality of status and the right to file a case may be conferred on the wife. In either situation, the whole scenario is extremely private. It stands in contradistinction to the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a complaint

for second marriage. Adultery stands on a different footing from the aforesaid offences. Adultery does not fit into the concept of crime. If it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to be left as a ground for divorce. For any other purpose as Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two. (Para 58)

Common Cause v. Union of India, (2018) 5 SCC 1, relied on

Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 :1986 SCC (L&S) 429, affirmed

Halsbury's Laws of England, Vol. 11 (4th Edn.) p. 11; Kenny's Outlines of Criminal Law, 19th Edn., 1966 by J.W. Cecil Turner, referred to

Earldom of Oxford, In re, (1625) W Jo 96 : 82 ER 50, cited

Adultery as a crime is no more prevalent in People's Republic of China, Japan, Australia, Brazil and many western European countries. The diversity of culture in those countries can be judicially taken note of. Non-criminalisation of adultery, apart from what has been stated hereinabove, can be proved from certain other facets. When the parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. (Para 64)

By no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship. In case of the said offences, there is no third party involved. It is the husband and his relatives. There has been correct imposition by law not to demand dowry or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so. (Para 59)

Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said "act" should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness. (Para 65)

Thinking of adultery from the point of view of criminality would be a retrograde step. The Supreme Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law. (Para 66)

Adultery is better to be left as a ground for any kind of civil wrong including dissolution of marriage. As Section 497 IPC is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare Section 198 CrPC which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path. (Paras 50 and 67)

Per Nariman, J. (concurring)

International trends worldwide indicate that very few nations continue to treat adultery as a crime, though most nations retain adultery for the purposes of divorce laws. (Para 98)

James Sibongo v. Lister Lutombi Chaka, Case No. SA 77 of 2014, decided on 19-8-2016 (SC of Namibia); Wassenaar v. Jameson, (1969) 2 SA 349 (W), referred to

De v. Rh, 2015 SCC Online ZACC 18 : (2015) 5 SA 83 (CC), cited

2009 Hun-Ba 17, (26-2-2015) [Constitutional Court of South Korea]; Expediente 936-95, (7-3-1996), Republica de Guatemala Corte de Constitucionalidad [Constitutional Court of Guatemala], referred to

Per Chandrachud, J. (concurring)

The last few decades have been characterised by numerous countries around the world taking measures to decriminalise the offence of adultery due to the gender discriminatory nature of adultery laws as well as on the ground that they violate the right to privacy. However, progressive action has primarily been taken on the ground that provisions penalising adultery are discriminatory against women either patently on the face of the law or in their implementation. Reform towards achieving a more egalitarian society in practice has also been driven by active measures taken by the United Nations and other international human rights organisations, where it has been emphasised that even seemingly gender-neutral provisions criminalising adultery cast an unequal burden on women. The abolishing of adultery has been brought about in equal measure by legislatures and courts. When decisions have been handed down by the judiciary across the world, it has led to the creation of a rich body of transnational jurisprudence. (Para 144)

Law & Advocacy for Women in Uganda v. Attorney General of Uganda, 2007 SCC OnLine UGCC 1; De v. Rh, 2015 SCC OnLine ZACC 18 : (2015) 5 SA 83 (CC), referred to

UN Working Group on Women's Human Rights: Report (18-10-2012) ' available at: <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx? NewsH)=12672&LangiD=E>; Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourt.goJa/cckhome/eng/ decisions/majordecisions/majorDetail.do>; Fkstpost, "South Korean court abolishes law that made adultery illegal", (26-2-2015), available at <https://www.firstpost.com/world/ south-korean-court-abolishes-law-saying-adultery-is-illegal-2122935.hunl>; Opinions of Park Han-Chul, Lee Jin-Sung, Kim Chang-Jong, Seo Ki-Seog and Cho Yong-Ho, JJ. (Adultery is Unconstitutional); Article 10 of the South Korean Constitution; Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourt.go.kr/cckhome/ eng/decisions/majordecisions/majorDetail.do>, Part V-A (3)(1) ("Change in Public's Legal Awareness" under the head of "Appropriateness of Means and Least Restrictiveness"); Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourt.go.kr/cckhome/ eng/decisions/majordecisions/majorDetail.do>, Part V-A

(3)(3) ("Effectiveness of Criminal Punishment", under the head of "Appropriateness of Means and Least Restrictiveness"); Case No: 2009Hun-Bal7, (Adultery Case), South Korean Constitutional Court (26-2-2015), available at <http://english.ccourt.go.kr/cckhome/eng/decisions/ majordecisions/ majorDetail.do, Part V-A (5) ("Balance of Interests & Conclusion"), referred to

Recognition of sexual autonomy as inhering in each individual and of the r elements of privacy and dignity have a bearing on the role of the State in regulating the conditions and consequences of marital relationships. There is a fundamental reason which militates against criminalisation of adultery. Its genesis lies in the fact that criminalising an act is not a valid constitutional response to a sexual relationship outside the fold of marriage. Adultery in the course of a subsisting marital relationship may, and very often does question the commitment of the : spouse to the relationship. In many cases, a sexual relationship of one of the spouses outside of the marriage may lead to the end of the marital relationship. But in other cases, such a relationship may not be the cause but the consequence of a pre-existing disruption of the marital tie. All too often, spouses who have drifted apart irrevocably may be compelled for reasons personal to them to continue with the veneer of a marriage which has ended for all intents and purposes. The interminably long delay of the law in the resolution of matrimonial conflicts is an aspect which cannot be ignored. The realities of human existence are too complex to place them in closed categories of right and wrong and to subject all that is considered wrong with the sanctions of penal law. Just as all conduct which is not criminal may not necessarily be ethically just, all conduct which is inappropriate does not justify being elevated to a criminal wrongdoing.(Para 211)

The State undoubtedly has a legitimate interest in regulating many aspects of marriage. That is the foundation on which the State does regulate rights, entitlements and duties, primarily bearing on its civil nature. Breach by one of the spouses of a legal norm may constitute a ground for dissolution or annulment. When the State enacts and enforces such legislation, it does so on the postulate that marriage as a social institution has a significant bearing on the social fabric. But in doing so, the State is equally governed by the norms of a liberal Constitution which emphasise dignity, equality and liberty as its cardinal values. The legitimate aims of the State may, it must be recognised, extend to imposing penal sanctions for certain acts within the framework of marriage. Physical and emotional abuse and domestic violence are illustrations of the need for legislative intervention. The Indian State has legitimately intervened in other situations such as by enacting anti-dowry legislation or by creating offences dealing with the harassment of women for dowry within a marital relationship. The reason why this constitutes a legitimate recourse to the sovereign authority of the State to criminalise conduct is because the acts which the State proscribes are deleterious to human dignity. In criminalising certain types of wrongdoing against women, the State intervenes to protect the fundamental rights of every woman to live with dignity. Consequently, it is important to underscore that this judgment does not question the authority and even the duty of the State to protect the fundamental rights of women from being trampled upon in unequal societal structures. Adultery as an offence does not fit that paradigm. In criminalising certain acts, Section 497 has proceeded on a hypothesis which is deeply offensive to the dignity of women. It is grounded in paternalism, solicitous of patriarchal values and subjugates the woman to a position where the law disregards her sexuality. The sexuality of a woman is part of her inviolable core. Neither the State nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalising adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that it has been concluded that

Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21. (Para 212)

Per Indu Malhotra, J. (concurring)

Criminal sanction may be justified where there is a public element in the wrong, such as offences against State security, and the like. These are public wrongs where the victim is not the individual, but the community as a whole. Adultery undoubtedly is a moral wrong qua the spouse and the family. But there is no sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law. (Paras 281 and 281.1)

The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment. The State must follow the minimalist approach in the criminalisation of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices. (Paras 281.2 and 281.3)

The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State. (Para 281.4)

Oliverson v. West Valley City, 875 F Supp 1465 (1995); Lawrence v. Texas, 2003 SCC OnLine US SC 73 : 156 L Ed 2d 508 : 539 US 558 (2003); RH v. DE, 2013 SCC OnLine ZASCA 94 : 2014 ZASCA 133; Green v. Fitzgerald, 1914 AD 88; Adultery case, 27-1 (A) KCCR 20 (26-2-2015), referred to

Illinois Criminal Code, 720ILCS 5/11-35, Adultery; Martin Siegel, "For Better or for Worse: Adultery, Crime & the Constitution", 30 Journal of Family Law 45,51-52 (1991); Abhinav Sekhri, "The Good, The Bad, and The Adulterous: Criminal Law and Adultery in India", 10 Socio Legal Review 47 (2014); Utah Code Ann. 76-7-103; New York Penal Laws, Article 255.17-Adultery; Criminal Code of Canada, 1985, Section 172; Divorce Act, 1968; S. 54(l)(a), Law Reform (Marriage and Divorce) Act, 1976. [Malaysia]; S. 58, Law Reform (Marriage and Divorce) Act, 1976. [Malaysia]; S. 183, Penal Code, 1907 [Japan]; H. Meyers, "Revision of Criminal Code of Japan", Washington Law Review & State Bar Journal, Vol. 25, (1950) pp. 104-34; Article 770, Civil Code, 1896. [Japan]; Anayasa Mahkemesi, 1996/15; 1996/34 (23-9-1996); No. 15 CVS 5646 (2017) (Superior Court of North Carolina); Oxford University Press, (7th Edn.) May 2013; A.P. Simester and Andreas von Hirsch: Crimes, Harms, and Wrongs: On The Principles of Criminalisation, (Hart Publishing, Oxford 2011), referred to

Constitutional Morality and Transformative Constitutionalism

Y. Constitutional Law — Constitutional Morality/Values and Transformative Constitutionalism — Constitutional morality — Different from "common morality" — Constitutional morality recognises certain indispensable rights for free, equal and dignified existence — State should be guided by values of constitutional morality in making law relating to exercise of sexual agency by women — Commitment to constitutional morality obliges Court to enforce constitutional guarantees — Constitution of India, Arts. 14, 15 and 21

Held:

Per Chandrachud, J.

It is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires the Court to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497. (Para 143)

Z. Constitution of India — Pt. Ill — Role of the Constitution in evolution of law — In process of evolution, law operates as "site for discursive struggle" where ideas compete and new visions are shaped

Held:

Per Chandrachud, J.

The Constitution, both in text and interpretation, has played a significant role in the evolution of law from being an instrument of oppression to becoming one of liberation. Used in a liberal perspective, the law can enhance democratic values. As an instrument which preserves the status quo on the other hand, the law preserves stereotypes and legitimises unequal relationships based on pre-existing societal mscximination. Constantly evolving, law operates as an important "site for discursive struggle", where ideals compete and new visions are shaped. In regarding law as a "site of discursive struggle", it becomes imperative to examine the institutions and structures within which legal discourse operates. (Para 113) Ratna Kapur and BrendaCossman, SubversiveSiies: Feminist Engagements with Law in India (Sage Publications 1996) p. 41; Gayatri Spivak, Post-Colonial Critic: Interviews, Strategies, Dialogues (Routledge 1990), referred to

ZA. Precedents — Generally — Doctrine of, how affected by transformative constitutionalism — Cohesive adjustment

— When constitutionality of a law is assailed, Court has to keep in mind normative changes, principle of transformative constitutionalism and evolving concept of recognising certain rights as forming part of fundamental rights such as Arts. 14 and 21 of the Constitution — If in process precedent loses its efficacy, cohesive adjustment is needed to effectuate progressive interpretation — Constitution of India — Arts. 141, 14 and 21 — Constitutional Law — Constitutional Morality/Values and Transformative Constitutionalism

Held:

Per Dipak Misra, C.J. and Khanwilkar, J.

It is not correct to say that the precedents are not to be treated as such and that it is excuse of perceptual shift of law, the binding nature of precedent should not be allowed to retain its status or allowed to be diluted. When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of

a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation.

A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts. (Para 4)

ZB. Jurisprudence — Certainty of law — No inflexible concept can be laid down in view of societal changes and expansion of rights by Court on interpretation of organic and living Constitution of India

Held:

Per Dipak Misra, C.J. and Khanwilkar, J.

Though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past. (Para 3)

ZC. Jurisprudence — Law and society — Social reforms — Role of law in influencing society and societal values — Law must be understood as a discourse about social structuring

ZD. Jurisprudence — Law and society — Role of law and society in bringing gender equality — Patriarchal social values and law should not be allowed to hinder exercise of constitutional rights by women — Role of court

Held:

Per Chandrachud, J.

Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a "discourse" about social structuring. However, the discourse of law is not homogeneous. In the context particularly of Section 497, it regards individuals as "gendered citizens". In doing so, the law creates and ascribes gender roles based on existing societal stereotypes. An understanding of law as a "discourse" would lead to the recognition of the role of law in creating "gendered identities". (Para 111)

Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India (Sage Publications 1996) p. 40, referred to

Over the years, legal reform has had a significant role in altering the position of women in societal orderings. This is seen in matters concerning inheritance and in the protection against domestic violence. However, in some cases, the law operates to perpetuate an unequal world for women. Thus, depending on the manner in which it is used, law can act as an agent of social change as well as social stagnation. (Para 112)

Patricia J. Williams, The Alchemy of Race and Rights (HUP, Cambridge 1991), referred to

ZE. Interpretation of Statutes — Basic Rules — Contextual construction/ meaning — Provision of law should be read in context of social, historical and cultural contexts in which it operates

Held:

Per Chandrachud, J.

A provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. In its operation, law "permeates and is inseparable from everyday living and knowing, and it plays an important role in shaping (legal) consciousness". A contextual reading of the law shows that it influences social practices, and makes "asymmetries of power seem, if not invisible, natural and benign". (Para 183)

Rosemary Coombe, "Is There a Cultural Studies of Law?", in A Companion to Cultural Studies (Oxford 2001); Austin Sarat, Jonathan Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship", Yale Journal of Law & the Humanities, (2001), p. 19; R.B. Outwaithe, The Rise and Fall of the English Ecclesiastical Courts, 1500-1860 (CUP, Cambridge UK 2007); Angela Fernandez, "Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity" in Tim Stretton and Krista J. Kesselring (Eds.), Married Women and the Law: Coverture in England and the Common Law World, (McGill-Queen's University Press 2013) pp. 192-216; Blackstone's Commentaries on the Laws of England, Books HI & TV (8th Edn.), 1778; Bracton: De Legibus Et Consuetudinibus Anglice (Bracton on the Laws and Customs of England attributed to Henry of Bratton, c. 1210-1268) Vol. B3, p. 115; Margot Finn, "Women, Consumption and Coverture in England, c. 1760-1860". The Historical Journal, 39 (1996), pp. 703-22; "The High Sheriff of Oxfordshire's Annual Law Lecture" given by Lord Wilson on 9-11-2012; Matrimonial Causes Act, 1857; 1857 (20 & 21 Vict.) C. 85, referred to

ZF. Statute Law — Presumptions — No presumption of constitutionality arises in favour of existing pre-constitutional law made in British era — Such law requires to be tested on anvil of Pt. Ill of the Constitution — Constitution of India—Pt. Ill — Constitutionality of law — Presumptions .....

..... 266.1. The respondents submit that an act which outrages the morality of society, and harms its members, ought to be punished as a crime. Adultery falls squarely within this definition.

266.2. The learned ASG further submitted that adultery is not an act that merely affects just two people; it has an impact on the aggrieved spouse, children, as well as society. Any affront to the marital bond is an affront to the society at large. The act of adultery affects the matrimonial rights of the spouse, and causes substantial mental injury. Adultery is

essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society.

267. It was argued on behalf of the Union of India that Section 497 is valid on the ground of affirmative action. All discrimination in favour of women is saved by Article 15(3), and hence were exempted from punishment. Further, an underinclusive definition is not necessarily discriminatory. The contention that Section 497 does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional.

268. It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law.

269. It was finally suggested that if this Court finds any part of this Section violative of the constitutional provisions, the Court should read down that part, insofar as it is violative of the Constitution but retain the provision.

....

Discussion and Analysis

270. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would have to be tested on the anvil of Part III of the Constitution.

271. Section 497 IPC is placed under Chapter XX of "Offences Relating to Marriage". The provision of Section 497 is replete with anomalies and incongruities, such as:

271.1. Under Section 497, it is only the male paramour who is punishable for the offence of adultery. The woman who is pari delicto with the adulterous male, is not punishable, even as an "abettor". The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery (W. Kalyani5, SCC para 10).

271.2. The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man, has no similar right to prosecute her husband or his paramour.

271.3. Section 497 IPC read with Section 198(2) CrPC only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery.

271.4. The act of a married man engaging in sexual intercourse with an unmarried or divorced woman, does not constitute "adultery" under Section 497.

271.5. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

271.6. The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.

272. The constitutional validity of Section 497 has to be tested on the anvil of Article 14 of the Constitution. Any legislation which treats similarly situated persons unequally, or discriminates

between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

(i) The classification is made on the basis of an "intelligible differentia" which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and

(ii) The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

272.1. The discriminatory provisions in Section 497 have to be considered with reference to the classification made. The classification must have some rational basis,[25] or a nexus with the object sought to be achieved. With respect to the offence of adultery committed by two consenting adults, there ought not to be any discrimination on the basis of sex alone since it has no rational nexus with the object sought to be achieved.

272.2. Section 497 JPC, makes two classifications:

272.2.1. The first classification is based on who has the right to prosecute: it is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery. Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour.

272.2.2. The second classification is based on who can be prosecuted. It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence.

2723. The aforesaid classifications were based on the historical context in 1860 when the IPC was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or "property" of their husbands. Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a "theft" of his property, for which he could proceed to prosecute the offender. The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.

272.4. A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore ex facie discriminatory against women, and violative of Article 14. Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary.

25 E.V. Chinnaiah v. State ofA.R, (2005) 1 SCC 394: (2008) 2 SCC (L&S) 329 (A legislation may not be amenable to a challenge on the ground of violation of Article 14 of the Constitution if its intention is to give effect to Articles 15 and 16 or when the differentiation is not unreasonable or arbitrary).

273. A law which could have been justified at the time of its enactment with the passage of time may become outdated and discriminatory with the evolution of society and changed circumstances.[26] What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic.

273.1. A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality.[27]

273.2. Section 497 IPC was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860s. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals.[189] This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society.

2733. It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a "victim", and the male offender is the "seducer".

273.4. Section 497 fails to consider both men and women as equally autonomous individuals in society. In Anuj Garg v. Hotel Assn. of India[160], this Court held that: (SCC pp. 11-12 & 13, paras 20 & 26)

"20. At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the State is very significant, nonetheless it does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics, it is clear that time has come that we take leave of the theme encapsulated under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interests.

* * *

26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al." (emphasis supplied)

26 Motor General Traders v. State ofA.R, (1984) 1 SCC 222; See also Rattan Arya v. State of T.N., (1986) 3 SCC 385

27 John Vallamattom v. Union of India, (2003) 6 SCC 611

273.5. The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereotypes in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution. There is therefore, no justification for continuance of Section 497 IPC as framed in 1860, to remain on the statute book.

274. Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens. Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution. The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as "beneficial legislation".

275. This Court in Thota Sesharathamma v. Thota Manikyamma[28] held that: (SCC pp. 325-26, para 21)

"27. ... Article 15(3) relieves from the rigour of Article 15(1) and charges the State to make special provision to accord to women socio¬economic equality. ... As a fact Article 15(3) as a forerunner to common code does animate to make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race, caste or religion."

276. In W. Kalyani v. State[5] this Court has recognised the gender bias in Section 497. The Court in Kalyani[5] observed that: (SCC p. 360, para 10)

"70. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband."

277. The purpose of Article 15(3) is to further socio-economic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences. A section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

278. The petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage. The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved. It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21.

279. In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a threefold requirement as held in K.S. Puttaswamy (Privacy-9J.) v. Union of India39: (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which

28 (1991) 4 SCC 312 5 (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445 39 (2017) 10 SCC 1

ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the threefold requirement, and must therefore be struck down.

280. The issue remains as to whether "adultery" must be treated as a penal offence subject to criminal sanctions, or marital wrong which is a valid ground for divorce.

280.1. One view is that family being the fundamental unit in society, if the same is disrupted, it would impact stability and progress. The State, therefore, has a legitimate public interest in preserving the institution of marriage. Though adultery may be an act committed in private by two consenting adults, it is nevertheless not a victim-less crime. It violates the sanctity of marriage, and the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulterer and the adulteress, it impacts the growth and well-being of the children, the family, and society in general, and therefore must be subject to penal consequences. Throughout history, the State has long retained an area of regulation in the institution of marriage. The State has regulated various aspects of the institution of marriage, by determining the age when an adult can enter into marriage; it grants legal recognition to marriage; it creates rights in respect of inheritance and succession; it provides for remedies like judicial separation, alimony, restitution of conjugal rights; it regulates surrogacy, adoption, child custody, guardianship, partition, parental responsibility; guardianship and welfare of the child. These are all areas of private interest in which the State retains a legitimate interest, since these are areas which concern society and public well-being as a whole. Adultery has the effect of not only jeopardising the marriage between the two consenting adults, but also affects the growth and moral fibre of children. Hence the State has a legitimate public interest in making it a criminal offence.

280.2. The contra view is that adultery is a marital wrong, which should have only civil consequences. A wrong punishable with criminal sanctions, must be a public wrong against society as a whole, and not merely an act committed against an individual victim. To criminalise a certain conduct is to declare that it is a public wrong which would justify public censure, and warrant the use of criminal sanction against such harm and wrongdoing. The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the "best interest" of the individual.

2803. Andrew Ashworth and Jeremy Horder in their commentary titled Principles of Criminal Law[29] have stated that the traditional starting point of criminalisation is the "harm principle" the essence of which is that the State is justified in criminalising a conduct which causes harm to others. The authors opine that the three elements for criminalisation are: (/) harm, (ii) wrongdoing, and (iii) public element, which are required to be proved before the State can classify a wrongful act as a criminal offence.

29 Oxford University Press, (7th Edn.) May 2013.

280.4. John Stuart Mill states that "the only purpose for which power can be rightly exercised over the member of a civilized community against his will is to prevent harm to others".[30]

280.5. The other important element is wrongfulness. Andrew Simester and Andreas von Hirsch opine that a necessary prerequisite of criminalisation is that the conduct amounts to a moral wrong.[31] That even though sexual infidelity may be morally wrong conduct, this may not be a sufficient condition to criminalise the same.

281. In my view, criminal sanction may be justified where there is a public element in the wrong, such as offences against State security, and the like. These are public wrongs where the victim is not the individual, but the community as a whole.

281.1. Adultery undoubtedly is a moral wrong qua the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law?

281.2. The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.

2813. The State must follow the minimalist approach in the criminalisation of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

281.4. The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

282. In view of the aforesaid discussion, and the anomalies in Section 497, as enumerated in para 271 above, it is declared that:

282.1. Section 497 is struck down as unconstitutional being violative of Articles 14,15 and 21 of the Constitution.

282.2. Section 198(2) CrPC which contains the procedure for prosecution under Chapter XX IPC shall be unconstitutional only to the extent that it is applicable to the offence of adultery under Section 497.

282.3. The decisions in Sowmithri Vishnu[3], V. Revathi[4] and W. Kalyani[5] hereby stand overruled.

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30 John S. Mill, "Chapter I: Introductory", On Liberty, (4th Edn., Longman, Roberts, & Green Co., London 1869).

31 A.P. Simester and Andreas von Hirsch, Crimes, Harms, and Wrongs: On The Principles of Criminalisation, (Hart Publishing, Oxford 2011).

SUMAN KAPUR VERSUS SUDHIR KAPUR

In the Supreme Court of India

Bench : Hon'ble Mr. Justice C.K. Thakker & Hon'ble Mr. Justice D.K. Jain

(2009) 1 SCC 422

Civil Appeal No. 6582 of 2008
Arising out of Special Leave Petition (Civil) No. 10907 of 2007

Suman Kapur ...Appellant
Versus
Sudhir Kapur ...Respondent

Abortion by a woman without her husband's knowledge and consent will amount to mental cruelty and a ground for divorce, the Supreme Court has held.

"Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse," said a Bench consisting of Justices C.K. Thakker and D.K. Jain.

It was held: "The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty. Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure, can also amount to mental cruelty."

The conduct must be much more than jealousy, selfishness, possessiveness, which caused unhappiness and dissatisfaction and emotional upset but might not be a reason for grant of divorce on the ground of mental cruelty.

Absence of intention

It was held: "To establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs the act complained of could otherwise be regarded as cruelty. Mens rea is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill treatment."

"Mere coldness or lack of affection cannot amount to cruelty; frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable."

In the instant case, Suman Kapur was aggrieved at the decree of divorce granted against her by a trial court and confirmed by the Delhi High Court. Both courts gave a finding that her three abortions without the knowledge and consent of her husband, Sudhir Kapur, was a valid ground for divorce. Disposing of the appeal, the Bench noted that Sudhir Kapur got remarried on March 5, 2007 before

the expiry of the period of 90 days for filing appeal before this court and a child was born from the second marriage.

"Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both courts, i.e. the trial court as well as the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have remarried before the expiry of period stipulated for filing appeal. Ends of justice would be met if we direct the respondent to pay Rs. 5 lakh to the appellant."

JUDGMENT

C.K. THAKKER, J.

1. Leave granted.

2. The present appeal is filed by the appellant-wife being aggrieved and dissatisfied with the decree of divorce dated August 07, 2004 passed by the Additional District Judge, Delhi in HMA No. 322/2001/96 and confirmed by the High Court of Delhi on January 29, 2007 in Matrimonial Appeal No. 62 of 2004.

3. The facts in nutshell are that the appellant Suman Kapur is the wife and respondent Sudhir Kapur is the husband. The matrimonial alliance was entered into between the parties as per Hindu rites and rituals in Delhi on March 04, 1984. It was the case of the appellant that both the parties were friends from childhood and were knowing each other since 1966. They had also studied together in the same school. They were very close since 1974 and after a friendship of more than a decade, they decided to marry. The marriage was inter-caste marriage. Though initially parents of both the parties were opposed to the marriage, subsequently, they consented. The parties have no issue from the said wedlock.

4. The appellant has a brilliant academic record and has been the recipient of the prestigious Lalor Foundation Fellowship of United States of America (USA), offered to young scientists for outstanding performance in the area of research. According to her, at the time of her marriage, she was in employment with the Department of Bio-chemistry in the All India Institute of Medical Sciences (AIIMS) and was also pursuing her Ph.D.

5. It is the case of the appellant that she conceived for the first time in 1984, within a period of about one month of the marriage, but on account of being exposed to harmful radiations as a part of lab work of her Ph.D. thesis, she decided to terminate the pregnancy. The appellant asserted that it was done with the knowledge and consent of the respondent-husband.

6. Again, in 1985, she conceived. But even that pregnancy was required to be terminated on the ground of an acute kidney infection for which she had to undergo an IVP, which entailed six abdominal X-rays and radiometric urinary reflect test with radioactive drinking dye. She claimed that even the second pregnancy was terminated with the knowledge and consent of the respondent- husband.

7. According to the appellant, third time she became pregnant in 1989, but she suffered natural abortion on account of having a congenitally small uterus and thus prone to recurrent miscarriages.

8. It is the case of the appellant that though she was well-placed and having good job in AIIMS in Delhi, only with a view to accompany her husband who was serving in Bombay, she left the job. In 1988, the parties together left for USA. The appellant was awarded Lalor Foundation Fellowship in USA for which she had to move to Kansas city and could not join the respondent-husband at the place of his work.

9. The case of the respondent-husband, on the other hand was that since solemnization of marriage between the parties, the attitude, conduct and behaviour of the appellant-wife towards the respondent as well as his family members was indignant and rude. It was alleged by him that first pregnancy was terminated in 1984 by the appellant-wife without consent and even without knowledge of the respondent. Same thing was repeated at the time of termination of second pregnancy in 1985. He was kept in complete dark about the so-called miscarriage by the appellant-wife in 1989. The respondent was thus very much aggrieved since he was denied the joy of feeling of fatherhood and the parents of the respondent were also deprived of grand-parenthood of a new arrival. It was also contended by the respondent that the attitude of the appellant-wife towards her in-laws was humiliating. Several instances were cited in support of the said conduct and behaviour by the husband.

10. The respondent-husband, therefore, filed HMA No. 322/2001/96 in the Court of Additional District Judge, Delhi under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as `the Act') for getting divorce from the appellant-wife. Two grounds were taken by the respondent-husband in the said petition, i.e. (i) cruelty and (ii) desertion. It was alleged by the husband that the wife was all throughout conscious, mindful and worried of one thing and that was her career. In view of her thinking only in one direction, she deprived the respondent-husband of conjugal rights and matrimonial obligations. She also treated the family members of the respondent-husband with cruelty. She, without consent or even knowledge of the respondent- husband, got her pregnancy terminated twice in 1984 as well as in 1985 and falsely stated that there was natural miscarriage at the time of third pregnancy in 1989. At no point of time, she had taken consent of the husband nor even she had informed about the termination of pregnancy or about miscarriage to the respondent. At several occasions, she had stated that she was not interested at all in living with the respondent-husband and to perform marital obligations. She had made it explicitly clear to the respondent-husband that she was not willing to be a mother at the cost of her career. She had specifically told the respondent-husband that if he was very much interested and eager to be a father and his mother (respondent's mother) wanted to be a grand-mother, he could enter into marriage tie with any other woman, but the appellant-wife would not give up her career. She had also stated that she had no objection if the respondent adopts a child which action would not adversely affect her career. She had issued a notice to the respondent-husband that it would be better that they would peacefully separate from each other so that the respondent-husband may be able to fulfil the wishes of his parents and the appellant-wife may pursue her future career. The respondent- husband, therefore, submitted that the case attracted both the provisions, viz. (i) cruelty on the part of the wife under clause (ia) of sub-section (1) of Section 13 and (ii) desertion of matrimonial home and refusal to perform marital obligations falling under clause (ib) of sub-section (1) of Section 13 of the Act. On both the grounds, the respondent- husband was entitled to a decree of divorce.

11. The appellant-wife in her objections denied the allegations of the husband. According to her, she was doing her best to please her husband as well as her in-laws. Precisely for that purpose, she had left her service in Delhi and joined the husband. It was admitted that she was in service and was also interested in career as she was well- educated lady and wanted to contribute to the society. But that did not mean that she was not performing her marital obligations. It was an admitted fact that immediately after her marriage, she conceived and she was very happy about it. Unfortunately, however, for the circumstances beyond her control, she was compelled to get the pregnancy terminated with the knowledge and consent of her husband. The same thing was repeated in 1985. In 1989, there was natural miscarriage. She also contended that she had to go to USA for receiving prestigious award of Lalor Foundation Fellowship. According to her, instead of being happy about the progress of the wife, the husband had initiated the present proceedings with jealousy and hence, he was not entitled to a decree of divorce. Even otherwise, there was no cruelty on her part. According to the wife, during regular intervals, the parties used to stay together and the appellant had never refused to perform her matrimonial obligations or even had shown her intention to deprive the husband of conjugal rights. It was, therefore, submitted that the husband was not entitled to the relief sought by him and the petition was liable to be dismissed.

12. The trial Court after hearing the parties held that the husband was not entitled to a decree of divorce on the ground that the wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. He, however, held that it was fully established by the husband that there was cruelty on the part of the wife. The wife without the knowledge and consent of the husband got her pregnancy terminated twice - firstly in 1984 and secondly in 1985. The husband was also not informed about natural miscarriage in 1989. A finding was also recorded by the trial Court that the wife was not ready and willing to perform matrimonial obligations and she always attempted to stay away from her husband by depriving conjugal rights of the husband. It was, therefore, a case of mental cruelty. The trial Court also referred to several letters written by wife to the husband, and notice issued by the wife through an advocate which went to show that she was not interested in performing marital obligations and continuing marital relations with the husband. The Court also relied upon various entries made by the appellant-wife in her diary which suggested that all throughout she was worrying about her future and her career. For wife, according to the trial Court, her career was the most important factor and not matrimonial obligations. The trial Court, therefore, held that the case was covered by mental cruelty which was shown by the wife towards the husband and the husband was entitled to a decree of divorce on that ground.

13. Being aggrieved by the decree passed by the trial Court, the wife preferred an appeal in the High Court of Delhi. The High Court again appreciated the evidence on record and confirmed the decree of divorce passed by the trial Court. The High Court, however, held that it was not necessary for the Court to consider mental cruelty so far as termination of pregnancy was concerned, since in the opinion of the High Court, even otherwise from the letters and entries in diary, it was proved that there was mental cruelty on the part of the wife. Accordingly, the decree of divorce passed by the trial Court was confirmed by the High Court.

14. The said order has been challenged in the present proceedings. On July 16, 2007, notice was issued by this Court. The respondent appeared and affidavit-in-reply and affidavit-in-rejoinder

were thereafter filed. Considering the nature of controversy, the Registry was directed to place the matter for final hearing and accordingly, the matter has been placed before us.

15. We have heard the learned counsel for the parties.

16. The learned counsel for the appellant contended that both the courts had committed an error of law in granting a decree of divorce against the appellant-wife. It was submitted that the courts below ought not to have held that there was mental cruelty on the part of the appellant-wife and the respondent-husband was entitled to a decree of divorce on that ground. It was also submitted that once the High Court has not considered the allegation as to termination of pregnancy without the consent of the husband, no decree for divorce on the ground of mental cruelty could have been passed by it. Even if all the allegations leveled against the wife had been accepted, they were in the nature of `normal wear and tear' in a matrimonial life of a couple which would not fall within the mischief of clause (ia) of sub- section (1) of Section 13 of the Act and the orders passed by the courts below are liable to be set aside. It was further submitted that even otherwise, the wife is entitled to an appropriate relief from this Court inasmuch as from the evidence, it is clearly established that the High Court confirmed the decree passed by the trial Court on January 29, 2007 and before the period of filing Special Leave to Appeal to this Court expires, the respondent- husband entered into re-marriage with a third party and from the said wedlock, he is having an issue. It was, therefore, submitted that the husband has created a situation which had seriously prejudiced the appellant and the Court may not allow the respondent-husband to take undue advantage of the situation created by him.

17. The learned counsel for the respondent-husband, on the other hand, supported the decree passed by the trial Court and confirmed by the High Court. It was urged that the trial Court on the basis of evidence adduced by the parties recorded a finding of fact that the conduct and behaviour of the wife was in the nature of mental cruelty and accordingly allowed the petition filed by the husband. The High Court, though convinced on all grounds, did not think it fit to enter into correctness or otherwise of the finding recorded with regard to illegal termination of pregnancy by wife without the knowledge and consent of the husband since it was convinced that even otherwise on the basis of evidence on record, mental cruelty of the wife was established. It was not necessary for the High Court to consider and to record a finding as to illegal termination of pregnancy by wife since the decree passed by the trial Court could be confirmed. As far as mental cruelty is concerned, on the basis of other evidence and material on record, a finding had been recorded by the trial Court. The said finding was a finding of fact which was confirmed by the High Court. In exercise of jurisdiction under Article 136 of the Constitution, this Court will not interfere with the said finding and hence the appeal deserves to be dismissed.

18. Regarding re-marriage by the husband, it was stated that after the decree of divorce passed by the trial Court, the husband did not re-marry. But the decree of divorce was confirmed by the High Court. The husband thereafter had taken the action which cannot be said to be illegal or otherwise unlawful. The wife, therefore, cannot take a technical contention that the husband should have waited till the period of filing Special Leave to Appeal to this Court would expire. It was, therefore, submitted that the appeal deserves to be dismissed.

19. Having heard the learned counsel for the parties, on the facts and in the circumstances of the case, in our opinion, it cannot be said that by recording a finding as to mental cruelty by the wife against the husband, the Courts below had committed any illegality.

20. Section 13 of the Hindu Marriage Act provides for grant of divorce in certain cases. It enacts that any marriage solemnized whether before or after the commencement of the Act may be dissolved on a petition presented either by the husband or by the wife on any of the grounds specified therein. Clause (ia) of sub- section (1) of Section 13 declares that a decree of divorce may be passed by a Court on the ground that after the solemnization of marriage, the opposite party has treated the petitioner with cruelty.

21. Now, it is well-settled that the expression `cruelty' includes both (i) physical cruelty; and (ii) mental cruelty. The parties in this connection, invited our attention to English as well as Indian authorities. We will refer to some of them.

Mental Cruelty

22. The concept of cruelty has been dealt with in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under;

> *"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse".*

23. In Gollins V. Gollins 1964 AC 644: (1963)2 All ER 966, Lord Reid stated:

> *"No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health".*

24. Lord Pearce also made similar observations;

> *"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from normal standards of conjugal kindness causes injury to health or an apprehension of it, is, I think, cruelty if a reasonable person, after taking due account of the*

temperament and all the other particular circumstances would considered that the conduct complained of is such that this spouse should not be called on to endure it".

[see also Russell v. Russell, (1897) AC 395 : (1895-99) All ER Rep 1].

25. The test of cruelty has been laid down by this court in the leading case of N.G. Dastane v. S. Dastane, (1975)2 SCC 326 thus:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent...."

26. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr., (1981) 4 SCC 250, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. It was further stated that to establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty.

27. In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, this Court examined the concept of cruelty. It was observed that the term `cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(ia) of the Act in the context of human conduct and behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one spouse which adversely affects the other spouse. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of degree which is relevant. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the other spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Mens rea is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

28. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337, the Court observed;

"Mental Cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such unintentional. If it is physical, it is a question of fact and degree.

If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a

matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment or conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made".

29. This Court in Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, stated;

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case".

30. Mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehta(2002) 5 SCC 706 thus;

"Cruelty for the purpose of Section 13 (1)(ia) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental Cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The

approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

31. In A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22, the Court observed as under:

"The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial dispute."

32. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778, the Court said;

"It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such willful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

The word "cruelty" has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted".

33. It was further stated:

"Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters.

The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellants, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure."

34. Recently, in Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, this Court held;

"No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of `mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental Cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty".

35. Now, coming to the facts of the case, from the evidence of Smt. Vimal Kapur (mother- in-law of appellant-wife and mother of respondent-husband) who is examined as PW 1 and Sudhir Kapur, husband-PW 2, the trial Court held that the wife was interested in her career only and she had neglected towards matrimonial obligations and exercise of conjugal rights by the husband. The trial Court also held that termination of pregnancy by wife was without consent

or even knowledge of the husband which was in the nature of mental cruelty. But keeping the said element of mental cruelty aside, the High Court was convinced that the allegation of mental cruelty towards the husband by the wife was clearly established from the evidence on record adduced by the respondent-husband. The High Court noted that the appellant-wife was constantly and continuously avoiding staying with the husband and preventing him to have matrimonial relations. From the letters of the appellant- wife also, the High Court held that it was the wife who had stated that she had completely lost interest in the marriage and she was willing to get divorce. The High Court further noted that the appellant-wife sent a notice through her advocate to the respondent-husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income-tax return, the husband mentioned the Social Security Number of his wife as 476-15-6010, a number which did not belong to the appellant-wife, but to some American lady (Sarah Awegtalewis). The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving Social Security Number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in Social Security Number, the appellant wife had gone to the extent of making serious allegation that the respondent had married to an American woman whose Social Security Number was wrongly typed in the income tax return of the respondent-husband.

36. The High Court also observed that the appellant wanted to pursue her professional career to achieve success. In her written statement itself, she had admitted that she was very much interested in her career; that she was independent since 1979 and she was keen to live independent life.

37. The High Court also took a serious note of an entry in the personal diary of the appellant-wife dated September 14, 1986 wherein she stated;

"I said, "we started this journey as two individuals and if you can do so fine otherwise forget and don't bring the ghost of parents in between the two of us. He did not like the use of words ghosts and first cursed my vocabulary and then he said "you do not have any, but I have better ties". At this I told him you are given these 15 days and you can find another wife for yourself. He has this notion that he will go to USA (NY) and I will stay with his parents and I told him I will not and he says this was the deal in July and when I refuted he said "no you had promised". I told him you have just now paid the fine and you are again using the same tricks again. Naturally, he did not like and said to me "I am not and have never with you played tricks". I said sorry- I do not trust you any further and he said it is your fault. It may now be my fault but I think it is just quits. I don't think I will write to anybody back in Delhi now for 15 days and if I can find myself work here any kind".

38. From the above letter, it is clear that the appellant-wife had described the parents of the husband as `ghost'.

39. In the letter dated June 21, 1988, she stated;

"I really wish you would understand my urge in pursuing my freedom away from the hawk eyes of your mother, sister and all other relatives. But, as I am not ready to share the economic gains of this job with you and other family members. I don't expect either you or them to

understand my need and commitment for this job, or any job. I am bound to cause friction with so many people around me- I was at war with just you around me in Bombay."

40. In another letter, she stated that the respondent-husband should not make a condition for the wife of living together. She stated;

"I am not a good person to waste all your potential, emotion on. I do not deserve it.

... ...

Please do not make living together a condition for the coming few months. And do not read from these lines that I do not miss you- I do so individually and circumstantially- but as is my way of working I am not ready to stop myself for bonds and I believe the same for you. I wish the best and topmost for you-the most perfect, one can hope to be and wish that nothing becomes a barrier between you and you and your achievements. Even me. It will be best if we could help each other constructively; I also believe that we can do so- it is just that we believe in different things.

... ...

If possible, stand out of all this mess and try to work the best possible solution for us and your family. I do want you to remember that you are only one son and your family commitments. I would honour- but not at the cost of my spiritual search in life."

41. She further said that the respondent- husband should not bring her marital status preventing her from pursuing her career in the name of marriage. She stated that when she was unable to give even a child to the respondent- husband, up to what stage, they should live together. She clarified that she did not want to close her avenues in life at least at that stage. She also did not want to forego her chances whatever she would believe about her chances. She did not believe in love any more. She expressly stated that she did not believe in Indian social value system and she was very happy in the foreign country.

42. She stated;

"Mujhe is vivah ke naam per apne raste se mat roke. Ho sakta he mein he galat hoon-per mujhe nahin lagta. Dampati ke tarah hum saath ji liye hein- purani quality of life se kuch neechey hi star per jiye hein- ye aur koin jaane ya na jaane- Cambridge school se ek dosre ko bada hota dekh suman- sudhir achhey se jaante hein. Es vivah mein aapko santan bhi na de saki- phir kahan tak jaruri hai ki hum saath rahe? Aap mere vicharo se to kabhi sahmat nahin honge per auron ki rai kar lein-jis kisiki bhi- apni jindgi suljha lein. Mujh se ye ummid karma chod de ke kisi vyaktigat (per mujh se unrelated) ya samajik karan se abhi mein apna rehne sochne ka tarika badloon. Jaisa maine pehle likha- jindagi ji kar jaise bhi, job hi, jab bhi samajh aayega tabhi aayega, jaise main apne liye chhot chahti hoon vaise he apni oar se jitna mujhe adhikar hein aapko bhi mukt karti hoon. Meine to kareeb chheh page par hi ye patr samapt kar diya-except for some help that I needed for car, etc-buy your fax today was quite unsettling. I don't like to close my avenues in life- at lease not yet. I was naove to believe whatever I did for marriage as a constitution and marriage to you. I am not ready to forgo my chances- whatever I believe to be chances for what I have experienced as being married. I think the best alternative will be you stay in India for some more time. Chances are that even if you get an assignment outside Kansas we would be living separately. So decide for yourself

cause when time comes I am going to do so for myself. I will this time not make a compromise and regret it a few months later and make both our lives miserable. I have done that several times in the past-at least you should have enough of it to stop trying to push me against my belief.

My way of loving is not like that. I do not even believe in love any more. There is no bigger lie that any one could tell another person. I do not even believe in the Indian social value system. So I am better off being here away from every person and every thing that I grew up with. Whenever I have understood things to be a different shade I will decide whether I want to be here or there."

43. The High Court, in contrast, referred to the letters written by the respondent- husband. It noted that those letters were full of love and affection. According to the High Court, the husband tried his level best to keep the marriage tie to subsist and made all attempts to persuade the wife explaining and convincing her about the sacred relations of husband and wife, the need and necessity of child in their life and also feelings of his parents who wanted to become grand parents. According to the High Court, however, nothing could persuade the wife who was only after her career. In the light of the above facts and circumstances, the Court held that the trial Court did not commit any error of fact or of law in passing the decree for divorce on the ground of mental cruelty.

44. The High Court in paragraph 28 of the judgment stated;

"Applying the above principles to the facts of the present case, I feel the respondent has been able to establish and prove `cruelty' under Section 13(1) (ia) of the Act. The conduct of the appellant has been examined above. I have referred to the letters exchanged between the parties during the period 1986 onwards till 1994. Some of the letters have been written by the appellant herself. These letters reveal the conflict and difference between the parties. The present case also reveals that the respondent was bending over his heels to placate and woo the appellant till 1994 but thereafter gave up. The respondent was deeply in love and was emotionally attached to her. He has however over the passage of time developed a hatred and ill-will for the appellant. There is no apparent ground and reason for the same except the conduct of the appellant."

45. We find no infirmity in the approach of the High Court. The finding relating to mental cruelty recorded by the trial Court and confirmed by the High Court suffers from no infirmity and we see no reason to interfere with the said finding.

46. The fact, however, remains and it has been brought to the notice of this Court that the respondent got re-married on March 05, 2007 before the expiry of period of filing Special Leave to Appeal to this Court under Article 136 of the Constitution. It was also stated that a child was born from the said wedlock on December 20, 2007. Thus, the marriage had been performed within a period of ninety days of the order impugned in the present appeal.

47. Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both the courts, i.e. the trial Court as well as by the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have re-married before the expiry of period stipulated for filling Special Leave to Appeal in this Court by the wife.

48. It is true that filing of appeal under Article 136 of the Constitution is not a right of the party. It is the discretion conferred on this Court to grant leave to the applicant to file appeal in appropriate cases. But, since the Constitution allows a party to approach this Court within a period of ninety days from an order passed by the High Court, we are of the view that no precipitate action could have been taken by the respondent-husband by creating the situation of fait accompli. Considering the matter in its entirety, though we are neither allowing the appeal nor setting aside the decree of divorce granted by the trial Court and confirmed by the appellate Court in favour of respondent-husband, on the facts and in the circumstances of the case, in our opinion, ends of justice would be met if we direct the respondent-husband to pay an amount of Rs. Five lakhs to the appellant-wife. The said payment will be made on or before 31st December, 2008.

49. The appeal is disposed of accordingly. The parties will bear their own costs all throughout.

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NARAYAN GANESH DASTANE VERSUS SUCHETA NARAYAN DASTANE

1975 SCR (3) 967 1975 SCC (2) 326

Bench: Hon'ble Mr. Justice Y.V. Chandrachud, Hon'ble Mr. Justice P.K. Goswami & Hon'ble Mr. Justice N.L. Untwalia

Petitioner: Narayan Ganesh Dastane
Versus
Respondent: Sucheta Narayan Dastane

1975 AIR 1534
DATE OF JUDGMENT 19/03/1975

Hindu Marriage Act--Section 10(1)(b) and 23(1)(a)(b)--Meaning of cruelty--Burden of proof in matrimonial matters--Whether beyond reasonable doubt--Condonation--of cruelty--Whether sexual intercourse amounts to condonation--Whether condonation is conditional--Revival of cruelty.

Code of Civil Procedure--Section 100 and 103--Powers of High Court in second appeal.

The appellant husband filed a petition for annulment of marriage on the ground of fraud, for divorce on the ground of unsoundness of mind and for judicial separation on the ground of cruelty. The appellant and respondent possess high educational qualifications and they were married in 1956. Two children were born of the marriage one in 1957 and the other in 1959.

The Trial Court rejected the contention of fraud and unsoundness of mind. It, however, held the wife guilty of cruelty and on that ground passed a decree for judicial separation. Both sides went in appeal to the District Court which dismissed the husband's appeal and allowed the wife's. The husband then filed a Second Appeal in the High Court.

The High Court dismissed that appeal.

On appeal to this Court,

Neither s.10 nor s. 23 of the Hindu Marriage Act requires that the petitioner must prove his case beyond reasonable doubt S. 23 confers on the court the power to pass a decree if it is satisfied on the matters mentioned in Clauses (a) to (e) of that Section. Considering that proceedings under the Act are essentially of a civil nature the word 'satisfied' must mean satisfied on a preponderance of probabilities and not satisfied beyond a reasonable doubt. The society has a stake in the institution of marriage and, therefore, the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for- the dissolution of marriage, it has no bearing on the standard of proof in matrimonial cases. In England, a view was at one time taken that a petitioner in a matrimonial petition must establish his or her case beyond a reasonable doubt but the House of

Lords in Blyth v. Blyth has held that the grounds of divorce or the bars to the divorce May be proved by a preponderance of probability

On the question of condonation of cruelty, a specific provision of a specific enactment has to be interpreted, namely s. 10(1) (b). The enquiry, therefore, has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such a danger.

Acts like the tearing of the Mangal Sutra, locking out the husband when he is due to arrive from the office, rubbing of chilly powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. The conduct of wile amounts to cruelty within the meaning of s. 10(1) (b) of the Act. The threat that she would put an end to her own life or that she will set the house on fire, the threat that she will make the husband lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents are all of so grave an order as to 'imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2224 of 1970.

From the judgment and order dated the 19th February, 1969 of the Bombay High Court in Second Appeal No. 480 of 1968.

V. M. Tarkunde, S. Bhandare, P. H. Parekh and Manju Jaitely, for the appellant.

V. S. Desai, S. B. Wad and Jayashree Wad, for the respondents.

The Judgment of the Court was delivered by

CHANDRACHUD, J.-This is a matrimonial dispute arising out of a petition filed by the appellant for annulment of his marriage with the respondent or alternatively for divorce or for judicial separation. The annulment was sought on the ground of fraud, divorce on the ground of unsoundness of mind and judicial separation on the ground of cruelty.

The spouses possess high academic qualifications and each one claims a measure. of social respectability and cultural sophistry. The evidence shows some traces of these. But of this there need be no doubt,: the voluminous record which they have collectively built up in the case contains a fair reflection of their rancour and acrimony, The appellant, Dr. Narayan Ganesh Dastane, passed his M.Sc. in Agriculture from the Poona University. He was sent by the Government of India to Australia in the Colombo Plan Scheme. He obtained his Doctorate in Irrigation Research from an Australian University and returned to India in April, 1955. He worked for about 3 years as an Agricultural Research Officer and in October, 1958 he left Poona to take charge of a new post as an Assistant Professor of Agronomy in the 'Post-Graduate School, Pusa Institute, Delhi. At present be is said to be working on a foreign assignment.

His father was a solicitor-cum lawyer practising in Poona.

The respondent, Sucheta, comes from Nagpur but she spent her formative years mostly in Delhi. Her father was transferred to Delhi in 1949 as an Under Secretary in the Commerce Ministry of the Government of India and she came to Delhi along with the rest of the family. She passed her B.Sc. from the Delhi University in 1954 and spent a year in Japan where her father was attached to the Indian Embassy. After the rift in her marital relations, she obtained a Master's Degree in Social Work. She has done field work in Marriage Conciliation and Juvenile Delinquency. She is at present working in the Commerce and Industry Ministry, Delhi.

In April, 1956 her parents arranged her marriage with the appellant. But before finalising the proposal, her father- B. R. Abhyankarwrote two letters to the appellant's father saying in the first of these that the respondent "had a little misfortune before going to Japan in that she had a bad attack of sunstroke which affected her mental condition for sometime". In the second letter which followed at an interval of two days, "cerebral malaria" was mentioned as an additional reason of the mental affectation. The letters stated that after a course of treatment at the Yeravada Mental Hospital, she was cured : "you find her as she is today". The respondent's father asked her appellant's father to discuss the matter, if necessary, with the doctors of the Mental Hospital or with one Dr. P. L. Deshmukh, a relative of the respondent's mother. The letter was written avowdely'in order that the appellant and his people "should not be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily".

Dr. Deshmukh confirmed what was stated in the letters and being content with his assurance, the appellant and his father made no enquiries with the Yeravada Mental Hospital. The marriage was performed at Poona on May 13, 1956. The appellant was then 27 and the respondent 21 years of age.

They lived at Arbhavi in District Belgaum from June to October, 1956. On November 1, 1956 the appellant was transferred to Poona where the two lived together till 1958.

During this period a girl named Shubha was born to them on March 11, 1957. The respondent delivered in Delhi where ,her parents lived and returned to Poona in June, 1957 after an absence, normal on such occasions, of about 5 months. In October, 1958 the appellant took a job in the Pusa Institute of Delhi, On March 21, 1959 the second daughter, Vibha, was born. The respondent delivered at Poona where the appellant's parents lived and returned to Delhi in August, 1959. Her parents were living at this time in Djakarta, Indonesia.

In January, 1961, the respondent went to Poona to attend the marriage of the appellant's brother, a doctor-by profession, who has been given an adoption in the Lohokare family. A fortnight after the marriage, on February 27, 1961 the appellant who had also gone to Poona for the marriage got the respondent examined by Dr. seth, a Psychiatrist in charge of the Yeravada Mental Hospital. Dr. Seth probably wanted adequate data to make his diagnosis and suggested that he would like to have a few sittings exclusively with the respondent. For reasons good or bad, the respondent was averse to submit herself to any such scrutiny. Either she herself or both she and the appellant decided that she should stay for some time with a relative of bers, Mrs-Gokhale. On the evening of the 27th, she packed her titbits and the appellant reached her to Mrs. Gokhale's house.

There was no consultation thereafter with Dr. Seth.

According to the appellant, she had promised to see Dr, Seth but she denies that she made any such promise. She believed that the appellant was building up a case that she was of unsound mind and she was being lured to walk into that trap.

February 1961 was the last that they lived together-. But on the day of parting she was three months in the family way. The third child, again a girl, named Pratibha was born on August 19, 1961 when her parents were in the midst of a marital crisis.

Things had by then come to an impossible pass. And close relatives instead of offering wise counsel were fanning the fire of discord that was devouring the marriage. A gentleman called Gadre whose letter-head shows an "M.A. (Phil.) M.A. (Eco.) LL.B.", is a maternal uncle of the respondent. On-March 2, 1961 he had written to tile appellant's father a pseudonymous letter now proved to be his, full of malice and sadism. He wrote :

> *"I on my part consider myself to be the father of 'Brahmadev ..... This is only the beginning. From the spark of your foolish and half-baked egoism, a big conflagration of family quarrels will break out and all will perish therein This image of the mental agony suffered by all your kith and' kin gives me extreme happiness..... You worthless person, who cherishes a desire to spit on my face, now behold that all the world is going to spit on your old cheeks.*
>
> *So why should I loose the opportunity of giving you a few severe slaps on your cheeks and of fisting your ear. It is my earnest desire that the father-in-law should beat your son with foot-ware in a public place."*

On March 11, 1961 the appellant returned to Delhi all alone. Two days later the respondent followed him but she went straight to her parents' house in)Delhi. On the 15th, the appellant wrote a letter to the police asking for protection as he feared danger to his life from the respondent's parents and relatives. On the 19th, the respondent saw the appellant but that only gave to the parties one more chance to give vent to mutual dislike and distrust. After a brief meeting, she left the broken home for good. On the 20th, the appellant once again wrote to the police renewing his request for protection.

On March 23, 1961 the respondent wrote to the appellant complaining against his conduct and asking for money for the maintenance of herself and the daughters. On May 19, 1961 the respondent wrote a letter to the Secretary, Ministry of Food and Agriculture, saying that the appellant had deserted her, that he had treated her with extreme cruelty and asking that the Government should make separate provision for her maintenance. On March 25, her statement was recorded by an Assistant Superintendent of Police, in which she alleged desertion and ill-treatment by the appellant. Further statements were recorded by the police and the Food Ministry also followed up respondent's letter of May 19 but ultimately nothing came out of these complaints and cross complaints. As stated earlier, the third daughter, Pratibha, was born on August 19, 1961. On November 3, 1961 the appellant wrote to respondent's father complaining of respondent's conduct and expressing regret that not even a proper invitation was issued to him when the naming ceremony of the child was performed. On December 15, 1961 the appellant wrote to respondent's father stating that he had decided to go to the court for seeking separation from the respondent. The proceedings out of which this appeal arises were instituted on February 19, 1962.

The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if wotmen professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata

of society to which these two belong. All circumstances which constitute the ,occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination.

The appellant asked for annulment of his marriage by a decree of nullity under section 12(1) (c) of 'The Hindu Marirage Act', 25 of 1955, ("The Act") on the ground that his consent to the marriage was obtained by fraud. Alternatively, he asked for divorce under section 13 (1) (iii) on the ground that the respondent was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. Alternatively, the appellant asked for Judicial separation under section 10(1) (b) on the ground that the respondent had treated him with such cruelty as to cause a reasonable apprehension in his mind that. it would be harmful or injurious for him to live with her.

The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Menfal Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria. The trial court rejected this contention. It also rejected the contention that the respondent was of unsound mind.It,however, held that the respondent was guilty of cruelty and on that ground it passed a decree for judicial separation.

Both sides went in appeal to the District Court which dismissed the appellant's appeal and allowed the respondent's, with the result that the petition filed by the appellant stood wholly dismissed.

The appellant then filed Second Appeal No. 480 of 1968 in the Bombay High Court. A learned single Judge of that court dismissed that appeal by a judgment dated February 24, 1969.

This Court granted to the appellant special leave to appeal, limited to the question of judicial separation on the ground of cruelty.

We are thus not concerned with the question whether the appellant's consent to the marriage was obtainede by fraud or whether the respondent bad been of unsound mind for the requisite period preceding the presentation of the petition.

The decision-of the-High Court on those questions must be treated as final and can not be reopened. In this appeal by special leave, against the judgment rendered by the High Court in Second Appeal, we would not have normally permitted the parties to take us through the evidence in the case. Sitting in Second Appeal, it was not open to the High Court itself to reappreciate evidence. Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second appeal to questions of law or to substantial errors or defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. But the High Court came to the conclusion that both the courts below had "failed to apply the correct principles of law in determining the issue of cruelty". Accordingly, the High Court proceeded to consider the evidence for itself and came to the conclusion independently that the appellant had failed to establish that the respondent had treat him with cruelty. A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for this Court in appeals under Article 136 of the Constitution to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties.

In judging of the conduct of the respondent, the High Court assumed that the words of abuse or insult used by the respondent "could not have been addressed in vacuum. Every abuse, insult, remark or retort must have been probably in exchange for remarks and rebukes from the husband..... a court is bound to consider the probabilities and infer, as I have done, that they must have been in the context of the abuses, insults, rebukes and remarks made by the husband and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impossible to draw inferences against the wife."

We find this approach difficult to accept. Under section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of 'fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100. But, if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating ,evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guesswork.

If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there was evidence, direct or circumstantial, to justify such an inference. But the High Court itself felt that there was no evidence on the record with regard to the conduct of the husband in response to which the wife could be said to have behaved in the particular manner. The High Court reacted to this situation by saying that since there was no evidence regarding the conduct of the husband, "it is difficult, if not impossible, to draw inferences against the wife". If there was no evidence that the husband had provoked the wife's utterances, no inference could be drawn against the husband.

There was no question of drawing any inferences against the wife because, according to the High Court, it was established on the evidence that she had uttered the particular words of abuse and insult. The approach of the High Court is thus erroneous and its findings are vitiated. We would have normally remanded the matter to the High Court for a fresh consideration of the evidence but this proceeding has been pending for 13 years and we thought that rather than delay the decision any further, we should undertake for ourselves the task which the High Court thought it should undertake under section 103 of the Code. That makes it necessary to consider the evidence in the case.

But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act.

But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge

of cruelty, what is the standard of proof to be applied in order Lo judge whether the burden has been discharged ?

The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2).

But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so' nicely balanced that a reasonable, (1) Per Dixon,J.in Wright v.Wright (1948)77 C.L.R.191at p. 210. (2) Blyth v. Blyth, [1966] 1 A.E.R. 524 at 536. not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To mar' or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender.]But this social philosophy, though it may

have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation.

Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in Moonshee Bazloor Rubeem v. Shamsoonnissa Begum(3), where the Privy Council observed:

> *"The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own of which one of the most recent exposition is the following :- 'There must be actual violence (1) [1966] A.E.R. 524 at 536. (2) 1948, 77 C.L.R. 191 at 210. (3) 11 Moore's Indian Appeals 551. of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it'."*

The High Court then refers to the decisions of some of the Indian Courts to illustrate "The march of the Indian Courts with the Englishs Courts" and cites the following passage from D. Tolstoy's "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Ed., p. 61):

> *"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."*

The High Court concludes that "Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can he considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law."

An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

> *"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-*
>
> *(b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"*

The inquiry therefore has to be whether the conduct charged a,.- cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent.

It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. The risk of relying on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton(1), says :

> *"Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health." (1) [1940] P. 187.*

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

One other matter which needs to be clarified is that though under section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours to finish the day's work and some one may want to get up early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse,. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."(1) The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins (2).

> *"In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make bout them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."*

We must therefore try and understand this Dr. Dastane and his wife Sucheta as nature has made them and as they have shaped their lives.

(1) American Jurisprudence, 2nd Ed., Vol. 24, p. 206.

(2) [1963] 2 A.E.R. 966,970.

The only rider is the interdict of section 23 (1) (a) of the Act that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise. We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable, wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas.

The spouses parted company on February 27, 1961, the appellant filed his petition on February 19, 1962 and the trial began in September, 1964. The 3-1/2 years' separation must naturally have created many more misunderstandings and further embitterment. In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that has to be examined with care.

The married life of these spouses is well-documented, almost incredibly documented. They have reduced to writing what crossed their minds and the letters which they have written to each other bear evidence of the pass to which the marriage had come. Some of these were habitually written as the first thing in the morning like a morning cup (if tea while some were written in the silence of mid-night soon after the echo of harsh words had died down. To think that this young couple could indulge in such an orgy of furious letter-writing is to have to deal with a problem out of the ordinary for it is seldom that a husband and wife, while sharing a common home, adopt the written word as a means of expression or communication.

The bulk of the correspondence is by the wife who seems to have a flair for letter-writing. She writes in some style and as true as "The style is the man", her letters furnish a clue to her personality. They are a queer mixture of confessions and opprobrious accusations. It is strange that almost every one connected with this couple his a penchant for writing. The wife, apart from her voluminous letters, has written an autobiographical account of her unfortunate experiences in the Yeravada Hospital, calling it "Mee Antaralat Tarangat Asta" ("while I was floating in space").

The husband's father idealised the Shiva-Parvati relationship in a book called : "Gauriharachai Goad Kahani" ("The sweet story of Gaurihar"). Quite a few of the wifes relatives including a. younger sister of hers and of course her maternal uncle have set their pen to paper touching some aspect or the other of her married life. Perhaps, it was unfortunate that the promised millennium that did not come began with a letter. That was the letter of April 25, 1956 which the wife's lather wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.

Nothing deserving any serious notice happened till August, 1959 except that the letters Exs. 556, 238, 243 and 244 show that quite frequently the respondent used to get into fits of temper and say things

for which She would express regret later. In the letter Ex. 556 dated November 23, 1956 she admits to having behaved "very badly"; in Ek. 238 dated March 26, 1959 she admits that she was behaving like an "evil star" and had harassed the appellant; in Ex. 243 dated May 5, 1959 she says that she was aware of her "lack of sense" and asks for forgiveness for having insulted the appellant, his parents, his sister and her husband; and in Ex. 244 dated May 22, 1959 she entreats the appellant that he should not feel guilty for the insults hurled by her at his parents.

The period from August 1959 to March 1960 was quite critical and the correspondence covering that period shows that an innate lack of self-control had driven the respondent to inexorable conduct. By the letter. Ex. 256 dated February 16, 1960 the appellant complained to the respondent's father who was then in Indonesia that the respondent kept on abusing him, his parent and sister and that he was extremely unhappy. The appellant says in the letter that differences between a husband and wife were understandable but that it was impossible to tolerate the respondent constantly accusing him and his relatives of wickedness. The appellant complains that the respondent used to say that the book written by his father should be burnt to ashes, that the appellant should apply the ashes to his forehead, that the whole Dastane family was utterly mean and that she wished that his family may be utterly ruined. The appellant was gravely hurt at the respondent's allegation that his father's 'Sanad' bad been once forfeited. The appellant tells the respondent's father that if he so desired he could ask her whether anything stated in the letter was untrue and that he had conveyed to her what be was stating in the letter. It may be stated that the respondent admits that the appellant had shown her this letter before it was posted to her father. On March 21. 1960 the respondent wrote a letter (Ex. 519) to the appellant's parents admitting the truth of the allegations made by the appellant in Ex. 256.

On June 23, 1960 the respondent made a noting in her own hand stating that she had accused the appellant of being a person with a beggarly luck, that she had said that the food eaten at his house, instead of being digested would cause worms in the stomach and that she had given a threat :

"murder shall be avenged with murder".

During June 1, 1960 to December 15, 1960 the marital relations were subjected to a stress and strain which ultimately wrecked the marriage. In about September, 1960 the appellants father probably offered to mediate and asked the appellant and the respondent to submit to him their respective complaints in writing. The appellant's bill of complaints is at Ex. 426 dated October 23, 1960. The letter much too long to be reproduced, contains a sorry tale. The gist of the more important of the appellant's grievances in regard to the period prior to June, 1960 is this : (1)' The respondent used to describe the appellant's mother as a boorish woman; (2) On the day of 'Paksha' (the day oil which oblations are offered to ancestors) she used to abuse the ancestors of the appellant; (3) She tore off the 'Mangal- Sutra'; (4) She beat the daughter Shubha while she was running a high temperature of 104'; (5) One night she started behaving as if she was 'possessed'. She tore off the Mangal-Sutra once again and said that she will not put it on again; and (6) She used to switch on the light at midnight and sit by the husband's bedside nagging him through the night, as a result he literally prostrated himself before her on several occasions.

The gist of the incidents from May to October, 1960 which the appellant describes as 'a period of utmost misery' is this. (1) The respondent would indulge in every sort of harassment and would blurt out anything that came to her mind; (2) One day while a student of the appellant called Godse was sitting in the outer room she shouted :

"You are not a man at all"; (3) In the heat of anger she used to say that she would pour kerosene on her body and would set fire to herself and the house; (4) She used to lock out the appellant when he was due to return from the office. On four or five occasions he had to go back to the office without taking any food; (5) For the sheer sake of harassing him she would hide his shoes, watch, keys and other things.

The letter Ex. 426 concludes by saying : , "She is a hard headed, arrogant, merciless, thoughtless, unbalanced girl devoid of sense of duty. Her ideas about a husband are : He is a dog tied at doorstep who is supposed to come and go at her beck and call whenever ordered. She behaves with the relatives of her husband as if they were her servants. When I see her besides herself with fury, I feel afraid that she may kill me at any moment. I have become weary of her nature of beating the daughters, scolding and managing me every night uttering abuses and insults."

Most of these incidents are otherwise, supported, some by the admissions of the respondent herself, and for their proof we do not have to accept the bare word of the appellant.

On July 18, 1960 the respondent wrote a letter (Ex. 274) to the appellant admitting that within the bearing of a visitor she had beaten the daughter Shubha severely. When the appellant protested she retorted that if it was a matter of his prestige, be should not have procreated the children.

She has also admitted in this letter that in relation to her daughters she bad said that there will be world deluge because of the birth of those "ghosts". On or about July 20. 1960 she wrote another letter (Ex. 275) to the appellant admitting that she had described him as "a monster in a human body", that she had and that be'should not have procreated children. that he should "Pickle them and preserve them in a jar" and that she had given a threat that she would see to it that he loses his job and then she would publish the news in the Poona newspapers. On December 15, 1960 the appellant wrote a letter (Ex. 285) to the respondent's father complaining of the strange and cruel behaviour not only of the respondent but of her mother. He says that the respondent's mother used to threaten him that since she was the wife of an Under Secretary she knew many important persons and could get him dismissed from service, that she used to pry into his correspondence in his absence and that she even went to the length of saying that the respondent ought to care more for her parents because she could easily get another husband but not another pair of parents.

The respondent then went to Poona for the appellant's brother's marriage, where she was examined by Dr. Seth of the Yeravada Hospital and the spouses parted company on February 27, 1961.

The correspondence subsequent to February 27, 1961 shall have to be considered later in a different,, though a highly important, context. Some of those letters clearly bear the stamp of being written under legal advice. The parties had fallen out for good and the domestic war having ended inconclusively they were evidently preparing ground for a legal battle.

In regard to the conduct of the respondent as reflected in her admissions, two contentions raised on her behalf must be considered. It is urged in the first place that the various letters containing admissions were written by her under coercion. There is no substance in this contention. In her written statement, the respondent alleged that the appellant's parents had coerced her into writing the letters. At the trial she shifted her ground and said that the coercion proceeded from the appellant himself. That apart, at a time when the marriage had gone asunder and the respondent sent to the appellant formal letters resembling a lawyer's notice, some of them by registered post, no allegation was made that the appellant or his parents had obtained written admissions from her. Attention may be drawn in this

behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to the elaborate complaint Ex. 318 dated May 19, 1961 which she made to the Secretary to Government of India, Ministry of Food and Agriculture.

Prior to that on September 23, 1960 she had drawn up a list of her complaints (Ex. 424) which begins by saying : "He has oppressed me in numerous ways like the following." But she does not speak therein of any admission or writing having been obtained from her. Further, letters like Exs. 271 and 272 dated respectively June 23 and July 10, 1960 which besides containing admissions on her part also contain allegations against the appellant could certainly not have been obtained by coercion. Finally, considering that the respondent was always surrounded by a group of relatives who had assumed the role of marriage-counsellors, it is unlikely that any attempt to coerce her into making admissions would have been allowed to escape unrecorded. After all, the group here consists of greedy letter-writers.

The second contention regarding the admissions of the respondent is founded on the provisions of section 23(1)(a) of the Act under which the court cannot decree relief unless it is satisfied that "the petitioner is not in any way taking advantage of his own wrong'. The fulfilment of the conditions mentioned in, section 23(1) is so imperative that the legislature has taken the care to provide that "then, and in such a case, but not otherwise, the court shall decree such relief accordingly". It is urged that the appellant is a bigoted and egocentric person who demanded of his wife an impossibly rigid standard of behaviour and the wife's conduct must be excused as being in selfdefence. In other words, the husband is said to have provoked the wife to say and act the way she did and he cannot be permitted to take advantage of his own wrong. The appellant, it is true, seems a stickler for domestic discipline and these so-called perfectionists can be quite difficult to live with. On September 22, 1957 the respondent made a memorandum (Ex. 379) of the instructions given by the appellant, which makes interesting reading:

"Special instructions given by my husband.

(1) On rising up in the morning, to look in the minor.

(2) Not to fill milk vessel or tea cup to the brim.

(3) Not to serve meals in brass plates cups and vessels.

(4) To preserve carefully the letters received and if addresses of anybody are given therein to note down the same in the note book of addresses.

(5) After serving the first course during meals, not to repeatedly ask 'what do you want?' but to inform at the beginning of the meals how much and which are the courses.

(6) As far as possible not to dip the fingers in any utensils.

(7) Not to do any work with one hand.

(8) To keep Chi. Shuba six feet away from the primus stove and Shegari.

(9) To regularly apply to her 'Kajal' and give her tomato juice, Dodascloin etc. To make her do physical exercise, to take her for a walk and not to lose temper with her for a year.

(10) To give him his musts and the things he requires when he starts to go outside.

(11) Not to talk much.

(12) Not to finish work somehow or the other; for example to write letters in good hand writing, to take a good paper, to write straight and legibly in a line.

(13) Not to make exaggerations in letters.

(14) To show imagination in every work. Not to note down the milk purchased on the calendar."

Now, this was utterly tactless but one cannot say that it called for any attack in self-defence. The appellant was then 28 and the respondent 22 years of age. In that early morning flush of the marriage' young men and women do entertain lavish expectations of each other do not and as years roll by they see the folly of. their ways. But we think that the wife was really offended by the instructions given by the appellant. The plea of self-defence seems a clear after-thought which took birth when there was a fundamental failure of faith and understanding.

Reliance was then placed on certain letters to show that the husband wanted to assert his will at any cost, leaving the wife no option but to retaliate. We see no substance in this grievance either. The, plea in the written statement is one of the denial of conduct alleged and not of provocation. Secondly, there are letters on the record by which the wife and her relatives had from time to time complimented the husband and his parents for their warmth, patience and understanding.

Counsel for the respondent laid great emphasis on the letter, Ex. 244 dated May 22, 1959 written by her to the appellant in which she refers to some "unutterable question" put by him to her. It is urged that the appellant was pestering her with a demand for divorce and the "unutterable question" was the one by which he asked for divorce. No such inference can in our opinion be raised. The respondent has not produced the letter to which Ex. 244 is reply; in the written statement there is hardly a suggestion that the appellant was asking her for a divorce; and the appellant was not asked in his evidence any explanation in regard to the "unutterable question".

These defences to the charge of cruelty must accordingly be rejected. However, learned counsel for the respondent is right in stressing the warning given by Denning L.J., in Kaslefsky v. Kaslefsky that : "If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread especially in undefended cases. The temptation must be resisted test we slip into a state of affairs where the institution of marriage itself is imperilled." But we think that t1o hold in this case that the wife's conduct does not amount to cruelty is to close for ever the door of cruelty so as to totally prevent any access thereto. This is not a case of mere austerity of temper, petulance of manners, rudeness of language or a want of civil attention to the needs of the husband and the household. Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner. But the respondent is the mercy of her inflexible temper. She delights in causing misery to her husband and his relation-, and she willingly suffers the calculated insults which her relatives hurled at him and his parents : the false accusation that, "the pleader's Sanad of that old bag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty", "burn (1)[1950] 2 A.E.R. 398,403.

the book written by your father and apply the ashes to your forehead"; "you are not a man" conveying that the children were not his; "you are a monster in a human body. "I will make you lose your job and publish it in the Poona newspapers"-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household. Acts like the tearing of the Mangal-Sutra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly

while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of behaviour which the respondent generally adopted was grossly excessive.

The conduct of the respondent clearly amounts to cruelty within the meaning of section 10(1) (b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end of her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the, persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety. mental, happiness, job satisfaction and reputation. Her once-too-frequent.

apologies do not reflect genuine contrition but were merely impromptu device to tide over a crisis temporarily. The next question for consideration is whether the appellant had at any time condoned the respondent's cruelty. Under section 23(1) (b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty".

The respondent did not take up the plea in her written statement that the appellant bad condoned her cruelty. Probably influenced by that omission, the trial court did not frame any issue on condonation. While granting a decree of judicial separation on the ground of cruelty, the learned Joint Civil Judge, Junior Division, Poona, did not address himself to the question of condonation. In appeal, the learned Extra Assistant Judge, Poona, having found that the conduct of the respondent did not amount to cruelty, the question of condonation did not arise. The High Court in Second Appeal confirmed the finding of the 1st Appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned by the appellant.

The condonation, according to the High Court, consisted in the circumstance that the spouses co-habited till February 27, 1961 and a child was born to them in August, 1961.

Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of co-habitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration(1). The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some

time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued co-habitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's Acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well magine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety.

> *"No matrimonial offence is erased by condonation. It is obscured but not obliterated" (1). Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence(2). Condoned cruelty can therefore be revived, say, by desertion or adultery."*

Section 23 (1) (b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from the circumstances that under the English law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned (3). But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English Courts from the canon law. 'Condonation' is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not 'forgiveness' as commonly understood (4). In England condoned adultery could

not be received because of the express provision contained in section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word 'condonation' must receive the meaning which it has borne for centuries in the world of law(").

'Condonation' under section 23 (1) (b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.

(1) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., Vol I, p. 305, ("Condonation").

(2) See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061.

(3) See Rayden on Divorce, 11th Ed. (1971) pp. 11, 12, 23, 68, 2403.

(4) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., p. 306 and the Cases cited therein.

(5) See Ferrers vs Ferrers (1791) 1 Hag. Con 130 at pp. 130, 131.

It therefore becomes necessary to consider the appellant's argument that even on the assumption that the appellant had condoned the cruelty, the respondent by her subsequent conduct forfeited the conditional forgiveness, thereby reviving the original cause of action for judicial separation on the ground of cruelty. It is alleged that the respondent treated the appellant with cruelty during their brief meeting on March 19, 1961, that she refused to allow to the appellant any access to the children, that on May 19, 1961 she wrote a letter (Ex. 318) to the Secretary to the Government of India, Ministry of Food and Agriculture, New Delhi, containing false and malicious accusations against the appellant and his parents and that she deserted the appellant and asked the Government to provide her with separate maintenance.

These facts, if proved, shall have to be approached and evaluated differently from the facts which were alleged to constitute cruelty prior to its condonation. The incidents on which the appellant relied to establish the charge of cruelty had to be grave and weighty. And we found them to be so. In regard to the respondent's conduct subsequent to condonation, it is necessary to bear in mind that such conduct may not be enough by itself to found a decree for judicial separation and yet it may be enough to revive the condoned offence. For example, gross familiarities short of adultery(1) or desertion for less than the statutory period (2) may be enough to revive a condoned offence. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint (Ex. 295) which he made to the police on March 20, 1961. He says therein that on the 19th morning, the respondent went to his house with some relatives, that those relatives-instigated her against him, that they entered his house though he asked them not to do so and that she took away certain household articles with her. As shown by her letter (Ex. 294) dated the 19th itself, the articles which she took away were some petty odds and ends like a do]], a slate, a baby hold-all, two pillows, a bundle of clothes and a baby-cart. The police complaint made by the appellant betrays some hypersensitivity.

As regards the children, it does seem that ever since February 27, the appellant was denied a chance to meet them. His letters Exs. 307. 309 and 342 dated April 20, April 21 and November 23, 1961 respectively contain the grievance that the children were deliberately not allowed to see him., From his point of view the grievance could be real but then the children, Shubha and Vibha, were just 4 and 2 years of age in February, 1961 when their parents parted company.

Children of such tender age need a great amount of looking after and they could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who bad left or bad to leave the matrimonial home for good. The appellant's going to the house of the respondent's parents where he was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

(1) Halsbury's Law-, of England, 3rd Ed., Vol. 12, p. 306, para 609.

(2) Beard vs. Beard [1945] 2 A.E.R. 306.

The allegations made by the respondent in her letter to the Government, Ex. 318 dated May 19, 1961 require a close consideration. It is a long letter, quite an epistle, in tune with the, respondent's proclivity as a letter-writer. By that letter, she asked the Government to provide separate maintenance for herself and the children. The allegations contained in the letter to which the appellant's counsel has taken strong exception are these : (1) During the period that she lived with the appellant, she was subjected to great harassment as well as mental and physical torture; (2) The appellant had driven her out of the house on February 27, 1961; (3) The appellant had deserted her and had declared that he will not have any connection with her and that he will not render any financial help for the maintenance of herself and the children. He also refused to give medical help to her in her advanced stage of pregnancy; (4) The appellant had denied to her even the barest necessities of life like food and clothing; (5) The parents of (he appellant were wicked persons and much of her suffering was due to the influence which they had on the appellant; (6) The appellant used to threaten her that he would divorce her, drive her out of the house and even do away with her life, (7) The plan to get her examined by Dr. Seth of the Peravada Mental Hospital was an insincere wicked and evil move engineered by the appellant, his brother and his father, (8) On her refusal to submit to the medical examination any further, she was driven out of the house with the children after being deprived of the valuables on her person and in her possession; and (9) The appellant had subjected her to such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.

Viewed in isolation, these allegations present a different and a somewhat distorted picture. For their proper assessment and understanding, it is necessary to consider the context in which those allegations came to be made. We will, for that purpose, refer to a few letters.

On March 7, 1961 the respondent's mother's aunt, Mrs. Gokhale wrote a letter (Ex. 644) to the respondent's mother. The letter has some bearing on the events which happened in the wake of the separation which took place on February 27, 1961. It shows that the grievance of the respondent and her relatives was not so much that a psychiatrist was consulted as that the consultation was arranged without any prior intimation to the respondent. The letter shows that the appellant's brother Dr. Lohokare, and his brother-in-law Deolalkar, expressed regret that the respondent should have been got examined by a psychiatrist without previous intimation to any of her relatives. The letter speaks of a possible compromise between the husband and wife and it sets out the terms which the respondent's relatives wanted to place before the appellant. The terms were that the respondent would stay at her parents' place until her delivery but she would visit the appellant off and on; that the children would be free to visit the appellant; and that in case the appellant desired that the respondent should live with him, he should arrange that Dr. Lohokare's mother should stay with them in Delhi for a few days. The last term of the proposed compromise Was that instead of digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwritting of the respondent

herself and the significance of that circumstance is that it was evidently written with her knowledge and consent. Two things are clear from the letter : one, that the respondent did not want to leave the appellant and two, that she did not either want to prevent the children from seeing the appellant. The letter was written by one close relative of the respondent to another in the ordinary course of events and was not, so to say, prepared in order to create evidence or to supply a possible defence. It reflects a genuine attitude, not a make believe pose and the feelings expressed therein were shared by the, respondent whose handwriting the letter bears.

This letter must be read along with the letter Ex. 304 which the respondent sent to the appellant on April 18, 1961. She writes :

> *"I was sorry to hear that you are unwell and need treatment. I would always like never to fail in my wifely duty of looking after you, particularly when you are ailing, but you will, no doubt, agree that even for this, it will not be possible for me to join you in the house out of which you have turned me at your father's instance. 'This is, therefore, just to keep you informed that if you come to 7/6 East Patel Nagar, I shall be able to nurse you properly and my parents will ever be most willing to afford the necessary facilities under their care to let me carry out this proposal of mine."*

There is no question that the respondent had no animus to desert the appellant and as stated by her or on her behalf more than once, the appellant had on February 27, 1961 reached her to Mrs. Gokhale's house in Poona, may be in the hope that she will cooperate with Dr. Seth in the psychiatric exploration. She did not leave the house of her own volition.

But the appellant had worked himself up to believe that the respondent had gone off her mind. On March 15, 1961 he made a complaint (Ex. 292) to the Delhi Police which begins with the recital that the respondent was in the Mental Hospital before marriage and that she needed treatment from a psychiatrist. He did say that the respondent was "a very loving and affectionate person" but he qualified it by saying : "when excited, she appears to be a very dangerous woman, with confused thinking".

On April 20, 1961 the appellant wrote a letter (Ex. 305) to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he will not be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter (Ex. 307) to the respondent's father reminding him that he, the appellant, had accepted a girl "who had returned from the Mental Hospital". On April 21, 1961 he wrote it letter (Ex. 309) to the Director of Social Welfare, Delhi Administration, in which he took especial care to declare that the respondent "was in the Poona Mental Hospital as a lunatic before the marriage". The relevance of these reiterations regarding the so-called insanity of the respondent, particularly in the last letter, seems only this, that the appellant was preparing ground for a decree of divorce or of annulment of marriage. He was surely not so naive as to believe that the Director of Social Welfare could arrange to "give complete physical and mental rest" to the respondent. Obviously, the appellant was anxious to disseminate the information as widely as possible that the respondent was of unsound mind.

On May 6, 1961 the respondent sent a reply (Ex. 314) to the appellant's letter, Ex. 305, dated April 20, 1961. She expressed her willingness to go back to Poona as desired by him, if he could make satisfactory arrangements for her stay there. But she asserted that as a wife she was entitled to live with him and there was no purpose in her living at Poona "so many miles away from Delhi, without your shelter". In regard to the appellant's resolve that he will not bear the expenses incurred by her, she

stated that not a pie remitted by him will be illspent and that, whatever amount he would send her will be, accounted for fully. It is in this background that on May 19, 1961 the respondent wrote the letter Ex. 318 to the Government. When asked by the Government to offer his explanation, the appellant by his reply Ex. 323 dated July 19, 1961 stated that the respondent needed mental treatment, that she may have written the letter Ex. 318 in a "madman's frenzy" and that her father had "demoralised" her. In his letter Ex. 342 dated November 23 , 1961 to the respondent's father, he described the respondent as "'your schizophrenic daughter".

Considered in this context, the allegations made by the respondent in her letter Ex. 318 cannot revive the original cause of action. These allegations were provoked by the appellant by his persistent and purposeful accusation, repeated times without number, that the respondent was of unsound mind. He snatched every chance and wasted no opportunity to describe her as a mad woman which, for the purposes of this appeal, we must assume to be wrong and unfounded. He has been denied leave to appeal to this Court from the finding of the High Court that his allegation that the respondent was of unsound mind is baseless. He also protested that he was not liable to maintain the respondent.

It is difficult in these circumstances to accept the appellant's argument either that the respondent deserted him or that she treated him with cruelty after her earlier conduct was condoned by him. It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival(1) and in cases of cruelty, "very slight fresh evidence is needed to show a resumption of the cruelty. for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out". But the conduct of the respondent after condonation cannot be viewed apart from the conduct of the appellant after condonation. Condonation is conditional forgiveness but the grant of such forgiveness does not give

(1) Cooper vs. Cooper (1950) W.N. 200 (H.L.)

(2) Per Scott L. J. in Batram vs. Batram (1944) p. 59 at p. 60.

to the condoning spouse a charter to malign the other spouse. If this were so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy. The respondent ought not to have described the appellant's parents as "wicked" but that perhaps is the only allegation in the letter Ex. 318 to which exception may be taken. We find ourselves unable to rely on that solitary circumstance to allow the revival of condoned cruelty.

We therefore hold that the respondent was guilty of cruelty but the appellant condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

Appeal dismissed.

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BIPIN CHANDER JAISINGHBHAI SHAH VERSUS PRABHAWATI

Equivalent Citations: 1956 Scr 838

(Before Hon'ble Mr. Justice Bhuvneshwar P. Sinha, Hon'ble Mr. Justice B. Jagannadhadas & Hon'ble Mr. Justice T.L. Venkatarama Aiyyar, JJ.)

1957 AIR 176

Bipin Chander Jaisinghbhai Shah
Vs.
Prabhawati.

Date of Judgment: 19/10/1956

HMA-section 13- divorce- ground of desertion - For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely

(1) the factum of separation, and

(2) the intention to bring cohabitation permanently to an end (animus deserendi).

Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and

(2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively....

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus deserendi coincide in point of time.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 247 of 1953. Appeal by special leave from the judgment and decree dated August 22, 1952 of the Bombay High Court in Appeal No. 66 of 1952 arising out of the decree dated March 7, 1952 of Bombay High Court in its Ordinary Original Civil Jurisdiction in Suit No. 1177 of 1951.

M. C. Setalvad, Attorney-General for India, Purshottam Tricumdas, T. Godiwala, J. B. Dadachanji, Rameshwar Nath and S. N. Andley, for the appellant.

C. K. Daphtary, Solicitor-General of India and Sardar Bahadur, for the respondent.

1956, October 19. The Judgment of the Court was delivered by

SINHA J.-This is an appeal by special leave against the judgment and decree of the High Court of Judicature at Bombay dated August 22,1952, reversing those of a single Judge of that Court on the Original Side, dated March 7,1952, by which he had granted a decree for dissolution of marriage between the appellant and the respondent.

The facts and circumstances of this case may be stated as follows: The appellant, who was the plaintiff, and the respondent were married at Patan on April 20, 1942, according to Hindu rites of the Jain Community. The families of both the parties belong to Patan, which is a town in Gujarat, about a night's rail journey from Bombay. They lived in Bombay in a two-room flat which was in occupation of the appellant's family consisting of his parents and his two sisters, who occupied the larger room called the hall, and the plaintiff and the defendant who occupied the smaller room called the kitchen. The appellant's mother who is a patient of asthma lived mostly at Patan. There is an issue of the marriage, a son named Kirit, born on September 10, 1945. The defendant's parents lived mostly at Jaigaon in the East Khandesh district in Bombay. The parties appear to have lived happily in Bombay until a third party named Mahendra, a friend of the family came upon the scene and began to live with the family in their Bombay flat some time in 1946, after his discharge from the army. On January 8, 1947, the appellant left for England on business. It was the plaintiff's case that during his absence from Bombay the defendant became intimate with the said Mahendra and when she went to Patan after the plaintiff's departure for England she carried on "amorous correspondence" with Mahendra who continued to stay with the plaintiff's family in Bombay. One of the letters written by the defendant to Mahendra while staying at the plaintiff's flat in Bombay, is Ex. E as officially translated in English, the original being in Gujerati except a few words written in faulty English. This letter is dated April,1947, written from the plaintiff's house at Patan, where the defendant bad been staying with her mother-in-law. This letter had been annexed to the plaint with the official translation. It was denied by the defendant in her written statement. But at the trial her counsel admitted it to have been written by her to Mahendra. As this letter started all the trouble between the parties to this litigation, it will have to be set out in extenso hereinafter. Continuing the plaintiff's narrative of the events as alleged in the plaint and in his evidence, the plaintiff returned to Bombay from abroadon May 20, 1947. To receive him back from his foreign journey the whole family' including the defendant was there in Bombay. According to the plaintiff, he found that on the first night after his return his bed had been made in the hall occupied by his father and that night he slept away from his wife. As this incident is said to have some significance in the narrative of events leading up to the separation between the husband and the wife and about the reason for which the parties differ, it will have to be examined in detail later. Next morning, that is to say, on May 21, 1947, the plaintiff's father handed over the letter aforesaid to the plaintiff, who recognised it as being in the familiar handwriting of his wife. He decided to tackle his wife with reference to the letter. He handed it to a photographer to have photo copies made of the same. That very day in the evening he asked his wife as to why she had addressed the letter to Mahendra. She at first denied having written any letter and asked to see the letter upon which the plaintiff informed her that it was with the photographer with a view to photo copies being made. After receiving the letter and the photo copies from the photographer on May 23, the plaintiff showed the defendant the photo copy of the letter in controversy between them at that stage and then the defendant is alleged to have admitted having written the letter to Mahendra and to have further told the plaintiff that Mahendra was a better man than him and that Mahendra loved her and she loved him. The next important event in the narrative is what happened on May 24, 1947. On the morning of that day, while the plaintiff was getting ready to go to his business office his wife is alleged to have told him that she had packed

her luggage and was ready to go to Jalgaon on the ostensible ground that there was a marriage in her father's family. The plaintiff told her that if she had made up her mind to go, he would send the car to take her to the station and offered to pay her Rs. 100 for her expenses. But she refused the offer. She left Bombay apparently in the plaintiff's absence for Jalgaon by the afternoon train. when the plaintiff came back home from his office, he "discovered that she had taken away everything with her and had left nothing behind". It may be added here that the plaintiff's mother had left for Patan with his son some days previously. Plaintiff 's case further is that the defendant never came back to Bombay to live with him, nor did she write any letters from Jalgaon, where she stayed most of the time. It appears further that the plaintiff took a very hasty, 'if not also a foolish, step of having a letter addressed to the defendant by his solicitor on July 15, 1947, charging her with intimacy between herself and Mahendra and asking her to send back the little boy. ,The parties violently differ on the intent and effect of this letter which will have to be set out in extenso at the appropriate place. No answer to this letter was received by the plaintiff. In November, 1947, the plaintiff's mother came from Patan to Bombay and informed the plaintiff that the defendant might be expected in Bombay a few days later. Thereupon the plaintiff sent a telegram to his father-in-law at Patan. The telegram is worded as follows:-

"Must not send Prabha. Letter posted.

Wishing happy new year".

The telegram stated that a letter bad been posted. The defendant denied that any such letter bad been received by her or by her father. Hence the original, if any, is not on the record. But the plaintiff produced what he alleged to be a carbon copy of that letter which purports to have been written on November 13, 1947, the date on which the telegram was despatched. An English translation of that letter is Ex. C and is to the following effect:-

Bombay 13-11-47 To Rajmanya Rajeshri Seth Popatlal & others. There is no letter from you recently. You must have received the telegram sent by me today.

Further, this is to inform you that I have received information from my Mami (mother) thatPrabha is going to come to Bombay in 3 or 4 days. I am surprised to hear this news; Ever since she has gone to Jalgaon, there has been not a single letter from her to this day. Not only that, but, although you know everything, neither you nor any one on your behalf has come to see me in this connection. What has made Prabha thus inclined to come all of a sudden! After her behaviour while going to Jalgaon for: the marriage, (and after), her letter to Mahendra and her words. 'He is better than you-Has feeling for' me and I love him' and all this, I was afraid that she would not set up a house with me. Hence when my mother gave me the news of her return, I was surprised.

I have not the slightest objection to the return of Prabha, but if she gives such shameless replies to me and shows such improper behaviour, I shall not be able to tolerate the same. If she now really realises her mistake and if she is really repenting and wants sincerely to come, please make her write a reply to this letter. On getting a letter from her, I shall personally come to Patan to fetch her. Kirit is young. For his sake also, it is necessary to persuade Prabha.

Further, I have to state that I have so far kept peace. I have made efforts to call back Prabha. Please understand this to her my final effort. If even now Prabha does not give up her obstinacy, I am not responsible and (then) do not blame me.

Well, that is all for the present. Kirit must be bale and hearty. My new year's greetings to you all. Please do assign to me such work-as I can manage.

Written by Bipinchandra"

The plaintiff stated that be received no answer either to the telegram or to the letter. Two days later, on, November 15, the plaintiff's father addressed a letter to the defendant's father, which is Ex. D. This letter makes reference. to the defendant's mother having, talked to the plaintiffs mother about sending the defendant I to Bombay and to the fact that the plaintiff bad sent a telegram on November 13, and ends with the expression of opinion by the plaintiff's father that it was "absolutely necessary" that the plaintiff's consent should be obtained before sending the defendant to Bombay. This letter also remained unanswered. According to the plaintiff, nothing happened until May, 1948, when he went to Patan and there met the defendant and told her "that if she repented for her relations with Mahendra in the interests of the child as well as our own interests she could come back and live with me". To that the defendant is said to have replied that in November, 1947, as a result of pressure from her father and the community, she had-been thinking of coming to live with the plaintiff) but that she had then decided not to do so. The defendant has given quite a different version of this interview. The second interview between the plaintiff and the defendant again took place at Patan some time later in 1948 when the plaintiff went there to see her on coming to know that she had been suffering from typhoid,. At that time also she evinced no desire to come back to the plaintiff. The third and the last interview between the plaintiff and the defendant took place at Jalgaon in April-May, 1949. At that interview also the defendant turned down the plaintiff's request that at least in the interests of the child she should come back to him. According to the plaintiff, since May 24, 1947, when the defendant left his home in Bombay of her own accord, she bad not come back to her marital home. The suit was commenced by the plaintiff by filing the plaint dated July 4, 1951, substantially on the ground that the defendant bad been in desertion ever since May 24, 1947, without reasonable cause and without his consent and against his will for a period of over four years. He therefore prayed for a decree for a dissolution of his marriage with the defendant and for the custody of the minor child.

The suit was contested by the defendant by a written statement filed on February 4, 1952, substantially on the ground that it was the plaintiff who by his treatment of her after his return from England had made her life unbearable and compelled her to leave her marital home against her wishes on or about May 24, 1.947. She denied any intimacy between herself and Mahendra or that she was confronted by the plaintiff with a photostat copy of the letter., Ex. E, or that she had confessed any such intimacy to the plaintiff. She admitted having received the Attorney's letter, Ex. A, and also that she did not reply to that letter. She adduced her father's advice as the reason for not sending any answer to that letter. She added that her paternal uncle Bhogilal (since deceased) and his son Babubhai saw the plaintiff in Bombay at the instance of the defendant and her father and that the plaintiff turned down their request for taking her back. She also made reference to the negotiations between the defendant's mother and the plaintiff's mother to take the defendant back to Bombay and that the defendant could not go to Bombay as a result of the telegram of November 13, 1947, and the plaintiff's father's letter of November 15, 1947, aforesaid. She also stated that the defendant and her son, Kirit, both lived with,the plaintiff's family at Patan for over four months and off and on on several occasions. The defendant's definite case is that she had always been ready and willing to go back to the plaintiff and that it was the plaintiff who all along had been wailfully refusing to keep her and to cohabit with her. On those allegations she

resisted the plaintiff's claim for a decree for a dissolution of the marriage. On those pleadings a single issue was joined between the parties, namely,-

"Whether the defendant deserted the plaintiff for a continuous period of over four years prior to the filing of the suit".

At the trial held by Tendolkar, J. of the Bombay High Court on the Original Side, the plaintiff examined only himself in support of his case. The defendant examined herself, her father, Popatlal, and her cousin, Bhogilal, in support of her case that she had been all along ready and willing to go back to her marital home and that in spite of repeated efforts on her part through her relations the plaintiff had been persistently refusing to take her back.

The learned trial Judge answered the only issue in the case in the affirmative and granted a decree for divorce in favour of the plaintiff, but made DO order as to the costs of the suit. He held that the letter, Ex. E "reads like a love letter written by a girl to her paramour. The reference to both of them having been anxious about something and there being now no need to be anxious any more can only be to a possible fear that she might miss her monthly periods and her having got her monthly period thereafter, because, if it were not so and the reference was to anything innocent, there was nothing that she should have repented later on in her mind as she says she did, nor should there have been occasion for saying 'after all love is such an affair'." With reference to that letter he further held that it was capable of the interpretation that she had misbehaved with Mahendra and that she was conscious of her guilt. With reference to the incident of May 24, the learned Judge observed that having regard to the demeanour of the plaintiff and of the defendant in the witness box, he was inclined to prefer the husband's testimony to that of the wife in all matters in which there was a conflict. He held therefore that there was desertion with the necessary animus deserendi and that the defendant had failed to prove that she entertained a bonafide intention to come back to the marital home, that is to say, there was no animus revertendi. With reference to the contention that the solicitor's letter of July 15,1947, had terminated the desertion, if any, he held that it was not well founded inasmuch as the defendant had at no time a genuine desire to return to her husband. He made no reference to the prayer in the plaint that the custody of the child should be given to the father, perhaps because that prayer was not pressed. The defendant preferred an appeal under the Letters Patent which was heard by a. Division Bench consisting of Chagla C.J. and Bhagwati J. The Appellate Bench, allowed the appeal, set aside the decision of the trial Judge and dismissed the suit with costs. It held that the defendant was not guilty of desertion, that the letter of July 15, 1947, clearly established that it was the 'plaintiff who had deserted the defendant. Alternatively, the Appellate Court held that even assuming that the defendant was in desertion as a result of what had happened on May 24, and subsequently, the letter aforesaid bad the effect of putting an end to that desertion. In its judgment the letter, Ex. E, did not justify the plaintiff having any reasonable suspicions about his wife's guilt and that the oral evidence of the defendant and her relations proved the wife's anxiety to return back to her husband and of the obduracy of the husband in refusing to take the wife back. The plaintiff made an application to the High Court for leave to appeal to this Court. The leave asked for was refused by another Division Bench consisting of the Chief Justice and Dixit J. Thereafter the plaintiff moved this Court and obtained special leave to appeal from the judgment of the Appellate Bench of the High Court.

In this appeal the learned Attorney-General appearing on behalf of the appellant and the learned Solicitor-General appearing on behalf of the respondent have placed all relevant considerations of fact and law before us, and we are beholden to them for the great assistance they rendered to us

in deciding this difficult case. The difficulty is enhanced by the fact that the two courts below have taken diametrically opposite views of the facts of the case which depend mostly upon oral testimony of the plaintiff-husband and the defendant-wife and not corroborated in many respects on either side. It is a case of the husband's testimony alone on his side and the wife's testimony aided by that of her father and her cousin. As already indicated, the learned trial Judge was strongly in favour of preferring the husband's testimony to that of the wife whenever there was any conflict. But he made no reference to the testimony of the defendant's father and cousin which, if believed, would give an entirely different colour to the case. Before we deal with the points in controversy, it is convenient here to make certain general of observations on the history of the law on the subject and the well established general principles on which such cases are determined. The suit giving rise to this appeal is based on section 3(1) (d) of the Bombay Hindu Divorce Act', XXII of 1947, (which hereinafter will be referred to as "The Act") which came into force on May 12, 1947, the date the Governor's assent was published in the Bombay Government Gazette. This Act, so far as the Bombay Province, as it then was, was concerned, was the first step in revolutionizing the law of matrimonial relationship, and, as the Preamble shows, was meant "to provide for a right of divorce among all communities of Hindus in certain circumstances". Before the enactment, dissolution of a Hindu marriage particularly amongst what were called the regenerate classes was unknown to general Hindu law and was wholly inconsistent with the basic conception of a Hindu marriage as a sacrament, that is to say, a holy alliance for the performance of religious duties. According to the Shastras, marriage amongst the Hindus was the last of the ten sacraments enjoined by the Hindu religion for purification. Hence according to strict Hindu law as given by the Samhitas and as developed by the commentators, a Hindu marriage could not be dissolved on any-ground whatsoever, even on account of degradation in the hierarchy of castes or apostacy. But custom', particularly amongst the tribal and what used to be called the lower castes recognised divorce on rather easy terms. Such customs of divorce on easy terms have been in some instances held by the courts to be against public policy. The Act in section 3 sets out the grounds of divorce. It is noticeable that the Act does not recognise adultery simpliciter as one of the grounds of divorce, though cl. (f) renders the fact that a husband "has any other woman as a concubine" and that a wife "is a concubine of any other man or leads the life of a prostitute" a ground of divorce. In the present case we are immediately concerned with the provisions of s. 3(1)(d), which are in these terms:-

3. (1) A husband or wife may sue for divorce on any of the following grounds, namely:-

.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years".

"Desertion" has been defined in section 2(b) in these terms:-

'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse". It will be seen that the definition is tautological and not very helpful and leads us to the Common Law of England where in spite of repeated legislation on the subject of matrimonial law, no attempt has been made to define "desertion". Hence a large body of case law has developed round the legal significance of "desertion". "Marriage" under the Act means "a marriage between Hindus whether contracted before or after the coming into operation of this Act". "Husband" means a Hindu husband and "wife" means a Hindu wife.

In England until 1858 the only remedy for desertion was a suit for restitution of conjugal rights. But by the Matrimonial Causes Act of 1857, desertion without cause for two years and upwards was made

a ground for a suit for judicial separation. It was not till 1937 that by the Matrimonial Causes Act, 1937, desertion without cause for a period of three years immediately preceding the institution of proceedings was made a ground for divorce. The law has now been consolidated in the Matrimonial Causes Act, 1950 (14 Geo. VI, c. 25). It would thus appear that desertion as affording a cause of action for a suit for dissolution of marriage is a recent growth even in England. What is desertion? "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to on end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras. 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.) Vol. 12, in the following words:- "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. , The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.' For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years

without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or-implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial some with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced,, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce' the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson[32] may be referred to:-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution.....

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

In this connection the plaintiff in the witness box deposed to the incident of the night of May 20, 1947. He stated that at night he found that his bed had been made in the hall in which his father used to sleep, and on being questioned by him, the defendant told him that it was so done with a view to giving him the opportunity after a long absence in England to talk to his father. The plaintiff expressed his wish to the defendant that they should sleep in the same room as they used to before his departure for England, to which the wife replied that as the bed had already been made, "it would look indecent if they were removed". The plaintiff therefore slept in the hall that night. This incident was relied upon by the plaintiff with a view to showing that the wife had already made up her mind to stop cohabitation. This incident has not been admitted by the defendant in her cross-examination. On the other hand

32 [1955] 1 All E.R. 341, 342.

she would make it out that it was at the instance of the plaintiff that the bed had been made in the hall occu- pied by his father and that it was the plaintiff and not she who was responsible for their sleeping apart that night. As the learned trial Judge has preferred the plaintiff's testimony to that of the defendant on all matters on which there was simply oath against oath, we would not go behind that finding. This incident by itself is capable of an innocent explanation and therefore has to be viewed along with the other incidents deposed to by the plaintiff in order to prove his case of desertion by the defendant. There was no reason why the husband should have thought of sleeping apart from the wife because there was no suggestion in the record that the husband was aware till then of the alleged relationship between the defendant and Mahendra. But the wife may have been apprehensive that the plaintiff had known of her relations with Mahendra. That apprehension may have induced her to keep out of the plaintiff's way. The most important event which led to the ultimate rupture between the parties took place on May 21, 1947, when in the morning the plaintiff's father placed Mahendra's letter aforesaid in the plaintiff's hands. The letter which has rightly been pointed out in the courts below as the root case of the trouble is in its relevant parts in these terms:-

"Mahendrababu, Your letter has been received. I have read the same and have noted the contents. In the same way, I hope, you will take the trouble of writing me a letter now and then. I am writing, this letter with fear in my mind, because if this reaches anybody's hands, that cannot be said to be decent. What the mind feels has got to be constrained in the mind only. On the pretext of lulling (my) son to sleep, I have been sitting here in this attic, writing this letter to you. All others are chitchatting below. I am thinking now and then that I shall write this and shall write that. Just now my brain cannot go in any way. I do not feel like writing on the main point. The matters on which we were to remain anxious and you particularly were anxious, well we need not now be. I very much repented later on in my mind. But after all love is such an affair. (Love begets love).

..... "While yet busy doing services to my mother-in-law, the clock strikes twelve. At this time, I think of you and you only, and your portrait shoots up before my eyes. I am reminded of you every time. You write of coming, but just now there is nothing like a necessity, why unnecessarily waste money? And again nobody gets salvation at my bands and really nobody will. You know the natures of all. Many a time I get tired and keep on being uneasy in my mind, and in the end I weep and pray God and say, 0 Lord, kindly take me away soon: I am not obsessed by any kind of anxiety and so relieve me from this mundane existence. I do not know how many times I must be thinking of you every day....."

This letter is not signed by the defendant and in place of the signature the word "namaste" findsplace. The contents of the letter were put to the defendant in cross-examination. At that time it was no more a contested document, the defendant's counsel having admitted it during the cross-examination" of the plaintiff. She stated that she had feelings for Mahendra as a brother and not as a lover' When the mysterious parts of the letter beginning with the words "The matters on which" and ending with the words "such an affair" were put to her, she could not give any explanation as to what she meant. She denied the suggestion made on behalf of the plaintiff in these words:-

"It is not true that the reference here is to our having had sexual intercourse and being afraid that I might remain pregnant".

The sentence "I very much repented later on in my mind" was also put to her specifically and her answer was "I do not know what I repented for. I wrote some thing foolishly". Pressed further about

the meaning of the next sentence after that, her answer was "I cannot now understand how I came to write such a letter. I admit that this reads like a letter written by a girl to her lover. Besides the fact that my brain was not working properly I bad no explanation to give as to how I wrote such a letter". She also admitted that she took good care to see that the. other members of the family, meaning the mother-in-law and the sisters-in-law, did not see her writing that letter and that she wanted that the letter should remain a secret to them. Being further pressed to explain the sentence "We need not be anxious now", her answer was " I did not intend to convey that I had got my monthly period about which we were anxious. I cannot say what the normal natural meaning of this letter would be". She bad admitted having received at least one letter from Mahendra. Though it would appear from the trend of her cross-examination that she received more letters than one, she stated that she did not preserve any of his letters. She has further admitted in cross-examination "I have not signed this letter. It must have remained to be signed by mistake. I admit that under the letter where the signature should be I have put the word 'Namaste' only. It is not true that I did not sign this letter because I was afraid, that if it got into the hands of any one, it might compromise me and Mahendra. Mahendra would have known from my handwriting that this was my letter. I had previously written one letter to him. That letter also I had not signed. I had only said 'Namaste'". The tenor of the letter and the defendant's explanation or want of explanation in the witness box of those portions of the letter which very much need explanation would leave no manner of doubt in any person who read that letter that there was something between her and Mahendra which she was interested to keep a secret from everybody. Even when given the opportunity to explain, if she could, those portions of the letter, she was not able to put any innocent meaning to her words except saying in a bland way that it was a letter from a sister to a brother. The trial court rightly discredited her testimony relating to her answers with respect to the contents of the letter. The letter shows a correspondence between her and Mahendra which was clearly unworthy of a faithful wife and her pose of innocence by characterising it as between a sister and a brother is manifestly disingenuous. Her explanation, if any, is wholly unacceptable. The plaintiff naturally got suspicious of his wife and naturally taxed her with reference to the contents of the letter. That she had a guilty mind in respect of the letter is shown by the fact that she at first denied having written any such letter to Mahendra, a denial in which she persisted even in her answer to the plaint. The plaintiff's evidence that he showed her a photostatic copy of that letter on May 23, 1947, and that she then admitted having written that letter and that she bad tender feelings for Mahendra can easily be believed. The learned trial Judge was therefore justified in coming to the conclusion that the letter betrayed on the part of the writer "a consciousness of guilt". But it is questionable how far the learned Judge was justified in observing further that' the contents of the letter "are only capable of the interpretation that she had misbehaved with Mahendra during the absence of the plaintiff". If he meant by the word "misbehaved" that the defendant had sexual intercourse with Mahendra, he may be said to have jumped to the conclusion which did not necessarily follow as the only conclusion from them. The very fact that a married girl was writing amorous letters to a man other than her husband was reprehensible and easily capable of furnishing good grounds to the husband for suspecting the wife's fidelity. So far there can be no difficulty in assuming that the husband was fully justified in losing temper with his wife and in insisting upon her repentance and assurance of good conduct in future. But we are not prepared to say that the contents of the letter are capable of only that interpretation and no other. On the other hand, the learned Judges of the Appeal Court were inclined to view this letter as an evidence merely of what is sometimes characterised as "platonic love" between two persons who by reasons of bond of matrimony are compelled to restrain themselves and not to go further than

merely showing love and devotion for each other. We are not prepared to take such a lenient, almost indulgent, view of the wife's conduct as betrayed in the letter in question. We cannot but sympathise with the husband in taking a very serious view of the lapse on the wife's part. The learned Judges of the Appeal Court have castigated the counsel for the plaintiff for putting those questions to the defendant in cross-examination. They observe in their judgment (speaking through the Chief Justice) that there was no justification for the counsel for the plaintiff to put to the defendant those questions in cross-examination suggesting that she had intercourse with Mahendra as a result of which they were apprehending future trouble in the shape of pregnancy and illegitimate child birth. It is true that it was not in terms the plaintiff's case that there had been an adulterous intercourse between the defendant and Mahendra. That need not have been so, because the Act does not recognise adultery as one of the grounds for divorce. But we do not agree with the appellate Court that those questions to the defendant in cross-examination were not justified. The plaintiff proposed to prove that the discovery of the incriminating letter containing those mysterious sentences was the occasion for the defendant to make up her mind to desert,the plaintiff. We do not therefore agree with the observations of the appellate Court in all that they have said in respect of the letter in question.

There can be no doubt that the letter in question made the plaintiff strongly suspicious of his wife's conduct (to put it rather mildly), and naturally he taxed his wife to know from her as to what she bad to say about her relations with Mahendra. She is said to have confessed to him that Mahendra was a better man than the plaintiff and that he loved her and she loved him. When matters had come to such a head, the natural reaction of the parties would be that the husband would get not only depressed, as the plaintiff admitted in the witness box, but would in the first blush think of getting rid of such an unloving, if not a faithless, wife. The natural reaction of the defendant would be not to face the husband in that frame of mind. She would naturally wish to be out of the sight of her husband at least for some time, to gain time for trying, if she was so minded, to reestablish herself in her husband's estimation and affection, if not love. The event of the afternoon of May 24, 1947, must therefore be viewed in that light. There was going to be performed the marriage of the defendant's cousin at her father's place of business in Jalgaon, though it was about five to six weeks from then. The plaintiff would make it out in his evidence that she left rather in a recalcitrant mood in the afternoon during his absence in office with all her belongings and that she had refused his offer of being sent in his car to station and Rs. 100 for' expenses. This conduct on the part of the wife can easily be explained as that of a person who had found that her love letter had been discovered by the husband. She would-naturally try to flee away from the husband for the time being at least because she had not the moral courage to face him. The question is whether her leaving her marital home on the afternoon of May 24, 1947, is only consistent with her having deserted, her husband, in the sense that she had deliberately' decided permanently to forsake all relationship with her husband with the intention of not returning to consortium, without the consent of the husband and against his wishes. That is the plaintiff's case. May that conduct be not consistent with the defendant's case that she had not any such intention, i.e., being in desertion? The following observations of Pollock, M. R. in Thomas v. Thomas[33] may usefully be quoted in this connection:-

"Desertion is not a single act complete in itself and revocable by a single act of repentance.

33 [1924] P. 194.

The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see Charter v. Charter[34]. A mere temporary parting is equivocal, unless and until its purpose and object is made plain.

I agree with the observations of Day J. in Wilkinson v. Wilkinson[35] that desertion is not a specific act, but a course of conduct. As Corell Barnes J. said in Sickert v. Sickert[36]: 'The party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion'. That conduct is not necessarily wiped out by a letter of invitation to the wife to return".

The defendant's further case that she bad been turned out of the house by the husband under duress cannot be accepted because it is not corroborated either by circumstances or by direct testimony. Neither her father nor her cousin say a word about her speaking to them on her arrival at Jalgaon that she had been turned out of her husband's home. If her case that she bad been forcibly turned out of her marital home by the husband had been made out, certainly the husband would have been guilty of "constructive desertion", because the test is riot who left the matrimonial home first. (See Lang v. Lang[37]). If one spouse by his words and conduct compel the other spouse to leave the marital home. the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the marital home. It should be noted that the wife did not cross-petition for divorce or for any other relief. Hence it is no more necessary for us to go into that question. It is enough to point out that we are not prepared to rely upon the uncorroborated testimony 'of the defendant Chat she had been compelled to leave her marital home by the threats of the plaintiff.

The happenings of May 24, 1947, as pointed out above, are consistent with the plaintiff's case of desertion by the wife. But they are also consistent not with the defendant's case as actually Pleaded in her written statement, but with the fact; and circumstances disclosed in the evidence, namely, that the defendant having been discovered in her clandestine amorous correspondence with her supposed paramour Mahendra, she could not face her husband or her husband's people living in the same flat in Bombay and therefore shamefacedly withdrew herself and went to her parent's place of business in Jalgaon on the pretext of the marriage of her cousin which was yet far off. That she was not expected at Jalgaon on that day in connection with the marriage is proved by her own admission in the witness box that "when I went to Jalgaon everyone was surprised". As pointed out above, the burden is on the plaintiff to prove desertion without cause for the statutory period of four years, that is. to say, that the deserting spouse must be in desertion throughout the whole period. In this connection the following observations of Lord Macmillan in his speech in the House of Lords in the case of Pratt v. Pratt[38] are apposite:-

"In my opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The 861, deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting

34 84 L T. 272.

35 58 J. P. 415.

36 [1899] P. 278, 282

37 [1955] A.C. 402. 417.

38 [1939] A C. 417, 420.

wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion". It is true that the defendant did not plead that she had left her husband's home in Bombay in the circumstances indicated above. She, on the other hand, pleaded constructive desertion by the husband. That case, as already observed, she has failed to substantiate by reliable evidence. But the fact that the defendant has so failed does not necessarily lead to the conclusion that the plaintiff has succeeded in proving his case. The plaintiff must satisfy the court that the defendant had been in desertion for the continuous period of four years as required by the Act. If we come to the conclusion that the happenings of May 24, 1947, are consistent with both the conflicting theories, it is plain that the plaintiff has not succeeded in bringing the offence of desertion home to the defendant beyond all reasonable doubt. We must therefore examine what other evidence there is in support of the plaintiff's case and in corroboration of his evidence in court.

The next event of importance in this narrative is the plaintiff's solicitor's letter of July 15, 1947, addressed to the defendant, care of her father at Jalgaon. The defendant's cousin's marriage was performed towards the end of June and she could have come back to her husband's place, soon thereafter' Her evidence is that after the marriage had been performed she was making preparations to go back to Bombay but her father detained her and asked her to await a letter from the plaintiff. The defendant instead of getting an invitation from the plaintiff to come back to the marital home received the solicitor's letter aforesaid, which, to say the least, was not calculated to bring the parties nearer. The letter is in these terms:-

"Madam, Under instructions from our client Bipin Chandra J. Shah we have to address you as under:-

That you were married to our client in or about April 1942 at Patan. Since the marriage you and our client lived together mostly in Bombay and son by name Kirit was born on or about the 10th day of September 1944.

Our client. states that he left for Europe in January last and returned by the end of May last. After our client's return, our client learnt that during our client's absence from India you developed intimacy with one Mahendra and you failed to give any satisfactory reply when questioned about the same and left for your parents under the pretext of attending to the marriage ceremony of your cousin. You have also taken the minor with you and since then you are residing with your father to evade any satisfactory explanation.

Our client states that under the events that have happened, our client has become entitled to obtain a divorce and our client does not desire to keep you any longer under his care and protection. Our client desires the minor to be kept by him and we are instructed to request you to send back the minor to our client or if necessary our client will send his agent to bring the minor to him. Our client further states that in any event it will be in the interest of the minor that he should stay with our client. Our client has made this inquiry about the minor to avoid any unpleasantness when our client's agent comes to receive the minor". The letter is remarkable in some respects,apart from antedating the birth of the son Kirit by a year. The letter does not in terms allege that the defendant was in desertion, apart from mentioning the fact that she had left against the plaintiff's wishes or that she had done so with the intention of permanently abandoning her marital duties. On the other hand, it alleges that "You are residing with your father to avoid any satisfactory explanation". The most important part of the letter is to the effect that the plaintiff had "become entitled to obtain a divorce" and that he "does not desire to

keep you any longer under his care and protection". Thus if the solicitor's letter is any indication of the working of the mind of the plaintiff, it makes it clear that at that time the plaintiff did not believe that the defendant had been in desertion and that the plaintiff had positively come to the determination that he was no longer prepared to affirm the marriage relationship. As already indicated, one of the essential conditions for success in a suit for divorce grounded upon desertion is that the deserted spouse should have been willing to fulfill his or her part of the marital duties. The statement of the law in para 457 at p. 244 of Halsbury's Laws of England (3rd Edn. Vol 12) may be usefully quoted:

"The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fulfill the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent; but in practice it is accepted that once desertion has been started by the fault of the deserting spouse, it is no longer necessary for the deserted spouse to show that during the three years preceding the petition be or she actually wanted the other spouse to come back, for the intention to desert is presumed to continue. That presumption may, however, be rebutted". Applying those observations to the facts of the present case, can the plaintiff honestly say that be was all along willing to fulfill the duties of the marriage and that the defendant's desertion, if any, continued throughout the statutory period without his consent. The letter, Ex. A) is an emphatic no. In the first place, even the plaintiff in that letter did not allege any desertion and, secondly, he was not prepared to receive her back to the matrimonial home. Realising his difficulty when cross-examined as to the contents of that letter, he wished the court to believe that at the time the letter was written in his presence he was "in a confused state of mind" and did not remember exactly whether he noticed the sentence -that he did not desire to keep his wife any longer. Pressed fur- ther in cross-examination, he was very emphatic in his answer and stated:-

"It is not true that by the date of this letter I had made up my mind not to take her back. It was my hope that the letter might induce her parents to find out what had happened, and they would persuade her to come back. I am still in the confused state of mind that despite my repeated attempts my wife puts me off".

In our opinion, the contents of the letter could not thus be explained away by the plaintiff in the witness box. On the other hand, it shows that about seven weeks after the wife's departure for her father's place the plaintiff had at least for the time being convinced himself that the defendant was no more a suitable person to live with. That, as found by us, be was justified in this attitude by the reprehensible conduct of his wife during his absence is beside the point. This letter has an importance of its own only in so far as it does not corroborate the plaintiff's version that the defendant was in desertion and that the plaintiff was all along anxious to induce her to come back to him. This letter is more consistent with the supposition that the husband was very angry with her on account of her conduct as betrayed by the letter, Ex. E and that the wife left her husband's place in shame not having the courage to face him after that discovery. But that will not render her in the eye of the law a deserter, as observed by Pollock, M. R. in Bowron v. Bowron[39] partly quoting from Lord Gorell as follows:-

"In most cases of desertion the guilty party

39 [1925] P. 187, 192.

actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion: See also Graves v. Graves[40]; Pulford v. Pulford[41]; Jackson v. Jackson[42]; where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention".

It is true that once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued and that it is not necessary for the deserted spouse actually to take steps to bring the deserting spouse back to the matrimonial home. So far we do not find any convincing evidence in proof of the alleged desertion by the wife and naturally therefore the presumption of continued desertion cannot arise.

But it is not necessary that at the time the wife left her husband's home, she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of Lang v. Lang[43] in an appeal from the decision of the High Court of Australia, to the following effect:-

"Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct the 'factum' of desertion; secondly, the 'animus deserendi' the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the 'animus'. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?" In this connection the episode of November, 1947, when the plaintiff's mother came from Patan to Bombay is relevant. It appears to be common ground now that the defendant had agreed to come back to Bombay along with the plaintiff's mother or after a few days. But on this information being given to the plaintiff he countermanded any such steps on the wife's part by sending the telegram, Ex. B,aforesaid and the plaintiff's father's letter dated November 15, 1947. 'We are keeping out of consideration for the present the letter, Ex. C, dated November 13, 1947, which is not admitted to have been received either by the defendant or her father. The telegram is in peremptory terms: "Must not send Prabha". The letter of November 15, 1947, by the plaintiff's father to the defendant's father is equally peremptory. It says "It is absolutely necessary that you should obtain the consent of Chi. Bipinchandra before sending Chi. Prabhavati". The telegram and the letter which is a supplement to the telegram, as found by the courts below, completely negative the plaintiff's statement in court that he was all along ready and willing to receive the defendant back to his home. The letter of November 13, 1947, Ex. C, which the plaintiff claims to have written to his father-in-law in explanation of the telegram and is a prelude to it is altogether out of tune with the tenor of the letter and the telegram referred to above. The receipt of this letter has been denied by the defendant and her father. In court this letter has been described as a fake in the sense that it was an afterthought and was written with a. view to the legal position and

40 3 Sw. & Tr. 350.

41 [1923] P. 18.

42 [1924] P. 19.

43 [1955] A.G. 402, 417.

particularly with a view to getting rid of the effect of the solicitor's letter of July 15, which the plaintiff found it hard to explain away in the witness box. Neither the trial court, which was entirely in favour of the plaintiff and which had accepted the letter as genuine, nor the appellate Court, which was entirely in favour of the defendant has placed implicit faith in the bona fides of this letter. The lower appellate Court is rather ironical about it, observing "This letter as it were stands in isolated glory. There is no other letter. There is no other conduct of the plaintiff which is consistent with this letter". Without going into the controversy as to the genuineness or bona fldes of this letter, it can be said that the plaintiff's attitude, as disclosed therein, was that he was prepared to take her back into the matrimonial home provided she wrote a letter to him expressing real repentance and confession of mistake. This attitude of the plaintiff cannot be said to be unreasonable in the circumstances of the case. He was more sinned against than sinning at the beginning of the controversy between the husband and the wife.

This brings us to a consideration of the three attempts alleged by the plaintiff to have been made by him to induce his wife to return to the matrimonial home when he made two journeys to Patan in 1948 and the third journey in April- May, 1949, to Jalgaon. These three visits are not denied by the defendant. The only difference between the parties is as to the purpose of the visit and the substance of the talk between them. That the plaintiff's attachment for the defendant had not completely dried up is proved by the fact that when he came to know that she had been suffering from typhoid he went to Patan to see her. On this occasion which was the second visit the plaintiff does not say that he proposed to her to come back and that she refused to do so. He only says that she did not express any desire to come back. That may be explained as being due to diffidence on her part. But in respect of the first and the third visits the plaintiff states that on both those occasions he wanted her to come back but she refused. On the other hand, the defendant's version is that the purpose of his visit was only to take away the child and not to take her back to his home. It is also the plaintiff's complaint that the defendant never wrote any letter to him offering to come back. The wife's answer is that she did write a few letters before the solicitor's letter was received by the father and that thereafter under her father's advice she did not writeany more to the plaintiff. In this connection it becomes necessary to examine the evidence of her cousin Babulal and her father Popatlal. Her cousin, Babulal, who was a member of her father's joint family, deposes that on receipt of the letter, Ex. A, a fortnight later he and his father, since deceased, came to Bombay and saw the plaintiff. They expostulated with him and pleaded the defendant's cause and asked the plaintiff to forgive and forget and to take her back. The plaintiff's answer was that he did not wish to keep his wife. The defendant's father's evidence is to the effect that after receipt of the letter, Ex. A, he came to Bombay and saw the plaintiff's father at his residence and protested to him that "a false notice had been given to us". The plaintiff's father is said to have replied that they "would settle the matters amicably" He also deposes as to his brother and his brother's son having gone to the plaintiff. He further states that he with his wife and the defendant went to Patan and saw the plaintiff's mother and in consultation with her made arrangements to send her back to 'Bombay. But before that could be done the telegram, Ex. B, and the letter, Ex. D, were received and consequently he gave up the idea of sending the defendant to Bombay without straightening matters. Both these witnesses on behalf of the defendant further deposed to the defendant having done several times and stayed with the plaintiff's family, particularly his mother at Patan along with the boy. The evidence of these two witnesses on behalf of the defendant is ample corroboration of the defendant's ,case and the evidence in court that she has all along been ready and willing to go back to the matrimonial home. The learned trial Judge has not noticed this evidence and we have not the advantage of his comment on this corroborative evidence. This body of evidence is in consonance with the

natural course of events. The plaintiff himself stated in the witness box that he had sent the solicitor's' letter by way of a shock treatment to the defendant's family so that they might persuade his wife to come back to his matrimonial home. The subsequent telegram and letters (assuming that both the letters of the 13th and 15th November had been posted in the usual course and received by the addressees) would give a shock to the family. Naturally thereafter the members of the family would be up and doing to see that a reconciliation is brought about between the husband and the wife. Hence the visits of the defendant's uncle and the father would be a natural conduct after they had been apprised of the rupture between them. We therefore do not see any sufficient reasons for brushing aside all that oral evidence which has been believed by the Lower Appellate Court and had not in terms been disbelieved by the trial court. This part of the case on behalf of the defendant and her evidence is corroborated by the evidence of the defendant's relatives aforesaid. It cannot be seriously argued that evidence should be disbelieved, because the witnesses happened to be the defendant's relatives. They were naturally the parties most interested in bringing about a reconciliation They were anxious not only for the welfare of the defendant but were also interested in the good name of the family and the community as is only natural in families like these which have not been so urbanised as to completely ignore the feelings of the community. They would therefore be the persons most anxious in the interests of all the parties concerned to make efforts to bring the husband and the wife together and to put an end to a controversy which they con- sidered to be derogatory to the good name and, prestige of the families concerned. The plaintiff's evidence, on the other hand, on this part of the case is uncorroborated. Indeed his evidence stands uncorroborated in many parts of his case and the letters already discussed run counter to the tenor of his evidence in court. We therefore feel inclined to accept the defendant's case that after her leaving her husband's home and after the performance of her cousin's marriage she was ready and willing to go back to her husband. It, follows from what we have said so far that the wife was not in desertion though she left her husband's home without any fault on the part of the plaintiff which could justify her action in leaving him, and that after the lapse of a few months' stay at her father's place she was willing to go back to her matrimonial home. This conclusion is further supported by the fact that between 1948 and 1951 the defendant stayed with her mother- in-law at Patan whenever she was there, sometimes for months, at other times for weeks. This conduct is wholly inconsistent with the plaintiff's case that the defendant was in desertion during the four years that she was out of her matrimonial home. It is more consistent with the defen- dant's attempts to. get herself re-established in her husband's home after the rupture in May 1947 as aforesaid. It is also in evidence that at the suggestion of her mother- in-law the defendant sent her three year old son to Bombay so that be might induce his' ,father to send for the mother, The boy stayed in Bombay for about twenty days and then was brought. back to Patan by his father as he (the boy) was unwilling to stay there without the mother., This was in August_September 1948 when the defendant deposes to having questioned her husband why she bad not been called back and the husband's answer was evasive. Whether or not this statement of the defendant is true, there can be no doubt that the defendant would not have allowed her little boy of about three years of age to be sent alone to Bombay except in the hope that he might be instrumental in bringing about a reconciliation between the father and the mother. The defendant has deposed to the several efforts made by her mother-in-law and her father-in-law to intercede on her behalf with the plaintiff but without any result. There is no explanation why the plaintiff could not examine his father and mother in corroboration of his case of continuous desertion for the statutory period by the defendant. Their evidence would have been as valuable, if not more, as that of the defendant's father and cousin as

discussed above. Thus it is not a case where evidence was not available in corroboration of the plaintiff's case. As the plaintiff's evidence on many important aspects of the case has remained uncorroborated by evidence which could be available to him, we must hold that the evidence given by the plaintiff falls short of proving his case of desertion by his wife. Though we do not find that the essential ingredients of desertion have been proved by the plaintiff, there cannot be the least doubt that it was the defendant who had by her objectionable conduct brought about a rupture in the matrimonial home and caused the plaintiff to become so cold to her after she left him.

In view of our finding that the plaintiff has failed to prove his case of desertion by the defendant, it is not necessary to go into the question of animus revertendi on which considerable argument with reference to case-law was addressed to us on both sides. For the aforesaid reasons we agree with the Appellate Bench of the High Court in the conclusion at which they had arrived, though not exactly for the same reasons. The appeal is accordingly dismissed. But as the trouble started on account of the defendant's con- duct, though she is successful in this Court, we direct that each party must bear its own costs throughout. Appeal dismissed.

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SAMAR GHOSH VERSUS JAYA GHOSH

Bench : Hon'ble Mr. Justice B.N. Agrawal, Hon'ble Mr. Justice P.P. Naolekar & Hon'ble Mr. Justice Dalveer Bhandari

PETITIONER: Samar Ghosh
Vs.
RESPONDENT: Jaya Ghosh

APPEAL (CIVIL) 151 OF 2004
DATE OF JUDGMENT: 26/03/2007

Apex Court put down the law with regard to mental cruelty as grounds for divorce in matrimonial law. The significance of the nature of conduct constituting cruelty lies in the fact that the "fault" or "matrimonial offence" theory is followed in Indian matrimonial law. Irretrievable breakdown of marriage is not grounds for divorce according to statutory law, and divorce can only be granted by establishing that the erring spouse has committed an "offence" like adultery, cruelty or desertion.

JUDGMENT

Hon'ble Mr. Justice Dalveer Bhandari :—

This is yet another unfortunate matrimonial dispute which has shattered the twenty two year old matrimonial bond between the parties. The appellant and the respondent are senior officials of the Indian Administrative Service, for short 'IAS'. The appellant and the respondent were married on 13.12.1984 at Calcutta under the Special Marriage Act, 1954. The respondent was a divorcee and had a female child from her first marriage. The custody of the said child was given to her by the District Court of Patna where the respondent had obtained a decree of divorce against her first husband, Debashish Gupta, who was also an I.A.S. officer.

The appellant and the respondent knew each other since 1983. The respondent, when she was serving as the Deputy Secretary in the Department of Finance, Government of West Bengal, used to meet the appellant between November 1983 and June 1984. They cultivated close friendship which later developed into courtship. The respondent's first husband, Debashish Gupta filed a belated appeal against the decree of divorce obtained by her from the District Court of Patna. Therefore, during the pendency of the appeal, she literally persuaded the appellant to agree to the marriage immediately so that the appeal of Debashish Gupta may become infructuous. The marriage between the parties was solemnized on 13.12.1984. According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love, affection, future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.

The appellant asserted that the apathy of the respondent and her inhuman conduct towards him became apparent in no time. In February 1985, the appellant suffered prolonged illness. The respondent's

brother was working in Bareilly. Her parents along with her daughter went there for sojourn. The appellant could not go because of high temperature and indifferent health. She left him and went to Bareilly even when there was no one to look after him during his illness. On her return, the respondent remained in Calcutta for about four days, but she did not care to meet the appellant or enquire about his health. According to the appellant, he made all efforts to make adjustments and to build a normal family life. He even used to go to Chinsurah every weekend where the respondent was posted but she showed no interest and was overtly indifferent to him. The appellant usually returned from Chinsurah totally dejected. According to the appellant, he felt like a stranger in his own family. The respondent unilaterally declared that she would not have any child and it was her firm decision. The appellant felt that his marriage with the respondent was merely an eye-wash because immediately after the marriage, serious matrimonial problems developed between them which kept growing.

The respondent was transferred to Calcutta in May 1985. Their residential flat at the Minto Park Housing Estate stood allotted to the appellant. The respondent used to come to their flat intermittently. One Prabir Malik, a domestic servant-cum-cook also used to live in the said flat. He used to cook food and carry out household work for the appellant. According to the appellant, the respondent used to say that her daughter was being neglected and that she might even be harmed.

The indication was towards Prabir Malik. The appellant and the respondent virtually began to live separately from September, 1985.

The appellant was transferred to Murshidabad in May 1986 but the respondent continued to stay in Calcutta. The appellant stayed in Murshidabad up to April 1988 and thereafter he went on deputation on an assignment of the Government of India but there he developed some health problem and, therefore, he sought a transfer to Calcutta and came back there in September 1988. On transfer of the appellant to Murshidabad, the flat in which they were staying in Minto Park was allotted to the respondent as per the standard convention. The appellant and the respondent again began living together in Calcutta from September 1988. The appellant again tried to establish his home with the respondent after forgetting the entire past.

According to the appellant, the respondent never treated the house to be her family home. The respondent and her mother taught respondent's daughter that the appellant was not her father. The child, because of instigation of the respondent and her mother, gradually began to avoid the appellant. The respondent in no uncertain terms used to tell the appellant that he was not her father and that he should not talk to the child or love her. The appellant obviously used to feel very offended.

The appellant also learnt that the respondent used to tell her mother that she was contemplating divorce to the appellant. The respondent's daughter had also disclosed to the appellant that her mother had decided to divorce him. According to the appellant, though they lived under the same roof for some time but the respondent virtually began to live separately from April, 1989 at her parent's house. In April 1990 the appellant's servant Prabir Malik had left for Burdwan on getting a job. The respondent used to come from her parents house to drop her daughter to her school La Martinere.

She used to come to the flat at Minto Park from the school to cook food only for herself and leave for the office. The appellant began to take his meals outside as he had no other alternative.

According to the appellant, the said Prabir Malik came to the flat on 24th August, 1990 and stayed there at the night. The next two days were holidays. The respondent and her father also came there on 27th August, 1990. On seeing Prabir, the respondent lost her mental equanimity. She took strong

exception to Prabir's presence in her flat and started shouting that the appellant had no self-respect and as such was staying in her flat without any right. According to the appellant, he was literally asked to get out of that flat. The respondent's father was also there and it appeared that the act was pre-conceived. The appellant felt extremely insulted and humiliated and immediately thereafter he left the flat and approached his friend to find a temporary shelter and stayed with him till he got a government flat allotted in his name on 13.9.1990.

Admittedly, the appellant and the respondent have been living separately since 27th August, 1990. The appellant further stated that the respondent refused cohabitation and also stopped sharing bed with him without any justification. Her unilateral decision not to have any child also caused mental cruelty on the appellant. The appellant was not permitted to even show his normal affection to the daughter of the respondent although he was a loving father to the child. The appellant also asserted that the respondent desired sadistic pleasure at the discomfiture and plight of the appellant which eventually affected his health and mental peace. In these circumstances, the appellant has prayed that it would not be possible to continue the marriage with the respondent and he eventually filed a suit for the grant of divorce.

In the suit for divorce filed by the appellant in Alipur, Calcutta, the respondent filed her written statement and denied the averments. According to the version of the respondent, Prabir Malik, the domestic servant did not look after the welfare and well-being of the child. The respondent was apprehensive that Prabir Malik may not develop any affection towards the respondent's daughter.

According to the version of the respondent, the appellant used to work under the instructions and guidance of his relations, who were not very happy with the respondent and they were interfering with their family affairs. The respondent stated that the appellant has filed the suit for divorce at the behest of his brothers and sisters. The respondent has not denied this fact that from 27th August, 1990 they have been continuously living separately and thereafter there has been no interaction whatsoever between them.

The appellant, in support of his case, has examined himself as witness no.1. He has also examined Debabrata Ghosh as witness no.2, N. K. Raghupatty as witness no.3, Prabir Malik as witness no.4 and Sikhabilas Barman as witness no.5.

Debabrata Ghosh, witness no.2 is the younger brother of the appellant. He has stated that he did not attend the marriage ceremony of the appellant and the respondent. He seldom visited his brother and sister-inlaw at their Minto Park flat and he did not take any financial assistance from his brother to maintain his family. He mentioned that he noticed some rift between the appellant and the respondent.

The appellant also examined N. K. Raghupatty, witness no.3, who was working as the General Secretary at that time. He stated that he knew both the appellant and the respondent because both of them were his colleagues. He was occupying a suite in the Circuit House at Calcutta. He stated that two weeks before the Puja vacation in 1990, the appellant wanted permission to stay with him because he had some altercation with the respondent. According to this witness, the appellant was his close friend, therefore, he permitted him to stay with him. He further stated that the appellant after a few days moved to the official flat allotted to him.

Prabir Malik was examined as witness no.4. He narrated that he had known the appellant for the last 8/9 years. He was working as his servant-cum-cook. He also stated that since April 1990 he was serving at the Burdwan Collectorate. He stated that after getting the job at Burdwan Collectorate, he used to

visit the Minto Park flat of the appellant on 2nd and 4th Saturdays. He stated that the relationship between the appellant and the respondent was not cordial. He also stated that the appellant told him that the respondent cooks only for herself but does not cook for the appellant and he used to eat out and sometimes cooked food for himself. He stated that the brothers and sisters of the appellant did not visit Minto Park flat. He also stated that the daughter of the respondent at times used to say that the appellant was not her father and that she had no blood relationship with him. He stated that on 4th Saturday, in the month of August, 1990, he came to the flat of the appellant. On seeing him the respondent got furious and asked him for what purpose he had come to the flat? She further stated that the appellant had no residence, therefore, she had allowed him to stay in her flat. She also said that it was her flat and she was paying rent for it. According to the witness, she further stated that even the people living on streets and street beggars have some prestige, but these people had no prestige at all. At that time, the father of the respondent was also present.

According to Prabir Malik, immediately after the incident, the appellant left the flat.

The appellant also examined Sikhabilas Barman as witness no.5, who was also an IAS Officer. He stated that he had known the appellant and his wife and that they did not have cordial relations. He further stated that the appellant told him that the respondent cooks for herself and leaves for office and that she does not cook for the appellant and he had to take meals outside and sometimes cooked food for himself. He also stated that the respondent had driven the appellant out of the said flat.

The respondent has examined herself. According to her statement, she indicated that she and the appellant were staying together as normal husband and wife. She denied that she ill-treated Prabir Malik. She further stated that the brothers and sisters of the appellant used to stay at Minto Park flat whenever they used to visit Calcutta. She stated that they were interfering in the private affairs, which was the cause of annoyance of the respondent. She denied the incident which took place after 24.8. 1990. However, she stated that the appellant had left the apartment on 27.8.1990. In the crossexamination, she stated that the appellant appeared to be a fine gentleman. She admitted that the relations between the appellant and the respondent were not so cordial. She denied that she ever mentioned to the appellant that she did not want a child for two years and refused cohabitation.

The respondent also examined R. M. Jamir as witness no. 2. He stated that he had known both of them and in the years 1989-90 he visited their residence and he found them quite happy. He stated that in 1993 the respondent enquired about the heart problem of the appellant.

The respondent also examined her father A. K. Dasgupta as witness no. 3. He stated that his daughter neither insulted nor humiliated her husband in presence of Prabir Malik nor asked him to leave the apartment. He stated that the appellant and the respondent were living separately since 1990 and he never enquired in detail about this matter. He stated that the appellant had a lot of affection for the respondent's daughter. He stated that he did not know about the heart trouble of the appellant.

He stated that he was also unaware of appellant's byepass surgery.

The learned Additional District Judge, 4th Court, Alipur, after examining the plaint, written statements and evidence on record, framed the follows issues:

"1. Is the suit maintainable?

2. Is the respondent guilty of cruelty as alleged?

3. Is the petitioner entitled to decree of divorce as claimed?

4. To what other relief or reliefs the petitioner is entitled?"

Issue no. 1 regarding maintainability of the suit was not pressed, so this issue was decided in favour of the appellant.

The trial court, after analyzing the entire pleadings and evidence on record, came to the conclusion that the following facts led to mental cruelty:

1. Respondent's refusal to cohabit with the appellant.

2. Respondent's unilateral decision not to have children after the marriage.

3. Respondent's act of humiliating the appellant and virtually turning him out of the Minto Park apartment. The appellant in fact had taken shelter with his friend and he stayed there till official accommodation was allotted to him.

4. Respondent's going to the flat and cooking only for herself and the appellant was forced to either eat out or cook his own meals.

5. The respondent did not take care of the appellant during his prolonged illness in 1985 and never enquired about his health even when he underwent the bye-pass surgery in 1993.

6. The respondent also humiliated and had driven out the loyal servant-cum-cook of the appellant, Prabir Malik.

The learned Additional District Judge came to the finding that the appellant has succeeded in proving the case of mental cruelty against the respondent, therefore, the decree was granted by the order dated 19.12.1996 and the marriage between the parties was dissolved. The respondent, aggrieved by the said judgment of the learned Additional District Judge, filed an appeal before the High Court. The Division Bench of the High Court vide judgment dated 20.5.2003 reversed the judgment of the Additional District Judge on the ground that the appellant has not been able to prove the allegation of mental cruelty. The findings of the High Court, in brief, are recapitulated as under:

I. The High Court arrived at the finding that it was certainly within the right of the respondent-wife having such a high status in life to decide when she would like to have a child after marriage.

II. The High Court also held that the appellant has failed to disclose in the pleadings when the respondent took the final decision of not having a child.

III. The High Court held that the appellant also failed to give the approximate date when the respondent conveyed this decision to the appellant.

IV. The High Court held that the appellant started living with the respondent, therefore, that amounted to condonation of the acts of cruelty.

V. The High Court disbelieved the appellant on the issue of respondent's refusing to cohabit with him, because he failed to give the date, month or the year when the respondent conveyed this decision to him.

VI. The High Court held that the appellant's and the respondent's sleeping in separate rooms did not lead to the conclusion that they did not cohabit.

VII. The High Court also observed that it was quite proper for the respondent with such high status and having one daughter by her previous husband, not to sleep in the same bed with the appellant.

VIII. The High Court observed that refusal to cook in such a context when the parties belonged to high strata of society and the wife also has to go to office, cannot amount to mental cruelty.

IX. The High Court's findings that during illness of the husband, wife's not meeting the husband to know about his health did not amount to mental cruelty.

The High Court was unnecessarily obsessed by the fact that the respondent was also an IAS Officer. Even if the appellant had married an IAS Officer that does not mean that the normal human emotions and feelings would be entirely different.

The finding of the Division Bench of the High Court that, considering the position and status of the respondent, it was within the right of the respondent to decide when she would have the child after the marriage. Such a vital decision cannot be taken unilaterally after marriage by the respondent and if taken unilaterally, it may amount to mental cruelty to the appellant.

The finding of the High Court that the appellant started living with the respondent amounted to condonation of the act of cruelty is unsustainable in law.

The finding of the High Court that the respondent's refusal to cook food for the appellant could not amount to mental cruelty as she had to go to office, is not sustainable. The High Court did not appreciate the evidence and findings of the learned Additional District Judge in the correct perspective. The question was not of cooking food, but wife's cooking food only for herself and not for the husband would be a clear instance of causing annoyance which may lead to mental cruelty.

The High Court has seriously erred in not appreciating the evidence on record in a proper perspective. The respondent's refusal to cohabit has been proved beyond doubt. The High Court's finding that the husband and wife might be sleeping in separate rooms did not lead to a conclusion that they did not cohabit and to justify this by saying that the respondent was highly educated and holding a high post was entirely unsustainable. Once the respondent accepted to become the wife of the appellant, she had to respect the marital bond and discharge obligations of marital life.

The finding of the High Court that if the ailment of the husband was not very serious and he was not even confined to bed for his illness and even assuming the wife under such circumstances did not meet the husband, such behaviour can hardly amount to cruelty, cannot be sustained. During illness, particularly in a nuclear family, the husband normally looks after and supports his wife and similarly, he would expect the same from her. The respondent's total indifference and neglect of the appellant during his illness would certainly lead to great annoyance leading to mental cruelty.

It may be pertinent to mention that in 1993, the appellant had a heart problem leading to bye-pass surgery, even at that juncture, the respondent did not bother to enquire about his health even on telephone and when she was confronted in the cross-examination, she falsely stated that she did not know about it. Mr. A. K. Dasgupta, father of the respondent and father-in-law of the appellant, was examined by the respondent. In the cross-examination, he stated that his daughter and son-in-law were living separately and he never enquired about this. He further said that the appellant left the apartment, but he never enquired from anybody about the cause of leaving the apartment. He also stated that he did not know about the heart trouble and bye-pass surgery of the appellant. In the

impugned judgment, the High Court has erroneously placed reliance on the evidence submitted by the respondent and discarded the evidence of the appellant. The evidence of this witness is wholly unbelievable and cannot stand the scrutiny of law.

The High Court did not take into consideration the evidence of Prabir Malik primarily because of his low status in life. The High Court, in the impugned judgment, erroneously observed that the appellant did not hesitate to take help from his servant in the matrimonial dispute though he was highly educated and placed in high position. The credibility of the witness does not depend upon his financial standing or social status only. A witness which is natural and truthful should be accepted irrespective of his/her financial standing or social status. In the impugned judgment, testimony of witness no.4 (Prabir Malik) is extremely important being a natural witness to the incident. He graphically described the incident of 27.8.1990. He also stated that in his presence in the apartment at Minto Park, the respondent stated that the appellant had no place of residence, therefore, she allowed him to stay in her flat, but she did not like any other man of the appellant staying in the flat. According to this witness, she said that the flat was hers and she was paying rent for it. According to this witness, the respondent further said that even people living on streets and street beggars have some prestige, but these people have no prestige at all. This witness also stated that immediately thereafter the appellant had left the flat and admittedly since 27.8.1990, both the appellant and the respondent are living separately. This was a serious incident and the trial court was justified in placing reliance on this evidence and to come to a definite conclusion that this instance coupled with many other instances led to grave mental cruelty to the appellant. The trial Court rightly decreed the suit of the appellant. The High Court was not justified in reversing the judgment of the trial Court.

The High Court also failed to take into consideration the most important aspect of the case that admittedly the appellant and the respondent have been living separately for more than sixteen and half years (since 27.8.1990).

The entire substratum of the marriage has already disappeared. During this long period, the parties did not spend a single minute together. The appellant had undergone bye-pass surgery even then the respondent did not bother to enquire about his health even on telephone. Now the parties have no feelings and emotions towards each other.

The respondent appeared in person. Even before this Court, we had indicated to the parties that irrespective of whatever has happened, even now, if they want to reconcile their differences then the case be deferred and they should talk to each other. The appellant was not even prepared to speak with the respondent despite request from the Court. In this view of the matter, the parties cannot be compelled to live together.

The learned Additional District Judge decreed the appellant's suit on the ground of mental cruelty. We deem it appropriate to analyze whether the High Court was justified in reversing the judgment of the learned Additional District Judge in view of the law declared by a catena of cases. We deem it appropriate to deal with the decided cases.

Before we critically examine both the judgments in the light of settled law, it has become imperative to understand and comprehend the concept of cruelty.

The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'. The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

"Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

> *"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty.*
>
> *Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."*

In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

> *"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."*

In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

This Court has had an occasion to examine in detail the position of mental cruelty in N.G. Dastane v. S. Dastane reported in (1975) 2 SCC 326 at page 337, para 30 observed as under :-

> *"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent\005."*

In the case of Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr. reported in (1981) 4 SCC 250, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social

conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

In the case of Shobha Rani v. Madhukar Reddi reported in (1988) 1 SCC 105, this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other.

The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment. In Rajani v. Subramonian AIR 1990 Ker. 1 the Court aptly observed that the concept of cruelty depends upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance, judged by standard of modern civilization in the background of the cultural heritage and traditions of our society.

Again, this Court had an occasion to examine in great detail the concept of mental cruelty. In the case of V. Bhagat v. D. Bhagat (Mrs.) reported in (1994) 1 SCC 337, the Court observed, in para 16 at page 347, as under:

> *"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it*

is a case of accusations and allegations, regard must also be had to the context in which they were made."

This Court aptly observed in Chetan Dass v. Kamla Devi reported in (2001) 4 SCC 250, para 14 at pp.258-259, as under:

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

In Savitri Pandey v. Prem Chandra Pandey reported in (2002) 2 SCC 73, the Court stated as under:

"Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

This Court in the case of Gananath Pattnaik v. State of Orissa reported in (2002) 2 SCC 619 observed as under:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."

The mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehta reported in (2002) 5 SCC 706 at pp.716-17 [para 21] which reads as under:

"Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In

case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

In this case the Court also stated that so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably.

In A. Jayachandra v. Aneel Kaur reported in (2005) 2 SCC 22, the Court observed as under:

"The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the

meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

> *The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."*

This Court in Vinita Saxena v. Pankaj Pandit reported in (2006) 3 SCC 778 aptly observed as under:

> *"As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer."*

In Shobha Rani's case (supra) at pp.108-09, para 5, the Court observed as under:

> *"5. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."*

In this case, the Court cautioned the lawyers and judges not to import their own notions of life in dealing with matrimonial problems. The judges should not evaluate the case from their own standards. There may be a generation gap between the judges and the parties. It is always prudent if the judges keep aside their customs and manners in deciding matrimonial cases in particular.

In a recent decision of this Court in the case of Rishikesh Sharma v. Saroj Sharma reported in 2006 (12) Scale 282, this Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. The Court further observed that it will not be possible for the parties to live together and therefore there was no purpose in compelling both the parties to live together. Therefore the best course was to dissolve the marriage by passing a decree of divorce so that the parties who were litigating since 1981 and had lost valuable part of life could live peacefully in remaining part of their life. The Court

further observed that her desire to live with her husband at that stage and at that distance of time was not genuine.

This Court observed that under such circumstances, the High Court was not justified in refusing to exercise its jurisdiction in favour of the appellant who sought divorce from the Court.

"Mental cruelty" is a problem of human behaviour. This human problem unfortunately exists all over the world. Existence of similar problem and its adjudication by different courts of other countries would be of great relevance, therefore, we deem it appropriate to examine similar cases decided by the Courts of other jurisdictions.

We must try to derive benefit of wisdom and light received from any quarter.

ENGLISH CASES:

William Latey, in his celebrated book 'The Law and Practice in Divorce and Matrimonial Causes' (15th Edition) has stated that there is no essential difference between the definitions of the ecclesiastical courts and the post-1857 matrimonial courts of legal cruelty in the marital sense. The authorities were fully considered by the Court of Appeal and the House of Lords in Russell v. Russell (1897) AC 395 and the principle prevailing in the Divorce Court (until the Divorce Reform Act, 1969 came in force), was as follows:

Conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger. {see: Russell v. Russell (1895) P. 315 (CA)}.

In England, the Divorce Reform Act, 1969 came into operation on January 1, 1971. Thereafter the distinction between the sexes is abolished, and there is only one ground of divorce, namely that the marriage has broken down irretrievably. The Divorce Reform Act, 1969 was repealed by the Matrimonial Causes Act, 1973, which came into force on January 1, 1974. The sole ground on which a petition for divorce may be presented to the court by either party to a marriage is that the marriage has broken down irretrievably.

Lord Stowell's proposition in Evans v. Evans (1790) 1 Hagg Con 35 was approved by the House of Lords and may be put thus: before the court can find a husband guilty of legal cruelty towards his wife, it is necessary to show that he has either inflicted bodily injury upon her, or has so conducted himself towards her as to render future cohabitation more or less dangerous to life, or limb, or mental or bodily health. He was careful to avoid any definition of cruelty, but he did add: 'The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged'. But the majority of their Lordships in Russell v. Russell (1897) (supra) declined to go beyond the definition set out above. In this case, Lord Herschell observed as under:

> *"It was conceded by the learned counsel for the appellant, and is, indeed, beyond controversy, that it is not every act of cruelty in the ordinary and popular sense of that word which amounted to saevitia, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts inflicting pain and misery in respect of which that relief could not be obtained."*

Lord Merriman, in Waters v. Waters (1956) 1 All. E.R. 432 observed that intention to injure was not necessary ingredient of cruelty.

Sherman, J. in Hadden v. Hadden, The Times, December 5, 1919, (also reported in Modern Law Review Vol.12, 1949 at p.332) very aptly mentioned that he had no intention of being cruel but his intentional acts amounted to cruelty. In this case, it was observed as under:

'It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called upon to endure it.'

Lord Simon in Watt (or Thomas) v. Thomas [(1947) 1 All E.R. 582 at p. 585] observed as under:

> *"\005 the leading judicial authorities in both countries who have dealt with this subject are careful not to speak in too precise and absolute terms, for the circumstances which might conceivably arise in an unhappy married life are infinitely various. Lord Stowell in Evans v. Evans 1790 (1) Hagg Con 35 avoids giving a "direct definition".*

While insisting that "mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty."

In Simpson v. Simpson (1951) 1 All E.R. 955, the Court observed that:

"When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus, it is inaccurate, and liable to lead to confusion, if the word "cruelty" is used as descriptive only of the conduct complained of, apart from its effect on the victim.

Lord Reid, concurring, reserved opinion as to cases of alleged cruelty in which the defender had shown deliberate intention, though he did not doubt that there were many cases where cruelty could be established without its being necessary to be satisfied by evidence that the defender had such an intention. Lord Tucker, also concurring, said:

'Every act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies.'

In Prichard v. Pritchard (1864) 3 S&T 523, the Court observed that repeated acts of unprovoked violence by the wife were regarded as cruelty, although they might not inflict serious bodily injury on the husband. Wilde, J.O. in Power v. Power (1865) 4 SW & Tr. 173 aptly observed that cruelty lies in the cumulative ill conduct which the history of marriage discloses.

In Bravery v. Bravery (1954) 1 WLR 1169, by majority, the Court held as under:

'If a husband submitted himself to an operation for sterilization without a medical reason and without his wife's knowledge or consent it could constitute cruelty to his wife. But where such an operation was

performed to the wife's knowledge, though without her consent and she continued to live with him for thirteen years, it was held that the operation did not amount to cruelty.'

Lord Tucker in Jamieson v. Jamieson (1952) I All E.R. 875 aptly observed that "Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the wisdom of this course".

In Le Brocq v. Le Brockq [1964] 3 All E.R. 464, at p. 465, the court held as under:

> *"I think \005. that 'cruel' is not used in any esoteric or 'divorce court' sense of that word, but that the conduct complained of must be something which an ordinary man or a jury \005.. would describe as 'cruel' if the story were fully told."*

In Ward v. Ward [(1958) 2 All E.R. 217, a refusal to bear children followed by a refusal of intercourse and frigidity, so that the husband's health suffered, was held to be cruelty; so also the practice by the husband of coitus interruptus against the wish of his wife though she desired to have a child. (Also see: White (otherwise Berry) v. White [1948] 2 All E.R. 151; Walsham v. Walsham, [1949] I All E.R. 774; Cackett (otherwise Trice) v. Cackett, [1950] I All E.R. 677; Knott v. Knott [1955] 2 All E.R. 305.

Cases involving the refusal of sexual intercourse may vary considerably and in consequence may or may not amount to cruelty, dependent on the facts and circumstances of the parties. In Sheldon v. Sheldon, [1966] 2 All E.R. 257, Lord Denning, M.R. stated at p. 259:

> *"The persistent refusal of sexual intercourse may amount to cruelty, at any rate when it extends over a long period and causes grave injury to the health of the other. One must of course, make allowances for any excuses that may account for it, such as ill-health, or time of life, or age, or even psychological infirmity. These excuses may so mitigate the conduct that the other party ought to put up with it. It after making all allowances however, the conduct is such that the other party should not be called upon to endure it, then it is cruelty."*

Later, Lord Denning, at p. 261, said that the refusal would usually need to be corroborated by the evidence of a medical man who had seen both parties and could speak to the grave injury to health consequent thereon.

In the same case, Salmon, L. J. stated at p. 263:

> *"For my part, I am quite satisfied that if the husband's failure to have sexual intercourse had been due to impotence, whether from some psychological or physical cause, this petition would be hopeless. No doubt the lack of sexual intercourse might in such a case equally have resulted in a breakdown in his wife's health. I would however regard the husband's impotence as a great misfortune which has befallen both of them."*

There can be cruelty without any physical violence, and there is abundant authority for recognizing mental or moral cruelty, and not infrequently the worst cases supply evidence of both. It is for the judges to review the married life of the parties in all its aspects. The several acts of alleged cruelty, physical or mental, should not be taken separately. Several acts considered separately in isolation may be trivial and not hurtful but when considered cumulatively they might well come within the description of cruelty. (see: Jamieson v. Jamieson, [1952] I All E.R. 875; Waters v. Waters, [1956] I All E.R. 432.

"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered." (per Lord Normand in King v. King [1952] 2 All E.R. 584). In Warr v. Warr [1975] I All ER 85), the Court observed that "Section 1(2)(c) of the Matrimonial Causes Act, 1973 provides that irretrievable breakdown may be proved by satisfying the court that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition."

AMERICAN CASES:

In Jem v. Jem [(1937) 34 Haw. 312], the Supreme Court of Hawaii aptly mentioned that cruel treatment not amounting to physical cruelty is mental cruelty. While dealing with the matter of extreme cruelty, the Supreme Court of South Dakota in the case of Hybertson v. Hybertson (1998) 582 N.W. 2d 402 held as under:

"Any definition of extreme cruelty in a marital setting must necessarily differ according to the personalities of the parties involved. What might be acceptable and even common place in the relationship between rather stolid individuals could well be extraordinary and highly unacceptable in the lives of more sensitive or high-strung husbands and wives. Family traditions, ethnic and religious backgrounds, local customs and standards and other cultural differences all come into play when trying to determine what should fall within the parameters of a workable marital relationship and what will not."

In Rosenbaum v. Rosenbaum [(1976) 38 Ill.App.3d. 1] the Appellate Court of Illinois held as under:

"To prove a case entitling a spouse to divorce on the ground of mental cruelty, the evidence must show that the conduct of the offending spouse is unprovoked and constitutes a course of abusive and humiliating treatment that actually affects the physical or mental health of the other spouse, making the life of the complaining spouse miserable, or endangering his or her life, person or health."

In the case of Fleck v. Fleck 79 N.D. 561, the Supreme Court of North Dakota dealt with the concept of cruelty in the following words:

"The decisions defining mental cruelty employ such a variety of phraseology that it would be next to impossible to reproduce any generally accepted form. Very often, they do not purport to define it as distinct from physical cruelty, but combine both elements in a general definition of 'cruelty,' physical and mental. The generally recognized elements are:

(1) A course of abusive and humiliating treatment;

(2) Calculated or obviously of a nature to torture, discommode, or render miserable the life of the opposite spouse; and

(3) Actually affecting the physical or mental health of such spouse."

In Donaldson v. Donaldson [(1917) 31 Idaho 180, 170 P. 94], the Supreme Court of Idaho also came to the conclusion that no exact and exclusive definition of legal cruelty is possible. The Court referred to 9 RCL p. 335 and quoted as under:

"It is well recognized that no exact inclusive and exclusive definition of legal cruelty can be given, and the courts have not attempted to do so, but generally content themselves with determining whether the facts in the particular case in question constitute cruelty or not.

Especially, according to the modern view, is the question whether the defending spouse has been guilty of legal cruelty a pure question of fact to be resolved upon all the circumstances of the case."

CANADIAN CASES:

In a number of cases, the Canadian Courts had occasions to examine the concept of 'cruelty'. In Chouinard v. Chouinard 10 D.L.R. (3d) 263], the Supreme Court of New Brunswick held as under:

"Cruelty which constitutes a ground for divorce under the Divorce Act, whether it be mental or physical in nature, is a question of fact. Determination of such a fact must depend on the evidence in the individual case being considered by the court. No uniform standard can be laid down for guidance; behaviour which may constitute cruelty in one case may not be cruelty in another. There must be to a large extent a subjective as well as an objective aspect involved; one person may be able to tolerate conduct on the part of his or her spouse which would be intolerable to another. Separation is usually preceded by marital dispute and unpleasantness. The court should not grant a decree of divorce on evidence of merely distasteful or irritating conduct on the part of the offending spouse. The word 'cruelty' denotes excessive suffering, severity of pain, mercilessness; not mere displeasure, irritation, anger or dissatisfaction; furthermore, the Act requires that cruelty must be of such a kind as to render intolerable continued cohabitation."

In Knoll v. Knoll 10 D.L.R. (3d) 199, the Ontario Court of Appeal examined this matter. The relevant portion reads as under:

"Over the years the courts have steadfastly refrained from attempting to formulate a general definition of cruelty. As used in ordinary parlance "cruelty" signifies a disposition to inflict suffering; to delight in or exhibit indifference to the pain or misery of others; mercilessness or hard-heartedness as exhibited in action. If in the marriage relationship one spouse by his conduct causes wanton, malicious or unnecessary infliction of pain or suffering upon the body, the feelings or emotions of the other, his conduct may well constitute cruelty which will entitle a petitioner to dissolution of the marriage if, in the court's opinion, it amounts to physical or mental cruelty "of such a kind as to render intolerable the continued cohabitation of the spouses."

In Luther v. Luther [(1978) 5 R.F.L. (2d) 285, 26 N.S.R. (2d) 232, 40 A.P.R. 232], the Supreme Court of Nova Scotia held as under:

"7. The test of cruelty is in one sense a subjective one, namely, as has been said many times, is this conduct by this man to this woman, or vice versa, cruelty? But that does not mean that what one spouse may consider cruel is necessarily so. Cruelty must involve serious and weighty matters, which, reasonably considered, may cause physical or mental suffering. It must furthermore -- an important additional requirement -- be of such a nature and kind as to render such conduct intolerable to a reasonable person."

The Supreme Court further held as under:

"9. To constitute mental cruelty, conduct must be much more than jealousy, selfishness or possessiveness which causes unhappiness, dissatisfaction or emotional upset. Even

less can mere incompatibility or differences in temperament, personality or opinion be elevated to grounds for divorce."

In another case Zalesky v. Zalesky 1 D.L.R. (3d) 471, the Manitoba Court of Queen's Bench observed that where cohabitation of the spouses become intolerable that would be another ground of divorce. The Court held as under:

"There is now no need to consider whether conduct complained of caused 'danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it' or any of the variations of that definition to be found in the Russell case.

In choosing the words 'physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses' Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under s. 3(d) of the Act."

AUSTRALIAN CASES:

In Dunkley v. Dunkley (1938) SASR 325, the Court examined the term "legal cruelty" in the following words:

"'Legal cruelty', means conduct of such a character as to have caused injury or danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of danger. Personal violence, actual or threatened, may alone be sufficient; on the other hand, mere vulgar abuse or false accusations of adultery are ordinarily not enough; but, if the evidence shows that conduct of this nature had been persisted in until the health of the party subjected to it breaks down, or is likely to break down, under the strain, a finding of cruelty is justified."

In La Rovere v. La Rovere [4 FLR 1], the Supreme Court of Tasmania held as under:

"When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus it is inaccurate and liable to lead to confusion, if the word 'cruelty' is used as descriptive only of the conduct complained of, apart from its effect on the victim."

We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

The 71st Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much

earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case Lodder v. Lodder 1921 New Zealand Law Reports 786. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

> *"The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."*

In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bonds which are of the essence of marriage have disappeared. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

Law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into disrepute.

This Court in Naveen Kohli v. Neelu Kohli reported in (2006) 4 SCC 558 dealt with the similar issues in detail. Those observations incorporated in paragraphs 74 to 79 are reiterated in the succeeding paragraphs.

> *"74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that*

fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory."

On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie.

By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

The High Court in the impugned judgment seriously erred in reversing the judgment of the learned Additional Sessions Judge. The High Court in the impugned judgment ought to have considered the most important and vital circumstance of the case in proper perspective that the parties have been living separately since 27th August, 1990 and thereafter, the parties did not have any interaction with each other. When the appellant was seriously ill and the surgical intervention of bye-pass surgery had to be restored to, even on that occasion, neither the respondent nor her father or any member of her family bothered to enquire about the health of the appellant even on telephone. This instance is clearly illustrative of the fact that now the parties have no emotions, sentiments or feelings for each other at least since 27.8.1990. This is a clear case of irretrievable breakdown of marriage. In our considered view, it is impossible to preserve or save the marriage. Any further effort to keep it alive would prove to be totally counterproductive.

In the backdrop of the spirit of a number of decided cases, the learned Additional District Judge was fully justified in decreeing the appellant's suit for divorce. In our view, in a case of this nature, no other logical view is possible.

On proper consideration of cumulative facts and circumstances of this case, in our view, the High Court seriously erred in reversing the judgment of the learned Additional District Judge which is based on carefully watching the demeanour of the parties and their respective witnesses and the ratio and spirit of the judgments of this Court and other Courts. The High Court erred in setting aside a well-reasoned judgment of the trial court based on the correct analysis of the concept of mental cruelty. Consequently, the impugned judgment of the High Court is set aside and the judgment of the learned Additional District Judge granting the decree of divorce is restored.

This appeal is accordingly disposed of but, in the facts and circumstances of the case, we direct the parties to bear their own costs.

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DR. AMIT KUMAR VERSUS DR. SONILA

Supreme Court of India

Bench : Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Sanjay Kishan Kaul

Dr. Amit Kumar ....Appellant
Versus
Dr. Sonila & Ors. ...Respondents

CIVIL APPEAL NO. 10771 OF 2018

[Arising out of SLP(C) No.21786/2018]

Decided on : 26th October, 2018

In the present case, the Appellant and Respondent were married and from the wedlock were born a son and a daughter (aged 11 and 8 years respectively). Both the parties are doctors deployed with the CRPF.

Due to the relationship becoming sore between them, the parties agreed for a decree of divorce by mutual consent and henceforth filed a petition under Section 13B of the Hindu Marriage Act, 1955. According to the decree of divorce, both the parties were at liberty to marry any other person and agreed to the custody of both the children with the husband with a stipulation that financial obligations of the son would be borne by the husband and those of the daughter to be borne by the wife.

After a while, the husband re-married and also got transferred to Jammu. Consequently, he admitted the children at a boarding school in Pune. Till then, the wife had not made any payment with regard to her financial obligation. Therefore, the husband sent a legal notice demanding the payment. In reply, the wife stated that the consent decree was not accepted to her and thereupon she also filed an application under Section 6 of the Hindu Minority and Guardianship Act, 1956 seeking custody of her minor children.

After two rounds of litigation, the matter reached the Supreme Court .

held that the decision to give custody to the husband was a conscious decision taken by the parties and can hardly be categorized as a decision under force, pressure or fraud. Also, there was six months hiatus period for the parties to think over the terms of the settlement. Further, the proceedings initially initiated for the custody and thereafter for seeking cancellation of the decree of divorce were clearly an endeavor to pressurize the appellant not to claim any amounts.

Therefore, having regard to the facts of the case, the court held that the custody should remain with the father.

JUDGMENT

Hon'ble Mr. Justice Sanjay Kishan Kaul :—

1. Leave granted.

2. The appellant and respondent No.1 were married according to Hindu rites on 7.5.2004 and, from the wedlock were born a son (respondent No.2) and a daughter (respondent No.3), who

are now about 11 years and 8 years respectively. It appears that the marriage ran into problem at some stage and all endeavours for reconciliation failed. The appellant and respondent No.1, both, are qualified doctors, who were deployed with the CRPF throughout, which position exists even today.

3. The appellant and respondent No.1 ultimately agreed for a decree of divorce by mutual consent and filed a petition under Section 13B of the Hindu Marriage Act, 1955. The first motion was filed in June, 2016 and after the expiry of the statutory period of six (6) months, the second motion was passed and a decree of divorce was granted on 9.12.2016.

4. The two relevant terms of the decree of divorce for the purposes of this present appeal are extracted as under:

> **5)** That, petitioner No.1 and 2 are at liberty to marry with any other person of their choice. In future petitioner No.1 has no any right of husband over petitioner No.2, so also petitioner No.2 has lost right as wife over petitioner No.1 today.
>
> **6)** That, petitioner No.1 and 2 both are agree to custody of both the childrens residing with petitioner No.1. Petitioner No.1 will provide education, medicines, and marriage of Aarokya Kumar s/o Amit Kumar. Petitioner No.2 will provide education, medicines and marriage of Riya Kumar d/o Amit Kumar.

5. A perusal of the aforesaid shows that para 5 was a natural corollary to the decree of divorce, i.e., that either parties could re-marry. Clause 6 provides for an agreement inter se the appellant and respondent No.1 qua the issue of custody of both the children, which was agreed to be with the appellant. However, possibly in view of their similar financial strength, it was agreed that the appellant would provide for education, medicines and marriage of the son while respondent No.1 would do the likewise for the daughter.

6. The parties at the relevant time were posted in Nanded and, thus, initially the arrangement for custody worked out fine. The issue, however, arose once the appellant was transferred out of Nanded. The appellant was transferred to Jammu, which apparently necessitated him to make arrangements for admission of respondent Nos.2 & 3 to a boarding school in Pune, while he assessed the possibility of bringing the children to live with him in Jammu. The undisputed fact is that at no point of time did respondent No.1 make any financial contributions towards her obligations, in terms of the decree of divorce by mutual consent. The appellant sent a legal notice dated 28.3.2017 to respondent No.1 pointing out this fact and demanding the payment of unpaid amounts, apart from the amount required for securing admission and meeting the living expenses of the daughter in the boarding school at Pune. It is this demand which seems to have triggered off the present dispute.

7. Respondent No.1 sent a reply to the aforesaid notice through her counsel on 15.4.2017. The said reply raised the issue that the consent decree was not acceptable to her, and hence her counsel had advised her to seek a modification of the terms & conditions of the decree regarding the custody of the children. It was also alleged that the transfer of respondent Nos.2 & 3 to the boarding school was a unilateral act of the appellant and that the expenses quoted were exorbitant.

8. Respondent No.1 filed an application dated 31.5.2017 under Section 6 of the Hindu Minority and Guardianship Act, 1956, seeking custody of her minor children. In the application, it is alleged that respondent No.1 was mentally disturbed regarding the future of respondent Nos.2 & 3, who are of a tender age, and that at the time of the divorce, the appellant forced and coerced the applicant to dance on his tunes though not acceptable to the applicant. It is further pleaded that respondent No.1 had not asked for absolute custody of the children only so that they do not get disturbed in their education. This application also admits that the trigger has been the notice dated 28.3.2017, sent by the appellant through his counsel, whereby respondent No.1 was for the first time informed that the children were being put in a boarding school. A reference has also been made to the communication, where it was alleged by the appellant that the respondent No.1 wanted to get rid of the custody and responsibility of the children and that is the reason why she had given their custody to the appellant as respondent No.1 had decided to get re-married. There are certain other allegations made qua the problem of the visiting rights of respondent No.1 vis-a-vis the appellant but they are not germane to the controversy in question.

9. The aforesaid application was resisted by the appellant by filing a reply where it was sought to be emphasised that the terms of the decree had been agreed upon, six months time period had been granted to the parties to have a thought over the same, and only thereafter had they been incorporated in the decree of divorce. In the reply it has also been pointed out that though the marriage between the appellant and respondent No.1 was a love marriage, issues arose on account of an alleged affair between respondent No.1 and her school boyfriend, as named in the reply. It was also alleged that she was caught red-handed, but on her begging forgiveness, the appellant decided to maintain the relationship. This, however, it is alleged, did not bring the liaison to an end. Not only this, in March 2016, she is alleged to have started an affair with a person working in the same organisation, who has been named in the application, and that on being found out, respondent No.1 even attempted to commit suicide on that account, for which medical records are available. The divorce is stated to have been agreed upon without making these allegations against respondent No.1, in order to maintain the dignity of the parties in the society at large. The District Judge disposed of the application on 04.09.2017. The court noticed that the paramount consideration was the interest of the children. The court took into consideration that both the parties were well qualified and enjoyed an equal occupation and status, and had mutually agreed to the terms and conditions of the decree for divorce after the completion of the statutory period of six months. There was, thus, no reason to deprive the appellant of the custody of the children, but visiting right arrangements were made in view of the fact that the two parties were based in different stations.

10. This order was assailed by respondent No.1 before the High Court in WP No.12432/2017 in September, 2017. While the writ petition was still pending, respondent No.1 filed a civil suit for declaration that the decree of divorce by mutual consent passed by the Family Court had been obtained by coercion, fraud and misrepresentation and was, thus, null and void, and hence did not affect the marriage between the parties. This suit is stated to be still pending.

11. During the proceedings, mediation was also endeavoured, but it failed. The learned Single Judge of the Bombay High Court passed an order on 12.6.2018, after having interacted with the children. The learned Judge took note of the subsequent development that the appellant had married recently, prior to the order, and that there was a biological son of his second wife, borne

out of her first wedlock, who is residing with them, currently. The appellant had also got the children admitted to a school in Jammu, by that point in time. The interaction with the children is stated to have led the Judge to the conclusion that the son and daughter desire to live with respondent No.1, but that they also love their father equally. The learned Judge gave preference to the desire of respondent No.1, as a mother, and directed that the children would remain in the custody of the mother for a period of one year to take education at a school in which they would acquire admission, at the place where their mother lives and that the father would have visiting rights. A number of directions were passed qua the implementation of the visiting rights.

12. The appellant, aggrieved by this order, preferred SLP (Civil) No.16667/2018. Leave was granted and this appeal No.6500/2018 was disposed of on 11.7.2018, by making a reference to the clauses in the consent decree, which had not been noticed by the High Court, while passing the order. The matter was then remitted to the High Court for fresh consideration.

13. Based on the interaction with the children, the learned Single Judge of the Bombay High Court by the impugned order dated 25.7.2018, once again, directed the custody of the children to be with the mother, with visiting rights given to the father. The High Court after noticing the submission made on behalf of the appellant that the condition in the divorce decree had not been varied till date, posted the matter on 19.3.2019, to be reviewed after a year.

14. We had directed the personal presence of the appellant and the respondents with whom we interacted. Learned counsel for the appellant drew our attention to certain pleadings which would show that proceedings had been initiated against the officer with whom the liaison of respondent No.1 was alleged. The Memorandum dated 14.3.2017 issued by the Directorate General, CRPF referred to the imputations of misconduct in support of the article of charges and it is specifically alleged that the said officer had used immoral texts during office hours while communicating with respondent No.1. The details of the same have also been set out. The inquiry is stated to be still pending. In the course of the Courts interaction, it came to light that as per the appellant and his second wife, the matrimonial arrangement was with the understanding that Respondent Nos.2 and 3 would stay with the appellant, and the second wife of the appellant would take care of them. The second wife of the appellant is an MBA graduate and was previously working with a bank, but resigned to take care of domestic responsibilities. The appellant also stated that while on the one hand no financial aid had been given by respondent No.1 to the appellant for the daughter, as per the obligations in the consent decree on other hand she had been transferring substantive amounts to the person with whom she allegedly had a liaison. On the Courts query, respondent No.1 initially took offence to the fact that the appellant had access to her bank details, but on a pointed query admitted that she did transfer the funds to her colleague, but stated that the same was her own business. She sought to plead that it was immaterial whether she was or was not a good wife, but that she was indeed a good mother, as had become apparent in the interaction of the children with the learned Single Judge.

15. We have given deep thought to the matter. The issue is not so simple as it involves the interests of these young children, respondent Nos.2 & 3, which is of paramount concern. While saying so, it has been kept in mind that these children are still young and are of an impressionable age and the interaction can only be one of the factors to be taken into account.

16. In our view, it clearly emerges that the decision to give custody to the appellant, of the two children, was a conscious decision taken by the parties at the relevant stage and can hardly be categorised as a decision under force, pressure or fraud. Respondent No.1 is well-educated and is a medical practitioner. There was a six (6) months hiatus period for the parties to think over the terms of the settlement before the grant of the decree of divorce, which is the statutory period available for the parties to have a re-think, if they so deem it appropriate. The parties had clearly agreed as per clause 5 that they were free to re-marry. As per the terms of the custody, the said marriage does not have any effect on the custody rights, at least in the terms between the parties. The appellant has also borne all the expenses for both the children, as respondent No.1 even initially failed to contribute anything towards the expenses for the daughter, contrary to the agreement inter se the parties.

17. The trigger for respondent No.1 claiming custody of the children only arose when the appellant asked her to contribute financially. It was not a case of financial difficulty, but the unwillingness of respondent No.1 to contribute for her own daughter, while simultaneously transferring amounts to a colleague of hers. It does appear that the proceedings initiated initially for the custody and thereafter for seeking cancellation of the decree of divorce were clearly an endeavour to pressurise the appellant to not claim any amounts. We may also invite attention to Order II Rule 2 of the Code of Civil Procedure, 1908 specifying that where a plaintiff intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so relinquished. Respondent No.1 had relinquished her rights to claim custody and the suit filed by her, thus, is also highly doubtful.

18. We may hasten to add that it is not as if there can be no eventuality where such terms may require modification, but that would arise if the interests of the children so desire, and more specifically if the appellant had failed to honour his commitments, or look after the children. The second marriage of the appellant cannot be put against him, nor can the factum of the child of his second wife residing with him deprive him of the custody rights of his two children, which has been specifically conferred on him with the consent of respondent No.1.

19. A perusal of the impugned order shows that it is not as if the appellant was not looking after the children. The children showed affection for their father. It was due to the exigencies of the appellants service condition that the children had to be put in a boarding school for some time, which exigency also does not remain at present. It was known to the parties that they were in a transferable job. A conscious decision was taken by the parties to give the sole custody to the appellant, in the interest of the children. The second wife of the appellant is an educated lady. Merely because the appellant has decided to go ahead in life, and has had a second marriage, it provides no ground whatsoever to deprive him of the custody of the children as agreed upon between the appellant and respondent No.1, especially when he has been looking after the children and has not gone back on any of his commitments. Respondent No.1, in order to avoid the financial liability started these proceedings, resulting in the impugned order, as also a separate suit proceeding. One fails to appreciate what is it that respondent No.1 wants by filing the suit now, by claiming that the decree of divorce is null and void, when there is admission of a mutual consent for divorce and the appellant has already re-married. We are not going into the details of the allegations against respondent No.1s liaison with another man in the same service, as the inquiry is still pending and, it may not be appropriate also, to do so in the present

proceedings. We, however, see no reason why the appellant has been compelled to go through this unnecessary litigation when the parties, at the threshold, after deep deliberation, and for the interest of the children, have given the custody to the appellant.

20. We are of the view that the learned Single Judge has given undue importance to the conversation with the children at a time when naturally they would prefer to stay with a parent rather than a boarding school. Respondent No.1 cannot be permitted to take advantage of the visiting rights granted for the vacation period to now claim that the children should continue to stay with her.

21. We are, thus, of the unequivocal view that the interference by the learned Single Judge, vide impugned order dated 25.7.2018, was unjustified, and the order of the Family Court dated 9.12.2016 was in order.

22. Insofar as any further facilitative directions, for the purpose of visiting rights of respondent No.1 are concerned, it would be open for the Family Court or High Court to make necessary arrangements. Respondent Nos.2 & 3 should be returned to the appellant by respondent No.1, along with all relevant documents of the children, within thirty (30) days from today, before the Family Court. In case the appellant is unable to make arrangement for a mid-term admission for the children, he may inform respondent No.1 and in that eventuality the children will continue to study in the same school at present and continue to stay with respondent No.1 till the end of the session. This is in order to ensure that the study of the children are not disturbed. We also make it clear that the rights and obligations as envisaged in the decree of divorce by mutual consent will bind both the appellant and respondent No.1. Needless to say that after the children attain the age of majority, they would have their own choice.

23. The appeal is accordingly allowed, leaving the parties to bear their own costs.

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IQBAL BANO VERSUS STATE OF U.P.

Supreme Court of India

Bench : Hon'be Mr. Justice Dr. Arijit Pasayait and Hon'be Mr. Justice D.K. Jain

CRIMINAL APPEAL NO. 795 OF 2001†

Iqbal Bano ...Appellant;
Versus
State of U.P. and another ...Respondents.

Decided on June 5, 2007

A. Criminal Procedure Code, 1973 — S. 125 — Muslim women not barred from filing petition under — Muslim Women (Protection of Rights on Divorce) Act, 1986, held, applies only to divorced women and not to women who are not divorced — Furthermore, since the proceedings under S. 125 CrPC and the 1986 Act are tried before the same court, and given the beneficial nature of the 1986 Act, even if a divorced Muslim woman applies under S. 125 CrPC, it is open to the court to treat it as an application under the 1986 Act — Muslim Law

Allowing the appeal and remanding the matter for decision afresh, the Supreme Court

Held:

The view expressed by the First Revisional Court that no Muslim woman can maintain a petition under Section 125 CrPC is clearly unsustainable. The Muslim Women (Protection of Rights on divorce) Act, 1986 only applies to divorced women and not to a woman who is not divorced. Furthermore, proceedings under Section 125 CrPC are civil in nature. Even if the court noticed that there was a divorced Muslim woman who had made an application under Section 125 CrPC, it was open to the court to treat the same as a petition under the 1986 Act considering the beneficial nature of the legislation, especially since proceedings under Section 125 CrPC and claims made under the Muslim Women Act are tried by the same court. (Paras 6 and 3)

Vijay Kumar Prasad v. Stale of Bihar, (2004) 5 SCC 196 : 2004 SCC (Cri) 1576, relied on

B. Muslim Law — Divorce — Divorce on utterance of "talaq" thrice — Mode for effectuation and proof of — Reiterated, a mere plea taken in a written statement, of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife — Evidence needs to be adduced and the pronouncement of talaq at the claimed earlier date has to be proved

The conclusion that in view of the statement in the written statement about an alleged divorce 30 years back by utterance of the words "talaq" "talaq" "talaq" three times is sufficient in law, is not sustainable. A mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent 2 ought to have adduced evidence and proved the pronouncement of talaq at the claimed earlier date and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. (Para 6)

Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) Misapplied

C. Muslim Women (Protection of Rights on Divorce) Act, 1986 — S. 3 — Maintenance payable under by (ex-)hushand — Scope of — Reiterated, liability of a Muslim husband to his divorced wife under S. 3(1)(a) is not confined to the iddat period — He is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well — This future provision must be made within the iddat period though in terms of S. 3(l)(a)

D. Muslim Women (Protection of Rights on Divorce) Act, 1986 — S. 3(2) — Invocation of jurisdiction of Magistrate under — Irrelevance of mehr having been paid and iddat period having expired

The conclusions about the mehr having been paid and the iddat period being over have no relevance as far as invoking the jurisdiction of the Magistrate under Section 3(2) of the Muslim Women Act, 1986 is concerned. Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Muslim Women Act, 1986 to pay maintenance is not confined to the iddat period. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wile which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(l)(a) of the Muslim Women Act, 1986. (Para 7)

Daniai latifi v. Union of India, (2001) 7 SCC 740; Sahra Shamim v. Maqsood Ansari, (2004) 9 SCC 616. applied

Mohd. Ahmed Khan v. Shah Bono Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, cited

K. Constitution of India — Art. 227 — Revision — Proper mode for disposal of — Need to give reasons — Summary disposal held improper — Criminal Procedure Code, 1973 — S. 397 — Revision (Para 6)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Dr. Arijit Pasayat.—

In the present appeal the appellant questions correctness of the order passed by a learned Single Judge of the Allahabad High Court dismissing her revision petition (Criminal Revision No. 1161 of 1995). The appellant had questioned correctness of the order passed by the learned Additional Sessions Judge, Aligarh, setting aside the order dated 7-7¬1994 passed by the learned Judicial Magistrate, Aligarh. By ihe said order dated 7-7-1994 the learned Judicial Magistrate had accepted the prayer for grant of maintenance filed by the appellant in terms of Section 125 of the a Code of Criminal Procedure, 1973 (in short "CrPC"). She directed Respondent 2 to pay a monthly maintenance of Rs 450 to the appellant.

2. Background facts in a nutshell are as follows:

The appellant had married Respondent 2 in the year 1959 and a child was born to them in 1966. Unfortunately, the son died in the year 1991. Respondent 2 who was living separately from the appellant stopped coming to the house of the appellant where she was staying and also did not pay anything for her subsistence. Therefore, an application under Section 125 CrPC was (1 led on 21-2-1992. Before that she had sent notice demanding payment of maintenance. Respondent 2 replied to the notice and denied his liability to pay maintenance. As noted above, on 21-2-

1992 application was filed claiming maintenance of Rs 500 p.m. It was stated that the income of Respondent 2 was Rs 4000 per month. On 28-5-1992 written statement was filed wherein it was stated that long back he had divorced his wife by utterance of the words "talaq" "talaq" "talaq". It was further stated that there was severance of marital ties between them for years as the divorce was over by the utterance of the word "talaq" thrice and he had also paid mehr and as the iddat period was over the claim was not acceptable. He also stated that he had contracted a second marriage.

3. The learned Magistrate held that there was no material to substantiate the plea of divorce and accordingly maintenance was granted. Order was challenged by filing a revision before the learned Additional Sessions Judge.

Stand of the respondent was that after enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (in short "the Act"), petition under Section 125 CrPC was not maintainable. It was also stated that not only in the reply to the notice, was there mention about the utterance of the words "talaq" "talaq" "talaq", there was mention in the written statement also, amounting to divorce. Learned Additional District and Sessions Judge accepted the pica. He held that after the enactment of the Act, petition by any married Muslim woman under Section 125 CrPC is not maintainable. Such woman can claim maintenance under the Act and not under CrPC. It was further held that mention was made in the written statement about the divorce purportedly 30 years back and the mentioning about this fact in law amounted to divorce. Accordingly, order of the learned Magistrate was set aside. The High Court dismissed the writ petition summarily and observed as follows:

"Heard learned counsel for the revisionist.

The learned Additional District and Sessions Judge has committed no illegality in modifying the order passed by the Magistrate in declining the maintenance after the date of divorce.

The revision has got no force. Il is dismissed accordingly."

4. Learned counsel for the appellant submitted that the approach of the First Revisional Court was clearly erroneous. There is no bar on a Muslim woman filing petition in terms of Section 125 CrPC. The Act only applies to divorced women and not married Muslim women who arc not divorced. Further, mere statement in the written statement about some divorce long a back docs not meet the requirement of law. The finding of the First Revisional Court about payment of mehr has no relevance.

5. Mr S.W.A. Qadri, learned counsel for the State of Uttar Pradesh brought to our notice several decisions of this Court to support the stand of the appellant. Learned counsel for Respondent 2 on the other hand supported the order of the His>h Court. It was submitted that no interference is called for.

6. The dismissal of the revision petition by the High Court in the manner done is clearly unsustainable. The absence of these reasons has rendered the High Court's order unsustainable.

7. The view expressed by the First Revisional Court that no Muslim woman can maintain petition under Section 125 CrPC is clearly c unsustainable. The Act only applies to divorced women and not to a woman who is not divorced. The conclusion that in view of the statement in the written statement about alleged divorce 30 years back by utterance of the words "talaq" "talaq" "talaq"

three times is sufficient in law is not sustainable. This Court in Shamim Ara v. State of U.P.[44] observed: (SCC p. 527, para 16)

"16. We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (see Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of talaq having taken place on 11-7-1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent 2 ought to have adduced evidence and proved the pronouncement of talaq on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A pica of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31-8-1988. filed in some previous judicial proceedings not inter partes, containing a self-serving statement of Respondent 2, could not have been read in evidence as relevant and of any value."

8. The conclusions about the mehr having been paid and the iddat period is over have no relevance. A Constitution Bench of this Court in Daniai Latifi v. Union of India[45] observed as follows: (SCC pp. 760-62 & 765-66, paras 28¬29 & 36)

"28. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was slated (hat Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression 'within' should be read as 'during' or 'for' and this cannot be done because words cannot be construed contrary to their meaning as the word 'within' would mean 'on or before', 'not beyond' and, therefore, it was held that the Act would . mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited

44 (2002) 7 SCC 518 : 2002 SCC (Cri) 1814

45 (2001) 7 SCC 740

only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

29. The important section in the Act is Section 3 which provides that a divorced woman is entitled to obtain from her former husband 'maintenance', 'provision' and 'mehr', and to recover from his possession her wedding presents and dowry and authorises the Magistrate to order payment or restoration of these sums or properties.

The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a 'reasonable and fair provision' for his divorced wife; and (2) to provide 'maintenance' for her. The emphasis of this section is not on the nature or duration of any such 'provision' or 'maintenance', but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, 'within the iddat period'. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both 'reasonable and fair provision and 'maintenance' by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1) (d) the Act. Precisely, the point that arose for a consideration in Shah Bano case[46] was that the husband had not made a 'reasonable and fair provision' for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions b enacted under the Act are 'a reasonable and fair provision and maintenance to be made and paid' as provided under Section 3(1)(cr) of the Act and these expressions cover different things, firstly, by the use of two different verbs—'to be made and paid to her within the iddat period' it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly. Section 4 of the Act, which c empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to 'provision'. Obviously, the right to have 'a fair and reasonable provision' in her favour is a right enforceable only against the woman's former husband, and in addition lo what he is obliged to pay as 'maintenance'; thirdly, the words of The Holy Quran, as translated by Yusuf Ali of 'mala' as 'maintenance' though may be incorrect and that other translations employed the word 'provision', this Court in Shah Bano case[7] dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether 'mata' was rendered 'maintenance' or 'provision', there could be no pretence that the husband in Shah Bano case[7] had provided anything at all by way of 'mata' to his divorced wife. e The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to 'mata' is only a single or one-time transaction which docs not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word 'provision' in Section 3(1) (a) of the Act incorporates 'mata' as a right of the divorced Muslim woman distinct

46 Mohd. Ahmed Khan v. Shah Bano Begum. (1985) 2 SCC 556 : 1985 SCC (Cri) 245

from and in addition to mahr and maintenance for the iddat period, also enables 'a reasonable and fair provision' and 'a reasonable and fair provision' as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to ^ the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Bano case[7], actually codifies the very rationale contained therein.

36. While upholding the validity of the Act, we may sum up our conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14. 15 and 21 of the Constitution of India."

9. The position was followed in Sabra Shamim v. Maqsood Ansari[47].

10. Proceedings under Section 125 CrPC are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 CrPC and claims made under the Act are tried by the same court. In Vijay Kumar Prasad v. State of Bihar[48] it was held that proceedings under Section 125 CrPC are civil in nature. It was noted as follows: (SCC p. 200, para 14)

"14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126(1) an application by the father or the mother

47 (2004) 9 SCC 616

48 (2004) 5 SCC 196 : 2004 SCC (Cri) 1576

claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

11. Accordingly, we set aside the impugned order of the High Court and remit the matter for fresh consideration.

12. The High Court while deciding the matter shall keep in view the principles indicated above. Since the matter is pending since long, the High Court shall dispose of the matter within six months from the date of receipt of this order to avoid unnecessary delay. We direct the parties to appear before the High Court on 23-7-2007. We request the Chief Justice of the High Court to list the matter before the appropriate Bench.

13. The appeal is disposed of accordingly.

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KOLLAM CHANDRA SEKHAR VERSUS KOLLAM PADMA LATHA

Bench : Hon'ble Mr. Justice G.S. Singhvi and Hon'ble Mr. Justice V. Gopala Gowda

CIVIL APPEAL NO. 8264 OF 2013

Kollam Chandra Sekhar .. Appellant;
Versus
Kollam Padma Latha .. Respondent.

Decided on September 17, 2013

A. Family and Personal Laws — Hindu Law — Hindu Marriage Act, 1955 — S. 13(1)(iii) Expln. and S. 9 — Divorce on grounds of "unsoundness of mind" and "mental disorder" including schizophrenia — When may not be granted — Merc existence of mental disorder insufficient to justify dissolution of marriage — Need for existence of serious mental disorder — Further held, one spouse cannot simply abandon the other spouse because the latter is suffering from sickness

— In instant case, medical report failed to support case of appellant husband that respondent was suffering from serious case of schizophrenia — Rather, report indicated that although respondent was suffering from a "illness of schizophrenic type" but did not show symptoms of psychotic illness, had responded well to treatment from acute phases and her symptoms were fairly under control with medication and further that if there was good compliance with treatment coupled with good family and social support, a schizophrenic patient could continue normal conjugal and marital relationship — Besides, respondent wife had not only completed MBBS but had also done a postgraduate diploma in Medicine and was ^ continuously working as a Government Medical Officer — Had she been suffering from any serious kind of mental disorder, it would have been impossible for her to work in said post — Impugned judgment not granting decree of divorce and allowing petition for restitution of conjugal rights, upheld — Special Marriage Act, 1954, S. 27(1)(e)

B. Family and Personal Laws — Marriage — Strong foundation of marriage — To weather storms and embrace sunshine, both with equanimity

C. Family and Personal Laws — Divorce — Welfare of child prime consideration

The marriage between the appellant and the respondent was solemnised on 31-5-1995 as per Hindu rites and customs. A child was born to them on d 7-7-1997. Some tensions arose between the two after the death of appellant husband's brother, and both of them received medical treatment.

The appellant husband alleged that the respondent fell seriously ill, and when she consulted some psychiatrists they advised her to live with her mother; and that when he visited her after two weeks, her mental condition had aggravated to such a point that it was impossible to cohabit as her husband. He contended that she was exhibiting all the classical symptoms of schizophrenia e including violence, psychotic behaviour, suicidal tendencies and abnormal and irrational behaviour.

The trial court relying on certified copy of report from Institute of Mental Health, Government Hospital for mental care found that the respondent wife suffered from schizophrenia, and hence granted decree of divorce to husband, while dismissing the respondent's petition for restitution of conjugal rights.

The High Court by the impugned judgment allowed the appeal filed by respondent wife holding that there was no positive evidence to show that the respondent suffered from schizophrenia, and even if she did suffer it was not of such seriousness as would attract Section 13(1 Hindu Marriage Act, 1955 for grant of divorce.

Hence, instant appeal by appellant husband.

The issue for consideration was whether the marriage between the parties can be dissolved by granting a decree of divorce on the basis of mere existence of one spouse's mental illness which includes schizophrenia under Section 13(1)070 of the Hindu Marriage Act, 1955.

Dismissing the appeal, the Supreme Court

Held: .

The High Court relied on the evidence of RW 2 Superintendent, Institute of Mental Health who had stated that schizophrenia can be put on a par with diseases like hypertension and diabetes, and by constant medication it can be controlled. Reliance was also placed on the testimony of PW 4. Professor and Head of Department of Psychiatry at NlMHANS, Bangalore who had deposed that there was no contra-indication in leading a normal conjugal life. The High Court has rightly examined the evidence on record and correctly found fault with the findings recorded by the trial court with regard to the ailment attributed to the respondent for seeking dissolution of marriage under the ground of "unsound mind" which is a non-existent fact. It was also justified in holding that a husband cannot simply abandon his wife because she is suffering from mental sickness. Section 13(1)(m) of HMA, 1955 does not make a mere existence of a mental disorder of any degree sufficient in law to justify the dissolution of marriage. (Paras 22 to 36)

The contents of the report as stated by the team of doctors do not support the case of the appellant that the respondent is suffering from a serious case of schizophrenia, in order to grant the decree of divorce under Section 13(1)(iii) of the Act. The report states that the respondent, although suffering from "illness of schizophrenic type", docs not show symptoms of psychotic illness at present and has responded well to the treatment from the acute phases and her symptoms are fairly under control with the medication which had been administered to her. It was further stated that if there is good compliance with treatment coupled with e good social and family support, a schizophrenic patient can continue their marital relationship. In view of the aforesaid findings and reasons recorded, it is held that the patient is not suffering from the symptoms of schizophrenia. (Para 37)

A pertinent point to be taken into consideration is that the respondent had not only completed MBBS but also did a postgraduate diploma in Medicine and was continuously working as a Government Medical Officer and had she been f suffering from any serious kind of mental disorder, particularly, acute type of schizophrenia, it would have been impossible for her to work in the said post. The appellant husband cannot simply abandon his wife because she is suffering from sickness. Hence, the two parties must reconcile and if the appellant so feels that the respondent is still suffering, then she must be given the right treatment. The respondent must stick to her treatment plan and make the best

attempts to get better. A decree for restitution of conjugal rights under Section 9 of the Act in favour of the respondent. (Paras 38, 39, 43 and 44)

Kollam Padma Latha v. Kollam Chandra Sekhar, (2007) 1 ALD 598 : (2007) 1 An LT 177, affirmed

Under Hindu law, marriage is an institution, a meeting of two hearts and minds and is something that cannot be taken lightly. In the Vedic period, the sacredness of the marriage tic was repeatedly declared; the family ideal was decidedly high and it was often realised. Marriage is highly revered in India and we are a nation that prides itself on the strong foundation of our marriages, come hell or high water, rain or sunshine. Lite is made up of good times and bad, and the bad times can bring with it terrible illnesses and extreme hardships. The partners in a marriage must weather these storms and embrace the sunshine with equanimity. Any person may have bad health, this is not their fault and most times, it is not within their control, as in the present case, the respondent was unwell and was taking treatment for the same. The illness had its fair share of problems. But, this cannot be a reason for the appellant to abandon her and seek dissolution of marriage after the child is born from their union. The welfare of the child must be the prime consideration for both the parties. (Paras 41 and 42)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice V. Gopala Gowda.— Leave granted. This appeal is directed against the common judgment and order dated 28-9-2006 passed in Kollam Padma Latha v. Kollam Chandra Sekhar[49] of the High Court of Andhra Pradesh as it has set aside the judgment and decree of divorce granted in favour of the appellant husband dissolving the marriage between the appellant and the respondent by dismissing Original Petition No. 203 of 2000 tiled by the appellant for dissolution of their marriage under Section 13(1)(iii) of the Hindu Marriage Act, 1955 (in short "the Act") and allowing Original Petition No. 1 of 1999 filed by the respondent wife against the appellant by granting restitution of conjugal rights urging various facts and legal contentions.

2. The factual and rival legal contentions urged on behalf of the parties are adverted to in this judgment with a view to examine the tenability of the appellant's submissions. The relevant facts arc stated as hereunder:

3. The marriage between the appellant and the respondent was solemnised on 31-5-1995 at Kakinada (Andhra Pradesh) as per Hindu rites and customs and their marriage was consummated. It is the case of the appellant that at the time of marriage, he was working as Senior Resident at the All India Institute of Medical Sciences in New Delhi. After marriage, the respondent wife joined the appellant at New Delhi and secured employment in the said Institute.

4. It is the case of both the parties that when they were living at New Delhi, the brother of the appellant died in an accident. At that point of time, the appellant herein came to Yanam (Andhra Pradesh) leaving the respondent at Delhi, who gave birth to a female child on 7-7-1997.

5. It is contended by the learned Senior Counsel for the appellant, Mr Jaideep Gupta, in the pleadings that dispute arose between the appellant and his parents on the one hand and the in-laws of the deceased brother of the appellant on the other. There were threats to kill the appellant. During that period, the respondent's father stayed in the company of the appellant and his parents at Yanam. At that time, both the appellant and the respondent suffered tensions and they were restless on account of the situation created by the in ¬laws of the appellant's

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deceased brother. Both of them received medical treatment and due to depression, the appellant submitted his resignation and the respondent also resigned from her job at AllMS. The appellant then joined as Assistant Professor in Gandhi Hospital at Secunderabad. The respondent and the child also joined him at Hyderabad. It is their further case that while they were in Hyderabad, the appellant used to receive threatening calls from the in-laws of his deceased brother which used to create tension in their family. The respondent was treated for hypothyroidism problem.

6. In the counter-statement filed by the respondent, she contended that after one year of their marriage, the appellant and his parents started harassing her by demanding colour television, refrigerator, etc. In May 1998, after the death of the father of the respondent, the appellant went on insisting that the respondent gets the house situated at Rajahmundry registered in his name and when she refused, he started to torture her. The respondent applied for postgraduate entrance examination, which was scheduled to be held on 13-8-1998, and the appellant was making arrangements to go to Madras on 12-8-1998 in connection with FRCS admission. On 11-8-1998, the appellant picked up a quarrel with the respondent insisting that she must get the house at Rajahmundry registered in his name to which she did not agree. The respondent also requested him not to go to Madras as she had to appear for the postgraduate entrance examination on 13-8-1998 for which the respondent alleged that the appellant badly tortured her both physically and mentally

7. A telegram was sent to the respondent's mother with false allegations of her mental illness with a view to create evidence as he could have as well conveyed the message through telephone as there was telephone facility at the house of her parents. As the appellant was preparing to appear for FRCS examination and would spend most of his time in the libraries and the respondent and their child would be left alone without help, he suggested that the appellant (sic respondent) should go to Rajahmundry and stay with her parents to which she agreed and went to Rajahmundry and joined Chaitanya Nursing Home and Bhavaili Nursing Home to work as a doctor.

8. In the second week of November 1998, the appellant came to Rajahmundry and asked the respondent to go to Yanam and stay with his parents saying that she can have the company of his parents and she can carry on the medical profession along with his father who was also a doctor to which she agreed. Thereafter, the appellant got issued a notice dated 25-11-1998 to the respondent making certain false allegations saying that she a was suffering from schizophrenia and she had suicidal tendencies, etc. with the object of marrying again for fat dowry.

9. The respondent has denied that she suffered from schizophrenia or suicidal tendencies and further stated that during her delivery days and subsequently on account of the threats received from the in-laws of the appellant's deceased brother, there was some depression for which the respondent was treated and the appellant never allowed her to go through the prescriptions of her treatment at any time and she was also not allowed to see the medicines given to her as part of treatment for her depression. It is stated by her that she believes that as part of the ill motive of the appellant, he might have administered some medicines to build up a false case against her with a view to file petition for dissolution of marriage. The respondent got issued a reply notice to the lawyer of the appellant mentioning the above facts on 18-12-1998.

10. It is further contended by the learned Senior Counsel for the respondent, Mr Pallav Shishodia, that the appellant never cared for her and encouraged his parents to dislodge her from the family house. She filed OS No. 53 of 1998 on the file of the District Munsif's Court, Yanam for permanent injunction against the parents of the appellant and filed Interlocutory Application No. 237 of 1998 for temporary injunction against them not to evict her from the residential house where she was staying. It is further stated that the appellant has no right to withdraw from her society and demand for divorce and that she is entitled for restitution of conjugal rights.

11. It is contended by the respondent that the impugned judgment[50] is a e well-considered judgment both on facts and in law and the Division Bench of the High Court lightly allowed the appeals filed by the respondent refusing to grant a decree of divorce in favour of the appellant and granting a decree for restitution of conjugal rights in favour of the respondent. Therefore, the respondent has prayed for dismissal of the petition filed by the appellant praying for grant of decree of divorce against her.

12. The appellant filed the counter-statement to the petition for restitution of conjugal rights denying the allegations made in the petition. He contended that the behaviour of the respondent even when they were staying at New Delhi was marked by emotional disturbances and she also received treatment from a psychiatrist there. He has further stated that he underwent severe mental stress due to irrational behavioural pattern of the respondent. Her erratic behaviour started increasing as time passed by. She started manifesting symptoms of schizophrenia like violent or aggressive behaviour and a tendency to be harsh and hostile towards other members of the family without any reason whatsoever which were not visible earlier. For that reason, she was kept with her parents' family so that she can develop a sense of security which is required for patients suffering from schizophrenia. He has further stated that she also started developing the symptoms like sudden withdrawal and being silent for long periods without any communication.

13. Further, the appellant has stated that after the death of his brother, he brought his wife and child to Hyderabad where he had secured a job as Assistant Professor of Orthopaedics in Gandhi Medical College. He further contended that on account of the death of his brother, tension developed in his family and that neither he nor his family members harassed the respondent demanding goods, etc. He also stated that at the time of marriage, mental status of the respondent was not known to him. Further, the respondent tried to evict his parents from their house at Yanam and when she failed in her attempt, she tiled OS No. 53 of 1998 at the District Munsif's Court, Yanam which shows her erratic attitude towards the parents of the appellant.

14. The respondent fell seriously ill due to which the appellant sent her mother a telegram to come and take care of her. She went to live with her mother at Rajahmundry as she consulted some psychiatrists who advised her to live with her mother. The appellant visited her after two weeks and found that her mental condition had aggravated to such a point that it would be impossible for him to live with her as her husband. He contended that she was showing all the classical symptoms of schizophrenia including violence, psychotic behaviour, suicidal tendencies, withdrawal symptoms and abnormal and irrational behaviour including in the matter of her speech and her conversation. She also used to say that she would like to commit suicide and he was, thus, worried about her and the child. The respondent was continuously on psychiatric treatment.

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15. The above facts were narrated by the appellant in his divorce petition filed before the trial court. He has further contended that under the circumstances narrated above, it was impossible for him to resume cohabitation with the respondent as he was afraid of danger to his life and that of his daughter and therefore, he requested the court for grant of a decree of divorce and that the respondent's petition for restitution of conjugal rights be dismissed as she is not entitled to the relief prayed for by her.

16. The learned trial Judge in his judgment held that the appellant is entitled to a decree of divorce if not annulment of marriage and that since the disease of the respondent was not disclosed to the appellant before marriage, she is not entitled to a decree of restitution of conjugal rights. As a result, OP No. 1 of 1999 filed by the respondent for restitution of conjugal rights was dismissed and OP No. 203 of 2000 filed by the appellant for grant of divorce was allowed by dissolving the marriage between the appellant and the respondent and decree of divorce was granted.

17. The trial court relied on the certified copy of report from Institute of Mental Health, Government Hospital for Mental Care, Sanjeeva Reddy Nagar, Hyderabad, bearing Nos. A and D/402 of 1999 submitted to the Registrar (Judicial), High Court of Andhra Pradesh, Hyderabad, marked as Ext. B-10, given as per procedure and by conducting chemical examination, etc. It is stated that the report clearly showed that the respondent is suffering from schizophrenia. The trial court relied on Tarlochan Singh v. Jit Kaut[51], wherein it was held that since the fact of the wife being a patient of schizophrenia was not disclosed to the husband before marriage, it would amount to matrimonial fraud and therefore it was held that the husband was a entitled to decree of divorce if not annulment of marriage.

18. Being aggrieved by the common judgment and decree of the trial court passed in OPs Nos. 1 of 1999 and 203 of 2000 the respondent filed appeals before the High Court of Andhra Pradesh questioning the correctness of the same urging various grounds. The High Court on reappreciation of the pleadings and evidence held that there is no positive evidence to show that the respondent has suffered schizophrenia and even in the case that she suffered from schizophrenia, it cannot be said that she was suffering from such a serious form of the disease that it would attract the requirements of Section 13(1)(iii) of the Act for grant of decree for dissolution of marriage between the parties.

19. On perusal of the facts and legal evidence on record and hearing the rival legal contentions urged by both the parties, the points that would arise for consideration of this Court arc:

19.1. (i) Whether the respondent is suffering from a serious mental disorder i.e. schizophrenia or incurable unsoundness of mind, and can this be considered as a ground for divorce under Section 13(l)(m) of the Hindu Marriage Act, 1955?

19.2. (ii) Whether the High Court has correctly reap predated the facts pleaded and evidence on record while dismissing the divorce petition of the appellant and allowing the petition for restitution of conjugal rights of the respondent?

19.3. (iii) Whether the appeal filed by the appellant has to be allowed and we must restore the judgment and decree of the trial court and dismiss the petition for conjugal rights filed by the respondent?

51 AIR 1986P&H379

19.4. (iv) What order? Answer to Points (i) to (iii)

20. These points arc answered together as they arc interrelated. On careful scrutiny of the pleadings and evidence on record and the decision of this Court referred to above, the provision of Section 13(1)(m) of the Act is interpreted and the meanings of "unsound mind'7 and "mental disorder" as occurring in the above provisions of the Act are examined and referred to in the impugned judgment.

21. The High Court, while examining the correctness of the findings recorded in the common judgment of the trial court, has placed reliance on Ram Narain Gupta v. Rameshwari Gupta[52], wherein this Court has interpreted g the provision of Section 13(1)(iii) of the Act and laid down the law regarding mental disorder or unsound mind as a ground available to a party to get dissolution of the marriage.

22. The relevant portions with regard to "unsoundness of mind" and "mental disorder" from the case referred to supra are extracted hereunder: (Ram Narain Gupta case[3], SCC pp. 254-56, paras 20-24)

"20. The context in which the ideas of unsoundness of 'mind' and 'mental disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the 'mental disorder'. Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities arc not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law.

21. The answer to the apparently simple—and perhaps misleading—question as to 'who is normal?' runs inevitably into philosophical thickets of the concept of mental normalcy and as involved therein, of the 'mind' itself. These concepts of 'mind', 'mental phenomena, etc. are more known than understood and the theories of 'mind' and 'mentation' do not indicate any internal consistency, let alone validity, of their hasic ideas. Theories of 'mind' with cognate ideas of 'perception' and 'consciousness' encompass a wide range of thoughts, more ontological than cpistcmological. Theories of mental phenomena arc diverse and include the dualist concept—shared by Descartes and Sigmund Freud— of the separateness of the existence of the physical or the material world as distinguished from the non-material mental world with its existence only spatially and not temporally. There is, again, the theory which stresses the neurological basis of the 'mental phenomenon' by asserting the functional correlation of the neuronal arrangements of the brain with mental phenomena. The 'behaviourist' tradition, on the other hand, interprets all reference to mind as 'constructs' out of behaviour. 'Functionalism', however, seems to assert that mind is the logical or functional state of physical systems. But all theories seem to recognise, in varying degrees, that the psychometric control over the mind operates at a level not yet fully taught to science. When a person is oppressed by intense and seemingly insoluble moral dilemmas, or when grief of loss of deal- ones etch away all the bright colours of life, or where a broken*

52 (1988) 4 SCC 247

marriage brings with it the loss of emotional security, what standards of normalcy of behaviour could be formulated and applied? The arcane infallibility of science has not fully pervaded the study of the non-material dimensions of being'.

22. Speaking of the indisposition of science towards this study, a learned author says:

'... we have inherited cultural resistance to treating the conscious mind as a biological phenomenon like any other. This goes back to Descartes in the seventeenth century. Descartes divided the world into two kinds of substances: mental substances and physical substances. Physical substances were the proper domain of science and mental substances were the property of religion. Something of an acceptance of this division exists even to the present day. So, for example, consciousness and subjectivity are often regarded as unsuitable topics for science. And this reluctance to deal with consciousness and subjectivity is part of a persistent objectifying tendency. People think science must be about objectively ohservable phenomena. On occasions when I have lectured to audiences of biologists and neurophysiologists, I have found many of them very a reluctant to treat the mind in general and consciousness in particular as a proper domain of scientific investigation.

... the use of the noun 'mind' is dangerously inhabited by the ghosts of old philosophical theories. It is very difficult to resist the idea that the mind is a kind of a thing, or at least an arena, or at least some kind of black box in which all of these mental processes occur.[53]

23. Lord Wilberforce, referring to the psychological basis of physical illness said that the area of ignorance of the body-mind relation seems to expand with that of knowledge. In McLaughlin v. 0'Brians[54]*, the learned Lord said, though in a different context: (AC p. 418 B : All ER p. 301)*

Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may he caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts '

24. But the illnesses that are called 'mental' are kept distinguished from those that ail the 'body' in a fundamental way. In Philosophy and Medicine, Vol. 5 at p. X the learned editor refers to what distinguishes the two qualitatively:

'Undoubtedly, mental illness is so disvalued because it strikes at the very roots of our personhood. It visits us with uncontrollable fears, obsessions, compulsions and anxieties....

... This is captured in part by the language we use in describing the mentally ill. One is an hysteric, is a neurotic, is an obsessive, is a schizophrenic, is a manic-depressive.

53 John R. Searle, Minds, Bruins and Science-Reith Lectures (Harvard University Press, 1984), a pp. 10 and 11.

54 (1983) 1 AC 410 : (1982) 2 WLR 982 : (1982) 2 All ER 298 (HL)

On the other hand, one has heart disease, has cancer, has the flu, has malaria, has smallpox. (emphasis in original)

The principle laid down by this Court in the aforesaid case with all fours is applicable to the fact situation on hand wherein this Court has rightly referred to Section 13(1)(iii) of the Act and Explanation to the said clause and made certain pertinent observations regarding "unsound mind" or "mental disorder" and the application of the same as grounds for dissolution of marriage. This Court cautioned that Section 13(1)(iii) of the Act does not make a mere existence of a mental disorder of any degree sufficient in law to justify the dissolution of marriage.

23. The High Court in the present case stated that a husband cannot simply abandon his wife because she is suffering from sickness and relied on the evidence of RW 2, Dr Krishna Murthy, Superintendent, Institute of Mental Health, Hyderabad, wherein it is stated by him that schizophrenia can be put on a par with diseases like hypertension and diabetes on the question of treatability meaning that constant medication is required in which event the disease would be under control.

24. The High Court also relied on the evidence of PW 4, Dr Ravi S. Pandey, Professor and Head of Department of Psychiatry at NIMHANS, Bangalore, who had examined the respondent and stated that the team could not find any evidence suggesting that she has been suffering from schizophrenia at the time of examining her and also stated in his cross-examination that no treatment including drugs were given to her at NIMHANS as they did not find any abnormality in her behaviour. He also stated that it is true that psychiatrically there is no contra-indication in leading a normal C conjugal life. Thus, they gave her a certificate, which is marked as Ext. B-l 1, based on clinical examination and in the absence of any abnormal behaviour including psychiatric features in the past history of the respondent.

25. The High Court has not accepted the finding of fact recorded by the trial court on the contentious issue and further stated that "schizophrenia" does not appear to be such a dangerous disease and it can be controlled by drugs and in the present case, this finding is supported by evidence of RW 2, who has stated in his examination-in-chief that the appellant herein has not made any reference to any of the acts of the respondent that can constitute "schizophrenia" ailment.

26. It is further held by the High Court that there is no positive evidence to show that the respondent has suffered from schizophrenia and even in case she has suffered from some form of schizophrenia, it cannot be said that she was suffering from such a serious form of the disease that would attract the requirement as provided under Section 13(1)(a) of the Act and that it is of such a nature that it would make life of the appellant so miserable that he cannot lead a marital life with her.

27. We are of the opinion that the High Court has rightly examined the entire evidence on record and correctly found fault with the findings of fact recorded by the trial court with regard to the ailment attributed to the respondent for seeking dissolution of marriage under the ground of "unsound mind" which is a non-existent fact. In Vinita Saxena v. Pankaj Pandit6, this Court has examined in detail the issue of schizophrenia wherein the facts arc different and the facts and evidence on record are not similar to the case on & hand. Therefore, the observations made in the judgment for grant of decree for dissolution of marriage under Section 13(1)(i-a) and

Section 13(1)(iii) of the Act cannot be applied to the fact situation of the case on hand. But, we would like to examine what was said in that case on the issue of this disease, schizophrenia: (SCC pp. 794-95, para 28)

"What is the disease and what one should know?

A psychotic lacks insight, has the whole of his personality distorted by illness, and constructs a false environment out of his subjective experiences.

It is customary to define 'delusion' more or less in the following way. A delusion is a false un shake able belief, which is out of keeping with the patient's social and cultural background. German psychiatrists tend to stress the morbid origin of the delusion, and quite rightly so. A delusion is the product of internal morbid processes and this is what makes it unamenable to external influences.

Apophanous experiences which occur in acute schizophrenia and form the basis of delusions of persecution, but these delusions arc also the result of auditory hallucinations, bodily hallucinations and experiences of passivity. Delusions of persecution can take many forms. In delusions of reference, the patient feels that people are talking about him, slandering him or spying on him. It may be difficult to be certain if the patient has delusions of self-reference or if he has self-reference hallucinosis. Ideas of delusions or reference arc not confined to schizophrenia, but can occur in depressive illness and psychogenic reactions.

Causes

The causes of schizophrenia are still under debate. A chemical imbalance in the brain seems to play a role, but the reason for the imbalance remains unclear. One is a bit more likely to become schizophrenic if he has a family member with the illness. Stress does not cause schizophrenia, but can make the symptoms worse.

Risks

Without medication and therapy, most paranoid schizophrenics are unable to function in the real world. If they fall victim to severe hallucinations and delusions, they can be a danger to themselves and those around them.

What is schizophrenia?

Schizophrenia is a chronic, disabling mental illness characterised by: Psychotic symptoms Disordered thinking Emotional blunting

How does schizophrenia develop?

Schizophrenia generally develops in late adolescence or early adulthood, most often:

In the late teens or early twenties in men

In the twenties to early thirties in women

What are the symptoms of schizophrenia?

Although schizophrenia is chronic, symptoms may improve at times (periods of remission) and worsen at other times (acute episodes, or period of relapse).

Initial symptoms appear gradually and can include:

Feeling tense

Difficulty in concentrating

Difficulty in sleeping

Social withdrawal

What are psychotic symptoms?

Psychotic symptoms include:

Hallucinations: hearing voices or seeing things.

Delusions: bizarre beliefs with no basis in reality (for example delusions of persecution or delusions of grandeur).

These symptoms occur during acute or psychotic phases of the illness, but may improve during periods of remission.

A patient may experience:

A single psychotic episode during the course of the illness Multiple psychotic episodes over a lifetime...."

28. As per evidence of RW 2, schizophrenia is a treatable, manageable disease, which can be put on a par with hypertension and diabetes. So also, PW 4, who had examined the respondent at NIMHANS, Bangalore stated that the team could not find any evidence suggesting schizophrenia at the time of their examining the respondent and he had stated in his cross-examination that no treatment including drugs was given to her at NlMHANS as they did not find any abnormality in her. They thus gave her a certificate of normal mental status, based on the absence of any abnormal findings in her medical report including psychiatric features in the past history and normal psychological test.

29. We have carefully perused the report marked as Ext. B-10 dated 24-4-1999 given by the doctors of Institute of Mental Health, Hyderabad before the trial court. The learned trial Judge has misread the contents of the said report and also wrongly interpreted the same and recorded the finding that the respondent is suffering from the ailment of "schizophrenia" and therefore he has accepted the case of the appellant who has made out a ground under Section 13(l)(w) of the Act wherein it is stated that a spouse suffering from schizophrenia or incurably unsound mind is a ground for dissolution of the marriage between the parties.

30. The High Court has thus rightly set aside the decree of dissolution of marriage granted in favour of the appellant and dismissed his petition and granted a decree of restitution of conjugal rights in favour of the respondent by allowing her petition. The High Court has recorded the finding of fact on reappreciation of material evidence on record and has rightly held that the trial court has erroneously come to the conclusion that the respondent was suffering from schizophrenia by relying on the evidence of PW 1, who is the appellant herein and as per the opinion given by the committee of doctors in Ext. B-10.

31. In the deposition by witness RW 2 Dr K. Krishna Murthy, he has stated in his examination-in-chief that schizophrenia has become eminently treatable with the advent of many new psychiatric drugs. He further stated that many patients with schizophrenia arc able to lead a near normal life

with medication. The trial court has erroneously relied on certain cases referred to and applied the principle laid down in those cases to the facts of this case even though they are not applicable to the case on hand cither on facts or in law as the appellant has not proved the allegations made in the petition against the respondent by adducing positive and substantive evidence on record to substantiate the same and that the alleged ailment of the respondent would fall within the provision of Section 13(1)(a) of the Act. Therefore, he has not made out a case for grant of decree for dissolution of marriage.

32. We have carefully examined Exts. X-6 to X-11, which are the prescriptions of medicine prescribed to the respondent by Dr Mallikarjuna Rao, Dr. Pramod Kumar and Dr. M. Kumari Devi. The above prescriptions mention the symptoms of the ailment of the respondent, which were in the nature of delusions, suspicious apprehensions and fears, altered hehaviours, suicidal tendency and past history of depression. Reliance is placed by PW 1 on the above documentary evidence to prove that the respondent was suffering from the mental disorder of schizophrenia and therefore it squarely falls within the provision of Section 13(1)(a) of the Act for grant of decree of dissolution of marriage in his favour.

33. The High Court has rightly held that the trial court has erroneously accepted the same and recorded its finding of fact on the contentious issues to pass decree of divorce in favour of the appellant, which is contrary to the decision of this Court in Ram Narain Gupta v. Rameshwari Gupta[3]. The same decision has been relied upon by the respondent before the High Court, wherein the said decision was correctly accepted by it to set aside the d erroneous finding of fact recorded by the trial court on the contentious issue.

34. The legal question that arises for our consideration is whether the marriage between the parties can be dissolved by granting a decree of divorce on the basis of one spouse's mental illness which includes schizophrenia under Section 13(1) of the Act?

35. In the English case of Whysall v. Whysall[55], it was held that a spouse e is "incurably of unsound mind" if he or she is of such mental incapacity as to make normal married life impossible and there is no prospect of any improvement in mental health, which would make this possible in future. The High Court of Judicature of Calcutta, in Pramatha Kumar Maity v. Ashima Maitys[56] has held that mental disorder of the wife, even if proved, cannot, by itself, warrant a decree of divorce and it must be further proved that it is of such a nature as the husband could not be expected to live with the wife.

36. The Allahabad High Court, in Titli v. Alfred Robert Jones[57] has held that where it has come on record that the wife has improved her educational qualifications and has been looking after her children, the apprehension of the husband that there is danger to his life or to his children is not borne out is the finding recorded in the said case. Inability to manage his or her affairs is an essential attribute of an "incurably unsound mind". The facts pleaded and the evidence placed on record produced by the appellant in this case does not establish such inability as a ground on which dissolution of marriage was sought for by him before the trial court.

55 1960 P 52 : (1959) 3 WLR 592 : (1959) 3 All ER 389

56 AIR 1991 Cal 123

57 AIR 1934 All 273

37. The High Court has rightly set aside the said finding and allowed the appeal of the respondent after careful scrutiny of Ext. B-10. The correctness of the finding of the High Court in the impugned judgment[1] is seriously challenged by the learned Senior Counsel on behalf of the appellant in this appeal. We have examined this contention, after careful perusal of the contents of Ext. B-10. In our considered view, the contents of the report as stated by the team of doctors do not support the case of the appellant that the respondent is suffering from a serious case of schizophrenia, in order to grant the decree of divorce under Section 13(1)(a) of the Act. The report states that the respondent, although suffering from "illness of schizophrenic type", does not show symptoms of psychotic illness at present and has responded well to the treatment from the acute phases and her symptoms arc fairly under control with the medication which had been administered to her. It was further stated that if there is good compliance with treatment coupled with good social and family support, a schizophrenic patient can continue their marital relationship. In view of the aforesaid findings and reasons recorded, we have to hold that the patient is not suffering from the symptoms of schizophrenia as detailed above.

38. We are of the view that the High Court in exercise of its appellate jurisdiction has rightly come to a different conclusion that the respondent is not suffering from the ailment of schizophrenia or incurable unsoundness of mind. Further, the High Court has rightly rejected the finding of the trial court which is based on Ext. B-10 and other documentary and oral evidence by applying the ratio laid down by this Court in Ram Narain Gupta v. Rameshwari Gupta[3] referred to supra. A pertinent point to be taken into consideration is that the respondent had not only completed MBBS but also did a postgraduate diploma in Medicine and was continuously working as a Government Medical Officer and had she been suffering from any serious kind of mental disorder, particularly, acute type of schizophrenia, it would have been impossible for her to work in the said post. The appellant husband cannot simply abandon his wife because she is suffering from sickness. Therefore, the High Court allowed both the CMAs and dismissed OP No. 203 of 2000 filed by the appellant for divorce and allowed OP No. 1 of 1999 filed by the respondent for restitution of conjugal rights wherein the High Court granted decree of restitution of conjugal rights in favour of the respondent.

39. It is thus clear that the respondent, even if she did suffer from schizophrenia, is in a much better health condition at present. Therefore, this Court cannot grant the dissolution of marriage on the basis of one spouse's illness. The appellant has not proved the fact of mental disorder of the respondent with reference to the allegation made against her that she has been suffering from schizophrenia by producing positive and substantive evidence on record and on the other hand, it has been proved that the respondent is in much better health condition and does not show signs of schizophrenia as per the most recent medical report from NIMHANS, as deposed by PW 4 in his evidence before the trial court.

40. For the aforesaid reasons, we are of the firm view that the findings and reasons recorded in setting aside the judgment and decree of the trial court is neither erroneous nor does it suffer from error in law which warrants our interference and calls for setting aside the impugned judgment[1] and decree of the first appellate court. Therefore, this Court cannot interfere with the impugned judgment of the High Court as the same is well-reasoned and based on cogent reasoning of facts and evidence on record and accordingly, we answer Point (iv) in favour of the respondent.

41. Under Hindu law, marriage is an institution, a meeting of two hearts and minds and is something that cannot be taken lightly. In the Vedic period, the sacredness of the marriage tie was repeatedly declared; the family ideal was decidedly high and it was often realised[58]. In Vedic Index I it is stated that "the high value placed on the marriage is shown by the long and striking hymn". In Rig Veda, X, 85; "be, thou, mother of heroic children, devoted to the Gods; be. thou. Queen in thy father-in-law's household. May all the Gods unite the hearts of us 'two into one' ", as stated in Justice Ranganath Misra's Mayne's Treatise on Hindu Law and Usage.

42. Marriage is highly revered in India and we are a nation that prides itself on the strong foundation of our marriages, come hell or high water, rain or sunshine. Life is made up of good times and bad, and the bad times can bring with it terrible illnesses and extreme hardships. The partners in a marriage must weather these storms and embrace the sunshine with equanimity. Any person may have bad health, this is not their fault and most times, it is not within their control, as in the present case, the respondent was unwell and was taking treatment for the same. The illness had its fair- share of problems. Can this be a reason for the appellant to abandon her and seek dissolution of marriage after the child is born from their union? Since the child is now a grown-up girl, her welfare must be the prime consideration for both the parties.

43. In view of the foregoing reasons, we arc of the opinion that the two parties in this case must reconcile and if the appellant so feels that the respondent is still suffering, then she must be given the right treatment. The respondent must stick to her treatment plan and make the best attempts to get better. It is not in the best interest of either the respondent or her daughter who is said to be of adolescent age for grant of a decree of dissolution of marriage as prayed for by the appellant. Hence, the appeal is liable to be dismissed.

44. Accordingly, we dismiss the appeal and uphold the judgment[1] of the High Court in not granting a decree of divorce and allowing the petition for restitution of conjugal rights. Therefore, we grant a decree for restitution of conjugal rights under Section 9 of the Act in favour of the respondent.

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58 Vedic Index, I, 484. 4S5: CHI. 1, 89 as in Rangana Ih Misra, J., Mayne's Treatise on Hindu Law and Usage I15lh Edn. (Revised). Bharat Law House, 2003] 91.

LANDMARK JUDGMENTS ON CUSTODY OF CHILD, VISITATION RIGHTS & SHARED PARENTING

TEJASWINI GAUD VERSUS SHEKHAR JAGDISH PRASAD TEWARI

In the Supreme Court of India

Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mr. Justice R. Subhash Reddy

Tejaswini Gaud and Others ...Appellants;
Versus
Shekhar Jagdish Prasad Tewari and Others ...Respondents.

CRIMINAL APPEAL NO. 838 OF 2019

(Arising out of SLP (Crl.) No. 1675 of 2019) Decided on May 6, 2019

A. ***Constitution of India — Art. 226 — Particular Writs — Habeas Corpus — Minor, custody of — Scope of jurisdiction of Writ Court — Held, Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention — Writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it — Detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child — For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the Writ Court has jurisdiction CPara 13)***

B. ***Family and Personal Laws — Hindu Law — Hindu Minority and Guardianship Act, 1956 — Ss. 13 and 6 — Welfare of minor child — Minor child lost mother at the age of 14 months —Maternal relatives battling over custody against father of the minor because of father's previous ailments — Held, merely because appellants being the relatives took care of the child for some time, they cannot retain the custody of the child — It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child — First respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child — Moreover, child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason — As pointed out by the High Court, the father is a highly educated person and is working in a reputed position and his economic condition is stable — Thus, welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach (Paras 33 and 34)***

Rosy Jacob v. Jacob A. Chakramakkat, (1973) 1 SCC 840, relied on

The Judgment of the Court was delivered by

Hon'ble Mrs. Justice R. Banumathi : —

Leave granted.

2. This appeal arises out of the judgment dated 06.02.2019 passed by the High Court of Bombay in Crl.W.P. No. 5214 of 2018 in and by which the High Court held that the first respondent-father of the child being the surviving parent and in the interest of welfare of the child, the custody of

the child must be handed over to the first respondent-father and issued writ of habeas corpus directing the appellants to handover the custody of the minor child to respondent No. 1-father of the child.

3. Brief facts of the case are that marriage of respondent No. 1 was solemnized with Zelam on 28-05-2006. During the fifth month of her pregnancy i.e. in May 2017, Zelam was detected with breast cancer. Respondent No. 1 and Zelam were blessed with a girl child named Shikha on 14-08-2017. While Zelam was undergoing treatment, child Shikha was with her father respondent No. 1 till November, 2017. Unfortunately, on 29-11-2017, respondent No. 1 was suddenly hospitalised and he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. While he was undergoing treatment, appellant No. 1-Tejaswini Gaud - one of the two sisters of Zelam and appellant No. 4-Dr. Pradeep Gaud who is the husband of Tejaswini, took Zelam along with Shikha to their residence at Mahim, Mumbai for continuation of the treatment. Later, in June 2018, Zelam was shifted to her paternal home along with Shikha in Pune i.e. residence of appellant No. 3-Samir Pardeshi, brother of Zelam. In July 2018, they were again shifted to the house of appellant No. 1 in Mumbai. On 17-10-2018, Zelam succumbed to her illness. Child Shikha continued to be in the custody of the appellants in Pune at the residence of appellant No. 3 till 17-11-2018. Respondent No. 1-father was denied the custody of child and on 17-11-2018, he gave a complaint to Dattawadi Police Station, Pune. Thereafter, respondent No. 1-father approached the High Court by filing a writ petition seeking custody of minor child Shikha. Respondent No. 1-father is a post-graduate in Management and is working as a Principal Consultant with Wipro Limited.

4. The High Court held that respondent No. 1-father, the only surviving parent of the child is entitled to the custody of the child and the child needs love, care and affection of the father. The High Court took into account that respondent No. 1 was hospitalised for a serious ailment and in those circumstances, the appellants have looked after the child and in the interest and welfare of the child, it is just and proper that the custody of the child is handed over back to the first respondent. However, the High Court observed that the efforts put in by the appellants in taking care of the child has to be recognized and so the High Court granted appellants No. 2 and 3 access to the child.

5. The appellants contend that the writ of habeas corpus cannot be issued when efficacious alternative remedy is available to respondent No. 1 under Hindu Minority and Guardianship Act, 1956. It was submitted that the child was handed over to the appellants by the ailing mother of the child who has expressed her wish that they should take care of the child and therefore, it is not a fit case for issuance of writ of habeas corpus which is issued only in cases of illegal detention. It is also their contention that the question of custody of the minor child is to be decided not on consideration of the legal rights of the parties; but on the sole and predominant criterion of what would best serve the interest and welfare of the minor and, as such, the appellants who are taking care of the child since more than a year, they alone would be entitled to have the custody of the child in preference to respondent No. 1-father of the child.

6. Learned counsel appearing for the appellants submitted that though the first respondent-father is a natural guardian of the minor child Shikha and has a preferential right to claim the custody of the minor child, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party, in this case,

the father. It was further submitted that Section 6 of the Hindu Minority and Guardianship Act, 1956 cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child and the welfare of the minor child has to be the sole consideration. In support of his contention, the learned counsel for the appellants has placed reliance upon: —

(i) Dr. Veena Kapoorv. Varinder Kumar Kapoor (1981) 3 SCC 92; Sarita Sharma v. Sushi! Sharma (2000) 3 SCC 14;

G. Eva Mary Eiezabath v. Jayaraj, 2005 SCC OnLine Mad 472: AIR 2005 Mad 452;

L. Chandran v. Mrs. Venkatalakshml, 1980 SCC OnLine AP 80: AIR 1981 AP 1; Ravi Kant Keshri v. Krishna Kumar Gupta, 1992 SCC OnLine All 548: AIR 1993 All 230;

Suriez v. M. Abdul Khader, 2017 SCC OnLine Kar 4935;

Murari Lai Sharma v. State of West Bengal, 2013 SCC OnLine Cal 23045: AIR 2013 Cal 213;

R. Suresh Kumar v. K.A. Kavathi Habeas Corpus Petition No. 40 of 2006, decided on 25-1-2006 (Mad); Athar Hussain v. Syed Siraj Ahmed (2010) 2 SCC 654; Nil Ratan Kundu v. Abhijit Kundu (2008) 9 SCC 413;

Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi (1992) 3 SCC 573;

Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42; Baby Sarojam v. S. Vijayakrishnan Nair, AIR 1992 Ker 277;

Abhimanyu Poria v. Rajbir Singh, 2018 SCC OnLine Del 6661: AIR 2018 Del 127; A.V. Venkatakrishnaiah v. S.A. Sathyakumar, 1978 SCC OnLine Kar 241: AIR 1978 Kar 220

7. Per contra, the learned counsel appearing for the first respondent has submitted that in view of Section 6 of the Hindu Minority and Guardianship Act, 1956, father has the paramount right to the custody of the children and he cannot be deprived of the custody of the minor child unless it is shown that he is unfit to be her guardian. The learned counsel submitted that in view of his illness and the illness of the mother Zelam, mother and child happened to be in Mumbai and Pune and considering the welfare of the child, she had to be handed over to the first respondent. It was further submitted that father being a natural guardian as per the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, the appellants have no legal right for the custody of the infant and the High Court rightly ordered the custody of the child to respondent No. 1. In support of his contention, learned counsel for the respondents inter alia placed reliance upon number of judgments: —

(i) Gohar Begam v. Suggi @ Nazma Begam, AIR 1960 SC 93;

(ii) Smt. Manju Maiini Sheshachaiam D/o Mr. R. Sheshachaiam v. Vijay Thirugnanam S/o Thivugnanam, 2018 SCC OnLine Kar 621;

(iii) Amol Ramesh Pawar v. State of Maharashtra, 2014 SCC OnLine Bom 280;

(iv) Marggarate Maria Pulparampii Nee Feldman v. Dr. Chacko Pulparampil, AIR 1970 Ker 1 (FB);

(v) Thirumalai Kumaran v. Union Territory of Dadra and Nagar Haveii 2003 (2) Mh.L.J.;

(vi) Capt. Dushyant Soma! v. Smt. Sushma Soma! (1981) 2 SCC 277;

(vii) Syed Saleemuddin v. Dr. Rukhsana (2001) 5 SCC 247;

(viii) Nirmaijit Kaur (2) v. State of Punjab (2006) 9 SCC 364;

(ix) Surya Vadanan v. State of Tamil Nadu (2015) 5 SCC 450;

(x) Ruchika Abbi v. State (National Capital Territory of Delhi) (2016) 16 SCC 764;

(xi) Kanika Goei v. State of Delhi through Station House Officer (2018) 9 SCC 578.

8. We have carefully considered the rival contentions and perused the impugned judgment and various judgments relied upon by the parties.

9. The question falling for consideration is whether in the writ of habeas corpus filed by respondent No. 1 seeking custody of the minor child from the appellants, the High Court was right in ordering that the custody of minor child be handed over to respondent No. 1-father. Further question falling for consideration is whether handing over of the custody of the child to respondent No. 1-father is not conducive to the interest and welfare of the minor child.

10. Section 6 of the Hindu Minority and Guardianship Act, 1956 enacts as to who can be said to be a natural guardian. As per Section 6 of the Act, natural guardian of a Hindu Minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) is the father, in the case of a boy or an unmarried girl and after him, the mother. Father continues to be a natural guardian, unless he has ceased to be a Hindu or renounced the world. Section 13 of the Act deals with the welfare of a minor. Section 13 stipulates that in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. Section 13(2) stipulates that no person shall be entitled to the guardianship by virtue of the provisions of the Act if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

11. **Maintainability of the writ of habeas corpus:-** The learned counsel for the appellants submitted that the law is well-settled that in deciding the question of custody of minor, the welfare of the minor is of paramount importance and that the custody of the minor child by the appellants cannot be said to be illegal or improper detention so as to entertain the habeas corpus which is an extraordinary remedy and the High Court erred in ordering the custody of the minor child be handed over to the first respondent-father. Placing reliance on Veena Kapoor[1] and Sarita Sharma[2] and few other cases, the learned counsel for the appellants contended that the welfare of children requires a full and thorough inquiry and therefore, the High Court should instead of allowing the habeas corpus petition, should have directed the respondent to initiate appropriate proceedings in the civil court. The learned counsel further contended that though the father being a natural guardian has a preferential right to the custody of the minor child, keeping in view the welfare of the child and the facts and circumstances of the case, custody of the child by the appellants cannot be said to be illegal or improper detention so as to justify invoking extra-ordinary remedy by filing of the habeas corpus petition.

12. Countering this contention, the learned counsel for respondent No. 1 submitted that in the given facts of the case, the High Court has the extraordinary power to exercise the jurisdiction under Article 226 of the Constitution of India and the High Court was right in allowing the

habeas corpus petition. The learned counsel has placed reliance on Gohar Begum[3] and. Manju Malini Sheshachalam[4]. Contention of respondent No. 1 is that as per Section 6 of the Hindu Minority and Guardianship Act, respondent No. 1, being the father, is the natural guardian and the appellants have no authority to retain the custody of the child and the refusal to hand over the custody amounts to illegal detention of the child and therefore, the writ of habeas corpus was the proper remedy available to him to seek redressal.

13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

14. In Gohar Begum[3] where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In Gohar Begum^-, the Supreme Court dealt with a petition for habeas corpus for recovery of an illegitimate female child. Gohar alleged that Kaniz Begum, Gohar's mother's sister was allegedly detaining Gohar's infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under: —

"7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

In Queen v. Clarke, (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193:

"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.

8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The

learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law.

10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child-She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited." (Underlining added)

15. In Veena Kapoor[1], the issue of custody of child was between the natural guardians who were not living together. Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half year old child. The Supreme Court directed the District Judge concerned to take down evidence, adduced by the parties, and send a report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

16. In Rajiv Bhatia[5], the habeas corpus petition was filed by Priyanka, mother of the girl, alleging that her daughter was in illegal custody of Rajiv, her husband's elder brother. Rajiv relied on an adoption deed. Priyanka took the plea that it was a fraudulent document. The Supreme Court held that the High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child.

17. In Manju Malinfr where the mother filed a habeas corpus petition seeking custody of her minor child Tanishka from her sister and brother-in-law who refused to hand over the child to the mother, the Karnataka High Court held as under: —

"24. The moment respondents 1 and 2 refused to handover the custody of minor Tanishka to the petitioner the natural and legal guardian, the continuation of her custody with them becomes illegal detention. Such intentional act on the part of respondent Nos. 1 and 2 even amounts to the offence of kidnapping punishable under S.361 of IPC. Therefore there is no merit in the contention that the writ petition is not maintainable and respondent Nos. 1 and 2 are in legal custody of baby Tanishka."

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such

jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

20. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent-father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

21. **Custody of the child - removed from foreign countries and brought to India:-** In a number of judgments, the Supreme Court considered the conduct of a summary or elaborate enquiry on the question of custody by the court in the country to which the child has been removed. In number of decisions, the Supreme Court dealt with habeas corpus petition filed either before it under Article 32 of the Constitution of India or the correctness of the order passed by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India on the question of custody of the child who had been removed from the foreign countries and brought to India and the question of repatriation of the minor children to the country from where he/she may have been removed by a parent or other person. In number of cases, the Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention. However, the Court has taken view that the order of the foreign court must yield to the welfare of the child. After referring to various judgments, in Ruchi Majoo[6], it was held as under: —

"58. Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.

59. The Court may also direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran (2010) 1 SCC 174 and Shilpa Aggarwal (2010) 1 SCC 591 cases or refuse to do so as was the position in Sarita Sharma case (2000) 3 SCC 14. What is important is that so long as the alleged detenu is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ

court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenu is within its territorial jurisdiction."

22. After referring to various judgments and considering the principles for issuance of writ of habeas corpus concerning the minor child brought to India in violation of the order of the foreign 7

"46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised."

23. In Sarita Sharma[2], the tussle over the custody of two minor children was between their separated mother and father. The Family Court of USA while passing the decree of divorce gave custody rights to the father. When the mother flew to India with the children, the father approached the High Court by filing a habeas corpus petition. The High Court directed the mother to handover the custody to the father. The Supreme Court in appeal observed that the High Court should instead of allowing the habeas corpus petition should have directed the parties to initiate appropriate proceedings wherein a thorough enquiry into the interest of children could be made.

24. In the recent decision in Lahari Sakhamuri[8], this court referred to all the judgments regarding the custody of the minor children when the parents are non-residents (NRI). We have referred to the above judgments relating to custody of the child removed from foreign country and brought to India for the sake of completion and to point out that there is a significant difference in so far the children removed from foreign countries and brought into India.

25. Welfare of the minor child is the paramount consideration:- The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

26. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in Nil Ratan Kundu[9], it was held as under: —

"49. In Goverdhan Lai v. Gajendra Kumar, AIR 2002 Raj 148 the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the

custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315 the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In Kamia Devi v. State of H.P., AIR 1987 HP 34 the Court observed:

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other."

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

27. Reliance was placed upon Gaurav Nagpal[10], where the Supreme Court held as under: —

"32. In McGrath, (1893) 1 Ch 143, Lindley, L.J. observed: (Ch p. 148) The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare'

must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded."

(emphasis supplied)

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguii case (2008) 7 SCC 673, the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

28. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in Rosy Jacobs[11], this Court has observed that: —

"7 ..... the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."

"15 The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred in reversing him on grounds which we are unable to appreciate."

29. The learned counsel for the appellants has placed reliance upon G. Eva Marv Elezabath[12] where the custody of the minor child aged one month who had been abandoned by father in church premises immediately on death of his wife was in question. The custody of the child was accordingly handed over to the petitioner thereon who took care of the child for two and half years by the Pastor of the Church. The father snatched the child after two and a half years from the custody of the petitioner. The father of the child who has abandoned the child though a natural guardian therefore was declined the custody.

30. In Kirtikumar Maheshankar Joshi[13], the father of the children was facing charge under Section 498-A IPC and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well-being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.

31. In the case at hand, the father is the only natural guardian alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.

32. The child Shikha went into the custody of the appellants in strange and unfortunate situation. Appellants No. 1 and 2 are the sisters of deceased Zelam. Appellant No. 4 is the husband of appellant No. 1. All three of them reside at Mahim, Mumbai. Appellant No. 3 is the married brother of Zelam who resides in Pune. During the fifth month of her pregnancy, Zelam was diagnosed with stage 3/4 breast cancer. Zelam gave birth to child Shikha on 14-08-2017. On 29-11-2017, respondent No. 1 collapsed with convulsions due to illness. Upon his collapse, he was rushed to hospital where he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. He was kept on ventilator for nearly eight days, during which period, appellants took care of Zelam and the child. The first respondent had to undergo treatment in different hospitals for a prolonged period. From 29-11-2017 to June 2018, Zelam and Shikha stayed at the residence of appellant's in Mumbai. During this period, Zelam underwent masectomy surgery. Zelam later relapsed into cancer and decided to get treatment from a doctor in Pune and therefore, shifted to appellant No. 3's house at Pune with Shikha and Zelam passed away on 17-10-2018. After recovering from his illness, the respondent visited Pune to seek custody of the child. But when they refused to hand over the custody, the father was constrained to file the writ petition seeking custody of the child. The child Shikha thus went to the custody of the appellants in unavoidable conditions. Only the circumstances involving his health prevented the father from taking care of the child. Under Section 6 of the Act, the father is the natural guardian and he is entitled to the custody of the child and the appellants have no legal right to the custody of the child. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.

33. As observed in Rosy Jacobs[11] earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

34. The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The

circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

35. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only IV2 years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. IV2 years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

36. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralized with the passage of time. However, till the child is settled down in the atmosphere of the first respondent-father's house, the appellants No. 2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 08.00 AM to 06.00 PM at the residence of the first respondent. The first respondent shall ensure the comfort of appellants No. 2 and 3 during such time of their stay in his house. After three months, the appellants No. 2 and 3 shall visit the child at the first respondent's house from 10.00 AM to 04.00 PM on Saturdays and Sundays. After the child completes four years, the appellants No. 2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 AM to 05.00 PM and shall hand over the custody of the child back to the first respondent-father before 05.00 PM. For any further modification of the visitation rights, either parties are at liberty to approach the High Court.

37. The impugned judgment of the High Court dated 06.02.2019 in Crl.W.P. No. 5214 of 2018 is affirmed subject to the above directions and observations. The appellants shall hand over the custody of the child to the first respondent-father on 10.05.2019 at 10.00 AM at the residence of the first respondent. Keeping in view the interest of the child, both parties shall co-operate with each other in complying with the directions of the Court. This appeal is accordingly disposed of.

Note :-

1 Dr. Veena Kapoorv. Varinder Kumar Kapoor [1981) 3 SCC 92

2 Sarita Sharma v. Sushil Sharma (2000) 3 SCC 14

3 Gohar Begum v. Suggi @ Nazma Begam, AIR 1960 SC 93

4 Smt. Manju Malini Sheshachaiam D/o Mr. R. Sheshachaiam v. Vijay Thlrugnanam S/o Thivugnanam, 2018 SCC OnLine Kar 621

5 Rajiv Bhatia v. Govt, of NCT of Delhi (1999) 8 SCC 525

6 Ruchi Majoo v. Sanjeev Majoo (2011) 6 SCC 479

7 Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454 s Lahari Sakhamuh v. Sobhan Kodali, 2019 (5) SCALE 97

9 Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413

10 Gaurav Nagpai v. Sumedha Nagpai (2009) 1 SCC 42

11 Rosy Jacob v. Jacob A. Chakramakkai, (1973) 1 SCC 840

12 G. Eva Mary Eiezabatb v. Jayaraj, 2005 SCC OnLine Mad 472

13 Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi (1992) 3 SCC 573

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PERRY KANSAGRA VERSUS SMRITI MADAN KANSAGRA

SUPREME COURT OF INDIA

Bench: Hon'ble Justice Mr. Abhay Manohar Sapre and Hon'ble Justice Mr. Uday Umesh Lalit

Perry Kansagra.....Appellate

Versus

Smriti Madan Kansagra.....Respondent

CIVIL APPEAL NO. 1694 OF 2019

[@ Special Leave Petition (Civil) No.9267 of 2018]

Decided On: 15th February, 2019

Hon'ble Mr. Justice Uday Umesh Lalit, J.

1. Leave granted.

2. This appeal challenges the final Judgment and Order dated 11.12.2017 passed by the High Court of Delhi allowing Review Petition No.221 of 2017 preferred by the respondent against the judgment and order dated 17.02.2017 passed by the High Court of Delhi in MAT App. (F.C.) No.67 of 2016.

3. The appellant (Kenyan and British Citizen) and Respondent (Indian Citizen) got married on 29.07.2007 at New Delhi. After marriage, the Respondent shifted to Nairobi, Kenya and settled into her matrimonial home with the appellant. A son, named Aditya Vikram Kansagra was born to the couple on 02.12.2019 at New Delhi. After delivery, the respondent returned back to Nairobi along with Aditya. Thereafter, the Respondent and Aditya travelled from Kenya to India on few occasions. Aditya holds Kenyan as well as British passport.

4. The appellant, Respondent and Aditya came from Nairobi to New Delhi on 10.03.2012. According to the appellant, the return tickets for travel back to Nairobi were booked for 06.06.2012. While in India, in May 2012, the Respondent filed a civil suit registered as CS (OS) No.1604 of 2012 before the High Court of Delhi praying inter alia for an injunction to restrain the appellant from removing Aditya from the custody of the Respondent. Upon notice being issued, the appellant contested the suit in which visitation orders were passed by the High Court from time to time. The appellant thereafter filed Guardianship Petition praying inter alia that he be declared the legal Guardian of Aditya and be given his permanent custody. The Guardianship Petition dated 06.11.2012 was registered as No.G-53 of 2012 before the Family Court, Saket, New Delhi.

5. In terms of visitation orders passed by the High Court, the appellant along with paternal grandparents were permitted to meet Aditya for 2 hours on Friday, Saturday and Sunday in the 2nd week of every month. According to the appellant he flew from Nairobi to New Delhi every month to meet Aditya along with the paternal grandparents. In view of the pendency of the guardianship petition, CS (OS) No.1604 of 2012 was disposed of by the High Court on 31.08.2015, leaving the parties to place their grievances before the Family Court. The arrangement of visitation was thereafter modified by the Family Court by its orders dated 09.02.2016 and 09.03.2016.

6. On 18.04.2016, an application was filed by the appellant praying that the Family Court may direct the Court Counsellor to bring Aditya to the Court for an in-chamber meeting, which prayer was objected to by the Respondent. After hearing both sides, the Family Court allowed said application vide Order dated 04.05.2016, and directed that Aditya be produced before the Court 07.05.2016. The relevant part of the Order was as under:-

".....The court is parens patriae in such proceedings. Petitioner's visitation with the child is anyway scheduled for 07.05.2016. Let the child be produced before the court at 10 am on 07.05.2016 before he goes for meeting with his father and grand parents."

7. The Respondent being aggrieved, filed MAT App. (FC) No.67 of 2016 before the High Court. On 06.05.2016, after hearing both sides, Division Bench of the High Court referred the parties to mediation and also directed that Aditya be produced before the Court on 11.05.2016. Paragraphs 7 and 9 of said Order were :-

"7. During our interaction with the parties, a desire is expressed by the parties to make one more attempt for a negotiated settlement of all disputes between the parties by recourse to mediation. The parents of the respondent are also present and have joined the proceedings before us. They have also submitted that they would like to make an attempt for a negotiated settlement for all disputes between the parties. ... ...

9. With the consent of parties, it is directed as follows:

(i) The parties shall appear before Ms. Sadhana Ramchandran, learned Mediator in SAMADHAN Delhi High Court Mediation and Conciliation Centre on 9th May, 2016 at 2:30 pm.

(ii) It shall be open for the learned Mediator to join any other person or relative of the parties, as may be deemed necessary, for a holistic and effective mediation.

(iii) In case, the respondent or any of his relative are not available in India, it shall be open for the learned Mediator to join them by any electronic mode of communication including Skype, Video Conferencing, etc. at the cost of the respondent.

(iv) It shall also be open for the learned Mediator to meet the child at any place, as may be deemed convenient to her, and to arrange any visitation or meetings with the respondent of the child with the consent of the parties."

8. Thereafter, the matter came up on 11.05.2016. The High Court interacted with Aditya and following observations were made in paras 2 to 6 of its Order :-

"2. We are also informed that the child has today met with Ms. Sadhana Ramachandran, learned Mediator as well as Ms. Swati Shah, Counsellor in SAMADHAN - Delhi High court Mediation and Conciliation Centre and that the mediation efforts are still underway.

3. The son of the parties - Master Aditya Vikram Kansagra has been produced before us today. We have also had a long conversation with him and are deeply impressed with the maturity of this intelligent 6½ year old child who displays self confidence and a

remarkable capacity of expressing himself with clarity. He exhibits no sign of confusion or nervousness at all.

4. *We also note that the child was comfortable in his interaction with his father and grandparents in court. The child has expressed happiness at his visitations with his father and grandparents. He unreservedly stated that he looks forward to the same. Master Aditya Vikram Kansagra is also able to identify other relatives in Kenya and enthusiastically refers to his experiences in that country. It is apparent that the child has bonded well with them.*

5. *We must note that the child is at the same time deeply attached to his mother and Nani. His bearing and personality clearly bear the stamp of the fine upbringing being given to him by the appellant and her mother.*

6. *As of now, since 9th February, 2016, the child is meeting his father and grandparents between 10:30 am and 05:00 pm on Saturday and Sunday in the second week of every month and for two hours on Friday in the second week of every month. The visitation is supervised as the court has appointed a Counsellor who has been directed to remain present throughout the visitation.*"

9. During the ensuing mediation sessions, the Mediator and the Counsellor interacted with Aditya. The Counsellor interacted with Aditya on 08.07.2016 and 11.07.2016. Based upon her interactions with him, the Counsellor submitted a report dated 21.07.2016 in a sealed cover. Though, mediation was attempted on many occasions, the parties were unable to resolve their disputes and differences and an interim report was submitted by the Mediator on 22.07.2016. On 11.08.2016, the sealed cover containing the report of the Counsellor was opened and the report was taken on record. Copies of the report of the Counsellor were given to the parties.

In an application moved the next day, i.e. on 12.08.2016, the appellant relied upon the report of the Counsellor dated 21.07.2016 and prayed for permission to speak to Aditya on telephone. While opposing the prayer, the respondent objected to such reliance on the ground of confidentiality. The Mediator thereafter filed final report in November, 2016 reporting failure. 10. Thereafter the matter came up for final arguments before another Division Bench of the High Court. The Respondent raised the issue of admissibility of the reports submitted by the Mediator and Counsellor contending that the reports could not be relied upon in view of principle of confidentiality. The High Court dealt with said submissions and while disposing of the appeal, by its judgment dated 17.02.2017 observed as under:-

10. "The mediation has failed.

11. But we are called upon to decide an important question concerning confidentiality of the mediation process for the reason on October 11, 2016 a report was received from the Mediator which was taken on record and copy given to both parties. The report of the Mediator refers to a child counsellor being involved who had also given an independent report which was also taken on record. ... ...

"*13. The report of the child counsellor is to the effect that the child was normal and in spite of being happy with his mother he seems to idolize his father and affectionately remembers his house in Kenya; about which house he loved talking with the counsellor.*

The affection and the bond of the child with the father was commended as the positive attitude of the appellant who, obviously was not torturing the child. The child showed his love, affection and comfort for the appellant, evidenced by he fondly and happily talking about a recent vacation in Kashmir with his mother. The child was not uncomfortable with the idea of making a trip to Kenya.

... ...

17. *There can be no quarrel with the proposition that mediation proceedings are confidential proceedings and anything disclosed, discussed or proposed by the parties before the mediator cannot be recorded, much less divulged. The reason being that very often during mediations, offers, counter offers and proposals are made. The ethos of mediation would bar disclosure of specified communications and writings associated with mediation. Parties are encouraged during mediation to engage in honest discussions as regards their problems and in matrimonial disputes these honest discussions many a time give rise to a better understanding between the couple. Such an approach encourages a forget and forgive attitude to be formed by the parties.*

    If either spouse is under an apprehension that the wellmeant deliberations might subsequently be used against them it would hamper an unreserved consideration of their problems. The atmosphere of mutual trust during mediation warrants complete confidentiality.

18. *But where the scope of mediation is the solution of a child parenting issue, report by a mediator or a child counsellor concerning the behavior and attitude of the child would not fall within the bar of confidentiality for the reason no information shared by the couple is being brought on record. The mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of.*

19. *In the instant case, what has been taken on record during mediation proceedings is the report of the Child Counsellor and the mediator, which we find are reports commending the good attitude of both parents who, unlike many other couples, are not using the child as a tool to take revenge against the other. As noted above, the interaction by the previous Division Bench with the child has been recorded in the order dated May 11, 2016 i.e. the child being equally comfortable with both parents and having a desire to spend quality time with not only his mother and relatives from the maternal side but even with the father and relatives from the paternal side. Such reports are a neutral evaluation of expert opinion to a Court to guide the Court as to what orders need to be passed in the best interest of the child. These reports are not confidential communications of the parties.*

20. *Having answered the issue which incidentally arose, and noting that otherwise the appeal has been rendered infructuous, we terminate further proceedings in the appeal inasmuch as no orders are now warranted to be passed in the appeal.*

21. *The learned Judge Family Court would consider granting over night interim custody to the respondent when he is in India by imposing such terms and conditions which would ensure that the child is not removed from the territory of India. The issue concerning the appellant claiming that she has lost the Kenyan passport of the child and a fresh*

passport being issued in the name of the child would also be looked into by the learned Judge, Family Court."

11. On 18.03.2017, the respondent filed Review Petition No.221 of 2017 questioning the judgment dated 17.02.2017. The Review Petition was allowed by yet another Division Bench of High Court by judgment and order dated 11.12.2017. After posing the question, "..whether the Counsellor's report furnished in the course of mediation proceedings or the Mediator's report in case of mediation, when the process fails, can be used by either of the parties during trial", the High Court concluded that the reports of the Mediator and the Counsellor "..shall be disregarded by the family court, when it proceeds to decide the merits of the case".

During the course of its discussion, the High Court noted Delhi High Court Mediation and Conciliation Rules, 2004; Format of application of SAMADHAN (the Delhi High Court Mediation and Conciliation Centre); Conciliation rules of UNCITRAL; Sections 75 and 81 of the Arbitration and Conciliation Act, 1996; Mediation Training Manual issued by the Mediation and Conciliation Project Committee, Supreme Court of India and Chartered Institute of Arbitrator's Rules mandating confidentiality in matters pertaining to mediation and observed as under:-

"21. There can, be no quarrel with the proposition that the mediation proceedings are confidential and anything disclosed, discussed or proposed before the mediator need not be recorded, much less divulged and that if it is done there would always be an apprehension that the discussion may be used against the parties and it would hamper the entire process. The atmosphere of mutual trust warrants complete confidentiality and the same is in fact noted in the main judgment. The petitioner is aggrieved by its later part which notes "but where the scope of the mediation is resolution of child parenting issue, the report concerning the behavior and attitude of the child would not fall within the bar of confidentiality". To our mind, this is against the principle of mediation and charts the course of a slippery slope, as this judgment would hereafter discuss.

22. No exceptions are made in the mediation rules either in our laws or in various jurisdictions mentioned above to the absolute rule of confidentiality. This Court held the mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of; yet the issue is whether the order dated May 6, 2016 was passed purely under Section 12 of the Family Courts Act, 1984 or it was simply to facilitate mediation of disputes between the parents of the child.

... ...

25. Section 12 of the 1984 Act, empowers the Family Court with the discretion to refer the parties to a counsellor, Undoubtedly, that power also extends to the appellate court. However, this case has three rather unusual features: one that the Court never authorized the mediator to exercise power that is vested statutorily with it. The discretion to involve or not to involve a counsellor is the Court's and is non delegable. The respondent husband's argument that the referral order permitted the mediator to involve "others" cannot be meant to authorize the exercise of discretion that is solely vested with the Court. Second, the issue of confidentiality is to be examined because the mediator furnished two reports-to the Court, in this case.

A mediator's position is unique; undoubtedly she (or he) has professional training and competence to handle issues that involve intense and bitter struggle over matrimonial issues, properties, shared household, custody, (temporary or permanent) and in commercial matters, issues that have monetary and financial impacts. In all cases, parties express their fears, their expectations and their dearly held positions on the strength of the confidence that they repose in the mediator and the mediation process-both of which are reinforced by the absolute cloak of confidentiality. Given these imperatives, mediator's reports, where the process has led to failure, should not record anything at all. Having regard to this position the fact that a mediator in a given case, proposes-for all the best and bona fide reasons, the involvement of a counsellor, does not in any manner undermine or take away the Court's sole power to exercise it. In the eventuality of the parties' agreeing, to such a course, they have to be asked to approach the Court, for appropriate orders: the Court would then refer them to the counsellor.

The question of the kind of report to be submitted to the Court and whether it would be a part of the record would be known during the course of the proceeding. In the present case, the parties merely consented. There is nothing to show that the parties were aware that the mediator's report, with regard to not merely what transpired, but with respect to her reflections, would be given to the court; nor was there anything to show that they were aware - when they consented to the involvement of a counsellor that her report would be given to the court. The third unusual feature is that in at least two sittings with the counsellor, the mediator was present. This "joint" proceeding is, in the opinion of the Court, unacceptable. It can lead to undesirable consequences, especially if the mediator and counsellor proceed to furnish their reports (as they did in this case). A reading of both reports in the present case, paints a definite picture to the reader strongly suggestive of a plausible course of action or conclusion. It is this, the power of suggestion, which parties are guaranteed protection from, when they agree to mediation. Imagine if there were to be a possibility of divergence of opinion. Where would that lead? Aside from adding to contentiousness, the Court too would be left confounded.

... ...

29. *The observations made in the main judgment dated February 17, 2017 in effect would permit the mediators to exercise de facto, or in default, the exclusive powers of the Court under Section 12 of the 1984 Act, which are non delegable. There is no question of validation of such action, by a later order of the Court. The danger of this would be that Courts can well draw upon such irregularly produced material, to arrive at conclusions. The requirement of Section 12 also has to be understood as the mandate of law that only the Court and no other body can refer the parties to counseling.*

The proposition that something which the law mandates to be performed in one manner and no other manner "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all"1 applies with full force. The order dated May 06, 2016 in this case merely referred the parties to the mediator and carved out the course and ambit of mediation. The report of the counsellor was never sought by the Court, and yet was treated to be one under Section 12 of the Act of 1984. Had the

Court invoked Section 12 of the Family Courts Act, 1984 it would have clearly spelt out and recorded that while doing so; and in that sense there ought to have been a clear invocation of Section 12.

The absence of such reference necessarily meant that the reference to "others' meant only those connected with the dispute, such as family members of either the husband or the wife, whose participation was to facilitate amicable dispute resolution, not independent evaluation by a counsellor in an unguided manner to be incorporated or annexed to a mediation report.

30. If such a position is allowed as in this case, mediation may then well be used as a forum for gathering expert opinion which would then enter the main file of the case.

The mandate of Section 89 of the Civil Procedure Code, 1908, read with Rule 20 and Rule 21 of the Delhi High Court Mediation and Conciliation Rules, 2004 provides for confidentiality and non-disclosure of information shared with the mediator and during the proceedings of mediation. In the present case, the help of the counsellor sought by the mediator to get holistic settlement between the parties was not ordered in the manner visualized by Section 12 of the Family Courts Act, 1984. Consequently, neither the report of the mediator nor of the counsellor could have been allowed to be exhibited. They are contrary to the mandate of principles governing the mediation - they undermine party autonomy and choice; besides, they clearly violate Section 75 of the Arbitration and Conciliation Act.

The observations in the judgment dated February 17, 2017 to the extent it notes that "the reports of the mediator as also of the counsellor concerning the behavior and attitude of the child, especially when the mediation process has failed would not fall within the bar of confidentiality and hence cannot be used in any proceeding..... Such reports are a neutral evaluation of expert opinion to a Court to guide the Court as to what orders need to be passed in the best interest of the child.

These reports are not confidential communications of the parties" and carving a general exception to mediation confidentiality in child custody matters and disputes for which the Family Court can seek the assistance of the counsellor, under Section 12 of the 1984 Act, are hereby recalled. We hasten to add that this judgment is not a reflection on the mediator whose unstinted track record is known to all, or the endeavor of the counsellor, who too is very experienced in her field. Their commitment and sincerity to secure a settlement satisfactory to all, and the mediation process in general, is not doubted; this judgment should in no way dampen that zeal and determination that they have displayed."

12. The view taken by the High Court in allowing the review is presently under challenge. Mr. Anunya Mehta, learned Advocate for the appellant submitted -

(a) the High Court exceeded the scope of review jurisdiction as if it was sitting in appeal over the earlier judgment; that in terms of law laid down by this court an error which is not self-evident and which is required to be detected by a process of reasoning cannot be termed as error apparent on the face of the record;

b) the report of the Counsellor was not hit by confidentiality as it merely recorded the interaction of the Counsellor with the child and did not record any information or submission by parties to the lis; that there is a recognized exception to the rule of confidentiality in child custody matters as the court, in such matters exercises parens patriae jurisdiction. Mr. Saurabh Kirpal, learned Advocate for the respondent responded -

(i) mediation reports are part of confidential proceedings and cannot be permitted to be used in court proceedings for which reliance was placed on various statutory provisions;

(ii) the Counsellor was not appointed under Section 6 of the Family Courts Act;

(iii) exception under Rule 8

(viii) to

(xiv) of the Family Court Rules cannot be read as exception to Rules 20 and 23 of the Mediation Rules;

(iv) the mediation reports given by the Counsellor-inmediation did not fall within the exceptions provided in rule 8;

(v) there was no waiver of confidentiality and the respondent had objected to the use of the reports at the first instance;

(vi) the earlier order being based on a misconception of law, the High Court was right in exercising review jurisdiction.

13. The issues that arise for our consideration can broadly be put under two heads:

a) Whether the High Court was justified in exercising review jurisdiction and setting aside the earlier judgment and

b) Whether the High Court was correct in holding that the reports of the Mediator and the Counsellor in this case were part of confidential proceedings and no party could be permitted to use the same in any court proceedings or could place any reliance on such reports.

14. As regards the first issue, relying on the decisions of this Court in Inderchand Jain (dead) through Lrs. vs. Motilal (dead) through Lrs., Ajit Kumar Rath vs. State of Orissa and others and Parsion Devi and others vs. Sumitri Devi and others4, it was submitted by the appellant that the exercise of review jurisdiction was not warranted at all. In Inderchand Jain it was observed in paras 10, 11 and 33 are as under:-

"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India this Court held: (SCC p. 251, para 56)

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise."

... ...

33. The High Court had rightly noticed the review jurisdiction of the court, which is as under: "The law on the subject- exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarised as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit." In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly been applied."

In Ajit Kumar Rath3, it was observed:-

"29. In review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of review under Section 22(3)(f) of the Administrative Tribunals Act, 1985....." Similarly, in Parsion Devi4 the principles were summarized as under:

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

15. On the other hand, reliance was placed by the respondent on the decision in Board of Control for Cricket in India and another vs. Netaji Cricket Club and others6 to submit that exercise in review would be justified if there be misconception of fact or law. Para 90 of said decision was to the following effect:

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit"."

16. We have gone through both the judgments of the High Court in the instant case and considered rival submissions on the point. It is well settled that an error which is required to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record. To justify exercise of review jurisdiction, the error must be self-evident. Tested on this parameter, the exercise of jurisdiction in the present case was not correct. The exercise undertaken in the present case, in our considered view, was as if the High Court was sitting in appeal over the earlier decision dated 17.02.2017.

Even assuming that there was no correct appreciation of facts and law in the earlier judgment, the parties could be left to challenge the decision in an appeal. But the review was not a proper remedy at all. In our view, the High Court erred in entertaining the review petition and setting aside the earlier view dated 17.02.2017. Having so concluded, the logical course in the circumstances would be to set aside the judgment under appeal and permit the respondent to challenge the judgment dated 17.02.2017. But such a course would entail further litigation and therefore, we have considered the matter from the stand point of second issue as well.

17. At the outset, we must, therefore, consider various provisions on which reliance was placed by either side.

18. The Family Courts Act, 1984 (hereinafter referred to as the Act) was enacted to provide for the establishment of Family Courts with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section 4 deals with "appointment of Judges" and sub-section (4) states that while selecting persons for appointment as Judges - every endeavor shall be made to ensure that persons committed to the need inter alia to promote the welfare of children and to promote settlement of disputes by conciliation and counselling, are selected. Under Section 6 Counsellors can be appointed by the State Government in consultation with the High Court. Section 7 deals with "jurisdiction" and under sub clause (g) of sub-section (1) the jurisdiction extends in relation to guardianship issues, or the custody of, or access to, any minor.

Section 9 deals with "duty of Family Court to make efforts for settlement" and empowers the Court, subject to any rules made by the High Court, to follow such procedure as may be deemed fit. Section 10 deals with "procedure generally" and states inter alia that Family Court can lay down its own procedure with a view to arrive at a settlement. Section 12 deals with "assistance of medical and welfare experts" and Section 20 gives overriding effect to the Act. Section 21 enables the High Court to frame rules which may inter alia provide for "efforts which may be made by, and the procedure which may be followed by, a Family Court for assisting and

persuading parties to arrive at a settlement". The relevant Sections being Sections 6, 9 and 12 of the Act are as under:-

"6. Counsellors, officers and other employees of Family Courts. -

(1) The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

(2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in subsection (1), shall be such as may be specified by rules made by the State Government. 9. Duty of Family Court to make efforts for settlement -

(1) In every suit or proceeding, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2). If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it think fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.

12. Assistance of medical and welfare experts.- In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act."

19. Pursuant to the rule making power, the High Court of Delhi notified the Family Courts (Procedure) Rules, 1992 (hereinafter referred to as the Rules). Rule 5 deals with Institution of Proceedings while Rule 8 deals with procedure to be followed to arrive at a settlement. Rule 8 is to the following effect.

"8. Procedure to be followed to arrive at a settlement

(i) In every suit or proceeding the Judge may, at any stage, direct the parties to attend a counsellor with a view to promote conciliation and to secure speedy settlement of disputes.

(ii) The parties shall be bound to attend the counsellor on the date and time fixed by the Judge.

(iii) The counsellor may require the parties or any one of them to appear on a date and time fixed for further counselling. In case any of the parties fails to appear, the counsellor may report the matter to the Judge and the Judge shall pass such orders including awarding of costs, as the circumstances of the case may require. The Judge may nevertheless require the counsellor to submit a report.

(iv) The counsellor, in the discharge of his duties may:-

(a) Pay visits to the homes of both or any of the parties.

(b) Interview, relatives, friends and acquaintances of the parties or any of them.

(c) Seek such information from the employer of any of the parties, as may be deemed necessary.

v) With the prior permission of the Judge the counsellor may:-

a) refer the parties to an expert in other areas, such as medicine or psychiatry.

b) seek assistance of any of the institutions, organizations or persons mentioned in Section 5 of the Act.

vi) The counsellor shall maintain a diary in respect of every case giving in brief the steps taken.

vii) Information gathered by the counsellor, any statement made before the counsellor or any notes or report prepared by the counsellor will be treated as confidential. The counsellor shall not be called upon to disclose such information, statements, notes or report to any court except with the consent of both the parties.

viii) The counsellor shall not be asked to give evidence in any court in respect of such information statements or notes. Provided, however, that the counsellor will submit to the Judge a report relating to the home environment of the parties concerned, their personalities and their relationship with their child and/or children in order to assist the Judge in deciding the question of the custody or guardianship of any child or children of the marriage. Provided further that the counsellor will also submit to the Judge a report relating to the home environment, income or standard of living of the party or parties concerned in order to assist the Judge in determining the amount of maintenance and/or alimony to be granted to one of the parties.

ix) The Judge may also request the counsellor to submit a report on any other matter, the Judge consider necessary.

x) A copy of any report may be supplied to the parties, on such request being made by the parties.

xi) The parties will be entitled to make their submissions on the report.

xii) The counsellor shall not be asked to give evidence in any court in respect of any report made by him. xiii) Save as aforesaid, the counsellor will submit a brief

memorandum to the Judge informing the Judge of the outcome of the proceedings within the time specified by the Judge.

xiv) When the parties arrive at a settlement before the counsellor relating to the dispute or any part thereof, such settlement shall be reduced to writing and shall be signed by the parties and countersigned by the counsellor. The Judge shall pronounce a decree or order in terms thereof unless the Judge considers the terms of the settlement unconscionable or unlawful.

xv) Cohabitation between the parties in the course of conciliation proceedings will not be deemed to be condonation of the matrimonial offence.

xvi) Even after passing of the decree or order the Judge may require the counsellor to supervise the placement of children in custody of a party and to pay surprise visits to the home where the child resides. In case any alternation is required in the arrangements the counsellor will make a report to the Judge. The Judge may after notice to the parties pass such orders as Judge may deem fit.

xvii) The Judge may require the counsellor to supervise, guide and/or assist reconciled couples, even after the disposal of the case for such further period as the court may order.

xviii) On a request received from the counsellor the Judge may issue process to any person to appear before the counsellor at such place, date and time as may be desired by the counsellor."

20. Since reliance has been placed on various other statutory provisions to bring home the issue regarding confidentiality in mediation process, some of those provisions are also extracted herein:-

A] Sections 75 and 81 of the Arbitration and Conciliation Act, 1996 are to the following effect:-

"75. Confidentiality - Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

81. Admissibility of evidence in other proceedings. - The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,-

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

B] Rule 20 of the Delhi High Court Mediation and Conciliation Centre (SAMADHAN) is to the following effect:-

"Rule 20: Confidentiality, disclosure and inadmissibility of information.

(a) When a Mediator /Conciliator receives factual information concerning the dispute(s) from any party, he shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate. Provided that, when a party gives information to the Mediator/ Conciliator subject to a specific condition that it be kept confidential, the Mediator/ Conciliator shall not disclose that information to the other party.

(b) Receipt or perusal, or preparation of records, reports or other documents by the Mediator/Conciliator, while serving in that capacity shall be confidential and the Mediator/Conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the Mediator/Conciliator before any Court or tribunal or any other authority or any person or group of persons.

(c) Parties shall maintain confidentiality in respect of events that transpired during the Mediation/ Conciliation and shall not rely on or introduce the said information in other proceedings as to:

(i) views expressed by a party in the course of the mediation/conciliation proceedings;

(ii) documents obtained during the mediation/conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the Mediator/Conciliator;

(iii) proposals made or views expressed by the Mediator/Conciliator.

(iv) admission made by a party in the course of mediation/conciliation proceedings;

(v) The fact that a party had or had not indicated willingness to accept a proposal.

d) There shall be no audio or video recording of the mediation/conciliation proceedings.

e) No statement of parties or the witnesses shall be recorded by the Mediator/Conciliator."

C] The format of the application which the Centre for Mediation and Conciliation (SAMADHAN) requires every party to fill in is to the following effect :-

"I agree to attend all the Mediation Sessions at the time and place fixed by the Mediator. Any party can withdraw from mediation if they so choose on finding that it is not helping them or their case. Each party will bear its own lawyer's fees. Each party will also share the cost of the Mediator's fees equally, unless the Court directs otherwise. The entire process of mediation will be confidential and whatever is submitted to the Mediator will not be divulged or produced or be admissible in any Court proceedings. The Mediator will not be compelled to appear as a witness in any Court of law. The mediation process is voluntary and not binding on the parties till they, on their own volition, reach a settlement agreement and sign the same."

D] Certain other provisions relied upon by the respondent are:-

"i) The UNICITRAL Conciliation Rules contain Article 14, which provides for confidentiality of all matters relating to conciliation.

ii) That Section of the Uniform Mediation Act, USA, 2003, provides for privilege against disclosure, admissibility and discovery of communication and information exchanged during mediation process.

iii) That Rule of the Honk Kong International Arbitration Centre Rules mandates mediation to be a private and a confidential process.

iv) The Code of Practice of Family Mediators followed by the Family Mediation Council, England and Wales in paragraph 5.5 provides that the Mediator must not disclose any information about, or obtained in the course of the mediation to anyone, including a court appointed officer or court, without express consent of each participant, an order of the court or where the law imposes an overriding obligation of disclosure on Mediator to do so.

v) The Family Justice Courts, Singapore also mandates that all information and matters discussed during the Family Dispute Resolution Conferences, counselling, mediation or co-mediation are to be confidential.

vi) The Members Code of Professional Conduct of Family Mediation Canada in Article 7 extends the principle of confidentiality to the documents prepared specifically for or resulting from mediation.

vii) The California Rules of Court, 2017 also provides for confidentiality to be maintained in mediation relating to child custody matters."

21. In Afcons Infrastructure Limited and another vs. Cherian Varkey Construction Company Private Limited and others while dealing with issues concerning scope and width of Section 89 Civil Procedure Code and the modalities of Alternative Dispute Resolution mentioned therein, this Court noted various kinds of disputes in respect of which process of Alternative Dispute Resolution has normally been found to be suitable. Para 28 of the decision was as under:-

"28. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

(i) All cases relating to trade, commerce and contracts, including

- *disputes arising out of contracts (including all money claims);*
- *disputes relating to specific performance;*
- *disputes between suppliers and customers;*
- *disputes between bankers and customers;*
- *disputes between developers/builders and customers;*
- *disputes between landlords and tenants/licensor and licensees;*
- *disputes between insurer and insured;*

(ii) All cases arising from strained or soured relationships, including

- *disputes relating to matrimonial causes, maintenance, custody of children;*
- *disputes relating to partition/division among family members/coparceners/ co-owners; and*
- *disputes relating to partnership among partners.*

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- *disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);*
- *disputes between employers and employees;*
- *disputes among members of societies/associations/apartment owners' associations;*

(iv) All cases relating to tortious liability, including

- *claims for compensation in motor accidents/other accidents; and*

(v) All consumer disputes, including

- *disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.*

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process."

22. In Moti Ram (dead) through Lrs. and another vs. Ashok Kumar and another it was held that mediation proceedings are totally confidential and in case the mediation is unsuccessful, the Mediator should not write anything that was discussed, proposed or done during the mediation proceedings. The observations in that behalf were:-

"2. In this connection, we would like to state that mediation proceedings are totally confidential proceedings. This is unlike proceedings in court which are conducted openly in the public gaze. If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the court stating that the "mediation has been unsuccessful". Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings.

This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process." *Similarly, while dealing with a matter arising under the Arbitration and Conciliation Act, 1996, it was held by this Court in Govind Prasad Sharma and others vs. Doon*

Valley Officers Co-operative Housing Society Ltd. that "both the Conciliator and the parties must keep as confidential all matters relating to conciliation proceedings".

23. Reliance was placed by the respondent on the decisions mentioned above and some statutory provisions including procedural norms in different jurisdictions to submit that there must be absolute confidentiality in respect of any statements made during the course of mediation. The appellant, however, relies upon Sub-Rule(viii) of Rule 8 of the Rules in support of the submission that in relation to matters, inter alia, of custody or guardianship of any child or children, the Counsellor could be asked to submit to the Judge a report relating to home environment of the parties concerned, their personalities and their relationship with the child and or children in order to assist the Judge in deciding the questions involved in the matter.

24. We, thus, have line of cases dealing with mediation/conciliation and other proceedings in general and Rule 8 of the Rules dealing inter alia, with custody issues which is in the nature of an exception to the norms of confidentiality. It is true that the process of mediation is founded on the element of confidentiality. Qualitatively, Mediation or Conciliation stands on a completely different footing as against regular adjudicatory processes.

Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation is to resolve the dispute at a level which is amicable rather than adversarial. In the process, the parties may make statements which they otherwise they would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement, ought not to be used against the maker of such statements in case at a later point the attempts at mediation completely fail.

If the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost. The element of confidentiality and the assurance that the statements would not be relied upon helps the parties bury the hatchet and move towards resolution of the disputes. The confidentiality is, thus, an important element of mediation/conciliation.

25. Complete adherence to confidentiality would absolutely be correct in normal matters where the role of the court is purely of an adjudicator. But such an approach may not essentially be conducive when the court is called upon and expected to discharge its role in the capacity as parens patriae and is concerned with the welfare of a child. All custody and guardianship issues are resolved on the touchstone or parameter of "best interest of the child".

In custody and guardianship disputes between two parties, a minor child is in a peculiar situation. At times, both sides are busy fighting legal battles and the court is called upon in parens patriae to decide what is in the best interest of the child. In order to reach correct conclusion, the court may interview the child or may depend upon the analysis of an expert who may spend some more time with the child and gauge the upbringing, personality, desires or mental frame of the child and render assistance to the court. It is precisely for this reason that the element of confidentiality which is otherwise the basic foundation of mediation/conciliation, to a certain extent, is departed from in Sub-Rule (viii) of Rule 8 of the Rules.

26. If the reports of the Counsellor touching upon the home environment of the parties concerned, their personalities and their relationship with their child or children would assist the court in determining the custody or guardianship issues, any technicality ought not to stand in the way.

Sub-Rule (viii) of Rule 8 seeks to achieve that purpose and makes such material available for the assessment of the court. The observations of this Court in Ashish Ranjan vs. Anupma Tandon and another10 have crystalized the approach to be adopted in matters concerning custody or guardianship issues. Paras 18 & 19 of the decision are as under:

"18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical wellbeing".

The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution, with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (Vide Gaurav Nagpal v. Sumedha Nagpal.)

19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (Vide Elizabeth Dinshaw v. Arvand M. Dinshaw12, Chandrakala Menon v. Vipin Menon13, Nil Ratan Kundu v. Abhijit Kundu14, Shilpa Aggarwal v. Aviral Mittal15 and Athar Hussain v. Syed Siraj Ahmed16.)"

27. Statements made by the parents during the course of mediation may not be relied upon on the ground of confidentiality but natural responses and statements made by the minor to the Counsellor would certainly afford a chance to decide what is in the best interest of the child.

A child may respond naturally and spontaneously in its interactions with the Counsellor, who is professionally trained to make the child feel comfortable. Record of such interaction may afford valuable inputs to the Court in discharge of its duties in parens patriae jurisdiction. If during such interaction issues or aspects concerning welfare of a child are noticed, there is no reason why the Court be deprived of access to such aspects. As held by this Court in various judgments, the paramount consideration ought to be to see what is in the best interest of the child.

28. In terms of Sub Rule (viii) of Rule 8, the Counsellor is obliged to give report, inter alia, relating to home environment of the parties concerned, their personalities and their relationship with the child and/or children in order to assist the Judge in deciding the question of guardianship of any child or children. The intention is clear that the normal principle of confidentiality will not apply in matters concerning custody or guardianship issues and the Court, in the best interest of the child, must be equipped with all the material touching upon relevant issues in order to render complete justice.

This departure from confidentially is consistent with the underlined theme of the Act in general and Section 12 in particular. Once there is a clear exception in favour of categories stated therein, principles in any other forms of mediation/conciliation or other modes of Alternative Dispute Resolution regarding confidentiality cannot be imported. The effect of such exception cannot be diluted or nullified. In our view, the High Court considered the matter in correct perspective in paragraphs 17 to 20 of its judgment dated 07.02.2017.

29. There is, however, one aspect which must also be considered and that is who is the "Counsellor" within the meaning of Rule 8 and whether the Counsellor who assisted the court in the present matter comes within the four corners of said provision. It is true that under Section 6 the Counsellors are appointed by the State Government in consultation with the High Court. It is also true that the Counsellor in the present case was not the one who was appointed in terms of Section 6 but was appointed by a committee of the High Court and her assistance had been requested for in connection with many matters. The order passed on 06.05.2016 had indicated that the Mediator could join "any other person" as may be deemed necessary for a holistic and effective mediation.

The next order dated 11.05.2016 did mention the name of the Counsellor and the fact that the Counsellor had a fruitful meeting with Aditya. The Counsellor, thereafter, interacted with him on 08.07.2016 and 11.07.2016, based on which interaction, a report was submitted on 21.07.2016. The engagement of the Counsellor was thus in complete knowledge of the parties as well as with express acceptance of the High Court. It may be that said Counsellor was not appointed under Section 6 of the Act but if the paramount consideration is the welfare of the child, there cannot be undue reliance on a technicality. As a matter of fact, the width of Section 12 of the Act would admit no such restriction.

The report given by the Counsellor in the present case cannot, therefore, be eschewed from consideration. It is noteworthy that there was absolutely nothing against the Counsellor and in the judgment under appeal, the High Court went on to observe in para No.30 that the Counsellor was well experienced and known for her commitment and sincerity to secure a settlement which would be satisfactory to all.

30. We do not, therefore, see any reason why the reports in the present case, be kept out of consideration.

31. We, therefore, allow this appeal, set aside the judgment dated 11.12.2017 passed by the High Court and restore the earlier judgment dated 17.02.2017 passed by the High Court of Delhi. There shall be no order as to costs.

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SURYA VADANAN VERSUS STATE OF TAMIL NADU & ORS.

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Madan B. Lokur & Hon'ble Mr. Justice Uday Umesh Lalit

CRIMINAL APPEAL NO. 395 OF 2015

(Arising out of S.L.P. (Crl.) No.3634 of 2014)

Surya Vadanan …Appellant
Versus
State of Tamil Nadu & Ors. …Respondents

Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.

There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are:

(1) Sarita Sharma v. Sushil Sharma, (2) Shilpa Aggarwal v. Aviral Mittal & Anr., (3) V. Ravi Chandran v. Union of India, (4) Ruchi Majoo v. Sanjeev Majoo, and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao. These decisions were extensively read out to us and we propose to deal with them in seriatim. (1) Sarita Sharma v. Sushil Sharma.

The following principles were accepted and adopted by this court:

(1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.

(2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.

(3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight

to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.

(5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.

(6) Since the interest and welfare of the child is paramount, a domestic court "is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."

This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that:

(1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.

(2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.

(3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.

JUDGMENT

Hon'ble Mr. Justice Madan B. Lokur.—

1. Leave granted.

2. The question before us relates to the refusal by the Madras High Court to issue a writ of habeas corpus for the production of the children of Surya Vadanan and Mayura Vadanan. The appellant sought their production to enable him to take the children with him to the U.K. since they were wards of the court in the U.K. to enable the foreign court to decide the issue of their custody.

3. In our opinion, the High Court was in error in declining to issue the writ of habeas corpus.

The facts

4. The appellant (hereafter referred to as Surya) and respondent No.3 (hereafter referred to as Mayura) were married in Chennai on 27th January, 2000. While both are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India.

5. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.

6. On 23rd September, 2004, a girl child Sneha Lakshmi Vadanan was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21st September, 2008 another girl child Kamini Lakshmi Vadanan was born to the couple in U.K. and she too is a British citizen by birth. The elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age.

7. It appears that the couple was having some matrimonial problems and on 13th August, 2012 Mayura left U.K. and came to India along with her two daughters. Before leaving, she had purchased return tickets for herself and her two daughters for 2nd September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them.

According to Surya, the reason for the purchase of roundtrip tickets was that the children's schools were reopening on 5th September, 2012 and she had intended to return to U.K. before the school reopening date.

8. Be that as it may, on her arrival in India, Mayura and her daughters went to her parents house in Coimbatore (Tamil Nadu) and have been staying there ever since.

9. On 21st August, 2012 Mayura prepared and signed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955[1] seeking a divorce from Surya. The petition was filed in the Family Court in Coimbatore on 23rd August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other.

10. On or about 23rd August, 2012 Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27th August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him.

11. Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent.

12. Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6th September, 2012. About a month later, on 16th October, 2012 he received a summons dated 6th October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29th October, 2012. We are told that the divorce proceedings are still pending in the Family Court in Coimbatore and no substantial or effective orders have been passed therein.

Proceedings in the U.K.

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1 13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—
(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or [rest of the provision is not relevant]

13. Faced with this situation, Surya also seems to have decided to initiate legal action and on 8th November, 2012 he petitioned the High Court of Justice in U.K. (hereinafter referred to as 'the foreign court') for making the children as wards of the court. It seems that along with this petition, he also annexed documents to indicate (i) that he had paid the fees of the children for a private school in U.K. with the intention that the children would continue their studies in U.K. (ii) that the children had left the school without information that perhaps they would not be returning to continue their studies.

14. On 13th November, 2012 the High Court of Justice passed an order making the children wards of the court "during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court" and requiring Mayura to return the children to the jurisdiction of the foreign court. The relevant extract of the order passed by the foreign court on 13th November, 2012 reads as under:-

"IT IS ORDERED THAT:

1. *The children SNEHA LAKSHMI VADANAN AND KAMINI LAKSHMI VADANAN shall be and remain wards of this Honourable Court during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court.*
2. *The Respondent mother shall :*
   a. *By no later than 4 p.m. on 20th November 2012 inform the father, through his solicitors (Messrs Dawson Cornwell, 15 Red Lion Square, London, WC1R 4QT. Tel: 0207 242 2556 Ref: SJ/AMH), of the current care arrangements for the children;*
   b. *By no later than 4 p.m. on 20th November 2012 inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;*
   c. *Return the children to the jurisdiction of England and Wales by no later than 11.59 p.m. on 27th November 2012;*
   d. *Attend at the hearing listed pursuant to paragraph 3 herein, together with solicitors and/or counsel if so instructed. A penal notice is attached to this paragraph.*
3. *The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London on 29th November 2012 at 2 p.m. with a time estimate of 30 minutes.*
4. *The mother shall have leave, if so advised, to file and serve a statement in response to the statement of the Applicant father. Such statement to be filed and served by no later than 12 noon on 29th November 2012.*
5. *Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel*

documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the order of the court.

6. *The solicitors for the Applicant shall have permission to serve these proceedings, together with this order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.*

7. *The Applicant father shall have leave to disclose this order to:*

   a. *The Foreign and Commonwealth Office;*

   b. *The British High Commission, New Delhi;*

   c. *The Indian High Commission, London*

   d. *Into any proceedings as the mother may have issued of India, including any divorce proceedings.*

8. *Costs reserved.*

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

15. In response to the petition filed by Surya, a written statement was filed by Mayura on 20th November, 2012. A rejoinder was filed by Surya on 13th December, 2012.

16. Apparently, after taking into consideration the written statement, the foreign court passed another order on 29th November, 2012 virtually repeating its earlier order and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence. The relevant extract of the order dated 29th November, 2012 reads as under:-

"IT IS ORDERED THAT :

1. *The children SNEHA LAKSHMI VADANAN AND KAMINI VADANAN shall be and remain wards of this Hon'ble Court during their minority and until such time as this provision of this Order is varied or alternatively discharged by the further Order of the Court.*

2. *The 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal Grandmother shall:*

   a. *Forthwith upon serve of this Order upon them inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;*[2]

   b. *Return the children to the jurisdiction of England and Wales forthwith upon service of this Order upon them;*

2 There is no paragraph 2(c) in the text of the order supplied to this court.

A penal notice is attached to this paragraph.

3. *The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London within 72 hours of the return of the children or alternatively upon application to the Court for a further hearing.*

4. *The father shall have leave, if so advised, to file and serve a statement of the mother. Such statement to be filed and served by no later than 12 noon on 13th December 2012.*

5. *Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the Order of the Court.*

6. *The solicitors for the Applicant shall have permission to serve these proceedings, together with this Order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.*

7. *The Applicant father shall have leave to disclose this order to:*

   a. *The Foreign and Commonwealth Office;*

   b. *The British High Commission, New Delhi;*

   c. *The Indian High Commission, London;*

   d. *Into any proceedings as the mother may have issued in the jurisdiction of India, including any divorce proceedings.*

8. *The maternal grandparents Dr. Srinivasan Muralidharan and Mrs. Rajkumari Murlidharan shall be joined as Respondents to this application as the 2nd and 3rd Respondents respectively.*

9. *The mother shall make the children available for skype or alternatively telephone contact each Sunday and each Wednesday at 5.30 p.m. Indian time.*

10. *Liberty to the 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal grandmother to apply to vary and/or discharge this order (or any part of it) upon reasonable notice to the Court and to the solicitors for the father.*

11. *Costs reserved.*

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

17. We are told that no further effective or substantial orders have been passed by the foreign court thereafter.

Proceedings in the High Court

18. Since Mayura was not complying with the orders passed by the foreign court, Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.

19. After completion of pleadings, the petition filed by Surya was heard by the Madras High Court and by a judgment and order dated 4th November, 2013 the writ petition was effectively dismissed.

20. The Madras High Court, in its decision, took the view that the welfare of the children (and not the legal right of either of the parties) was of paramount importance. On facts, the High Court was of opinion that since the children were in the custody of Mayura and she was their legal guardian, it could not be said that the custody was illegal in any manner. It was also noted that Surya was permitted to take custody of the children every Friday, Saturday and Sunday during the pendency of the proceedings in the Madras High Court; that the order passed by the foreign court had been duly complied with and that Surya had also returned to the U.K. On these facts and in view of the law, the Madras High Court "closed" the petition filed by Surya seeking a writ of habeas corpus.

21. Feeling aggrieved, Surya has preferred the present appeal on or about 9th April, 2014.

Important decisions of this court

22. There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are: (1) Sarita Sharma v. Sushil Sharma[3], (2) Shilpa Aggarwal v. Aviral Mittal & Anr.[4], (3) V. Ravi Chandran v. Union of India[5], (4) Ruchi Majoo v. Sanjeev Majoo[6], and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao.[7] These decisions were extensively read out to us and we propose to deal with them in seriatim. (1) Sarita Sharma v. Sushil Sharma

23. As a result of matrimonial differences between Sarita Sharma and her husband Sushil Sharma an order was passed by a District Court in Texas, USA regarding the care and custody of their children (both American citizens) and their respective visiting rights. A subsequent order placed the children in the care of Sushil Sharma and only visiting rights were given to Sarita Sharma. Without informing the foreign court, Sarita Sharma brought the children to India on or about 7th May, 1997.

24. Subsequently on 12th June, 1997 Sushil Sharma obtained a divorce decree from the foreign court and also an order that the sole custody of the children shall be with him. Armed with this, he moved the Delhi High Court on 9th September, 1997 for a writ of habeas corpus seeking custody of the children. The High Court allowed the writ petition and ordered that the passports of the children be handed over to Sushil Sharma and it was declared that he could take the

3 (2000) 3 SCC 14
4 (2010) 1 SCC 591
5 (2010) 1 SCC 174
6 (2011) 6 SCC 479
7 (2013) 15 SCC 790

children to USA without any hindrance. Feeling aggrieved, Sarita Sharma preferred an appeal in this court.

25. This court noted that Sushil Sharma was an alcoholic and had used violence against Sarita Sharma. It also noted that Sarita Sharma's conduct was not "very satisfactory" but that before she came to India, she was in lawful custody of the children but "she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission."

26. This court noted the following principles regarding custody of the minor children of the couple:

(1) The modern theory of the conflict of laws recognizes or at least prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.[8]

(2) Even though Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.[9]

(3) The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.[10]

On the merits of the case, this Court observed:

"Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held."

27. Notwithstanding this, neither was the matter remanded to the High Court for issuing such a direction to Sushil Sharma to approach the appropriate court for conducting a "full and thorough" inquiry nor was such a direction issued by this court. The order of the Delhi High Court was simply set aside and the writ petition filed by Sushil Sharma was dismissed.

28. We may note that significantly, this court did not make any reference at all to the principle of comity of courts nor give any importance (apart from its mention) to the passage quoted from Surinder Kaur Sandhu to the effect that:

"The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that

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8 Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698

9 Surinder Kaur Sandhu v. Harbax Singh Sandhu

10 Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 which in turn referred to McKee v. McKee, 1951 AC 352: (1951) 1 All ER 942 (PC)

place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage."

(2) Shilpa Aggarwal v. Aviral Mittal & Anr.

29. Shilpa Aggarwal and her husband Aviral Mittal were both British citizens of Indian origin. They had a minor child (also a foreign national) from their marriage. They had matrimonial differences and as a result, Shilpa Aggarwal came to India from the U.K. with their minor child. She was expected to return to the U.K. but cancelled their return tickets and chose to stay on in India. Aviral Mittal thereupon initiated proceedings before the High Court of Justice, Family Division, U.K. and on 26th November, 2008 the foreign court directed Shilpa Aggarwal, inter alia, to return the minor child to the jurisdiction of that foreign court. Incidentally, the order passed by the foreign court is strikingly similar to the order passed by the foreign court subject matter of the present appeal.

30. Soon thereafter, Shilpa Aggarwal's father filed a writ petition in the Delhi High Court seeking protection of the child and for a direction that the custody of the child be handed over to him. The High Court effectively dismissed the writ petition and granted time to Shilpa Aggarwal to take the child on her own to the U.K. and participate in the proceedings in the foreign court failing which the child be handed over to Aviral Mittal to be taken to the U.K. as a measure of interim custody, leaving it for the foreign court to determine which parent would be best suited to have the custody of the child.

31. Feeling aggrieved, Shilpa Aggarwal preferred an appeal before this court which noted and observed that the following principles were applicable for deciding a case of this nature:

(1) There are two contrasting principles of law, namely, comity of courts and welfare of the child.

(2) In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.[11] Domestic courts cannot be guided entirely by the fact that one of the parents violated an order passed by a foreign court.[12]

32. On these facts and applying the principles mentioned above, this court agreed with the view of the High Court that the order dated 26th November, 2008 passed by the foreign court did not intend to separate the child from Shilpa Aggarwal until a final decision was taken with regard to the custody of the child. The child was a foreign national; both parents had worked for gain in the U.K. and both had acquired permanent resident status in the U.K. Since the foreign court had the most intimate contact[13] with the child and the parents, the principle of "comity of courts" required that the foreign court would be the most appropriate court to decide which parent would be best suited to have custody of the child.

(3) V. Ravi Chandran v. Union of India

33. The mother (Vijayasree Voora) had removed her minor child (a foreign national) from the U.S.A. in violation of a custody order dated 18th June, 2007 passed by the Family Court of the

11 Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42. Even though this court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.
12 Sarita Sharma v. Sushil Sharma
13 Surinder Kaur Sandhu v. Harbax Singh Sandhu

State of New York. The custody order was passed with her consent and with the consent of the child's father (Ravi Chandran, also a foreign national).

34. On 8th August, 2007, Ravi Chandran applied for modification of the custody order and was granted, the same day, temporary sole legal and physical custody of the minor child and Vijayasree Voora was directed to immediately turn over the minor child and his passport to Ravi Chandran and further, her custodial time with the child was suspended. The foreign court also ordered that the issue of custody of the child shall be heard by the jurisdictional Family Court in the USA.

35. On these broad facts, Ravi Chandran moved a petition for a writ of habeas corpus in this court for the production of the child and for his custody. The child was produced in this court and the question for consideration was: "What should be the order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national."

36. This court referred to a large number of decisions and accepted the following observations, conclusions and principles:

(1) The comity of nations does not require a court to blindly follow an order made by a foreign court.[14]

(2) Due weight should be given to the views formed by the courts of a foreign country of which the child is a national. The comity of courts demands not the enforcement of an order of a foreign court but its grave consideration.[15] The weight and persuasive effect of a foreign judgment must depend on the facts and circumstances of each case.[16]

(3) The welfare of the child is the first and paramount consideration,[17] whatever orders may have been passed by the foreign court.[18]

(4) The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one way or the other.[19]

(5) One of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country.[20]

(6) While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiry or an elaborate inquiry in this regard. In the event the domestic court conducts a summary inquiry, it would return the custody of the child to the country from which the child was removed unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the permanent welfare of the child lay and ignore the order of the foreign court or treat the

14 B's Settlement, In re. B. v. B.,1940 Ch 54: (1951) 1 All ER 949 and McKee v. McKee
15 McKee v. McKee
16 McKee v. McKee
17 McKee v. McKee
18 B's Settlement, In re
19 Kernot v. Kernot, 1965 Ch 217: (1964) 3 WLR 1210: (1964) 3 All ER 339
20 H. (Infants) , In re, (1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)

fact of removal of the child from another country as only one of the circumstances.[21] An order that the child should be returned forthwith to the country from which he or she has been removed in the expectation that any dispute about his or her custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.[22]

(7) The modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.[23]

37. On the facts of the case, it was held that an elaborate inquiry was not required to be conducted. It was also observed that there was nothing on record which could remotely suggest that it would be harmful for the child to return to his native country. Consequently, this court directed the repatriation of the child to the jurisdiction of the foreign court subject to certain directions given in the judgment.

38. This court also quoted a passage from Sarita Sharma to the effect that a decree passed by a foreign court cannot override the consideration of welfare of a child.

(4) Ruchi Majoo v. Sanjeev Majoo

39. Ruchi Majoo (wife) had come to India with her child consequent to matrimonial differences between her and her husband (Sanjeev Majoo). All three that is Ruchi Majoo, Sanjeev Majoo and their child were foreign nationals.

40. Soon after Ruchi Majoo came to India, Sanjeev Majoo approached the Superior Court of California, County of Ventura in the USA seeking a divorce from Ruchi Majoo and obtained a protective custody warrant order on 9th September, 2008 which required Ruchi Majoo to appear before the foreign court. She did not obey the order of the foreign court perhaps because she had initiated proceedings before the Guardian Court at Delhi on 28th August, 2008. In any event, the Guardian Court passed an ex-parte ad interim order on 16th September, 2008 (after the protective custody warrant order passed by the foreign court) to the effect that Sanjeev Majoo shall not interfere with the custody of her minor child till the next date of hearing.

41. Aggrieved by this order, Rajiv Majoo challenged it through a petition under Article 227 of the Constitution filed in the Delhi High Court. The order of 16th September, 2008 was set aside by the High Court on the ground that the Guardian Court had no jurisdiction to entertain the proceedings since the child was not ordinarily resident in Delhi. It was also held that the issue of the child's custody ought to be decided by the foreign court for the reason that it had already passed the protective custody warrant order and also because the child and his parents were American citizens.

42. On these broad facts, this court framed three questions for determination. These questions are as follows:-

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21 L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)
22 L. (Minors), In re,
23 Surinder Kaur Sandhu v. Harbax Singh Sandhu

(i) Whether the High Court was justified in dismissing the petition for custody of the child on the ground that the court at Delhi had no jurisdiction to entertain it;

(ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts; and

(iii) Whether the order granting interim custody of the child to Ruchi Majoo calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

43. We are not concerned with the first and the third question. As far as the second question is concerned, this court was of the view that there were four reasons for answering the question in the negative. Be that as it may, the following principles were accepted and adopted by this court:

(1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.[24]

(2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.[25]

(3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.[26]

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.[27]

(5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.[28]

(6) Since the interest and welfare of the child is paramount, a domestic court "is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."

24 Dhanwanti Joshi v. Madhav Unde
25 Dhanwanti Joshi v. Madhav Unde
26 Sarita Sharma v. Sushil Sharma
27 V. Ravi Chandran and Aviral Mittal
28 Dhanwanti Joshi referring to Elizabeth Dinshaw v. Arvand M. Dinshaw

44. On the facts of the case, this court held that "repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage." Accordingly, it was held that the "Interest of the minor shall be better served if he continued to be in the custody of his mother [Ruchi Majoo]."

(5) Arathi Bandi v. Bandi Jagadrakshaka Rao

45. The facts in this case are a little complicated and it is not necessary to advert to them in any detail. The sum and substance was that Arathi Bandi and her husband Bandi Rao were ordinarily residents of USA and they had a minor child. There were some matrimonial differences between the couple and proceedings in that regard were pending in a court in Seattle, USA.

46. In violation of an order passed by the foreign court, Arathi Bandi brought the child to India on 17th July, 2008. Since she did not return with the child to the jurisdiction of the foreign court bailable warrants were issued for her arrest by the foreign court.

47. On or about 20th November, 2009 Bandi Rao initiated proceedings in the Andhra Pradesh High Court for a writ of habeas corpus seeking production and custody of the child to enable him to take the child to USA. The Andhra Pradesh High Court passed quite a few material orders in the case but Arathi Bandi did not abide by some of them resulting in the High Court issuing non-bailable warrants on 25th January, 2011 for her arrest. This order and two earlier orders passed by the High Court were then challenged by her in this court.

48. This court observed that Arathi Bandi had come to India in defiance of the orders passed by the foreign court and that she also ignored the orders passed by the High Court. Consequently, this court was of the view that given her conduct, no relief could be granted to Arathi Bandi.

49. This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that:

(1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.[29]

(2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.[30]

(3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.[31]

Discussion of the law

50. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or

29 Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw
30 V. Ravi Chandran v. Union of India
31 V. Ravi Chandran v. Union of India

substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.

51. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved – it is not the beginning of the exercise but the end.

52. Therefore, we are concerned with two principles in a case such as the present. They are (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law"[32] but they are not 'contrasting' in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case.

53. What then are some of the key circumstances and factors to take into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.

54. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court – the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.[33] In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a

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32 Shilpa Aggarwal v. Aviral Mittal

33 13. When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
(a) where it has not been pronounced by a Court of competent jurisdiction;
(b) where it has not been given on the merits of the case;
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in India.

matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

55. If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child.

This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

56. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).

57. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal – Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in Ruchi Majoo where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

58. As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained.

No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory – and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here – merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.

59. Finally, this court has accepted the view[34] that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

60. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.[35] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

34 L. (Minors), In re,
35 Arathi Bandi

Discussion on facts

61. The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K. meaning thereby that their exposure to the education system was different from the education system in India.[36] The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.

62. Mayura has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly, she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship. That being the position, there is no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. The fact that Mayura is of Indian origin cannot be an overwhelming factor.

63. Though Mayura filed proceedings for divorce in India way back in August 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children, nor did she persuade the trial court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principle applicable.

64. It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. We are assuming that the Family Court was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore.

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36 In our order dated 9th July, 2014 we have noted that according to Mayura the children are attending some extra classes. This is perhaps to enable them to adjust to the education system and curriculum in India.

No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.

65. We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.

66. The orders passed by the foreign court are only interim and interlocutory and no finality is attached to them. Nothing prevents Mayura from contesting the correctness of the interim and interlocutory orders and to have them vacated or modified or even set aside. She has taken no such steps in this regard for over two years. Even the later order passed by the foreign court is not final and there is no reason to believe that the foreign court will not take all relevant factors and circumstances into consideration before taking a final view in the matter of the custody of the children. The foreign court may well be inclined, if the facts so warrant, to pass an order that the custody of the children should be with Mayura in India.

67. There is also nothing on the record to indicate that any prejudice will be caused to the children of Mayura and Surya if they are taken to the U.K. and subjected to the jurisdiction of the foreign court. There is nothing to suggest that they will be prejudiced in any manner either morally or physically or socially or culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. There is nothing to suggest that the foreign court is either incompetent or incapable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare.

68. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.

69. We have considered the fact that the children have been in Coimbatore since August 2012 for over two years. The question that arose in our minds was whether the children had adjusted to life in India and had taken root in India and whether, under the circumstances, it would be appropriate to direct their repatriation to the U.K. instead of conducting an elaborate inquiry in India. It is always difficult to say whether any person has taken any root in a country other than that of his or her nationality and in a country other than where he or she was born and

brought up. From the material on record, it cannot be said that life has changed so much for the children that it would be better for them to remain in India than to be repatriated to the U.K. The facts in this case do not suggest that because of their stay in India over the last two years the children are not capable of continuing with their life in the U.K. should that become necessary. However, this can more appropriately be decided by the foreign court after taking all factors into consideration.

70. It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a report that mediation between the parties had failed. This left us with no option but to hear the appeal on merits.

71. Given these facts and the efforts made so far, in our opinion, there is no reason to hold any elaborate inquiry as postulated in L. (Minors) - this elaborate inquiry is best left to be conducted by the foreign court which has the most intimate contact and the closest concern with the children. We have also noted that Surya did not waste any time in moving the foreign court for the custody of the children. He moved the foreign court as soon as he became aware (prior to the efforts made by this court) that no amicable solution was possible with regard to the custody of the children.

72. We are conscious that it will not be financially easy for Mayura to contest the claim of her husband Surya for the custody of the children. Therefore, we are of the opinion that some directions need to be given in favour of Mayura to enable her to present an effective case before the foreign court.

73. Accordingly, we direct as follows:-

(1) Since the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanan will take the children to the U.K. during the summer vacations of the children and comply with the order dated 29th November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadanan will bear the cost of litigation expenses of Mayura Vadanan.

(2) Surya Vadanan will pay the air fare or purchase the tickets for the travel of Mayura Vadanan and the children to the U.K. and later, if necessary, for their return to India. He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.

(3) Surya Vadanan will pay maintenance to Mayura Vadanan and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate out of pocket expenses, Surya Vadanan will give to Mayura Vadanan prior to her departure from India an amount equivalent to £1000 (Pounds one thousand only).

(4) Surya Vadanan shall ensure that all coercive processes that may result in penal consequences against Mayura Vadanan are dropped or are not pursued by him.

(5) In the event Mayura Vadanan does not comply with the directions given by us, Surya Vadanan will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadanan will deliver to Surya Vadanan the passports of the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan.

74. The appeal is disposed of on the above terms.

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NITHYA ANAND RAGHAVAN VERSUS STATE (NCT OF DELHI) AND ANOTHER

Supreme Court of India

Bench : Hon'ble Mr. Justice Dipak Misra, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Mr. Justice Mohan M. Shantanagoudar

CRIMINAL APPEAL NO. 972 OF 2017[†]

Nithya Anand Raghavan .. Appellant;

Versus

State (NCT of Delhi) and another .. Respondents.

Decided on July 3,2017

A. Constitution of India — Art. 226 — Habeas corpus — Custody of child — Inter-country dispute — Power of Indian courts to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return — Availability of such power — Overriding consideration must be the interests and welfare of the child—No primacy to order of foreign court which must yield to best interests and welfare of the child, which is of paramount importance — Principles underlying S. 14 of 1890 Act and S. 10 CPC, particularly S. 10 Expln. CPC can be invoked by Indian courts

— Child removed from foreign country (UK) by mother in violation of interim/interlocutory order of foreign (UK) court which had directed mother to produce child before it where issue of wardship of child was pending consideration — Law to be followed by Indian courts when India is a non-signatory of international convention concerned viz. Civil Aspects of International Child Abduction — Scope of jurisdiction and power of foreign court and Indian court — Summary and elaborate enquiry by High Court in India — When and how to be conducted — Principles summarised

— High Court should undertake elaborate enquiry by considering question on merits bearing in mind welfare of child as of paramount importance and reckoning order of foreign court only as a factor to be taken into consideration, unless it thinks it fit to exercise summary jurisdiction — High Court in interest and for welfare of child not denuded of power to deny relief of return of child to jurisdiction of UK court, on being satisfied that thereby child may be exposed to grave harm, physical or psychological — In such case foreign court order must yield to welfare of child — Principles of "forum convenience", "comity of courts" and "first strike" (i.e. substantive order passed by foreign court prior to that passed by domestic court) not significant in this context, and must yield to best interests and welfare of the child, which is of paramount importance — Surya Vadanan, (2015) 5 SCC 450 overruled on this point — Guardians and Wards Act, 1890 — Ss. 7, 8, 12, 17, 26 — Hindu Minority and Guardianship Act, 1956 — S. 6 — Human and Civil Rights — Children's rights — Civil Aspects of International Child

Abduction, 1980 — Guardians and Wards Act, 1890 — S. 14 — Civil Procedure Code, 1908, S. 10 and Expln. thereto

B. Constitution of India — Art. 226 — Habeas corpus — Custody of child — Girl child — Guardianship of her mother of utmost significance for development of her personality, especially when she is around seven years of age, unless circumstances indicate that it would harmful for her — Hindu Minority and Guardianship Act, 1956, S. 6

C. Constitution of India — Arts. 226, 136 and 142 — Habeas corpus — Removal of child from foreign country to India by mother in violation of interim/interlocutory order of foreign court where wardship issue was pending — Habeas corpus petition filed before High Court in India by father from whose custody child was removed — Even when it is held by High Court, or by Supreme Court in appeal, that custody of child must remain with mother, order and directions of foreign court are required to be complied with — Supreme Court would, therefore, to do complete justice between parties, mould reliefs to facilitate mother to participate in proceedings before foreign court

D. Constitution of India — Art. 226 — Habeas corpus — Custody of child — Child removed from custody of father residing in foreign country and brought to India by mother — Habeas corpus petition filed by father before High Court in India — Legality of custody of child to be first ascertained in such petition — Presumption of legality — When child removed from foreign country by biological mother herself, custody of child would be presumed to be legal — Merely because of order of foreign court directing mother to produce child before it, custody of child would not become unlawful per se — In such case, petitioner father can be asked to resort to substantive prescribed remedy for getting custody of child — Hindu Minority and Guardianship Act, 1956, S. 6

E. Constitution of India — Art 226 — Habeas corpus — Custody of child — Child removed from custody of father residing in foreign country and brought to India by mother in violation of interim/interlocutory order of foreign court for producing of child before it where issue of wardship was pending consideration — Habeas corpus petition filed by father before High Court in India — Held, remedy of writ of habeas corpus cannot be used for enforcement of directions of foreign court and convert jurisdiction of High Court into an executing court — Writ petitioner can take recourse to other remedy or proceedings for enforcement of foreign court's order

F. Constitution of India — Art. 226 — Habeas corpus — Custody of child — Welfare of child prime consideration — For this, court must take into account all attending circumstances and totality of situation

G. Constitution of India — Art. 226 — Habeas corpus — Nature and object — Principles summarised

The father as well as mother of the child are of Indian origin. They were married in Chennai in India according to Hindu rites and customs. The father, an

Indian citizen, had gone to the UK as a student in 2003 and was working there since 2005. After the marriage, the couple shifted to the UK in early 2007 and stayed in Watford. The mother did get

an employment in London in 2008, but had to come to her parents' house in Delhi in June 2009, where she gave birth to a girl child Nethra. Thus Nethra is an Indian citizen by birth. She has not given up her Indian citizenship. The mother, along with Nethra, returned to the UK in March 2010. But from August 2010 till December 2011, because of matrimonial issues between the appellant and Respondent 2, the appellant and her daughter remained in India. It was only after the intervention of and mediation by the family members, the appellant and her daughter Nethra went back to England in December 2011, more than a year after they had come to India. After returning to UK, Nethra was admitted to a nursery school in January 2012. An application for grant of UK citizenship was made on behalf of Nethra in September 2012 which was subsequently granted in December 2012. The father (Respondent 2) then acquired the citizenship of UK in January 2013. After grant of citizenship of UK, Nethra was admitted to a primary school in UK in September 2013 and studied there only till July 2015. Since Nethra had acquired British citizenship, the UK Court could exercise jurisdiction in respect of her custody issues.

On 16-12-2015, the appellant filed a complaint with the Crime Against Women Cell (C AWC), New Delhi which then issued notice to Respondent 2 and his parents, asking them to appear before it. On the date of hearing, neither Respondent 2 nor his parents appeared before the CAWC. As a counterblast, Respondent 2 filed a custody/wardship petition on 8-1-2016 before the High Court of Justice, Family Division, UK, seeking the return of his daughter to the jurisdiction of the UK Court. The UK Court passed an ex parte order on 8-1-2016 against the mother after recording prima facie satisfaction that the minor Nethra was as on 2-7-2015, habitually resident in the jurisdiction of England and Wales and was wrongfully removed from England on 2-7-2015 and has been wrongfully retained in India since then. The UK Court also recorded the father's willingness to bear the expenses for the transport and stay of the mother and the child to the UK. The UK Court held that it had the jurisdiction to hear the matter and directed that the child would become a ward of the court during her minority or until further orders and that the mother would have to return the child to England by 22-1-2016. This order has not been challenged by the appellant so far nor has the appellant applied for modification thereof before the court concerned (foreign court).

Then, on 23-1-2016, Respondent 2 filed a habeas corpus writ petition before the High Court of Delhi, seeking to have his daughter produced before the Court. The High Court passed the impugned judgment dated 8-7-2016, inter alia, directing the appellant to produce her daughter and comply with the orders passed by the UK Court or handover her daughter to Respondent 2 within 3 weeks from the date of the order.

The Delhi High Court concluded as follows: The foreign court having the most intimate contact with the child would be better placed to appreciate the social and cultural milieu in which the child had been brought up. The principle of comity of courts should not be discarded except for special and compelling reasons, especially when interim or interlocutory orders have been passed by foreign courts. If a foreign court has jurisdiction to hear the matter, then an interim/interlocutory order passed by such court should be given due weightage and respect. If such jurisdiction is not in doubt, then the "first strike" principle i.e. a substantive order passed by a foreign court prior to a substantive order passed by another foreign or domestic court, becomes applicable. Due respect and weight ought to be given to the earlier substantive order as compared to the latter order. A foreign court passing an interim/interlocutory order can make prima facie adjudications, similar to a domestic court. Merely because a parent has violated an order of a foreign court does not mean that the parent should be

penalised for the same. While the conduct of the parent may be taken into account while passing the final order, the said conduct should not have a penalising result. A court may either hold an elaborate inquiry to decide whether a child should be repatriated to a foreign country or a summary inquiry without going into the merits of the dispute, relating to the best interests and welfare of the child. If, however, there exists a pre-existing order of a foreign court of competent jurisdiction, then a domestic court must have special reasons to hold an elaborate inquiry. It must consider various factors such as the nature of the interim order passed by the foreign court, the likelihood of harm caused to the child, if any, when repatriated, the alacrity with which the parent moves the foreign court, etc. There was no special or compelling reason to ignore the interim order passed by the UK Court and the child was accustomed to and well adapted to the culture in UK.

The High Court held that the child, having lived in UK since the time of her birth in 2009, had developed roots there. Further, the child was a permanent citizen of UK and held a British passport. The High Court also examined the wardship order passed ex parte by the High Court of Justice, Family Division, London on 8-1-2016. The High Court opined that in the light of the order passed by the UK Court, the mother would not face any financial hardship and further, the order of the UK Court had attained finality due to lapse of time. The High Court held that since the mother had not sought custody of the child by approaching any competent Indian Court prior to the passing of the order by the UK Court, therefore, the first, effective order/direction had been passed by the UK/ foreign court and, applying the principle expounded in Surya Vadanan, (2015) 5 SCC 450 of comity of courts, the balance of favour would lie with the UK Court. Since the child had spent most of her life in UK and studied there, it would be in the best interests of the child that she be returned to UK. Further, the High Court opined that there was no force in the mother's allegation that she was a victim of domestic abuse since she had not made a single complaint to the authorities while she was staying with Respondent 2 in the UK. In addition, there was no documentary evidence to support such a claim either. Finally, the High Court rejected the contention, that the child ought to be medically treated only in Delhi for her heart ailment with which she was suffering and not in the UK, as baseless.

Allowing the appeal, the Supreme Court Held:

India is not yet a signatory to the Hague Convention of 1980 on Civil Aspects of International Child Abduction. So far as non-Convention countries are concerned, the law is that the court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. If the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is

shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. (Paras 40, 42 and 69)

V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174: (2010) 1 SCC (Civ) 44, relied on, on this point

Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, affirmed

Lozano v. Montoya Alvarez, 2014 SCC Online US SC 62:134 S Ct 1224:572 US _ (2014), referred to

In Surya Vadanan case the inquiry suggested inevitably recognises giving primacy to the order of the foreign court on the issue of custody of the minor. That has been explicitly negated in Dhanwanti Joshi, (1998) 1 SCC 112. In Surya Vadanan case the Court concluded: "The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry." This also cannot be accepted. (Paras 62 and 61)

Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, affirmed

Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94, overruled on this point

The concept of forum convenience has no place in wardship jurisdiction as applicable in India in respect of child custody matters. The principle of comity of courts cannot be given primacy or more weightage in non-Convention countries for deciding the matter of custody or for return of the child to the native state. (Paras 39, 42 and 66)

V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44, relied on, on this point

Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, affirmed

H. (Infants), In re, (1966) 1 WLR 381 : 1965 H. No. 2428 : (1966) 1 All ER 886 (CA); Elizabeth Dinshaw v. ArvandM. Dinshaw, (1987) 1 SCC 42:1987 SCC (Cri) 13; McKee v. McKee, 1951 AC 352 (PC); J. v. C., 1970 AC 668: (1969) 2 WLR 540 (HL); E. (An Infant), In re, 1967 Ch 761 : (1967) 2

WLR 1370 (CA); L (Minors) (Wardship : Jurisdiction), In re, (1974) 1 WLR 250 (CA); R. (Minors) (Wardship: Jurisdiction), In re, (1981) 2 Fam LR 416 (CA); R (A Minor) (Child Abduction: Non-Convention Country), In re, 1947 Fam 45 : (1997) 2 WLR 223 (CA); A. (A Minor) (Abduction: Non-Convention Country), In re, The Times, l-l-mi (CA); Khamis v. Khamis, (1978) 4 Fam LR 410 (Full Court, Australia), cited

It is also not relevant as to which party first approached the court or so to say "first strike". The analogy regarding extrapolating that principle to the courts in India, if an order is passed by the Indian court is inapposite. For, the Indian courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction. The invocation of first strike principle as a decisive factor would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The High Court was unjustly and incorrectly impressed by the principle of comity of courts and the obligation of the Indian courts to comply with a pre-existing order of the foreign court for return of the child and including the "first strike" principle referred to in Surya Vadanan case. Section 14 of the 1890 Act and the principle underlying Section 10 CPC, especially the one contained in Section 10 Explanation i.e. pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action, can be invoked in such situations. (Paras 63, 66 and 68)

Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, affirmed

Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94, overruled on this point

Shilpa Aggarwal v. Aviral Mittal, (2010) 1 SCC 591: (2010) 1 SCC (Civ) 192, referred to

The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. Habeas corpus is essentially a procedural writ dealing with machinery of justice. The object underlying the writ is to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful. (Para 44)

Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980, relied on

Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247:2001 SCC (Cri) 841; Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13, affirmed

Paul Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823, approved

The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position

referred to above. The decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised. (Para 46)

For considering at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition), in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child. (Para 47)

Merely because an order passed by the foreign court, directing the mother to produce the child before it, the custody of the minor would not become unlawful per se. In the present case, it is not possible to hold that the custody of the minor with her mother has been declared to be unlawful. At best, the appellant may have violated the direction to return the minor to England, who has been ordered to be a ward of the court during her minority and further order. No finding has been rendered that till the minor returns to England, the custody of the minor with the mother has become or will be treated as unlawful including for the purposes of considering a petition for issuance of writ of habeas corpus. The custody of the minor with the appellant, being her biological mother, will have to be presumed to be lawful. (Paras 48 and 49)

The High Court in such a situation may then examine whether the return of the minor to his/her native state would be in the interests of the minor or would be harmful. While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign court directing return of the child within the stipulated time, since the order of the foreign court must yield to the welfare of the child. The facts of the case may necessitate the court to issue direction to return the child to the native State. That does not mean that in deserving cases the courts in India are denuded from declining the relief to return the child to the native state merely because of a pre- existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case to case basis — be it in a summary inquiry or an elaborate inquiry. For answering this issue, there can be no straitjacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly, the parent having custody of the minor who has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle

of the best interests and welfare of the child to be considered by the court. That ought to be the paramount consideration. (Paras 50, 53 to 56, 67 and 68)

Significantly, till Nethra returned to India along with her mother on 2-7-2015, no proceeding of any nature came to be filed in the UK Court, either in relation to the matrimonial dispute between the appellant and Respondent 2 or for the custody of Nethra. Further, Nefhra is staying in India along with the appellant, her grandparents and other family members and relatives, unlike in UK where she lived in a nuclear family of the three with no extended family. She has been schooling here for the past over one year and has spent equal time in both the countries out of the first six years. She would be more comfortable and feel secured to live with her mother here, who can provide her love, understanding, care and guidance for her complete development of character, personality and talents. Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother. No such material or evidence is forthcoming in the present case except the fact that the appellant (mother) has violated the order of the UK Court directing her to return the child to UK before the stipulated date. When Nethra was in UK, no restraint order was issued by any court or authority in UK in that behalf. She had travelled along with her mother from UK to India on official documents. Nethra is suffering from cardiac disorder and needs periodical medical reviews and proper care and attention. That can be given only by her mother. Respondent 2 (father) is employed and may not be in a position to give complete attention to his daughter. There is force in the stand taken by the appellant that if Nethra returns to UK, she may not be able to get meaningful access to provide proper care and attention. Further, she has no intention to visit UK. The appellant has acquired the status of only a permanent resident of UK, as she was staying with Respondent 2 who is gainfully employed there. The appellant has alleged and has produced material in support of her case that during her stay with Respondent 2 in UK, she was subjected to physical violence and mental torture. She has also alleged that if she goes back to UK, she may suffer the same ignominy. Further, the proceeding in the UK Court instituted by the husband is a counterblast to the complaint filed by her in Delhi about the violence inflicted on her by the husband and his family members. Indeed, Respondent 2 has vehemently denied and rebutted these allegations. It is not necessary for the Supreme Court to adjudicate these disputed questions of facts. (Paras 50, 53 to 56, 67 and 68)

Sarita Sharma v. Sushil Sharma, (2000) 3 SCC 14 : 2000 SCC (Cri) 568, affirmed Taking the totality of the facts and circumstances into account, it would be in the interests of Nethra to remain in custody of her mother and it would cause harm to her if she returns to UK. That does not mean that the appellant must disregard the proceedings pending in the UK Court against her or for custody of Nethra, as the case may be. So long as that court has jurisdiction to adjudicate those matters, to do complete justice between the parties the Supreme Court may prefer to mould the reliefs to facilitate the appellant to participate in the proceedings before the UK Court which she can do through her solicitors to be appointed to espouse her cause before that court. The present appeal arises from a writ petition filed by Respondent 2 for issuance of a writ of habeas corpus and not to decide the issue of grant or non-grant of custody of the minor as such. In a substantive proceeding for custody of the minor before the court of competent jurisdiction including in India if permissible, all aspects will have to be considered on their own merit without being influenced by any observations in this judgment. (Para 57)

V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44; Shilpa Aggarwalv. Aviral Mittal, (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192; Arathi Bandi v. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475, explained and distinguished on facts

After the minor child (Nethra) attains the age of majority, she would be free to exercise her choice to go to UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. The appellant cannot disregard the proceedings instituted before the UK Court. She must participate in those proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice. For that, Respondent 2 will bear the costs of litigation and expenses to be incurred by the appellant. If the appellant is required to appear in the said proceeding in person and for which she is required to visit UK, Respondent 2 will bear the air fares or purchase the tickets for the travel of appellant and Nethra to UK and including for their return journey to India as may be required. In addition, Respondent 2 will make all arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice at reasonable costs. In the event, the appellant is required to appear in the proceedings before the High Court of Justice in UK, Respondent 2 shall not initiate any coercive process against her which may result in penal consequences for the appellant and if any such proceeding is already pending, he must take steps to first withdraw the same and/or undertake before the court concerned not to pursue it any further. That will be condition precedent to pave way for the appellant to appear before the court concerned in UK. (Paras 70 and 71)

The Judgment of the Court was delivered by

Hon'ble Mr. Justice A.M. Khanwilkar.— Leave granted. This appeal arises from the final judgment and order[37] (for short "the impugned judgment") passed by the High Court of Delhi dated 8-7-2016 in a writ petition for issuance of a writ of habeas corpus for production of the minor daughter Nethra, allegedly illegally removed by the appellant mother on 2-7-2015 from the custody of Respondent 2 father (writ petitioner) from the United Kingdom (UK), being Writ Petition (Criminal) No. 247 of 2016.

2. The High Court inter alia directed the mother to produce her daughter Nethra and to comply with the order dated 8-1-2016 passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom (UK), within 3 (three) weeks from the date of the impugned order or in the alternative to handover the custody of the daughter to the father within 3 (three) weeks from the date of the order.

3. The appellant has assailed the aforesaid order, inter alia, on the ground that in the present scenario, the paramount interests and welfare of the daughter Nethra, who is presently over seven years of age, is to remain in custody of her mother, especially because she suffers from a cardiac disorder and that she would face immense physical and psychological harm if repatriated to the custody of the father in England in the light of the alleged physical, verbal and mental abuse meted out by him.

4. The appellant has also contended that the UK Court does not have intimate contact with Nethra merely because she has acquired the citizenship of the UK in December 2012. The daughter has her deep roots in India as she was born here in Delhi and has retained her Indian citizenship.

37 Anand Raghavan v. State of Delhi, 2016 SCC OnLine Del 3804

She has been schooling here for the past 12 (twelve) months and has spent equal time in both the countries out of her first six years. Further, Nethra has her grandparents, family and relatives here in India, unlike in the UK where she lived in a nuclear family of the three (father, mother and herself) with no extended family and friends. Thus, it is the Indian Courts which have the intimate contact with the minor and including the jurisdiction to decide the matter in issue. Furthermore, Respondent 2 did not initiate any action for initial six months even after knowing that the appellant was unwilling to return along with her daughter and until he was slapped with a notice regarding complaint filed by the appellant before the Women Cell at Delhi in December 2015, relating to violence inflicted by him. As a counterblast to that notice Respondent 2 rushed to the UK Court and then filed writ petition in the Delhi High Court to pressurise the appellant to withdraw the allegations regarding violence inflicted by him.

5. To be able to fully appreciate and analyse the issues raised before this Court, it would be expedient to first set out the factual milieu from which the present case arises.

6. The appellant has a Masters' degree in communication and had worked in India prior to her marriage. Respondent 2 had gone to the United Kingdom as a student in 2003 and was working there since 2005. Admittedly, both the appellant and Respondent 2 were Indian citizens when they contracted marriage.

7. On 30-11 -2006, the appellant and Respondent 2 were married in Chennai according to Hindu rites and customs and was registered before the SDM Court, Chennai under the Hindu Marriage Act. Their traditional marriage ceremony was performed in Chennai on 22-1-2007. After marriage, the parties shifted to the UK in early 20Q7 and began living in Respondent 2's home in Watford (UK).

8. After marriage, disputes and differences arose between the parties. The appellant contends that these disputes were often violent and that she was physically, mentally and psychologically abused, a claim strenuously denied by Respondent 2. The appellant eventually got a job with an advertising agency in London in 2008, earning close to 25,000 pounds (GBP) per annum.

9. Having conceived in and around December 2008, the appellant left the UK for Delhi in June 2009 to be with her parents. On 7-8-2009, the appellant gave birth to a girl child—Nethra, in Delhi. Respondent 2 soon joined them in India. After the birth of their daughter, they went back to the UK in March 2010. Subsequently in August 2010, the appellant and her daughter returned to India after several incidents with Respondent 2.

10. After an exchange of legal correspondence between the parties, setting out the numerous differences which had arisen in the marriage, the appellant and her daughter eventually went back to London in December 2011, more than a year after they had come to India.

11. In January 2012, the daughter was admitted to a nursery school in the UK and attended the same till she was old enough to attend a primary school. In September 2012, an application was filed on behalf of the daughter for grant of UK citizenship, purportedly with the consent of both the appellant and Respondent 2. The appellant, however, denies that she gave consent for this application.

12. In December 2012, the daughter was granted citizenship of the UK. Soon thereafter in January 2013, Respondent 2 was also granted citizenship of the UK. Subsequently, Respondent 2

purchased another house in the UK, purportedly with the consent of the appellant, and the parties shifted there. The appellant had acquired a driving licence in the UK around the same time.

13. In September 2013, the daughter who was around 4 (four) years old at the time, was admitted to a primary school in the UK (and studied there till July 2015). Respondent 2 was paying the annual fees for the school amounting to approximately 10,000 GBP per annum.

14. Subsequently, in July 2014, the appellant returned to India owing to certain purported health problems, and also brought her daughter along with her. Both the appellant and her daughter went back to the UK around a month later i.e. on 6-9-2014, purportedly at the insistence of Respondent 2.

15. From late 2014 till early 2015, the daughter took ill and was eventually diagnosed with a cardiac disorder for which she had to undergo periodical medical reviews. According to the appellant, she was taking care of her daughter during this period while Respondent 2 did not even bother about the daughter's condition, a claim vehemently contested by Respondent 2.

16. On 2-7-2015, the appellant came back to India along with her daughter because of the alleged violent behaviour of Respondent 2. Respondent 2 asserts that soon after the appellant left for India with their daughter, she sent an email to the school in which the daughter was enrolled, giving the reason for her departure as "family medical reasons". The appellant then allegedly sent further emails to the school, first informing it that her daughter would remain in India for an extended duration and finally, informing it that her daughter would not be coming back to the UK due to her own well-being and safety.

17. On 16-12-2015, the appellant filed a complaint with the Crime Against Women Cell (CAWC), New Delhi which then issued notice to Respondent 2 and his parents, asking them to appear before it. On the date of hearing, neither Respondent 2 nor his parents appeared before the CAWC. As a counterblast, Respondent 2 filed a custody/wardship petition on 8-1-2016 before the High Court of Justice, Family Division, UK, seeking the return of his daughter to the jurisdiction of the UK Court. On this petition, the High Court of Justice passed an ex parte order inter alia directing the appellant to return the daughter to the UK and to attend the hearing at the Royal Courts of Justice.

18. Then, on 23-1-2016, Respondent 2 filed a habeas corpus writ petition before the High Court of Delhi, seeking to have his daughter produced before the Court. The High Court passed the impugned judgment dated 8-7-2016[1], inter alia, directing the appellant to produce her daughter and comply with the orders passed by the UK Court or handover her daughter to Respondent 2 within 3 (three) weeks from the date of the order.

19. The High Court, while ordering that the appellant mother should return to the UK with the child and produce her before the UK Court, set out and examined the factual aspects of the case. The High Court held that the child, having lived in the UK since the time of her birth in 2009, had developed roots there. Further, the child was a permanent citizen of the UK and held a British passport. The High Court also examined the wardship order passed ex parte by the High Court of Justice, Family Division, London on 8-1-2016. In the said order, the UK Court, inter alia, recorded that the child had been wrongfully removed from England in July 2015 and wrongly retained in India since then. The UK Court also recorded the father's willingness to bear the

expenses for the transport and stay of the mother and the child to the UK. The UK Court held that it had the jurisdiction to hear the matter and directed that the child would become a ward of the court during her minority or until further orders and that the mother would have to return the child to England by 22-1-2016.

20. The High Court opined that in the light of the order passed by the UK Court, the mother would not face any financial hardship and further, the order of the UK Court had attained finality due to lapse of time. The High Court then examined the law as propounded in several judgments, including Arathi Bandi v. Bandi Jagadrakshaka Rao[38], Surya Vadanan v. State of T.N.[39], Surinder Kaur Sandhu v. Harbax Singh Sandhu[40], Elizabeth Dinshaw v. ArvandM. Dinshaw[41], Marggarate Maria Pulparampil Nee Feldman v. Chacko Pulparampil[42], Kuldeep Sidhu v. Chanan Singh[43], H. (Infants), In res[44] sa ARuchi Majoo v. Sanjeev Majoo[45]. The High Court held that since the mother had not sought custody of the child by approaching any competent Indian Court prior to the passing of the order by the UK Court, therefore, the first, effective order/ direction had been passed by the UK/foreign court and, applying the principle expounded in Surya Vadanan[3] of comity of courts, the balance of favour would he with the UK Court. Since the child had spent most of her life in the UK and studied there, it would be in the best interests of the child that she be returned to the UK.

21. After analysing the principles deduced from the aforesaid judgments, the High Court was of the opinion that:

21.1. The foreign court having the most intimate contact with the child would be better placed to appreciate the social and cultural milieu in which the child had been brought up;

21.2. The principle of comity of courts should not be discarded except for special and compelling reasons. Especially when interim or interlocutory orders have been passed by foreign courts;

21.3. If a foreign court has jurisdiction to hear the matter, then an interim/ interlocutory order passed by such court should be given due weightage and respect. If such jurisdiction is not in doubt, then the "first strike" principle i.e. a substantive order passed by a foreign court prior to a substantive order passed by another foreign or domestic court, becomes applicable. Due respect and weight ought to be given to the earlier substantive order as compared to the latter order;

21.4. A foreign court passing an interim/interlocutory order can make prima facie adjudications, similar to a domestic court;

21.5. Merely because a parent has violated an order of a foreign court does not mean that the parent should be penalised for the same. While the conduct of the parent may be taken into account while passing the final order, the said conduct should not have a penalising result;

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38 (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475
39 (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94
40 (1984) 3 SCC 698 : 1984 SCC (Cri) 464
41 (1987) 1 SCC 42 :1987 SCC (Cri) 13
42 1969 SCC Online Ker 86 : AIR 1970 Ker 1
43 1988 SCC Online P&H 98 : AIR 1989 P&H 103
44 (1966) 1 WLR 381 :1965 H. No. 2428 : (1966) 1 All ER 886 (CA)
45 (2011) 6 SCC 479 : (2011) 3 SCC (Civ) 396 : (2011) 2 SCC (Cri) 1033 : AIR 2011 SC 1952

21.6. A court may either hold an elaborate inquiry to decide whether a child should be repatriated to a foreign country or a summary inquiry without going into the merits of the dispute, relating to the best interests and welfare of the child. If, however, there exists a pre-existing order of a foreign court of competent jurisdiction, then a domestic court must have special reasons to hold an elaborate inquiry. It must consider various factors such as the nature of the interim order passed by the foreign court, the likelihood of harm caused to the child, if any, when repatriated, the alacrity with which the parent moves the foreign court, etc.

22. The High Court essentially applied the exposition in Surya Vadanan? and held that there was no special or compelling reason to ignore the interim order passed by the UK Court and that the child was accustomed to and well adapted to the culture in the UK. Further, the High Court opined that there was no force in the mother's allegation that she was a victim of domestic abuse since she had not made a single complaint to the authorities while she was staying with Respondent 2 in the UK. In addition, there was no documentary evidence to support such a claim either. Finally, the High Court rejected the contention, that the child ought to be medically treated only in Delhi for her heart condition and not in the UK, as baseless.

23. Advocate Malavika Rajkotia, learned counsel for the appellant, first submits that the High Court has given undue emphasis to the principle of comity of courts in complete disregard to the paramount interests and welfare of the child. She submits that the welfare of the child is of paramount consideration and that such consideration ought to override the need to enforce the principle of comity of courts. There is an obvious need to protect the interests of the child and the mother, especially in light of the fact that Respondent 2 had been physically and verbally abusive to the appellant in the past and even put the child at risk with his behaviour. She submits that while India is a signatory to the United Nations Child Rights Convention (UNCRC), it is not a signatory to the Hague Convention. The UNCRC mandates that in all actions concerning children, the best interests of the child shall be of primary concern and the child shall be provided the opportunity to be heard. The Hague Convention is intended to prevent parents from abducting children across borders and is governed by the principle of comity of courts. Upholding the principle of comity of courts while disregarding the welfare of the child would thus go against the public policy in India and result in great harm being caused to the child and the appellant.

24. Ms Rajkotia submits that parens patriae jurisdiction of the court within whose jurisdiction the child is located as also the welfare of the child in question must be given greater weightage as opposed to a mechanical interpretation of the principle of comity of courts. By giving effect to the comity of courts, the High Court has eroded its own parens patriae jurisdiction and also ignored the welfare of the child who is located within its jurisdiction. In fact, the evolving standard, at least as far as the USA and the UK Courts are concerned, is to give greater importance to the welfare of the child as opposed to giving primacy to the principle of comity of courts. She has relied upon a judgment of the United States Supreme Court in Lozano v. Montoya Alvarez[46] wherein the Court, inter alia, stated that while the Hague Convention was intended to discourage child abduction, it was not supposed to do so at the cost of the child's interest in choosing to remain in the jurisdiction of the country or in settling the matter.

46 2014 SCC Online US SC 62 :134 S Ct 1224 : 572 US _ (2014)

25. Ms Rajkotia then submits that the High Court has failed to follow the established judicial trail of opinion as set out in several judgments of this Court while deciding custody matters. She submits that this Court has expounded that the welfare of the child is of paramount consideration and that the Court must rest its decision based on the best interests of the child. Even in instances where a mother has submitted to the jurisdiction of a foreign court but has subsequently fled that country with her child after an order of the foreign court, this Court has protected the welfare of the child. In the present case, the appellant left the UK prior to any proceedings being initiated against her, let alone any judicial order being passed. Ms Rajkotia has relied upon the following judgments to buttress her argument: Surinder Kaur Sandhu4, Elizabeth Dinshaw5, Sarita Sharma v. Sushil Sharma[47] and V. Ravi Chandran (2)\. Union of India[48].

26. Ms Rajkotia further submits that in two cases viz. Shilpa Aggarwal v. Aviral Mittal[49] and most recently in Surya Vadanan3, this Court has deviated from the established principle of putting the welfare of the child above all other considerations. In both these cases, the Court ordered that the child and mother return to the jurisdiction of the foreign court, despite the fact that the two had left the foreign jurisdiction before the court had passed any order. She has taken exception to the reasoning given in these two judgments on the ground that the decisions overlook the parens patriae jurisdiction of the Court as also misinterpreted the concept of "intimate contact" with the child. The "intimate contact" principle only applies in an instance where the child has been taken to a country with an alien language, social customs, etc. It cannot be applicable where the child returns to a country where he/she has been born and brought up in, like in the present case. Further, the judgment in Surya Vadanan3 has the chilling effect of giving dominance to the principle of comity of courts over the welfare of the child. The judgment, in effect, rejects the perspective of the child and may encourage multiplicity of proceedings. This, ultimately, leads to a mechanical application of the principle of comity of courts. This is in direct conflict with the binding decision in V. Ravi Chandran (2)[12] where a three-Judge Bench categorically held that under no circumstances can the principle of welfare of the child be eroded and that a child can seek refuge under the parens patriae jurisdiction of the Court.

27. Ms Rajkotia then submits that the child has been born and brought up in India. While the child now has British citizenship, she still retains her Indian citizenship. The child was forced to return with the mother under compelling situation emanating from domestic violence inflicted by the father. The appellant even informed Respondent 2 that she had no desire to return to the UK, to which there was no reply.

28. Ms Rajkotia submits that the legal action taken by Respondent 2 was nothing but a counterblast to the appellant's allegations of abuse and violence levelled against him. This can be discerned from the fact that Respondent 2 initiated action before the UK Court 6 (six) months after the appellant had left the UK and only after he learned that she had filed a complaint with the CAWC in December 2015. The Court also needs to consider that the order of the UK Court was passed ex parte without giving the appellant an opportunity to present her case. The intention of Respondent 2 can be ascertained by the fact that he filed a habeas corpus petition before the High Court, which is meant for urgent and immediate relief whereas the appellant and the child were staying in India for more than 6 months. Clearly, there was no immediate or urgent

47 (2000) 3 SCC 14 : 2000 SCC (Cri) 568
48 (2010) 1 SCC 174: (2010) 1 SCC (Civ) 44
49 (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192

need necessitating the production of the child and the petition was filed as an afterthought and litigation stratagem. The High Court should have been loath to countenance such stratagem adopted by Respondent 2, which is bordering on abuse of the process of court.

29. Ms Rajkotia finally submits that the High Court has failed to consider certain factual circumstances and has committed manifest error in that regard.

In that, Respondent 2 was offering the appellant a paltry monthly maintenance of just 1000 GBP whereas he himself was earning 10,000 GBP per month. Even after making such offer, Respondent 2 has not paid for the welfare or education of the child in India. Further, the High Court has not considered the serious health issues being faced by the child while ordering her to go back to the UK. Ms Rajkotia submits that in India, the child has access to private, specialist healthcare whereas in the UK, the child would be constrained by the National Health Service (NHS) which is the publicly funded national healthcare system for England. Further, the High Court has relied on incorrect facts while passing the impugned judgment1.

30. In addition to the aforementioned cases, Ms Rajkotia has also submitted a compendium of judgments titled "List of judgments filed on behalf of appellant". The judgments referred to therein have been considered by us.

31. Per contra, Advocate Prabhjit Jauhar appearing for Respondent 2 first submits that the child was a British citizen and had been brought up in the UK. The child had been residing in the UK and the appellant was also a permanent resident of the UK. Respondent 2 has also acquired citizenship of the UK. Both the appellant and Respondent 2 had every intention to permanently settle in the UK along with their child. The appellant had even signed the application/ citizenship form of the child for British citizenship. Thus, the appellant's submission before the High Court that she had not given permission to apply for their child's British citizenship is patently false. In the emails exchanged with the child's school, the appellant mentioned that they would be returning to the UK. It is only much later that Respondent 2 was made aware by the school that the appellant would not be returning to the UK. The High Court even recorded that the parties had every intention of making the UK their home and that the child had developed roots in the UK. Hence, the UK Courts had the closest concern and intimate contact with the child as regards welfare and custody and would have jurisdiction in the matter.

32. Further, Mr Jauhar submits that the High Court has duly considered the factum of welfare and interests of the child while passing the impugned judgment. While citing the judgments in Surinder Kaur Sandhu4 and Surya Vadanan5, the High Court noted that the UK Court would have the most intimate contact with and closest concern for the child. The child had clearly adapted to the social and cultural milieu of the UK and it was in the best interests of the child that she return to the UK. There was neither any material to suggest that repatriation of the child would result in psychological, physical or cultural harm nor anything to indicate that the UK Court was incompetent to take a decision in the interests and welfare of the child. There was no compelling reason for the High Court to ignore the principle of comity of courts. Further,

33. Mr Jauhar then submits that Respondent 2's bona fides can be gleaned from the fact that the High Court directed Respondent 2 to honour his commitment of paying for accommodation near the child's school as well as boarding and travelling expenses of the appellant and the child. Respondent 2 made statements before the UK Court that he would vacate his family home for

use of the appellant's family, pay for the child's school expenses and pay 1000 GBP per month for incidental expenses. In fact, Respondent 2 even made a statement before the High Court that he would not pursue any criminal proceedings against the appellant for kidnapping the child and only wished the family to be reunited in the UK so that the child could continue with her education. In addition to the aforesaid payments, Respondent 2 was even ready to provide a monthly payment of 1000 GBP to the appellant and is now willing to fund the cost of litigation borne by the appellant for custody of the child in the UK.

34. Mr Jauhar then submits that only the UK Court would have jurisdiction with regard to the alleged acts of domestic violence levelled against Respondent 2 as the acts complained against allegedly occurred while the parties were staying in the UK.

35. Mr Jauhar submits that there has been no delay on the part of Respondent 2 in filing the writ petition before the High Court of Delhi. Respondent 2 became aware that the appellant was not inclined to bring the child back to the UK only on 23-11-2015 and thereafter came to India in December 2015. He then moved the UK Court on 8-1-2016 and filed the writ petition before the High Court of Delhi on 23-1-2016. Thus, it can be seen that Respondent 2 did not delay filing of proceedings.

36. Mr Jauhar finally submits that legal notices were exchanged between the parties from 24-12-2010 till 7-6-2011, after which the appellant and the daughter came back to the UK on 11-12-2011 and the parties stayed together till 2-7-2015. Thus, on applying the principle of condonation all the allegations made in the aforesaid legal notices stood condoned and the fact that these notices were exchanged in 2010-2011 are of no relevance and do not take away the jurisdiction of the foreign court.

37. In support of his arguments, Mr Jauhar has cited several cases which have been placed before this Court in the form of a "List of judgments on habeas corpus". The same have been taken on record and duly considered.

38. We have cogitated over the submissions made by the counsel for both the sides and also the judicial precedents pressed into service by them. The principal argument of the respondent husband revolves around the necessity to comply with the direction issued by the foreign court against the appellant wife to produce their daughter before the UK Court where the issue regarding wardship is pending for consideration and which Court alone can adjudicate that issue. The argument proceeds that the principle of comity of courts must be respected, as rightly applied by the High Court in the present case.

39. We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court. We may usefully refer to the decision in Dhanwanti Joshi v. Madhav Unde[50]. In paras 28 to 30,32 and 33 of the reported decision, the Court observed thus: (SCC pp. 124-27)

> *"28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee v. McKee[51]. In that case, the parties, who were American citizens, were*

50 (1998)1 SCC 112
51 1951 AC 352 (PC)

married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941,a decree of divorce waspassedinUSA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign court in US would yield to the welfare of the child. "Comity of courts demanded not its enforcement, but its grave consideration." This case arising from Canada which lays down the law for Canada and UK has been consistently followed in latter cases. This view was reiterated by the House of Lords in /. v. C.[52] This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis v. Khamis[53].)

29. *However, there is an apparent contradiction between the above view and the one expressed in H. (Infants), In res8 and in E. (An Infant)54, to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (Minors) (Wardship : Jurisdiction)[55] and in R. (Minors) (Wardship : Jurisdiction)[56]. It was held by the Court of Appeal in L., In re[19] that the view in McKee v. McKee[15] is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry, or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The * summary jurisdiction* to return the child is invoked, for example,.if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a*

52 1970 AC 668 : (1969) 2 WLR 540 (HL)
53 (1978) 4 Fam LR 410 (Full Court, Australia)
54 E. (An Infant), In re, 1967 Ch 761 : (1967) 2 WLR 1370 (CA)
55 L (Minors) (Wardship : Jurisdiction), In re, (1974) 1 WLR 250 (CA)
56 R. (Minors) (Wardship : Jurisdiction), In re, (1981) 2 Fam LR 416 (CA) 15 1951 AC 352 (PC)

*foreign system of. education —for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an eatly decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an *elaborate inquiry* on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79; Bromley, Family Law, 7th Edn., 1987.) In R. (Minors) (Wardship : Jurisdiction)20, it has* been firmly held that the concept of forum convenience has no place in wardship jurisdiction.

30. *We may here state that this Court in Elizabeth Dinshaw v. Arvind M. Dinshaw5, while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts—which were independently considered—it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (Infants), In re* which case, as pointed out by us above has been explained in L., In re19 as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee15 and J. v. C.16 and the distinction between summary and elaborate inquiries as stated in L (Minors), In re19, are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 —even assuming that the earlier orders passed in India do not operate as constructive res judicata.*

32. *In this connection, it is necessary to refer to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the Convention prohibits the court from going into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused if it would expose the child to*

physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

33. So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee[15] unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in L, In re19. As recently as 1996-1997, it has been held in P. (A Minor) (Child Abduction: Non- Convention Country), In re[57] by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence—which was not a party to the Hague Convention, 1980—the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A. (A Minor) (Abduction: Non-Convention Country), In re[58] [by Ward, LJ. (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA." (emphasis supplied)

40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/ her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre¬existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied

57 1947 Fam 45 : (1997) 2 WLR 223 (CA)
58 The Times, 3-7-1997 (CA)

that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition.

41. Notably, the aforementioned exposition has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2)12 as can be discerned from para 27 of the reported decision. In that case, after extracting paras 28 to 30 of the decision in Dhanwanti Joshi case14, the three-Judge Bench observed thus: [V. Ravi Chandran (2) case12, SCC p. 194]

> *"27. ... However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the rders of US courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, the matter is-to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor." (emphasis supplied)*
>
> *Again in paras 29 and 30, the three-Judge Bench observed thus: (SCC pp. 195-96)*
>
> *"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.*
>
> *30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in McKee v. McKee[15] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L. (Minors), In re19 and the said view has been approved by this Court in Dhanwanti Joshi14. Similar view taken by the*

Court of Appeal in H. (Infants), In re has been approved by this Court in Elizabeth Dinshaw*[5]." *(emphasis supplied)*

42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State.

43. The respondent husband has placed emphasis on four decisions of this Court in V. Ravi Chandran (2)[12], Shilpa Aggarwal[13], Arathi Bandi[2] and Surya Vadanan[3]. We shall deal with those decisions a little later.

44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling[59], has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana[60], has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth[5], it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction,

59 (1973) 2 SCC 674 :1973 SCC (Cri) 980
60 (2001) 5 SCC 247 : 2001 SCC (Cri) 841 -

as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun v. State (NCT of Delhi)[61] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

48. The next question to be considered by the High Court would be whether an order passed by the foreign court, directing the mother to produce the child before it, would render the custody of the minor unlawful? Indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se. As in the present case, the order passed by the High Court of Justice, Family Division, London on 8-1 -2016 for obtaining a wardship order, reads thus: (Anand Raghavan case1, SCC OnLine Del para 59)

> *"59 'Order made by His Honour Judge Richards sitting as a Deputy High Court Judge sitting at the Royal Courts of Justice, Strand, London WC2A 2LL in Chambers on 8-1-2016 IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF THE SENIOR COURTS ACT, 1981 The child is Nethra Anand (a girl, born 7-8-2009) AFTER HEARING Counsel Paul Hepher, on behalf of the applicant father. AFTER consideration of the documents lodged by the applicant. IMPORTANT WARNING TO NITHYA ANAND RAGHAVAN If you NITHYA ANAND RAGHAVAN disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.*

61 2004 SCC OnLine Del 699 : (2004) 113 DLT 823

If any other person who knows of this order and does anything which helps or permits you NITHYA ANAND RAGHAVAN to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

You have the following legal rights:

(a) to seek legal advice. This right does not entitle you to disobey any part of this order until you have sought legal advice;

(b) to require the applicant's solicitors, namely, Dawson Cornwell, 15 Red Lion Square, London WC1R 4QT, Tel. 020 7242 2556 to provide you with a copy of any application form(s), statement(s), note of the hearing;

(c) to apply, whether by counsel or solicitor or in person, to Judge of the Family Court assigned to hearing urgent applications at the Royal Courts of Justice, Strand, London, if practicable after giving notice to the applicant's solicitors and to the court, for an order discharging or varying any part of this order. This right does not entitle you to disobey any part of this order until your application has been heard;

d) if you do not speak or understand English adequately, to have an interpreter present in court at public expense in order to assist you at the hearing of any application relating to this order.

The parties

1. The applicant is ANAND RAGHAVAN represented by Dawson Cornwell, Solicitor. The respondent is NITHYA ANAND RAGHAVAN.

Recitals

2. This order was made at a hearing without notice to the respondent. The reason why the order was made without notice to the respondent is because she left England and Wales on or about 2-7-2015 and notice may lead her to take steps to defeat the purpose of the application and fail to return the child.

3. The Judge read the following documents:

(a) Position statement,

(b) C67 application and CIA form,

(c) Statement of Anand Raghavan with exhibits dated 8-1-2016.

4. The court was satisfied on a provisional basis of the evidence filed that

(a) NETHRA ANAND (a girl born on 7-8-2009) was on 2-7-2015 habitually resident in the jurisdiction of England and Wales.

(b) NETHRA ANAND (a girl born on 7-8-2009) was wrongfully removed from England on 2-7-2015 and been wrongfully retained in India since.

(c) The courts of England and Wales have jurisdiction in matters of parental responsibility over the child pursuant to Articles 8 and 10 of BUR.

5. *The father has agreed to pay for the cost of the flights for the mother and child in returning from India to England. He will either purchase the tickets for the mother and child himself, or put her in funds, or invite her to purchase the tickets on his credit card, as she may wish, in order for her to purchase the tickets herself.*

Undertakings to the court by the solicitor for the applicant

6. *The solicitors for the applicant undertake:*

   (a) to issue these proceedings forthwith and in any event by no later than 4 p.m. 11-1-2016;

   (b) To pay the ex parte application fee forthwith and in any event by no later than 4 p.m. 11-1-2016;

AND NOW THEREFORE THIS HONOURABLE COURT RESPECTFULLY REQUESTS:

7. *Any person not within the jurisdiction of this Court who is in a position to do so to cooperate in assisting and securing the immediate return to England and Wales of the ward NETHRA ANAND (a girl born on 7-8-2009) IT IS ORDERED THAT:*

8. *NETHRA ANAND (a girl born on 7-8-2009) is and shall remain a ward of this Court during the minority or until further order.*

9. *The respondent mother shall return or cause the return of NETHRA ANAND (a girl born on 7-8-2009) forthwith to England and Wales, and in any event no later than 23.59 on 22-1-2016.*

10. *Every person within the jurisdiction of this Honourable Court who is in a position to do so shall cooperate in assisting and securing the immediate return to England and Wales of NETHRA ANAND (a girl born on 7-8-2009) a ward of this Court.*

11. *The applicant's solicitor shall fax copies of this order to the Office of the Head of International, Family Justice at the Royal Courts of Justice, the Strand, London WC2A 2LL (DX4550 Strand RCJ: fax 02079476408); and (if appropriate) to the Head of the Consular Division, Foreign and Commonwealth Office Spring Gardens London SW1A 2PA, Tel: 02070080212, Fax 02070080152.*

12. *The matter shall be listed for directions at 10:30 a.m. on 29-1-2016 at the Royal Courts of Justice, the Strand, London WC2A 2LL, with a time estimate of 30 minutes, when the Court shall consider what further orders shall be made. The Court may consider making declarations in the terms of Para 4 above.*

13. *The respondent mother shall attend at the hearing listed pursuant to the preceding paragraph, together with solicitors or counsel if so instructed.*

She shall file and serve by 4 p.m. 27-1-2016 a short statement responding to the application.

14. *This order may be served on the respondent, outside of the jurisdiction of England and Wales as may be required, by way of fax, email or personally in order for the Court to deem that it constitutes good service.*

15. *Costs reserved.*

Dated 8-1-2016."

49. On a bare perusal of this order, it is noticed that it is an ex parte order passed against the mother after recording prima facie satisfaction that the minor Nethra Anand (a girl born on 7-8-2009) was as on 2-7-2015, habitually resident in the jurisdiction of England and Wales and was wrongfully removed from England on 2-7-2015 and has been wrongfully retained in India since then. Further, the Courts of England and Wales have jurisdiction in the matters of parental responsibility over the child pursuant to Articles 8 and 10 of BUR. For which reason, it has been ordered that the minor shall remain a ward of that Court during her minority or until further order; and the mother (appellant herein) shall return or cause the return of the minor forthwith to England and Wales in any event not later than 22-1-2016. Indeed, this order has not been challenged by the appellant so far nor has the appellant applied for modification thereof before the court concerned (foreign court). Even on a fair reading of this order, it is not possible to hold that the custody of the minor with her mother has been declared to be unlawful. At best, the appellant may have violated the direction to return the minor to England, who has been ordered to be a ward of the court during her minority and further order. No finding has been rendered that till the minor returns to England, the custody of the minor with the mother has become or will be treated as unlawful including for the purposes of considering a petition for issuance of writ of habeas corpus. We may not be understood to have said that such a finding is permissible in law. We hold that the custody of the minor with the appellant, being her biological mother, will have to be presumed to be lawful.

50. The High Court in such a situation may then examine whether the return of the minor to his/her native state would be in the interests of the minor or would be harmful. While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign court directing return of the child within the stipulated time, since the order of the foreign court must yield to the welfare of the child. For answering this issue, there can be no straitjacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly, the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration.

51. For considering the factum of interests of the child, the court must take into account all the attending circumstances and totality of the situation. That will have to be decided on case to case basis. In the present case, we find that the father as well as mother of the child are of Indian origin. They were married in Chennai in India according to Hindu rites and customs. The father, an Indian citizen, had gone to the UK as a student in 2003 and was working there since 2005. After the marriage, the couple shifted to the UK in early 2007 and stayed in Watford. The mother did get an employment in London in 2008, but had to come to her parents' house in Delhi in June 2009, where she gave birth to Nethra. Thus, Nethra is an Indian citizen by birth. She has not given up her Indian citizenship. Indeed, the mother, along with Nethra, returned to the UK in

March 2010. But from August 2010 till December 2011, because of matrimonial issues between the appellant and Respondent 2, the appellant and her daughter remained in India. It is only after the intervention of and mediation by the family members, the appellant and her daughter Nethra went back to England in December 2011, more than a year after they had come to India. After returning to the UK, Nethra was admitted to a nursery school in January 2012.

52. An application for grant of UK citizenship was made on behalf of Nethra in September 2012 which was subsequently granted in December 2012. The father (Respondent 2) then acquired the citizenship of the UK in January 2013. After grant of citizenship of the UK, Nethra was admitted to a primary school in the UK in September 2013 and studied there only till July 2015. Since Nethra had acquired British citizenship, the UK Court could exercise jurisdiction in respect of her custody issues.

53. Significantly, till Nethra returned to India along with her mother on 2-7-2015, no proceeding of any nature came to be filed in the UK Court, either in relation to the matrimonial dispute between the appellant and Respondent 2 or for the custody of Nethra. Further, Nethra is staying in India along with the appellant, her grandparents and other family members and relatives, unlike in the UK where she lived in a nuclear family of the three with no extended family. She has been schooling here for the past over one year and has spent equal time in both the countries out of the first six years. She would be more comfortable and feel secured to live with her mother here, who can provide her love, understanding, care and guidance for her complete development of character, personality and talents. Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother [see Sarita Sharma11, para 6]. No such material or evidence is forthcoming in the present case except the fact that the appellant (mother) has violated the order of the UK Court directing her to return the child to the UK before the stipulated date.

54. Admittedly, when Nethra was in the UK, no restraint order was issued by any court or authority in the UK in that behalf. She had travelled along with her mother from the UK to India on official documents. It is a different matter that Respondent 2 alleges that he was not informed before Nethra was removed from the UK and brought to India by his wife (appellant herein).

55. It is common ground that Nethra is suffering from cardiac disorder and needs periodical medical reviews and proper care and attention. That can be given only by her mother. Respondent 2 (father) is employed and may not be in a position to give complete attention to his daughter. There is force in the stand taken by the appellant that if Nethra returns to the UK, she may not be able to get meaningful access to provide proper care and attention. Further, she has no intention to visit the UK.

56. Admittedly, the appellant has acquired the status of only a permanent resident of the UK, as she was staying with Respondent 2 who is gainfully employed there. The appellant has alleged and has produced material in support of her case that during her stay with Respondent 2 in the UK, she was subjected to physical violence and mental torture. She has also alleged that if she goes back to the UK, she may suffer the same ignominy. Further, the proceeding in the UK Court instituted by the husband is a counterblast to the complaint filed by her in Delhi about

the violence inflicted on her by the husband and bis family members. Indeed, Respondent 2 has vehemently denied and rebutted these allegations. It is not necessary for us to adjudicate these disputed questions of facts.

57. Suffice it to observe that taking the totality of the facts and circumstances into account, it would be in the interests of Nethra to remain in custody of her mother and it would cause harm to her if she returns to the UK. That does not mean that the appellant must disregard the proceedings pending in the UK Court against her or for custody of Nethra, as the case may be. So long as that court has jurisdiction to adjudicate those matters, to do complete justice between the parties we may prefer to mould the reliefs to facilitate the appellant to participate in the proceedings before the UK Court which she can do through her solicitors to be appointed to espouse her cause before that court. In the concluding part of this judgment, we will indicate the modalities to enable the appellant to take recourse to such an option or any other remedy as may be permissible in law. We say so because the present appeal arises from a writ petition filed by Respondent 2 for issuance of a writ of habeas corpus and not to decide the issue of grant or non-grant of custody of the minor as such. In a substantive proceeding for custody of the minor before the court of competent jurisdiction including in India if permissible, all aspects will have to be considered on their own merit without being influenced by any observations in this judgment.

58. As aforesaid, Respondent 2 has heavily relied on four decisions of this Court. The case of V. Ravi Chandran (2)12 also arose from a writ of habeas corpus for production of minor son and not from the substantive proceedings for custody of the minor by the father. The minor was in custody of his mother. It was a case of custody of a "male" child born in the US and an American citizen by birth, who was around 8 years of age when he was removed by the mother from the United States of America (USA) in spite of a consent order governing the issue of custody and guardianship of the minor passed by the competent court, namely, the New York State Supreme Court. The minor was given in joint custody to the parents and a restraint order was operating against the mother when the child was removed from the USA surreptitiously and brought to India. Before being removed from the USA, the minor had spent his initial years there. These factors weighed against the mother, as can be discerned from the discussion in paras 32 to 38 of the reported judgment. This Court, therefore, chose to exercise summary jurisdiction in the interests of the child. The Court directed the mother to return the child "Aditiya" on her own to the USA within the stipulated time. In the present case, the minor is a "girl" child who was born in India and is a citizen of India by birth. She has not given up her citizenship of India. It is a different matter that she later acquired citizenship of the UK. We have already indicated the reasons in the preceding paragraph, which would distinguish the facts from the case relied upon by Respondent 2 and under consideration.

59. As regards the case of Shilpa Aggarwal13, the minor (girl child) was born in England having British citizenship, who was only three-and-a-half years of age. The parents had also acquired the status of permanent residents of the UK. The UK Court had not passed any order to separate the child from the mother until the final decision was taken with regard to the custody of the child, as in this case. This Court recorded its satisfaction on the basis of the facts and circumstances of the case before it that in the interests of the minor child, it would be proper to return the child to the UK and then applied the doctrine of comity of courts. Further, the Court was of the opinion that the issue regarding custody of the child should be decided by the foreign court

from whose jurisdiction the child was removed and brought to India. This decision has been rendered after a summary inquiry on the facts of that case. It will be of no avail to Respondent 2. It does not whittle down the principle expounded in Dhanwanti Joshi14, the duty of the court to consider the overarching welfare of the child. Be it noted, the predominant criterion of the best interests and welfare of the minor outweighs or offsets the principle of comity of courts. In the present case, the minor is born in India and is an Indian citizen by birth. When she was removed from the UK, no doubt she had, by then, acquired UK citizenship, yet for the reasons indicated hitherto dissuade us to direct return of the child to the country from where she was removed.

60. In Arathi Bandi2 also, the male child was born in the USA and had acquired citizenship by birth there. The child was removed from the USA by the mother in spite of a restraint order and a red corner notice operating against her issued by the court of competent jurisdiction in the USA. The Court, therefore, held that the matter on hand was squarely covered by facts as in V. Ravi Chandran (2)12. More importantly, as noted in para 42 of the reported decision the mother (the wife of the writ petitioner) had expressed her intention to return to the USA and live with the husband. However, the husband was not prepared to cohabit with her. In the present case, the situation is distinguishable as alluded to earlier.

61. In Surya Vadanan3, the minor girls were again British citizens by birth. The elder daughter was 10 years of age and the younger daughter was around 6 years of age. They lived in the UK throughout their lives. In a petition for issuance of a writ of habeas corpus, the Court directed return of the girls to the UK also because of the order passed by the court of competent jurisdiction in the UK to produce the girls before that Court. The husband had succeeded in getting that order even before any formal order could be passed on the petition filed by the wife in Coimbatore Court seeking a divorce from the appellant husband. That order was followed by another order of the UK Court giving peremptory direction to the wife to produce the two daughters before the UK Court. A penal notice was also issued to the wife. The husband then invoked the jurisdiction of the Madras High Court for issuance of a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters of the couple and that they may be ordered to be produced in the Court and to pass appropriate direction thereafter. The said relief was granted by this Court. After the discussion of law in paras 46 to 56 of the reported decision, on the basis of precedents adverted to in the earlier part of the judgment, in para 56 the Court opined as under: (Surya case3, SCC p. 474)

> *"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:*
>
> *(a) The nature and effect of the interim or interlocutory order passed by the foreign court.*
>
> *(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.*
>
> *(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to*

the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.2 In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

62. As regards clauses (a) to (c) above, the same, in our view, with due respect, tend to drift away from the exposition in Dhanwanti Joshi case14, which has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2)12. In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign court on the issue of custody of the minor. That has been explicitly negated in Dhanwanti Joshi case14. For, whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign court can be reckoned only as one of the factor to be taken into consideration. We have elaborated on this aspect in the earlier part of this judgment.

63. As regards the fourth factor noted in clause (d) of para 56, Surya Vadanan case3, we respectfully disagree with the same. The first part gives weightage to the "first strike" principle. As noted earlier, it is not relevant as to which party first approached the court or so to say "first strike" referred to in para 52 of the judgment. Even the analogy given in para 54 regarding extrapolating that principle to the courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

64. Section 14 of the said Act plainly deals with that aspect. The same reads thus:

"14. Simultaneous proceedings in different courts.—(1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more courts than one, each of those courts shall, on being apprised of the proceedings in the other court or courts, stay the proceedings before itself.

(2) If the courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

(3) In any other case in which proceedings are stayed under sub-section (1), the courts shall report the case to, and be guided by such orders as they may receive from, their respective State Governments."

65. Similarly, the principle underlying Section 10 of the Code of Civil Procedure, 1908 can be invoked to govern that situation. The Explanation clarifies the position even better. The same reads thus:

"10. Stay of suit.—No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between

the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.—The pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action." (emphasis supplied)

66. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case14, in relation to non-Convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare.

67. The facts in ail the four cases primarily relied upon by Respondent 2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the courts in India are « denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case to case basis — be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment. J

68. In the present case, we are of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the minor (Nethra) to remain in custody of her mother (appellant) else she would be exposed to harm if separated from the mother. We have, therefore, no hesitation in overturning the conclusion reached by the High Court. Further, we find that the High Court was unjustly impressed by the principle of comity of courts and the obligation of the Indian courts to comply with a pre-existing order of the foreign court for return of the child and including the "first strike." principle referred to in Surya Vadanan case3.

69. We once again reiterate that the exposition in Dhanwanti Joshi14 is a good law and has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2)12. We approve the view taken in Dhanwanti Joshi14, inter alia, in para 33 that so far as non-Convention countries are concerned, the law is that the court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. The summary

jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests. and welfare of the child.

70. Needless to observe that after the minor child (Nethra) attains the age of majority, she would be free to exercise her choice to go to the UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. He can do so by giving notice of at least two weeks in advance intimating in writing to the appellant and if such request is received, the appellant must positively respond in writing to grant visitation rights to Respondent 2 Mr Anand Raghavan (father) for two hours per day twice a week at the mentioned venue in Delhi or as may be agreed by the appellant, where the appellant or her representatives are necessarily present at or near the venue. Respondent 2 shall not be entitled to, nor make any attempt to take the child (Nethra) out from the said venue. The appellant shall take all such steps to comply with the visitation rights of Respondent 2, in its letter and spirit. Besides, the appellant will permit Respondent 2 Mr Anand Raghavan to interact with Nethra on telephone/mobile or video conferencing, on school holidays between 5 p.m. to 7.30 p.m. 1ST.

71. As mentioned earlier, the appellant cannot disregard the proceedings instituted before the UK Court. She must participate in those proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice. For that, Respondent 2 Anand Raghavan will bear the costs of litigation and expenses to be incurred by the appellant. If the appellant is required to appear in the said proceeding in person and for which she is required to visit the UK, Respondent 2 Anand Raghavan will bear the air fares or purchase the tickets for the travel of appellant and Nethra to the UK and including for their return journey to India as may be required. In addition, Respondent 2 Anand Raghavan will make all arrangements for the comfortable stay of the appellant and her companions at an independent place of her choice at reasonable costs. In the event, the appellant is required to appear in the proceedings before the High Court of Justice in the UK, Respondent 2 shall not initiate any coercive process against her which may result in penal consequences for the appellant and if any such proceeding is already pending, he must take steps to first withdraw the same and/or undertake before the court concerned not to pursue it any further. That will be condition precedent to pave way for the appellant to appear before the court concerned in the UK.

72. Accordingly, this appeal is allowed in the above terms. The impugned judgment and order passed by the High Court of Delhi dated 8-7-2016 in Anand Raghavan v. State of Delhi1 is set aside. Resultantly, the writ petition for issuance of writ of habeas corpus filed by Respondent 2 stands dismissed subject however, to the arrangement indicated above in paras 70 and 71 respectively.

73. No order as to costs.

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SHEILA B. DAS VERSUS P.R. SUGASREE

Bench : Hon'ble Mr. Justice B.P. Singh & Hon'ble Mr. Justice Altamas Kabir

APPEAL (CIVIL) 6626 OF 2004

Petitioner: Sheila B. Das
Vs.
Respondent: P.r. Sugasree

DATE OF JUDGMENT: 17/02/2006

The appellant, who appeared in person, urged that both the Family Court and the High Court had erred in law in removing the minor child from the custody of the mother to the father's custody, having particular regard to the fact that the minor girl was still of tender age and had attained the age when a mother's care and counseling was paramount for the health and well-being of the minor girl child. The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period. Apart from the above, the appellant, who, as stated hereinbefore, is a doctor by profession, claimed to be in a better position to take care of the needs of the minor in comparison to the respondent who, it was alleged, had little time at his disposal to look after the needs of the minor child.

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities.

Ordered :

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.

2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the child with

her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.

JUDGMENT

Hon'ble Mr. Justice Altamas Kabir.—

The appellant, who is a paediatrician by profession, was married to the respondent, who is a lawyer by profession, on 29th March, 1989, at Thrissur in Kerala under the provisions of the Special Marriage Act. A girl child, Ritwika, was born of the said marriage on 20th June, 1993.

As will appear from the materials on record, the appellant, for whatever reason, left her matrimonial home at Thrissur on 26th February, 2000, alongwith the child and went to Calicut without informing the respondent.

Subsequently, on coming to learn that the appellant was staying at Calicut, the respondent moved an application in the High Court at Kerala for a writ in the nature of Habeas Corpus, which appears to have been disposed of on 24th March, 2000 upon an undertaking given by the appellant to bring the child to Thrissur.

On 24th March, 2000, the respondent, alleging that the minor child had been wrongfully removed from his custody by the appellant, filed an application before the Family Court at Thrissur under Sections 7 and 25 of the Guardians and Wards Act, 1890, and also Section 6 of the Hindu Minority and Guardianship Act, 1956, which came to be numbered as OP 193 of 2000 and OP 239 of 2000.

Before taking up the said two applications for disposal, the learned Judge of the Family Court at Thrissur took up the respondent's application for interim custody of the minor child and on 27th April, 2000 interviewed the minor child in order to elucidate her views with regard to the respondent's prayer for interim custody. No order was made at that time on the respondent's application for interim custody. On 20th March, 2001, the learned Judge of the Family Court at Thrissur took up the two applications filed by the respondent under Sections 7 and 25 of the Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act for final disposal. While disposing of the matter the learned Judge had occasion to interview the minor child once again before delivering judgment and ultimately by his order of even date the learned Judge of the Family Court at Thrissur allowed the applicati16ons filed by the respondent by passing the following order:-

> "*1. The respondent is directed to give custody of the child to the petitioner the father of the child, the natural guardian immediately after closing of the schools for summer vacation.*

2. *The father shall take steps to continue the study of the minor child in CSM Central School Edaserry and steps to restore all the facilities to the minor child to enjoy her extra curricular activities and studies also.*

3. *The respondent mother is at liberty to visit the child either at the home of the petitioner or at school at any time.*

4. *If the mother respondent shifts her residence to a place within 10 kms. radius of the school where the child is studying the child can reside with the mother for not less than three days in a week. The petitioner father shall not, object to taking of the child by the mother to her own house in such condition.*

5. *The father the petitioner shall meet all the expenses for the education, food and cloths etc. of the minor child and the mother of her own accord contribute to the same anything for the child and the father should not prohibit the mother from giving the child anything for her comfort and pleasant living.*

6. *If the mother the respondent fails to stay within 10 kms. radius of the CSM central School, Edasserry however she is entitled to get custody of the child for 2 days in any of the weekend in a month and 10 days during the Summer vacation and 2 days during the Onam hoilidays excluding the Thiruvonam day.*

7. *This arrangement for custody is made on the basis of the prime consideration for the welfare of the minor child and in case there is any change in the situation or circumstance affecting the welfare of the minor child, both of the parties are at liberty to approach this court for fresh directions on the basis of the changed circumstance.*

OP 239/2000 is partly allowed prohibiting the respondent husband by a permanent injunction from removing or taking forcefully the "B" schedule articles mentioned in the plant. The parties in both these cases are to suffer their costs."

Being dissatisfied with the order of the Family Court, the appellant herein filed an appeal in the High Court of Kerala, being M.F.A.No.365/01, wherein by an order dated 21st May, 2001, the order of the Family Court was stayed. The respondent thereupon filed an application before the High Court for review of the said order and in the pending proceedings, a direction was given by the High Court to the Family Court at Calicut to interview the minor child. The report of the Family Court was duly filed before the High Court on 5th July, 2001.

From the said report, a copy of which has been included in the paperbook, it is evident that the minor child preferred to stay with her father and ultimately by its order dated 25th July, 2001 the High Court vacated the stay granted by it on 21st May, 2001.

On the application of the appellant herein, one Dr. S.D. Singh, Psychiatrist, was also appointed by the High Court on 14th September, 2001, to interview the appellant and the respondent in order to make a psychological evaluation and to submit a report. On such report being filed, the High Court by its order dated 31st May, 2002, granted custody of the minor child to the respondent till the disposal of the appeal.

Soon thereafter, in June 2002, the respondent filed an application for divorce before the Family Court at Thrissur. While the same was pending, the appellant filed a Special Leave Petition being S.L.P.(

C)\005 C.C.No.6954/2002 against the order of the High Court granting custody of the minor child to the respondent till the disposal of the appeal. The said Special Leave Petition was dismissed on 9th September, 2002. The appeal filed by the appellant before the High Court against the order of the learned Judge of the Family Court allowing the respondent's application under Sections 7 and 25 of the Guardians and Wards Act, being M.F.A. No.365/01, was also dismissed on 16th June, 2003. Immediately, thereafter, on 28th June, 2003, the Family Court granted divorce to the parties. Being aggrieved by the dismissal of her appeal, being M.F.A.No.365/01, the appellant herein filed the instant Special Leave Petition, being SLP) No.18961/2003, which after admission was renumbered as Civil Appeal No.6626/2004. On 20th July, 2004, the appellant herein filed a petition in the pending Special Leave Petition for interim visitation rights in respect of her minor child for the months of August and September, 2004. After considering the submissions made by the appellant, who was appearing in person, and the learned counsel for the respondent, this Court passed the following order:-

"This petition has been filed by the mother of minor girl-Ritwika, aged about 12 years, challenging the impugned order of the High Court dated 16th June, 2003. By the impugned order the High Court confirmed the order of the Family Court holding that it is in the best interest of the child that she be in the custody of the father. The High Court, however, permitted the petitioner to visit the child at the house of the father once in a month, that is, first Sunday of every month and spend the whole day with the child there with a further stipulation that she will not be removed from the father's house. The petitioner and the respondent have not been living together since February, 2000. The divorce between them took place by order dated 26th June, 2003. On question of interim custody, in terms of the order dated 30th April, 2003, the Family Court Trichur, was directed to make an order regarding the visitation rights of the petitioner for the months of May, June and July, 2004 so that the petitioner may meet her daughter at the place of some neutral person and, if necessary, in the presence of a family counsellor or such other person deemed just, fit and proper by the Family Court. The Family Court was directed to fix any two days, in months of May, June and July of 2004, considering the convenience of the parties, when the petitioner may be in a position to spend entire day with her child. Pursuant to the above said order the Family Court had fixed two days in the months of May, June and July, 2004 so that the petitioner could meet her daughter on those days. The Family Court directed that the said meeting shall take place in the room of family counsellor in Court precincts. According to the petitioner the said arrangement was not satisfactory, so much so that ultimately she made a request to the Family Court that instead of meeting her daughter in the room of the family counsellor, the earlier arrangement of meeting her at father's house was may be restored. The Family Court, however, did not modify the order having regard to the orders passed by this Court on 30th April, 2004. It is, however, not necessary at this stage to delve any further on this aspect.

Ritwika is studying in 7th class in a school in Trichur. Having heard petitioner-in-person and learned counsel for the respondent and on perusal of record, we are of the view that without prejudice to parties' rights and contentions in Special Leave Petition, some interim order for visitation rights of the petitioner for the months of August and September, 2004 deserves to be passed. Accordingly, we direct as under:

(1) The petitioner can visit the house of the respondent at Trichur on every Sunday commencing from 1st August, 2004 and be with Ritwika from 10.00 a.m. to 5.00 p.m.

During the stay of the petitioner at the house of the respondent, only the widowed sister of the respondent can remain present. The respondent shall not remain present in the house during the said period. It would be open to the petitioner to take Ritwika for outing, subject to the condition that Ritwika readily agrees for it. We also hope that when at the house of the respondent, the petitioner would be properly looked after, insofar as, normal facilities and courtesies are concerned;

(2) We are informed that the school in which Ritwika is studying shall be closed for 7 days in the month of August, 2004 during Onam festival. It would be open to the petitioner to take the child for outing during those holidays for a period of three days. After the expiry of three days, it will be the responsibility of the petitioner to leave the child at the house of the respondent.

The arrangement about meeting on every Sunday would also continue in the month of September, 2004.

List the matter on 5th October, 2004"

The question relating to the appellant's visitation rights pending decision of the Special Leave Petition came up for consideration before this Court again on 5th October, 2004, when on a reference to its earlier order dated 20th July, 2004, this Court further directed that the appellant would be at liberty to move appropriate applications in M.F.A.No.365/01, which had been decided by the High Court on 16th June, 2003, and the High Court on hearing the parties or their counsel would pass such orders as it considered appropriate in respect of the interim custody of Ritwika during the Christmas Holidays. It was also clarified that till the matter was finally decided by this Court, it would be open to the appellant to make similar applications before the High Court which would have to be considered on its own merits, since it was felt that the High Court would be in a better position to consider the local conditions and pass interim orders including conditions, if any, required to be placed on the parties.

As mentioned hereinbefore, on leave being granted, the Special Leave Petition was renumbered as Civil Appeal No.6626/04, which has been taken up by us for final hearing and disposal.

The appellant, who appeared in person, urged that both the Family Court and the High Court had erred in law in removing the minor child from the custody of the mother to the father's custody, having particular regard to the fact that the minor girl was still of tender age and had attained the age when a mother's care and counseling was paramount for the health and well-being of the minor girl child. The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period.

Apart from the above, the appellant, who, as stated hereinbefore, is a doctor by profession, claimed to be in a better position to take care of the needs of the minor in comparison to the respondent who, it was alleged, had little time at his disposal to look after the needs of the minor child.

From the evidence adduced on behalf of the parties, the appellant tried to point out that from morning till late at night, the respondent was busy in court with his own work and activities which left the minor child completely alone and uncared for. According to the appellant, the respondent who had a farm house some distance away from Thrissur, spent his week- ends and even a major part of the week days in the said farm house. The appellant urged, that as a mother, she knew what was best for

the child and being a professional person herself she was in a position to provide the minor not only with all such comforts as were necessary for her proper and complete upbringing, but also with a good education and to create in her an interest in extracurricular activities such as music and dancing. The appellant strongly urged that the respondent had never had any concern for the minor child since her birth and till the time when the appellant left with her for Calicut. The appellant contended that for 7 years after the birth of the minor child, the appellant had single-handedly brought up the minor since the respondent was too preoccupied with other activities to even notice her.

According to the appellant, the minor child was extremely happy to be with her till the respondent began to claim custody of the minor and soon after obtaining such custody, he was able to influence the minor to such an extent that she even went to the extent of informing the learned Judge of the Family Court that she preferred to stay with her father.

On this aspect of the matter, the appellant urged that the minor had been exposed by the respondent to what she termed as "Parental Alienation Syndrome". She urged that such a phenomenon was noticeable in parents who had been separated and who are bent upon poisoning the mind of their minor children against the other party. According to the appellant, there could otherwise be no other explanation as to why even after being with the appellant for 7 years, the minor child had expressed a preference to be with her father after she was placed in his custody. The appellant laid stress on her submissions that not only till the age of 8 years, when custody of the minor child was given to him, but even thereafter the respondent had all along been an absentee father taking little or no interest in the affairs and upbringing of the minor child. According to the appellant, in view of the peculiar habits of the respondent, the minor child was left on her own much of the time, which was neither desirable nor healthy for a growing adolescent girl child.

Urging that she had the best interest of the minor child at heart, the appellant submitted that although under the provisions of Hindu Law by which the parties were governed, the father is accepted as the natural guardian of a minor, there were several instances where the courts had accepted the mother as the natural guardian of a minor in preference to the father even when he was available. Referring to Section 6 of the Hindu Minority and Guardianship Act, 1956, which provides that the natural guardian of a Hindu minor in the case of a boy or an unmarried girl is the father and after him the mother; provided that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother, the appellant submitted that the aforesaid provision had recognized the mother also as the natural guardian of a minor. It was urged that in various cases the Courts had considered the said provision and had opined that there could be cases where in spite of the father being available, the mother should be treated to be the natural guardian of a minor having regard to the incapacity of the father to act as the natural guardian of such minor.

In support of her aforesaid submission, the appellant referred to and relied on the decision of this Court in Hoshie Shavaksha Dolikuka vs. Thirty Hoshie Dolikuka, reported in AIR 1984 SC 410, wherein having found the father of the minor to be disinterested in the child's welfare this Court held that the father was not entitled to the custody of the child.

The appellant also referred to and relied on a Division Bench decision of the Kerala High Court in the case of Kurian C. Jose vs. Meena Jose, reported in 1992 (1) KLT 818, wherein having regard to the fact that the father was living with a concubine who was none else than the youngest sister of the mother, it was held that the father was not entitled to act as the guardian of the minor. On a consideration of

the provisions of Section 17 (3) of the Guardians and Wards Act, 1890, it was also held that a minor's preference need not necessarily be decisive but is only one of the factors to be taken into consideration by the court while considering the question of custody.

Reference was also made to another decision of this Court in the case of Kumar V. Jahgirdar vs. Chethana Ramatheertha, (2004) 2 SCC 688, wherein in consideration of the interest of the minor child, the mother, who had re-married, was given custody of the female child who was on the advent of puberty, on the ground that at such an age a female child primarily requires a mother's care and attention. The Court was of the view that the absence of female company in the house of the father was a relevant factor in deciding the grant of custody of the minor female child. The appellant urged that the courts in the aforesaid cases had considered the welfare of the minor to be of paramount importance in deciding the question of grant of custody. The appellant urged that notwithstanding the fact that the minor child had expressed before the learned Judge of the Family Court that she preferred to be with the father, keeping in mind the fact that the welfare of the minor was of paramount importance, the court should seriously consider whether the minor child should be deprived of her mother's company during her period of adolescence when she requires her mother's counselling and guidance. The appellant submitted that while the respondent had indulged Ritwika so as to win over her affection, the appellant had tried to instill in her mind a sense of discipline which had obviously caused a certain amount of resentment in Ritwika. The appellant submitted that the court should look behind the curtain to see what was best for the minor girl child at this very crucial period of her growing up In support of her aforesaid submission, the appellant referred to and relied on a decision of the Bombay High Court in the case of Saraswatibai Shripad Ved vs. Shripad Vasanji Ved, AIR 1941 Bombay 103, wherein in a similar application under the Guardians and Wards Act, it was held that since the minor's interest is the paramount consideration, the mother was preferable to the father as a guardian. The appellant emphasized the observation made in the judgment that if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years notwithstanding the fact that the father remains as the natural guardian of the minor.

A similar view was expressed by this Court in the case of Rosy Jacob vs. Jacob A. Chakramakkal, AIR 1973 SC 2090, wherein in the facts and circumstance of the case, the custody of the daughter (even though she was more than 13 years of age) and that of the youngest minor son, was considered to be more beneficial with the wife rather than with the husband. The appellant submitted that during the child's growing years, she had from out of her own professional income, provided her with amenities which a growing child needs, including admission and tuition fees for the child's schooling in a good school and for extracurricular activities. The appellant submitted that she had made fixed deposits for the benefit of the minor and had even taken out life insurance policies where the minor child had been made the nominee. The appellant submitted that apart from the above, she had also made various financial investments for the benefit of the minor so that the minor child would not be wanting in anything if she was allowed to remain with the appellant. The appellant submitted that although she had been granted visitation rights by the different interim orders, since she was residing in Calicut and the respondent was residing in Thrissur, she was unable to remain in contact with her minor daughter on account of the distance between Calicut and Thrissur. In fact, the appellant complained of the fact that on several occasions when she had gone to meet her minor child at the residence of the respondent, she had not been allowed to meet the child or to spend sufficient time with her. The

appellant submitted that the interest of the minor child would be best served if her custody was given to the appellant.

The claim of custody of the minor child made by the appellant was very strongly resisted by the respondent who denied all the various allegations levelled against him regarding his alleged apathy towards the minor and her development. It was submitted on his behalf that till the age of 7 years, the child had been living with both the parents, and was well cared for and looked after during this period. The minor child was suddenly and surreptitiously removed from the respondent's custody by the appellant who left her matrimonial home on 26th February, 2000 without informing the appellant who had gone out of Thrissur on his professional work. It was submitted that only after coming to learn that the appellant had removed the child to Calicut that the respondent was compelled to file a Habeas Corpus Petition in the Kerala High Court which ended upon an undertaking given by the appellant to bring the minor child to Thrissur. It was only thereafter that the respondent was compelled to file the application under Sections 7 and 25 of the Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act,1956.

According to the respondent, even though the appellant had forcibly removed the minor to Calicut, thereby depriving the respondent of the minor child's company, the said minor during her interview by the learned Judge of the Family Court at Thrissur made her preference to be with the father known to the learned Judge.

On behalf of the respondent, it was also submitted that keeping in mind the fact that the girl child was attaining the age of puberty, the respondent had arranged with his elder sister, who was a retired headmistress of a school, to come and stay with him and to attend to the minor's needs during her growing years when she required the guidance and counselling of a woman. It was submitted that the said aspect of the matter was duly considered by the Family Court as well as by the High Court on the basis of an affidavit filed by the respondent's sister expressing her willingness to stay with the respondent to look after the minor child. In addition to the above, it was submitted on behalf of the respondent that the Court had found on evidence that he had sufficient finances to look after and provide for all the needs of the minor child. In any event, what was of paramount importance was the welfare of the minor and the court had also taken into consideration the preference expressed by the minor in terms of Section 17 (3) of the Guardians and Wards Act, 1890. On behalf of the respondent it was submitted that the respondent was quite alive to the fact that the minor child should not be deprived of her mother's company and that for the said purpose, the appellant was welcome to visit the minor child either at the respondent's house or in some neutral place and to even keep the child with her on specified days if she was ready and willing to stay with the appellant. What was sought to be emphasized on behalf of the respondent was that in the interest of the child she should be allowed to remain with him since he was better equipped to look after the minor, besides being her natural guardian and also having regard to the wishes of the minor herself.

Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without either of the parents being present, in order to ascertain her preference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies in school, and we were convinced that despite the tussle between her parents, she would be in a position to make an intelligent choice with regard to her custody. From

our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the Courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor.

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities. We, accordingly dispose of this appeal by retaining the order passed by the learned Judge of the Family Court at Thrissur on 20.3.2001 while disposing of O.P.No.193/2000 filed by the respondent herein under Sections 7 and 25 of the Guardians and Wards Act, 1890 with the following modifications:-

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.

2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.

The parties will each bear their own costs.

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DR. V. RAVI CHANDRAN VERSUS UNION OF INDIA & ORS.

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Tarun Chatterjee, Hon'ble Mr. Justice R. M. Lodha & Hon'ble Dr. Justice B.S. Chauhan

WRIT PETITION (CRL.) NO.112/2007

Dr. V. Ravi Chandran ..Petitioner
Versus
Union of India & Ors. ..Respondents

Adithya is a boy of seven, born on July 1, 2002, in the United States of America. He is a foreign national. The petition before us is by the father – Dr. V . Ravi Chandran—praying for a writ of habeas corpus for the production of his minor son Adithya and for handing over the custody and his passport to him.

Dr. V. Ravi Chandran - petitioner – is an American citizen. He and respondent no. 6 got married on December 14, 2000 at Tirupathi, Andhra Pradesh according to Hindu rites. On July 1, 2002, Adithya was born in United States of America. In the month of July 2003, respondent no. 6 approached the New York State Supreme Court for divorce and dissolution of marriage. A consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court on April 18, 2005. The Court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. On July 28, 2005, a Separation Agreement was entered between the petitioner and respondent no.6 for distribution of marital property, spouse maintenance and child support. As regards custody of the minor son Adithya and parenting time, the petitioner and respondent no. 6 consented to the order dated April 18, 2005. On September 8, 2005, the marriage between the petitioner and respondent no.6 was dissolved by the New York State Supreme Court. Child custody order dated April 18, 2005 was incorporated in that order.

Upon the petition for enforcement filed by respondent no.6 before the Family Court of the State of New York, on June 18, 2007, upon the consent of both parties, inter – alia, the following order came to be passed:

"ORDERED, the parties shall share joint legal and physical custody of the minor child; and it is further ORDERED, that commencing during August 2007, Adithya shall reside in Allen,Texas.

On June 28, 2007 respondent no.6 brought minor Adithya to India informing the petitioner that she would be residing with her parents in Chennai. On August 08, 2007, the petitioner filed the petition for modification (Custody) and Violation Petition (Custody) before the Family Court of the State of New York on which a show cause notice came to be issued to respondent no.6. On that very day, the petitioner was granted temporary sole legal and physical custody of Adithya and respondent no. 6 was directed to immediately turn over the minor child and his passport.

While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the

court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child.

JUDGMENT

Hon'ble Mr. Justice R.M. Lodha.—

Adithya is a boy of seven, born on July 1, 2002, in the United States of America. He is a foreign national. The petition before us is by the father – Dr. V . Ravi Chandran—praying for a writ of habeas corpus for the production of his minor son Adithya and for handing over the custody and his passport to him.

2. On August 28, 2009, this Court passed an order requesting Director, Central Bureau of Investigation (CBI) to trace minor Adithya and produce him before this Court. The necessity of such order arose as despite efforts made by the police officers and officials of different states, Adithya and his mother – respondent no. 6—Vijayasree Voora—could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. In pursuance of the order dated August 28, 2009, CBI issued look out notices on all India basis through heads of police of States, Union Territories and Metropolitan Cities and also alert notices through Deputy Director, Bureau of Immigration (Immigration), Ministry of Home Affairs, New Delhi and flashed photographs of the child Adithya and his mother Vijayasree Voora. Ultimately with its earnest efforts, CBI traced Adithya and his mother Vijayashree Voora in Chennai on October 24, 2009 and brought them to Delhi and produced the child along with his mother at the residential office of one of us (Tarun Chatterjee, J.) on October 25, 2009. On that day, the CBI authorities were directed to keep the child under their custody and produce him before the Court on October 27, 2009. Respondent no. 6 was also directed to be produced on that date. On October 27, 2009, the matter was adjourned for November 4, 2009 since respondent no.6 wanted to engage a lawyer and file a counter affidavit. On November 4, 2009, matter was adjourned to November 10, 2009 and then to November 12, 2009. The petitioner was permitted to meet the child for one hour on November 10, 2009 and November 12, 2009. In the meanwhile, respondent no. 6 has filed counter affidavit in opposition to the habeas corpus petition and petitioner has filed rejoinder affidavit to the counter affidavit filed by respondent no.6.

3. We heard Ms. Pinky Anand, learned senior counsel for the petitioner and Mr. T.L.V. Iyer, learned senior counsel for respondent no. 6. Now since minor Adithya has been produced, the only

question that remains to be considered is with regard to the prayer made by the petitioner for handing over the custody of minor Adithya to him with his passport.

4. But before we do that, it is necessary to notice few material facts. Dr. V. Ravi Chandran – petitioner – is an American citizen. He and respondent no. 6 got married on December 14, 2000 at Tirupathi, Andhra Pradesh according to Hindu rites. On July 1, 2002, Adithya was born in United States of America. In the month of July 2003, respondent no. 6 approached the New York State Supreme Court for divorce and dissolution of marriage. A consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court on April 18, 2005. The Court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. On July 28, 2005, a Separation Agreement was entered between the petitioner and respondent no.6 for distribution of marital property, spouse maintenance and child support. As regards custody of the minor son Adithya and parenting time, the petitioner and respondent no. 6 consented to the order dated April 18, 2005. On September 8, 2005, the marriage between the petitioner and respondent no.6 was dissolved by the New York State Supreme Court. Child custody order dated April 18, 2005 was incorporated in that order.

5. Upon the petition for modification of custody filed by the petitioner and the petition for enforcement filed by him and upon the petition for enforcement filed by respondent no.6 before the Family Court of the State of New York, on June 18, 2007, upon the consent of both parties, inter – alia, the following order came to be passed:

"ORDERED, the parties shall share joint legal and physical custody of the minor child; and it is further

ORDERED, that commencing during August 2007, Adithya shall reside in Allen, Texas; and it is further

ORDERED, that the parties acknowledge that it is the intention of the parties to reside within the same community. As such, it is the mother's current intention to relocate to Texas, within a forty (40) mile radius of the father's residence. If the mother does relocate to a forty (40) mile radius of the father's residence (which shall be within a twenty (20) mile radius from the child's school),, the parties shall equally share physical custody of Adithya. The parties shall alternate physical custody on a weekly basis, with the exchange being on Friday, at the end of the School day, or at the time when school would ordinarily let out in the event that there is no school on Friday;

ORDERED, that in the event that the mother does not relocate within forty (40) miles from the father's residence located in Allen, Texas (and within twenty (20) miles of Adithya's school), the mother shall have custodial time with the minor child, as follows:

A. On Alternating weekends from Friday, at the end of the school day until Monday, prior to the beginning of school, commencing during the first week of September, 2007. Such periods of custodial time shall take place within forty (40) miles from the father's residence located in Allen, Texas. In the event that there is no school on the Friday of the mother's weekend, she shall have custodial time with the child beginning at 7.00 a.m. on Friday morning, and, in the event that there is no school on Monday of the mother's custodial weekend, she shall have custodial time until 5.00 p.m. on Monday, and

B. For ten (10) consecutive days during Spring vacation from school; and

C. For the entirety of the Christmas recess from School, except for Christmas Eve and Christmas day, which shall be with the father. In the event that the school recess is prior to Christmas Eve, the mother shall have the right to have custodial time during those recessed days to long as she produces the child at the father's residence for Christmas Eve and Christmas day ; and

D. During the following holidays:

i) Mother's birthday, which is on April 25;

ii) Mother's Day;

iii) Hindu Festival of Diwali and Deepavali;

iv) Adithya's birthday (July 1) in alternating years;

v) Thanks giving in alternating years (so that the mother has custodial time during even – numbered years and the father has custodial time during odd – numbered years);

vi) New Year's Day in alternating years (so that the mother has custodial time during even – numbered years and the father has custodial time during odd –numbered years) ;

ORDERED, that the parties shall share the summer recess from school so that the mother has custodial time for a total of up to fifty (50) days on a schedule so that each party has custodial time for 4 consecutive weeks, with the mother's custodial time commencing on the Monday following the final day of school…….

ORDERED, for the summer of 2007, the mother shall have custodial time from June 18 until June 20; the father shall have custodial time from June 20 until June 24; the mother shall have custodial time from June 25 until July 1; the father shall have custodial time from July 1 until July 6; and the mother shall then have custodial time from July 6 until August 3 and she shall be solely responsible for transporting the child to the father's residence in Allen, Texas on August 3. The father shall have custodial time until the commencement of school.

Thereafter the father shall continue to have custodial time until such time as the mother either a) returns from India and/or begins her alternating weekly schedule as set froth herein, or b) moves within 40 miles of the father's residence in Allen, Texas and commences her custodial time during alternating weeks;

ORDERED, that each party agrees that they shall provide the other parent with a phone number and address where the child will be located at all time, and that the other parent shall have reasonable and regular telephone communication with the minor child; and it is further

ORDERED, that each party agrees to provide the other party with the child's passport during each custodial exchange of the minor child, and that each party shall sign and deliver to the other, whatever written authorization may be necessary for travel with the child within the Continental United States or abroad;"

6. On June 28, 2007 respondent no.6 brought minor Adithya to India informing the petitioner that she would be residing with her parents in Chennai. On August 08, 2007, the petitioner filed the petition for modification (Custody) and Violation Petition (Custody) before the Family Court of the State of New York on which a show cause notice came to be issued to respondent no.6. On

that very day, the petitioner was granted temporary sole legal and physical custody of Adithya and respondent no. 6 was directed to immediately turn over the minor child and his passport to the petitioner and further her custodial time with the minor child was suspended and it was ordered that the issue of custody of Adithya shall be heard in the jurisdiction of the United States Courts, specifically, the Albany County Family Court.

7. It transpires that the Family Court of the State of New York has issued child abuse non-bailable warrants against respondent no.6.

8. In the backdrop of the aforenoticed facts, we have to consider—now since the child has been produced—what should be the appropriate order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national.

9. In re B—'s Settlement,[62] Chancery Division was concerned with an application for custody by the father of an infant who had been made a ward of court. The father was a Belgian national and the mother a British national who took Belgian nationality on marriage to him. The infant was born in Belgium. The mother was granted a divorce by a judgment of the Court in Belgium, but the judgment was reversed and the father became entitled to custody by the common law of Belgium. The mother, who had gone to live in England, visited Belgium and was by arrangement given the custody of the infant for some days. She took him to England and did not return him. The infant had been living with mother in England for nearly two years. The father began divorce proceedings in Belgium, and the Court appointed him guardian. Pending the proceedings, the Court gave him the custody and ordered the mother to return the infant within twenty-four hours of service of the order on her. She did not return the infant. The Correctional Court in Brussels fined her for disobedience and sentenced her to imprisonment should the fine be not paid. The Correctional Court also confirmed the custody order. In the backdrop of these facts, the summons taken out by the father that custody of the infant be given to him came up before Morton, J. who after hearing the parties and in view of the provisions of the Guardianship of Infants Act, 1925 observed thus:

"…At the moment my feeling is very strong that, even assuming in the father's favour that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England for the time being In the present case the position is that nearly two years ago, when the child was already in England, an interlocutory order was made by the Divorce Court in Belgium giving the custody of the child to the father I do not know how far, if at all, the matter was considered on the footing of what was best for the child at that time, or whether it was regarded as a matter of course that the father, being the guardian by the common law of Belgium and the applicant in the divorce proceedings and the only parent in Belgium, should be given the custody. I cannot regard that order as rendering it in any way improper or contrary to the comity of nations if I now consider, when the boy has been in this country for nearly two years, what is in the best interests of the boy. I do not think it would be right for the Court, exercising its jurisdiction over a ward who is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937. I think the present case differs from Nugent v. Vetzera {FN10}, the case that was before Page Wood V.-C., and it

62 {1940} Ch. 54

is to be observed that even in that case, and in the special circumstances of that case, the Vice-Chancellor guarded himself against anything like abdication of the control of this Court over its wards. It does not appear what the Vice-Chancellor's view would have been if there had been evidence, for example, that it would be most detrimental to the health and well-being of the children if they were removed from England and sent to Austria ……..I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country."……

10. In Mark T. Mc.Kee vs. Eyelyn McKee[63], the Privy Council was concerned with an appeal from the Supreme Court of Canada. That was a case where the parents of the infant were American citizens. They were married in America and to whom a son was born in California in July 1940. They separated in December 1940 and on September 4, 1941, executed an agreement which provided, inter- alia, that neither of them should remove the child out of the United States without the written permission of the other. By a judgment of December 17, 1942, in divorce proceedings before the Superior Court of the State of California, the custody of the child was awarded to the father. On August 1, 1945, following applications by the father and the mother, the previous order as to custody was modified to provide full custody of the child to the mother with right of reasonable visitation to the father. Thereafter, and without the consent or knowledge of the mother, the father went from the United States of America with the child into the Province of Ontario. The mother thereupon instituted habeas corpus proceedings in the Supreme Court of Ontario seeking to have the child delivered to her.

Wells, J., before whom the matter came held that infant's best interests would be served in the custody of his father. The Court of Appeal for Ontario dismissed the appeal preferred by the mother. However, the Supreme Court of Canada by majority judgment allowed the appeal of the mother and set aside the order of custody of child to the father. On appeal from the Supreme Court of Canada at the instance of the father, the Privy Council held as follows:

"…….For, after reaffirming "the well established general rule that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant",

he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose jurisdiction he himself invoked, becomes "entitled as of right to have the whole question retried in our courts and to have them reach a anew and independent judgment as to what is best for the infant". and it is, in effect, because he held that the father had no such right that the judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to. But with great respect to the judge, this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. But it is the negation of the proposition,

63 {1951} A.C. 352

from which every judgment in this case has proceeded, namely, that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. But if so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.

It cannot be ignored that such consequences might follow as are suggested by Cartwright, J. The disappointed parent might meet stratagem by stratagem and, taking the child into the Province of Manitoba, invoke the protection of its courts, whose duty it would then be to determine the question of custody. That is a consideration which, with others, must be weighed by the trial judge. It is not, perhaps, a consideration which in the present case should have weighed heavily.

It has been said that the weight or persuasive effect of a foreign judgment must depend on the circumstances of each case. In the present case there was ample reason for the trial judge, in the first place, forming the opinion that he should not take the drastic course of following it without independent inquiry and, in the second place, coming to a different conclusion as to what was for the infant's benefit."……..

11. The aforesaid two cases came up for consideration in Harben vs. Harben[64], wherein Sachs J. observed as follows:

"It has always been the practice of this court to ensure that a parent should not gain advantage by the use of fraud or force in relation to the kidnapping of children from the care of the other spouse, save perhaps where there is some quite overwhelming reason in the children's interest why the status quo should not be restored by the court before deciding further issues. In the present case I am concerned with three young children, two of whom are girls and the youngest is aged only three. It is a particularly wicked thing to snatch such children from the care of a mother, and, in saying that, I have in mind not merely the mother's position but the harm that can be done to the children. No affidavit of the husband tendering either his regrets or any vestige of excuse for his action has been proffered. Further, as I have already mentioned, when first I asked Mr. Syms what was the nature of the case which he might wish to make, if so minded, for depriving these children of a mother's care, he only spoke of her association with a certain man and never suggested that she had in any way whatsoever failed to look after the children properly."

12. In Kernot vs. Kernot[65] , the facts were thus: In May 1961, the plaintiff mother, an Italian lady, married an English man in Italy where both were residents. A boy was born there on March 29, 1962.

64 {1957} 1. W.L.R. 261
65 {1965} Ch.217

On October 19, 1963, they obtained in Italian Court a separation order by consent providing therein that custody of the child would remain with father, with rights of access to the mother . On October 29, 1963, the father brought the infant to England with intention to make England his home. The mother commenced wardship proceedings in which she brought a motion for an order that the father return the infant to her in Italy. She also prayed for restraint order against him from taking the infant out of her care. Buckley, J. in these facts held thus:

"So that even where a foreign court has made an order on the merits – which is not the present case, because the only order which has been made was a consent order without any investigation of the merits by the Italian court – that domestic court before whom the matter comes (the Ontario court in the case to which I have just referred, or this court in the case before me) is bound to consider what is in the best interests of the infant; and although the order of the foreign court will be attended to as one of the circumstances to be taken into account it is not conclusive one way or the other. How much stronger must the duty of this court be to entertain the case where the foreign court has not made any order based on any investigation of the case on its merits."

13. In re H. (Infants)[66], the Court of Appeal was concerned with two American boys whose divorced parents were both citizens of United States of America. On December 11, 1964, the Supreme Court of New York State made a consent order directing that the two boys whose custody had been given to the mother should be maintained in her apartment in New York and not be removed from a 50 miles' radius of Peekskill without the prior written consent of the father. However, the mother in March 1965 brought these boys to England and bought a house for herself and children in June 1965. On June 15, 1965, the New York Court ordered the children to be returned to New York. The mother started wardship proceedings in the English court. The father took out motion asking the mother that the two children should be delivered into his care, that he should be at liberty to convey them to New York and that the wardship of the children should be discharged. The Trial Judge held that the justice of the case required the children to be returned without delay to the jurisdiction of the New York court, so that the question of where and with whom they should live might be decided as soon as possible by that court. The mother appealed to the Court of Appeal. Willmer L.J. and Harman L.J. by their separate judgments affirmed the view of the Trial Judge and held that the proper order was to send these two boys back to their State of New York, where they belong (and where the Supreme Court is already seized of their case), and more especially so having regard to the fact that they have been kept in flagrant contempt of New York Court's order.

Willmer L.J. agreed with the remark of Cross J. where he said:

"The sudden and unauthorized removal of children from one country to another is far too frequent nowadays, and as it seems to me it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing."

Willmer L.J. went on to hold:

"The judge took the view (and I think it was the right view) that in a case such as the present it was not necessary to go into all the disputed questions between the parents, but that he ought to send these boys back to their own country to be dealt with by the court of their own country,

66 (1966) 1 W.L.R. 381 = (1966) 1 All.E.R. 886

provided that he was satisfied (as he was satisfied, having seen the father himself, and having had the benefit of the view expressed on behalf of the Official Solicitor) that they would come to no harm if the father took them back to the United States; and that this was so, even though it might subsequently turn out, after all the merits of the case had been thoroughly thrashed out in the court in New York, that it would perhaps be better after all for the boys to reside in England and see little or nothing of their father."

Harman L.J. in his separate judgment held thus:

".....But if he chose to take the course which the judge here took in the interests of the children , as he thought, of sending them back to the United States with no more inquiry into the matter than to ensure, so far as he could, that there was no danger to their moral or physical health in taking that course, I am of opinion that he was amply justified, and that that was the right way in which to approach the issue. These children had been the subject of an order (it is true made by consent) made in the courts of their own country in December, 1964. It was only three months later that the mother flouted that order, deceived her own advisers and deceived the court , and brought the children here with the object of taking them right out of their father's life and depriving him altogether of their society. The interval is so short that it seems to me that the court inevitably was bound to view the matter through those spectacles; that is to say, that the order having been made so shortly before, and there being no difference in the circumstances in the three months which had elapsed , there was no justification for the course which the mother had taken, and that she was not entitled to seek to bolster her own wrong by seeking the assistance of this court in perpetuating that position, and seeking to change the situation to the father's disadvantage."

14. In re. L (minors)[67], the Court of Appeal was concerned with the custody of the foreign children who were removed from foreign jurisdiction by one parent. That was a case where a German national domiciled and resident in Germany married an English woman. Their matrimonial home was Germany and the two children were born out of the wedlock and brought up in Germany. The lady became unhappy in her married life and in August, 1972, she brought her children to England with an intention of permanently establishing herself and the children in England. She obtained residential employment in the school in England and the children were accommodated at the school. The children not having returned to Germany, the father came to England to find them. On October 25, 1972, the mother issued an originating summons making them wards of court. The trial judge found that the children should be brought up by their mother and treating the case as a 'kidnapping' class of case, approached the matter by observing that in such a case where the children were foreign children, who had moved in a foreign home, their life should continue in what were their natural surroundings, unless it appeared to the court that it would be harmful to the children if they were returned. He concluded that in view of the arrangements which their father could make for them, the children would not be harmed by being returned. He, accordingly, ordered that they be returned to Germany and that they remain in their father's custody until further order. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. Buckley, LJ in his detailed consideration of the matter, wherein he referred to the aforenoticed decisions and few other decisions as well, held as follows :

67 (1974) 1 All ER 913

".....Where the court has embarked on a full-scale investigation of that facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, any may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the 'kidnapper' the child should remain in his or her care (McKee v. McKee, Re E (an infant) and Re. T.A. (infants), where the order was merely interim); or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed. Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment apply, but the decision must be justified on somewhat different grounds.

The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child....."

15. In re. L. (minors)[6], the Court of Appeal has made a distinction between cases, where the court considers the facts and fully investigates the merits of a dispute, in a wardship matter in which the welfare of the child concerned is not the only consideration but is the first and paramount consideration, and cases where the court do not embark on a full-scale investigation of the facts and make a summary order for the return of a child to a foreign country without investigating the merits. In this regard, Buckley, L.J. noticed what was indicated by the Privy Council in McKee v. McKee[2] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child.

16. This Court in Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and Another[68] was concerned with the custody of a child— British citizen by birth—to the parents of Indian citizens, who after their marriage settled in England. The child was removed by the husband from the house when the wife was in the factory where she was working and brought him to India. The wife obtained an order under Section 41(English) Supreme Court Act, 1981 whereby the husband was directed to handover the custody of the boy to her. The said order was later on confirmed by the High Court in England. The wife then came to India and filed a writ petition under Article 226 in the High Court praying for production and custody of the child. The High Court dismissed her writ petition against which the wife appealed before this Court. Y.V. Chandrachud, C.J. (as he then was) speaking for the Court held thus :

68 (1984) 3 SCC 698

"The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company v. State of Washington which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

17. In Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Another[69], this Court held that it was the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing. In para 9 of the report, this Court considered the decision of the Court of Appeal in re H.5 and approved the same in the following words:

"9. In Re H. (infants) [(1966) 1 All ER 886] the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a naturalborn American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June 1965, by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American court was the proper court to decide the issue of custody, and as it was the

69 (1987) 1 SCC 42

duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgment in the Court of Appeal, Willmer, L.J. while dismissing the appeal extracted with approval the following passage from the judgment of Cross, J. [(1965) 3 All ER at p. 912. (Ed. : Source of the second quoted para could not be traced.)]:

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a Judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

10. With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the courts in situations such as this."

18. In the case of Dhanwanti Joshi v. Madhav Unde[70], this Court was again concerned with the matter relating to removal of a child from one country to another contrary to custody order of the court from where the child was removed. This court considered English decisions, inter alia, McKee v. McKee[2] and H. (infants), re.[5] and also noticed the decision of this Court in Mrs. Elizabeth Dinshaw[8] and observed as follows :

"28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee v. McKee [(1951) AC 352]. In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign court in US would yield to the welfare of the child. "Comity of courts demanded not its enforcement, but its grave consideration". This case arising from Canada which lays down the law for Canada and U.K. has been

70 (1998) 1 SCC 112

consistently followed in latter cases. This view was reiterated by the House of Lords in J v. C (1970 AC 668). This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis v. Khamis [(1978) 4 Fam LR 410 (Full Court) (Aus)].

29. However, there is an apparent contradiction between the above view and the one expressed in H. (infants), Re[(1966) 1 All ER 886] and in E. (an infant), Re [(1967) 1 All ER 881] to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (minors) (wardship : jurisdiction), Re [(1974) 1 All ER 913, CA] and in R. (minors) (wardship : jurisdiction), Re [(1981) 2 FLR 416 (CA)]. It was held by the Court of Appeal in L., Re [(1974) 1 All ER 913, CA] that the view in McKee v. McKee [1951 A.C. 352 : (1951) All ER 942] is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, — for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79; Bromley, Family law, 7th Edn., 1987.) In R. (minors) (wardship : jurisdiction), Re [(1981) 2 FLR 416 (CA)] it has been firmly held that the concept of forum conveniens has no place in wardship jurisdiction.

30. We may here state that this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Crl.) 13] while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not

only because of the principle of comity but also because, on facts, — which were independently considered — it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), Re which case, as pointed out by us above has been explained in L. Re as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee and J v. C and the distinction between summary and elaborate inquiries as stated in L. (infants), Re are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 — even assuming that the earlier orders passed in India do not operate as constructive res judicata."

However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to United States of America on the ground that its removal from USA in 1984 was contrary to orders of U.S. Courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.

19. In the case of Sarita Sharma v. Sushil Sharma[71], this Court was seized with a matter where the mother had removed the children from U.S.A. despite the order of the American Court. It was held :

"6. *Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have American citizenship and there is a possibility that in U.S.A they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them, one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder then the daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit*

71 (2000) 3 SCC 14

him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of the mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would epend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights."

20. While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child. The indication given in McKee v. McKee[2] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child has been explained in re. L (minors)6 and the said view has been approved by this Court in Dhanwanti Joshi[9]. Similar view taken by the Court of Appeal in re. H5 has been approved by this Court in Elizabeth Dinshaw[8].

21. Do the facts and circumstances of the present case warrant an elaborate enquiry into the question of custody of minor Adithya and should the parties be relegated to the said procedure before appropriate forum in this country in this regard? In our judgment, this is not required. Admittedly, Adithya is an American citizen, born and brought up in United States of America. He has spent his initial years there. The natural habitat of Adithya is in United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interest, the parties have obtained series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent courts of jurisdiction in America. Initially, on April 18, 2005, a consent order governing the issues of custody and guardianship of minor Adithya was

passed by the New York State Supreme Court whereunder the court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on July 28, 2005, the consent order dated April 18, 2005 regarding custody of minor son Adithya continued. In September 8, 2005 order whereby the marriage between the petitioner and respondent no. 6 was dissolved by the New York State Supreme Court, again the child custody order dated April 18, 2005 was incorporated. Then the petitioner and respondent no. 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on June 18, 2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made. The fact that all orders concerning the custody of the minor child Adithya have been passed by American courts by consent of the parties shows that the objections raised by respondent no. 6 in counter affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by the respondent no. 6 in the counter affidavit that the American courts which passed the order/decree had no jurisdiction and being inconsistent to Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that the respondent no. 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter affidavit that initially respondent no. 6 initiated the proceedings under Guardianship and Wards Act but later on withdrew the same. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by respondent no. 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the courts in the native State of the child, i.e. United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country.

22. It is true that child Adithya has been in India for almost two years since he was removed by the mother—respondent no. 6 —contrary to the custody orders of the U.S. court passed by consent of the parties. It is also true that one of the factors to be kept in mind in exercise of summary jurisdiction in the interest of child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in child developing roots in the country to which he has been removed. From the counter affidavit that has been filed by respondent no. 6, it is apparent that in last two years child Adithya did not have education at one place. He has moved from one school to another. He was admitted in school at Dehradun by respondent no. 6 but then removed within few months. In the month of June, 2009, the child has been admitted in some school at Chennai. As a matter of fact, the minor child Adithya and respondent no. 6 could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. The respondent no. 6 and the child has been moving from one State to another. The parents of

respondent no. 6 have filed an affidavit before this Court denying any knowledge or awareness of the whereabouts of respondent no. 6 and minor child Adithya ever since they left in September, 2007. In these circumstances, there has been no occasion for the child developing roots in this country. Moreover, the present habeas corpus petition has been filed by the petitioner promptly and without any delay, but since the respondent no. 6 has been moving from one State to another and her whereabouts were not known, the notice could not be served and child could not be produced for more than two years.

23. In a case such as the present one, we are satisfied that return of minor Adithya to United States of America, for the time being, from where he has been removed and brought here would be in the best interest of the child and also such order is justified in view of the assurances given by the petitioner that he would bear all the traveling expenses and make living arrangements for respondent no. 6 in the United Sates of America till the necessary orders are passed by the competent court; that the petitioner would comply with the custody/parenting rights as per consent order dated June 18, 2007 till such time as the competent court in United States of America takes a further decision; that the petitioner will request that the warrants against respondent no. 6 be dropped; that the petitioner will not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America and that if any application is filed by respondent no. 6 in the competent court in United States of America, the petitioner shall cooperate in expeditious hearing of such application. The petitioner has also stated that he has obtained confirmation from Martha Hunt Elementary School, Murphy, Texas, 75094, that minor son Adithya will be admitted to school forthwith.

24. The learned Senior Counsel for respondent no. 6 sought to raise an objection regarding the maintainability of habeas corpus petition under Article 32 of the Constitution before this Court but we are not persuaded to accept the same. Suffice it to say that in the peculiar facts and circumstances of the case which have already been noticed above and the order that we intend to pass, invocation of jurisdiction of this Court under Article 32 cannot be said to be inappropriate.

25. We record our appreciation for the work done by the concerned officers/officials of CBI in tracing the minor child Adithya and producing him in less than two months of the order passed by this Court, although, the Police Officers and Officials of different States failed in tracing the child Adithya and respondent no. 6 for more than two years. But for the earnest efforts on the part of the CBI authorities, it would not have been possible for this Court to hear and decide this habeas corpus petition involving the sensitive issue concerning a child of seven years who is a foreign national.

26. In the result and for the reasons stated, we pass the following order :

(i) The respondent no. 6 shall act as per the consent order dated June 18, 2007 passed by the Family Court of the State of New York till such time any further order is passed on the petition that may be moved by the parties henceforth and, accordingly, she will take the child Adithya of her own to the United States of America within fifteen days from today and report to that court.

(ii) The petitioner shall bear all the traveling expenses of the respondent no. 6 and minor child Adithya and make arrangements for the residence of respondent no. 6 in the United States of America till further orders are passed by the competent court.

(iii) The petitioner shall request the authorities that the warrants against respondent no. 6 be dropped. He shall not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America.

(iv) The respondent no. 6 shall furnish her address and contact number in India to the CBI authorities and also inform them in advance the date and flight details of her departure along with child Adithya for United States of America.

(v) In the event of respondent no. 6 not taking the child Adithya of her own to United States of America within fifteen days from today, child Adithya with his passport shall be restored to the custody of the petitioner to be taken to United States of America. The child will be a ward of the concerned court that passed the consent order dated June 18, 2007. It will be open to respondent no. 6 to move that court for a review of the custody of the child, if so advised.

(vi) The parties shall bear their own costs.

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ASHISH RANJAN VERSUS ANUPAM TANDON

Supreme Court of India

Bench : Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice B.S. Chauhan

CONTEMPT PETITION (CIVIL) NO. 394 OF 2009

IN

Transfer Petition (Civil) No. 195 of 2008

Dr. Ashish Ranjan ...Petitioner

Versus

Dr. Anupama Tandon & Anr. ...Contemnors/Respondents

Decided on 30 November, 2010

JUDGMENT

Hon'ble Mr. Justice Dr. B.S. Chauhan.—

1. The instant contempt petition has been filed by the applicant alleging that the consent order dated 3.5.2008 passed by the Lok Adalat held by this Court has willfully and deliberately been violated by the respondents, as it has been ensured by them that the applicant may not reach his son.

2. Applicant herein got married with respondent no.1 on 31.10.2002 at Ajmer (Rajasthan), though both of them had been married earlier and stood separated from their respective spouses after getting divorced. Out of the said wedlock, one male child namely, Kislay was born at Ajmer in 2003. Father of respondent No.1 died on 9.1.2005 and soon thereafter relations between the parties became very strained and the respondent No.1 returned to her mother's place at Ajmer. She also filed FIR No.43 of 2007 with Ajmer Police on 29.3.2007, wherein after investigation the charge sheet was filed on 31.12.2007. The applicant herein, the husband filed H.M.A. Case No.2 of 2008 at Gopalganj (Bihar) on 5.1.2008 seeking divorce.

3. After receiving the summons of the said matrimonial case, the respondent no.1 approached this Court by filing Transfer Petition (Civil) No.195 of 2008 seeking transfer of the said case from Gopal- ganj (Bihar) to the Family Court, Ajmer. At the time of hearing of the transfer petition, this Court vide order dated 31.3.2008 stayed the proceeding in matrimonial case pending at Gopalganj and referred the matter to Lok Adalat for disposal by mutual consent. Before the Lok Adalat, the parties agreed to resolve all their disputes and for that the terms and conditions were reduced in writing.

This Court vide order dated 3.5.2008 disposed of the transfer petition on the consent terms resolving all the civil and criminal cases pending between the parties and dissolved their marriage.

4. So far as the issue relating to custody of the child, Kislay, as per the said consent order is concerned, the following clauses are relevant:

".....

(viii) As agreed between the parties, Dr. Anupma Tandon shall have the physical custody and guardianship of the child Master Kislay Ranjan who is at present four and a half years old.

(ix) Dr. Ashish Ranjan and his parents shall have visiting rights to Master Kislay Ranjan who is at present living in Ajmer with his maternal grand-parents. Since Dr. Ashish Ranjan and/or his parents would have to come to Ajmer from Gopalganj at long distance, they would naturally advise about the dates and length of their visits at Ajmer before hand either by telephone or through a letter.

(x) In Ajmer, Dr. Ashish Ranjan and/or his parents will visit Master Kislay Ranjan at mutually convenient time(s) in the house where he is living. They will stay with the child for a few hours or as long as the child might wish. Dr. Anupma Tandon stated before the Lok Adalat that while visiting Master Kislay Ranjan, Dr. Ashish Ranjan and his parents will be treated with courtesy and dignity and she would do everything reasonable to facilitate their meeting with the child. It will be open to Dr. Ashish Ranjan and/or his parents to bring suitable gifts for the child.

(xi) To begin with, the meetings with the child will be held only in the house where he might be living with his maternal grandparents or his mother. However, as confidence builds up between all concerned, including the child and as the child grows up and he himself wishes to go out with his father or grandparents, it will be open to Dr. Ashish Ranjan and/or his parents to take out the child in the city where he might be living initially for brief periods.

(xii) As the child further grows up and in case he expresses his willingness and consent to spend one or two nights with his father Dr. Ashish Ranjan and/or his grandparents, it will be open to Dr. Ashish Ranjan and/or his parents to take the child out from his residence for some period and to keep him with them for one or two nights in the same city.

(xiii) As and when the child reaches his teens and in case he is willing to spend some of his holidays or vacations with his father or grandparents away from the place where he might be living with her maternal grandparents or mother, it will be open to Dr. Ashish Ranjan and/or his parents to take the child out of Ajmer or the city he might be living in at that time for as long as the child might wish to stay with them during his holidays or vacations.

(xiv) On each occasion when Dr. Ashish Ranjan and/or his parents take away the child from his guardian, i.e., Dr. Anupma Tandon or his maternal grandparents, it will be their duty and obligation to take full care of the physical, mental and emotional well-being of the child while he remains with them and to return him to his mother/maternal grandparents at the agreed time. As and when the child is taken out from Ajmer, all the expenses of his travel and stay will be borne by Dr. Ashish Ranjan and/or his parents.

(xv) Dr. Ashish Ranjan and/or his parents will be at liberty to speak to Master Kislay Ranjan on telephone at convenient times.

(xvi) All these arrangements insofar as they relate to the child will be subject to the express wish and willingness of the child. No visits to see him or taking him out would be permitted unless the child himself is willing and prepared to meet the father and the grandparents and is willing to go out with them.

....."

To begin with, the meeting with the child will be held

5. In order to substantiate his claim, a large number of documents have been placed on record by the applicant, particularly, several returned envelopes seeking visitation rights for the applicant in the year 2008, with endorsement of "refusal" or "the addressee was not available". Copies of E-mails dated 24.6.2008, 17.9.2008 and 23.12.2008 intimating the respondent no.3 in this respect have also been filed. It has also been submitted that telephone calls made by the applicant were not attended by the respondent no.1, as she had the facility of identifying the caller on her landline Telephone Set. The applicant claims that he had gone to Ajmer in July 2008 to meet his son, Master Kislay, but the respondents ensured that he could not meet his son.

In view of the fact that the applicant could not receive any response for his proposal to meet the child, the applicant and his parents have to cancel the Ajmer visit scheduled on July 22, 2008. On 10.9.2009, the applicant travelled along with his parents to Ajmer by car to see the child but they found the house of the respondent No.2 locked and could not meet the child.

6. In this contempt petition, notice was issued by this Court on 15.1.2010. The respondent entered appearance. On 5.4.2010, the respondent No.1 appeared in person. After considering the grievances of the applicant, this Court passed the following order : "In terms of the earlier direction of this Court dated 03.05.2008, we pass the following order:

"It is brought to our notice that at present the Child Master Kislay Ranjan is studying in Sanskriti School, Ajmer. The petitioner Dr. Ashish Ranjan is permitted to visit the above referred school from 12.07.2010 to 23.07.2010. We request the Principal of the School to permit Dr. Ashish Ranjan and his parents to meet the child Master Kislay Ranjan after school hours in his/her chamber or any suitable place within the school premises. We also request the Principal to render all assistance for a conducive atmosphere and send a report to this Court about the behaviour and attitude of the child Master Kislay Ranjan towards his father Dr. Ashish Ranjan.' Copy of this order be forwarded to the Principal, Sanskriti School, Ajmer, Rajasthan.

List in the first week of August, 2010."

7. In pursuance to the aforesaid order, the applicant had gone to Ajmer and was allowed to meet his son at Sanskriti School, Ajmer. The Principal of the said school has also submitted a report. After perusing the same, this Court vide order dated 13.9.2010 directed that both the parties alongwith the child, Master Kislay, would remain present before this Court on 22.10.2010. On the said date, both of us had a long conversation with the child in Chambers and tried to know his mind and understand his views about the applicant. We came to the conclusion that the matter required full hearing. Hence, the matter came for final hearing.

8. Shri Prashant Bhushan, learned counsel appearing for the applicant, has submitted that there is ample evidence on record to show that the consent order passed in the Lok Adalat has been

violated by the respondents. The mind of the child has been poisoned/polluted and the child does not have any inclination towards his father because of the tutoring by the respondents. The child had been taught not to pick up the phone. Respondent No.2 is quite aged, seriously ill and it was one of the main grounds seeking transfer of the matrimonial case pending before Gopalganj Court (Bihar) by the respondent no.1. It is not in the interest/welfare of the child to continue his education at Ajmer, as the respondent No.1 lives and is working in U.P. Institute of Medical Sciences at Saifai, Dist. Etawah (U.P.). The Court must ensure the compliance of the right of visitation to his son given to the applicant.

9. Shri V.K. Shukla, learned counsel appearing for the respondents, has fairly conceded that the applicant has right of visitation and must be concerned about the welfare of the child. However, the child is getting the best education at Ajmer, which should not be disturbed. As the child himself is not inclined to talk to the applicant, he cannot be forced to have any communication/ meeting with the applicant. None of the respondents has tutored the child. The applicant has filed a writ petition No. 155 of 2009 before this Court seeking the relief, which has been sought in this petition, and the same stood dismissed vide order dated 29.9.2009. Therefore, this petition itself is not maintainable and, thus, is liable to be dismissed.

10. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

This matter has been heard by us and we had an opportunity to talk to the parties, as well as to the child. We are of the view that the applicant could not get the benefit of his visitation right under the final order passed by this Court on 3.5.2008, and, to certain extent, the respondents are responsible for tutoring the child as the conversation between the applicant and the child reveals many things which a child is not supposed to know/understand at the tender age of 2-1/2 years. Even in conversation with us, the child, Master Kislay, has narrated many things which could not be in his personal knowledge and which he could not say by his own memory.

During our conversation with the child we could clearly note that the child has been tutored by the respondents to make him completely hostile towards his father.

11. The submission made by Shri Shukla, learned counsel for the respondents, that the writ petition filed by the applicant seeking the same relief stood dismissed and thus, no relief can be granted to him, is preposterous. It stood dismissed more than 15 months ago, wherein the applicant had appeared in person. The niceties of law cannot come in the way of this Court while deciding an issue of such a delicate nature. More so, the writ petition could not be maintainable for the relief sought herein.

Be that as it may, it is settled legal proposition that a party cannot be rendered remediless. (See: Rameshwar Lal v. Municipal Council, Tonk & Ors. (1996) 6 SCC 100).

12. In Mohammad Idris & Anr. v. Rustam Jehangir Bapuji & Ors., AIR 1984 SC 1826; and Y.N. Gangadhara Setty & Ors. v. Jaya Prakash Reddy, MD, Karnataka Cooperative Milk Products Federation, (2007) 14 SCC 434, this Court held that even undergoing the punishment for contempt does not mean that the court is not entitled to give appropriate directions to remedy and rectify the consequences of actions in violation of its orders.

13. In Delhi Development Authority v. Skipper Construction Company (P) Ltd. & Anr., AIR 1996 SC 2005, this Court held as under:

"There is no doubt that the salutary rule has to be applied and given effect to by this court, if necessary, by over-ruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give way. The Court must ensure full justice between the parties before it."

14. Thus, it is evident from the above that a mere technicality cannot prevent the Court from doing justice in exercise of its inherent powers. The power under Article 142 of the Constitution can be exercised by this Court to do complete justice between the parties, wherever it is just and equitable to do so and must be exercised to prevent any obstruction to the stream of justice.

15. In Rosy Jacob v. Jacob A. Chakramakkal, AIR 1973 SC 2090, this Court (Three-Judge Bench) considered the nature of custody of a minor under the provisions of Guardians and Wards Act, 1890 and application of doctrine of res-judicata/estoppel in respect of the same and held as under:

"The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation."

16. The aforesaid judgment was re-considered by this Court (Two- Judge Bench) in Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112, and after quoting the ratio of the said judgment, held as under:

"21. .....However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the Family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting a new case before the court. It must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results....."

17. In Jai Prakash Khadria v. Shyam Sunder Agarwalla & Anr., AIR 2000 SC 2172; and Mausami Moitra Ganguli v. Jayant Ganguli, AIR 2008 SC 2262, this court held that it is always permissible for the wards to apply for the modification of the order of the court regarding the custody of the child at any stage if there is any change in the circumstances.

(See also Vikram Vir Vohra v. Shalini Bhalla, (2010) 4 SCC 409)

18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be

determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical well- being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (vide Gaurav Nagpal v. Sumedha Nagpal, AIR 209 SC 557).

19. Statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (vide Elizabeth Dinshaw v. Arvand M. Dinshaw, AIR 1987 SC 3; Chandrakala Menon v. Vipin Menon, (1993) 2 SCC 6; Nil Ratan Kundu & Anr. v. Abhijit Kundu, (2008) 9 SCC 413; Shilpa Aggarwal v. Aviral Mittal & Anr. (2010) 1 SCC 591; and Athar Hussain v. Syed Siraj Ahmed & Anr., (2010) 2 SCC 654).

20. In addition to the statutory provisions of the Contempt of Court Act, 1971 the powers under Articles 129 and 142 of the Constitution are always available to this court to see that the order or undertaking which is violated by the contemnor is effectuated and the court has all powers to enforce the consent order passed by it and also issue further directions/orders to do complete justice between the parties. Mutual settlement reached between the parties cannot come in the way of the well established principles in respect of the custody of the child and, therefore, a subsequent application for custody of a minor cannot be thrown out at the threshold being not maintainable. It is a recurring cause because the right of visitation given to the applicant under the agreement is being consistently and continuously flouted. Thus, doctrine of res-judicata is not applicable in matters of child custody.

21. If the instant case is considered in totality taking into consideration the above referred judgments, we are of the view that in the facts and circumstances of the case, inference can be drawn that the rights of visitation given to the applicant by this court vide order dated 3.5.2008 stood completely frustrated and the respondents have ensured that the applicant may not reach his son and all attempts made by the applicant in this regard stood futile. The mind of the child has been influenced to such an extent that he has no affection/respect for the applicant. In such a fact-situation, we do not hesitate in holding that the respondents have deliberately and willingly violated the terms of the consent order and are guilty of committing the contempt of this court.

However, imposing any punishment on the respondents would not serve any purpose, nor it would serve in a better way to the welfare of the child, Kislay.

The respondent No.1 is serving at Saifai, Dist. Etawah (U.P.) at a distance of about 500 Kms. from Ajmer and is certainly not in a position to take care of the child, Kislay. The respondent No.2 is quite aged lady who herself has been suffering from various ailments. Therefore, interest/ welfare of the child, Kislay is not being taken care of at all. A child of this age may not be able to learn family values, the importance of bonding or have interpersonal relationships, etc. if he

gets inadequate opportunities for social inaction. It is necessary for a child that he should be in regular contact of the non-custodial parent also.

22. Be that as it may, undoubtedly, the order dated 3.5.2008, so far as the custody of the child, Kislay, is concerned, has proved unworkable as the respondents succeeded in frustrating the same totally. The child has been tutored by the respondents to the extent that he has no inclination towards the applicant father. The respondents have ensured that all efforts of the applicant or his parents to meet the child turned futile. The child, Kislay, has been instructed not to pick up the phone, so that even by chance he may not hear the voice of the applicant or his parents.

In such a charged/hostile atmosphere, it is beyond one's imagination that the other terms/ conditions incorporated in the order dated 3.5.2008, that the applicant may take out the child to another city; or stay with the child for few nights in the same city, would be complied with.

More so, further, clause no.(XV) of the order, that the applicant or his parents would be at liberty to talk to the child on telephone has never been observed as all attempts made by the applicant in this regard have failed.

The child, Kislay, has been tutored by the respondents and he has adopted an hostile attitude towards the applicant.

In such a fact-situation, where circumstances have substantially changed subsequent to the order dated 3.5.2008, due to non- compliance of the terms of compromise order, the applicant is fully justified seeking review/modification of the said order.

The issue raised herein being a pure question of fact requires to be examined by an appropriate forum taking into consideration all the factual and legal aspects.

23. Thus, in view of the above, we dispose of the contempt petition giving liberty to the applicant to approach the appropriate court/forum for seeking custody of the child, Kislay, or any other appropriate relief in this regard. In case, such a petition is filed, the court concerned is requested to proceed and dispose of the same in accordance with law, without being influenced by the consent order dated 3.5.2008 or dismissal order of the writ petition dated 29.9.2009 passed by this Court regarding the custody and visiting rights of the parties towards the child, most expeditiously.

Needless to say that the court concerned would proceed with the case, if any, without taking note of any observation made hereinabove in this judgment as we have expressed no opinion on merit on the issue of custody.

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LANDMARK JUDGMENTS ON DUTY OF FAMILY COURTS

LAHARI SAKHAMURI VERSUS SOBHAN KODALI

IN THE SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice A.M. Khanwilkar & Hon'ble Mr. Justice Ajay Rastogi

Lahari Sakhamuri …..Appellant(S)
Versus
Sobhan Kodali …..Respondent(S)

CIVIL APPEAL NO(S). 3135-3136 OF 2019

(Arising out of SLP(Civil) No(s). 15892-15893 of 2018)
WITH
CRIMINAL APPEAL NO(s). 500 OF 2019
(Arising out of SLP(Crl.) No. 2316 of 2018)

Decided on 15 March, 2019

JUDGMENT

Hon'ble Mr. Justice Ajay Rastogi.—

Leave granted.

2. Both the appeals although arise from two separate orders passed by the High Court of Hyderabad for the State of Telangana and State of Andhra Pradesh dated 8th February 2018 in a Habeas Corpus Petition filed at the instance of the respondent (Sobhan Kodali) and by the appellant (Lahari Sakhamuri) under the Guardians & Wards Act, 1890 primarily for the custody of the two minor children who were born in the United States on 14th March, 2012 and 13th October, 2014 and are US citizens and holding US passports. For the custody of children, a tussle was going on between the parents who are residing in US since 2004-2005. Their marriage was solemnized on 14th March 2008 in Hyderabad and both are green card holders and not only highly educated but well placed. It appears that some differences cropped up which can be a misunderstanding or failing to understand each other, various efforts were made through conciliation and after the matter came to this Court through the process of mediation, the orders of this Court indicate that lot of efforts were made for reconciliation and at one point of time, it reached to a final stage but unfortunately could not reach to its logical end for various reasons and factors.

3. The persons who are affected are the minor children who have been directly impacted because of the fact that their parents have not been able to resolve their differences. Children are very sensitive and due to the conflict of their parents if could not be resolved at the earliest, the minor children became the victim of time for which they are not at fault but indeed the sufferers. It has to be examined in different perspective also that rights of the child as a progressive approach to the best interest of the child and what is needed in the best interest of the child is the one which has to be deciphered by us in the instant proceedings through the manifold arguments being advanced from both sides keeping in view the principles of law on the subject but still remain a guess work.

4. Before this Court may proceed to examine the question, there are plentitude of judgments of this Court but still each case has to be decided on its own facts and circumstances. Obviously, the ultimate goal which has to be kept in mind is the best interest of the child which is of utmost importance and of a paramount consideration.

5. The brief facts of the case which manifests from the voluminous record placed before us are that the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) are the parents of the minor children. Appellant (Lahari Sakhamuri) went to USA for her masters in September, 2004 and thereafter started working in USA. She is a Biomedical Engineer by profession. Respondent (Sobhan Kodali) is also highly qualified and went to USA in July 2005 and is presently a Cardiologist by profession. Their marriage was solemnized according to Hindu rites in Hyderabad on 14th March, 2008. From this wedlock, son, namely, Arthin and daughter Neysa were born on 14th March, 2012 and 13th October, 2014 and both are US citizens and also hold US passports. The couple purchased house in Pennsylvania on 29th January, 2016 in their joint names and moved to their new home. The son started going to a school in September 2014 and a daughter in December, 2016. Both the children being there in US from their birth, the social and cultural value of US certainly was embedded in both of them.

6. This fact cannot be ruled out that something certainly has gone wrong in their marital relations and it went to an extent where the appellant (Lahari Sakhamuri) took a decision to file petition for divorce and custody of the minor children in US on 21st December, 2016 on the premise that there was a complete irretrievable breakdown of marriage under the Divorce Code, 1980 prevalent in US. It may be relevant to note that along with the application filed for divorce and custody of minor children, there is a prescribed format which has to be filled disclosing the details of any wrong, if happened physically or abuse has been committed and the fact is that she was completely silent and positive in assertion in her application. Although both the parties were residing together in the same house, with joint legal custody of their children who were residing with them and there was no criminal/abuse history ever in the past.

7. Irretrievable breakdown of marriage can be due to marital difficulties with no reasonable prospect of reconciliation but it appears that in the US before such matrimonial matters are taken up for adjudication on the judicial side, all efforts are being made for conciliation and mediation between the parties which is also being actively taken note of under Section 89 of Code of Civil Procedure of resolving matrimonial and custodial disputes through the process of mediation and which is very successful and effective in India as well.

8. It reveals from the record that on the date of filing of the petition for divorce and custody of minor children by the appellant (Lahari Sakhamuri), i.e. 21st December, 2016 in US, the order came to be passed on the petition directing respondent (Sobhan Kodali) to appear for conciliation conference on 20th January, 2017 and both the parties were directed not to change the residence of the children which would affect the other party's ability to exercise custodial rights. It may be appropriate to quote the extract of the order which came to be passed on the application filed by the appellant (Lahari Sakhamuri) which reads as under: " ORDER OF COURT You, Sobhan Kodali, Defendant/Respondent, have been sued in court to obtain shared legal and primary physical custody of the children, Arthin Kodali, born March 14, 2012 and Neysa Sakhamuri Kodali, born October 13, 2014. You are ordered to appear in person at Room 325, Lehigh County Courthouse, 455 W. Hamilton Street, Allentown, Pennsylvania, on January 20, 2017 at

2:00 p.m., for XX a conciliation or mediation conference. a pretrial conference. a hearing before the Court. If you fail to appear as provided by this Order, an order for custody may be entered against you or the Court may issue a warrant for your arrest. You must file with the Court a verification regarding any criminal record or abuse history regarding you and anyone living in your household on or before the initial in-person contact with the Court (including, but not limited to, a conference with a conference officer or judge or conciliation) but not later than 30 days after service of the Complaint or Petition. No party may make a change in the residence of any child which significantly impairs the ability of the other party to exercise custodial rights without first complying with all of the applicable provisions of 23 Pa.C.S. §5337 and Pa.R.C.P. No. 1915.17 regarding relocation. YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE. Lehigh County Bar Association Lawyer Referral Service P.O. Box 1324 Allentown, PA 18105-1324 Telephone: 610-433-7094 Americans with Disabilities Act of 1990 The Court of Common Pleas of Lehigh County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the Court, please contact the Court Administrator's Office at (610) 782-3014. All arrangements must be made at least 72 hours prior to any hearing or business before the Court. You must attend the scheduled conference or hearing.

BY THE COURT: 12/21/2016 _____/RR Date J."

9. It reveals from the record that efforts were going on in the process of conciliation and the same were held on 21st March, 2017 and since the parties could not arrive to any consensus regarding the custody of their children, another conference was scheduled as agreed for 25th March, 2017.

10. By the time parties could reach to a final consensus by the intervention of the trained conciliators which indisputedly play a very pivotal role in matrimonial matters, there was a sad demise of the maternal grandmother of the appellant (Lahari Sakhamuri) and in providing strength and support to the family, the appellant travelled to India with both the minor children on 23rd March, 2017 with return tickets of 24th April, 2017 and within 20 days of coming to Hyderabad(India) where her family reside, filed a petition in the Family Court, Hyderabad on 12th April, 2017 seeking custody of minor children and injunction against respondent (Sobhan Kodali) under the Guardians and Wards Act, 1890 and she was able to succeed in getting ex-parte interim injunction on 12th April, 2017. It would be appropriate to quote the extract of the ex-parte injunction order passed by the learned Family Court, Hyderabad dated 12th April, 2017 which is as follows:- "AD INTERIM INJUNCTION IN THE COURT OF JUDGIGE ADDITIONAL FAMILY COURT : CITY CIVIL COURT : HYDERABAD I.A. No. 292 OF 2017 in OP No.433 of 2017 BETWEEN : Smt. Lahari Sakhamuri, W/o Sobhan Kodali, Hindu, aged 34 years, R/o Plot No. 443/A-28, Road No.86, Jubilee Hills, Hyderabad T.S … Petitioner AND Sobhan Kodali, S/o Dr. Jaya Ramesh Kodali, Hindu, aged about 37 years, R/o # 2C85, Bellflower Lane, Centre Valley, Lehigh County, Pennsylvania-18034, USA … Respondent To Sobhan Kodali, S/o Dr. Jaya Ramesh Kodali, Hindu, aged about 37 years, R/o # 2C85, Bellflower Lane, 9 Centre Valley, Lehigh

County, Pennsylvania-18034, USA UPON MOTION made unto this court by Sri K. Chaitanya, Counsel for the petitioner seeking the court to grant ad interim injunction restraining the respondent from forcibly taking away the minor children Arthin Kodali and Neysa Sakhamur from the custody of the petitioner pending the above O.P. Upon hearing of the arguments of the counsel for the petitioner this court while issuing notice to respondent returnable by 26.04.2017 doth order restraining respondent from taking away minor children namely Arthin Kodali and Neysa Sakhamur from the custody of the petitioner till 26.04.2017 and that petitioner should not shift the children from the jurisdiction of this court without permission from the court, and that petitioner should also look after food, shelter and medical facilities of the children petition stood posted to 26.04.2017. Given under my hand and the seal of the court on this the 12th day of April, 2017. Sd/- JUDGE, ADDL. FAMILY COURT CITY CIVIL COURT, HYDERABAD"

11. After few days, she also filed a FIR against respondent (Sobhan Kodali) and his family members for offence under Section 498A IPC i.e. on 21st April, 2017 but after investigation, the police filed closure report on 1st November, 2017. The fact to be noticed here at this stage is that the very appellant (Lahari Sakhamuri) filed a petition for divorce and custody of minor children in US on 21st December, 2016, there was no whisper or an averment that there was any domestic violence or abuse either subjected upon her or the minor children by respondent (Sobhan Kodali) and he was informed on 23rd April, 2017, twelve hours before her flight that she would not be returning and does not have a travel date in mind. Respondent (Sobhan Kodali) and his counsel in the US were orally informed of the ex-parte order which was received by respondent (Sobhan Kodali) on 29th April, 2017 through e-mail from the counsel for appellant (Lahari Sakhamuri) in India.

12. Immediately, on receiving the oral information, on 26th April, 2017, emergency petition for interim orders in petition for divorce and custody filed at the instance of the appellant (Lahari Sakhamuri) was filed by respondent (Sobhan Kodali). The said application was contested by the appellant (Lahari Sakhamuri) through Attorney and in defence stated that she had only temporarily relocated to India for attending her grandmother's funeral and providing emotional support to her mother. After hearing the parties, the US Court passed order on 22nd May, 2017 for continuing the jurisdiction over the custody matter and granted temporary physical custody of the children to respondent (Sobhan Kodali) with a further direction that children be returned to the jurisdiction of the Court in US by 2nd June, 2017. It would be appropriate to quote the extract of the order passed by US Court on the emergency custody petition filed by respondent Sobhan Kodali on 22nd May, 2017:- "IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA CIVIL DIVISION Lahari Sakhamuri) Plaintiff) File No.2016-FC-1641 Vs) Sobhan Kodali) in custody Defendant) ORDER AND NOW, this 22nd May, 2017 upon consideration of the Emergency Petition for Relief Requesting an Interim order of custody filed 26.04.2017, by defendant and hearing conducted on 22.05.2017 attended by the defendant / petitioner Sobhan Kodali represented by his legal counsel, Mark B. Dischell, Esquire and plaintiff/respondent, Lahari Sakhamuri having failed to appear for said hearing, but represented by her legal counsel, Mary J B. Eidelman Esquire;

IT IS HEREBY ORDERED that :

1. Lehigh County, Pennsylvania, United States of America shall remain the sole home country, home state and country of the parties' minor children, Arthin Kodali born 14.03.2012 and Neyas Sakhamuri Kodali, born 13.10.2014.

2. This Court shall have sole continuing jurisdiction of this custody matter which was filed by the plaintiff, Lahari Sakhamuri, on 21.12.2016.

3. Pending further order of court, father is granted temporary physical custody of the children;

4. Mother shall return the children to Lehigh County, Pennsylvania, United States of America, to the father's custody on late than 02.06.2017.

5. Until the children's return, father shall have telephone and video chat contact with the children each day;

6. Upon her return to this jurisdiction, mother shall not be permitted to travel out of the Commonwealth of Pennsylvania with the minor children without further order of court;

7. The passports of the children shall be held in escrow by the parties' counsel or another mutually agreeable person;

8. Should the mother fail to return the children to father by 02.06.2017, mother shall pay to father $1,000 each day she does not return the children;

9. In the event mother does not return the children to the father by 02.06.2017, father and/ or any of his designees being his father, Jayaramesh Kodali; his mother, Vijaya Bharathi; his cousin, Chaitanya Kadiyala, shall be permitted to receive the children from mother in India and bring them to Lehigh County, Pennsylvania, United States of America;

10. Until such time as mother returns to the United States, she shall be precluded from seeking child support on behalf of the children;

11. A certified copy of this order shall be sent to the America Consulate in India and shall be registered with appropriate court / jurisdiction in Hyderabad, India;

12. Within thirty (30) days of this order, mother shall pay father $10,000 as partial payment towards counsel fee incurred by father in this matter. A final determination on the amount of counsel fees to be paid by mother to father will be made by the court after subsequent hearing which may be requested by either party.

BY THE COURT :

Sd/- Daniel K. McCarthy"

13. Thereafter, the respondent (Sobhan Kodali) moved an application under Order 7 Rule 11 CPC in the proceedings instituted in the Family Court, Hyderabad asserting that the Family Court, Hyderabad has no jurisdiction to decide the application for the custody of minor children as they are not the ordinary resident of Hyderabad but that came to be rejected vide order dated 15th September, 2017 holding that the Family Court, Hyderabad is competent to exercise jurisdiction to examine the application filed at the instance of the appellant (Lahari Sakhamuri) on merits.

14. At this stage, respondent (Sobhan Kodali) preferred appeal to the High Court under Section 19(1) of the Family Courts Act against the order dated 15th September, 2017 passed by the learned Family Court, Hyderabad holding jurisdiction to examine the application filed by the appellant (Lahari Sakhamuri) regarding custody of the minor children under Guardians and Wards Act, 1890. Simultaneously, without any loss of time, respondent (Sobhan Kodali) also filed

a writ petition seeking Writ of Habeas Corpus for producing the minor children in the custody of the US Court taking note of the earlier order passed dated 21st December, 2016 followed with order dated 22nd May, 2017. The appeal and the writ petition were clubbed but were decided by the High Court by separate orders dated 8th February, 2018 holding that the Family Court, Hyderabad has no jurisdiction as the children are not ordinarily residing within the jurisdiction of the Family Court, Hyderabad as provided under Section 9 of the Guardians and Wards Act, 1890. In consequence thereof, application filed by the appellant (Lahari Sakhamuri) stood rejected. At the same time, in the Habeas Corpus Petition, Order came to be passed dated 8th February, 2018. The Court finally ordered as under:-

"36. In view of the above discussion and the legal position, we are of the considered opinion that it would be in the best interest of the minor children to return to the US so that they can enjoy there in the natural environment, receive the love, care and attention of their father and paternal grandparents, resume their school and be with their teachers, peers and friends.

37. Accordingly, we hereby direct the 5th respondent to return the children to the petitioner in India within four (04) weeks from the date of receipt of a copy of this order failing which, the Consulate General of the US at Hyderabad shall take the custody and handover the custody of the children to the petitioner in India or in the US by making their comfortable journey to US.

38. The 5th respondent is also highly educated and was gainfully employed in the US for number of years. Accordingly, we hereby grant liberty to the 5th respondent, whenever she feels to visit the children in US, the petitioner shall make all arrangements i.e., travel, comfortable stay at US and other expenses till the US Court pass directions in the petitions filed by the 5th respondent or she become the gainful in any country, whichever is earlier.

39. As undertaken by the petitioner that, we direct the petitioner that he shall not insist upon costs and fine imposed by the Court of US upon the 5th respondent.

40. We also direct the petitioner that if children are in India and 5 th respondent happens to be in India, the children shall remain with 5th respondent. He shall give all access to 5th respondent to chat with the children on whatsapp and video conference etc."

15. Both the orders passed by the High Court while disposing of the appeal filed by the respondent (Sobhan Kodali) under Section 19(1) of the Family Courts Act as well as the Habeas Corpus Petition dated 8th February, 2018 came to be challenged by the appellant (Lahari Sakhamuri) in the present appeals.

16. In the pending proceedings, in the Court of Common Pleas of Lehigh County, Pennsylvania Civil Division-Law, further order has been passed on 9th March, 2018 permitting the respondent (Sobhan Kodali) to apply for replacement of US passports on behalf of the minor children. The order is reproduced as under:- "IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA CIVIL DIVISION – LAW LAHARI SAKHAMURI,

Plaintiff, : NO. 2016-FC-1641

Vs. :

:

SOBHAN KODALI, : IN CUSTODY

Defendant, :

ORDER OF COURT

AND NOW THIS 9th day of March, 2018, upon

consideration of the Defendant's Emergency Petition for Special Relief in Custody, it is hereby ORDERED and DECREED as follows:

1. Defendant's Emergency Petition for Special Relief is GRANTED;

2. Defendant, Sobhan Kodali, is granted sole legal custody of the minor children, Arthin Kodali, born March 14, 2012, and Neysa Sakhamuri Kodali, born October 13, 2014;

3. Mother's retention of the children in India is a "wrongful retention" of the children pursuant to the Child Abduction Remedies Act, codified at 23 Pa.C.S. § 5201 et. seq.

4. Defendant, Sobhan Kodali, shall be permitted to apply for replacement U.S. Passports on behalf of the minor children, Arthin Kodali, born March 14, 2012, and Neysa Sakhamuri Kodali, born October 13, 2014, through application of Form DS-11 attached hereto as Exhibit "B", and without Mother's consent.

5. The United States Department of State, upon presentation of a Certified Copy of this Order, shall issue replacement passports to Sobhan Kodali, Father of the minor children, even though Father previously requested the entry of the children into the Department's Child Passport Issuance Alert Program (CPIAP) and received confirmation of the entry of the children into that system on May 24, 2017, via Case Number 1536567.

BY THE COURT _____J."

17. Before the submissions made by the learned counsel for the parties being canvassed, it may reveal from the orders passed by this Court that keeping in view the personal relations of the spouse and the utmost and paramount consideration of the welfare of the children on a high pedestal and to find out if there is any possibility in resolving their matrimonial differences through the process of mediation which indisputably plays a very pivotal role in such matters. The parties appeared in person on various dates and at one stage, it was sent for mediation as it reveals from Order dated 12th October 2018, the Court appointed Mediator used his good office to find out an amiable solution which may be acceptable to the parties and at one stage from Order dated 29th October, 2018, it reveals that the parties had reached to an amicable solution in resolving their on-going matrimonial differences by sitting across the table with the intervention of the Court appointed Mediator. But what happened thereafter is really very unfortunate that parties could not reach to any final conclusion and both the learned counsel informed this Court that as the mediation could not have been now possible, the matter may be heard and decided on merits.

18. Learned counsel for the appellant Ms. Malavika Rajkotia, submits that repatriation to US would not be in the best interest of the children and this Court has always held that the best interest of the children cannot be sacrificed on the principle of comity of courts or any other legal

principle could not plead in overcoming the best interest of the children which is of primary and paramount consideration. Learned counsel submits that there is a statutory presumption in favour of the mother, under the tender years doctrine and respondent (Sobhan Kodali) is unable to dispel from the pleadings on record in the instant proceedings and she being a fit mother and the best interest of the children is with mother as the primary caretaker and once the custody of the minor children is with mother appellant (Lahari Sakhamuri), it is in the children's best interest for the court to ensure the psychological well-being and the legal rights of the mother by protecting her autonomy at the first instance, to exercise her choice of location, particularly when she is distressed in her matrimonial home.

19. Learned counsel further submitted that the prima facie assumption may be rebutted in a trial but she cannot be non-suited by not providing her an opportunity in establishing her parental competence and the circumstances leading to protect herself and the children. Learned counsel further submitted that the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) are Indian citizens and to separate the primary caregiver from the children under the "best interest of child" rule constitutes invasion of her fundamental right of autonomy guaranteed to her under the law and further submitted that in giving parental rights and privileges, what is to be ensured is the best interest of the children that is admittedly difficult as it is related to their life and welfare in such circumstances is being called by a psychologist as the "least worst option" considering that the ideal of proximity with both parents is not possible in a given situation. The children and their mother are in India and is an accessible jurisdiction for the father being married in India and Indian law applies in a cultural context that is well appreciated here and respondent (Sobhan Kodali) father has means to come to India and meet his children in India.

20. Learned counsel for the appellant further submits that though she has been completely silent in her proceedings instituted in the US Court in a divorce and custody petition of the children as there is a provision in US that one can seek divorce if there is a irretrievable break down of marriage and prospects of conciliation is reasonably ruled out hence there was no occasion for her to indicate what mentally and physically she has suffered and how constrained it was to live due to acute mental, emotional and even physical violence and it is not in the interest of the children that their mother be pinned into an unhappy, abusive situation. It is not in the welfare of the children to be witness to their mother being devalued. It is also not in their interest that they, witness continued toxic conflict of their parents living as a family or even in proximity of collaborative parenting. In such cases, distance with the spouse, with the child as the only point of contact between two parents in their own location is the best solution.

21. Learned counsel for the appellant submits that due to the harassment meted out and humiliation suffered by her and their minor children at the hands of respondent (Sobhan Kodali) husband, no other option was left with her other than staying away from US. Further, the children are admitted in the best school in Hyderabad where they are presently studying. Learned counsel has further submitted that in Nithya Anand Raghavan Vs. State(NCT of Delhi) and another[1] , this Court has disagreed with the conclusions drawn in Surya Vadanan Vs. State of Tamil Nadu and Others[2] laying down the "first strike" principle that weightage should be given to the order of the foreign Court which has jurisdiction and held that the best interest and welfare of the children

1 2017(8) SCC 454

2 2015(5) SCC 450

is of paramount importance and that if handing over of the children to the foreign Court's jurisdiction would harm their best interest and welfare, the Court would not direct their return to the place falling within the jurisdiction of the foreign Court. That applying the principles laid down in the said case, the two minor children who are happily placed in the company of the appellant and her parents, if are entrusted to the foreign court's jurisdiction, the same may not be in their best interest and welfare of the children. Learned counsel submits that Indian Courts have jurisdiction because the parties had married here and the Hindu Marriage Act applies to Divorce and Section 26 deals with custody. What is being pleaded by the respondent under Order 7 Rule 11 CPC is a mixed question of law and facts and hence could be examined only during the course of the trial but not at this stage.

22. In support of the submission, learned counsel has placed reliance on the decision of this Court in Jasmeet Kaur Vs. Navtej Singh[3] holding that the jurisdiction founded on domicile is a matter of trial and cannot be decided summarily and submitted that the custody petition filed under Guardians and Wards Act, has been rejected by the High Court without taking note of the given fact situation and the scope under Order 7 Rule 11 CPC.

23. Per contra, learned senior counsel for the respondent Ms. Meenakshi Arora, referred to the decisions of this Court in Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Anr.[4] ; Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Another[5] ; V. Ravi Chandran(Dr.) Vs. Union of India and Others[6]; Nithya Anand Raghavan's case(supra) and Surya Vadanan's case(supra),and taking assistance thereof, submitted that two minor children were born in US and both of them are US citizens and are school goers and they enjoyed their schooling (which is evident from the photographs filed along with the additional documents) and removal of children from the US despite the Order of the US Court affects their future and the same may not be in their best interest.

24. Learned counsel further submitted that the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) started their matrimonial life in the US and been there for almost 14 years, they are being acclimatized with that culture and in their married life, except for duration on short visit to India, they spent their good time in US and removing the children from the US, in the given circumstances, may not be in their best interest. Learned counsel submitted that the appellant (Lahari Sakhamuri) had herself admitted that children were in shared custody with respondent (Sobhan Kodali) and she was never subjected to domestic violence at any given point of time and she had invoked the jurisdiction of US Court for divorce and custody of minor children based on their residence and, therefore, it may not be open for her to disregard the orders of US Court, more specially the order dated 22nd May, 2017 whereby respondent (Sobhan Kodali) was granted temporary physical custody of the children and appellant (Lahari Sakhamuri) was directed that minor children should be returned to the jurisdiction of US Court by 2nd June, 2017.

25. Learned counsel submitted that from the material which has come on record, even inference cannot be drawn that there could be any harm caused to the minor children in returning to their

3 2018(4) SCC 295 1890

4 1984(3) SCC 698

5 1987(1) SCC 42

6 2010(1) SCC 174

native state, i.e. US. Moreover, in the proceedings on behalf of the appellant (Lahari Sakhamuri) filed before the US Court, it is her own admission that there was no domestic violence having perpetrated upon her nor she was subjected to cruelty rather had asked for shared custody of children along with respondent (Sobhan Kodali) and in the given circumstances, her unilateral decision to return to India cannot deprive the minor children in terms of the love, attention, care and facilities, amenities, upbringing and environment to which they are accustomed to while in the US. No doubt, it is not the decision of the minor children to remain in India away from their father and their school and their peers. The US Court has the most intimate contact and closest concern to decide on the issue of minor children which has been extensively examined by the High Court and finding has been recorded under the impugned judgment upholding children best interest.

26. Learned counsel submitted that best interest of children has been sidelined while deciding to stay back in India with the minor children who are admittedly US citizens and were permanently residing in US till 23rd March, 2017 when they were removed from US in contravention of the Order dated 21st December, 2016 passed by the US Court and forcibly separated from their father respondent herein and the environment in US which children were experiencing, is their natural environment and in the given circumstances, detention of the children in India is unlawful and in violation of Child Abduction Remedies Act of minor children applicable in US and US Court has rightly directed the appellant (Lahari Sakhamuri) to bring back the children to US Court by 2nd June, 2017 and the findings which have been recorded by the High Court are based on cogent available material on records and needs no further interference.

27. Learned counsel further submits that the minor children are not ordinary residents of the jurisdiction of Family Court, Hyderabad as defined under Section 9 of the Guardians and Wards Act, 1890 as both are natural born US citizens and came to India only on 23rd March, 2017 and within 20 days, application came to be filed by the appellant (Lahari Sakhamuri) on 12th April, 2017 before the Family Court, Hyderabad for the custody of the children with ex-parte interim injunction passed by the learned Court and even from the pleadings, nothing is borne out that how the Ld. Family Court, Hyderabad was having jurisdiction to entertain application under Guardians and Wards Act, 1890 and in the given circumstances, the application filed by the respondent (Sobhan Kodali) under Order 7 Rule 11 CPC was arbitrarily rejected by the Ld. Family Court and that was reviewed by the High Court on the material available on record and the finding has been recorded holding that the children are not the ordinary residents of jurisdiction of the Family Court, Hyderabad where an application was filed by the appellant (Lahari Sakhamuri) for custody of the children and no error was committed by the High Court in rejecting the application filed by the appellant (Lahari Sakhamuri) under Guardians and Wards Act, 1890 for lack of jurisdiction and merely because their marriage was solemnized in Hyderabad would not confer a territorial jurisdiction to the Family Court, Hyderabad for the purpose of custody of the minor children under the Guardians and Wards Act, 1890.

28. Learned counsel further submits that both the issues in respect of the custody of the minor children and rejection of an application due to lack of territorial jurisdiction entertained by learned Family Court, Hyderabad has been discussed in detail under the two separate impugned judgments by the High Court and needs no further interference of this Court.

29. We have heard learned counsel for the parties and with their assistance perused the record and also the plentitude of judgments cited of this Court. Before we proceed, it will be appropriate to take note of what transpired between the hearing of the instant appeals. On 26th March, 2018, this Court directed the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) to remain personally present on the next date of hearing which was 9th April, 2018. During pendency of the proceedings, respondent (Sobhan Kodali) was allowed to meet children possibly keeping in view the amicable solution, if possible, to be arrived at between the parties and at one stage by Order dated 12th October, 2018, the parties were granted liberty to resolve their issues inter se amicably and to facilitate the parties in arriving at an amicable solution, a senior counsel was requested to mediate which was voluntarily accepted by the parties. Pursuant thereto, possibilities of settlements were explored and at one stage, settlement was also arrived at possibly acceptable to the parties as it reveals from the Order dated 29th October, 2018 of this Court. It will be appropriate to quote the extract of the order dated 29th October, 2018 followed by Order dated 27th November, 2018, which are as under:-

Order dated 29th October, 2018

"Both the respondent/husband and petitioner/wife are present. We are extremely happy that they have decided to forgive each other, forget the past and take their family life forward. Mrs. Lahri Sakhamuri/petitioner has submitted that she will withdraw all the cases filed by her in India and abroad and she does not want to pursue any criminal proceedings. Since Mr. Sobhan Kodali/respondent has to go back to United States tomorrow i.e. on 30.10.2018, post this matter on 14.11.2018 for formal orders, on the basis of the arrangement the parties have jointly made. We stay all the pending cases between Mrs. Lahari Sakhamuri and Sobhan Kodali, both civil and criminal. We also restrain them from instituting any case against each other or the members of their family or filing any petition/complaint against each other or their family members, without express permission from this Court. We record our appreciation for the strenuous efforts taken by Mr. Gurukrishna Kumar, learned senior counsel, for facilitating the reconciliation."

Order dated 27th November, 2018

"Learned counsel for both sides on instructions submit that they will withdraw all the cases filed against each other either in India or in United States. We direct the petitioner-Mrs. Lahari Sakhamuri to withdraw all the cases in both the jurisdictions within a period of one week from today. Let the respondent also withdraw all the cases filed both in India or in United States within the same period of time. Learned counsel for the respondent-husband on instructions submits that within 10 days, he will arrange for the passport of the minor child-Arthin from U.S. Consulate. It is also stated that husband will take all necessary steps for resolving all issues, if any, pertaining to the immigration and Visa status of the petitioner within the same period of time. Once such issues are cleared, we direct the petitioner to travel to U.S. along with her husband and children within a week of obtaining such clearances. We record our appreciation for the strenuous efforts taken by Shri Gurukrishna Kumar, learned senior counsel for assisting the parties to arrive at an amicable settlement and for reunion. List on mentioning by either side."

30. What unfolded thereafter may not be appropriate for this Court to take notice but the fact remains that agreement arrived at between the parties could not be taken to its logical end. It would have been better and in the interest of the parties themselves to amicably resolve their differences for their better future but as they have failed to do so, the judicial process has to intervene to decide the case on merits based on judicial precedents.

31. In the instant case, the facts on record clearly manifest that parties were residing in US since 2004-2005 and their marriage was solemnized in Hyderabad on 14th March, 2008. Both the children were born in US on 14th March, 2012 and 13th October, 2014 and are US citizens with US passports. Notably, the appellant (Lahari Sakhamuri) filed application for divorce and custody of minor children in the US Court on 21st December, 2016 and order came to be passed by the US Court on 21st December, 2016. Despite that interim order, the appellant (Lahari Sakhamuri) came to India on 23rd March, 2017 and within 20 days of her arrival in India, filed an application on 12th April, 2017 for custody of minor children in the Family Court, Hyderabad concealing her application for custody filed in the US Court. She also did not disclose that an order came to be passed by the US Court against her dated 22nd May, 2017 after hearing the counsel for the parties. In the given facts and circumstances, we find no difficulty in upholding the opinion of the High Court that the minor children were not ordinary residents of Hyderabad(India) as envisaged under Section 9(1) of the Guardians and Wards Act, 1890. Resultantly, the application for custody of minor children filed before the Family Court, Hyderabad is rightly rejected by the High Court in exercise of power under Order 7 Rule of CPC. At the same time, when the orders have been passed by the US Court, the parties cannot disregard the proceedings instituted before the US Court filed at the instance of the appellant (Lahari Sakhamuri) who is supposed to participate in those proceedings.

32. The judgment relied upon by the learned counsel for the appellant of Jasmeet Kaur's case(supra) may not be of any assistance for the reason that it was a case where one of the child was born in India which was one of the reason prevailed upon this Court to hold that principle of comity of courts or principle of forum convenience cannot determine the threshold bar of jurisdiction and when paramount consideration is the best interest of the child, it can be the subject-matter of final determination in proceedings and not under Order 7 Rule 11 CPC. In our considered view, the application for custody of minor children filed at the instance of the appellant was rightly rejected by the High Court under the impugned judgment, in consequence thereof, no legal proceedings in reference to custody of the minor children remain pending in India.

33. The custody of minor children has been considered difficult in adjudication by the Courts apart from raising delicate issues, especially when the spouses are non-resident Indians(NRIs).

34. This Court in Surinder Kaur Sandhu's case(supra) was concerned with the custody of a child who was British citizen by birth whose parents had been settled in England after their marriage. A child was removed by the husband from the house and was brought to India. The wife obtained a judicial order from the UK Court whereby the husband was directed to hand over the custody of a child to her. The said order was later confirmed by Court of England and thereafter the wife came to India and filed a writ petition in the High Court of Punjab and Haryana praying for custody and production of the child which came to be dismissed against which the wife appealed to this Court. This Court keeping in view the 'welfare of the child', 'comity of courts'

and 'jurisdiction of the State which has most intimate contact with the issues arising in the case' held thus:-

> *"10. We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the wellbeing of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses(See International Shoe Company v. State of Washington [90 L Ed 95 (1945) : 326 US 310] which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."*

35. In Elizabeth Dinshaw's case(supra), this Court held that it is the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing and was guided by the factors such as the longer time spent by the child in the US in which the child was born and became US citizen and also the fact that the child has not taken roots in India and was still not accustomed and acclimatized to the conditions and environment obtaining in the place of his origin in the United States of America. This Court took note of the fact that the child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune.

36. In V. Ravi Chandran(Dr.)'s case(supra), this Court was concerned with the custody of the child removed by a parent from one country to another in contravention of the orders of the Court where the parties had set up their matrimonial home. This Court took note of the English

decisions, namely L(Minors) in re[7] and McKee Vs. McKee[8] and also noticed the decision of this Court in Elizabeth Dinshaw's case(supra) and Dhanwanti Joshi Vs. Madhav Unde[9] keeping into consideration the fact that the child was left with his mother in India for nearly twelve years, this Court held that it would not exercise its jurisdiction summarily to return the child to the US on the ground that his removal from US in 1984 was contrary to the orders of US Courts. The relevant portion is as under:-

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in McKee v. McKee [1951 AC 352 : (1951) 1 All ER 942 (PC)] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re [(1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [(1998) 1 SCC 112] . Similar view taken by the Court of Appeal in H. (Infants), In re [(1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)] has been approved by this Court in Elizabeth Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13]."

37. This Court once again reiterated the principles of the closest concern, most intimate contact with the issues arising in the case, natural habitat of the minor child, best interest of the child and comity of Courts. This Court eventually directed the child to be taken to US from where he was removed to enable the parties to establish their right in the native state of the child, i.e. US.

7 (1974) 1 All ER 913(CA).

8 (1951) AC 352

9 1998(1) SCC 112

38. In Surya Vadanan's case(supra), it was a case where the spouses were of Indian origin and later the husband became the citizen of UK. They got married in India and had two daughters in UK. The wife also became a British citizen and had a British passport. After matrimonial dispute arose between them, the wife returned to India with her daughters and filed a petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 seeking divorce in the Family Court. At the same time, husband filed a petition in the High Court of Justice. The said Court had passed an order making the children wards of the Court during their minority or until further orders of the court and the wife was directed to return the children to the jurisdiction of the foreign court. This Court applied the principles of (i) "the first strike", i.e the UK Court had passed effective and substantial order declaring the children of the parties as wards of that court, (ii) the comity of courts and (iii) the best interest and welfare of the child. It also held that the "most intimate contact" doctrine and the "closest concern" laid down in Surinder Kaur Sandhu's case(supra) are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. The Court also reiterated that the best interest and welfare of the child are of paramount importance which shall always be kept in mind by the courts while adjudicating the disputes.

39. This was followed by a three Judge Bench of this Court in Nithya Anand Raghavan's case(supra) in which one of us(Justice Khanwilkar) was a party. In that case, the couple married on 30th November, 2006 at Chennai and shifted to UK in early 2007. Disputes arose between the spouse. The wife had conceived in December, 2008 came to New Delhi in June 2009 and stayed there with her parents and she gave birth to a girl child in August, 2009 at Delhi. After the husband arrived in India, the couple went back to UK in March, 2010 and following certain unsavoury events, the wife and the daughter returned to India in August 2010. After exchange of legal correspondence, the wife and her daughter went back to London in December 2011. In July, 2014, the wife returned to India along with her daughter and early 2015 the child became ill and was diagnosed with cardiac disorder and due to the alleged violent behavior of her husband filed complaint against him at the GAW Cell, New Delhi. In 2016, husband filed custody/wardship petition in UK to seek return of the child. He also filed habeas corpus petition in 2017 in Delhi High Court which was allowed. The matter was brought before this Court by the wife. This Court heavily relied upon its earlier judgment in Dhanwanti Joshi's case(supra) which in turn referred to Mckee's case(supra) where the Privy Council held that the order of foreign court would yield to the welfare of the child and that the comity of courts demanded not its enforcement, but its grave consideration. This Court also relied upon the judgment in V. Ravi Chandran's case(supra) and held that the role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parents patriae jurisdiction, as the minor is within the jurisdiction of the Court. This Court further held that the High Court while dealing with the petition for issuance of habeas corpus concerning a minor child in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances into consideration. It was held further by this Court that each case must depend on the totality of the facts and circumstances brought before it while considering the welfare of the child which is of paramount consideration and the order of the foreign Court must yield to the welfare of the child and the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. It was further observed that writ

petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or resort to any proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised. This Court has disapproved paragraph 56 (a) to (d) in Surya Vadanan's case(supra) which reads as follows:-

"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration: (a) The nature and effect of the interim or interlocutory order passed by the foreign court. (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court. (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [Arathi Bandi v. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] In such cases, the domestic court is also obliged to ensure the physical safety of the parent. (d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

40. As regards clauses (a) to (c) of paragraph 56 above, this Court termed the same as tending to drift away from the exposition in Dhanwanti Joshi's case(supra) and V. Ravi Chandran's case(supra) and with regard to clause (d), this Court disagreed with the same, and it was finally concluded as under:-

"69. We once again reiterate that the exposition in Dhanwanti Joshi [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112] is a good law and has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2) [V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ)] . We approve the view taken in Dhanwanti Joshi, inter alia, in para 33 that so far as nonConvention countries are concerned, the law is that the court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding 44 consideration must be the interests and welfare of the child."

41. The essence of the judgment in Nithya Anand Raghavan's case(supra) is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

42. In Kanika Goel Vs. State of Delhi through Station House Officer and another[10] in which one of us(Justice Khanwilkar) is a member, the marriage of the couple was solemnized in New Delhi and accordingly girl child was born in US in 2014. The mother along with the child came to India in December, 2016 with their return ticket to Chicago in January 2017. She filed a divorce petition after coming to India in Delhi and husband filed emergency custody petition in US Court. Wife obtained an ex-parte order from Family Court, Delhi restraining husband from removing the child from India on 11th January, 2017. Husband obtained ex-parte order for interim sole custody on 13th January, 2017 from foreign Court. At the same time, husband filed Habeas Corpus Petition in Delhi High Court which ordered the mother to comply with the order of UK Court. This Court, after taking into consideration totality of facts and circumstances, observed that the custody of the minor girl child to remain with the appellant mother until she attains the age of majority or the court of competent jurisdiction, trying the issue of custody of the minor.

43. The expression "best interest of child" which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social wellbeing and physical, emotional and intellectual development".

44. We shall now consider as to whether the facts and circumstances of the present case warrant summary enquiry into the question of custody of minor children, namely, Arthin and Neysa (as no legal proceedings between the parties remain pending in India) or whether an elaborate enquiry procedure will be necessary for entrustment of custody of the two minor children to the appellant (Lahari Sakhamuri) until they are produced before the US Court.

45. Indisputedly, the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) both were residing in US since 2004- 2005 and are well educated as the appellant (Lahari Sakhamuri) did Biomedical Engineering and the respondent (Sobhan Kodali) is a Cardiologist by profession. Their marriage was solemnized on 14th March, 2008 and two loving children namely, Arthin and Neysa, were born from this wedlock in US on 14th March, 2012 and 13th October 2014. Both have started going to school. They purchased a house in their joint name and moved to the new house in January, 2016. Something must have been gone wrong between them which compelled the appellant (Lahari Sakhamuri) in filing a divorce and custody petition of the minor children in the Court of Common Pleas of Lehigh County, Pennsylvania Civil Division on 21st December, 2016, seeking divorce, equitable distribution of marital property, primary physical and shared legal custody of the minor children. In the divorce petition, the appellant (Lahari Sakhamuri) made a specific averment about the permanent residence in US for both the parties and securing children's custody and also admitted that both the minor children were residing

10 2018(9) SCC 578

in US. It was also admitted that both the children were in joint custody of the appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) and they resided at 2085, Bellflower Lane, Canter Valley, Pennsylvania 18034.

46. It was her own admission in the declaration form annexed to the application that no mode of domestic violence or abuse was ever subjected upon her or upon the minor children by the respondent (Sobhan Kodali). The respondent (Sobhan Kodali) had purchased to and fro tickets of the appellant (Lahari Sakhamuri) and of minor children as also of his mother in law who was staying together in their matrimonial home, US with return tickets of 24th April, 2017 but after coming to India on 23rd March, 2017, because of the alleged death of her maternal grandmother, the appellant (Lahari Sakhamuri) refused to return back and was advised to file a Guardianship Petition before the Family Court, Hyderabad on 12th April, 2017 and took the ex-parte order concealing the material facts from the Family Court that such a petition is pending in US filed at her instance and there was an order passed on 21st December, 2016 restraining both the parties not to change residence of the children which would affect the other parties ability to exercise custodial rights.

47. It is not in dispute that both the minor children, from the very inception of their birth, till removal from the US on 23rd March, 2017 were living with their parents in US. This fact was admitted by the appellant (Lahari Sakhamuri) also in the guardianship petition filed before the Family Court, Hyderabad and also in the divorce and custody petition filed by her in US and only after hearing learned counsel for the parties, order was passed by the US Court on 22nd May, 2017 on the emergency custody petition granting temporary physical custody of the children with further direction to the appellant (Lahari Sakhamuri) to return along with the children to the jurisdiction of US Court on 2nd June, 2017. In case she was aggrieved by the order dated 22nd May, 2017 passed by the US Court after affording an opportunity of hearing which she contested through her Attorney, all the courses were available to her to assail the order of the Court. Since the appellant (Lahari Sakhamuri) failed in returning the children to the jurisdiction of the US Court despite order dated 22nd May, 2017, there was no option left with the respondent (Sobhan Kodali) but to file a Habeas Corpus Petition and pray that the children be repatriated back to US in compliance of the order of the US Court.

48. It is true that this Court has to keep in mind the best interest of the child as the paramount consideration. The observations of the US Court clearly show that principle of welfare of the children has been taken into consideration by the US Court in passing of the order as it reiterates that both the parties are necessary for proper upbringing of the children and the ultimate decision of custody and guardianship of the two minor children will be taken by the US which has the exclusive jurisdiction to take the decision as the children happened to be the US citizens and further order been passed on the respondent's emergency petition with special release in custody on 9th March, 2018 permitting the respondent (Sobhan Kodali) to apply for US passports on behalf of the minor children without appellant (Lahari Sakhamuri) being mother's consent. The appellant (Lahari Sakhamuri) cannot disregard the proceedings instituted at her instance before the US Court and she must participate in those proceedings by engaging solicitors of her choice to espouse her cause.

49. The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to

provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

50. While dealing with the younger tender year doctrine, Janusz Korczar a famous Polish-Jewish educator & children's author observed "children cannot wait too long and they are not people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they are meant to be the unknown person inside each of them is our hope for the future." Child rights may be limited but they should not be ignored or eliminated since children are in fact persons wherein all fundamental rights are guaranteed to them keeping in mind the best interest of the child and the various other factors which play a pivotal role in taking decision to which reference has been made taking note of the parental autonomy which courts do not easily discard.

51. The doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. Taking a holistic consideration of the entire case, we are satisfied that all the criteria such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of the children, citizenship of the spouse and the children, intimate connect, and above all, welfare and best interest of the minor children weigh in favour of the respondent (Sobhan Kodali) and that has been looked into by the High Court in the impugned judgment in detail. That needs no interference under Article 136 of the Constitution of India.

52. Before we conclude, we would like to observe that it is much required to express our deep concern on the issue. Divorce and custody battles can become quagmire and it is heart wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventful agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily the child is not a true participant in the process. While the bestinterests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself or does he have representation in the ordinary sense.

53. The child's psychological balance is deeply affected through the marital disruption and adjustment for changes is affected by the way parents continue positive relationships with their children. To focus on the child rights in case of parental conflict is a proactive step towards looking into this special situation demanding a specific articulation of child rights.

54. The judicial resolution of a custody dispute may permanently affect or even end the parties' legal relationship but the social and psychological relationship will usually continue and it seems appropriate that a negotiated resolution between the parents is preferable from the child's perspective for several reasons. A child's future relationship with each of his parents may be better maintained and his existing relationship is less damaged by a negotiated settlement than by one imposed by a court after adversarial proceedings.

55. In the present case, there is every possibility that the parties may reconcile and start over their relationship afresh, at least for the sake of happiness of their own off-spring if for no other reason. The parties are indeed mature and sensible enough to understand that the ordinary wear and tear of married life has to be put up in within the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Spouses must come over the temperamental disharmony which usually exists in every marriage, rather than magnifying it with impulsive desires and passions. Parents are not only caretakers, but they are instrumental in the development of their child's social, emotional, cognitive and physical well-being and work harmoniously to give their children a happy home to which they are justly entitled to. We hope and trust that the parties will forget and forgive their differences and join hands together in providing the congenial atmosphere which may be good not for themselves but also for the development of their minor children.

56. In our view, the best interest of the children being of paramount importance will be served if they return to US and enjoy their natural environment with love, care and attention of their parents including grandparents and to resume their school and be with their teachers and peers.

57. We accordingly direct the appellant (Lahari Sakhamuri) to return to US along with both the children, namely, Arthin and Neysa, within a period of six weeks from today. We further direct respondent (Sobhan Kodali) to make all arrangements of stay and travel expenses(including air tickets) of the appellant (Lahari Sakhamuri) and both the children as well as her companion, if any, in their own house or if she is not willing to stay for any personal reasons, make all arrangements for stay at the place of her choice at reasonable cost. In case the appellant (Lahari Sakhamuri) reports that she is not inclined to travel to US along with the minor children, or do not show any interest to accompany the children, the respondent (Sobhan Kodali) shall deposit a sum of Rs. 15 lakhs in the bank account of the appellant (Lahari Sakhamuri) and proof of deposit shall be placed in the Registry of the High Court of Andhra Pradesh who shall thereupon call upon the Consulate General of the US at Hyderabad to take the custody of the minor children, namely, Arthin and Neysa, along with their passports and other travel documents from the appellant (Lahari Sakhamuri) and hand over the same to the respondent (Sobhan Kodali) with a condition for taking the custody of the minor children (Arthin and Neysa) for being taken to US and hand over to the jurisdictional Court in US until further orders are passed in the pending proceedings by the US Court. The appellant (Lahari Sakhamuri) will be at liberty to utilize the money deposited by the respondent (Sobhan Kodali) in connection with her visit to US, if so desired, in future and the respondent (Sobhan Kodali) shall not take any coercive steps against her which in any manner may result in adverse consequences.

58. It is further made clear that the observations which has been made by us are only for the limited purpose of engaging in summary inquiry for consideration in the petition of Habeas Corpus and will be of no assistance to either party in the custody proceedings pending in the US Court which indeed will be decided on its own merits.

59. While parting, we express our word of gratitude for the sincere efforts put in by Mr. Gurukrishna Kumar, Senior Advocate, in persuading the parties to arrive at an amicable settlement.

60. Consequently, Civil Appeals arising out of SLP(Civil) Nos. 15892-15893 of 2018 are dismissed. No costs.

61. The Criminal Appeal arising out of SLP(Crl.) No. 2316 of 2018 stands disposed of in the above terms.

62. Pending application(s), if any, stand disposed of.

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SMRUTI PAHARIYA VERSUS SANJAY PAHARIYA

IN THE SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice K.G. Balakrishnan, CJI, Hon'ble Mr. Justice P. Sathasivam & Hon'ble Mr. Justice Asok Kumar Ganguly

CIVIL APPEAL NO. 3465 OF 2009

(@ SPECIAL LEAVE PETITION (CIVIL) NO. 17402 OF 2008)

Smruti Pahariya .....Appellant(s)
- Versus -
Sanjay Pahariya ....Respondent(s)

This Court strongly disapproves the manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach - an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."

Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

JUDGMENT

Hon'ble Mr. Justice Ashok Kumar Ganguly :—

1. Leave granted.

2. The wife, who is the appellant before this Court, filed this appeal seeking to impugn the judgment and order dated 5.6.2008 passed by the High Court of judicature at Bombay, which in a detailed judgment, was pleased to set aside the judgment and decree dated 5.12.2007 passed by the Family Court, Mumbai, in which the Family Court, dissolved the marriage between the appellant and the respondent by a decree of divorce on mutual consent under Section 13B of the Hindu Marriage Act, 1955 (hereinafter "the said Act").

3. Admittedly, the parties are Hindu and governed by the provisions of the said Act and they were married on 5.3.1993 at Mumbai following the Hindu Vedic rites. Marriage was also registered. After marriage, the parties resided together in Flat No. 601, 2nd Floor, Dinath Court, Sir Pochkhanwala Road, Worli, Mumbai. Two sons were born to them, one on 1.2.1995 and the other one on 3.4.1997. A few years after that, serious differences and incompatibility surfaced between them and all attempts of settlement failed. The parties stopped living together from January 2005 and decided to file a petition seeking divorce by mutual consent under Section 13B of the said Act. A joint petition to that effect was filed before the Family Court at Bandra, Mumbai and the same was registered on 19.5.2007. It was averred therein that incompatibility with each other made it difficult for them to co-exist and they stopped cohabiting as husband and wife from January 2005 (para 6). In paragraph 13, it was stated that there was no collusion between the parties in filing the petition for divorce by mutual consent and in paragraph 17 it was pointed out that there is no force or coercion between the parties in filing the petition. Along with the said petition, certain consent terms were also filed but with those terms we are not concerned in this proceeding.

4. Under the provisions of Section 13B (2) of the said Act, a minimum period of six month has to elapse before such petition can be taken up for hearing. In the instant case, the said period expired on or about 19.11.2007. In between, two dates were given, namely, 14.6.2007 and 23.8.2007 when the parties were given a chance for counselling but on both the days parties were absent and no counselling took place.

5. On 19.11.2007, after the mandatory period of six months, the matter came up before the Family Court. It appears from the affidavit filed by the wife in this proceeding before the Bombay High Court that on 3.11.2007, advocate of the parties informed the husband that the matter will be listed on 19.11.2007 and a draft affidavit of deposition was sent to him through E-mail. It is not in dispute that both the parties had the same advocate. It also appears from the affidavit of the wife that on 18.11.2007 the advocate received a text SMS in his mobile from the respondent-husband that he is unable to attend the court on 19.11.2007.

Therefore, on 19.11.2007, when the matter appeared for the first time before the Court, the husband was absent and the Family Court asked the advocate to inform the husband of the next date of hearing of the matter, which was fixed on 1.12.2007.

6. On 19.11.2007 itself, an application was made by the wife to summon the husband directing him to be present in the Family court on the next date. Accordingly, summons were sent by the Court on 23.11.2007 by courier and the courier returned with the remark "not accepting".

In this connection, the order which was passed by the Family Court, on 1.12.2007, on perusal of the service report is of some importance. The following order was passed on the service return:

"Perused the first summons and subsequent orders thereto. I have seen service affidavit also, states that servant was present. Hence I am not able to accept it as a proper one. The courier endorsement is also vague. Considering the contents in affidavit, I allow petitioner No.1 to serve the notice by pasting on the address given in cause title to petitioner No.2. EPSB allowed. It is made returnable on 4.12.2007."

7. The petition was thus made returnable on 4.12.2007. It appears that the bailiff pasted the summons on 3.12.2007 outside the door of the husband's residence and the matter came up before the Family Court on 4.12.2007 and on that day the husband was absent. The Family Court adjourned the matter to 10.12.2007. But on 5.12.2007, the wife, filed a petition before the Family Court with a prayer that the hearing of the matter may be pre-poned and be taken up on the very same day i.e. 5.12.2007. On the aforesaid prayer of the wife, though the matter was not on the board, it was taken on the board by the Family Court on 5.12.2007 and the decree of divorce was passed ex-parte on that date itself.

8. It may be mentioned in this connection that the Family Court pre-poned the hearing on wife's application and in the absence of the husband. Admittedly, the pre-ponement was done ex-parte.

9. In the background of these facts, basically four questions fall for our consideration:

I. Whether impugned decree of divorce passed by the Family Court on 5.12.2007 is vitiated by procedural irregularity?

II. Whether by conducting the proceeding, in the manner it did, the Family Court acted contrary to the avowed object of the Family Courts Act, 1984?

III. Whether from the absence of the husband before the Family Court on 19.11.2007, 1.12.2007 and 4.12.2007 it can be inferred that his consent for grant of divorce on a petition on mutual consent subsists, even though he has not withdrawn the petition for divorce on mutual consent?

IV. Whether on a proper construction of Section 13B (2) of the said Act, which speaks of 'the motion of both the parties', this Court can hold that the Family Court can dissolve a marriage and grant a decree of divorce in the absence of one of the parties and without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

10. This fourth question assumes general importance since it turns on the interpretation of the section. Apart from that, this question is relevant here in view of various recitals in the judgment and decree of the learned Judge of the Family Court. It appears that the Family Court granted the decree of divorce by proceeding on the presumption of continuing consent of the husband.

11. While dealing with the first question about procedural irregularity in the matter, this Court finds that the Family Court did not act properly even if it is held that it was correct in presuming the continuing consent of the respondent-husband.

12. From the sequence of events, it appears that on 19.11.2007 when the matter came up before the Court, the first day after the mandatory period of six months, the husband was absent. The Court directed service of summons on the husband on the request of the wife. The service return was before the Court on 1.12.2007. Looking at the service return, the Court found that service was not a proper one and the Court was also not satisfied with the endorsement of the courier. Under such circumstances, the Court's direction on the prayer of the appellant-wife, for substituted service under Order 5 Rule 20 of the Civil Procedure Code is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when Court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way".

13. In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her advocate's clerk that respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5 Rule 20 of the Code.

14. Apart from the aforesaid irregularity, the Court, after ordering substituted service and perusing service return on 4.12.2007, fixed the matter for 10.12.2007. Then, on the application of the wife on 5.12.2007, pre-poned the proceeding to 5.12.2007 and on that very day granted the decree of divorce even though the matter was not on the list.

15. This Court strongly disapproves of the aforesaid manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

16. On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in paragraph 34 of its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

17. While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

18. The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach – an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."

19. Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

20. In the instant case by responding to the illegal and unjust demand of the wife of pre-poning the proceeding ex-parte and granting an ex-parte decree of divorce, the Family Court did not discharge its statutory obligation under Section 13B (2) of the said Act of hearing the parties. When a proceeding is pre-poned in the absence of a party and a final order is passed immediately, the statutory duty cast on the Court to hear the party, who is absent, is not discharged. Therefore, the Family Court has not at all shown a human and a radically different approach which it is expected to have while dealing with cases of divorce on mutual consent.

21. Marriage is an institution of great social relevance and with social changes, this institution has also changed correspondingly. However, the institution of marriage is subject to human frailty and error. Marriage is certainly not a mere "reciprocal possession" of the sexual organs as was philosophized by I. Kant [The Philosophy of Law page 110, W. Hastie translation 1887] nor can it be romanticized as a relationship which Tennyson fancied as "made in Heaven" [Alymer's Field, in Complete Works 191, 193 (1878)].

22. In many cases, marriages simply fail for no fault of the parties but as a result of discord and disharmony between them. In such situations, putting an end to this relationship is the only way out of this social bondage. But unfortunately, initially the marriage laws in every country were 'fault oriented'. Under such laws marriage can be dissolved only by a Court's decree within certain limited grounds which are to be proved in an adversarial proceeding. Such 'fault' oriented divorce laws have been criticized as 'obsolete, unrealistic, discriminatory and sometimes immoral' (Foster, Divorce Law Reform; the choices before State page 112).

23. As early as in 1920 possibly for the first time in New Zealand, Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1920 gave the Court the discretion to grant a decree of divorce to parties when they had separated for three years under a decree of judicial separation

or separation order by the Magistrate or under a deed of separation or "even by mutual consent". Till such amendment, divorce after separation by parties on "mutual consent" was unknown.

24. Considering the said amendment of 1920 and exercising the discretion the amended law conferred on the Judge, Justice Salmond in Lodder Vs. Lodder, [1921, New Zealand Law Reports, 876], came to the conclusion that it is not necessary to enquire into the merits of the disputes between the parties since the man and the wife had put an end to their relationship 13 years ago and the learned Judge found that their alienation is "permanent and irredeemable". The learned Judge also felt that in the circumstances of the case "no public or private interest is to be served by the further continuance of the marriage bond" and a decree for its dissolution was passed. (See page 881).

25. This seems to be the first decision of a Court granting divorce on a 'no-fault' basis and because of the fact that a marriage had broken down for all practical purposes as parties were staying separately for a very long time.

26. The British society was very conservative as not to accept divorce on such a ground but in 1943, Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt, [1943, 2 All ER 76], speaking for the House of Lords, while categorizing the heads of discretion which should weigh with the courts in granting the decree of divorce, summed up four categories but at page 78 of the Report, the Lord Chancellor added a fifth one and the views of His Lordship were expressed in such matchless words as they deserve to be extracted herein below:-

"To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused".

27. In India also, prior to the amendment in our laws by insertion of Section 13B in the said Act, the Courts felt the necessity for an amendment in the divorce law. The Full Bench of the Delhi High Court in the judgment of Ram Kali Vs. Gopal Dass – ILR (1971) 1 Delhi 6, felt the inadequacy of the existing divorce law. Chief Justice Khanna (as His Lordship then was) speaking for the Full Bench came to the following conclusion:-

"...It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the façade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife." [See page 12].

28. In coming to the aforesaid conclusion, the learned Chief Justice relied on the observation of the Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt (Supra).

29. Within a year thereafter, Hon'ble Justice Krishna Iyer, in the case of Aboobacker Haji Vs. Mamu Koya - 1971 K.L.T. 663, while dealing with Mohammedan Law relating to divorce correctly traced the modern trend in legal system on the principle of breakdown of marriage in the following words:-

"When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days."(See page 668)

30. In coming to the said finding the learned Judge relied on the principles laid down by Justice Salmond in Lodder Vs. Lodder (supra).

31. After the said amendment in 1976 by way of insertion of Section 13B in the said Act in the 74th Report of the Law Commission of India (April, 1978), Justice H.R. Khanna, as its Chairman, expressed the following views on the newly amended Section 13B:

"Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals. A modified version of the basis of consent is to be found in the theory of divorce by mutual consent. The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognizes this theory in section 13B."

32. On the question of how to ascertain continuing consent in a proceeding under Section 13B of the said Act, the decision in the case of Smt. Sureshta Devi Vs. Om Prakash – (1991) 2 SCC 25, gives considerable guidance.

33. In Paragraph 8 of the said judgment, this Court summed up the requirement of Section 13B (1) as follows:

"8. There are three other requirements in sub-section (1). They are:-

(i) They have been living separately for a period of one year.

(ii) They have not been able to live together, and

(iii) They have mutually agreed that marriage should be dissolved."

34. In paragraph 10, the learned Judges dealt with sub-section (2) of Section 13B. In paragraphs 11 and 12, the learned Judges recorded the divergent views of the Bombay High Court [Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe – AIR 1982 Bom 302: 86 Bom LR 184], Delhi High Court [Chander Kanta v. Hans Kumar – AIR 1989 Del 73], Madhya Pradesh High Court [Meena Dutta v. Anirudh Dutta – (1984) 2 DMC 388 (MP)], and the views of the Kerala High Court [K.I. Mohanan v. Jeejabai – AIR 1988 Ker 28: (1986) 2 HLR 467: 1986 KLT 990], Punjab and Haryana High Court [Harcharan Kaur v. Nachhattar Singh – AIR 1988 P & H 27: (1987) 2 HLR 184: (1987) 92 Punj LR 321] and Rajasthan High Court [Santosh Kumari v. Virendra Kumar – AIR 1986 Raj 128: (1986) 1 HLR 620: 1986 Raj LR 441] respectively on Section 13B.

35. In paragraphs 13 and 14 of the Sureshta Devi (supra), the learned Judges gave an interpretation to Section 13B (2) and in doing so the learned Judges made it clear that the reasons given by the High Court of Bombay and Delhi are untenable inasmuch as both the High Courts held that once the consent is given by the parties at the time of filing the petition, it is impossible for them to withdraw the same to nullify the petition.

36. We also find that the interpretation given by Delhi and Bombay High Courts is contrary to the very wording of Section 13B (2) which recognizes the possibility of withdrawing the petition filed on consent during the time when such petition has to be kept pending.

37. In paragraph 13 of Sureshta Devi (supra), the learned Judges made the position clear by holding as follows:

"At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-Section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties,…. if the petition is not withdrawn in the meantime, the court shall….pass a decree of divorce…". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."

38. Therefore, it was made clear in Sureshta Devi (supra) that under Section 13B (2), the requirement is the 'motion of both the parties' and interpreting the same, the learned Judges made it clear that there should be mutual consent when they move the Court with a request to pass a decree of divorce and there should be consent also at the time when the Court is called upon to make an enquiry, if the petition is not withdrawn and then pass the final decree.

39. Interpreting the said Section, it was held in Sureshta Devi (supra) that if the petition is not withdrawn in the meantime, the Court, at the time of making the enquiry, does not have any jurisdiction to pass a decree, unless there is mutual consent.

40. Learned Judges made it further clear that if the Court makes an enquiry and passes a divorce decree even at the instance of one of the parties and against the consent of the other, such a decree cannot be regarded as a decree by mutual consent.

41. In paragraph 14 of the said judgment, learned Judges made it further clear as follows:-

"If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce.

"The consent must continue to decree nisi and must be valid subsisting consent when the case is heard." {See (i) Halsbury's Laws of England, 4th edn. Vol. 13 para 645; (ii) Rayden on Divorce, 12th edn., Vol. 1, P. 291; and (iii) Beales V. Beales}."

42. In paragraph 15 of the judgment, this Court held that the decisions of the High Courts of Bombay, Delhi and Madhya Pradesh cannot be said to have laid down the law correctly and those judgments were overruled. We also hold accordingly.

43. The decision in Sureshta Devi (supra) was rendered by a Bench of two learned Judges of this Court. In a subsequent decision of two learned Judges of this Court in the case of Ashok Hurra Vs. Rupa Bipin Zaveri – (1997) 4 SCC 226, the judgment in Sureshta Devi (supra) was doubted as according to the learned Judges some of the observations in Sureshta Devi (supra) appear to be too wide and require reconsideration in an appropriate case.

44. Learned Judges in Ashok Hurra (supra) made it clear that they were passing the order in that case on the peculiar fact situation. This Court also held that in exercise of its jurisdiction under Article 142 of the Constitution, a decree of divorce by mutual consent under Section 13B of the Act was granted between the parties. (See paragraph 16 and 22 of the report).

45. It appears that those observations were made by the learned Judges without considering the provisions of the Family Courts Act. In any event, the decision in Ashok Hurra (supra) was considered by a larger Bench of this Court in Rupa Ashok Hurra Vs. Ashok Hurra and Anr. – (2002) 4 SCC 388. No doubt was expressed by the larger Bench on the principles laid down in Sureshta Devi (supra). It appears that a petition for review was filed against the two judge decision in Ashok Hurra (supra) and the same was dismissed.

Thereafter, the question before the Constitution Bench in Rupa Ashok Hurra (supra) was as follows:-

"Whether the judgment of this Court dated 10.3.1997 in Civil Appeal No.1843 of 1997 [1997 (4) SCC 226] can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgment of this Court after the petition for review of the said judgment has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court."

46. In the Constitution Bench decision of this Court in Rupa Ashok Hurra (supra), this Court did not express any view contrary to the views of this Court in Sureshta Devi (supra).

47. We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Section 13B (1) and 13B (2), there is no scope of doubting the views taken in Shreshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

48. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).

49. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

50. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein.

51. It is nobody's case that a long period has elapsed between the expiry of period of six months and the date of final decree.

52. For the reasons aforesaid, we affirm the view taken by the learned Judges of the Bombay High Court in the order under appeal.

53. The appeal is disposed of as follows:-

(i) On receipt of the copy of this judgment, the Family Court is directed to issue notice to both the parties to appear in the Court on a particular day for taking further steps in the case.

(ii) On that day, the parties are at liberty to engage their own counsel and they may be personally present before the Court and inform the Court as to whether they have consent to the passing of the decree under Section 13B of the Act. If both the parties give their consent for passing of the decree under Section 13B, the Court may pass appropriate orders.

(iii) If any of the parties makes a representation that he/she does not have consent to the passing of the decree, the Court may dispose of the proceedings in the light of the observations made by us. There shall be no order as to costs.

❑❑❑

SANTHINI VERSUS VIJAYA VENKETESH

IN THE SUPREME COURT OF INDIA

TRANSFER PETITION (CIVIL) NO. 1278 OF 2016

Santhini Petitioner(S)

Versus

Vijaya Venketesh Respondent(S)

WITH

TRANSFER PETITION (CIVIL) NO. 422 OF 2017

The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. Reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. The child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents.

ORDER

1. The petitioner has approached this Court seeking for transfer of O.P.(HMA) No.580 of 2015 filed for dissolution of marriage of the respondent and petitioner and O.P. No.1282 of 2012 filed for custody of minor child, from the Court of Family Court, Alappuzha, Kerala to Family Court, Chennai, Tamil Nadu.

2. When the matter came up for consideration before this Court, learned counsel appearing for the respondent brought to our notice a decision rendered by a coordinate Bench of this Court in Krishna Veni Nagam v. Harish Nagam[11] and requested that there is no need to transfer the cases; instead parties can be directed to avail the facility of video conferencing, as suggested by this Court in the case referred to above.

3. In Krishna Veni Nagam (supra) a coordinate Bench of this Court went into the issue of preventing the backlog of transfer petitions before the Courts. It appears that the Court also had the assistance of an amicus. Having heard the learned Counsel on both the sides and learned amicus, the Court finally, at paragraph-18, issued the following directions:-

"18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-

i) Availability of video conferencing facility.

ii) Availability of legal aid service.

11 (2017) 4 SCC 150

iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.

iv) E-mail address/phone number, if any, at which litigant from out station may communicate."

4. We are informed that not only this Court but the High Courts and even the District Courts are passing orders in the light of the judgment referred to above, relegating the parties to video conferencing even where such facilities are not available. Thus, it is a situation not only of inter State appeal or intra State appeal but also of intra District appeal.

5. Having due regard to the nature of family disputes sought to be addressed by the Parliament, we are afraid, the Court in Krishna Veni Nagam (supra) has not been furnished with the required information, before passing the order.

6. The Family Courts Act, 1984 was introduced with the following purpose:-

"INTRODUCTION

From time to time, it had been urged by several organisations of women, other organisations and individuals that Family Courts be set-up for the settlement of family disputes. The Law Commission in its 59th Report had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. In 1976 the Code of Civil Procedure was also amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family, but not much change in the attitude of the courts was noticed. Therefore, the need was felt to establish Family Courts for speedy settlement of family disputes. Accordingly the Family Courts Bill was introduced in the Parliament.

STATEMENT OF OBJECTS AND REASONS

Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill, inter alia, seeks to-

(a) provide for establishment of Family Courts by the State Government;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above;

(d) exclusively provide within the jurisdication of the Family Courts the matters relating to-

(i) matrimonal relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae;

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects." (Emphasis supplied)

7. Section 9 of the Family Courts Act, 1984 makes it a mandatory duty of the Family Court to make efforts for settlement. The said provision reads as follows:-

"9. Duty of Family Court to make efforts for settlement. (1) In every suit or proceeding, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings." (Emphasis supplied)

8. In order to assist the Family Court, the Act has provided for association of social welfare agencies. In Section 6 provision regarding counsellors, officers and other employees of Family Courts is mentioned, which reads as follows:-

"6. Counsellors, officers and other employees of Family Courts. (1)The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

(2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government."

9. Section 12 provides for the assistance of medical and welfare experts, which reads as under:-

"12. Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act."

10. Section 11 provides that "in every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires".

11. Under the Hindu Marriage Act, 1955 also, in respect of the family matters, the Parliament has made several provisions for reconciliation. Under Section 23(2) "before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".

12. Sub-section (3) of Section 23 of the Hindu Marriage Act further provides for methods to facilitate the process, which reads as follows:-

"23 (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report." (Emphasis supplied)

13. Section 22 of the Hindu Marriage Act has given a very important safeguard for protecting the privacy of the proceedings or prohibiting the printing and publishing of any proceedings before the Court, except the printed judgment of the High Court or the Supreme Court. The section also provides for the situation where the proceedings are to be held in camera. Section 22 reads as follows:-

"22 Proceedings to be in camera and may not be printed or published.(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees." (Emphasis supplied)

14. Section 26 of the Hindu Marriage Act deals with the custody of children, wherein it is mandatory for the Court to ascertain the wish of the children as well before taking a decision on the custody. The said section reads as follows:-

"26 Custody of children.- In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent." (Emphasis supplied)

15. Order XXXIIA of the Code of Civil Procedure was introduced in the year 1976. The same pertains to "suits relating to matters concerning the family". Rule 3 casts a duty on the Court to make every effort for settlement in family matters, the said provision reads as follows:-

"3. Duty of court to make efforts for settlement.-

(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the court to adjourn the proceedings."

16. Rule 2 deals with in camera proceedings. Rule 4 provides for the assistance of a welfare expert and Rule 5 casts a duty on the Court to "inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant".

17. Unfortunately, it seems, none of these mandatory procedures as laid down by the Parliament have been brought to the notice of the Court while considering the case of Krishna Veni Nagam (supra). The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different.

18. The role of a counsellor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counsellor also assists the parties to resume free communication. In custody matters also the counsellor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counsellor assists the parents to shed their ego and take a decision in the best interest of the child.

19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in matrimonial disputes.

20. Therefore, we are of the view that the matter requires consideration by a larger Bench. The Registry is directed to place the papers before Hon'ble the Chief Justice of India. We request

Hon'ble the Chief Justice of India to expeditiously constitute a Bench havingregard to the urgency of the matter.

.....J.

[KURIAN JOSEPH]

.....J.

[R. BANUMATHI]

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) NO.1278 OF 2016

Bench : Hon'ble CJI, Hon'ble Mr. Justice Dipak Misra & Hon'ble Mr. Justice A.M. Khanwilkar

Santhini Petitioner(s)
Versus
Vijaya Venketesh Respondent(s)

WITH
TRANSFER PETITION (CIVIL) NO. 422 OF 2017

Decided on 9 October, 2017

JUDGMENT

Hon'ble Mr. Justice Dipak Misra, CJI. [For himself and Khanwilkar, J.] A two-Judge Bench in Krishna Veni Nagam v. Harish Nagam1, while dealing with transfer petition seeking transfer of a case instituted under Section 13 of the Hindu Marriage Act, 1955 (for brevity, the 1955 Act) pending on the file of IInd Signature Not Verified Presiding Judge, Family Court, Digitally signed by CHETAN KUMAR Jabalpur, Madhya Pradesh to the Family Court, Hyderabad, Andhra Date: 2017.10.09 16:22:15 IST Reason:

Pradesh, took note of the grounds of transfer and keeping in view the 1 (2017) 4 SCC 150 approach of the Court to normally allow the transfer of the proceedings having regard to the convenience of the wife, felt disturbed expressing its concern to the difficulties faced by the litigants travelling to this Court and, accordingly, posed the question whether there was any possibility to avoid the same. It also took note of the fact that in the process of hearing of the transfer petition, the matrimonial matters which are required to be dealt with expeditiously are delayed. That impelled the Court to pass an order on 09.01.2017 which enumerated the facts including the plight asserted by the wife, the concept of territorial jurisdiction under Section 19 of the 1955 Act, and reflected on the issues whether transfer of a case could be avoided and alternative mode could be thought of. Dwelling upon the said aspects, the Court articulated:-

> In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband

may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered. As the narration would exposit, the pivotal concern of the Court was whether an order could be passed so as to provide a better alternative to each individual who is compelled to move this Court.

2. The observation made in Anindita Das v. Srijit Das to the effect that on an average at least 10 to 15 transfer petitions are on board of each Court on each admission day was noticed. The learned Judges apprised themselves about the observations made in Mona Aresh Goel v. Aresh Satya Goel, Lalita A. Ranga v. Ajay Champalal Ranga, Deepa v. Anil Panicker, Archana Rastogi v. Rakesh Rastogi, Leena Mukherjee v. Rabi Shankar Mukherjee, Neelam Bhatia v. Satbir Singh Bhatia, Soma Choudhury v. Gourab Choudhaury, Rajesh Rani v. Tej Pal, Vandana Sharma v. Rakesh Kumar Sharma and Anju Ohri v. Varinder Ohri which rest on the principle of expedient for ends of justice to transfer the proceedings. It also adverted to Premlata Singh v. Rita Singh wherein this Court 2 (2006) 9 SCC 197 3 (2000) 9 SCC 255 4 (2000) 9 SCC 355 5 (2000) 9 SCC 441 6 (2000) 10SCC 350 7 (2002) 10 SCC 480 8 (2004) 13 SCC 436 : (2006) 1 SCC (Cri) 323 9 (2004) 13 SCC 462 : (2006) 1 SCC (Cri) 341 10 (2007) 15 SCC 597 11 (2008) 11 SCC 768 12 (2007) 15 SCC 556 13 (2005) 12 SCC 277 had not transferred the proceedings but directed the husband to pay for travelling, lodging and boarding expenses of the wife and/or person accompanying her for each hearing. The said principle was also followed in Gana Saraswathi v. H. Raghu Prasad.

3. The two-Judge Bench, after hearing the learned counsel for the parties, the learned Additional Solicitor General and the learned Senior Counsel who was requested to assist the Court, made certain references to the doctrine of forum non conveniens and held that it can be applied to matrimonial proceedings for advancing the interest of justice. The learned Additional Solicitor General assisting the Court suggested about conducting the proceedings by videoconferencing. In that context, it has been held:-

> **14.** One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of videoconferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country videoconferencing is now available. In any case, wherever such facility is available, it ought to be fully utilised and all the High Courts ought to issue appropriate administrative instructions to regulate the use of videoconferencing for certain category of cases. Matrimonial cases where one of the parties resides outside courts jurisdiction is one of such 14 (2000) 10 SCC 277 categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by video conferencing.

x x x x

16. The advancement of technology ought to be utilised also for service on parties or receiving communication from the parties. Every District Court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a District Court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every District Court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the High Courts. [Emphasis added]

4. After so stating, the two-Judge Bench felt the need to issue directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence which will eventually result in denial of justice. The safeguards laid down in the said judgment are:-

(i) Availability of videoconferencing facility.

(ii) Availability of legal aid service.

State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601 : 2003 SCC (Cri) 815; Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 3 SCC 284 : 2005 SCC (Cri) 705; Budhadev Karmaskar (4) v. State of W.B., (2011) 10 SCC 283 : (2012) 1 SCC (Cri) 285; Malthesh Gudda Pooja v. State of Karnataka, (2011) 15 SCC 330 : (2014) 2 SCC (Civ)

(iii) Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.

(iv) E-mail address/phone number, if any, at which litigant from outstation may communicate. Be it stated, the Court took note of the spirit behind the orders of this Court allowing the transfer petitions filed by wives and opined that the Court almost mechanically allows the petitions so that they are not denied justice on account of their inability to participate in proceedings instituted at a different place. It laid stress on financial or physical hardship. It referred to the authorities in the constitutional scheme that provide for guaranteeing equal access to justice, power of the State to make special provisions for women and children, duty to uphold the dignity of women and various steps that have been taken in the said direction.

5. In the said case, the Court transferred the case as prayed for and further observed that it will be open to the transferee court to conduct the proceedings or record the evidence of the witnesses who are unable to appear in court by way of videoconferencing. The aforesaid decision was brought to the notice of the two-Judge Bench in the instant case by the learned counsel appearing for the respondent who advanced his submission that there is no need to transfer the case and the parties can be directed to avail the facility of videoconferencing. The two-Judge Bench, after referring to the Statement of Objects and Reasons of the Family Courts Act, 1984 (for brevity, the 1984 Act), various provisions of the said Act, Sections 22, 23 and 26 of the 1955 Act, Rules 2, 3 and 4 of Order XXXIIA which were inserted by the 1976 amendment to the Code of Civil Procedure (for short, the CPC), the concept of reconciliation, the role of the counsellors in the Family Court and the principle of confidence and confidentiality, held:-

19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in 12 matrimonial disputes. Being of this view, it has referred the matter to be considered by a larger Bench. That is how the matter has been placed before us.

6. We have heard Mr. V.K. Sidharthan, learned counsel for the petitioner and Mr. Rishi Malhotra, learned counsel for the respondent. We have also heard Mr. Ajit Kumar Sinha, learned senior counsel who has been requested to assist the Court.

7. Before we refer to the scheme under the 1984 Act and the 1955 Act, we think it apt to refer to the decisions that have been noted in Krishna Veni Nagam (supra). In Mona Aresh Goel (supra), the three-Judge Bench was dealing with the transfer of the matrimonial proceedings for divorce that was instituted by the husband in Bombay. The prayer of the wife was to transfer the case from Bombay to Delhi. The averment was made that the wife had no independent income and her parents were not in a position to bear the expenses of her travel from Delhi to Bombay to contest the divorce proceedings. That apart, various inconveniences were set forth and the husband chose not to appear in the Transfer Petition. The Court, considering the difficulties of the wife, transferred the case from Bombay to Delhi. In Lalita A. Ranga (supra), the Court, taking note of the fact that the husband had not appeared and further appreciating the facts and circumstances of the case, thought it appropriate to transfer the petition so that the wife could contest the proceedings. Be it noted, the wife had a small child and she was at Jaipur and it was thought that it would be difficult for her to go to Bombay to contest the proceedings from time to time. In Deepas case, the stand of the wife was that she was unemployed and had no source of income and, on that basis, the prayer of transfer was allowed. In Archana Rastogi (supra), the Court entertained the plea of transfer and held that the prayer for transfer of matrimonial proceedings taken by the husband in the Court of District Judge, Chandigarh to the Court of District Judge, Delhi deserved acceptance and, accordingly, transferred the case. Similarly, in Leena Mukherjee (supra), the prayer for transfer was allowed. In Neelam Bhatia (supra), the Court declined to transfer the case and directed the husband to bear the to-and-fro travelling expenses of the wife and one person accompanying her by train whenever she actually appeared before the Court. In Soma Choudhury (supra), taking into consideration the difficulties of the wife, the proceedings for divorce were transferred from the Court of District Judge, South Tripura, Udaipur (Tripura) to the Family Court at Alipore (West Bengal). In Anju Ohri (supra), the Court, on the foundation of the convenience of the parties and the interest of justice, allowed

the transfer petition preferred by the wife. In Vandana Sharma (supra), the Court, taking note of the fact that the wife had two minor daughters and appreciating the difficulty on the said bedrock, thought it appropriate to transfer the case and, accordingly, so directed.

8. Presently, we think it condign to advert in detail as to what has been stated in Anindita Das (supra). The stand of the wife in the transfer petition was that she had a small child of six years and had no source of income and it was difficult to attend the court at Delhi where the matrimonial proceedings were pending. The two-Judge Bench referred to some of the decisions which we have already referred to and also adverted to Ram Gulam Pandit v. Umesh J. Prasad and Rajwinder Kaur v. Balwinder Singh and opined that all the authorities are based on the facts of the respective cases and they do not lay down any particular law which operates as a precedent. Thereafter, it noted that taking advantage of the leniency shown to the ladies by this Court, number of transfer petitions are filed by women and, therefore, it is required to consider each petition on merit. Then, the Court dwelled upon the fact situation and directed that the husband shall pay all travel and stay expenses to the wife and her companion for each and every occasion whenever she was required to attend the Court at Delhi. From the aforesaid decision, it is quite vivid that the Court felt that the transfer petitions are to be considered on their own merits and not to be disposed of in a routine manner.

9. Having noted the authorities relating to transfer of matrimonial disputes, we may refer to Section 25 of the CPC which reads as follows:-

Section 25. Power of Supreme Court to transfer suits, etc.- (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceedings be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by motion which shall be supported by an affidavit.

(3) The court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such Suit, appeal or proceeding.

10. Order XLI Rule 2 of the Supreme Court Rules, 2013 which deals with the application for transfer under Article 139A(2) of the Constitution and Section 25 of the CPC is as follows:-

1. Every petition under article 139A(2) of the Constitution or Section 25 of the Code of Civil Procedure, 1908, shall be in writing. It shall state succinctly and clearly all relevant facts and particulars of the case, the name of the High Court or other Civil Court in which the

case is pending and the grounds on which the transfer is sought. The petition shall be supported by an affidavit.

2. The petition shall be posted before the Court for preliminary hearing and orders as to issue of notice. Upon such hearing the Court, if satisfied that no prima facie case for transfer has been made out, shall dismiss the petition and if upon such hearing the Court is satisfied that a prima facie case for granting the petition is made out, it shall direct that notice be issued to the parties in the case concerned to show cause why the case be not transferred. A copy of the Order shall be transmitted to the High Court concerned.

3. The notice shall be served not less than four weeks before the date fixed for the final hearing of the petition. Affidavits in opposition shall be filed in the Registry not later than one week before the date appointed for hearing and the affidavit in reply shall be filed not later than two days preceding the day of the hearing of the petition. Copies of affidavits in opposition and in reply shall be served on the opposite party or parties and the affidavits shall not be accepted in the Registry unless they contain an endorsement of service signed by such party or parties.

4. The petition shall thereafter be listed for final hearing before the Court.

5. Save as otherwise provided by the rules contained in this Order the provisions of other orders (including Order LI) shall, so far as may be, apply to petition under this Order. The purpose of referring to the same is that this Court has been conferred with the power by the Constitution under Article 139A(2) to transfer the cases and has also been conferred statutory jurisdiction to transfer the cases. The Rules have been framed accordingly. The Court has the power to allow the petition seeking transfer or to decline the prayer and indubitably, it is on consideration of the merits of the case and satisfaction of the Court on that score.

11. Having stated thus, it is necessary to appreciate the legistative purpose behind the 1984 Act. The Family Courts have been established for speedy settlement of family disputes. The Statement of Objects and Reasons reads thus:-

Statement of Objects and Reasons Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special family.

However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill inter alia, seeks to

(a) provide for establishment of Family Courts by the State Governments;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above.

(d) exclusively provide within the jurisdiction of the Family Courts the matters relating to

(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) Make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counselors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae,

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects.

12. The preamble of the 1984 Act provides for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

13. Presently, we may recapitulate how this Court has dealt with the duty and responsibility of the Family Court or a Family Court Judge. In Bhuwan Mohan Singh v. Meena and others, the three-Judge Bench referred to the decision in K.A. Abdul Jaleel v. T.A. Shahida and laid stress on securing speedy settlement of disputes relating to marriage and family affairs. Emphasizing on the role of the Family Court Judge, the Court in Bhuwan Mohan Singh (supra) expressed its anguish as the proceedings before the family court had continued for a considerable length

of time in respect of application filed under Section 125 of the Code of Criminal Procedure (CrPC). The Court observed:-

It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim.

When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto.

When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow.

And again:

We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the Objects and Reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

14. The said passage makes it quite clear that a Family Court Judge has to be very sensitive to the cause before it and he/she should be conscious about timely delineation and not procrastinate the matter as delay has the potentiality to breed bitterness that eventually corrodes the emotions. The Court has been extremely cautious while stating about patience as a needed quality for arriving at a settlement and the need for speedy settlement and, if not possible, proceeding with meaningful adjudication. There must be efforts for reconciliation, but the time spent in the said process has to have its own limitation.

15. In Shamima Farooqui v. Shahid Khan, after referring to the earlier decisions, especially the above quoted passages, the Court expressed:-

When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, it is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands still on some unknown bank of the river.

It cannot allow it to sing the song of the brook. Men may come and men may go, but I go on forever. This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more. [Underlining is ours]

16. The object of stating this is that the legislative intent, the schematic purpose and the role attributed to the Family Court have to be perceived with a sense of sanctity. The Family Court Judge should neither be a slave to the concept of speedy settlement nor should he be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated.

17. Let us now proceed to analyse the fundamental intent of the scheme of the 1984 Act. Section 4 of the 1984 Act deals with the appointment of the judges. Section 5 provides for association of social welfare agencies, etc. It engrafts that the State Government may, in consultation with the High Court, provide, by rules, for the association in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of institutions or organisations engaged in social welfare or the representatives thereof; persons professionally engaged in promoting the welfare of the family; persons working in the field of social welfare; and any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of the 1984 Act. The aforesaid provision, as is evident, conceives involvement of institutions or organizations engaged in social welfare or their representatives and professionals engaged in promoting the welfare of the family for the purpose of effective functioning of the Family Court to sub-serve the purposes of the Act. Thus, the 1984 Act, to achieve its purpose, conceives of involvement of certain categories so that, if required, the Family Court can take their assistance to exercise its jurisdiction in an effective manner.

18. Section 6 provides for counselors, officers and other employees of Family Courts. Section 7 deals with the jurisdiction of the Family Court. The jurisdiction conferred on the Family Court, as we perceive, is quite extensive. It confers power in a Family Court to exercise jurisdiction exercisable by any district court or any subordinate civil court under any law relating to a suit or a proceeding between the parties to a marriage or a decree of a nullity of marriage declaring the marriage to be null and void or annulling the marriage, as the case may be, or restitution of conjugal rights or judicial separation or dissolution of marriage. It has the authority to declare as to the validity of a marriage so as to annul the matrimonial status of any person and also the power to entertain a proceeding with respect to the property of the parties to a marriage or either of them. The Family Court has the jurisdiction to pass an order or injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceedings for grant of maintenance, guardianship of the person or the custody of or access to any minor. That apart, it has also been conferred the authority to deal with the applications for grant of maintenance for wife and children and parents as provided under the CrPC.

19. Section 9 prescribes the duty of the Family Court to make efforts for settlement by rendering assistance and persuading the parties for arriving at a settlement in respect of the subject matter

of the suit or proceeding. For the said purpose, it may follow the procedure laid down by the High Court. If in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable opportunity of settlement between the parties, it may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

20. Section 11 provides for proceedings to be held in camera. The provision, being significant, is reproduced below:-

Section 11. Proceedings to be held in camera.In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires. On a plain reading of the aforesaid provision, it is limpid that if the Family Court desires, the proceedings should be held in camera and it shall be so held if either of the parties so desires. A reading of the said provision, as it seems to us, indicates that, once one party makes a prayer for holding the proceedings in camera, it is obligatory on the part of the Family Court to do so.

21. Section 12 stipulates for assistance of medical and welfare experts for assisting the Family Court in discharging the functions imposed by the Act.

22. At this juncture, it is profitable to refer to certain provisions of the 1955 Act. Section 22 of the said Act provides for proceedings to be in camera and stipulates that the proceeding may not be printed or published. Section 23(2) of the 1955 Act enjoins that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. The said provision is not applicable to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13. Sub-section (3) of Section 23 permits the Court to take aid of a person named by the parties or of any person nominated by the Court to bring out a resolution. It enables the Court, if it so thinks, to adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall, in disposing of the proceeding, have due regard to the report.

23. It is worthy to note here that the reconciliatory measures are to be taken at the first instance and emphasis is on efforts for reconciliation failing which the court should proceed for adjudication and the command on the Family Court is to hold it in camera if either party so desires.

24. Section 26 of the 1955 Act deals with custody of children. It empowers the court, from time to time, to pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes, wherever possible, and the Government may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also, from time to time, revoke, suspend or vary any such orders and provisions previously made. The proviso appended thereto postulates that the application with respect to

the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

25. It is to be borne in mind that in a matter relating to the custody of the child, the welfare of the child is paramount and seminal. It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be pro-active and sensibly objective.

26. In Mausami Moitra Ganguli v. Jayant Ganguli, it has been held that the principles of law in relation to the custody of a minor child are well settled. While determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The provisions contained in the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 hold out the welfare of the child as a predominant consideration because no statute on the subject can ignore, eschew or obliterate the vital factor of the welfare of the minor.

27. In the said case, a passage from Halsburys Laws of England (4 th Edn., Vol. 13) was reproduced which reads thus:-

809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

28. In Rosy Jacob v. Jacob A. Chakramakkal, the Court ruled that the children are not mere chattels, nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

29. In Vikram Vir Vohra v. Shalini Bhalla, the Court took note of the fact that the learned Judge of the High Court had personally interviewed the child who was seven years old to ascertain his wishes. The two Judges of this Court also interacted with the child in the chambers in the absence of his parents to find out about his wish and took note of the fact that the child was aged about 10 years and was at an informative and impressionable stage and eventually opined that the order passed by the High Court affirming the order of the trial Court pertaining to visitation rights of the father had been so structured that it was compatible with the educational career of the child and the rights of the father and the mother had been well balanced. It is common

knowledge that in most of the cases relating to guardianship and custody, the Courts interact with the child to know her/his desire keeping in view the concept that the welfare of the child is paramount.

30. It is essential to reflect on the reasoning ascribed in Krishna Veni Nagam (supra). As we understand, the two-Judge Bench has taken into consideration the number of cases filed before this Court and the different approaches adopted by this Court, the facet of territorial jurisdiction, doctrine of forum non-conveniens which can be applicable to matrimonial proceedings for advancing the interest of justice, the problems faced by the husband, the recourse taken by this Court to videoconferencing in certain cases and on certain occasions, the advancement of technology, the role of the High Courts to issue appropriate administrative instructions to regulate the use of videoconferencing for certain categories of cases and ruled that the matrimonial cases where one of the parties resides outside the courts jurisdiction do fall in one of such categories.

31. Before we proceed to analyse further, we would like to cogitate on the principles applied in the decisions rendered in the context of videoconferencing. In State of Maharashtra v. Dr. Praful B. Desai, the proceedings related to recording of evidence where the witness was in a foreign country. In Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr., the controversy pertained to a criminal trial under Section 302 IPC wherein the Court, in exercise of power under Article 142 of the Constitution, directed shifting of the accused from a jail in Patna to Tihar Jail at Delhi. In that context, the Court permitted conducting of the trial with the aid of videoconferencing.

In Budhadev Karmaskar (4) v. State of West Bengal, the issue of videoconferencing had arisen as the lis related to rehabilitation of sex workers keeping in view the interpretation of this Court of life to mean life of dignity.

32. In Malthesh Gudda Pooja v. State of Karnataka & Ors., the question that fell for consideration was whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing, on grant of application for review by a co-ordinate Bench, could refuse to act upon the order of review on the ground that the said order made by a Bench different from the Bench which passed the original order granting review is a nullity. We need not dilate upon what ultimately the Court said. What is necessary to observe is what arrangement should be made in case of a High Court where there are Principal Seat and Circuit Benches and Judges move from one Bench to another for some time and decide the matters and review is filed. In that context, the Court opined:-

when two Judges heard the matter at a Circuit Bench, the chances of both Judges sitting again at that place at the same time, may not arise. But the question is in considering the applications for review, whether the wholesome principle behind Order 47 Rule 5 of the Code and Chapter 3 Rule 5 of the High Court Rules providing that the same Judges should hear it, should be dispensed with merely because of the fact that the Judges in question, though continue to be attached to the Court are sitting at the main Bench, or temporarily at another Bench. In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same Court. Any attempt to too readily provide for

review applications to be heard by any available Judge or Judges should be discouraged. And further:-

With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video conferencing.

33. The aforesaid pronouncements, as we find, are absolutely different from a controversy which is involved in matrimonial proceedings which relate to various aspects, namely, declaration of marriage as a nullity, dissolution of marriage, restitution of marriage, custody of children, guardianship, maintenance, adjudication of claim of stridhan, etc. The decisions that have been rendered cannot be regarded as precedents for the proposition that videoconferencing can be one of the modes to regulate matrimonial proceedings.

34. The two-Judge Bench has also noted the constitutional scheme that provides for guaranteeing equal access to justice and the power of the State to make special provisions for women and children as enshrined under Article 15(3) of the Constitution and the duty to uphold the dignity of women and the various steps taken in the said direction. The Court has also referred to Articles 243-D and 243-T of the Constitution under which provisions have been made for reservation for women in Panchayats and Municipalities by the 1973 and 1974 amendments. It has also taken note of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that underlines the awareness of the international commitments on the subject. There is also reference to various authorities of the Court that have referred to the international conventions and affirmative facet enshrined under Article 15(3) of the Constitution. We must immediately clarify that these provisions of the Articles of the Constitution and the decisions find place in the footnote of the judgment to highlight the factum that various steps have been taken to uphold the dignity of women.

35. The two-Judge Bench has referred to certain judgments to highlight the affirmative rights conferred on women under the Constitution. We shall refer to them and explain how they are rendered in a different context and how conducting of matrimonial disputes through videoconferencing would scuttle the rights of women and not expand the rights. In Mackinnon Mackenzie & Co. Ltd v. Audrey Dcosta and another, the Court dealt with the principle of applicability of equal pay for equal work to lady stenographers in the same manner as male stenographers. A contention was advanced by the employer that this discrimination between the two categories had been brought out not merely on the ground of sex but the Court found it difficult to agree with the contention and referred to various aspects and, eventually, did not interfere with the judgment of the High Court that had granted equal remuneration to both male and female stenographers. In Vishaka and others v. State of Rajasthan and others, the three-Judge Bench, taking note of Articles 14, 15, 19(1)(g), 21 and 51-A and further highlighting the concept of gender equality and the recommendations of CEDAW and the absence of domestic law, laid down guidelines and norms for observation at work places and other institutions for the purpose of effective enforcement of the basic human right of gender equality and sexual harassment and abuse, more particularly, sexual harassment at work places.

36. In Arun Kumar Agrawal and another v. National Insurance Company Limited and others, the lis arose pertaining to the criteria for determination of compensation payable to the dependants of a woman who died in a road accident and who did not have regular source of income. Singhvi,

J. opined that it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependants of a deceased wife/mother who does not have a regular income by comparing her services with that of a housekeeper or a servant or an employee who works for a fixed period. The gratuitous services rendered by the wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. Ganguly, J., in his concurring opinion, said that women make a significant contribution at various levels. He referred to numerous authorities and ruled:-

63. Household work performed by women throughout India is more than US $612.8 billion per year (Evangelical Social Action Forum and Health Bridge, p. 17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to womens high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing just compensation.

64. In this context the Australian Family Property Law has adopted a very gender sensitive approach. It provides that while distributing properties in matrimonial matters, for instance, one has to factor in the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.

37. In Voluntary Health Association of Punjab v. Union of India and others, the two-Judge Bench which was dealing with the sharp decline in female sex ratio and mushrooming of various sonography centers, issued certain directions keeping in view the provisions of the Medical Termination of Pregnancy Act, 1971 and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996. The concurring opinion adverted to the direction contained in point 9.8 of the main judgment which related to the steps taken by the State Government and the Union Territory to educate the people of the necessity of implementing the provisions of the said Act by conducting workshops as well as awareness camps at the State and district levels. In the concurring opinion, reference was made to the authority in State of H.P. v. Nikku Ram and M.C. Mehta v. State of T.N. and it was stated:-

A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realised when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society.

38. In Charu Khurana and others v. Union of India and others, the controversy arose about the prevalence of discrimination of gender equality in the film industry where women were not

allowed to become make-up artists and only allowed to work as hair-dressers. Referring to various earlier judgments and Article 51-A(e), the Court observed:-

On a condign understanding of clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the mansion of dignity, for it is a highly cherished value. And again: The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well-nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity.

39. Eventually, directions were issued that women were eligible to become make-up artists. The aforesaid decisions unequivocally lay stress and emphasis on gender equality and dignity of women.

40. In Voluntary Health Association of Punjab v. Union of India and Ors, while dealing with female foeticide, it has been observed:-

It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise.

41. Emphasizing on the equality and dignity of women, it has been stated:-

... let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. The society that treats man and woman with equal dignity shows the reflections of a progressive and civilised society. To think that a woman should think what a man or a society wants her to think tantamounts to slaughtering her choice, and definitely a humiliating act. When freedom of free choice is allowed within constitutional and statutory parameters, others cannot determine the norms as that would amount to acting in derogation of law.

42. In Vikas Yadav v. State of Uttar Pradesh and others, condemning honour killing, the Court after referring to Lata Singh v. State of U.P. and Maya Kaur Baldevsingh Sardar v. State of Maharashtra, has opined:-

One may feel My honour is my life but that does not mean sustaining ones honour at the cost of another.

Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of honour, comparable to medieval obsessive assertions.

43. The aforesaid enunciation of law makes it graphically clear that the constitutional identity, freedom of choice, dignity of a woman and affirmative rights conferred on her by the Constitution cannot be allowed to be abrogated even for a moment. In this context, we have to scan and appreciate the provision contained in Section 11 of the 1984 Act. The provision, as has been stated earlier, mandates the proceedings to be held in camera if one of the parties so desires. Equality of choice has been conferred by the statute. That apart, Section 22 of the 1955 Act lays down the proceedings to be held in camera and any matter in relation to any such proceeding may not be printed or published except a judgment of the High Court or of the Supreme Court with the previous permission of the Court.

44. We, as advised at present, constrict our analysis to the provisions of the 1984 Act. First, as we notice, the expression of desire by the wife or the husband is whittled down and smothered if the Court directs that the proceedings shall be conducted through the use of videoconferencing. As is demonstrable from the analysis of paragraph 14 of the decision, the Court observed that wherever one or both the parties make a request for the use of videoconferencing, the proceedings may be conducted by way of videoconferencing obviating the need of the parties to appear in person. The cases where videoconferencing has been directed by this Court are distinguishable. They are either in criminal cases or where the Court found it necessary that the witness should be examined through videoconferencing. In a case where the wife does not give consent for videoconferencing, it would be contrary to Section 11 of the 1984 Act. To say that if one party makes the request, the proceedings may be conducted by videoconferencing mode or system would be contrary to the language employed under Section 11 of the 1984 Act. The said provision, as is evincible to us, is in consonance with the constitutional provision which confer affirmative rights on women that cannot be negatived by the Court. The Family Court also has the jurisdiction to direct that the proceedings shall be held in camera if it so desires and, needless to say, the desire has to be expressed keeping in view the provisions of the 1984 Act.

45. The language employed in Section 11 of the 1984 Act is absolutely clear. It provides that if one of the parties desires that the proceedings should be held in camera, the Family Court has no option but to so direct. This Court, in exercise of its jurisdiction, cannot take away such a sanctified right that law recognizes either for the wife or the husband. That apart, the Family Court has the duty to make efforts for settlement. Section 23(2) of the 1955 Act mandates for reconciliation. The language used under Section 23(2) makes it an obligatory duty on the part of the court at the first instance in every case where it is possible, to make every endeavour to bring about reconciliation between the parties where it is possible to do so consistent with the nature and circumstances of the case. There are certain exceptions as has been enumerated in the proviso

which pertain to incurably of unsound mind or suffering from a virulent and incurable form of leprosy or suffering from venereal disease in a communicable form or has renounced the world by entering any religious order or has not been heard of as being alive for a period of seven years, etc. These are the exceptions carved out by the legislature. The Court has to play a diligent and effective role in this regard.

46. The reconciliation requires presence of both the parties at the same place and the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family Court Judge would not be in a position to interact with the parties in the manner as the law commands. By virtue of the nature of the controversy, it has its inherent sensitivity. The Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. Needless to emphasise, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with. There can be no denial of this fact. It is sanguinely private. Recently, in Justice K.S. Puttaswamy (Retd) v. Union of India & others, this Court, speaking through one of us (Chandrachud, J.), has ruled thus:-

The intersection between ones mental integrity and privacy entitles the individual freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity.

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. And again:

Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal.

47. Frankfurter Felix in Schulte Co. v. Gangi, has stated that the policy of a statute should be drawn out of its terms as nourished by their proper environment and not like nitrogen out of the air.

Benjamin N. Cardozo, in Hopkins Savings Assn. v. Cleary, has opined that when a statute is reasonably susceptible of two interpretations, the Court has to prefer the meaning that preserves to the meaning that destroys.

48. The command under Section 11 of the 1984 Act confers a right on both the parties. It is statutory in nature. The Family Court Judge who is expected to be absolutely sensitive has to take stock of the situation and can suo motu hold the proceedings in camera. The Family Court Judge is only meant to deal with the controversies and disputes as provided under the 1984 Act. He is not to be given any other assignment by the High Court. The in camera proceedings stand in contradistinction to a proceeding which is tried in court. When a case is tried or heard in court, there is absolute transparency. Having regard to the nature of the controversy and the sensitivity of the matter, it is desirable to hear in court various types of issues that crop up in these types of litigations. The Act commands that there has to be an effort for settlement. The legislative intendment is for speedy settlement. The counsellors can be assigned the responsibility by the court to counsel the parties. That is the schematic purpose of the law. The confidentiality of the proceedings is imperative for these proceedings.

49. The procedure of videoconferencing which is to be adopted when one party gives consent is contrary to Section 11 of the 1984 Act. There is no provision that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings take place which is in the nature of reconciliation, it will be well nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for sometime, is not possible in videoconferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

50. The two-Judge Bench had referred to the decisions where the affirmative rights meant for women have been highlighted in various judgments. We have adverted to some of them to show the dignity of woman and her rights and the sanctity of her choice. When most of the time, a case is filed for transfer relating to matrimonial disputes governed by the 1984 Act, the statutory right of a woman cannot be nullified by taking route to technological advancement and destroying her right under a law, more so, when it relates to family matters. In our considered opinion, dignity of women is sustained and put on a higher pedestal if her choice is respected. That will be in consonance with Article 15(3) of the Constitution.

51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr.46, after enunciating the universally accepted proposition in favour of open trials, expressed:-

While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court.

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there

is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in Krishna Veni Nagam (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent

57. We place on record our appreciation for the assistance rendered by Mr. Ajit Kumar Sinha, learned senior counsel.

58. The matters be placed before the appropriate Bench for consideration of the transfer petitions on their own merits.

.CJI.

(Dipak Misra) ..J.

(A.M. Khanwilkar)

New Delhi.

October 9, 2017.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) No. 1278 OF 2016

(Before Hon'ble Dr. Justice D.Y. Chandrachud)

Santhini ..... Petitioner
Versus
Vijaya Venketesh ..... Respondent

WITH T.P. (C) NO.422 OF 2017

JUDGMENT

Hon'ble Dr. Justice D.Y. Chandrachud :—

The judgment proposed by the learned Chief Justice has been circulated and deliberated upon. The reasons why I am unable to adopt the view propounded in the judgment of the learned Chief Justice will be delivered separately. I record below my conclusions:

1. The Family Courts Act, 1984 has been enacted at a point in time when modern technology (at least as we know it today) which enables persons separated by spatial distances to communicate with each other face to face was not the order of the day or, in any case, was not as fully developed.

That is no reason for any court - especially for this court which sets precedent for the nation - to exclude the application of technology to facilitate the judicial process.

2. Appropriate deployment of technology facilitates access to justice. Litigation under the Family Courts Act 1984 is not an exception to this principle. This court must be averse to judicially laying down a restraint on such use of technology which facilitates access to justice to persons in conflict, including those involved in conflicts within the family. Modern technology is above all a facilitator, enabler and leveler.

3. Video conferencing is a technology which allows users in different locations to hold face to face meetings. Video conferencing is being used extensively the world over (India being no exception) in on line teaching, administration, meetings, negotiation, mediation and telemedicine among a myriad other uses. Video conferencing reduces cost, time, carbon footprint and the like.

4. An in-camera trial is contemplated under Section 11 in two situations: the first where the Family Court so desires; and the second if either of the parties so desires. There is a fallacy in the hypothesis that an in-camera trial is inconsistent with the usage of video conferencing techniques. A trial in-camera postulates the exclusion of the public from the courtroom and allows for restraints on public reporting. Video conferencing does not have to be recorded nor is it accessible to the press or the public. The proper adoption of video conferencing does not negate the postulates of an in-camera trial even if such a trial is required by the court or by one of the parties under Section 11.

5. The Family Courts Act 1984 envisages an active role for the Family Court to foster settlements. Under the provisions of Section 11, the Family Court has to endeavour to "assist and persuade" parties to arrive at a settlement. Section 9 clearly recognises a discretion in the Family Court to determine how to structure the process. It does so by adopting the words "where it is possible to do so consistent with the nature and circumstances of the case". Moreover, the High Courts can frame rules under Section 9(1) and the Family Court may, subject to those rules, "follow such procedure as it deems fit". In the process of settlement, Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take the benefit of counsellors, medical experts and persons professionally engaged in promoting the welfare of the family.

6. The above provisions - far from excluding the use of video conferencing - are sufficiently enabling to allow the Family Court to utilise technological advances to facilitate the purpose of achieving justice in resolving family conflicts. There may arise a variety of situations where in today's age and time parties are unable to come face to face for counselling or can do so only at such expense, delay or hardship which will defeat justice. One or both spouses may face genuine difficulties arising from the compulsions of employment, family circumstances (including the needs of young children), disability and social or economic handicaps in accessing a court situated in a location distant from where either or both parties reside or work. It would be inappropriate to deprive the Family Court which is vested with such wide powers and procedural flexibility to adopt video conferencing as a facilitative tool, where it is convenient and readily available. Whether video conferencing should be allowed must be determined on a case to case analysis to best effectuate the concern of providing just solutions. Far from such a procedure being excluded by the law, it will sub serve the purpose of the law.

7. Conceivably there may be situations where parties (or one of the spouses) do not want to be in the same room as the other. This is especially true when there are serious allegations of marital abuse. Video conferencing allows things to be resolved from the safety of a place which is not accessible to the other spouse against whom there is a serious allegation of misbehaviour of a psychiatric nature or in a case of substance abuse.

8. Video conferencing is gender neutral. In fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally defeats the cause of a party which is not the dominant partner in a relationship. Asymmetries of power have a profound consequence in marital ties. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice.

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.

II The reference should in my opinion be answered in the above terms.

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LANDMARK JUDGMENTS ON STRIDHAN

KRISHNA BHATACHARJEE VERSUS SARATHI CHOUDHURY

2015 Supreme Court Cases OnLine SC 1229

Bench : Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice Prafulla C. Pant

Krishna Bhatacharjee ... Appellant
Versus
Sarathi Choudhury and Anr. ... Respondents

CRIMINAL APPEAL NO. 1545 OF 2015

(@ SLP(Crl) No. 10223 OF 2014)

Decided on November 20, 2015

... Stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family.

.... It is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Dipak Misra :—

Leave granted.

2. The appellant having lost the battle for getting her Stridhan back from her husband, the first respondent herein, before the learned Magistrate on the ground that the claim preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'the 2005 Act') was not entertainable as she had ceased to be an "aggrieved person" under Section 2(a) of the 2005 Act and further that the claim as put forth was barred by limitation; preferred an appeal before the learned Additional Sessions Judge who concurred with the view expressed by the learned Magistrate, and being determined to get her lawful claim, she, despite the repeated non-success, approached the High Court of Tripura, Agartala in Criminal Revision No. 19 of 2014 with the hope that she will be victorious in the war to get her own property, but the High Court, as is perceivable, without much analysis, declined to interfere by passing an order with Spartan austerity possibly thinking lack of reasoning is equivalent to a magnificent virtue and that had led the agonised and perturbed wife to prefer the present appeal, by special leave.

3. Prior to the narration of facts which are essential for adjudication of this appeal, we may state that the 2005 Act has been legislated, as its Preamble would reflect, to provide for more effective protection of the rights of the women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The 2005 Act is a detailed Act. The dictionary clause of the 2005 Act, which we shall advert to slightly at a later stage, is in a broader spectrum. The definition of "domestic

violence" covers a range of violence which takes within its sweep "economic abuse" and the words "economic abuse", as the provision would show, has many a facet.

4. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts where under the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless "aggrieved person" under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.

5. Presently to the narration of the facts. The marriage between the appellant and the respondent No. 1 was solemnised on 27.11.2005 and they lived as husband and wife. As the allegations proceed, there was demand of dowry by the husband including his relatives and, demands not being satisfied, the appellant was driven out from the matrimonial home. However, due to intervention of the elderly people of the locality, there was some kind of conciliation as a consequence of which both the husband and the wife stayed in a rented house for two months. With the efflux of time, the husband filed a petition seeking judicial separation before the Family Court and eventually the said prayer was granted by the learned Judge, Family Court. After the judicial separation, on 22.5.2010 the appellant filed an application under Section 12 of the 2005 Act before the Child Development Protection Officer (CDPO), O/O the District Inspector, Social Welfare & Social Education, A.D. Nagar, Agartala, Tripura West seeking necessary help as per the provisions contained in the 2005 Act. She sought seizure of Stridhan articles from the possession of the husband. The application which was made before the CDPO was forwarded by the said authority to the learned Chief Judicial Magistrate, Agartala Sadar, West Tripura by letter dated 1.6.2010. The learned Magistrate issued notice to the respondent who filed his written objections on 14.2.2011.

6. Before the learned Magistrate it was contended by the respondent that the application preferred by the wife was barred by limitation and that she could not have raised claim as regards Stridhan after the decree of judicial separation passed by the competent court. The learned Magistrate taking into consideration the admitted fact that respondent and the appellant had entered into wedlock treated her as an "aggrieved person", but opined that no "domestic relationship" as defined under Section 2(f) of the 2005 Act existed between the parties and, therefore, wife was not entitled to file the application under Section 12 of the 2005 Act. The learned Magistrate came to hold that though the parties had not been divorced but the decree of judicial separation would be an impediment for entertaining the application and being of this view, he opined that no domestic relationship subsisted under the 2005 Act and hence, no relief could be granted. Be it stated here that before the learned Magistrate, apart from herself, the appellant examined

three witnesses and the husband had examined himself as DW-1. The learned Magistrate while dealing with the maintainability of the petition had noted the contentions of the parties as regards merits, but has really not recorded any finding thereon.

7. The aggrieved wife preferred criminal appeal No. 6(1) of 2014 which has been decided by the learned Additional Sessions Judge, Agartala holding, inter alia, that the object of the 2005 Act is primarily to give immediate relief to the victims; that as per the decision of this Court in ***Inderjit Singh Grewal v. State of Punjab***[1] that Section 468 of the Code of Criminal Procedure applies to the proceedings under the 2005 Act and, therefore, her application was barred by time. Being of this view, the appellate court dismissed the appeal.

8. On a revision being preferred, the High Court, as is demonstrable from the impugned order, after referring to the decision in Inderjit Singh Grewal (supra), has stated that the wife had filed a criminal case under Section 498(A) IPC in the year 2006 and the husband had obtained a decree of judicial separation in 2008, and hence, the proceedings under the 2005 Act was barred by limitation. That apart, it has also in a way expressed the view that the proceedings under the 2005 Act was not maintainable.

9. In our prefatory note, we have stated about the need of sensitive approach to these kinds of cases. There can be erroneous perception of law, but as we find, neither the learned Magistrate nor the appellate court nor the High Court has made any effort to understand and appreciate the stand of the appellant. Such type of cases and at such stage should not travel to this Court. We are compelled to say so as we are of the considered opinion that had the appellate court and the High Court been more vigilant, in all possibility, there could have been adjudication on merits. Be that as it may.

10. The facts that we have enumerated as regards the "status of the parties", "judicial separation" and "the claim for Stridhan" are not in dispute. Regard being had to the undisputed facts, it is necessary to appreciate the scheme of the 2005 Act. Section 2(a) defines "aggrieved person" which means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Section 2(f) defines "domestic relationship" which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Section 2(g) defines the term "domestic violence" which has been assigned and given the same meaning as in Section 3. Sub-section (iv) of Section 3 deals with "economic abuse". As in the facts at hand, we are concerned with the "economic abuse", we reproduce Section 3(iv) which reads as follows:-

"Section 3. Definition of domestic violence.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by

1 (2011) 12 SCC 588

the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.-For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

11. Section 8(1) empowers the State Government to appoint such number of Protection Officers in each district as it may consider necessary and also to notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under the 2005 Act. The provision, as is manifest, is mandatory and the State Government is under the legal obligation to appoint such Protection Officers. Section 12 deals with application to Magistrate. Sub-sections (1) and (2) being relevant are reproduced below:-

"Section 12. Application to Magistrate.-(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off."

12. Section 18 deals with passing of protection orders by the Magistrate. Section 19 deals with the residence orders and Section 20 deals with monetary reliefs. Section 28 deals with procedure and stipulates that all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. Section 36 lays down that the provisions of the 2005 Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

13. Having scanned the anatomy of the 2005 Act, we may now refer to a few decisions of this Courts that have dealt with the provisions of the 2005 Act. In ***V.D. Bhanot v. Savita Bhanot***[2] the question arose whether the provisions of the 2005 Act can be made applicable in relation to an incident that had occurred prior to the coming into force of the said Act. Be it noted, the High Court had rejected the stand of the respondent therein that the provisions of the 2005 Act cannot be invoked if the occurrence had taken place prior to the coming into force of the 2005 Act. This Court while dealing with the same referred to the decision rendered in the High Court which after considering the constitutional safeguards under Article 21 of the Constitution vis-à-vis the provisions of Sections 31 and 33 of the 2005 Act and after examining the Statement of Objects and Reasons for the enactment of the 2005 Act, had held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that Parliament enacted the 2005 Act in order to provide for some effective protection of rights guaranteed under the Constitution to women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them and further that a petition under the provisions of the 2005 Act is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was no more living with him, at the time when the Act came into force. After analyzing the verdict of the High Court, the Court concurred with the view expressed by the High Court by stating thus:-

"We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005."

14. In ***Saraswathy v. Babu***[3] a two-Judge Bench, after referring to the decision in *V.D. Bhanot* (supra), reiterated the principle. It has been held therein:-

"We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines "domestic violence" in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DVA, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent husband has not complied with the order and direction passed by the trial court and the appellate court. He also misleads the Court by giving wrong statement before the High Court in the contempt petition filed by the appellant wife. The appellant wife having being harassed since 2000 is entitled for protection order and residence order under Sections 18 and 19 of the DVA, 2005 along with the maintenance as allowed by the trial court under Section 20(1)(d) of the DVA, 2005. Apart from these reliefs, she is also entitled for compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent husband. Therefore, in addition to the reliefs granted by the courts below, we are of the view that the appellant wife should be compensated by the respondent husband. Hence, the respondent is hereby directed

2 (2012) 3 SCC 183
3 (2014) 3 SCC 712

to pay compensation and damages to the extent of Rs 5,00,000 in favour of the appellant wife."

15. In the instant case, as has been indicated earlier, the courts below as well as the High Court have referred to the decision in Inderjit Singh Grewal (supra). The said case has to be understood regard being had to the factual exposè therein. The Court had referred to the decision in ***D. Velusamy v. D. Patchaiammal***[4] wherein this Court had considered the expression "domestic relationship" under Section 2(f) of the Act and judgment in Savitaben ***Somabhai Bhatiya v. State of Gujarat***[5] and distinguished the said judgments as those cases related to live-in relationship without marriage. The Court analyzing the earlier judgments opined that the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage. The said judgments were distinguished on facts as those cases related to live-in relationship without marriage. The Court opined that the parties therein had got married and the decree of the civil court for divorce subsisted and that apart a suit to declare the said judgment and decree as a nullity was still pending consideration before the competent court. In that background, the Court ruled that:-

"In the facts and circumstances of the case, the submission made on behalf of Respondent 2 that the judgment and decree of a civil court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by Respondent 2 to declare the said judgment and decree dated 20-3-2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the civil court subsists. On a similar footing, the contention advanced by her counsel that even after the decree of divorce, they continued to live together as husband and wife and therefore the complaint under the 2005 Act is maintainable, is not worth acceptance at this stage."

[Emphasis supplied]

16. It may be noted that a submission was advanced by the wife with regard to the applicability of Section 468 CrPC. While dealing with the submission on the issue of limitation, the Court opined:-

"..... in view of the provisions of Section 468 CrPC, that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the 2005 Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 which make the provisions of CrPC applicable and stand fortified by the judgments of this Court in ***Japani Sahoo v. Chandra Sekhar Mohanty,*** *(2007) 7 SCC 394, and* ***NOIDA Entrepreneurs Assn. v. NOIDA****, (2011) 6 SCC 508."*

17. As it appears, the High Court has referred to the same but the same has really not been adverted. In fact, it is not necessary to advert to the said aspect in the present case.

18. The core issue that is requisite to be addressed is whether the appellant has ceased to be an "aggrieved person" because of the decree of judicial separation. Once the decree of divorce is

4 (2010) 10 SCC 46
5 (2005) 3 SCC 636

passed, the status of the parties becomes different, but that is not so when there is a decree for judicial separation. A three-Judge Bench in ***Jeet Singh and Others Vs. State of U.P.***[6] though in a different context, adverted to the concept of judicial separation and ruled that the judicial separation creates rights and obligations. A decree or an order for judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment. Though judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live keeping their status as wife and husband till their lifetime.

19. In this regard, we may fruitfully refer to the authority in ***Hirachand Srinivas Managaonkar v. Sunanda***[7] wherein the issue that arose for determination was whether the husband who had filed a petition seeking dissolution of the marriage by a decree of divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 can be declined relief on the ground that he had failed to pay maintenance for his wife and daughter despite an order of the court. The husband was appellant before this Court and had filed an application under Section 10 of the Hindu Marriage Act, 1955 for seeking judicial separation on the ground of adultery on the part of the appellant. Thereafter, the appellant presented the petition for dissolution of marriage by decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of more than one year after passing of the decree for judicial separation. The stand of the wife was that the appellant having failed to pay the maintenance as ordered by the court, the petition for divorce filed by the husband was liable to be rejected inasmuch he was trying to get advantage of his own wrong for getting the relief. The High Court accepted the plea of the wife and refused to grant the prayer of the appellant seeking divorce. It was contended before this Court that the only condition for getting divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 is that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of the decree for judicial separation in a proceeding to which both the spouses are parties. It was urged that if the said condition is satisfied the court is required to pass a decree of divorce. On behalf of the wife, the said submissions were resisted on the score that the husband had been living in continuous adultery even after passing of the decree of judicial separation and had reasonably failed to maintain the wife and daughter. The Court proceeded to analyse Section 13(1-A)(i) of the Hindu Marriage Act, 1955. Analysing the provisions at length and speaking about judicial separation, it expressed that after the decree for judicial separation was passed on the petition filed by the wife it was the duty of both the spouses to do their part for cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was to act as a devoted wife towards the husband. If this concept of both the spouses making sincere contribution for the purpose of successful cohabitation after a judicial separation is ordered then it can reasonably be said that in the facts and circumstances of the case the husband in refusing to pay maintenance to the wife failed to act as a husband. Thereby he committed a "wrong" within the meaning of Section 23 of the Act. Therefore, the High Court was justified in declining to allow the prayer of the husband for dissolution of the marriage by divorce under Section 13(1-A) of the Act.

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6 (1993) 1 SCC 325
7 (2001) 4 SCC 125

20. And, the Court further stated thus:-

"... The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and readjustment. The decree may fall by a conciliation of the parties in which case the rights of the respective parties which float from the marriage and were suspended are restored. Therefore the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."

21. It is interesting to note that an issue arose whether matrimonial offence of adultery had exhausted itself when the decree for judicial separation was granted and, therefore, it cannot be said that it is a new fact or circumstance amounting to wrong which will stand as an obstacle in the way of the husband to obtain the relief which he claims in the divorce proceedings. Be it stated that reliance was placed on the decision of Gujarat High Court in ***Bai Mani v. Jayantilal Dahyabhai***[8]. This Court did not accept the contention by holding that living in adultery on the part of the husband is a continuing matrimonial offence, and it does not get frozen or wiped out merely on passing of a decree for judicial separation which merely suspends certain duties and obligations of the spouses in connection with their marriage and does not snap the matrimonial tie. The Court ruled that the decision of the Gujarat High Court does not lay down the correct position of law. The Court approved the principle stated by the Madras High Court in the case of ***Soundarammal v. Sundara Mahalinga Nadar***[9] in which a Single Judge had taken the view that the husband who continued to live in adultery even after decree at the instance of the wife could not succeed in a petition seeking decree for divorce and that Section 23(1)(a) barred the relief.

22. In view of the aforesaid pronouncement, it is quite clear that there is a distinction between a decree for divorce and decree of judicial separation; in the former, there is a severance of status and the parties do not remain as husband and wife, whereas in the latter, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped. Thus understood, the finding recorded by the courts below which have been concurred by the High Court that the parties having been judicial separated, the appellant wife has ceased to be an "aggrieved person" is wholly unsustainable.

23. The next issue that arises for consideration is the issue of limitation. In the application preferred by the wife, she was claiming to get back her stridhan. Stridhan has been described as saudayika by Sir Gooroodas Banerjee in "Hindu Law of Marriage and Stridhan" which is as follows:-

"First, take the case of property obtained by gift. Gifts of affectionate kindred, which are known by the name of saudayika stridhan, constitute a woman's absolute property, which she has at all times independent power to alienate, and over which her husband has only a qualified right, namely, the right of use in times of distress."

8 AIR 1979 Guj 209
9 AIR 1980 Mad 294

24. The said passage, be it noted, has been quoted ***Pratibha Rani v. Suraj Kumar and Another***[10]. In the said case, the majority referred to the stridhan as described in "Hindu Law" by N.R. Raghavachariar and Maine's "Treatise on Hindu Law". The Court after analyzing the classical texts opined that:-

"It is, therefore, manifest that the position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes — she may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt."

25. In the said case, the Court ruled:-

"... a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife nor can he burden her with losses of business by using the said property which was never intended by her while entrusting possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under Section 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only a custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property."

26. The decision rendered in the said case was referred for a fresh look by a three-Judge Bench. The three-Judge Bench ***Rashmi Kumar (Smt) v. Mahesh Kumar Bhada***[11] while considering the issue in the said case, ruled that :-

"9. A woman's power of disposal, independent of her husband's control, is not confined to saudayika but extends to other properties as well. Devala says: "A woman's maintenance (vritti), ornaments, perquisites (sulka), gains (labha), are her stridhana. She herself has the exclusive right to enjoy it. Her husband has no right to use it except in distress…." In N.R. Raghavachariar's Hindu Law — Principles and Precedents, (8th Edn.) edited by Prof. S. Venkataraman, one of the renowned Professors of Hindu Law para 468 deals with "Definition of Stridhana". In para 469 dealing with "Sources of acquisition" it is stated that the sources of acquisition of property in a woman's possession are: gifts before marriage, wedding gifts, gifts subsequent to marriage etc. Para 470 deals with "Gifts to a maiden". Para 471 deals with "Wedding gifts" and it is stated therein that properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhiyagni or Adhyavahanika, are the bride's stridhana. In para 481 at page 426, it is stated that ornaments presented to the bride by her husband or father constitute

10 (1985) 2 SCC 370
11 (1997) 2 SCC 397

her Stridhana property. In para 487 dealing with "powers during coverture" it is stated that saudayika meaning the gift of affectionate kindred, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure.

10. It is thus clear that the properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof."

27. After so stating the Court proceeded to rule that stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family. Further, the Court observed that it is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom. Thereafter, the Court adverted to the concept of entrustment and eventually concurred with the view in the case of Pratibha Rani (supra). It is necessary to note here that the question had arisen whether it is a continuing offence and limitation could begin to run everyday lost its relevance in the said case, for the Court on scrutiny came to hold that the complaint preferred by the complainant for the commission of the criminal breach of trust under Section 406 of the Indian Penal Code was within limitation.

28. Having appreciated the concept of Stridhan, we shall now proceed to deal with the meaning of "continuing cause of action". In ***Raja Bhadur Singh v. Provident Fund Inspector and Others***[12] the Court while dealing with the continuous offence opined that the expression "continuing offence" is not defined in the Code but that is because the expressions which do not have a fixed connotation or a static import are difficult to define. The Court referred to the earlier decision in ***State of Bihar v. Deokaran Nenshi***[13] and reproduced a passage from the same which is to the following effect:-

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

12 (1984) 4 SCC 222
13 (1972) 2 SCC 890

29. The Court further observed :-

"This passage shows that apart from saying that a continuing offence is one which continues and a non-continuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar."

30. Thereafter, the Court referred to the authorities and adverted to *Deokaran Nenshi* (supra) and eventually held:-

"The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence..."

31. Regard being had to the aforesaid statement of law, we have to see whether retention of stridhan by the husband or any other family members is a continuing offence or not. There can be no dispute that wife can file a suit for realization of the stridhan but it does not debar her to lodge a criminal complaint for criminal breach of trust. We must state that was the situation before the 2005 Act came into force. In the 2005 Act, the definition of "aggrieved person" clearly postulates about the status of any woman who has been subjected to domestic violence as defined under Section 3 of the said Act. "Economic abuse" as it has been defined in Section 3(iv) of the said Act has a large canvass. Section 12, relevant portion of which have been reproduced hereinbefore, provides for procedure for obtaining orders of reliefs. It has been held in *Inderjit Singh Grewal* (supra) that Section 498 of the Code of Criminal Procedure applies to the said case under the 2005 Act as envisaged under Sections 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006. We need not advert to the same as we are of the considered opinion that as long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. We are disposed to think so as the status between the parties is not severed because of the decree of dissolution of marriage. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians. For the purpose of the 2005 Act, she can submit an application to the Protection Officer for one or more of the reliefs under the 2005 Act. In the present case, the wife had submitted the application on 22.05.2010 and the said authority had forwarded the same on 01.06.2010. In the application, the wife had mentioned that the husband had stopped payment of monthly maintenance from January 2010 and, therefore, she had been compelled to file the application for stridhan. Regard being had to the said concept of "continuing offence" and the demands made, we are disposed to think that the application was not barred by limitation and the courts below as well as the High Court had fallen into a grave error by dismissng the application being barred by limitation.

32. Consequently, the appeal is allowed and the orders passed by the High Court and the courts below are set aside. The matter is remitted to the learned Magistrate to proceed with the application under Section 12 of the 2005 Act on merits.

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MEENAL BHARGAVA VERSUS NAVEEN SHARMA

IN THE SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice A Bhushan, Hon'ble Mr. Justice A Sikri

Meenal Bhargava .....Appellant(S)
Versus
Naveen Sharma .....Respondent(S)

CIVIL APPEAL NO. 1606 OF 2018

WITH
CIVIL APPEAL NO. 3629 OF 2018

Decided on 9 May, 2018

HEADNOTE

1. These are the cross-appeals, filed by both the parties challenging different parts of the orders dated January 9, 2018 passed by the High Court of Judicature at Rajasthan in D.B. Civil Contempt Petition No. 1846 of 2017.

2. The respondent filed a case for custody of Pranav in a Canadian Court. Vide order dated October 29, 2014, the Court granted temporary custody of Pranav to the respondent.

3. Thus, by order dated December 17, 2015, the parties were referred to mediation. This effort bore fruits as the respondent and appellant settled the matter.

4. The High Court has, by impugned judgment dated January 9, 2018, found the appellant to be in contempt and award maximum punishment of six months civil imprisonment under Section 12(1) read with Section 12(3) of the Act with direction to the appellant to surrender within four weeks.

5. The High Court has, by impugned judgment dated January 9, 2018, found the appellant to be in contempt and award maximum punishment of six months civil imprisonment under Section 12(1) read with Section 12(3) of the Act with direction to the appellant to surrender within four weeks.

Held:

1. In the aforesaid background, the respondent had filed petition for Habeas Corpus.

2. .For certain reasons, the parties fell apart and the settlement terms could not be fructified leading to the unfortunate situation. As per the respondent, he had played his part by complying with the said terms inasmuch as he withdrew the illinois police complaint, warrants/red-corner notice issued by FBI/Interpol on February 12, 2016. He also visited India three times i.e. in August, 2016, December, 2016 and August, 2017.

3. The consent terms on which the parties settled the matter contained an important part of agreement, namely, both the parties decided to live together again. This happened in the proceedings which essentially related to the custody of child.

4. No doubt, when the parties agreed to resume the matrimonial relations and decided to live again

as husband and wife, the problem of custody of Pranav got automatically solved thereby as it brought about an ideal situation where Pranav could have the company of his both the parents.

5. Even when a decree of conjugal rights is filed by a competent court of law in favour of one of the spouses, such a decree cannot be executed and the other spouse who is directed to resume the conjugal relations, cannot be forced to do so. It is a different matter that for not obeying such a decree, other consequence follow including right to the decree holder to seek divorce.

6. In a matter like this, the focus of the High Court should have been on the custody of the child, which was a subject matter of the Habeas Corpus petition.

JUDGMENT

Hon'ble Mr. Justice A.K.Sikri.—

These are the cross-appeals, filed by both the parties challenging different parts of the orders dated January 9, 2018 passed by the High Court of Judicature at Rajasthan in D.B. Civil Contempt Petition No. 1846 of 2017. The parties are husband and wife. After their marriage in the year 2007, the wife joined her husband in the United States of America (USA). Their child, named Pranav, was born out of this wedlock in August, 2009 at Baltimore, USA. In 2010, they migrated to Signature Not Verified Digitally signed by ASHWANI KUMAR Canada. For certain reasons, the matrimonial relations became strained Date: 2018.05.09 17:04:39 IST Reason:

and the wife viz. Meenal Bhargava (hereinafter referred to as the 'appellant'), left the company of her husband Naveen Sharma (hereinafter referred to as the 'respondent') and on July 26, 2013, went away from her husband, taking Pranav with her. Initially, for some time, she stayed in Buffalo, New York and thereafter came to India in August, 2013.

2. The respondent filed a case for custody of Pranav in a Canadian Court. Vide order dated October 29, 2014, the Court granted temporary custody of Pranav to the respondent. By that time, appellant had brought Pranav to India i.e. on August 4, 2013. After order dated October 29, 2014 granting temporary custody of Pranav was passed in favour of the respondent, the mother of the appellant filed a motion in a Court at Canada stating that the said Court at Canada had no jurisdiction in the matter. This contention was, however, rejected by the Court and, thereafter on April 2, 2015, another order was passed directing the appellant to return Pranav to its jurisdiction and appear before the Court on April 16, 2015. The appellant did not comply with this order, which led to issuance of red corner notice by the FBI/Interpol against the appellant.

3. Since the appellant had travelled out of territorial jurisdiction of the Canadian Court and had come to India with Pranav, finding no other alternative, the respondent herein filed a Habeas Corpus Petition in the High Court of Judicature at Rajasthan. In the said petition, notice was issued to the appellant herein. Having regard to the nature of dispute, the High Court deemed it proper to explore the possibility of settlement in the first instance. Thus, by order dated December 17, 2015, the parties were referred to mediation. This effort bore fruits as the respondent and appellant settled the matter.

4. The appellant agreed to come back to USA and join the company of the respondent along with Pranav. Consent terms were recorded and on the basis thereof, the High Court disposed of the Habeas Corpus Petition vide order dated December 17, 2015 incorporating those terms of

settlement in its order and directing the parties to abide by the same. These consent terms are as under:

"(1) Both the parties will withdraw their respective cases within 4 months from today.

(2) Mr. Naveen Sharma will find out 3-4 flats for choice of Smt. Meenal and Smt. Meenal will then go to U.S.A. to select one of them. This process should complete within 18 months.

(3) In the meantime Mr. Naveen Sharma will come to India to meet Mrs. Meenal and Pranav at least for 3 time. Similarly Mrs. Meenal will go to U.S.A. along with her son under the security with condition that Mr. Naveen will arrange all their expenses including travelling expenses and will undertake that if both of them desire to return India then Mr. Naveen will arrange their safe return to India.

(4) The flat which is going to purchase by Mr. Naveen Sharma should be in joint name of both party. None of the party will entitle to sale this flat or it's any part independently. Mr. Naveen Sharma will arrange collateral security against loan and in no case the flat should be taken from ownership and possession of Mrs. Meenal Sharma. In case any mis-happening the flat will remain in ownership of Mrs. Meenal Sharma.

(5) Mr. Naveen, Mrs. Meenal and Pranav will live jointly at U.S.A. after purchase of flat. None of the family member of both parties will disturb and interfere in their lives."

5. For certain reasons, the laudable settlement, hoping to achieve win-win situation, did not turn into reality. As per the respondent, it is the appellant who committed breach of the said settlement and also violated the directions contained in the order of the High Court to comply with these terms. As she failed to adhere to the settlement and did not comply with the directions of the High Court in this behalf, the respondent herein filed Civil Contempt Petition in the High Court seeking execution of the consent terms and punishment to the appellant under the Contempt of Courts Act, 1971 (hereinafter referred to as the 'Act'). The appellant also, thereafter, filed application in the High Court seeking recall of the consent order dated December 17, 2015. The High Court has, by impugned judgment dated January 9, 2018, found the appellant to be in contempt and award maximum punishment of six months civil imprisonment under Section 12(1) read with Section 12(3) of the Act with direction to the appellant to surrender within four weeks. The High Court has also dismissed the application preferred by the appellant for recall of order dated December 17, 2015. However, it has not accepted the request of the respondent to give him the custody of Pranav pursuant to the Canadian Court's order dated April 16, 2015 and, instead, permitted the respondent to seek execution of the said order.

6. The appellant has challenged the aforesaid order against the findings of the High Court holding her to be in contempt of its order and awarding the said punishment. The respondent feels aggrieved by that part of the order whereby the High Court has refused to grant him the custody of Pranav and showed him the route of execution. This, in nutshell, is the scope of two appeals before this Court.

7. As noted above, Pranav was born in Baltimore, USA on August 22, 2009. He is having US citizenship. Both the parties, after their marriage, have resided in America or Canada. They have also became Permanent Residents of Canada as well as America. From the date of his birth in

August, 2009, Pranav remained with their parents, initially in America and thereafter in Canada till July 26, 2013, when the appellant went away with him to Buffalo, New York and thereafter came to India on August 4, 2013. Pranav stayed with his father, along with her mother, for four years and since then he is living with her mother to the exclusion of the respondent. He was 4 years of age when he was brought to India by the appellant and is in India now for more than 4½ years. Another pertinent fact which is to be noted is that the respondent has got orders from the Canadian Court giving custody of Pranav to him and has directed the appellant herein to return the child back to Canada.

8. In the aforesaid background, the respondent had filed petition for Habeas Corpus. However, the said petition was not heard on merits inasmuch as parties were relegated to mediation where they settled the matter leading to disposal of the Habeas Corpus petition vide order dated December 17, 2015 on the consent terms which were made part of the order with specific directions to both the parties to adhere to those conditions. We have already noted the consent terms as per which the parties had to withdraw their respective cases against each other within 4 months from the date of the order of the High Court. The respondent was obligated to find out 3-4 flats for choice of the appellant. After having chosen these flats, he was to show the same to the appellant. The appellant, at that stage, was supposed to go to USA to select one of the said flats. On this selection, she was to join the respondent with Pranav, thereby achieving again the matrimonial alliance and Pranav having benefit of the company of both his parents. This entire process was to be completed within 18 months. During the aforesaid period of 18 months which was given to the respondent to find out flats in USA, the respondent was permitted to come to India, at least three times, to meet the appellant and Pranav. Likewise, the appellant and Pranav were also supposed to go to USA under security and for such visits, it was the responsibility of the respondent to arrange all their expenses including travelling expenses. During such visits, they were entitled to remain in USA as per their choice and as and when they desired to return to India, the respondent had to arrange their safe return to India.

9. Three main obligations, as per the consent terms, were foisted upon the respondent, viz.:

(i) To find 3-4 flats in USA to enable the appellant to select one of them. The chosen flat was to become abode of the family.

(ii) To withdraw the cases filed against the appellant. This included complaint filed with Police and also take steps to ensure that warrants/red-corner notice issued by the FBI/Interpol also stands withdrawn. This was necessary for smooth entry of the appellant in USA.

(iii) After the selection of the flat by the appellant, the respondent was obligated to purchase the said flat in joint names.

10. Likewise, the appellant was bound to carry out the following tasks as per the aforesaid statements:

(i) To withdraw all the cases filed by her against the respondent.

(ii) After earmarking of 3-4 flats by the respondent, to go to USA to select one of them.

(iii) On selecting the flat and purchase thereof by the respondent in joint names of the appellant and respondent, she was to go to USA along with Pranav and stay there with the respondent.

11. For certain reasons, the parties fell apart and the settlement terms could not be fructified leading to the unfortunate situation. As per the respondent, he had played his part by complying with the said terms inasmuch as he withdrew the illinois police complaint, warrants/red-corner notice issued by FBI/Interpol on February 12, 2016. He also visited India three times i.e. in August, 2016, December, 2016 and August, 2017. During these visits, the respondent had shown to the appellant various flats selected online by him with request to the appellant to make her choice. However, on his third visit in August, 2017, the appellant did not allow Pranav to meet the respondent as a result of which police complaint was filed with the SHO, Ajmer on August 26, 2017. The respondent also sent air tickets to the appellant on August 31, 2017 for travel on September 3, 2017 to enable her and Pranav to visit USA. The respondent further claims that he had also planned a trip to Disney World, Florida for Pranav along with the appellant. According to the respondent, in spite of all the efforts made by the respondent, it is the appellant who backed out and resiled from the settlement as she failed to perform her role.

12. The appellant, on the other hand, blames the respondent which led to the aforesaid failure. Her accusation is that after the Habeas Corpus Petition was disposed of vide order dated December 17, 2015, she filed following three petitions on April 12, 2016 seeking to withdraw the following cases filed by her:

(i) Custody Petition filed by her before the Family Court, Ajmer.

(ii) Maintenance case filed by her before the Family Court, Ajmer.

(iii) Divorce case filed by her before the Family Court, Ajmer.

13. It is further claimed by the appellant that even the criminal proceedings launched by her under Section 498-A IPC etc. were quashed by the High Court on a petition filed by the respondent under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which happened because of her no objection as per the settlement. Pointing the finger at the respondent, her imputation is that he did not withdraw the custody case filed by him in the Canadian Court and/or sought vacation/rescinding of order dated April 16, 2015 by which custody of Pranav was ordered in favour of the respondent. She also alleges that the respondent failed to send a list of flats to her within the stipulated 18 months time which was mentioned in the consent terms. Thus, according to the appellant, it is the respondent who has not fulfilled his obligations under the settlement. In fact, she even filed miscellaneous application in the petition that was filed by the respondent under Section 482 Cr.P.C. and was allowed by the High Court on April 12, 2017, seeking recall of the said order on the ground that it was the respondent who had committed breach of the settlement. High Court, however, rejected the said application vide order dated May 9, 2017 on the ground that the said order had been passed after issuance of notice to the appellant.

14. With this kind of impasse, the respondent filed a miscellaneous application in the Habeas Corpus Petition seeking revival thereof on the ground that the appellant had breached the consent terms. This application was, however, not accepted by the High Court on the ground that if there was any breach or disobedience on the part of the appellant herein, there was an alternative remedy available to the respondent to file contempt petition. This application was, thus, dismissed as withdrawn by order dated October 5, 2017 with liberty to the respondent to file the contempt

petition. Thereafter, the respondent filed the contempt petition on November 7, 2017 which has culminated in the impugned judgment dated January 9, 2018.

15. We may mention at this stage that when the notice of the contempt petition was served upon the appellant, she filed reply thereto stating that she had taken requisite steps under the settlement and it is the respondent who failed to get orders dated April 16, 2015 passed by Canadian Court nullified thereby disabling her to go to America inasmuch as she could be arrested immediately on landing in USA/Canada in view of the aforesaid order. She also alleged that list of flats was not sent to her. Moreover, conduct of the respondent, post-settlement, was not good. She had also filed additional reply dated December 11, 2017 contending (i) pursuant to High Court orders, she had gone to Delhi hotel to meet respondent and his mother but she was publicly humiliated there, (ii) she had found that the respondent had been fired by his employer IBM for taking bribes and he had not been truthful to the Government also and (iii) respondent had not paid a single penny as maintenance. This was followed by application dated December 19, 2017 by the appellant seeking recall of order dated December 17, 2015.

16. The aforesaid stand of the appellant has been taken note of with a specific purpose, namely, it is the contention of Mrs. Anjana Prakash, learned senior counsel appearing for the appellant, that the High Court has, in the impugned judgment, not even discussed and dealt with the submissions of the appellant that she had not committed any breach of the order or consent terms and on the contrary, it is the respondent who failed to fulfil his obligations thereunder. She submitted that from the reading of the impugned order, it can be discerned that the High Court Bench kept on insisting the appellant to join the company of the respondent along with Pranav and on her refusal to do so, the High Court has taken the view that appellant has shown strong defiance to the orders of the Court. In the process, the High Court has not even cared to examine who was at fault insofar as adherence to the consent order is concerned. She also submitted that the High Court took into consideration another extraneous factor. It has noted in the impugned judgment that statement was given in the Court by the father of the appellant that the application for recall of order dated May 9, 2017 passed in petition filed by the respondent under Section 482 Cr.P.C., was moved by the counsel for the appellant without her instructions. That, however, was found to be false assertion inasmuch as the High Court called for the record of that case and found that each page of the application was signed by the appellant and on realising this, it was conceded that lawyer was instructed to make such an application. It was contended by the learned senior counsel that even if this was correct, it has no bearing insofar as the contempt case is concerned.

17. Mr. Jauhar, learned counsel appearing for the respondent, on the other hand, put entire blame upon the appellant who, according to him, took summersault with intention to commit breach of settlement terms as there was change of heart and she decided not to join the company of the husband. He took pains to demonstrate that respondent had took all the necessary steps in terms of the settlement. He still wanted the appellant to resume matrimonial alliance for the sake of saving the family ties and also to enable Pranav be in the company of both the parents.

18. We have duly considered the submissions of counsel for both the parties. As noted in detail above, both the parties are blaming each other for the failure of settlement terms. In this backdrop, we have gone through the impugned order passed by the High Court. In the entire judgment, the High Court has not adverted to the important aspect that needed attention in such a case,

namely, whether it was the appellant who was responsible for not adhering to the terms of the consent order and thereby violated the directions issued by the High Court in in its orders dated May 09, 2017. After all, the respondent had filed the contempt petition attributing breach of the directions on the part of the appellant. In reply, the appellant had taken up the stand that she was not responsible for the happenings and squarely blamed the respondent therefor. The High Court has not discussed these aspects. On the contrary, the approach of the High Court was to insist the appellant to adhere to the settlement terms even at that stage and on her refusing to do so it arrived at a finding that she had committed the contempt of the court's order as the aforesaid conduct was found to be abhorrent. It is, thus, the stubborn attitude shown by the appellant during the hearing of the contempt petition which has weighed by the High Court. That, according to us, was not the correct approach for punishing the appellant for contempt of court. The contempt petition was filed by the respondent alleging that the appellant had not fulfilled her obligations under the consent terms and the directions given by the High court in this behalf. It was, thus, necessary for the High Court to discuss and consider, in the first instance, as to whether these allegations of the respondent were correct.

19. There is another way of looking into the matter. The consent terms on which the parties settled the matter contained an important part of agreement, namely, both the parties decided to live together again. This happened in the proceedings which essentially related to the custody of child. No doubt, when the parties agreed to resume the matrimonial relations and decided to live again as husband and wife, the problem of custody of Pranav got automatically solved thereby as it brought about an ideal situation where Pranav could have the company of his both the parents. Unfortunately, this did not materialise. In a case like this whether the High Court could force the appellant to join the company of the respondent and live with him, if he had decided for certain reasons not to do so? Even when a decree of conjugal rights is filed by a competent court of law in favour of one of the spouses, such a decree cannot be executed and the other spouse who is directed to resume the conjugal relations, cannot be forced to do so. It is a different matter that for not obeying such a decree, other consequence follow including right to the decree holder to seek divorce. When that is the position even in respect of a decree passed by competent court of law forcing the appellant to join the company of the respondent and on her failing to do so punishing her in committing contempt of the court's order, that too byawarding maximum civil imprisonment in law cannot be countenanced. In a matter like this, the focus of the High Court should have been on the custody of the child, which was a subject matter of the Habeas Corpus petition. However, as far as that aspect is concerned, the High Court simply stated that it would be open to the respondent to execute the order of the Canadian Court dated April 16, 2015. Here again the High Court has fallen into error. In fact, in a matter like this, the High Court should have restored the Habeas Corpus Petition and decided the same on merits. However, when application for this purpose was filed by the respondent, instead of doing so the High Court passed the orders dated October 05, 2017 giving liberty to the respondent to file the contempt petition.

20. Having regard to our aforesaid discussion, we allow the appeal filed by the appellant and set aside the order of the High court whereby the appellant is punished for contempt. It would be open to the respondent to press the contempt petition before the High Court and if he so choses the High Court shall decide the contempt petition in the light of the aforesaid observations made by this Court, namely, to first find out as to whether the appellant is correct in her submissions

that it is the respondent who did not take necessary steps to ensure that the appellant joins the company of the respondents along with Pranav in USA. We also allow the appeal of the respondent partly by setting aside the direction of the High Court permitting the respondent to file the execution petition. Instead with the consent of both the parties, order dated October 05, 2017 passed in Miscellaneous Application filed by respondent in Habeas Corpus petition is set aside and her Habeas Corpus petition is revived which shall be dealt with by the High Court on merits in order to decide as to whether custody of Pranav is to be handed over to the respondent. Before us, both the parties have advanced arguments on this aspect whereas the appellant submitted that the welfare of Pranav lies in continuing his custody with his mother. The respondent had made a fervent plea to claim the custody on the basis of the order of the Canadian Court. However, we are deliberately not dealing with this aspect as this aspect is the subject matter of Habeas Corpus Petition pending in the High Court and it is the High Court which has to deal with and decide this question, in the first instance.

21. Both the aforesaid appeals are allowed on the aforesaid terms, without any orders as to costs.

22. Before we part with, we are constrained to make few comments about the conduct of the parties who are not fully acknowledging the truth and reality of the situation. It is either the appellant or the respondent or may be, to some extent, both of them, who are to be blamed for the egoist approach. No doubt, on an earlier occasion, some differences arose between them which led to strained relations and the appellant even came back to India. Legal battles of all kinds started with both the parties filing multiple proceedings against each other. In these dark clouds enveloping the relationship between the parties, a silver lining emerged in the form of mediation. As both the parties acted with wisdom and maturity, mediation exercise was successful. Both the parties not only buried their acrimony against each other but decided to have a new beginning. The magic of mediation worked at that moment. The consent terms which were recorded in the settlement arrived at during mediation proceedings brought about the resolution which could truly be levelled as 'win-win' situation. The accord was aimed at reuniting the two spouses with the aim of bringing happiness in the matrimonial relationship. More importantly, paramount interest of Pranav as a child was acknowledged by the parties as any child, particularly at this age, needs the company of both the parents for him/her to bloom and for ideal bringing up. In fact, as is clear from the events noted above, both the parties even took initial steps to make this settlement a success. However, before it could be seen as 'happy ending' and parties could reach that end of the road where they could find their final destination as envisaged in the settlement, they encountered a road block. Whether it happened due to the fault of the appellant or that of respondent, we are not commenting about the same. Unfortunate part is that instead of acknowledging the truth, parties are grumbling continuously and complaining against each other. This accusation, castigation, chargeability and dilation, depicting deviation from rectitude is a mindless exercise and, in the process, true welfare of Pranav is sought to be sacrificed. We are compelled to express these sentiments because of the reason that things have still not gone beyond repair. Had the parties shown positive and cooperative attitude (which, we are sure, they had demonstrated during mediation talks) they could still achieve an amiable resolution, inasmuch as it is even now possible to work out the terms of the compromise that was entered into between them. In fact, the respondent had expressed his willingness to go an extra-mile to save the settlement and the matrimonial home. However, the appellant stood firm in her attitude as she kept on saying that she could no longer repose confidence and trust in the respondent.

She has a grudge that respondent lured her into the settlement with selfish motive to take away the custody of Pranav with no love towards her and his moves lack bona fides. The respondent, on the other hand, maintained the position that appellant was resorting to falsehood because of her selfish motives which were kept higher in priority, even at the cost of family life. However, we may re-emphasise that all is not lost and situation can still be brought under control if there is a dispassionate and objective thinking by both the parties, keeping aside their ego. Life has problems. Parties have to understand those problems and to reflect on the reasons why these problems have arisen leading to such kind of disputes. Both the parties have also to reflect on the future and to make up their mind on that basis as to whether it would be in their interest, as well as in the interest of Pranav to bury the hatched and have a new beginning. We say no more.

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You have to be expert in dealing with dispute which are of extreme importance to the society, so, if you are posted as a Judge of the family court you should be happy that you are able to give something in return.

Hon'ble Ms. Justice Indira Banerjee

in 3rd Regional Coference for Sensitization of Family Court Matters at Sikkim

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न्याय सब के लिए
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